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# What educators need to know about global trade deals

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2017



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# Dedication

For all those educators who care about the future of the next generation...



# Acronyms

ACTA	Anti-Counterfeiting Trade Agreement
BIA	Bridge International Academies
CETA	Comprehensive Economic Trade Agreement
DfID	Department for International Development
EUDS	European Union Directive on Services
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDC	Global Financial Crisis
GERM	Global Education Reform Movement
IFC	International Finance Corporation
IIA	International Investment Agreements
IP	Intellectual Property
ISDS	Investor State Dispute Settlement
MA	Mixed Agreement
MR	Mutual Recognition
NT	National Treatment
OECD	Organization for Economic Cooperation & Development
PTA	Preferential Trade Agreements
R&D	Research and Development
RTA	Regional Trade Agreements
SAPs	Structural Adjustment Policies



SDGs	Sustainable Development Goals
SSDS	State-State Dispute Settlement
TISA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Commission on Trade and Development
USAID	United States Aid Agency
WB	Bank of Reconstruction and Development
WIPO	World Intellectual Property Organization
WBG	World Bank Group
WTO	World Trade Organization

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# Chapter 1

## Trade Matters

### Introduction

Educators don't normally have 'trade negotiations' on their radar as something that they must be informed about. Their concerns are rightly with other matters, such as who is learning what, the challenges of new accountability policies in education, how to manage curriculum innovations, or sharing data on student performance. Terms like 'trade in education services', 'cross-border supply', 'national treatment', 'stand-still', 'negative list' and 'ratchet' – to name just a few that are used in negotiating international trade and investment deals – are strange interlopers into the world of education.

Yet education is a sector now included in a raft of trade and investment negotiations and agreements either underway or recently concluded and awaiting ratification. And it is not just higher education but all levels, from early years to schooling, adult and higher education, that are included.

How come, you ask, you are not aware of these this? The answer is simple. Many of these negotiations have been carried in secret, much to the consternation of those worried about democratic politics. The occasional 'wikileaks', 'guessing' based on recently concluded deals (such as the Trans-Pacific Partnership (TPP) in 2015, and the Comprehensive Economic Trade Agreement (CETA) in 2016), or the use of the 'best' Free Trade Agreement (such as the EU-Korea) achieved as a reference point, has been the basis of much commentary.

The negotiators are also from trade and not education departments, with the result that educators are unlikely to know about them. They are also located at national levels of government, whilst many education systems are organised at the sub-national or provincial level. This makes them both invisible to educators, and therefore incredibly powerful, as they are not accountable to the sector.

Even knowing about these trade deals brings their own headaches. The most significant is the language that is used to describe education as now part of a goods and services economy subject to international rules around trade and investment. A significant amount of decoding and translating is necessary for these agreements to be accessible to the wider public. The other is the sheer volume of pages; the recently concluded TPP runs to some five and a half thousand pages, with lengthy annexes. And this is simply one agreement out of a number.

Do any of these trade deals matter to educators? As you will see from this Report, the answer is YES! It matters in that the overall purpose of these negotiations is to: first, reframe education and treat it as a tradeable services sector open to investors; and, second, these trade deals aim to introduce new regulatory frameworks and mechanisms to ensure that education not only



continues rapidly down the path of further market liberalisation, but that the interests of the investors are protected by limiting government's policy-making spaces.

These trade deals will have a huge impact on less powerful economies, on the work conditions of educators, the costs of public procurement when opened to international investors, the regulation of knowledge and use of data, the recognition of credentials, and so on. Taken together these frameworks, mechanisms and enforcements will work in the interests of powerful countries, big corporations and profit-making, rather than educators, citizens, democratic processes, and sustainable development.

This reframing sits in stark contrast to the overall purposes of education; to have the conditions to educate the next generation so that they have the imagination, and means, to realise a socially-just and sustainable future. It is this vision that is at the heart of the Sustainable Development Goals (SDGs). Realising these goals by 2030 will demand political space to experiment with policies and practices that work in new contexts (Nussbaum, 2010). Losing policy space because it is a condition imposed by trade deals means losing out on the possibility to make other worlds possible, other than one dominated by profit-driven interests (Sennett, 2006).

This Report intends to ask some hard questions about trading education . For example, how and why has this state of affairs emerged? How and why has education, as an entitlement and human right, been reframed as 'an education services sector'? What part is government playing in opening up education to private sector interests and for-profit companies, and enabling it to be part of trade deals? And, finally, what are the implications of this market/trade framing for democratic education and sustainable futures?

## This Report

In this Report we will be exploring the wider economic, political and social conditions, development agendas, combinations of actors, and regulatory instruments, which together have challenged the idea of, and conditions for, education as a public service and a human right by locking in a market and profit-based framing of education in trade deals.

Aside from the published trade agreements of TPP and CETA (TPP is 5,544 pages long), this Report draws upon an extensive systematic review of the peer-reviewed and grey literatures on globalisation, regionalisation, multilateral institutions, knowledge-based services economies, education markets, development agendas, and trade negotiations. We also drew on a massive amount of material from dedicated websites on the state of different trade negotiations and possible outcomes, from Ministries of Trade to various citizen's watch and wiki-leaks websites. In Chapter 2 we sketch out the global education landscape to reveal competing agendas around education for profit-making versus education as a human right. We discuss the ideological shifts that have put into place new ways of thinking about and doing public sector work. We examine the role of policy entrepreneurs – from the institutional to the national and global - who have normalised talk about education markets, globally-competitive knowledge-based economies, trade in education, and education as an emerging market.



Chapter 3 examines earlier efforts to incorporate education into the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), and Trade-Related Aspects of Intellectual Property Rights (TRIPS), beginning in 1996 (Robertson et al., 2002; Kelsey, 2008; Verger, 2010). We show that though the multilateral system of negotiations through GATS and TRIPS stalled, this did not mean those protestors contesting the inclusion of public services in trade deals had secured a victory. Instead we show a proliferation of bi-lateral Preferential Trade Agreements (PTA) and Regional Trade Agreements (RTA) that emerged from 2005 onwards. In this regard we highlight concerns raised by the United Nations Commission on Trade and Development (UNCTAD) over the loss of national policy-making space as a result of the Investor-State Dispute Settlement (ISDS) mechanisms.

In Chapter 4 we introduce a series of cases that have been considered via the Investor-State Dispute Settlement mechanisms. We reflect on how they work, and what they tell us about how foreign investors, particularly from the developed powerful countries, are ruled in favour of as a result of systematic bias by the arbitrators.

The bulk of our Report is in Chapter 5 where we introduce the current round of trade negotiations and finalised deals where education as a services sector is included – the Trade in Services Agreement (TISA), the Trans-Pacific Partnership (TPP), the Comprehensive Economic Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP). We detail who is involved and why, what the state of play is regarding the scope of the negotiations, the key mechanisms included in the agreement, and whether and how education is included. We conclude by teasing out the overarching issues educators need to think about; the inclusion of education as a tradable service; labour rights; mutual recognition and skills; government procurement; intellectual property, and the regulation of data.

In Chapter 6 we examine the new global development agenda - the Sustainable Development Goals - driving education systems to be realised by 2030. Multiple goals are of concern to educators; Goal 4 - quality education; Goal 5 - gender equality; Goal 8 - decent work and economic growth, Goal 10 - reduced inequalities, and Goal 17 - partnerships. To be effective, ALL will require a crucial element that trade deals are aiming to close down; policy space to be used by governments and educators to enable experimentation, critical reflection, dialogue, and policy reversals. Realising the SDGs will depend upon an open agenda for the benefit of the wider society rather than investors and powerful corporations.

In a final Chapter 7 we offer two conclusions. A first is a list of 10 reasons to say NO to these trade deals. A second calls for steps that we might take instead to deliver education for social justice as part of the Sustainable Development Goals, and the kind of education opportunities our future generation deserves.

Our overall purpose in writing this Report is to help educators develop a level of critical literacy around the relationship between the commercialisation and privatisation of education, and how these dynamics relate to trade negotiations. Our hope is that you are able to see why it matters, and from there, how these insights help you to take action.



# Chapter 2

## Competing Agendas – Profits Vs Rights

### Introduction

In March 2014, Merrill Lynch Bank of America published a report stating that the global education sector was worth \$4.5-5 trillion and expected to grow to \$6-8 trillion by 2017 (Harnett et al., 2014: 6). In anyone's language, this is a huge figure. Yet it is important to remember there is some distance between asserting the dollar value of the sector now and into the future, and transforming education into a profit-producing enterprise for investors on a grand scale.

This is because creating a global education sector, by framing education as a profit producing service as part of a globally-regulated economy, takes a great deal of ideological and political 'work'. It takes ideological work in that how social life is best organised and what is to be valued are contested. It involves political work in that interested actors, from policy-brokers to politicians, policymakers, firms, media, think-tanks and foundations, all use their social networks, access to wealth, or other resources, to push this agenda forward.

We make this point to as none of what has happened to education over the past two decades is inevitable, and can be challenged and changed, though not if the investors shaping trade deals have their way. In her book *Not For Profit* (2010), the well-known philosopher Martha Nussbaum is highly critical of this short-sighted, narrow, economic agenda for education; one that erodes our ability to critique authority, reduces our sympathy for the marginalised and different, and damages our competence to deal with complex global problems. Similarly, the Special Rapporteur on the right to education, Kishore Singh, in his 2014 report on the Right to Education, points to "...the explosive growth of private education providers...and the need to preserve education as a public good...which must not be reduced to a profit-making business" (p. 2).

In the following sections we introduce key policy shifts instrumental in reframing education in economic rather than social terms. These include neoliberalism as an organising ideology in public service sectors, the promotion of trade in education as a comparative advantage; reimagining the economy as knowledge-based and tightly alignment with education, and education as an emerging market. We conclude by reflecting on the arguments advanced by promoters of education markets and trade versus those who are critical of what this means for education as a right and public good.

### Neoliberalism and Public Services

A first shift in recalibrating our understandings of the role, purpose, and organisation of education followed the advance and embedding of neoliberalism as new development model for



governments around the world. The economic crisis in the early 1970s provided the entry point for orchestrating this shift. As the historian Eric Hobsbawm was to describe it, a small group of “...ultra-liberal economic theologians” (1994: 409) took the opportunity to advance a free market agenda as the desired model for the future shape of societies.

Neoliberals argued that the future wealth of nations depended upon cutting the cost of government and creating the conditions whereby the private sector could boost productivity through competition, efficiencies, and innovation-driven profits. This was a direct challenge to the Keynesian model based on state planning, higher wages, full employment, and welfare provision.

Beginning with Chile in the 1970s, then later the United States of America (USA), the United Kingdom (UK), Australia, and New Zealand, amongst others, the exponents of free markets and neoliberalism promoted the liberalisation of existing economic arrangements (tariffs, financial regulations), the privatization of key public sector activities (state-owned enterprises like utilities), and the marketization of public services, like health and education (Harvey, 2005; Peck, 2010). This pro-market model was contrasted with a slow, one-size-fits-all, paternal, bureaucratic order (Berger et al., 1974).

Hood (1991) termed this new order of ‘user pays’, ‘outputs’, ‘standards’, ‘accountability’, ‘competition’, and ‘management-driven approaches’ - the New Public Management. Recent versions of this tendency in education is described by Pasi Sahlberg (2013) as the GERM, the Global Education Reform Movement. This model found its harshest expression in low-income countries, as a result of Structural Adjustment Policies (SAPs) in the 1980s and early 1990s (Robertson et al., 2007).

A great deal has been written about these reforms from both sides; those promoting, and those contesting the claims made for it as a way of organising public services in societies. Our point in noting this here is that it is this model of development - a neo-classical economic model that has propelled the transformation of many societies around the world since the 1980s. And it is this model that will be locked into current trade agreements being negotiated with little space for policy reversal. Leys (2003) describes this as market-driven politics aimed at creating a market society.

## Globally-Competitive Knowledge Economies

A second shift is the reconceptualization of the purpose of education to make it central to creating globally-competitive knowledge-based economies. Beginning in the 1980s, governments sought to get economic productivity back on track through a mix of policies aimed at expanding the stock of human capital through investment in higher education, promoting trade in education, boosting technologically-driven Research and Development (R&D), and extracting value from innovations via patents, spin-out firms and so on. In the following pages we sketch out the broad



detail of these developments because this triggered the interests of selected governments and corporations in extending trade in services across their national boundaries and ensuring that these markets remain open to them.

### **Exporting education services**

In the 1980s a small number of Western economies (especially Australia, New Zealand, and the United Kingdom) began viewing their education sectors as giving them a comparative advantage in trade terms and that they would promote it as an export (Welch, 2002; Robertson et al, 2002; Verger, 2010). The higher education sector was easier to transform on that 'internationalisation' has been central to its mission. Facing challenging funding environments, higher education institutions were encouraged to, and willingly engaged in, internationalisation strategies aimed at recruiting large numbers of full-fee-paying students (Marginson and Considine, 2000; OECD, 2016).

Countries like Australia found a willing market in neighbouring countries like Singapore and Malaysia with no long history of investing in higher education on a large scale. 'Importing' higher education provision through inviting foreign universities to establish a branch campus, or enabling local students to study abroad, would help boost the human capital of the sending country, and the coffers of the universities as well as the Government Treasury of the receiving country.

The premium attached to English as the medium of instruction, and the possibilities this has opened up in the world of transnational production for individuals, has enabled key English-speaking countries to consolidate their positions as exporters of education services. The result has been a spectacular increase in the volume of student movement, particularly from the Asian region to OECD countries, though new undercurrents are emerging with movements of students now to China (Robertson and Kedzierski, 2016).

Prior to the global financial crisis in 2008, the United States stood apart from this model of trade in education generated through the recruitment of full full-foreign-fee-paying students. The USA's interest in the student mobility market related to the recruitment of (largely) science and technology graduate students – typically funded by scholarships awarded by US institutions – to boost its research and innovation efforts. Following graduation, a good percentage of these international students, many from China and India, stayed in the US working on R&D in and around the universities (Saxenian, 2006). If US universities entered into the fee-paying undergraduate market it was largely via the development of branch campuses. Lane and Kinser (2014) chart the growth of what in trade language is termed the 'commercial presence' of foreign universities, mostly in East Asia and the Middle East.

Trade in education services, either through sending students or hosting branch campuses, is now an important 'industry' in a growing number of countries, including Australia, New Zealand, the United Kingdom, USA, Germany, the Netherlands and Canada. But there are new kids on the block, looking to take a share of this market. Countries here include Singapore, China, and Malaysia, as well as other European countries aside from the UK. All are jockeying for a share of the market (Robertson and Kedzierski, 2016), potentially using trade deals to strengthen and lock-in their position.



It follows that with such a significant investment in, and dependence upon, the 'education export market' that governments and institutions have given some thought as to how to maintain or increase their share of the market. It should come as no surprise that these countries have been active in trade talks, and particularly so following the 2008 global financial crisis. We return to this issue when we look at the rapid growth of Preferential Trade Agreements, beginning around 2005, and then from 2011 onward further round of trade negotiations aimed at promoting and locking in those rules preferred by the United States and Europe.

### **Extracting value from intellectual property**

A key claim of contemporary knowledge-economy policy agendas is that knowledge is Intellectual Property (IP) protected through law (e.g. patent, trademark and copyright law). New digitally-mediated innovations have enabled the creation of new products and services, with data and information now a form of currency (Curtis, 2012). Information is an important building block for new products and services around the creation, storage, analysis, sharing and innovative recombining of data and information. For instance large student satisfaction surveys with their university experience carried out by companies like i-graduate or the Princeton Review, gather data and sell information to students as to where best to study. They also sell information back to the sector to enable institutions to see how their competitors are doing.

Curtis (2012) argues there have been rapid changes in intellectual property and policy due to the intersection between international trade and the numerous international trade agreements that have been bought into force over this period. Driving this dynamic are developed countries who export intellectual property rights (music and so on) and who pressure other countries to change or create intellectual property rights-related policies and regulatory instruments to accommodate the exporter's interests. As a result, have been major changes in intellectual property (IP), law and policy over the past 20 years.

Yet as Curtis (2012: 8-9) points out, there is a tension between the rights of creators and the rights of users. Lawyers are largely concerned with the rights of creators, turning those rights into intellectual property rights. Economic policymakers are more interested in determining the cost-benefit ratio between the rights of creators and the rights of users in terms of innovation, economic growth and productivity. This is because in particular circumstances, limiting access to products and services through putting a price on them, in turn limits innovation. Similarly, copyright protections aimed at creators can limit creativity in that it makes it difficult for some texts to be easily accessed in sufficient volume by users. How closed and how open systems of regulation are to ensure that the creators of things (goods, services, artifacts, performances) get some financial return on their labour, is pitched against the costs or not for users to ensure that the costs of accessing innovations do not impede creativity and the emergence of new innovations.

Since the mid-1990s, global trade and intellectual property rules have come together with a view to regulating them through the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1996). TRIPS was later followed by the inclusion of IP standards and obligations in many regional and bilateral Free Trade Agreements trade agreements beginning



in 2000 (we detail these in Chapter 4), and in stand-alone plurilateral arrangements (such as the Anti-Counterfeiting Trade Agreement [ACTA]).

Though many countries have been developing their own infrastructures, the United States dominates the digital economy and digital trade; that is, commerce in products and services delivered using the Internet in cross border information flows (Aaronson, 2016). The United States is also behind efforts to develop trade rules to govern cross border flows. Ranked by market capitalisation, the United States is home to eleven of the fifteen largest internet-based businesses, including Apple, Google, Facebook, Amazon, LinkedIn and Twitter. China is home to four; Alibaba, Tencent, Baidu and JD.com (Aaronson, 2016: 7). No companies from Brazil, Canada, the EU28, India, Japan, or Korea are listed amongst the top fifteen digital corporations.

The stakes of who regulates the Internet has increased since 2008 following the global financial crisis, with governments around the world viewing the Internet and digital technologies as an economic saviour (Chakravorti et al., 2014). However they also worry about the dominance of the United States in issues of competition, human rights and infrastructural policies. As we show in Chapter 5 trade deals, it is the US who has pushed hardest to lay down its own version of what regulatory policies are to look like, and what the content of Intellectual Property chapters should be in the trade deals.

Education sectors include individuals and organisations (e.g. administrators, teachers, researchers, students, test and textbook producers, performance artists) who are both creators and users of intellectual property. As creators, their outputs may or may not be owned by the institutions in which they work. They may well sign away their rights as creators to publishers for a fee, or a share of the royalties.

