

## **GATS – GENERAL AGREEMENT ON TRADE IN SERVICES**

### **U.S. UPDATE ON THE GATS NEGOTIATIONS AND ISSUES FOR HIGHER EDUCATION: MARCH 2007**

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#### **I. BACKGROUND**

The American Council on Education (ACE) has published two background papers that provided general information about the General Agreement on Trade in Services (GATS), detailed the status of the Doha Round negotiations, and outlined the potential adverse consequences of GATS on fundamental features of U.S. higher education available on the ACE website.<sup>1</sup> This document updates those earlier papers and also does the following: (1) reviews the timetable and process for the Doha Round negotiations; (2) explains the current status of offers made by the United States and other WTO members with respect to higher education services; and (3) describes the efforts ACE has made to advise the Office of the U.S. Trade Representative (USTR) about the important interests of U.S. higher education institutions that could be at risk in the GATS negotiations.

#### **II. CURRENT STATUS OF THE DOHA ROUND NEGOTIATIONS**

The current set of WTO negotiations has been beset by difficulties. The Doha Round, which is named after the Doha Development Agenda that provided the original mandate for the negotiations, was intended to spread the benefits of international trade to the least-developed countries, lower tariffs and non-tariff barriers to trade, and open new markets for goods and services from developed countries. Balancing these multiple goals has proven challenging.

The Doha Round was initiated in March 2001 and has undergone several fundamental changes over the past six years. This has happened in part because ministerial meetings (conferences attended by the Trade Ministers of all WTO members) held in Cancun in September 2003 and in Hong Kong in 2005 failed to produce the progress necessary to advance the Round toward a satisfactory conclusion. Because progress in the Round has been difficult and members have failed to meet prescribed negotiating deadlines, WTO Director-General Pascal Lamy officially suspended the negotiations in late July 2006. The negotiations remained

suspended until late January 2007, when Director-General Lamy announced that the negotiations would fully resume in Geneva.

### **A. Scope of the Doha Round Impairs Progress**

One of the main impediments to the success of the Doha Round is its ambitiously broad scope. The Round contains three primary areas of negotiation: (1) agriculture; (2) non-agricultural market access (or NAMA); and (3) services. Agriculture traditionally has been the most difficult arena for WTO members to reach consensus on, and the Doha Round has proven to be no exception. In particular, the United States and the European Union have spent much of the last five years criticizing each other in the press for failing to offer the reductions to their agricultural support and subsidy programs that are necessary to make the Round viable. Further complicating the negotiations is the fact that several WTO members have refused to reduce barriers to trade on certain sensitive agricultural products. Additionally, while developed countries entered the Doha Round expecting to expand access to their agricultural and other markets to the least-developed countries, they also expected that markets in developing countries, particularly Brazil and India, would become more open to their exports of goods and services. This assumption has been sorely tested and has complicated the negotiations.

### **B. Development of the Services Negotiations**

Efforts to expand the coverage of the General Agreement on Trade have also faced obstacles. As detailed in ACE's earlier papers, the services negotiations began in 2000, even before the promulgation of the Doha Development Agenda, the statement that provided the mandate for the negotiations. The mechanism for negotiating the GATS differs significantly from the talks concerning the other two focus areas of the Doha Round, in which each WTO member must accept the full package of concessions being offered by all other WTO members.

The services negotiations are conducted on a sector-by-sector basis and consist of a series of requests and offers which can be treated separately rather than as a package. There are 12 sectors in the GATS, of which, education is one. Each WTO member submits requests to its trading partners, either individual members or groups of members, in order to obtain a new commitment in a new sector, to specify a barrier to be removed, or to ask for the removal of an exemption to Most Favored Nation treatment (i.e., to ensure equal and consistent treatment of all parties to the agreement).<sup>2</sup> Members then may elect to submit offers in response to the requests. Other WTO members are not required to match a particular offer, nor must they respond to an offer with a concession in a different service sector. As a result, even though a WTO member may want to open a particular service sector to trade and thus may submit a request to its trading partners and/or make an offer to entice other WTO members to respond in kind, the final outcome of the negotiations does not depend on trade liberalization in any particular services sector. There is therefore no guarantee that the GATS negotiations will result in a broad expansion of services trade, even though that is one of the primary objectives of the Doha Round.

