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TRADE LIBERALIZATION AND UNIVERSAL ACCESS TO
EDUCATION SERVICES

by

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I. INTRODUCTION

1. Ensuring universal access to quality education is widely recognized as vital to promoting economic, cultural, social and individual development. Countries have adopted different strategies for achieving full participation in primary and secondary education, and for promoting equitable access based on merit to tertiary education. In many cases, publicly provided education co-exists with private education. User fees, in the form of tuition, are not uncommon, particularly at the tertiary level. More recently, trade liberalization and market opening has been seen by some as allowing for the more efficient provision of education and for improvements in infrastructure and capacity, particularly in developing countries where State funding for education is insufficient to meet demands.
2. However, trade liberalization carries significant risks. Trade liberalization can have a powerful influence on existing regulatory measures affecting public education, and may also restrict the available policy space governments need in order to promote the goal of universal access to education. Binding commitments on education services in agreements such as the General Agreement on Trade in Services (GATS) may expose existing measures and can constrain governments from modifying or adopting new regulatory measures in the future.

II. GATS COVERAGE OF EDUCATION SERVICES

3. Education remains one of the least committed sectors in the GATS, in part reflecting the concerns of many countries that trade liberalization may negatively affect quality and accessibility. These concerns are underlined by the broad scope of the GATS. The agreement covers any measure, taken by any government or delegated authority at any level, which affects the supply of a service. Except for Article I:3, the agreement contains no specific exclusion for public services like education, or an exclusion that protects governmental regulatory authority associated with public service systems.¹ It also treats *public* and *private* service providers and delivery as “like”.² Similarly, the GATS treats *non-profit* and *for-profit* service providers the same.³

¹ Notably, there is no exclusion or exemption for the public sector comparable to those provided for the maintenance of public order (Article XIV) or for national security (Article XIVbis).

² There is no differentiation between “public” and “private” services or providers. In fact, where a distinction, it is to ensure that they are treated in a similar manner. Thus a “monopoly supplier of a service” (Article XXVIII(h)) is defined as either a “public or private” sole supplier, and a “juridical person” (Article XXVIII(l); see (d)) means “any legal entity ... whether privately-owned or governmentally-owned”.

³ “Juridical person” is defined in GATS as “any legal entity duly constituted ... whether for profit or otherwise...” (Article XXVIII(l)) In sectors where specific market-access commitments are made, Members are prohibited from

4. The preamble to GATS provides for the “the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives....” However, this preambular language is non-binding and is subordinate to the more specific, binding obligations of the agreement.
5. GATS Article I:3 contains a general exclusion for “services supplied in the exercise of governmental authority”, but this is defined very narrowly as “any service which is supplied neither on a commercial basis, nor in competition with one or more services suppliers.” Consequently, two criteria must apply in order for public education services to be excluded under this Article: education must be provided on a non-commercial basis *and* its delivery must not be in competition with another service supplier.
6. The exclusion therefore does not appear to apply to education services in cases where such services are provided on a non-commercial basis but which are supplied in competition with another service provider. Similarly, the exclusion would not appear to apply to education services that are supplied on a commercial basis even where these services are supplied in the absence of competition with any other service supplier. The exclusion would seem to apply only in those cases where education services are provided by completely non-commercial, absolute monopolies. In most countries, however, education services are normally supplied through a mixture of public and private suppliers, or frequently include certain commercial aspects. A strict reading of Article 1:3 would indicate that such services fall outside the exclusion. In any case, wherever uncertainties about the scope of the exclusion arise, the language will almost certainly be interpreted narrowly. The WTO Council for Trade in Services, for instance, has supported the view that even in the context of sensitive public service sectors such as health and social services, the exclusion “needed to be interpreted narrowly”.⁴
7. Despite the significance of GATS coverage for education services, there are indications that some member governments may not fully appreciate the limited scope of the “governmental authority” exclusion. Many governments may not recognize that certain aspects of education services and their regulation are likely already subject to those GATS obligations that apply horizontally, including most-favoured-nation treatment and transparency.

taking “measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service” (Article XVI:2(e)).

⁴ Council for Trade in Services, Report of the Meeting Held on 14 October 1998, Note by the Secretariat, S/C/M/30, 12 November 1998, p. 4.

8. The WTO Secretariat's background paper on education services⁵ does not directly discuss the application of the "government authority" exclusion in the education sector. However, it concludes that: "Basic education provided by the government *may be* considered to fall within the domain of, in the terminology of the GATS, services supplied in the exercise of governmental authority (supplied neither on a commercial basis nor in competition)," (emphasis added). The statement is noteworthy because it does not deny that basic education may *not*, in fact, fall within the "governmental authority" exclusion depending upon the degree of private sector involvement and competition in a country's education system.
9. In most WTO countries, education services are rarely delivered exclusively by government, but rather through a mix of public and private funding and public, private not-for-profit and private for-profit delivery. A more effective exclusion for "public services" would be needed to protect governments' ability to deliver services through the appropriate mix that they deem suitable to ensuring universal access.