More broadly, the global education publishing market is massive, and accounts for 15% of global media and entertainment (Wischenbart, 2016: 4) estimated to be worth over US\$1 trillion. The total world market value of publishing education is around €95.6 billion (Wischenbart, 2016: 2), with markets in the USA and China taking the major share. Figures reveal that the Chinese publishing industry is expected to grow further as a result of domestic consumption within China, and as a result of aspirations for a better education amongst the middle classes in urban regions (Wischenbart, 2016: 3). Recently e-books have revived a shaky book market, particularly in the US and the UK, both with strong export profiles.

As users of digitally-based intellectual property, many education providers have invested in virtual learning platforms to manage their teaching and learning interfaces. This applies to physically-located institutions, as well as purely on-line providers. Massive Open Online Courses (MOOCs), which emerged around 2010, now sit on platforms enabling learners from around the world to connect to bespoke courses offered by universities, sometimes with a small fee collected by the MOOC platform owners from the students who enrol in exchange for a certificate of participation.

Companies like LinkedIn, most recently purchased by Microsoft, not only connect data on the learning and employment profiles of individuals, but use this information to create new services around recruitment (Komljenovic, 2016). Many education institutions also use Google's Gmail



system, as well as other services, such as DropBox. The Cloud is also routinely used to store education-related data from libraries of papers to large data-sets. Facebook is used by education institutions to bring groups of learners and other study groups together, as well as being a means of keeping in touch with alumni. However these global companies do not reach into each country; China for instance places limits on the operation of digital firms inside its borders – such as Facebook and YouTube.

## Markets, Marketization and ‘Emerging Markets’

A third shift in reframing education in economic terms gathered momentum from the 1990s onwards. Here we discuss the role of multilateral agencies, education policy entrepreneurs, corporations, foundations, governments, and government aid agencies in promoting privatisation policies in education (Macpherson et al., Robertson et. al., 2012). High, medium and low-income countries are included here. In medium and high-income countries, policies are broadly referred to as those that use parental choice and market forces as a means of making education provision more efficient. In the case of low-income countries, education is often represented as an ‘emerging market’, particularly by financial institutions and investors, where opening up education sectors is a new source of profit-making.

There is a growing literature documenting these developments and trends (cf. Ball, 2007 2012; Robertson et al., 2012; Verger et al., 2016). Our purpose here is not to provide an extensive account of these. Rather, it is to provide examples so as to help us understand what the implications might be for countries if their already highly liberalised sectors are locked into even further liberalisation through ‘stand-still’ and ‘ratchet’ clauses in trade agreements (we develop these in Chapter 5).

Briefly, ‘standstill’ refers to the practice of locking in the level of liberalisation present at the time of the trade agreement. As a result, governments cannot use policy to reverse direction toward the nationalisation of education activities without paying penalties. The ‘ratchet clause’ means future activities are automatically locked into liberalisation; there is with this mechanism a strong tendency towards increasing liberalisation (EI, 2016).

### For-profit markets in high income contexts

In countries like the USA, UK, Sweden and Australia, for-profit activity in the schooling and higher education sectors is often invisible as a result of the adoption of language like Public Private Partnerships (Robertson et al., 2012). The model is the creation of a contractual relationship between the private sector (as provider/builder of infrastructures) and the public sector (as funder). That is, the state funds education, whilst the private sector delivers education.

This is manifest in arrangements like Charter Schools (USA/Canada) (Lubienski, 2013), Academies (UK) (Eyles and Machin, 2015) and Free Schools (Sweden) (Wiborg, 2010). Infrastructural activity is regulated under government procurement. We note this, as procurement is included in the current trade negotiations we address in Chapter 5.



One point of common connection in these school initiatives is that they are often able to operate much like a private business—free from many state laws and district regulations, apart from student outcomes. Wiborg (2010) argues the main beneficiaries of free schools in Sweden were the corporations. Evidence suggests that profit motives skew the incentives and activities of private providers (Robertson and Dale, 2013). For example, when the system tries to regulate through student outcomes, this then results in gaming the system – such as excluding poorer performing students to ensure that the school is able to demonstrate high student outcomes in return for payment from the government.

The role of private actors is not limited to provision or infrastructure. Ball (2007; 2012) and DiMartino and Scott (2012) show that private sector actors (such as global consulting firms, foundations, venture philanthropists) have penetrated the state's policymaking space so that even the government's role as policymaker/regulator has been captured by private sector interests. This matters when it comes to the question of trade, as it is particularly the large corporations with education portfolios, such as Microsoft or Pearson Education, who benefit from shaping government policy agendas, including those concerned with international trade.

In some cases, for-profit schooling initiatives, such as the Edison Schools in the United States, and the Free Schools in Sweden, have been transnationalized, extending their operations beyond their national borders into new national jurisdictions (Ball, 2012). Free Schools now operate in the UK, whilst Edison Schools operate in Canada. Both of these operations are protected by regional trade agreements. In the case of Free Schools – the EU's Directive on Services (EUDS) (2006) protects the free movement of services across Europe. In the case of the US-based Edison Schools, the North American Free Trade Agreement (NAFTA) enables a US-based firm to operate in the Canadian jurisdiction because it can demonstrate that its education sector has the features of a market.

We'll return to this point in Chapters 3 and 5 when we address trade issues more directly. For the moment, we point out that existing trade agreements, like NAFTA and the EUDS, provide useful insights into trade agreements and their operations, and their consequences for public services. That said, the current round of trade agreements include new features that also make them different to those that were being negotiated in the WTO. In particular they focus on elements that the GATS negotiations had found particularly difficult and controversial and had not developed; the nature of domestic regulation, and how this is perceived as a non-tariff barrier in the context of trade in services.

The growth of the for-profit higher education sector is also important. A small number of these institutions were active in forums as part of GATS negotiations in the late 1990s/early 2000s (such as the Global Alliance for Transnational Education). Since then the for-profit sector has grown rapidly in size, and in their range of operations in countries like the United States, Chile, Brazil, Spain, France, Australia, Singapore and UK. Until recently, for-profit universities were the fastest growing part of the US higher education sector – increasing from 0.2% in the 1970s to 9.1% of total enrolment in degree awarding HE in the US in 2009 (Deming et al., 2011). In 2009 for-profits enrolled 1.85 million US students.



These for-profit universities are diverse in terms of programme and size, and have the highest fraction of non-traditional students enrolled who obtain the greatest proportion of their total revenue from federal student aid in the US (loans and grants). Recently in the USA the for-profits faced tighter regulation by the US Department of State regarding their aggressive marketing strategies, the high level of student attrition, issues of institutional quality, and levels of indebtedness of students unlikely to earn sufficient income into the future to be able to pay back the loan. The US Government's stand has caused considerable tension between government and the for-profit sector who lobbied heavily to limit the state's regulation of their activities. In a world governed by trade rules of the kind that this Report is concerned with, imposing regulations on the sector would be difficult.

The **University of Phoenix** was opened 1976 as a for-profit university by John Sperling, catering largely for working adults studying part-time. In 1989 Sperling launched an online campus and it grew very quickly. He then created a parent company, the Apollo Group, and went public in 1994 by floating the Apollo Group on the stock exchange. The capital from Wall Street allowed the University of Phoenix to expand even further, as that within five years of going public, the university had more than 100,000 students.

The University of Phoenix proved higher education could be big business. Phoenix and other for-profits rode a huge wave propelled by the rising demand for higher education and interest by investors in new markets. Once it went public, the University of Phoenix was under intense pressure from investors to keep growing.

Sperling expanded the school's online degree programs and built campuses in more states of the US and also overseas, though the regulatory environments in both the United States and in different countries meant that this was not straightforward.

By the year 2000, Apollo stock had increased in value by 1,700 percent since its Initial Public Offer (IPO). It was the nation's largest and fastest-growing private university, with operations in 35 states and a growing population of students from all over the world taking classes online. With more than 100 locations around the U.S. and an online-only study program, the University of Phoenix is among the biggest U.S. for-profit colleges, with a student population that peaked at 470,800 in 2010, according to its annual reports. Enrolments declined to 300,800 in early 2013 following new legislation by the Obama government regarding the capacity to pay back student loans.

Additionally, Apollo Group, Inc. is the owner of BPP University in the United Kingdom, a for-profit degree awarding university. It joined forces with Carlyle Group to create Apollo Global for tactical investments in education abroad. Apollo Global also purchased UNIACC college in Santiago, Chile and ULA college in Mexico.

Source: Arnold and Childs, 2014 (Bloomberg Magazine)

*Box 2.1: University of Phoenix - Transnational HE Provider*

A number of for-profit universities have expanded their operations globally. An example is Laureate Education, a venture capital backed initiative which began life as Sylvan Learning Systems (Robertson and Komljenovic, 2016). In 2007 Laureate Education was acquired by an investor group and expanded rapidly since then, buying up other universities. Laureate Education's footprint in the global south now tops that of any American higher education institution; 80% of its revenues come from outside of the USA (Redden & Fain, 2012) and around 60% of its operations are in developing countries. In 2015 it enrolled 1 million students who were



spread across 28 countries and 88 institutions (Fain, 2014a, 2014b; Laureate Education, 2015) employing 70,000 employees, faculty and staff (Laureate, 2015 webpages), though only 4% of staff are on permanent contracts. They have a strong focus on employability. Students study mostly in low-cost programmes, such as education, health sciences, business education, engineering, sports science, and hospitality management. Most recently, Laureate has expanded its operations in Australia, under Torrens University Australia with 6 institutions offering a blend of on-line and campus learning. These kinds of operations provide us with an insight into the learning and labour arrangements for learners and teachers in large-scale, transnationalized, higher education learning settings.

### **For-profit markets in low-income contexts**

In April 1999, the Institute for Economic Affairs, together with the International Finance Corporation (IFC), published the results of a commissioned report on the role of private providers in education. From the vantage point of 2016 and looking back, this report - *The Global Education Industry* - highlights the regulatory issues (viewed as impediments to trade) that faced corporations wanting to operate in the education sector.

The Report is notable for other reasons. First, the International Finance Corporation, part of the World Bank Group, is visible almost for the first time as a global actor in the education sector. In the Foreword to the Report, the IFC's Vice President for Finance and Planning, Birgitta Kantola, points out that the IFC, the private sector lending arm of the World Bank Group, intended to move into new investment areas as a result of becoming "...increasingly aware of the potential to participate in private education" (Tooley, 1999: 7). By 2001, the IFC began framing education as an 'emerging market'. In doing so, it effectively equated education with other trade domains, such as tourism, or extractive industries.

Second, it was written by Professor James Tooley, well known throughout the 1990s for his writings on the relationship between the state and education. His books, *Disestablishing the School* (1995), and *Education Without the State* (1996), had already marked him out as a controversial figure both in the UK and globally, over his opposition to the state education. In these two books, Tooley argued that state governed education was failing to properly educate, and that state government regulations increased inequalities. The solution, he argued was to open opportunities for educational entrepreneurs to create a market-based rather than state-based education sector. Tooley's *Global Education Industry* (1999) report highlighted the extent of corporate activity in low-income countries, and the conditions that might enable it to expand. Education corporations were argued to be the 'least risky ventures' (p. 23) because the corporation had to worry about the value of the brand. Tooley also argued this kind of education establishment would also help grow the next generation of entrepreneurs amongst the populations it operated in, and provide education to families not well served by the public education system.

Particular attention is drawn to the frustrations faced by education entrepreneurs. The biggest block to the expansion of private education and the creation of a global education industry was the regulatory environment (Tooley, 1999: 95-104). A selection of quotes from the Report illustrates these arguments:



...although regulations may be intended to protect consumers and maintain standards, they often act to inhibit, and in some cases stifle, needed educational opportunities which the private sector could otherwise provide.

There appear to be three ways in which regulatory regimes can inhibit private growth and investment: (i) regulations are substantial, but mainly ignored; however the threat of enforcing them inhibits and threatens operations; (ii) regulation are applied in an arbitrary or ad hoc fashion, and (iii) petty regulations are enforced, leading to inconvenience, inefficiency and a brake on growth (p. 95).

Tooley points to regulations enforced in systems like Zimbabwe: the mandatory curriculum, he suggests inhibits the ability of private schools to compete with each other around curriculum content; provisional registration and the threat of withdrawal of recognition status of the provider makes it difficult to attract students to start up an operation (p.98); the insistence on compliance with The Teacher's Statute which regulates the labour contract for teachers means private providers cannot run their own system of incentives (p.99); and strict planning rules and regulations around marketing and recruiting international teachers limits the development and expansion of a school market (p. 100). His case studies of Brazil, India and Turkey are used to show similar kinds of challenges facing for-profit private operators. In his conclusions, Tooley argues private sector companies have much to offer the development agenda more generally, and innovation and equity in the education sector, specifically. Unless regulations were liberalised in education, education corporations were unlikely to emerge and prosper (Ibid: 122).

Here international organisations, such as the IFC, are turned to as having an important role to play, not only in helping change the climate of receptiveness to corporations interested in investing in education, but by lending investment funds to companies wanting to expand into the sector (ibid: 126). The IFC's education portfolio has expanded since 1999 (Mundy and Menashy, 2012). The International Finance Corporation has played a leading role in advocating and funding investments in private education (IFC, 2001). In January 2013, the IFC invested US\$150 million in Laureate Education – the for profit university we introduced above. In 2014, the IFC invested US\$10m in Bridge International Academies (BIAs), a controversial case which we introduce below.

### **Education entrepreneurs – promoters and makers of markets**

It is now a matter of history that many governments around the world have put into place governance arrangements which enable highly entrepreneurial education companies to more freely operate in the sector (cf. Ball, 2007, 2012; Robertson et al., 2012; Verger, et al., 2016). Tooley has been a key figure in this process, but he is not alone (Robertson and Verger, 2012). From the early 2000, a group of education policy entrepreneurs have been instrumental in promoting global education markets (such as Patrinos, Senior Education Economist, World Bank; Latham, Council for British Teachers; Laroque, Asia Development Bank) have been joined along the way by Michael Barber (McKinsey & Co., before becoming Chief Education Advisor, Pearson Education; education economists located in the academy).

These early advocates have been joined by sympathetic governments and allied agencies, from education foundations and other philanthropic organisations to large global consultancy firms, multinational corporations, the list goes on. Their interest in promoting a global education market, and their efforts to influence its expansion through shaping policy spaces – including the



Learning Metrics which will measure the realisation of the Sustainable Development Goals (see Chapter 6), is precisely because they directly benefit from the financial returns that follow. In concluding this section we focus attention on Pearson Education and Bridge International Academies as examples of the close relationship between policy entrepreneurs and entrepreneurial investors.

Bridge International Academies (BIA) was founded by Shannon May, Jay Kimmelman and Phil Frei in 2007. It is registered in Delaware, USA, and is a wholly-owned subsidiary of NewGlobe Schools Inc. It also has investments from the International Finance Corporation, United States Aid (USAid), Department for International Development (DfID), Pearson Education, Facebook's Mark Zuckerberg, Gates Foundation, Omidyar Network, Klosa Ventures, Novastar Ventures, amongst others. It has operations in Nairobi, Kenya; Lago, Ghana; and until August 2016 in Uganda (when it was forced to close pending a court case which it subsequently lost), with planned operations in Liberia and Andhra Pradesh.

In 2007 Jay Kimmelman, Shannon May and Phil Frei founded NewGlobe Schools Inc. owners of Bridge International Academies (BIAs). Bridge is a 'low-cost' fee-based, network of for-profit primary schools for families living under US\$2.00 per day in low-income countries.

In 2009, the first school was opened in Nairobi; a year later BIAs were operating 10 schools. The company has set a target of 3,337 schools by 2018, enrolling close to 2.5 million students. Bridge operated in Uganda (until its schools were closed in August 2016 for failing to meet government standards). It continues to operate in Ghana, and had a contract to operate publicly-funded private schools in Liberia beginning September 2016 as well as in India. The long-term goal is to regionalize to include more countries, and to enroll 10 million students.

BIA runs a distinctive business model based on standardization, technology and scale. It operates rather like a franchise. That is, each school is run by a School Manager who is responsible for the performance of the school. Each school is part of a network of schools closely linked to a Bridge International Headquarters – the central administration located in the US. Class sizes are between 55-65 students, making up a school of around 1000 students (pre-K to 8th grade). The school day runs from 7.30—5.00 weekdays and 9.00-4.00 on Saturday. "Teachers" are graduates of secondary schools.

The school curriculum, as well as the school operating procedures (finances, personnel, reporting), are known as a 'School in a Box'; the learning material is standardized lesson plans, there are scripts for teachers developed by Bridge International headquarters. The training of Bridge teachers (for which they receive a certificate) takes place in Bridge International Training Institutes.

Each school has access to a development coach. Each school is also funded from student fees which are paid using a mobile banking service. Student fees are \$6.00 per month per child. In Kenya the GNI is US\$730, with 46% of Kenyans living below the poverty line of US\$2.00 per day.

Sources: Rangan and Lee, 2010 (Harvard Business School Case Number N9-511-064); Brown-Martin, 2016; Riep and Macacek, 2016.

*Box 2.2: Bridge International Academies*

BIA rapidly expanded their operations in sub-Saharan Africa – starting in Kenya with 10 schools in 2009 and escalating to 459 in 2015 (Bridge International Academies, 2016). Their goal was to enrol 10 million students around the world from households earning under \$2.00 per day (see Box 2.2).

Whilst they are not the only 'low-fee' for profit provider in sub-Saharan Africa, the detail of their ambitions and operations are particularly interesting from a trade point of view, not least



because in August 2016, the Ugandan government withdrew the right for Bridge to operate, citing the failure to respect national standards, sub-standard pupil-teacher interaction, poor hygiene and violations of Ugandan law (see Box 2.3). Were a trade deal in place of the type that we detail in Chapter 5, Bridge may well have used the investor-state dispute settlement processes to claim that national standards were more burdensome than necessary, and less trade restrictive measures could have ensured the same purpose.

For the most part, Bridge has built its own schools, which is a cost that eroded profitability. As a result, Bridge sought to use schools built by the governments to limit its start-up costs. Similarly, aligning curriculum material with national education agendas takes time, and costs money (Brown-Martin, 2016). Developing their own curriculum (created in the US), pedagogy (scripted), forms of assessment (using low cost tablet computers for teachers) and lower-paid “teachers” (high school graduates trained by Bridge), and using this model across all of its schools, generates economies of scale, as costs per student are less. However, Bridge has faced a high turnover rate of teachers (Rangan and Lee, 2010; Brown-Martin, 2016; Reip, 2016).

Bridge’s claims to pupil performance also came in for criticism. This included the way performance data was collected, the method of analysis of the data, the claims made as a result (Goldstein, 2016), and the close connection between Bridge and the ‘independent’ evaluator (Brown-Martin, 2016). This case highlights that when bottom-line profits and corporate interests encounter education, those directly benefiting from selling education are likely to skew their model of learning and teaching in the direction that benefits the business and not the learner.