A scarcity of offers aimed at opening specific services sectors to foreign competitors and a lack of urgency have thus far marred progress in the GATS negotiations. WTO members have submitted 69 initial offers since March 31, 2003, and 30 revised services offers since

May 19, 2005. The United States has submitted both initial and revised services offers, including offers with respect to higher education.<sup>3</sup> However, the current pace of the services negotiations is slow and remains dependent on whether a favorable outcome can be reached in the agricultural and non-agricultural market access parts of the Doha Round. WTO members currently have agreed to prepare revised services offers for delivery on short notice in the event of a breakthrough in the other two areas of the Round, but no firm deadline has been established for submitting revised offers. According to Fernando de Mateo, the Mexican WTO Ambassador who is chairing the services negotiating group, the next round of services talks was scheduled to take place from February 26 to March 2.<sup>4</sup>

### **III. STATUS OF THE U.S. OFFER ON HIGHER EDUCATION**

The educational services sector includes higher education and four other educational areas: (1) primary, (2) secondary, (3) adult (covering education for adults outside the regular education system), and (4) other (covering all other education services not covered in the other categories, but excluding those related to recreation matters).

#### **A. The Initial U.S. Offer on Higher Education Services (2003)**

The United States made its first offer on higher education services in March 2003.<sup>5</sup> This offer contained specific language about which ACE has voiced its continuing concerns, particularly the possibility that public and private higher education institutions could be subject to differential treatment pursuant to the GATS. However, the offer also addressed many of the concerns that ACE and the Council for Higher Education Accreditation (CHEA) expressed to the USTR in meetings in early 2003.

Throughout its dialogue with USTR, ACE has sought to ensure that valued practices of U.S. higher education do not become subject to WTO dispute resolution pursuant to the GATS. ACE seeks to avoid trade agreements that cause WTO members to begin challenging U.S. federal and state laws, regulations, practices, or policies of higher education institutions, if a U.S. offer on higher education services becomes a binding U.S. WTO commitment. These concerns are outlined in more detail in the document *Higher Education and GATS*, in a 2005 update, and in the recent letter sent by ACE and CHEA to U.S. Trade Representative Susan Schwab (available on the [ACE web site](#)).

#### **B. The Revised U.S. Offer on Higher Education Services (2005)**

The United States submitted revised offers in the GATS negotiations on May 31, 2005, including one on higher education services. Although USTR has not made the revised offers publicly available, the offer related to higher education was attached to a 2006 report released by Public Citizen.<sup>6</sup> The revised U.S. offer incorporates several of ACE's recommendations to USTR intended to protect fundamental features of the U.S. higher education system from interference stemming from the GATS. For example, the revised U.S. offer contains language designed to minimize potential "national treatment" challenges, as outlined in Article XVII of the GATS. The national treatment principle requires WTO members to ensure that their laws, regulations, and policies do not favor domestic interests over foreign interests.

The “limitation on national treatment” included in the revised U.S. offer on higher education states:

The granting of U.S. federal or state government funding or subsidies may be limited to U.S.-owned institutions, including land grants, preferential tax treatment, and any other public benefits; and scholarships and grants may be limited to U.S. citizens and/or residents of particular states. In some cases, such funding may only be used at certain state institutions or within certain U.S. jurisdictions.<sup>7</sup>

This language provides two important constraints on the ability of WTO members to challenge the policies of U.S. higher education institutions, as well as the laws, regulations, and policies of federal and state government, on national treatment grounds. First, the revised U.S. offer would prevent national treatment challenges to grants or other subsidies from federal or state governments to U.S. higher education institutions (that is, the United States would not be required to extend federal and state government subsidies to foreign providers). And second, the revised U.S. offer exempts from national treatment those decisions of U.S. higher education institutions related to scholarships and grants. ACE welcomes this language from USTR and appreciates its decisions to listen to the higher education community’s concerns and to revise the U.S. offer to exempt these fundamental areas from national treatment scrutiny as a result of the GATS.

