

Note on the Plurilateral Request on Private Higher Education Services

Scope of the Request

- A plurilateral request has been tabled on behalf of New Zealand, Australia, Chinese Taipei, Malaysia and the United States for new or improved commitments on **private higher education** (CPC 923**) and **private “other” education services** (CPC 929**).
- The request is for commitments with **no market access or national treatment limitations** in modes 1 to 2. There is a modest allowance for only a **time limited exception** in mode 3 for limitations on foreign equity participation.
- Targets of the request are also being asked for a **horizontal commitment in mode 4** to allow natural persons who are education providers to enter temporarily.

Private and Public Education Services

- The request is intended to apply only to private higher and other education services. It is recognized that many Members have legitimately been reluctant to make commitments in education services because of the difficulty in defining what is private and what is public education. **Education in most countries is financed by a mix of public and private revenues, and is delivered by both public and private providers.**
- The countries forwarding the request argue that commitments can be taken safely in private education services without exposing public education. This, they say, can be done if Members write in **specific limitations** in their schedules that describe the part of their education systems they are willing to commit.
- Additionally, the demandeurs suggest that members can protect their public education systems by writing into their schedule all measures that fall outside of the scope of the commitment. Such measures might include public loans and grants restricted to citizens and permanent residents only or domestic subsidies to public institutions.
- Members, however, should be aware of the significant risks associated with relying upon specific limitations to protect public education. Specific limitations have to be exhaustive, need to be drafted very carefully, and **will be interpreted very narrowly.**
- Specific limitations also **only protect existing measures, and do not allow for future policy flexibility** without compensation.
- The mandate of GATS to promote the progressive liberalization of all service sectors means that once commitments are made in private education services, **pressure will arise in subsequent rounds** for specific limitations to be removed and for more education services to be covered.

National Treatment

- Members need to fully and critically assess the potential implications of national treatment commitments taken in private education services. National treatment prevents any qualitative difference in treatment afforded foreign and domestic providers. Some common measures in the education sector that would violate national treatment include:
 - conditions relating to nationality (such as the requirement in hiring procedures or admission policies that preference be given to instructors and students who are citizens or permanent residents);

¹ 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

- o regulations that require a minimum number of instructors and staff to be citizens or landed immigrants;
- o tax rules that provide preferential treatment to domestic institutions;
- o restrictions of student loan and student aid programs to citizens or permanent residents; and
- o restrictions of public subsidies to domestic schools or natural persons.

Market Access

- Full market access commitments on private education services would force many Members to eliminate measures designed to meet legitimate domestic policy objectives and development goals.
- Measures at risk include any **rules that restrict the presence of foreign providers**. This includes quantitative limits on the number of providers allowed to operate. However, many Members for instance place limits on the number of medical students and schools in order to control the supply of doctors and to meet identified needs and gaps.
- Other measures that could help countries develop their domestic education capacity could be at risk. Such measures include:
 - o technology transfer and research requirements;
 - o economic needs tests for private education providers;
 - o requirements that skilled foreign employees provide training to locals; and
 - o requirements that research and development grants and subsidies to foreign providers produce benefits in the local economy.
- Market access obligations also prevent Members from adopting **measures that restrict or require specific types of legal entity** through which a supplier may provide a service. Many Members, however, have adopted measures that grant preferential access and treatment to private not-for-profit educational providers over for-profit entities.
- Market Access obligations also prohibit limits being placed on the number of service suppliers in the form of monopolies and **exclusive service suppliers**. In the area of education, Members need to consider whether in their specific cases the authority to grant degrees and diplomas to a limited number of institutions is tantamount to creating exclusive service suppliers and, therefore, inconsistent with market access obligations.
- If a Member's domestic higher education institutions are deemed to be monopolies or exclusive service suppliers, and if they compete directly with foreign providers, then the potential exists for charges of cross-subsidization.

Accreditation Requirements

- The request argues that accreditation requirements for educational institutions and programs would not be affected by commitments taken. This is true, however, only with respect to market access and national treatment. As long as accreditation requirements are non-discriminatory and objective, they do not violate market access or national treatment obligations.
- However, Members need to be aware of how negotiations aimed at developing new disciplines on domestic regulation may affect accreditation requirements. Under the proposed rules on non-discriminatory measures, institutional accreditation procedures may be interpreted to constitute a licensing requirement. If that is the case, then accreditation requirements may be subject to a **"necessity test"** that would require Members 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.
- All of these rules would apply to **non-discriminatory measures** and regulations governing services, including education. That is, even if measures – such as university and college accreditation 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.

Conclusion

- The plurilateral request, while focused on private higher and other education services only, is still quite sweeping in scope. It would take away many measures that governments use to regulate private education and open the door to deeper commitments in the future.
- All Members, but particularly developing countries, require the flexibility to maintain, adapt, and extend their regulation of education services in response to changing domestic needs.
- Because there are so many concerns and unanswered questions about the impact of the proposed commitments on private education, and because there is so much at stake, all Members should adopt a precautionary approach. Members should neither make nor seek any commitments on education as a sector.