## Promoters Vs Critics

Governments like Australia, New Zealand and the UK, amongst others, have a vested interest in advancing trade agreements because of their export of private education on trade in education services. So, too, have the investors, including the IFC, who reported cumulative investments of over US\$500 million in 63 education projects, most of them focusing on low to middle income countries (Mundy and Menashy, 2012). Likewise when it comes to for-profit operators, and their shareholders and investors. In a pitch to potential investors, Bridge International Academies (2016) laid out their vision for securing \$billions in value through focusing on developing an education market based on those living under US\$2.00 per day “...with an aggressive technology leveraged, data-driven R&D, scaled approach” (Bridge, 2016: 6), and the possibilities of new markets in text books and in the creation of low-cost health insurance (op. Cit: 12).

To some observers, there is a lot more scope for rolling out a low-fee private school model of education that addresses the needs of the poor and the challenges facing developing countries. To other observers, the aspirations of the poor are being exploited; they argue government must ensure protection from exploitation. There has been an effort to create a legal framework that regulates the role of private actors in the education sector, in line with human rights law and international human rights standards (Aubry and Dorsi, 2016). Pointing out the highly contentious nature of this topic, and that much of this is a normative one, they none-the-less have set out to develop a framework based on existing legal instruments to assess the activities

of private actors in education. We return to this in our Conclusion when we outline the features of an education development paradigm that places free education as a right and societal good at the centre, regulated through democratic governance structures.

## Conclusions

In this chapter we have sketched out quite remarkable transformations not only in the education sector but in the ideological and normative frameworks through which we look at education itself. The lines have been increasingly more starkly drawn – with education as a sector producing profits, on the one side, and education as means for realising human rights, on the other. In relation to profits, critics fear that the current trade negotiations and agreements will work in the interests of corporations, some powerful governments and those institutions who financially profit from education. Why? Because as we show in the Chapters 4 and 5, the regulatory architectures advanced by advocates of international trade are all aimed at encouraging further liberalisation, as well as limiting democratic policy space.

# Chapter 3

## Trade Agreements: GATS and its Critics

### Introduction

We began this Report by drawing attention to what would appear to be strange bedfellows – education and trade. In this section we will look at earlier efforts to bring education sectors into global trade rules. We highlight the forms that this took, what was achieved, and what the limits were, particularly as a result of opposition to realising education as a tradeable service in trade agreements (Gill, 2003).

### The WTO and GATS

The World Trade Organization, launched in 1995, emerged out of the Uruguay Round spanning the years 1986-1994. The General Agreement on Tariffs and Trade (GATT), a post WWII trade agreement, remained part of this new organization, but was joined by two further agreements; Trade Related Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Service (GATS). The broad mandate of the Uruguay Round was to extend GATT trade rules on goods to areas previously exempted as too difficult to liberalize (such as textiles), as well as to bring in new areas previously not included – such as trade in services and intellectual property.

The WTO's mandate was to "...formalize, deepen and widen an international system of trade regulation. It was also to bring greater coherence in global policymaking by drawing together the work of the WTO with that of the IMF, the WB as well as to develop relations with other bodies" (Wilkinson, 2002: 129). Yet there were problems in defining services using the language of trade in goods. As Winham points out:

...services are processes, defining them is difficult, unless a strict functional definition is employed. ...The tasks for the negotiators at the Uruguay Round were to incorporate GATT principles of transparency, national treatment and reciprocity, as well as newer principles such as market access, into areas of trade that were conceptually dissimilar from trade in goods (2005: 101).

The result was a service's agreement that was "...not yet complete, not terribly user friendly, with a complex geometry and al a carte obligations set against the backdrop of near universal coverage and sovereign immunity in liberalization matters" (Sauve, 2002: 3).

Members who joined the WTO opted in under a single undertaking to a series of legally-binding rules and a built-in agenda to engage in on-going negotiations leading to progressive liberalisation. All sectors of education were included in GATS, though it was then up to the



negotiators as to which modes and sectors might be listed for agreement. This is called a 'positive list' approach.

Mode of Supply	Definition	Example
<b>Mode 1</b> <b>Cross Border Supply</b>	Supply of a service from one MS territory to another	Distance education Education software
<b>Mode 2</b> <b>Consumption Abroad</b>	Supply of a service in the territory of one MS to the service consumer	Fee paying international student studying abroad
<b>Mode 3</b> <b>Commercial Presence</b>	Supply of a service by a service supplier in the territory of another MS	Branch campus Language training company
<b>Mode 4</b> <b>Movement of Natural Persons</b>	Supply of a service by a service supplier of one MS through presence of natural persons	Professor, teachers, researchers working abroad on a temporary basis

*Box 3.1: GATS Modes of Supply, Definition and Example*

GATS has three components. The first is a framework of rules that lays down the general obligations governing trade in services, much as it does with the GATT. It lays out the basic elements, such as; 'transparency' of all regulation at all levels of government and including also non-governmental bodies exercising governmental power or authority (regarded as very important given the density of services trade), 'most-favoured nation' (MFN) treatment, 'market access' and 'national treatment'. In the second component there are annexes on specific service sectors, like education, as well as the movement of natural persons. The third component consists of 'schedules of commitments' detailing the liberalisation commitments of each WTO member.

The GATS distinguishes between 'four modes of supply' through which services can be traded (see Box 3.1). These are: Mode 1: cross border supply; Mode 2: consumption abroad; Mode 3: commercial presence; and Mode 4: movement of natural persons.

An exemption is only granted to a services sector under GATS Article 1.3; when it is supplied "...in the exercise of governmental authority" (Art 1.3(b)), and is "supplied neither on a commercial basis nor in competition with one or more service providers" (Art. 1.3 (c)). Governmental authority is interpreted in a narrow sense (WTO, 1998; see also Krajewski 2016: 2-3). However, the idea of governmental authority is only applicable to core sovereign functions and not applicable where there is any remuneration, or where there is evidence of competition – meaning there are one or more service suppliers. Were a commitment to be made, a reversal would be difficult in that other WTO Members would have the right to refuse such a reversal, to demand a similar commitment in an another sector, demand compensation for the reversal and could ultimately reject the reversal of the commitment. This has happened in at least two cases where developing countries wanted to make reversal to health commitments made by previous very neoliberal governments.



As we have shown in the previous section, public services in many countries around the globe have been encouraged to implement market mechanisms such as competition and choice (quasi-markets), or because they are existing markets made up of buyers (families/institutions/countries) and of sellers (firms/ countries) (Sahlberg, 2013; Verger et al., 2016). Indeed, most education systems are mixed systems, with a private sector playing a role (even if their education offer – such as they type of degree - differs). Furthermore, fees exist even in public schools. Education is therefore unlikely to have qualified for governmental authority at the time of GATS, and even less likely today.

Kelsey (2008: 234) argues the potentially controversial nature of including education as a public service or public utility was off the radar during the Uruguay Round, largely because it was widely understood by governments and citizens that education was a public good. However this norm was challenged in the 1990s, as trade departments saw the potential value of the sector, entrepreneurs saw new opportunities opening up as education became more and more central to developing competitive economies, and families were under growing pressure to buy additional education services and other opportunities to ensure social mobility (Brown et al., 2013).

## Contesting GATS - Human Rights Advocates

Despite efforts to list education commitments across the WTO members, the GATS negotiations proved to be hugely controversial. Each meeting was marked by protest; the iconic 'Battle in Seattle' in 1999 was hugely resonant of the times.

Between meetings, campaigners organised and promoted education as a human right, and not a commodity, though some countries did make education commitments. Verger (2010) shows that the extent of commitments was quite poor, and the density of these commitments quite varied. Those opposing the inclusion of education in GATS enrolled a competing narrative; education as a human right and entitlement as recognised in international instruments – most prominently the International Declaration of Human Rights launched in 1948 after World War II, and the Convention of the Human Rights of the Child launched in 1959.

In a specially commissioned report on GATS, the Special Rapporteur for Education pointed out that the "...rapid development of international trade law necessitated a decisive reaffirmation of education as a human right" (Tomasevski, 2001: 5). This led her to observe:

...the liberalization of trade in services, without adequate government regulation and proper assessment of its affects, can have undesirable effects. Different service sectors require different policies and time frames for liberalization and some areas are better left under governmental authority (p. 20)...While the WTO Agreements provide a legal framework for the economic aspects of the liberalisation of trade, they focus on commercial objectives. The norms and standards of human rights provide the means of providing a legal framework for the social dimensions of human rights...A human rights approach to trade liberalisation emphasizes the role of the



State, not only as negotiator of trade rules and setter of trade policy, but also as duty bearer for human rights (Tomasevski, 2001: 10).

In her Report, the Commissioner pointed to the different ways in which GATS would exaggerate social inequalities in education. For example, in Mode 1 (cross border supply) those advantaged by virtual suppliers were those who had the necessary infrastructures, such as the Internet, to access education. Mode 2 (consumption abroad) could lead to the introduction of a dual market of fees, and exaggerate inequalities if governments did not have a way of ensuring cross subsidization. Under Mode 3 (commercial presence), if user fees were introduced, then education would likely become more expensive, and it was not always easy to regulate foreign suppliers. Finally, under Mode 4 (presence of natural persons), whilst it might enable knowledge transfer and remittances to be returned to the sending country, it could also lead to brain drain. Locking countries into their schedule of commitments, and penalising them for seeking reversals, highlighted the tension between commercial interests and human interests. In making this point the High Commissioner observed:

From a commercial perspective, holding countries to their commitments to liberalise is important to ensure transparency and predictability in international trade and the payment of compensation is a legitimate commercial response to the settlement of disputes. From a human rights perspective, however, the focus is less on predictability and more on the need for flexibility to modify or withdraw commitments to liberalise services where experience demonstrates that a commitment constrains or limits the enjoyment of human rights. The need for flexibility is particularly relevant for developing countries given that they are in a dynamic process of building infrastructures. ...Moreover, while compensation to affected parties might be appropriate in some cases upon withdrawal of commitments, a human rights approach would question whether states should be sanctioned for taking action to protect human rights (2001: 28).

Other influential commentators, including academic activists like Jane Kelsey (2003, 2008), argued that GATS would have important consequences for marginalised and poorer sectors of societies, including indigenous peoples, women and girls, as GATS rules did not provide for any recognition of indigenous rights or cultural identity. And as a senior official of Education International, the global education union, pointed out, the irony was that:

...if a child does not get the education he/she is entitled to according to the Convention of the Human Rights of the Child (para 28 and 29) there is no way to force that government to meet its commitments. However, if a company trading in education services loses its right to trade in a particular country, that country where the company is based will have, according to the WTO rules, the right to compensation. Rules concerning trade seem to be much stronger in international law than rules concerning human rights (Fredrikssen, 2003: 8).

Similar concerns were aired, and statements issued by the higher education sector. In 2001, the Association of Universities and Colleges of Canada (AUCC), the American Council on Education



(ACE), European University Association (EUA), and the Council for Higher Education Accreditation (CHEA), declared that:

Our respective countries should not make commitments in Higher Education Services or in the related categories of Adult Education and Other Education Services in the context of the GATS. Where such commitments have already been made in 1995, no further ones should be forthcoming (EUA et al., 2001).

In support of this position, the Statement made clear that:

- HE serves the public interest; regulatory responsibility must therefore remain with the competent authority designated by each WTO member country
- The HE systems of developing countries must be protected
- Quality in HE depends, inter alia, on internationalisation and on existing quality assurance arrangements that must not be compromised
- The internationalisation of HE is developing rapidly; intervention at the level of GATS is unnecessary
- HE already falls within the scope of international agreements such as those sponsored by UNESCO on the recognition of academic qualifications
- Public and private inputs to HE are inextricably linked; ring fenced sub-sectoral settlements within the framework of GATS are not feasible In this context, the explicit exclusion of public service systems offers no reassurance Movement within GATS must be characterised by caution, consultation and transparency
- The impact of the inclusion of HE is virtually impossible to assess
- These concerns, along with growing disquiet amongst many developed and developing countries as to what free trade really meant for them resulted in negotiations grinding to a halt by 2005 (Kelsey, 2008).

## Conclusions

The inclusion of education as a services sector in the WTO's General Agreement on Trade in Services in 1996 marks a radical shift in understanding as to the purpose of education in society. From being a means of socialising individuals into a society – as both economic and political citizens, and thus a human right, the GATS reframes education as a global services sector to be governed through global rules of trade. Yet we have also shown that whilst some countries committing aspects of education sectors, well organised global protests around including the services sectors more generally resulted in limited progress by the GATS negotiators. This, of course, should not be read off as final success. We show that what emerged out of this impasse was that trade negotiators took the bi-lateral rather than multilateral route.



# Chapter 4

## Forum Shifting-Preferential Trade Agreements and ISDS

### Introduction

Following the challenges facing the GATS negotiations, the free trade advocates and corporations shifted their efforts to new forums to keep advancing this agenda. In this section we point to three forms this forum shifting took. At the national level, interested education services providers approached nationally located regulatory bodies to make claims to enter the sector (Robertson and Komljenovic, 2016). At the regional level, agreements like European Union's Directive on Services were advanced and finally agreed to in 2006 (European Parliament and Council, 2006) (ibid). At the bilateral level, a significant number of Bilateral and Preferential Trading Agreements were advanced (Horn et al, 2010). In combination, these different forums to advance liberalisation moved the trade agenda forward.

In this chapter we focus specifically on Bilateral and Preferential Trade Agreements, and International Investment Agreements (IIA), in that they help us see more clearly the ways in which trade architectures were being further developed, particularly in relation to the highly controversial mechanism, the Investor-State Dispute Settlement. We also review a range of dispute cases to show the ways in which arbitration works in these disputes, and who is likely to benefit.

### Preferential Trade and International Investor Agreements

Horn et al (2010) show that PTAs have grown significantly in number from 1995 when the World Trade Organization was launched – from 50 active PTA in 1995, to around 200 active agreements in 2008. A large part of this expansion involved agreements where either the US or the EC were at the centre of the partnership.

However, these newer PTAs were different to those formed prior to 1995; the earlier group largely focused on trade in goods and the reduction of tariff rates and quotas. With services and intellectual property now part of the multilateral trade negotiations, post 1995 PTAs now included the regulatory aspects of services and trade-related intellectual property – the two areas that had been particularly difficult to achieve under the Doha Development Round (Sauvé, 2013).

Commentators argue what is notable about this new generation of PTAs is that they tend to go further in their coverage of regulatory issues than under the WTO/GATS, and include provisions and mechanisms such as; "...investment protection, competition policy, labour standards and protection of the environment" (see Horn et al, 2010: 1566). This led some to argue that though the EC and US account for no more than 40% of world GDP and world trade, they account for



80% of the rules that regulate the functioning of world markets, and thus can be regarded as 'regulators of the world' (ibid).

In their 2014 Trade and Development Report, the United Nations Conference on Trade and Development (UNCTAD) signalled their concern over the steady erosion of national 'policy space' as a result of RTAs and International Investment Agreements "...some of which contain provisions that are more stringent than those covered by the multilateral trade regime, or they include additional provisions that go beyond those of the current multilateral trade agreements" (UNCTAD, 2014a: 19). They go on:

Provisions in RTA have become ever more comprehensive and many of them include rules that limit the options available in the design and implementation of comprehensive national development strategies. Even though these agreements remain the product of (often protracted) negotiations and bargaining between sovereign States, there is a growing sense that, due to the larger number of economic and social issues they cover, the discussions often lack transparency and the coordination – including amongst all potentially interested government ministries (UNCTAD, 2014a: 19).

International Investment Agreements have been steadily growing; by 2013 there were 3236; in 2017 some 3,707 (UNCTAD, 2017) – giving rise to major concerns over the loss of national policy space particularly in those partnerships with major asymmetries of power (Bhagwati, et al, 2015). UNCTAD (2014a: 20-21) notes that when these agreements were being concluded in the 1990s, the loss of policy space was considered a small price to pay for increased Foreign Direct Investment (FDI). However Poulsen (2014) argues many developing countries adopted FDIs without really considering the costs and benefits. By 2000 this view had changed in that it was evident investment rules could also obstruct a wide range of public policies – including the policy areas like education, and related sectors such as industrial policy, and its implications for labour markets and employment.

## **Investor Dispute Settlement Mechanisms**

More troubling are the processes surrounding the investor-state dispute settlement mechanisms built into International Investment Agreements – an issue we return to in the following section. UNCTAD (2014b) shows that there has been a steady rise in cases, particularly over the last 5 years (see Table 4.1), with 70 investor dispute cases filed in 2015 (UNCTAD, 2016).

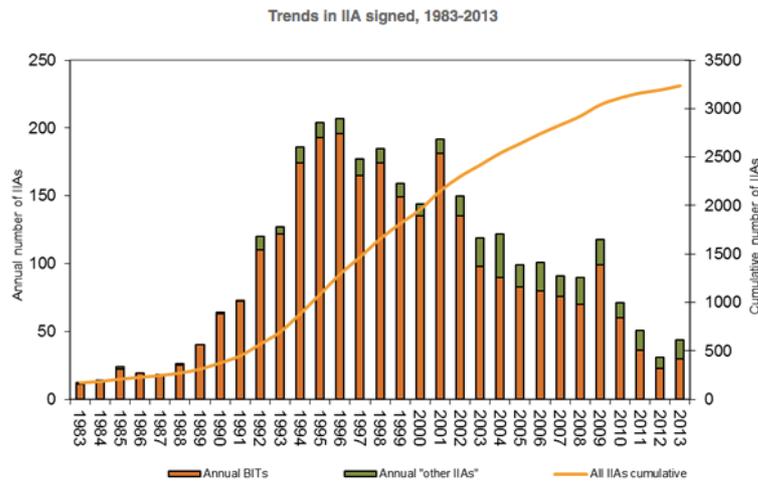


Table 4.1: Trends in International Investment Agreements signed 1983-13 (Source: UNCTAD, 2014b IIA database)

UNCTAD also notes that not only do the ad-hoc tribunals established to adjudicate disputes tend to display a pro-investor bias, but that there is a lack of transparency around the arbitration process. Research by Van Harten (2012: 6) confirms this; drawing upon empirical evidence, he shows that there is systematic bias in the arbitration resolutions in favour of the major Western capital-exporting states. The secretive nature of the arbitration process, and the lack of any requirement to consider precedent, allows plenty of scope for creative adjudications (Economist, 2014).

UNCTAD has called for the reform of the ISDS system through the introduction of an International Investment Court, an appeals system, limiting investor access to ISDS, and through the promotion of new attitudes toward investment that align with the intentions of the Sustainable Development Goals launched to carry the post-2015 development space (Tuerk, 2014; UNCTAD, 2014a, 2014b).