The revised U.S. offer does little, however, to protect the autonomy of U.S. institutions of higher education from potential challenges under the GATS. Rather, a footnote to the revised USTR offer states:

For transparency purposes, individual U.S. institutions maintain autonomy in admission policies, in setting tuition rates, and in the development of curricula or course content. Education and training entities must comply with requirements of the jurisdiction in which the facility is established. In some jurisdictions, accreditation of institutions or programs may be required. Institutions maintain autonomy in selecting the jurisdiction in which they operate, and institutions and programs maintain autonomy in choosing to meet standards set by accrediting organizations as well as to continue accredited status. Accrediting organizations maintain autonomy in setting accreditation standards. Tuition rates vary for in-state and out-of-state residents. Additionally, admission policies include considerations of equal opportunity for students (regardless of race, ethnicity, or gender), as permitted by domestic law, as well as recognition by regional, national, and/or specialty organizations; and required standards must be met to obtain and maintain accreditation. To participate in the U.S. student loan program, foreign institutions established in the United States are subject to the same requirements as U.S. institutions.<sup>8</sup>

This footnote clearly enumerates several features of fundamental importance to U.S. institutions. However, it does not specifically exempt these important features from dispute settlement

challenges as a result of the GATS. Moreover, if this language was designed to protect these important features of U.S. higher education from GATS interference, the placement of this language in a footnote severely undermines such an effort. Importantly, the WTO Committee on Specific Commitments for the GATS has stated that there should be “no need for footnotes” in WTO services commitments and that any language “intended to define the scope or extent of a commitment should be inscribed in the body of the schedule. Footnotes should in principle be avoided.”<sup>9</sup> Therefore, this footnote to the revised U.S. offer simply does not safeguard important features of U.S. higher education from potential WTO challenges as a result of the GATS. Important practices of U.S. colleges and universities could still be at risk from GATS challenges if the revised U.S. offer becomes effective.

#### **IV. ACE ENGAGEMENT WITH THE USTR ON THE GATS AND CONTINUING CONCERNS ABOUT THE IMPACT OF NEGOTIATIONS ON HIGHER EDUCATION**

Since 2000, ACE has monitored the progress of the GATS negotiations. ACE has reviewed the offers presented by WTO members in the GATS negotiations concerning higher education and has collaborated with other U.S. higher education associations, including CHEA, to provide input to the USTR. These efforts have been designed to provide USTR, the principal negotiator of U.S. international trade agreements, with a better understanding of the complexities of higher education, the unique strengths of the U.S. higher education system, and the views and concerns of the U.S. higher education community regarding the GATS. In 2001 and 2003, ACE submitted letters to the USTR expressing the concerns of higher education about the GATS (available on the [ACE web site](#)). To summarize briefly, the major concerns are the following:

- The 2005 U.S. offer does not protect the autonomy of U.S. higher education institutions from potential challenges under the GATS.
- Public and private higher education institutions could be subjected to different treatment as a result of the GATS, because state institutions would be considered as exercising powers delegated by the government.
- The rights of states to regulate and promulgate policies could be subject to challenges by the GATS.

ACE has recently increased its focus on the GATS negotiations in the Doha Round and on the offers made by the United States and other WTO members in the negotiations concerning the higher education services sector. This enhanced attention is prompted by two primary reasons: First, the Doha Round negotiations, which were generally dormant in the second half of 2006, have suddenly become active. This has happened in part because the Bush administration has made completion of the Doha Round a priority, and therefore, USTR Representative Schwab has, since the beginning of 2007, pushed the United States’ negotiating partners to accelerate the talks.

Over the past few months, USTR officials have emphasized the need for the country’s negotiating partners to make new offers in the GATS negotiations. However, they have thus far refused to change the current U.S. offer on higher education services, despite requests from ACE and CHEA to do so. Given the possibility that the Doha Round could advance rapidly and reach

a sudden conclusion, ACE is currently of the view that U.S. higher education institutions must now prepare to voice their dissatisfaction with the current U.S. offer on higher education.