III. SPECIFIC GATS COMMITMENTS ON EDUCATION SERVICES

10. In the Uruguay Round of negotiations, several countries took specific commitments on education services to which, subject to identified limitations, market access and national treatment obligations apply. In the Doha Round, before the suspension of talks, several countries had prepared to table new offers on education services. However, some members may not be aware that, where they have made specific commitments, certain aspects of their public service systems and of their regulatory ability in these areas may be subject to more demanding GATS restrictions of market access and national treatment.
11. Specific commitments are subject to market access obligations which prohibit members from maintaining or adopting measures that restrict the entry of foreign providers into the domestic market. According to Article XVI of the GATS, market access commitments prevent countries, unless otherwise specified, of adopting measures that place quantitative restrictions on service suppliers or the value of transactions, limit foreign capital participation, or restrict the types of legal entity (e.g. non-profit or for-profit) of a service supplier. In this way, market access commitments on education services could limit a number of important development measures including: technology transfer and research requirements; requirements that foreign schools provide

⁵ Education Services, Background Note by the Secretariat, Council for Trade in Services, 29 September 1998, S/C/W/49, p. 4.

benefits to the local economy; and requirements that publicly-funded research and development grants to foreign providers produce benefits in the host economy.

12. Specific commitments on education services, unless otherwise specified, are also subject to national treatment rules (Article XVII). National treatment obligations require WTO Members to “accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own like services and service suppliers.” Where commitments have been taken without limitation in education services, this would prevent Members from treating domestic schools and educational institutions more favourably than foreign ones.
13. The GATS national treatment obligation may therefore apply to subsidies given to public schools. In the case of the hospital sector, the WTO background paper indicates that: “In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII [National Treatment].”⁶ Similarly, in responding to concerns about private service providers seeking a share of public subsidies currently provided only to public services, the WTO Secretariat has indicated that a public service would *not* be excluded if the government were “simply to own a service provider operating in competition with the private sector”.⁷ The implication is that in such circumstances and where relevant specific commitments have been made, private for-profit education providers would have grounds under GATS to seek a share of subsidies that otherwise would be provided only to public, or private non-profit, service suppliers. This could affect attempts by governments to improve access to schools.

IV. DOMESTIC REGULATION

14. The scope of GATS coverage of education services may also be broadened by proposed new disciplines on domestic regulation. The new obligations would build upon Article VI and would cover non-discriminatory measures related to qualification requirements and procedures, technical standards, and licensing procedures and requirements. These categories are defined very broadly by many Members, leaving few service sector regulations untouched.

⁶ Health and Social Services, Background Note by the WTO Secretariat, S/C/W/50, 18 September 1998, p. 11.

⁷ Hartridge, David, Conference on GATS 2000 Negotiations, European Services Forum, Brussels, 27 November 2000, item 3, paragraph 1.

15. Qualification requirements and procedures refer both to the educational credentials or professional/trade certification requirements needed to provide a specified service, and to the ways that the qualification of a service provider is assessed. This is intended to capture all regulations related to examinations, documentation requirements, and verification of qualifications.
16. Technical standards, according to the WTO secretariat, refer not just to regulations affecting “technical characteristics of the service itself,” but also to “the rules according to which the service must be performed.” This is an extremely broad definition that would cover standards related to virtually all service sectors. In the area of education, it would likely apply to quality assurance requirements.
17. Licensing requirements could apply to not only professional licensing but also school accreditation as well as broadcast licenses, licensing of health facilities and laboratories, waste disposal permits, and municipal zoning procedures.
18. There are two key elements to the proposed disciplines: transparency and necessity. While there is no agreement on the reach of the new disciplines as yet, some proposals suggest that regulations covering qualification requirements, technical standard and licensing requirements must be “based on objective and transparent criteria” and must not be “more burdensome than necessary to ensure the quality of the service.” The “necessity test” is highly controversial as it would demand that governments, if challenged, would have to prove that regulations they have adopted are not more trade restrictive than necessary *and* that they are needed to achieve a specific public policy objective. WTO panels considering Article XX (General Exemptions) of GATT have applied a very high standard for the meaning of “necessary.” A member must show that “there were no alternative measures consistent with the General Agreement or less inconsistent with it.”⁸
19. All of these rules would apply to non-discriminatory measures and regulations governing services, including education. That is, even if measures – such as school accreditation and quality assurance requirements – are applied equally to domestic and overseas institutions, they could still be subject to domestic regulation disciplines if commitments have been taken in education services.

Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel adopted on 7 November 1990 (DS 10/R-37S/200). Available on-line at:
http://www.wto.org/english/tratop_e/dispu_e/90cigart.wpf

20. In general, applying a necessity test to domestic regulations ignores the reality of how educational regulations and regulations in all sectors are developed. Rules and standards are developed through compromises that impose neither the greatest burden nor the least burden on service providers. Requiring all regulations to be the least burdensome would limit both the content and the process for democratic decision-making.
21. All Members, but developing countries in particular, require flexibility to maintain and to extend their regulation of education services. As education systems develop, the need for additional regulation may arise. Therefore, it is important for Members to retain the flexibility to apply regulation suited to their developmental goals.

V. CONCLUSION

22. There is little evidence available that WTO members have fully reviewed and assessed the significance of the GATS on their public education systems, or on the regulatory authority of governments, at any level of jurisdiction. In light of the growing recognition of the narrowness of the “governmental authority” exclusion, some governments may consider such detailed reviews not only warranted, but long overdue. These assessments are especially important as some existing GATS obligations extend beyond international trade, reaching to the heart of governments’ domestic regulatory authority.
23. With the suspension of negotiations, Members now have an important opportunity to more fully assess the implications of GATS commitments on universal access objectives in education. Members that fail to perform such assessments run a significant risk of covering education services more broadly than intended, limiting future policy flexibility, and undermining their existing public education systems.