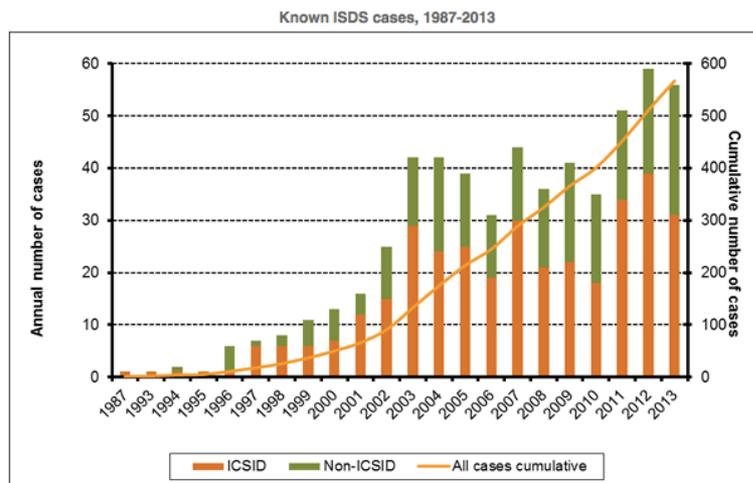


Table 4.2: Investor State Dispute Settlement cases 1983-13 (Source: UNCTAD, 2014b, IIA database)



Others have called for the elimination of ISDS mechanisms in that they are antithetical to sustainable development (Friends of the Earth, 2014). Even *The Economist*, not known for its anti-investor stance – reported in October 2014:

Multinationals have exploited woolly definitions of expropriation to claim compensation for changes in government policy that happen to have harmed their business. Following the Fukushima disaster in Japan in 2011, for instance, the German government decided to shut down its nuclear power industry. Soon after, Vattenfall, a Swedish utility that operates two nuclear plants in Germany, demanded compensation of €3.7 billion (\$4.7 billion), under the ISDS clause of a treaty on energy investments. This claim is still in arbitration. And it is just one of a growing number of such cases (*Economist*, 11 October, 2014)

*The Economist* goes on to argue that the sharp rise in contentious arbitrations are the result of companies having learnt how to exploit ISDS clauses, going as far as buying firms in jurisdictions where they apply simply to gain access to them.

Shopping around for firms in jurisdictions where they can make a claim is not just a case of ‘forum shopping’ – a term used to describe firms who look around for agreements that will give them most ‘return’ regarding potential investor pay-outs – but also of ‘place hopping’; that is, looking for those places, or jurisdictions, that enable them to launch a more lucrative claim – much as tax havens and states with a low taxation floors have been used. This uneven terrain is the result of different degrees of economic and political liberalisation operating vertically and horizontally, as well as overlapping and competing spaces and places regarding trade rules. Most importantly, ISDS gives exclusive rights to foreign investors; rights not available to domestic investors or citizens. Foreign investors are not even obliged to exhaust the domestic legal system before turning to ISDS.

## ISDS Cases

In this section we introduce a series of cases that helps to illustrate some of the claims made above regarding the biases built into the Investor-State Dispute Settlement mechanism. We also reflect on what these cases might mean for education if as service governed by trade and investment rules it was to be disputed. One case includes education.

### **Case: Achmea v. The Slovak Republic**

In 2004 the Slovak Republic liberalised its health insurance market, drawing investment into that sector from a number of foreign companies. A new government reversed this liberalisation in 2006, restricting “...the extent to which insurance companies could repatriate or retain their profits” (Thompson, 2013: 6). A case was brought by Achmea (formerly Eureko) under the 1992 Slovak-Netherlands BIT. Achmea had “incorporated and funded Union zdravotn poist’ovna (Union Healthcare) in the Slovak Republic” (Friends of the Earth, 2014: 9) claiming that the reversal of liberalisation violated the agreement on encouragement and reciprocal protection of investments by destroying the value of their investment and therefore constituting “unlawful indirect expropriation” (Friends of the Earth, 2014: 9). The Slovak Republic claimed that the BIT



had been rendered inapplicable because the Republic had joined the EU and EU law should supersede the BIT. However, the tribunal ruled that the BIT was not terminated and awarded Achmea €22.1 million, and another €2,905,350.94 in fees and assistance, €220,772.74 for costs at the merits stage of the arbitration process (Friends of the Earth, 2014: 9).

This case highlights two things; first that governments are unable to reverse liberalization policies that it believes might not be in the national interest. Second, that a newer agreement does not replace an older one; in this case effectively giving longevity to the investors claims despite changes in political arrangements. On these two grounds, the Netherland's-based company was awarded future lost earnings. This kind of case could easily apply to the education sector, where a government had experimented with privatizing part of the education sector, but sought to change this, following changes in political arrangements. In this case, the old agreement trumps any new political arrangements.

### **Case: Philip Morris v. Uruguay**

Tobacco giant, Philip Morris, has pursued a set of cases relating to plain packaging and other measures brought in by governments for public health reasons. Although Philip Morris lost a case it brought against Australia under Australia's 1993 Investment Promotion and Protection Agreement with Hong Kong (Hurst, 2015) because the tribunal ruled it did not have jurisdiction, until August of 2016 the decision in Philip Morris v Uruguay was pending. In August, the World Bank dispute settlement body dismissed a case bought by Philip Morris against the government of Uruguay.

This iteration, brought under the Switzerland-Uruguay BIT, relates to measures it claims "deprive the company of its ability to use its legally-protected trademarks and brands" (Thompson, 2013: 7) including requiring tobacco companies to market only one variation of cigarette per brand, increases in the size of health warnings on packets, and the inclusion of health warnings that – claim Philip Morris – "invoke emotions of repulsion and disgust, even horror" (Thompson, 2013: 7). In the Australian case "The Greens senator Peter Whish-Wilson said Australia had 'dodged a bullet' because of the jurisdictional ruling, but kept signing trade deals that gave corporations "the right to sue us for making laws that might impinge on a foreign corporation's profits" (Hurst, 2015).

This case shows the way in which a powerful corporation is challenging the right of a government to bring in progressive national legislation around tobacco packaging/advertising to protect its citizens' health. Philip Morris claim their right to trade with their distinctive 'brand' is compromised. The decision is seen as a landmark for those who view the company as using test cases to continually challenge and delay the introduction of public policy regulation, in this case public health protection measures and discourage other countries, particularly those with fewer resources, from strengthening their public policy regulations. Similar cases could be imagined in the education sector, where the 'brand' – for example Omega's Pay-As-You-Learn™ - might be viewed as compromised by government's putting into place education measures that limited the right of the company to use this form of education.

### **Case: AbitibiBowater Inc. v. Government of Canada**

AbitibiBowater operated a paper mill in Canada which was powered by their hydroelectric plant, with excess power being sold to the provincial utility company. Facing financial problems the company closed their mills “leaving behind a host of problems including unpaid bills, unemployed workers, unhonoured pension obligations, and highly contaminated industrial sites” (Sinclair, 2014: 11). The Newfoundland and Labrador legislature enacted, on December 16, 2008, the Abitibi-Consolidated Rights and Assets Act, to bring these issues within their control. The Act “...provided a process for determining appropriate compensation for the expropriated assets, but the investor did not avail itself of this process” (Sinclair, 2014: 11) instead seeking redress under NAFTA. The company claimed that the legislation “cancelled ...[their] extensive forestry and water rights in Newfoundland and Labrador and expropriated the company’s related hydro-electric generation facilities” (Global Affairs Canada, 2015). The Canadian government agreed to pay out CAN\$130m including “compensation for rights to publicly owned timber and water rights, which are not normally considered compensable under Canadian law” (Sinclair, 2014: 11).

This case illustrates the way a company has refused to act as a responsible citizen; instead they exempted themselves from nationally-located legislation, and appealed to NAFTA for compensation, despite its failings, and obligations to their employees, and those it owed money to. Rather than being held accountable for these obligations they were awarded compensation. A parallel example for education could happen if an education company finds themselves unable to recruit sufficient students or has problems meeting quality standards, and finds itself with unpaid bills and owing wages. New legislation by government to protect students, teachers and other services from the poor practices of the education company would be deemed an infringement on the right of the company to trade as an education company under the disciplines in the different trade agreements; governments would then find themselves in dispute with the company and likely to have to pay compensation.

### **Case: Vattenfall v. Germany II**

This case, filed in 2012, relates to Germany’s decision to phase out nuclear power generation after the Fukushima disaster in Japan in response to public concern (Friends of the Earth, 2014: 8) and following decades of public and democratic debate (Bernasconi-Osterwalder and Dietrich Brauch, 2014: 2). The country’s oldest reactors were closed first, including two run and partly owned by Vattenfall, an energy company wholly owned by the Swedish State (Bernasconi-Osterwalder and Dietrich Brauch, 2014: 2). The extreme secrecy in which the process is being undertaken means that even the sum being sought by Vattenfall is unclear, however it is thought to be in the region of 4.6 billion Euros (plus 4% interest).

A parallel case applied to education might be a decision to phase out for-profit schools and universities in the sector in response to public and democratic debate to build a more cohesive society. An example here might be a highly divided society, like South Africa, who wants to ensure their education systems are restructured to overcome historic divisions. A for-profit venture capital backed company, currently owning a number of universities in South Africa uses the ISDS mechanism to claim future lost earnings from the state.

### **Case: Cyprus V. EC - provision of education services**

The European Commission, under the EC's 2006 Directive on Services, sent a reasoned opinion to Cyprus in relation to certain provisions of the law regulating the establishment and operation of institutions of tertiary education. They stated:

Under this law private institutions of tertiary education in Cyprus are prohibited to "allow, by any means, to foreign educational institutions the possibility to award their own degrees in the Republic". This prohibition renders impossible the provision of services entailing the award of foreign degrees by educational institutions in Cyprus (such as services under validation, franchising or similar agreements), where recipients of such services are private institutions of tertiary education in Cyprus. The Commission considers this a restriction on the freedom to provide services and a restriction on the freedom of establishment which cannot be justified.

In addition, in accordance with the law in question, a company having as a shareholder or a member of its board a person who is neither a Cypriot citizen nor a citizen of an EU Member State cannot establish a private institution of tertiary education in Cyprus. As this prohibition precludes the recognition of companies duly formed in accordance with the law of another Member State, the European Commission considers it a restriction on the freedom of establishment which cannot be justified (European Commission, 2009).

In short, under the 2006 Directive on Services, Cyprus cannot deny the right of other EU countries to establish higher education institutions in Cyprus, and award their own degree.

## **Conclusions**

There are four main conclusions to be drawn from this chapter. The first is that governments and investors wanting to open up services sectors to trade rules have not been deterred by the stalemate they faced in advancing negotiations inside the World Trade Organization. The proliferation of bilateral and preferential trade and investment agreements over the past decade is indicative of this forum shifting.

Second, that a key feature of these agreements is the expanded coverage of the Investor State Dispute Settlement mechanism (even between developed countries), and the steady rise in cases. Organisations like UNCTAD have become alarmed at the ISDS system in that it provides a different space/system of arbitration to more democratically accountable national/subnational systems, but it is available only to foreign investors. The third is that research on the outcomes of arbitration show that there is systemic bias by the arbitrators in favour of major western capital exporting states.

Fourth, a review of cases reveals that in a number of them foreign investors' rights are privileged over citizens and workers in national jurisdictions. Investors have been able to appeal to the ISDS system to ensure that their right to returns of their investment into the future is placed above, and outside, politics.



The bilateral and preferential trade and investment agreements are significant for our purposes, as selected agreements (e.g. US-Korea) have largely been the blue-prints shaping the form and content of the mega-trade deals which we turn to next.

# Chapter 5

## State of Play - TISA, TPP, CETA & TTIP

### Introduction

Trade negotiations and agreements can be complicated, as we have shown in the previous section. Their use of both a 'legal' format, (such as Articles, Annexes, Schedules) and trade language (such as presence of natural persons, national treatment, or commercial presence) makes understanding particularly difficult, even for a skilled professional, let alone the average person. A trade deal, like the TPP stretches out to thousands and thousands of pages, making reading and understanding both challenging and time-consuming.

In this section we have tried to simplify matters by sketching out in broad terms the countries involved in each of the main trade deals, the purpose of the deal, how the deal came about, how each might relate to wider geostrategic issues, the regulatory mechanisms involved, and how education is being included.

It is also important to note out that in the case of CETA and TPP, the agreements have been concluded but not ratified by the respective governments. TTIP and TISA are both still ongoing, and it was hoped the Agreements would be concluded before USA President, Barack Obama, left office in January 2017. The position of the USA when it comes to international trade and investment is still uncertain following the election of Trump.. One of the first acts by Trump in taking up office in January 2017 was to withdraw the USA from the TPP. The USA has an interest in all the agreements mentioned here but the CETA s. It is currently unclear what their status is with regard to TISA and TTIP. Nevertheless, what is clear is that the new US Administration is much in favour of the deregulation agenda and business concentration that underline the expansion of trade and investment agreements.

In the following sections we introduce these different agreements, before turning to looking specifically at a number of issue areas that affect education, including labour standards, data, intellectual property and procurement.

### The Trade in Services Agreement (TISA)

The Trade in Services Agreement (TISA) originated in some parties' frustration at the stalemate in Doha Development Round. The TISA provides a means for the participants, an ad hoc and non-exclusive (EC, 2013) coalition of WTO member countries who had shown willingness to advance services negotiations in the Doha round (Peng, 2013: 614), to bypass the Doha talks (Gould, 2014: 9).



Calling themselves the 'Really Good Friends of Services', the parties to TISA are negotiating services independently of the GATS/WTO though they argue that they hope to inform them (Peng, 2013: 613). The negotiations formally began in March 2013, and a basic text had been agreed on by September of that year indicating which service markets participants were prepared to open and to what extent. As of November 2016 there have been 21 rounds of negotiation (EC, 2016).

### **Who is in TISA and when did they join?**

As of August 2016 there are 23 negotiating parties. Australia, Canada, Chile, Chinese Taipei (Taiwan), Colombia, the EU (representing its 28 member states), Hong Kong China, Japan, South Korea, Mexico, New Zealand, Norway, Pakistan, Switzerland, Turkey and the United States were (along with Singapore, which left early in the negotiations) the original 'Really Good Friends of Services' coalition in mid-2012. Costa Rica, Israel, Iceland, Panama, Peru and Turkey joined in late 2012 (Vincenti, 2012), Liechtenstein joined in 2013 (ICTSD, 2013), and Mauritius joined in 2015 (ICTSD, 2015). Paraguay and Uruguay had been involved in the negotiations but dropped out in September 2015 (Palmer, 2015).

Other countries are likely to become part of the negotiations. China has asked to join and its application is supported by the EU (EC, 2016). Negotiating parties to the TISA are responsible for 70% of cross-border global trade in services (excluding that which is within the EU) and two thirds of the world trade in services (Peng, 2013: 614). Most TISA parties also have at least one PTA in services amongst themselves, making them 'forum shoppers' (Marchetti and Roy, 2013), as well as being included in other pluri-lateral negotiations. For example, the only TISA countries with whom the EU does not have existing agreements for trade in services are Chinese Taipei (Taiwan), Israel, Pakistan and Turkey (EC, 2016).

### **Who is driving the agreement?**

The negotiations were initiated by the US and Australia (Peng 2013:614); both countries we have argued have a huge stake in the global education services market. More broadly, the 'Really Good Friends of Services' are predominantly OECD countries. Historically, the inclusion of services in the WTO was a concession for developing countries (Gould, 2014: 9) and Gould argues that the "...TISA negotiations are essentially a replay of the negotiations that produced the GATS, but this time without the delegations [developing countries] present in the room that might have pushed back against the more extreme demands of the transnational services lobby" (Gould, 2014: 9).

### **What are countries motivations for involvement?**

As with negotiations for the other trade agreements considered in this Report, the negotiation of TISA is, therefore, set in the context of wider global trade regimes and negotiations which are at various stages of development or stagnation. Gould (2014: 9) argues that TISA provides those negotiating it (with, crucially, OECD countries being heavily represented) the opportunity to develop an agreement that goes beyond anything that could be negotiated with a broader set of WTO members.

Given their economic and political dominance, those negotiating TISA will then be able to pressure more countries to sign onto the agreement once the rules of engagement have been worked out and ultimately push for it to be incorporated into the WTO architecture. In this way, countries are motivated by the prospect of effectively circumventing trade negotiations



elsewhere, negotiations in which nations opposed to key aspects of TISA (such as developing countries) are a party. The exclusion of such countries is therefore more broadly political. There is a widely shared view that the EU and US are attempting to create a set of rules for the global economy that work in their interests rather than those of the developed and developing worlds (cf. Bhagwati et al., 2015).

Whilst the EU (36.4%) and USA (26.9%) dominate in terms of their share of world trade in services (Sauve 2013), more than 30% of world trade in services is still amongst WTO members outside the TISA process. This matters in that, like with TTIP, whilst the argument is that the negotiators of the TISA architecture will attempt to align it with the WTO GATS. Sauve (2013) – a veteran WTO negotiator – points out this will be challenging because there will be little appetite to take on a set of rules that have been negotiated in secret. Of the top 20 services exporters/importers globally - China, India, Singapore, Russia, Brazil, Malaysia, Saudi Arabia, United Arab Emirates and Indonesia are not currently in TISA (Marchetti and Roy, 2013). This would have major implications for sectors like education, where international student flows and international branch campuses occur from, or are located within, countries not included in the TISA negotiations (Marchetti and Roy, 2013: 21). In other words, there are more markets of interest for TISA members outside (judging by WTO requests received and requests sponsored) rather than inside TISA.

Sauve (2013: 7) remarks that TISA is proceeding without the formal ascent of the broader WTO membership, negotiations are taking place in Geneva but outside of the perimeter of the WTO, it is at arm's length to the WTO Secretariat, and the RGFS do not allow observers in, including the WTO. This exclusive 'club mind-set' of TISA is viewed as problematic; it reduces the overall legitimacy of the agreement and it is unlikely to get buy-in from a very significant group of developing countries much as with the WTO negotiations. The ultimate outcome, in Sauve's (2013: 5) view, is that TISA is likely to face the very same fate of the services negotiations under the Uruguay and Doha Rounds; a stand-off between the developed and developing world.

### **What are the main aims of the TISA negotiations?**

The specific aims of the TISA negotiations are exemplified by the European Commission's communication to the European Council (EC, 2013) seeking a mandate to negotiate. The main elements are the creation of an agreement compatible with the GATS agreement to be later multilateralized; is comprehensive in scope with no exclusion of services sectors at the outset or mode of supply; commitments reflect reality on the ground; national treatment that applies horizontally to all service sectors and modes of supply; and the future elimination of discriminatory measures to be locked in (meaning that there can be no return to a different regulatory environment; the so called 'ratchet clause'). A combination of positive and negative list approach are to be used with a positive list for market access and a negative list for national treatment. A positive list refers to a list of services to be included; a negative list refers to a list where only these services that are listed can be exempted. All new services emerging in the future might be subject to progressive liberalization.