## V. ACE AND CHEA RECOMMENDATION TO THE USTR

ACE and CHEA have asked USTR to carve out all accredited degree-granting postsecondary education institutions, as well as accrediting bodies, from the scope of any final U.S. offer on higher education. This type of exclusion would still enable the United States to make a robust offer that covers educational testing services and services offered by non-degree granting institutions (e.g., certificate programs). In so doing, it would assist the handful of institutions and companies that have expressed an interest in expanding the coverage of the GATS, while at the same time protecting the vital interests of thousands of accredited, degree-granting public and private institutions of higher education in the United States.

## VI. CONCLUSION

ACE continues to monitor the GATS negotiations in the Doha Round on behalf of its members. Although the ultimate outcome of the Doha Round remains unclear, ACE remains vigilant in its efforts to protect the vital interests of the U.S. higher education system and believes that the revised U.S. offer on higher education could have adverse effects on those interests. The remainder of 2007 will be crucial to the negotiation of any final Doha Round agreement and also to the efforts of ACE to persuade USTR to exclude all degree-granting higher education institutions and accrediting bodies from the scope of any final U.S. offer on higher education pursuant to the GATS.

## NOTES

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<sup>1</sup> See American Council on Education, “GATS - General Agreement on Trade in Services: Higher Education and the General Agreement on Trade in Services (GATS)” (last updated Apr. 27, 2005), available at <http://www.acenet.edu/AM/Template.cfm?Section=International&Template=/CM/ContentDisplay.cfm&ContentID=19748>.

<sup>2</sup> See World Trade Organization, Technical Aspects of Requests and Offers (Feb. 20, 2002), available at [http://www.wto.org/english/tratop\\_e/serv\\_e/requests\\_offers\\_approach\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/requests_offers_approach_e.doc).

<sup>3</sup> See World Trade Organization, Developments in the Services Negotiations, at [http://www.wto.org/english/tratop\\_e/serv\\_e/s\\_negs\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm).

<sup>4</sup> See, e.g., “Eyeing Ag Breakthrough, WTO Members Urge Governments to Revise Services Offers,” BNA WTO Reporter (Feb. 5, 2007).

<sup>5</sup> The first U.S. offer on the higher education services is available on the USTR web site. See Office of the United States Trade Representative, U.S. Services Offers in WTO Trade Talks, available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2003/March/US\\_Services\\_Offers\\_in\\_WTO\\_Trade\\_Talks.html](http://www.ustr.gov/Document_Library/Press_Releases/2003/March/US_Services_Offers_in_WTO_Trade_Talks.html) (Mar. 31, 2003). The revised U.S. offer has never been made public, but

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USTR announced that it was submitted to the WTO prior to the May 31, 2005, deadline for revised offers. See Office of the United States Trade Representative, US Submits Revised Services Offer to the WTO, available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2005/May/US\\_Submits\\_Revised\\_Services\\_offer\\_to\\_the\\_WTO.html?ht=](http://www.ustr.gov/Document_Library/Press_Releases/2005/May/US_Submits_Revised_Services_offer_to_the_WTO.html?ht=) (May 31, 2005). A copy of the revised offer was posted on the Internet by Public Citizen. See Public Citizen, U.S. Negotiators Posed to Sign Up Higher Education “Service Sector” to World Trade Organization Jurisdiction in 2006, Jeopardizing Public Subsidies, Scholarships and Loans, as well as Other Education Policies (Memorandum from Mary Bottari, Public Citizen’s Global Trade Watch Division to U.S. Higher Education Officials, State Regulators, Educators, Students and Interested Parties) (July 15, 2006), available at <http://www.citizen.org/trade/> [hereinafter Public Citizen GATS Education Memo].

<sup>6</sup> See Public Citizen GATS Education Memo at 18.

<sup>7</sup> See Public Citizen GATS Education Memo at 18.

<sup>8</sup> See Public Citizen GATS Education Memo at 18.

<sup>9</sup> See World Trade Organization, Revision of Scheduling Guidelines (Note by the Secretariat), MTN.GNS/W/164 and 164/Add.1 (Mar. 5, 1999) (emphasis added), available at <http://docsonline.org/GEN>.