

Adverse Consequences to the Traditional U.S. Higher Education Services Sector Resulting from the U.S. Offer in WTO Services Negotiations

We understand that the requests for commitments submitted by the U.S. to other countries last June call for those countries to “provide full commitments for market access and national treatment in modes 1, 2, and 3 for higher education and training services, for adult education and for “other” education.” The U.S. request also states, “Consistent with the commitments, countries remain free to review and assess higher education and training, by governmental or non-governmental means, and to cooperate with other countries, for purposes of assuring quality education.” If the substance of the U.S. offer is consistent with that request, we believe it will have a serious negative effect on U.S. higher education service providers.

In a June 2002 meeting with former Assistant USTR Joe Papovich, the American Council on Education and the Council for Higher Education Accreditation identified three unique features of the U.S. higher education sector that must be taken into account in formulating the U.S. negotiating position in the GATS talks:

1. **Substantial Mix of Public and Private Institutions.** The U.S. has greater diversity among its institutions than any other country. In absolute numbers there are more private (not for profit, independent) institutions than public institutions. But public institutions account for a higher percentage of total enrollment. There is significant growth in the for-profit sector of higher education and some public institutions have for-profit arms.
2. **Institutional Autonomy.** Higher education institutions enjoy enormous autonomy in their operations and academic decision-making. This is particularly true for the large number of small, private (not for profit, independent) colleges. But even in those states where a university is a part of government, state legislatures have limited control over the institution.
3. **Decentralized Governance.** Unlike the situation in many other countries, the U.S. federal government does not control institutions of higher education. To the extent that education services are regulated, they are regulated at the state, not federal, level. And even the states avoid matters relating to academic quality, preferring to rely on non-governmental accrediting agencies for that purpose.

A U.S. offer that is consistent with the request described above would undermine all of these features of the highly successful U.S. higher education sector. It would undermine institutional diversity by imposing a greater degree of regulation on public institutions of higher education than would apply to private (not for profit, independent) institutions. The GATS rules apply to measures taken by governments and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities (GATS Art. I.3(a)). Some public institutions

operate pursuant to delegated powers of state governments. Thus, every measure taken by such institutions would be directly subject to the full national treatment and market access commitment proposed by the U.S. For example, if such an institution agreed to grant credit for a course of study taken at another U.S. institution, but not for a similar course of study offered at a foreign institution, it would be vulnerable to a charge of violating the national treatment obligations of GATS Art. XVII and could be required to grant credit for the foreign institution's course. It is not clear whether substantial government funding alone would constitute grounds for deeming an education institution to be a non-governmental body exercising government-delegated powers. If so, the number of institutions whose individual academic decisions would be subject to GATS scrutiny will expand.

In contrast, because private (not for profit, independent) institutions of higher education do not exercise government-delegated powers, their actions do not constitute "measures" within the meaning of GATS. These institutions could, without fear of challenge, grant credit for a course offered at a domestic institution but not from a foreign institution. Our membership would find such discriminatory treatment of public and private (not for profit, independent) institutions and interference with institutional autonomy intolerable. To avoid this result, the U.S. should make any offer contingent upon acceptance of the interpretation that no U.S. higher education service provider exercises power delegated by governments or governmental authorities within the meaning of Art. I.3(a).

The U.S. offer also threatens the decentralized governance of higher education institutions. As we have previously noted, state governments rely on non-governmental accrediting agencies for quality assurance purposes. As a matter of practice, if not law, accreditation is a necessary predicate to supplying higher education services in the U.S. For this reason and in light of the language of the U.S. request quoted above, an unqualified offer to undertake full national treatment and market access commitments could be interpreted as imposing upon such accreditation agencies the obligations of national treatment and market access with respect to their own individual actions. Thus, a refusal of an accrediting agency to undertake a review of a foreign institution for accreditation purposes could be challenged as a violation of national treatment. Similarly, in the U.S., for-profit universities must have boards of governors independent of the corporations that own the university in order to be eligible for accreditation. This practice could be challenged as a violation of GATS Art. XVI.2(e), which prohibits measures which require specific types of legal entity or joint venture through which a service supplier may supply a service. Therefore, the U.S. offer should expressly state that the commitment offered does not apply to the actions of U.S. accreditation agencies.

As these examples demonstrate, a U.S. offer that is not crafted with great care and precision would lead to GATS obligations that will fundamentally alter the U.S. higher education services sector. Moreover, these alterations will not improve the

quality or scope of services offered to consumers. On the contrary, they are likely to lead to a decrease in quality of service.