An example of how these objectives have been framed for a public audience is the statement regarding TISA from the Office of the US Trade Representative (2016). Similar to other agreements, such as the TPP, the direct economic benefits for domestic populations and businesses are foregrounded. TISA is presented as a means for "Supporting U.S. Jobs Through



Services Exports". The statement emphasizes that the agreement "...will encompass state-of-the-art trade rules aimed at promoting fair and open trade across the full spectrum of service sectors", "...take on new issues confronting the global marketplace", and "...support the development of strong, transparent, and effective regulatory policies, which are so important to enabling international commerce".

According to this rationale "...the opening services trade will help grow U.S. services exports and support more American jobs" unlocking "new opportunities for Americans". However, a number of studies have shown that the economic benefits have been overstated, and that either limited or negative outcomes, and for the USA little more than 0.5% GDP by 2030 (Petersen Institute for International Economics, 2016).

### **Is education included as a service?**

Given the secrecy surrounding the negotiation of the TISA, the final outcome regarding how education will be included remains uncertain. The 'negative list' principle for national treatment adopted in TISA means in principle, no service is excluded. As under the WTO/GATS, only those services that are services supplied in the exercise of 'governmental authority' – see Article 1.3(b) (WTO, 1999) – are exempted.

However, as we have shown in Chapter 2, education has become thoroughly marketized over the past two decades. Many other systems around the world, and particularly those in TISA members, would find it extremely difficult to show they are not some kind of hybrid – public private system. There is no basis for exemption – aside from political pressure for a 'carve out' or the complete exclusion of those services from the trade and investment agreements, or from the more contentious part of those agreements (Krajewski, 2016).

### **What mechanisms are involved?**

Currently TISA offers for 'market access' is based on a positive list approach, whilst 'national treatment' adopts a negative list approach (a negative list involves listing all exemptions; everything else is included; a positive list means listing all inclusions for the offer with the rest remaining outside trade rules). Those skeptical or opposed to the TISA negotiations have called for a positive list only, much as under the WTO/GATS round of negotiations which avoided the need to list all non-conforming measures. The argument is that a negative list assumes all exemptions can be known now and into the future. All new services, given that they have not been listed, will be included. A hybrid list of is thus problematic in that in mixing positive and negative lists it makes it more complicated to understand, and is likely to lead to mistakes. Even the US has made mistakes in the past in their WTO commitments.

Equally as important is that this hybrid model also places TISA at odds with any potential GATS architectural alignment in the same way that TTIP will not be aligned with GATS. TISA also uses a 'ratchet clause'; a mechanism currently found in CETA that requires the parties to automatically bind any future service into progressive liberalization.

Those concerned with wider social and economic issues view the ratchet clause as undermining social and other equity goals (see ETUCE, 2014; Scherrard, 2014) as well as democratic decision-making. Sauve (2013: 19-20) calls for a more flexible approach to rule making; one that is less



binding and more experimental in its approach to regulatory architectures so as to, “...acknowledge the increasing diversity of collective preferences”. He goes on: “Concluding plurilateral outcomes in an open setting that allows for economies of scale and learning is not the same thing as negotiating behind closed doors. History has not been kind to the latter initiatives”.

TISA rules regarding ISDS mechanisms remain unclear at this stage of the negotiations. In a written answer in 2015, the European Commission stated that TISA would “follow the scope and basic parameters of the WTO's General Agreement on Trade in Services and therefore it will not include any rules on investor-to-state dispute settlement (ISDS)” (European Parliament, 2015). However, although the TISA might not contain these rules, if the agreement contains a ‘Most Favoured Nation’ provision that can be applied to investor protection, ISDS provisions contained in other trade deals to which parties were signatories, could then apply to the TISA agreement (TUC, 2016).

## The Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP) was originally a free trade agreement between twelve Pacific Rim states that together account for 40% of world GDP, and 30% of global trade (Putz, 2016). As previously mentioned, the USA withdraw from TPP in January 2017 and the future of TPP is currently uncertain. TPP was signed on 4th February 2016 in New Zealand following negotiations that can be traced back as far as the 2002 Asia-Pacific Economic Cooperation (APEC) forum (Rajamoorthy, 2013: 1). It is seen as a “companion piece” to the TTIP (Russell, 2014; Hamilton, 2014). In its preamble the agreement is claimed to be “...a comprehensive regional agreement that promotes economic integration to liberalize trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth” (TPP Preamble 2016).

The TPP joins a large number of preferential trade agreements (PTAs) already operating in the Asian-Pacific region. and it has been suggested that the TPP will be comprehensive enough to “tame the tangle of PTAs” and achieve “the long-term Asia-Pacific Economic Cooperation (APEC) goal of liberalising trade among its member economies” (Capling and Ravenhill, 2011: 554). China has been notably absent from the TPP despite being a member of APEC and discussions on the strategic implications of the TPP have often focused on challenging the Chinese dominance in the region. The exit of the USA may well open the door for a Chinese presence.

### Who is in the TPP and when did they join?

Twelve ‘Pacific Rim’ countries signed the TPP trade agreement in February 2016: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States. In January 2017, USA President withdrew the USA from TPP claiming that trade deals were



bad for USA. In 2002 New Zealand, Chile and Singapore formed the Pacific Three.<sup>1</sup> They were joined in 2005 by Brunei to form the Pacific Four.

The free trade agreement between the Pacific Four came into force in 2006, with negotiations on financial services and investments deferred for two years. In 2008 the US joined these deferred negotiations which were then expanded to include the whole agreement (Rajamoorthy, 2013). Australia, Peru and Vietnam joined the negotiations at the same time, followed by Malaysia in 2010, Canada and Mexico in 2012, and Japan in 2013 (Global Edge, 2016). The agreement contains an accession clause and additional countries are eventually expected to join the TPP (Hamilton, 2014: 88).

**What the countries motivations for involvement?** In 2002 New Zealand, Chile and Singapore formed the Pacific Three.<sup>2</sup>

Since 2008 negotiations for the TPP have been US-led, though its exit will create a new dynamic in the group. The motivations for the different countries involved have centered on the deepening in, and protection of, trade relations already governed by members' existing PTAs (such as between the US and its NAFTA partners), the extension of trade agreements between countries who had no pre-existing PTA (such as Japan and the NAFTA countries), strategic political positioning in the region (such as through a US strategy of 'rebalancing'), and the definition of trade rules for emergent trade areas to shape future, including global, negotiations (such as the WTO).

As is indicated below, it is (unsurprisingly) that some countries were in a much more powerful position within the negotiations than others. Some countries who had joined the process as part of the original P-4 negotiations later found themselves having to make significant concessions once the US joined and began to lead the talks. Others felt compelled to join the process to protect existing PTAs with more powerful partners who were already TPP parties.

### **Protecting or deepening existing trade relations**

In the case of the US's NAFTA partners, Canada and Mexico, for example, Curtis (2015: 2) suggests that entry into the TPP negotiations was motivated by a concern to preserve the "preferential status in the United States market that had already been negotiated and 'paid for' during the NAFTA negotiations" with an eye also for additional access to Asian markets. Given that the shape of the deal has now been formed, the USA benefits from its initial shaping of the agreement.

Deepening existing trade relations also motivated Australian involvement, with the TPP seen by some as a means to achieve greater access to US markets than was possible under the existing bilateral Australia-US PTA (the AUSFTA) (Armstrong, 2011: 2) and – as will be discussed in detail below – improved terms relating to Asian education markets, such as arrangements for foreign schools in Malaysia which were previously contained in the Malaysia Australia Free Trade Agreement (MAFTA) (Australian Government, Department for Foreign Affairs and Trade, 2016).

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<sup>1</sup> This in turn originated in a 1998 US proposal for a PTA between Australia, New Zealand, Chile, Singapore and the US (Capling and Ravenhill, 2011: 558).



Those who questioned the economic significance of the TPP to the US noted that it was already in PTAs with a number of the parties to the TPP with the remainder being of “minimal economic importance” (Capling and Ravenhill, 2011: 559). As Rajamoorthy (2013: 3) notes, however, the negotiations were a chance for powerful players, like the US, to renegotiate the terms of trade previously established in existing bilateral PTAs. Chile and Peru, for example, had to make considerable concessions relating to intellectual property that further protected pharmaceutical and agrochemical products.

### **Extending trade agreements and relations**

The addition of Japan to the negotiation table in 2013 – a country with which the US did not have an existing PTA and the world’s third largest economy by GDP (Fergusson, McMinimy & Williams, 2015: 2) – increased the economic stakes for the parties. With the inclusion of Japan, the TPP would have been for the US the largest PTA in which it was involved, measured by trade value (Williams, 2013: summary). It is difficult to say what the future brings regarding the place of the USA in world trade agreements.

Japan’s inclusion also shifted Canada and Mexico’s interests beyond the “defensive” goal of protecting existing preferential arrangements as “[n]ot only would NAFTA preferences be retained for Canada and Mexico, but also, access to the large Japanese market could be enhanced, a clear-cut opportunity for both countries” (Curtis, 2015:2).<sup>1</sup> For Japan itself, involvement in TPP has been linked (see Curtis, 2015: 2; Xu, 2014 for example) to the post-2012 policies known as ‘Abenomics’; the economic doctrine of Prime Minister Shinzo Abe characterised by “an aggressive set of monetary, fiscal, and structural reforms” including extended trade partnerships within which the TPP is a flagship policy (Xu, 2014: 3).

### **Strategic positioning in the Asian-Pacific region**

In the case of the US, until its exit, most powerful country in the TPP and the leader of the negotiations, it has been suggested that involvement has been motivated as much by foreign policy and strategic aims as economic ones.<sup>2</sup> On this reading, the TPP provided a means of “rebalancing” (Russell, 2014; Hamilton, 2014: 85) in the region through a “return to Asia” that furthered “a broader strategy to re-engage with the region and to contain China’s influence” (Capling and Ravenhill, 2011: 559). For the moment US President Trump has adopted a hostile approach to China.

### **Definition of trade rules and leverage in other forums**

The negotiation of the TPP is set in the context of wider global trade regimes and negotiation taking place. By steering the TPP, the US has been able to set agendas and “...establish new rules on emerging trade areas” (Williams, 2013:1), such as digital trade and electronic commerce which could function as “path breakers” for the World Trade Organization (Curtis, 2015: 3; Fergusson, McMinimy & Williams, 2015: 3).

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<sup>2</sup> The economic benefits for countries of having a free trade agreement with Japan has not gone unquestioned domestically and is not as clear cut as Curtis (2015) suggests – see for example Rajamoorthy (2013: 5-6)

<sup>3</sup> Although as the Obama administration understands well, “foreign policy is economic policy” – Hamilton (2014: 81).



In this manner, powerful parties to the agreement (such as the US) are able to define trade rules that favour themselves, and do it in a forum from which most states are excluded (including, in the case of the TPP, other powerful economies such as China), but which will still shape the terms of global trade into the future. As President Obama put it when he was in office; "...TPP allows America – not countries like China – to write the rules of the road in the 21st Century, which is especially important in a region as dynamic as the Asia-Pacific" (BBC, 2016; Hamilton, 2014: 86).

In addition, as the only country in both the TPP and its companion - the TTIP, for the US the negotiations were a means to "leverage one set of negotiations to support its interests in the other" (Hamilton, 2014: 84). Successful negotiation of the TPP and TTIP was viewed as creating sufficient momentum to kick-start other stalled trade negotiations such as the WTO Doha Development round (Hamilton, 2014: 84).

### **What is the main rationale for the negotiations?**

Rationale's given by parties negotiating TPP have varied according to the intended audience. Somewhat unsurprisingly, rationales for public domestic consumption have emphasized the direct economic benefits for domestic populations and businesses. The US government, for example, claims that the agreement "levels the playing field for American workers and American businesses, leading to more Made-in-America exports and more higher-paying American jobs here at home". It also claims that the TPP "...firmly establishes the United States as a leader in the Pacific" and promotes US values "...helping to build a global trading system that will allow our workers to effectively compete in the modern economy" (Office of the US Trade Representative, 2016). The emphasis in this account is therefore on opening up other parts of the world to US exports rather than the other way around; a framing likely to make TTP more palatable to an American electorate who remember the job losses in manufacturing that were commonly attributed to another trade agreement, NAFTA (Darie, 2016). As we have noted earlier, the claim that American businesses will prosper under the TPP, are flawed.

### **Is education included as a service, and how?**

Education is affected in this agreement (see also Education International, 2016) by TPP's Chapter 9 (investment), Chapter 10 (Cross Border Trade in Services, Chapter 10 (Labour Rights), and Chapter 23 (Development).

Chapter 10 provides for no carve out of education; like GATS (and also CETA) an exception for services are those provided in the exercise of governmental authority, supplied neither on a commercial basis nor in competition with other suppliers. Given as we have shown that most education sectors across the TPP countries have been subject to market and choice policies, they will not be exempt. Further, countries like Australia, Canada and New Zealand see education trade as central to their economic development. And whilst some countries to TPP (Australia, Canada, Malaysia, Mexico, New Zealand and Peru) have included a reservation for maintaining public education (by which they largely mean schools), the definition of public is missing. This vagueness will open up education to conflicting interpretations and makes it vulnerable to investors wanting to access the sector.

In the case of Australia, a recently issued government primer on the outcomes of TPP (Australian Government, Department for Foreign Affairs and Trade, 2016) describes how "...[t]he TPP



provides a strong platform to expand Australian education and training services exports to TPP countries, including priority markets in South East Asia and Latin America” through “...courses delivered online by Australian institutions, Australian education professionals working overseas, foreign students studying at an Australian educational institution or a combination of these methods”. The document goes on to outline how the TPP will enable “guaranteed access” by Australian education and training service providers in emerging markets, such as online education which is in its infancy in a number of the TPP states.

Through the TPP, Australia has been able to negotiate particular arrangements in relation to education markets in a wide range of areas, including online education, the establishment of campuses and institutions, international schools and ease of access by Australian educators to jobs in TPP countries. Chapter 10 will facilitate further cross border access. Related to the establishment of Australian campuses or institutions in TPP countries, for example; “Commitments offered by Brunei Darussalam, Japan, Malaysia, Mexico, Peru and Vietnam will lock in existing market openness and guarantee that future liberalisation will be captured as a TPP commitment.” Finally, “Australian education service providers will now be able to bid for government procurement contracts in TPP countries”. Australian education service providers will be able to bid for contracts to provide primary, secondary and higher education services in Canada, Brunei, Japan, Malaysia, Mexico and Peru; adult education services in Canada, Peru, Japan, Malaysia, and Brunei; and research and development services in Brunei and Peru.

The Chapter (19) on Labour shows precisely the asymmetries at work. Investors’ rights are to be ensured by governments, while there are no enforceable mechanisms for labour rights. Any dispute is to be dealt with via negotiation first, before turning to dispute mechanisms. However the key catch here is showing how the dispute is related to trade and investment. If unable to do so, the claim is invalid.

### **What mechanisms are involved?**

The Investor-State Dispute Settlement (ISDS) mechanism is contained in Chapter 9 and the State-to-State Dispute mechanism (SSDS) is included in Chapter 28 of the TPP and are similar to those already in operation in agreements such as NAFTA. ISDS gives foreign investors exclusive rights to challenge laws and regulations which they feel are unfavourable to their business through private arbitration. There is no carve out of education in relation to these investor mechanisms (Chapter 9) ISDS’s are designed to allow disputes between investors from one of the party states and another party state to be dealt with by an international panel of arbitrators rather than within the domestic legal system (Samra and Juchawski, 2015).

In the case of NAFTA, ISDS mechanisms have resulted in practice in companies challenging state health and environmental protections and receiving payment for “alleged or even potential losses” by claiming expropriation (Sulkowski, 2015; see also Sinclair, 2014), a point on which they have been extensively criticised. Those services that are included in the TPP agreement are defined through a ‘negative list’ meaning that all services, except those that have been specifically named in the agreement as an exception, are included (Fergusson, McMinimy & Williams, 2015: 12).

### **Who signs off this agreement?**



Although the TPP has been signed, it has not been ratified. In order to come into force the TPP is now entering a two-year ratification window during which at least six of the twelve parties, accounting for 85% of the combined GDP, must approve it at the domestic level (Howard, 2016). Prior to the exit of the USA, in practice this meant that the fate of the TPP was dependent on both the US and Japan ratifying at the domestic level (Putz, 2016). It is not clear what the stakes are following the departure of the USA.

## Comprehensive Economic Trade Agreement (CETA)

CETA stands for the Comprehensive Economic and Trade Agreement negotiated between the EU and Canada. Its aims are to “boost trade, strengthen economic relations and create jobs” by offering “...EU firms more and better business opportunities in Canada and support jobs in Europe.” (EC, 2016, website). It will do this by removing 99% of customs duties and other perceived obstacles to doing business. It will also create sizeable new market access opportunities in services and investment. Those monitoring the agreement, however, state that over the course of the negotiations they have been much deeper and broader (hence comprehensive in the title) than any previous arrangement (e.g. NAFTA). They include all business sectors, and take into consideration tariff and non-tariff barriers (such as employment conditions and so on) (Leiva, 2015).

### What is the history of CETA?

Since 1976, trade relations between Canada and the EU were guided by a Framework Agreement for Commercial and Economic Cooperation. They met annually in bilateral summits to review issues of economic and trade relations.

In 2007, at the EU-Canada Summit in Berlin, Canada and the EU agreed to complete a joint study on the costs and benefits of pursuing a closer economic partnership. A scoping exercise was undertaken in early 2009, paving the way for the launch of the negotiations at the EU-Canada Summit in May 2009. These negotiations carried out in secret, were officially concluded in October, 2014. Following a legal review (legal scrubbing), changes were made to the ISDS mechanism going beyond the pure legal review and included further negotiations.

In July 2016 the European Commission formally proposed to the Council of the EU the signing and conclusion of CETA, however this was delayed by a few days due to objections from the Walloon Parliament. Following a decision by the Council and the consent of the European Parliament it will be possible to provisionally apply much (but not all) CETA as of 1 April 2017. Though only those areas falling under the competence of the EC can be provisionally implemented, critics argue this is a significant.

Its full entry into force will be subject to the ratification procedures of all EU Member States through the relevant national ratification procedures. However, even if a national parliament were to reject CETA, the provisional application would cover most of CETA (Webb, 2017). The CETA Agreement is composed of 1598 pages, 30 Chapters, and Annexes, and is now in the public domain.



