

methods of negotiation. This means that education policymakers and senior leaders need to develop a close and ongoing relationship with the lead trade negotiators and GATS experts in their country to become better informed and to influence future trade negotiations that involve education. Trade negotiators cannot be expert in all sectors, and thus the education sector has a role to play in providing analysis of the potential opportunities and benefits and/or the potential risks and disadvantages of trade in education services for their national higher education system. ■

GATS and Education Services: The Fallout from Hong Kong

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After six days of intensive and often acrimonious negotiations, trade ministers from the 149 member countries of the World Trade Organization reached an agreement in December 2005 to restart stalled global trade talks. While the breakthrough in agricultural subsidies was clearly the centerpiece of the deal struck in Hong Kong, the final declaration adopted by the Ministerial Conference also has important consequences for ongoing negotiations on services, including education services.

The controversial section on services in the declaration—Annex C—will rapidly accelerate General Agreement on Trade in Services (GATS) negotiations over the next year. Responding to frustrations expressed by some developed countries about the perceived slow pace of GATS talks, WTO trade ministers endorsed a controversial proposal to transform the nature of negotiations in a way that will put new pressure on members to deepen commitments across all sectors. Of particular interest to the education community is the fact that the declaration calls on members to develop sweeping new disciplines on domestic regulation before the end of the current round of talks—disciplines that could have a profound impact on everything from accreditation procedures to quality assurance standards.

PLURILATERAL NEGOTIATIONS: INTENSIFYING GATS TALKS

The Ministerial Declaration calls for a major change in the way services negotiations take place. Instead of the traditional one-on-one bilateral GATS talks, the declaration gives a mandate to members to enter into “plurilateral” request-offer negotiations.

It is already an intimidating prospect for many nations to face powerful *demandeur* countries one-on-one as in the bilateral request-offer process. Now, under a plurilateral approach, individual members will have to confront a group of powerful countries that represent the most aggressive *demandeurs* in a particular sector. As intended, this will greatly intensify pressure on many countries to make GATS commitments in sensitive service sectors.

The essence of the proposed plurilateral talks is to give a free rein to the so-called “friends” groups. Until now, these groups have been largely informal, ad hoc, industry-driven coalitions of countries that are *demandeurs* in key sectors, including education. New Zealand, for instance, is leading a “friends of private education exports” group that is pressing for national treatment and freer market access for private providers.

With a mandate to undertake plurilateral negotiations, members of the friends of private education exports group will now work collectively to develop model schedules of GATS education commitments that they would like to see other countries adopt. These education schedules will form the basis for subsequent negotiations. The schedules will entirely reflect the choices and interests of the *demandeurs*, putting target countries in a difficult and largely defensive position. In effect, target countries will be forced to negotiate over exceptions for particular government measures affecting education, within a framework dictated by the *demandeurs*.

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DOMESTIC REGULATION: UNDERMINING REGULATORY AUTHORITY

The second key issue arising from the Hong Kong Ministerial Declaration is the decision to conclude new disciplines on domestic regulation before the end of the current round. GATS Article VI:4 commits members to develop any “necessary disciplines” to ensure that “measures relating to qualification requirements and procedures, technical standards, and licensing procedures do not constitute unnecessary barriers to trade in services.” The aim of these disciplines is to require members to prove that these regulatory measures are “not more burdensome than necessary to ensure the quality of the service.”

The proposed disciplines explicitly target nondiscriminatory measures—that is, regulations that treat local and overseas providers the same. In other words, even if a regulatory measure is consistent with the nondiscrimination rules of GATS and the GATS market-access prohibitions, it could still be chal-

lenged under the proposed restrictions on domestic regulation.

The implication is clear: literally thousands of nondiscriminatory public interest regulations would be exposed to WTO oversight and potential challenge. At the stroke of a negotiator's pen, every WTO member government's existing GATS commitments—including those in education services—would be deepened.

The scope of these proposed disciplines is very broad. Many types of government measures covering education and other public services could be affected. Licensing requirements, for example, would apply not only to professional licensing but also to university and school accreditation, as well as broadcast licenses, licensing of health facilities and laboratories, waste disposal permits, and municipal zoning procedures. 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 a sweeping definition that would cover standards related to quality assurance requirements, health and safety regulations, sustainable environmental practices, and other vital regulations.

Surprisingly, this is not yet a hot-button issue among trade

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negotiators or even with many nongovernmental organizations. However, those of us who did flag these concerns with delegations in Hong Kong soon found signs of a growing unease with the planned rules on domestic regulation. The proposed disciplines, especially the necessity requirement, would unduly interfere with governments' rights to regulate services.

A VICTORY FOR THE DEMANDEURS

The ministerial mandate for members to engage in plurilateral negotiations and to develop disciplines on domestic regulation represents a major victory for the developed world. With respect to education, it means a powerful grouping of *demandeurs* led by New Zealand, the United States, and Australia will be able to place intense pressure on developing countries that are seen as potential new markets for education exports. At the same time, the capacity of developing countries to respond to a liberalized and open education marketplace will be severely constrained if new legally binding disciplines are imposed on their domestic regulatory authority.

Education services are highly regulated in most countries to promote quality, protect students, and to ensure that domestic social, economic, and cultural priorities are met. All countries, but developing nations 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 developing countries to retain the flexibility to apply regulations suited to their developmental goals. For these reasons, WTO members must seriously reconsider and reject any intrusion of trade law into domestic education policy. ■

Transnational Higher Education: A South African Perspective

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In the late 1990s, transnational education providers recognized South Africa as a major growth area for higher education and entered into various collaborative arrangements with local public and private institutions or offered the programs themselves. Prior to this, the apartheid state regulated the higher education sector, and only public providers were allowed to offer higher education in South Africa. In the early stages of the postapartheid period, the Department of National Education estimated that about 50 transnational providers had begun to operate in South Africa in some form or another.

The postapartheid constitution enshrined the provision rights of private and transnational providers. In 2000, a new regulatory framework was developed and implemented to integrate both private and transnational providers into the single coordinated national landscape of higher education.

DO THEY PROVIDE MORE AND DIFFERENT HIGHER EDUCATION?

According to the new regulatory framework, all private and transnational providers had to be registered by the Department of National Education, have their qualification registered on the national qualification framework by the South African Qualification Authority, and quality assured by the Higher Education Quality Committee. In January 1999, the Department of National Education initiated the process of the registration of private higher education institutions, including