The European Commission has put CETA forward as a 'mixed agreement' while maintaining its strict view that CETA is an EU-only agreement. As a mixed agreement, CETA must be ratified by each EU Member State, and must receive the European Parliament's consent. In the case of the UK, the consent must be laid before the Parliament for a period of 21 sitting days. The agreement can only be ratified if the 21 days pass without either house deciding it should not be ratified.

In the Canadian case, its multi-level system of governing generates complications. International trade and investment is the sole jurisdiction of the federal government in Canada, with the provinces having little say over these matters. Trading in education services, where education is a provincial responsibility but where trade is federal, shows the black holes that begin to emerge when two different jurisdictions do not map onto the nature of the service or good to be presided over.

### **Why is CETA important to Europe and Canada?**

Canada and Europe share a significant amount of trade. For Europe, Canada was the EU's 12th most important trading partner (1.7% of EU external trade); Europe was Canada's second most important trading partner after the United States (9.8% of Canada's external trade). The bilateral trade in goods (close to €60 billion) is more significant than services (€27 billion); typical services include transport, travel and insurance. Public procurement has also been included.

### **What mechanisms are included in CETA?**

CETA Chapters refer to cross border trade in services, temporary entry and mutual recognition of professional qualifications. It guarantees market access "without the risk of roll-back" (EC, 2016b: 9); it uses the negative list approach so that there are no reservations other than those that are explicitly stated on the list (EC, 2016b: 9).

CETA uses an investor-state dispute settlement (ISDS) mechanism but argues that in the interests of balance, it will "...create an independent investment court system, consisting of a permanent tribunal and an appeal tribunal...members of the tribunal [will] no longer be appointed in an ad hoc manner by the investor and the state involved in the dispute but in advance by the Parties to the agreement – the EU and Canada" (EC 2016b: 11-12).

However observers argue that far from being a better tool for settling disputes, the Investment Court System (ICS) is a rebranding of the ISDS as too many of its flawed elements remain "including elements that give rise to unacceptable biases among ICS judges" (Van Harten, 2015: 1). He also adds, "If the EC was committed to balance, it would ensure at least that ISDS could be used to hold foreign investors to account if they flaunt labour, environmental, consumer or other standards in situations where domestic or European institutions do not offer an effective remedy. The EC's proposal takes no steps at all toward such a balance" (op. Cit: 3).

Under CETA, the EU and Canada have also agreed to set up a Regulatory Cooperation Forum (RCF). However the RCF will take a trade point of view, for example, where regulations are considered barriers to trade, and not considered according to their public policy objectives. This applies to all sectors unless a particular sector is explicitly excluded. The Forum will operate as a voluntary scheme to exchange experiences and relevant information amongst regulators, and to help identify areas where regulators could cooperate. The RCF is also intended to provide assistance and make suggestions to regulators and legislators. According to the European



Commission, it will in no way restrict the decision-making power of regulators in the EU's Member States or at a EU level. The forum will not be able to change existing regulations or develop new legislation. Nevertheless, those suggestions would be provided prior to the democratic consideration of new legislation is introduced and could therefore have a cooling effect on the introduction of new public policies that may have an effect on international trade and investment. How is education presented in this agreement?

In the final CETA agreement (2016), and Annex II, reservations on market access and investment allows governments to use public monopolies for services considered public utilities. In response to public concerns over public services, the EC has stated that:

...the EU's position on public services remains clear. EU trade agreements do not and will not prevent governments, at any level, from providing, supporting or regulating services in areas such as water, education, health, and social services, nor will they prevent policy changes regarding the financing or organisation of these services. Trade agreements will not require governments to privatise any service, nor will they prevent governments from expanding the range of services they offer to the public. Trade agreements will not require governments to privatise any service (EC, 2015: 11).

However the term public utility is not defined, leaving it open to interpretation and dispute. Furthermore, the reservation protects against challenges under only one part of CETA's market access (Article 8.4.1 [a] [i] – but the government could be challenged on fair and equitable treatment (Article 8.10) and expropriations (Article 8.12) against which no reservations are made. The lack of clarity of the public utilities reservation, on the one hand, and potential challenges around fair treatment and so on by foreign investors, puts the education sector in a very vulnerable situation because it is not included in any of examples listed in the public utilities reservation. Knotttnerus and Sinclair (2016: 30) state: Contrary to official assurances, public and essential services are not fully protected. CETA, as drafted, conflicts with the freedom of democratically elected governments to provide and regulate public services in the public interest. Indeed Sinclair (2014: 5-6) argues that; "Foreign investors are far more likely than foreign governments to test the scope of the "public utilities" exception, which purports to protect the ability to re-establish public services where privatization has been tried and failed" and "foreign investors and their lawyers can [therefore] be expected to fully exploit any flaws or ambiguities in the reservations protecting European national, state and local public services."

CETA also prohibits governments from limiting market access, for example through quotas on the number service suppliers, or the requirement that they take a particular form (such as a non-for-profit university). It also bans performance requirements (Article 8.5) that governments often use to harness investment to promote social goals; here performance requirements such as widening the number of social groups included in a particular school or university in order to receive a public subsidy might be regarded a breach of market access rules.

CETAs Chapter 9 on cross border trade in services has significant public policy and education implications. The Chapter includes provisions on national treatment, (Article 9.3), most favoured nation (MFN) Article 9.5) and market access (Article 9.6) intended to liberalise trade in services between Europe and Canada. And although services supplied in the exercise of governmental



authority are excluded (Article 9.1) – defined similarly to the GATS agreement as services not supplied on a commercial basis or in competition with one or more suppliers” as we have argued in this report, education would not be excluded on this definition because of its elements of competitive and market like character.

CETA includes ‘standstill’ and ‘ratchet clauses’ is a fundamental premise and then the direction of travel is toward more and more commercialisation as a result of liberalisation. These mechanisms are found in Articles 8.15 (1)(a) and (c), and the services chapters (Articles 9.7(1)(a) and (c), although not explicitly. The standstill and ratchet clauses arise from specific wording in the reservations provisions. Governments therefore cannot enact new measures that violate the terms of the deal. As a result the current level of liberalisation is locked in, which is the standstill effect. Further, any measures might not decrease conformity (Article 9.7 (1)(c); in effect any changes are only allowed to increase liberalisation.

Whilst not making governments privatise, these different mechanisms – standstill, upward ratchet, the ISDS, transparency, regulatory cooperation and the negative list, all combine to move education as a services sector toward privatisation. And whilst the EC (2016b) states in its summary of the final negotiating results, “CETA explicitly allows a government in a Member State to reverse in the future at any time any autonomous decision it may have taken to privatise these sectors”, there is a difference between stating that a reversal is possible (it is also possible under the ISDS mechanism now) and making a reversal possible without having to pay the investor future lost earnings. Indeed, Investors can even use the threat of litigation as an effective tool to avoid “undesired” public policy regulations.

Chapter 20 deals with intellectual property – with new rules on patents and copyright that serve commercial interests. Early drafts of CETA included new strict rules on digital locks, liability for internet service providers and over copyright issues; in the final version these are watered down. The copyright provisions that made it into the CETA agreement are broadly in agreement with current EU and Canadian standards.

The chapter on technical barriers to trade (TBT) in CETA contains provisions to improve transparency by fostering closer contact between the EU and Canada in the field of ‘technical regulations’. To this end, the EU and Canada have agreed to strengthen links between their relevant standard-setting bodies. Standard setting bodies in education include qualification framework and quality assurance bodies at all levels of the education sector.

## The Transatlantic Trade and Investment Agreement

The Transatlantic Trade and Investment Agreement (TTIP) involves the United States of America and the European Union – the latter made up of 28 member states. The European Directorate General for Trade is the negotiator for all of the European Union. At the time of writing, the USA has not made any announcement with regard to its position on TTIP and whether the negotiations will continue.

### What is the history of TTIP?



TTIP emerged out of recommendations of the final report of the joint High level Working Group (HLWG) on Jobs and Growth following a European Union-United States Summit held in Washington in November 2011. The HLWG was directed by EU and US leaders to identify policies and measures to increase transatlantic trade and investment so as to boost growth following the 2008 global financial crisis. Attention was drawn particularly to “...eliminating or reducing tariff and non-tariff barriers to US-EU trade and investment” (Akhtar and Jones 2014: 3). TTIP negotiations began in July 2013.

According to the EC (2013), reforming services mattered as they accounted for as much as 60% of the global economy, with the US and Europe accounting for nearly half of global GDP. The overall justification for TTIP negotiations was that the two economies have not maximised their economic relationship, and there continue to be major regulatory and tariff barrier challenges (Akhtar and Jones, 2014).

### **How is productivity to happen through TTIP?**

The purpose of TTIP is to increase market access through: (i) the elimination of barriers to trade and investment on goods, services, agriculture, and government market procurement; (ii) enhancing regulatory coherence; and (iii) developing new rules, especially in the area of FDI, intellectual property, labour, and emerging new trade areas, such as data flows.

TTIP is the largest FTA ever negotiated by the US. Akhtar and Jones note the EU and USA have also “...expressed an interest in using the TTIP to present common approaches for the development of globally-relevant rules and standards in future multilateral trade agreements” (2014: 3).<sup>3</sup>

### **Where are the TTIP negotiations at present?**

As of January 2017, there have now been 15 rounds of negotiations (EC, 2017: 14). However, like other forums such as the WTO, TTIP has become “...increasingly mired in controversy and buffeted by the volatility of global politics. Negotiators were aiming to conclude the negotiations before Obama left office, but this did not happen.

As in the WTO/GATS process, guiding the negotiations forward has been particularly tricky. The secretive nature of the early stages of the negotiations were contested; the EC thus responded to public pressure and published reports following EC’s TTIP transparency initiative in early 2015. By way of contrast, the US has published none. This has led to speculation and guessing, including the use of the completed Comprehensive Economic Trade Agreement between the EU and Canada (CETA) as a potential prototype.

However, in both cases/sides, there has been limited and highly staged consultations with ‘stakeholders’. The US International Trade Commission has investigated the probable economic effects of TTIP, as well as requested public comments. The EC has also been pressed to consult with stakeholders on the issues of investment protection and the controversial ISDS mechanism. In 2014, 150,000 responses were sent to EC’s Director General of Trade, though there is a view the Commission listens, but it does not change course.

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<sup>4</sup> It should be noted, however, that the regulatory mechanisms are different making it difficult to anchor in WTO (Sauvé, 2013).

### **Challenging claims made around impact of TTIP**

Within the European Parliament, the Chair of the influential International Trade Committee (INTA), Bernd Lange, has been critical of the lack of transparency in the TTIP process.<sup>5</sup> Lange raised doubts over the EC's commissioned 'impact assessment' of TTIP conducted by the Centre for European Policy Studies (CEPS) (see Pelkmans et al., 2014), and the assumed positive effects on growth that is claimed. The model used is the Computational General Equilibrium model to determine impact. However this model does not include the costs that result from macro-economic adjustments – such as alignment to new standards, the displacement and retraining of workers, potential welfare losses in the society, and the threat to public policy goals (De Ville and Siles-Brügge, 2015: 669). De Ville and Siles-Brügge (2015) show that in the case of NAFTA, which also used the CGE, when comparing the ex-post evidence with the ex-ante claims, it is possible to show that both Mexico and Canada fared significantly worse in terms of economic gains (especially around costs over labour displacements).

### **Is education included as a services sector in TTIP and how?**

There is limited information about how education is being included. However given the centrality of education trade to GDP for countries like the UK, and the increase in the number of for-profit actors in both the USA and Europe at both the school and the higher education levels, unless education is included in a carve out, then it will be included in some manner as it cannot be seen to meet the criteria of a service supplied in the exercises of government authority.

Davies (2014c: 8) reports that: "In March EUA asked the lead negotiators whether their proposals included higher and adult education. Dan Mullaney for the US replied that they were not excluded, and that it would be useful to include them, but that no discussions had so far taken place". Davies (2014c) goes on to note that the US is particularly interested in privately-operated adult and other educational services, particularly those that are digitally delivered. This, of course, is good news for-profit firms who, until recently, had generated lucrative profits in the higher education sector in the US (Kinser, 2006). Yet a tighter regulatory environment in the US has limited their expansion locally. It is also a space in which Massive Open Online Courses (MOOCs) operate.

In all, it can be concluded that education (especially higher, adult and other) will be affected. One means will be through the easing of the conditions of entry into the sector for commercial firms seeking the liberalisation and marketization of education – using those member states of the EU with a very low regulatory floor – such as England or particular states of the USA – as the place from which to claim market access. This will result in growing fragmentation and diversification in the sector. It will likely sever the relationship between the idea of a university and research often used as a basis for recognition as a HEI provider, as research is viewed as a non-tariff barrier to trade. Academic autonomy, and other conditions of work might also be regarded as non-tariff

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<sup>5</sup> National governments and MEPs from the European Parliament's Trade Committee have only limited access to documents. Reading rooms? MPs at Westminster have no access to the texts being negotiated. Both the European Court of Justice and the European Ombudsman have criticized the high level of secrecy and the European Commission has been forced to publish some negotiating texts (UNISON, 2015: 2).

barriers that should be done away with, whilst quality assurance and other mechanisms are regulatory mechanisms that place undue burden on the provider.

### **What mechanisms – NTBs, MR, ISDS, and so on?**

A number of regulatory mechanisms can be used to achieve the elimination of NTBs, such as harmonisation, mutual recognition, or national treatment. Harmonisation refers to a common regulatory space between the Member countries – in this case the US and the EU. Mutual recognition means that the regulatory frameworks in the US and Europe respectively are recognised (this gives primacy to the market, and assumes a level of common identity - whether or not this is the case).<sup>6</sup> National treatment means that the foreign investor is treated no less favourable than a local firm or organisation (thus national politics holds sway). TTIP is promoting Mutual Recognition (MR) of standards (as more feasible) rather than harmonisation or national treatment. In other words, the standards (labour, safety, worker protection, qualifications, and so on) of the 'home' country will be recognised. This is likely to lead to the exploitation of uneven development by investors, giving rise to even further uneven development as place-based actors try to use their less demanding regulatory environment to attract investors.

For those not only sceptical but deeply opposed to TTIP, the inclusion of an Investor-State Dispute Settlement mechanism has been particularly controversial. They argue this will give foreign investors the right to sue national and regional governments for compensation whenever their access to markets is impeded by what is seen as unfair legislation, or whenever their expectations as legitimate inward foreign investors is thwarted. For its own part, the EC Trade Commissioner and Chief Negotiator for TTIP has, until recently, argued that the inclusion of ISDS in regional and preferential trade agreements has not placed any pressure on national sovereignty. However, this view is not widely shared and indeed as we have shown, UNCTAD has become concerned about the limits placed on national policymaking space.

As a means of easing the difficulties facing TTIP, in 2015 Report on the 10th TTIP Round held in July 2015, the European Commission referred to a State-to-State Dispute Settlement (SSDS) mechanism as opposed to an ISDS. Indeed SSDS and ISDS are not opposed but complementary mechanisms, giving investors different means of challenging regulations and decisions through dispute settlement mechanisms. The main difference is that the foreign investor in the SSDS would have to convince its government to initiate dispute settlement against the other state, while this limitation of the government's backing is not present in the ISDS. The TPP, for example, includes both mechanisms. However the US Trade negotiator has stated it will not consider an alternative to ISDS, and wants all of its agreements to fall into line (e.g. TTP). ISDS mechanisms, however, will result in the conservative use of policy in national regulatory environments, for as UNISON (2015: 5) states – the investor dispute mechanism and ratchet effects create "...a 'regulatory chill' that stays the hand of governments to regulate in the public interest for fear of litigation".

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<sup>6</sup> The USA has not ratified a number of the most important ILO Conventions, including the rights to freedom of association and collective bargaining. The US has also passed 'Right to Work' legislation in 24 states, meaning a union's capacity to organize is limited. This will encourage a firm to set up in one jurisdiction in the US, and operate using these regulations in Europe.

## Challenges and Issues – Drilling Down

It is possible to discern common patterns and issues across the trade agreements we have been discussing. Here we drill down and reflect on what this means for the education sector at all levels; for the education profession; for learning and teaching; the governance of the sector, and for democratic education. These are: (i) the status of public services; (ii) mutual recognition; (iii) government procurement; (iv) intellectual property; and (v) labour. Services sectors present major challenges regarding non-tariff barriers, for these barriers are in place to ensure quality (e.g. qualifications; recognition; standards and it will become clear in this section the tension between removal of barriers to trade in education services, and mechanisms to ensure quality, professional standards, and ethics.

### **The status of education as a public service**

Across the agreements, education is regarded as a sensitive sector. Were education to be a service “supplied in the exercise of governmental authority”, as in GATS Article 1.3(b), and “a service supplied neither on a commercial basis nor on competition with one or more service suppliers” Art 1.3(c), it would be exempted.

However as we have shown in Chapter 2, transformations in the governance of education systems as a result of the implementation of a wide range of tools, from New Public Management to the introduction of international student markets, for-profit provision, or Public Private Partnerships, all mean that forms of exchange and competition operate in the education sector. As a result its status is not as a state monopoly, and therefore education IS included.

Whilst ‘education’ is included in the trade texts alongside words that refer to ‘limitations’, or ‘reservations, the trade framework is highly likely to mitigate against this. In short, if education as a sector has been liberalised, it fails to meet the GATS criteria, and thus will be open to standstill and ratchet up effects. The claims of ‘no forced privatisation’ under CETA, for instance, is an empty promise, as in effect the ratchet up/negative list will provide the conditions for investors to operate in the sector. Policy reversals, again as stated in CETA, are in theory possible, but they were also feasible under GATS. It is the cost of reversal that is expensive, and thus a much more unlikely route in practice.

Education’s status as a public service or utility sits also now uncomfortably inside the ambition of building and expanding services sectors. Governments like the US, Australia, Canada and New Zealand, regions like Europe, along with investors, now focus increasingly on developing international trade in education, and on the recruitment of talented individuals. It is those governments too who are vying for a major role in rule setting. The United States drives a hard bargain in this regard. Added to this pressure, as Sinclair (2014: 5-6) argues, is that; “Foreign investors are far more likely than foreign governments to test the scope of the “public utilities” exception, which purports to protect the ability to re-establish public services where privatization has been tried and failed” and “foreign investors and their lawyers can [therefore] be expected to fully exploit any flaws or ambiguities in the reservations protecting national, state and local public services.

### **Mutual Recognition Agreements (MRAs)**



Because of the difficulties inherent in national treatment rules being applied in services negotiations, the current round of agreements appears to favour 'mutual recognition' (MRA). MRAs are an agreement between two or more parties to recognise the comparability of each other's qualifications in specified professional fields (Davies, 2016: 3).

The process begins with the relevant professional bodies from jurisdictions involved in meeting to set the parameters for negotiation, taking into account the over-arching criteria set down in the trade deal. The bodies make a recommendation to a Committee, who if it approves, then refers the draft MRA to the relevant authorities making sure it is consistent with the legislation in force in each of the Parties. The scope of professional mobility of 'natural persons' is normally set out in detail in the schedules of each trade agreement.

As we illustrated in Chapter 2, higher education is increasingly globalised as a result of movements of staff and students across national boundaries. Davies (2016: 3) argues that rising volumes of staff and student mobility (most recently driven by ideas like global competence; cross national research projects; globally-networked professionals like engineers and accrediting agencies), and growing emphasis on employability, in conjunction with trade agreements will drive further professional mobility.

The dependence on mobility and the significance of cross border recognition mean that HEIs will need to take notice of trade policy. For example, Macquarie University promotes its degree architectures as 'Bologna compliant'. This means internationally mobile student studying in Australia for their undergraduate degrees will not have recognition issues in Europe, assuming they were to apply for graduate studies in a European university or a job in the European labour market. This statement of compliance reduces the costs associated with 'recognition checks', as well as enabling enrolment and workplace recruitment processes, to move more quickly. It also presumably gives Macquarie a competitive advantage in certain recruiting markets.

If successfully concluded, all of the trade negotiations discussed above would boost the international mobility of regulated professionals in that the aim is to rationalise the number of different regulations related to the professions, to reduce the number of regulated professions, and to remove protectionism by the professions where possible.

Davies (2016) notes that currently there are no MRAs in place, though there are existing policies that might form the basis of the MRA. For instance in the EU, the Directive on the Recognition of Professional Qualifications in Europe, gives automatic recognition to seven sectoral professions, including medical doctors, pharmacist, general care nurse and architects. The legal profession has its own dedicated directive in European legislation. Quebec has a particular arrangement with France. Recognition by all Members States is only guaranteed if underwritten by a MRA enshrined in a formal trade agreement. Within Europe, an amended Directive on Professional Recognition (2013/55/EU) envisages a Common Training Framework – with a curricula based on a common set of knowledges, skills and competences. This is an important development and should be monitored.

Indeed the trade deals we have been looking at in this chapter post 2009 favours putting into place MRAs, though they will have to be consistent with the GATS framework – and specifically Mode 4 "...the supply of a service (...) by a service supplier if one Member, through presence of



natural persons of a Member of the territory of any other Member". It covers individuals who are commercial service providers (such as the administrative or academic staff of a for profit university from a territory of another member), or a self-employed person (such as an education consultant). In GATS, the principles regarding recognition of qualifications are implicit; that is, that recognition is not automatic, that it must not be discriminatory, and that must be justifiable in terms of the overall multilateral consensus. The view is MRAs will strengthen the GATS by providing it with specific rules and practices. MRAs in the current trade deals are intended to provide the new 'rules for realising' the regulatory detail so far missing in the GATS Mode 4 – presence of natural persons.

These new rules for recognizing the comparability of each other's qualifications in a specialized field, and the rules for realising what will form the basis of comparability, will transform the production of professional knowledge and its regulation. Here we see a shift being orchestrated in the nature of the knowledge in professional fields, and who oversees it. In essence, this is a shift from professionally-regulated knowledge and expertise to managerially-administered knowledge in the form of competences and skills, legitimated by the discourse of employability and transparency.

Mutual recognition now coalesces around generic, transnational, behavioural competences rather than specific, culturally-situated knowledges and expertises. The former limits the frictions necessary to doing quick business and trade in a market economy; the latter increases diversity and complexity, yet poses big issues of translation. The former suits transnational education firms, such as Kaplan, Laureate Education, and Bridge International Academies, in that they are able to scale up learning offers and generate financial returns with more limited input; the latter is the life-blood of cultural diversity, knowledge societies, and ongoing sustainability. We pick up this tension in Chapter 7 when we reflect on the need for a more democratic education paradigm to deliver a sustainable future.

### **Government procurement**

Government Procurement (GP) chapters feature in all of the trade agreements dealt with here. Government Procurement is also covered in the World Trade Organization's Government Procurement Agreement (GPA). In some cases, as we show below, these trade deals go a lot further in opening up government procurement to a greater number of entities – including those at different levels (for example local and other forms of sub-national government). In CETA, for instance, Canada will open to the EU opportunities for public procurement in 98 federal entities; at the sub-level this will include universities, school boards, and public funded academic, health and social service entities. This is the first time all of these levels of government in Canada will be included in a trade deal.

The Organisation for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO) estimates that government purchases represent approximately 15 percent of any country's gross domestic product, while other estimates value the global government procurement market at over \$1.3 trillion (Reichert, 2015). Each of the Parties to these trade deals hopes that their firms can take a bigger share of this investment market.



The detail of the Chapter in the TPP builds on several FTAs involving the US – with Korea, Peru, Panama and Colombia respectively – where the level of specification for a tender, and other aspects of government procurement, are well developed. According to the USA trade website, the TPP's government procurement Chapter (15) will "...level the playing field for American workers and American businesses, leading to more Made-In-America exports and more higher-paying American jobs at home" (TPP, Summary Ch 15) through removing tariffs on US exports to TPP Parties. Exports include information technologies, transport machinery, professional services, and many other products. For its own part, the US has a Buy America requirement – for mass transit and highway projects, water projects, transportation services, human feeding programmes, and defence systems.

The core commitment in this Government Procurement (GP) Chapter is that a TPP Party extends to its bidders on GP contracts the same treatment it extends to its own firms. The Chapter outlines the key conditions; timely information, time frames for bids, qualifications, and other conditions for participation. In terms of coverage, 9 of the 12 TPP Parties have agreed to an ambitious coverage of their government procurement, with the US intending to bring the remaining 3 inside. All of the TPP parties, except Malaysia and Vietnam, already open their procurement under bilateral trade agreements, and the pressure will be on these countries more closed countries to open their procurement up.

CETA's government procurement Chapter (19) lists similar features to the TPP; government tenders are to be explicit about time-frames, description of the contract, conditions, qualifications of suppliers, and so on. Sub-national government procurement is included in CETA, unlike the US's commitment in TPP.

Government's education sectors engage in a significant amount of procurement; ranging from technology, building education infrastructures such as schools and universities, education equipment for science laboratories, or supplying professional services, such as research contracts, testing platforms, and education management systems. For instance, in the TPP, the Annex showing Parties commitments on GP shows that the Australian Government has listed the Department for Education and Training, the Australian Research Council, plus its sub-national education systems, as entities to which GP now applies. Malaysia, by way of contrast, is particularly cautious regarding GP in the TPP regarding formal education; the Ministry of Education is not included in TPP GP regarding examination systems, school uniforms, text books, milk and food programmes for pre- and school-aged students. The higher education sector, including teacher training, is however included in TPP's GP. As a further contrast, there are no US commitments made for state or local procurement – meaning the government procurement contracts at this level are not included. Given that a very considerable amount of education is still a state and local responsibility, in the case of US public procurement this level of government is exempt.

### **Intellectual property and cross border information flows**

In this section we explore two related, though distinct, aspects of knowledge; (i) intellectual property/copyright, and (ii) cross-border information flows. Educators have a foot in both camps; they are creators and users of knowledge, on the one hand, and creators of information and users of digital infrastructures enabling flows across boundaries. Both of these aspects, we



pointed out in Chapter 2, have escalated in importance since the rise of the knowledge economy policies, the growth of the Internet, and new digital tools. These developments intersect with the interests of large corporations in generating profits from knowledge production activities and in providing knowledge-production and information architectures and infrastructures (rents from platforms, search engines, Internet Service Providers), with governments seeking to lock in their competitive advantage versus others also concerned about security and domestic interests, and citizens increasingly constructed as e-citizens living in a digitally-mediated world.

Since the implementation of the TRIPS chapter, there has been a great deal of activity around intellectual property, but not a lot pinned down, aside from 40 countries signed up to US driven Anti-Counterfeiting Trade Agreement (ACTA) in 2010 (Curtis, 2012). There is a view (again promoted by the US) in relation to cross-border information flows, that at least in the area of e-commerce (services that are delivered electronically), the GATS language is outdated and the rules are incomplete making it difficult to understand, let alone regulate, new developments like cloud computing, or deal with reservations placed on audio-visual materials (such as YouTube), or on the availability of particular publications (such as the case of China). Other important developments challenge GATS's based interpretations of the world. These include data accumulation, the rise of big data, data mining and trading, and the right to be unknown.

The US has used both bilateral trade agreements and the current round of trade deals to push its own interests. Under the Clinton administration 1993-2001, the US Trade Representative set out to shape the rules for e-commerce and data flows so that the Internet was a tariff free zone and electronic commerce a seamless global marketplace. Bilateral agreements were signed with the Netherlands, Japan, France, Ireland and Korea, and supported by the OECD (Aaronson, 2016: 11). However policymakers in a growing number of countries have sought to control the Internet within their borders and to encourage the rise of domestic firms, and restrict or block information flows. As the biggest companies are largely US based, this means blocking or restricting the activities of these firms with implications for their profits.

Beginning in 2009, the Obama administration made digital trade a high priority, criticising 'digital protectionism'. In 2011, the administration promised to put forward provisions in trade agreements that would encourage information flows using language that made these clauses legally binding and with recourse to dispute settlement. In the TPP the US has achieved binding language with 11 of the 12 countries; in TTIP it is negotiating with 28 members of Europe; and in TISA with the EUs 28 plus a further 23 more.

Michael Geist (2016) has undertaken a comprehensive review of the TPP rules around intellectual property and copyright. Noting earlier concerns by critics as to where the balance might lie – between the users and the creators – Geist argues that the final text suggests that this sits with the creators and not the users. In relation to copyright, under TPP copyright will now be set at the life of the author plus 70 years (20 years more than most jurisdictions, like Canada, New Zealand, and Vietnam) (Geist, 2016: 6). Penalties for infringement include criminal liability. This aspect does not feature in CETA.

At first glance those in the education world who are creators as well as users of copyright, might see this as a victory. As creators of works, those who use the materials that they have created are



subject to copyright law. However, academics, teachers, text-book writers, songwriters and so on, have mostly sign contracts for the publication of their papers with publishing firms.

Regarding papers published in journals, authors are allowed to publish on their own websites a publisher's version of the paper (this varies – but can be around 18 months in the social sciences) but the ownership still sits with the publisher. Access can be ensured immediately, but in this case the creator/author pays a significant sum (this can be close to £2500 per article) for its open access status. In relation to books, most authors sign contracts where they are paid some royalties in exchange for selling the rights of ownership to the publisher. Under TPP, extending the term of copyright extends the costs to consumers (learners, teachers, researchers) and the returns to the publisher.

If we take the production of literature or musical works more generally, and literacy criticism or musicology as an important cultural contribution to societies specifically, the 70 years beyond the author's life rule in TPP places limits on what kinds of works can be produced; this can include significant segments of text for the purposes of analysis and conversation.

A second issue regarding copyright refers to 'digital locks'. They are activated as part of Digital Rights Management (DRM) used to control access to, and use of, digital content. Geist (2016: 9) notes that Canada, for instance, had already caved into US pressure to go well beyond World Intellectual Property Organization (WIPO) Internet treaties. TPP however locks countries into a WIPO+ model; it limits the flexibilities that WIPO offers. Further, it adds in criminal liability as a means of enforcement. This is important in the field of education, because unlike a material good (in the form of a physical book, CD, record, and so on) owned by the individual, or a service like a library where multiple reads/listens/readers/listeners are possible over time, a digital lock limits the number of users, downloads, the length of the time the digital material is available for, and so on. The costs for the consumers of digital materials for education institutions, teachers, learners and researchers, because of digital locks, is increasing.

A third issue concerns how Internet Service Providers (ISP) deal with allegations regarding copyright infringement on their networks and sites. In TPP, the US has promoted its 'notice and takedown' system, whilst Canada has preferred a 'notice and notice' system that takes into account users and the public, and not just the ISPs. The 'notice and takedown' approach means content takedown does not require court oversight. 'Notice and notice' takes more time, especially for the ISP around processing and forwarding notices. All TPP countries, aside from Canada and Chile (exempt under its US-Chile FTA), will have to use the 'notice and takedown' approach doing little to balance the interests of copyright holders, the privacy rights of Internet holders, and the legal obligations of the Internet Service Providers.

Geist (2016: 13) argues this approach to copyright infringement says a great deal about the TPP; the US's regulatory system on all of the other countries in the agreement, giving the US a competitive advantage. Worse than this, the TPP copyright stand-still and ratchet clauses lock in a particular regulatory architecture into the future limiting the possibilities for domestic reforms in the different national jurisdictions who are Parties to the Agreement. And whilst the US is now not in TPP, it is likely to benefit from the fact that it has set the rules in an agreement that have now been signed off, subject to final ratification by the remaining members of the TPP.



These trade agreements also raise more fundamental concerns, over greater and greater tendencies toward proprietary knowledge in the face of educators and citizens call for greater levels of access and use of scientific knowledge as a basis for human development. Some cite the statement of the UN Special Rapporteur (2015) in the field of cultural rights, and the centrality of making knowledge accessible so as to increase options, particularly around future challenges to the planet, and sustainability concerns.

Others cite the blurred boundaries around the knowledge-work of the scientist and the technology work of the drug companies, and that whilst the latter builds upon the other, it also encloses the drug as a private good, making it subject to regulations around patents and trade deals (Correa, 2016: 2). Some point to the fact that public funds are invested in research, which are then enclosed and made private goods through university patents, spinout firm and so on. Still others (Curtis, 2012: Aaronson, 2016) point to the fact that in enclosing and making knowledge solutions private, this slows down the rate of innovation, and it limits creativity.

There has been a major shift in policy around open access to the public of the findings of research, though the beneficiaries are not necessarily the wider public. In the UK context, for instance, the beneficiaries appear to be the publishing companies who are paid significant sums to enable open access. Similar tendencies toward open access have also occurred in the US and the Office for Science and Technology Policy, and in European projects funded by the European Commission.

### **Labour**

Current trade agreements either have a chapter on labour, or a labour side accord, intended to guarantee the agreement does not contribute to a race to the bottom (Macdonald and MacEwan, 2016). Chapter 19 of the TPP, for instance, has provisions which it argues will ensure core labour standards will be protected.

In this section we draw on analyses that have been recently published reflecting on the details of the TPP, and on the CETA.

According to the US Trade Representative (USTR) website" TPP has the strongest protections for workers of any trade agreement in history". It requires all TPP members to abide by the fundamental labour rights as recognised by the International Labor Organization. These include the right to free association and collective bargaining, elimination of forced or compulsory labour, abolition of child labour, and the elimination of employment discrimination.

Macdonald and MacEwan (2016: 6) show that the TPP labour chapters are modelled on earlier accords or chapters – in particular NAFTA's side accord on labour – the North American Agreement on Labour Co-operation – developed during the Clinton administration to manage opposition to NAFTA. There were many weaknesses in this Accord, and ones that we won't pursue in detail. But the mechanisms to enforce these rules were ineffective, in the end labour rights – particularly in Mexico – were not protected. In the bilateral deals that followed NAFTA, there was



an attempt by unions to strengthen labour provisions – the most notable being the May 10 Agreement (2007) (e.g. also in the US-South Korea, 2012) which makes reference to ILO standards and the 1998 ILO Declaration.

Four elements of the May 10 Agreement are included in TPP Labour Chapter 19:

- Requirement to adopt, maintain, and enforce the four fundamental rights named in the 1998 ILO Declaration
- Clarification that a country cannot defend its failure to enforce labour law on the basis of resource allocation or resource limitations.
- A prohibition from lowering labour standards covered by the treaty in a manner affecting trade or investment.
- Labour obligations must be enforceable through the same dispute settlement mechanisms, and have access to the same penalties, as those available for other obligations under the FTA.

There are a number of issues here. The reference is to the ILO Declaration and not to the full weight carried in the core ILO conventions. CETA, has stronger language in its Labour chapter around the decent work agenda. The view is that both TPP and CETA had the chance to advance a much stronger agenda on labour but failed to do so (Das, 2016; Macdonald and MacEwan, 2016).

In relation to point 2, enforcement of labour law, Macdonald and MacEwan (2016: 14) point out that in the May 10 Agreement, non-enforcement is limited to cases of a sustained or recurring course of action or inaction that is affecting trade and investment. Here the onus is on demonstrating that this action or inaction has a negative effect upon trade. Demonstrating this will be difficult.

Concerning point 3, 'weakening or lowering labour standards to encourage trade and investment', the statements do not specify acceptable conditions of work. Weakening already poor conditions is hardly a strong protection for workers, as promised by the US Trade Representative. Will TPP help create a better set of protections for Vietnamese labour, especially in those industries who use forced labour or misuse their rights? An example here might be helpful. Were a Low-Fee Private Schools to operate in Vietnam, with its already significantly poorer pay and conditions, is unlikely to be targeted as needing to be made more acceptable. On point 4, 'equal access to trade disputes', Macdonald and MacEwan (2016) note that requesting a dispute settlement panel is a lengthy process of consultation, and whilst a case can be made by workers and their unions, the case has to be taken by the respective government. Given that right-leaning, neoliberal governments are often in dispute with workers, governments may not be prepared to take action.

The conclusion we draw is that if we use the TPP and CETA as examples of what the labour chapters of these trade deals mean for workers, the outcomes for labour are likely to be poor or negative. As Van Harten (2015) points out, whilst the foreign investors get powerful rights and privileges, they are not held to account if they flaunt labour rights.



Added to this is the way in which these negotiations took place: labour unions had little or no opportunity to put their case as part of the negotiations, unlike business groups. This is an asymmetrical rights regime then reflecting the uneven opportunities for shaping these trade agreements.

## Conclusions

In this chapter we have laid out the state of play for the four trade deals that affect education today; TISA, TPP, TTIP and CETA. Across these agreements we show a number of commonalities which are highly problematic for education if we are to hold on to its a societal good and human right promise. First, it is included as a services sector or public utility and not subject to a 'carve out', by which we mean complete exclusion, rather than inclusion but with limitations.

The trade agreements refer to services and utilities that might be excluded as those that (using GATS Art. 1.3) "supplied in the exercise of government authority", and "any service which is supplied neither on a commercial basis, nor in competition with one or more services suppliers". Not only would this NOT exempt education, given the rampant commercialisation that has taken place in the sector over the past two decades, but critics argue that a narrow interpretation will be encouraged, following the WTO 1998 meeting of the Council for Trade in Services (WTO, 1998) – as to what might count as core sovereign functions.

Both TPP and CETA agreements are now in the public domain. Both agreements are more far reaching than other trade agreements in the way they limit government's ability to create, expand, restore or regulate public services. Both agreements offer foreign service providers extensive additional opportunities in terms of market access, the protection of their investments and the enforceability of commercial rights. In CETA and the TPP, education services are affected by obligations and commitments in the chapters on investment, cross border trade in services and government procurement. Both agreements mechanisms effectively limit policy space in the name of market access and the rights of foreign investors, despite claims that public services are fully protected. Mechanisms like the negative list, along with stand-still and ratchet clauses, mean that services that do not yet exist and therefore are impossible to list at moment are automatically included and subject to the agreements mechanisms. Further, the ISDS mechanisms are anti-democratic in that they offer a privileged route to arbitration for foreign investors to dispute the state's decisions, and evidence suggests arbitrators show considerable bias in their decisions in the direction of western capitals and their corporations. This opens up non-transparent spaces for decisions about public goods like education and must be challenged. In the following Chapter addressing the Sustainable Development Goals for Education we show why policy space matters, and why it is that the conditions for labour, as well as access to knowledge resources matter.



# Chapter 6

## From MDGs to SDGs

### Introduction

How do the trade agenda we have been discussing so far sit alongside the other big agenda to guide education and development over the next decade and a half; the Sustainable Development Goals? In this section we introduce the SDGs, focusing particularly though not exclusively on SDG4 - Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all. We reflect on the conditions which would need to be in place to ensure the SDGs can deliver on their targets by 2030, and within the framework of education as a human right.

### The Sustainable Development Goals

At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development which now includes a set of 17 Sustainable Development Goals (SDGs) all aimed at ending poverty, fighting inequality and injustice, and tackling climate change by 2030.

The Sustainable Development Goals, sometimes referred to as Global Goals, build upon the Millennium Development Goals (MDGs) adopted in 2000 (see Box 6.1). The MDGs consisted of eight anti-poverty targets to achieving by 2015, largely focused on low-income countries.

The three most relevant goals for our discussion are MDG 2 (achieve universal primary education), MDG 3 (gender equality) and MDG 8 (develop a global partnership for development). Access to education, increasing gender equality (in this case through access to education), and a partnership of multi-stakeholders in education (government, civil society, NGOs, private sector/business, aid donors, multilateral institutions, and so on) were to help overcome poverty, hunger, disease, gender inequality more broadly, and access to water and sanitation.

## The 8 MDG Goals



1 Eradicate extreme poverty and hunger



2 Achieve universal primary education



3 Promote gender equality and empower women



4 Reduce child mortality



5 Improve maternal health



6 Combat HIV/AIDS, malaria and other diseases



7 Ensure environmental sustainability



8 Develop a global partnership for development

### *Box 6.1: Millennium Development Goals*

What progress was made, and what were some of the conditions that made possible, or limited, realisation of these goals? What insights can we draw from critically reflecting on these conditions so as to ensure that the current trade agenda and deals does not jeopardise the realisation of these goals?

Commentators have mixed views on what was achieved and why with regard to the MDGs. Influential actors such as the World Bank, and analysts like Chandy and Gertz (2011) argue that the corporate-driven, neo-liberal globalisation as we outlined above, led to stunning progress in reducing poverty by 2015.

Bello (2013), however, draws a very different conclusion. He argues one of the major issues which confronted the MDGs was that the MDG indicators "...told us very little about structural and policy factors that either perpetuate or reduce poverty" (p. 93), and that the MDGs tended to obfuscate the structural sources of these manifestations (especially poverty/access to education) and social injustices (Bello, 2013: 93-94). He points particularly to the outcomes of neoliberal policies, and their pernicious effects on communities, including also in high-income countries.

The new SDGs and the broader sustainability agenda aims to go much further than the MDGs. Like the MDGs, the SDGs aspire to overcome poverty by getting at the root causes of poverty via a commitment to the development for all as a universal or global goal. Goal 4 Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all relates specifically to 'quality education' and 'inclusion' through universal completion of free primary and secondary education. Other SDGs also relate to 'education' in that they are the preconditions for being able to access quality education: Goal 1 – aims for no poverty, Goal 2 – zero hunger, Goal 3 – good health and well-being, Goal 5 – gender equality, Goal 8 – decent work and economic growth, and Goal 10 – reduced inequalities. All of these Goals directly shape the opportunity structures in any society – including education, and as a result, its social justice outcomes (Robertson and Dale, 2013).



*Box 6.2: Sustainable Development Goals*

The question to be addressed in this report is: what are the implications of trade deals for realising the ambition of the SDGs with regard to education?

## **SDGs and Education – The Challenges**

The challenge going forward, to realise the targets associated with education, is ambitious and demanding (see Box 6.3), and the education development community does not under-estimate what is ahead, and what is at stake. In a fact sheet released in July 2016, the UNESCO Institute for Statistics and the Global Education Monitoring Report (UIS and GEM Report, 2016: 1-2) illustrates the magnitude of the task. Whilst in absolute terms the number of excluded children from school fell steadily between 2000 and 2007, progress after the 2008 global financial crisis slowed as a result of the collapse of aid budgets from the main donor countries.

UIS figures show that for the school year ended 2014, 263 million children, adolescents and youth were out of school; this includes 61 million children of primary school age (6-11 years), 60 million adolescents (12-14 years) and 142 million youth in upper secondary school. Of the 61 million children of primary school age, 34 million live in sub-Saharan Africa followed by Southern Asia (11 million).

**GOAL 4: Targets: by 2030...**

1. All girls and boys complete free, equitable and quality primary and secondary education leading to relevant and Goal-4 effective learning outcomes.
2. All girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education.
3. Ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university.
4. Substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship.
5. Eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations.
6. Ensure that all youth and a substantial proportion of adults, both men and women, achieve literacy and numeracy.
7. Ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development.
8. Build and upgrade education facilities that are child, disability and gender sensitive and provide safe, nonviolent, inclusive and effective learning environments for all.
9. (By 2020), substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries.
10. Substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries, especially least developed countries and small island developing states.

*Box 6.3: Targets to Realise Goal 4 – Education*

These regional snapshots, however, mask differences between countries, and given that trade deals are largely negotiated at a country rather than regional level, it is instructive for us to look at these. Six countries account for 1/3 of all out-of-school children according to UIS data; Nigeria (8.7 million), Pakistan (5.6 million), India (2.9 million) Sudan (2.7 million), Ethiopia (2.1 million) and Indonesia (2.0 million) (UIS and GEM Report, 2016: 4). Of this list, Pakistan is the only country included in the trade deals being discussed in this Report, though Indonesia is considering its situation in relation to the TPP. Pakistan is also a target country for the large education corporation, Pearson Education, as an emerging education market (Ball, 2012).

The SDGs embrace a more global view of inclusion and inequalities that includes all countries – low, middle and high income, as well as within and between countries. To this end governments have committed themselves to measuring disparities between different populations defined by region, ethnicity, disability, or other markers of disadvantage. Getting closer to targets will require resourcing (estimated to be around US\$39 billion per year) to fill the funding gap in low and middle-income countries.

There is wide agreement regarding the challenges facing policy-makers around the governance frameworks that need to be developed to bring about 12 years of free, publicly funded, equitable, quality education. To establish the overall scale and scope of changes needed to deliver on the SDGs, it is important to assess the extent to which governments will have scope to move away from the development paradigms that have given rise to deep and growing structural inequalities around the globe. A sober assessment of this is important if we are to understand the scale of the task, and the nature of the development paradigm, policy levers, and regulatory environments, that would need to be in place to address these issues. And whilst policy space is ensured through Target 17.15 – in the trade agreements government policy space is to be limited rather than protected.

Already there are signs the powerful corporations (such as Pearson Education, Facebook, Bridge Academies International), aided by some of the key UN institutions (especially World Bank Group) and think-tanks (Brookings Institution) see the SDGs as an opportunity to further their own interests and bottom lines (profits). Their presence is legitimated by SDG17, as partners in realising goals. Some of these corporations now play a significant role in shaping the nature of the goals and content of the learning metrics (for example, Michael Barber, Pearson Education, is co-chair of the Learning Metrics Taskforce which hopes to measure achievement of learning competences for SDG4).

It should be noted that some representations of the SDGs show them reframed as Global Goals, deleting the reference in GG4.1 to the word ‘free’. Their own versions of the global goals GG4.1 now reads: “all girls and boys complete, equitable and quality primary and secondary education leading to relevant and Goal-4 effective learning outcomes” (Adams, 2015). Yet as Aubry and Dorsi (2016) point out, free education is a human right and entitlement under Article 13 of the International Covenant on Economic, Social and Cultural Rights.

These corporations stand to benefit from the investments that will be made in the education sector over the next 15 years – whether as providers of ‘fee-based’ education, as testing agencies, textbook producers, provider of remedial services, and so on. Their aim will be delivering



education in as cheap a form as possible, much like the Bridge International Academies model referred to in Chapter 2. Government oversight of education is important. However in a market-driven education system shaped by trade and investment rules that work in the interests of foreign investors, governments are an impediment to trade. The consequences of poor government regulation of corporations can be seen across many of the countries that embraced neo-liberal policies; a sharp increase in social and economic inequalities (Piketty, 2014; Atkinson, 2015).

The challenges are huge, not least because of the determination of the big development agencies - the Department for International Development (DfID), USAid, and the World Bank Group (in particular the IFC) - all committed to promoting a model that favours market access/private-sector led rather than a public sector/state-led model of development. In July 2016, the UN Human Rights Council (UNHCR) tabled an historic resolution in the 32nd session of the Human Rights Council urging all States to “address any negative impacts of the commercialisation of education”, especially by putting into place a regulatory framework to regulate and monitor education providers, holding to account providers that negatively impact on the right to education. In this regard, the UK and the World Bank were singled out for note by the UNHCR.

## Conclusions

In 2015, world leaders at the UN Sustainable Development Summit adopted the 2030 Agenda for Sustainable Development aimed at ending poverty, fighting inequality and injustice, and tackling climate change. It promised to do this by ensuring access to inclusive and equitable quality primary and secondary education (SDG4).

In order to ensure the realisation of this promise, national governments need to be able to put into place good governance arrangements that enable them to deliver on this promise. Policy issue areas might include regulations around quality providers of education, the conditions for teachers and their employment, the nature of the curriculum, standards and accountability processes, government procurement, and so on.

The trade agreements we discussed in Chapter 4 and 5 all intend to place limits on government’s policy spaces, in the interests of foreign investors and their profits. Not only will these agreements undermine the possibility of realising the SDGs, but they also fail to meet one of the foundational premises of the SDGs, in that they are profoundly inequitable, unjust and anti-democratic.

# Chapter 7

## Conclusions

### Introduction

Our overall conclusions for this Report are presented in two parts. A first part outlines 10 reasons for saying NO to trade deals in education and why. A second part sets out steps that would take us away from a narrow focus on economism and profits, to one that guarantees the rights of all citizens to have a say over theirs and the next generation's future.

### 10 Reasons to Say NO to Trade Deals

Can trade deals help deliver democratic education for sustainable futures? Answer? NO. The reasons below explain why not.

#### **Reason 1: There is no 'carve out' of education.**

There is 'no carve out' of education and whilst governments could, they have not wanted to. In essence, this means that education is included as a services sector or public utility, subject to limitations or exclusions to be listed, and mechanisms like 'stand-still' (locks education into its current state of liberalisation with no reversals except to pay investors future lost income), 'ratchet clauses' (all new liberalisation are automatically locked into the future into the future to be liberalised), 'domestic regulation' (ought not be burdensome) and 'dispute settlement' (in private systems of arbitration whose decisions tend to privilege the interests of foreign investors)

#### **Reason 2: Negative lists – lock in a neo-liberal future.**

All current trade negotiations involve some form of negative list. A negative list means listing all reservations that apply. The phrase, list them or lose them, is apt here. This presumes all possible reservations are known and considered, both now and into the future.

#### **Reason 3: Investor-State Dispute Settlement (ISDS) mechanisms work in the interests of big corporations and not educators and learners.**

The Investor-State Dispute Settlement (ISDS) mechanism continues to be the form especially favoured by the United States in the agreements involving the US; TISA, TPP and the TTIP. A revised ISDS mechanism is now included in CETA, though analysts argue it is a very limited improvement. The ISDS remains an exclusive right to foreign investors, who then can use a very different system of arbitration than national investors. Analysis reveals that this system of arbitration works in favour of powerful western countries and their corporations.

#### **Reason 4: There is an inherent tension between public services and neo-liberal trade deals.**



There is an inherent tension between public services and agreements governing trade in services. Public services are oriented towards meeting basic social needs “affordably, universally and on a not-for-profit basis” meaning they are often accompanied by the regulation of commercialization. This clashes with the aims of trade agreements which are to promote the exploitation of services as a commodity.<sup>7</sup>

**Reason 5: Some countries get to be global rule makers and others simply have to take them .**

The large developed economies of the ‘west/north’, especially the USA and Europe, regard themselves as ‘makers’ of the rules for global trade in services, rather than being ‘takers’. They have driven trade negotiations in ways that suit their interests, whilst the outcomes of arbitration, via dispute settlement mechanisms, also appear to be systematically biased in their favour.

**Reason 6: Progressive liberalisation means reducing non-tariff barriers – this means lower standards, poorer labour conditions, loss of professional autonomy, higher costs of knowledge products.**

All the trade deals involving services are committed to the progressive liberalisation of their services sectors through the removal of non-tariff barriers. Whilst the language of ‘protecting living standards’ appears in the various summaries of results or press releases, in the face of competitive pressures labour conditions and the protection of professional qualifications cannot be assured.

**Reason 7: Secrecy is anti-democratic.**

These trade deals have largely been negotiated in secret aside from some increased transparency on behalf of the EU regarding proposals and offers in the most controversial negotiations to do with TTIP. This is anti-democratic and contravenes the principles of good government and principles of human rights.

**Reason 8: Unconstitutional Nature of Ratification**

All deals will require ratification by partner governments. Yet in the case of Europe, Canada and the USA (CETA, TTIP) these are federal governments (e.g. Canada, Australia) or regional bodies (European Commission) with no competence in sectors like education over which they are negotiating. In the case of CETA and TTIP, even if Member States of the EU have not ratified the agreement in their parliaments, the agreement will be provisionally applied.

**Reason 9: Close down political and policy spaces**

The current trade deals all have the same ambition: to close off policy space so that the interests of investors are protected, rather than policy spaces being the outcome of democratic processes that enable public debate, dialogue and new directions.

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<sup>7</sup> It is also worth noting that the impacts of ISDS have been uneven and have tended to favour Global North investors. Barlow (2015: 8) notes that the majority of cases are brought by corporations from the Global North against countries in the Global South with 60% of cases decided in favour of the private investor (Mann, 2015).

### **Reason 10: The promise of growth for all through trade and education not just narrow but wrong.**

All governments negotiating trade deals promise their citizens the deals will increase economic growth and wealth; that all boats will rise. This dance of figures – with everyone a winner – needs to be viewed with scepticism. The ‘evidence’ presented to support this claim are the predictions from modelling that does not take into account macro-economic and social adjustments. Evidence suggests that where there are gains in terms of productivity, these are very small. The overall outcome is loss of productivity for less powerful countries.

### **An Alternative Agenda: Steps Toward Democratic Education**

Saying NO is one response to the injustices that the trade deals promise, assuming they are ratified. But is it also important as educators to also lay out, and chart, an alternative development path that might take us in the directions that have as an explicit aim, the development of an education promise that turns away from the dominance of neoliberal thinking and its delivery of misery for most, and handsome rewards for a tiny few. This means bringing into view and limitations of the MDGs and what can be learnt.

The main assumption of the MDG paradigm was that poverty was created principally by internal domestic factors and could be eliminated mainly by domestic reform supported by foreign aid. Thus the focus of MDG attention was on the performance of local actors... The reality, however, is that the key structures perpetuating poverty, inequality and marginalisation are to a great extent because of the way external structures articulate with internal domestic structures. Moreover, this articulation is a dynamic process, the main driver of which is corporate-driven globalization (Bello, 2013: 95-96).

Considerable evidence has now emerged of the full effects of neoliberal policies on societies around the world. Corporate-driven globalisation, promoted by the World Bank, the World Trade Organization, and many western donors, has led - not to a virtuous circle of growth for all, but rather, to a spiralling downward pattern of decline and crisis.

This has had profound consequence not only on developing countries, but also in middle and upper-income countries, where the middle and working classes have taken the full brunt of those policies once touted as ‘letting all boats rise’ (Brown et al., 2011). More importantly education budgets have been cut under the aegis of austerity, with families on the one hand, and those who teach in education institutions, on the other, seeing their standards of living severely encroached upon.

Former World Bank Chief Economist, Joseph Stiglitz (2013), World Bank Senior Economist, Branco Milanovic (2011), Thomas Piketty, (2014) and Anthony Atkinson (2015), have all pointed to growing inequalities as a result of corporate-driven neo-liberal policies, including in the USA (which has now emerged as one of the most unequal countries in the world compared with its position the 1970s), Australia, the United Kingdom, New Zealand, and across Europe particularly since 2008. If there have been beneficiaries of these policies, it is the global financial and corporate elites,



along with the top layers of management – the 1% of the top 10% - whose fortunes have dramatically grown.

In sketching out the options for a Post 2015 Development Paradigm in 2013 Bello names many that have become part of the Sustainable Development Goals; climate, inequality, food security and industrialisation. Missing from the SDG list but on Bello's are decommodification of the commons as a result of the privatisation of public goods, comprehensive social protection measures to limit poverty and secure health, financial re-regulation to limit corruption and the rise of tax havens, together with the cancellation of high interest rate debt. But missing from Bello's list is an important further signpost; the creation of political institutions and the development and protection of the norms and practices of democratic participation, deliberation and representation so as to ensure a development trajectory the delivers social justice.

Atkinson (2015: 21) puts a more developed case in his book on Inequality as to what is required to make a society more equal is an engagement of the whole of government. Proposals and actions include strategies also aligned with those of Bello but more precise; to reduce poverty, increasing levels of tax in the top income brackets, increasing corporate tax, national pay scales, guaranteed public employment, and a global tax regime based on total wealth that would place limits on the role of tax havens in hiding wealth.

The key point for our Report here is that these proposals require political decisions to be made at multiple scales – from the local to the global. They will require openness to the kinds of proposals that Atkinson and others are advancing; one that champions a new development paradigm politically, the space to discuss and own these proposals, and the regulatory arm of governments and other organisations to realise these actions. Those working on the Sustainable Development Goals must place in the centre this at the heart of their advocacy for a sustainable, most socially-just and equitable world.

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# What educators need to know about global trade deals

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