

# Trade in Education Services under GATS

## Implications for Higher Education in India

*While universal elementary education is the state's constitutional obligation, development needs require that the skills of a nation's human resources are constantly updated and renewed, with increasing access to the wider knowledge society. Skills, knowledge and information are exchanged between countries which are thus partners in a process to optimise gains. Understanding these and several other implications for India in the context of GATS poses not only a challenge, but also an opportunity to formulate new strategies with regard to domestic regulations.*

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The objective of the present paper is to bring to the fore current issues relating to trade in education services under GATS especially higher education. It also highlights its implications for higher education in India. There are suggestions on institutional processes to deal with the internationalisation of higher education in India. Section I deals with issues relating to definition and modes of supply. Section II analyses subjectwise implications of trade in higher education under GATS. The focus of Section III is on domestic regulation and recognition of degrees in internationalising higher education in India. Section IV deals with the technical aspects of limitations to market access and national treatment towards scheduling that needs to be explored in depth and subjectwise. The concluding section highlights the priority area of action.

Before proceeding to the current controversies relating to higher education under GATS, some introductory remarks may be made.

(i) WTO is rule-based. It is an effort to bind all member states to certain minimum rules legally covered under different articles of GATS. This was considered necessary because markets under bilateral and multilateral agreements may behave in a way that favours some but acts against others. Under WTO, a minimum commitment is made to all the member states, thus there is no scope for discrimination. Thus one can predict the market under WTO.

(ii) WTO, unlike IMF and World Bank, is not based on voting rights in proportion to the subscriptions made by member countries. Within WTO, each member state is free to make offers and subsequently to commit to trade in particular services. Hence there is scope for revisions in offers through various rounds of negotiations. These revisions, however, should further the cause of progressive liberalisation rather than put up barriers to trade in services.

### I Definitions and Modes of Supply

Definition: In the services sectoral classification of WTO, education services is mentioned along with five subsectors. These subsectors with corresponding central product classification numbers are (i) primary education services (921); (ii) secondary education services (922); (iii) higher education services (923); (iv) adult education services (924) and (v) others (929).

The subsectoral classification is further subject to modifications in the light of developments in education services negotiations. As per the existing definition of higher education services,<sup>1</sup> it includes two distinct groups. One relates to the teaching of practical skills in secondary, sub-degree technical and vocational education institutions and the other deals with more theoretical educational services provided by universities, colleges and specialised professional skills. Any member may also give its own classification of educational services with a substantially detailed definition.

The issue of definition of higher education is far from settled. For instance, the US has requested the definition. Firstly, the definition of higher education is proposed to be expanded to include training, testing and out of university education for either skill development, leisure or for any other activity. It is also proposed to cover education and advertising agencies engaged in recruitment of students under education services. Secondly, it recognises the fact that a great deal of education and training is for profit and occurs outside the university system. Therefore higher education is proposed to be extended to cover all kinds of profit-making institutions outside the traditional university setting, which runs on non-profit basis.

It is also important that the higher education subsector may be further classified into various disciplines. The classification of higher education into broad, general, professional and technical categories is also imprecise. Hence it is desirable to further classify it into arts, science, commerce, law, agriculture, medical, management, engineering, architecture, homeopathy, ayurvedic, yoga, rural education and so on. The specification of subjects is considered necessary because the subjectwise commitments may be offered initially for negotiation and there may be no commitment in specific areas such as philosophy, history and law. Thus a detailed classification areawise would help make a positive list, where some commitments could be made, and also draw up a negative list where no such commitment is desired to be made.

It is also important to note that the scope of the concept of education services should not be widened to take into account education, training or testing services that fall outside the formal education sector. Although some of the education services in higher education fall outside the government sector, yet from the point of commitment India should limit its offer to cover

only government recognised providers of education from abroad i.e., public good and exclude ‘pure’ profit-making enterprise which is not part of public education.

*Modes of supply:* The four modes of supply of education services are referred to in GATS negotiations as set out in the Article I: 2. The modes are essentially defined on the basis of the origin of service supplier and consumer, and the degree and type of territorial presence, which they have at the moment the service is delivered. The following description will help illustrate the four modes of supply under education services.

*Mode I – Cross border supply:* In this type of education service, cross border supply covers all services provided through distance or through telecommunications or mail and through services embodied in exported goods (i.e., services supplied in or by a physical medium, such as a computer diskette or drawings). In such cases, the service supplier is not present within the territory of the member where the service is delivered.

Under mode I, there are two possibilities of trade. The first is through distance education offered by universities or through national open universities either via print or telecommunication or through computer diskette or by all the above methods. The second of course relates to all education services supplied by institutes other than universities or national open universities. The opening of mode I in the former case may be permitted through universities or the national open university. Furthermore, the opening of mode I should also have positive and negative list of subjects/disciplines. For example, while technical education such as engineering or medical or architecture, etc., may be put in the negative list whereas management, for example, could be put in the positive list subject to the condition of providing it through the national open university.

It is important that the subjectwise implications of opening up education services through mode I should be debated among academics. Furthermore, it should be restricted to only public service providers such as universities or national open university. Mode I should not be permitted through private or profit for channels.

*Mode II – Consumption abroad:* This mode of supply is often referred to as “movement of the consumer”. The essential feature of the mode is that the service is delivered outside the territory of the member making commitment. Often the actual movement of the consumer i.e., students is necessary as in education services. It should be noted that a member might only be able to impose restrictive measures affecting its own consumers (students), not those of other members, on activities taking place outside its jurisdiction. For example, if India opens mode II, then it may impose limitations with respect to mode II on market access or national treatment that affects students coming from abroad to India (i.e., its own consumers). India cannot impose restrictions affecting students going to say, US, for studies there.

There is no doubt that opening of mode II has various implications for higher education. Educational institutions of developed countries have competitive advantages in relation to the educational institutions of developing countries. Thus if India makes full commitment in higher education, then the educational institutions in India should be such as to attract foreign students in India. Do our educational institutions have international curricula, world class, infrastructure and facilities such as library, hostels, equipment? If not, making full commitment in mode II is not of any advantage. Statistics reveal that the numbers of foreign students coming to India has been falling in recent years. Even IITs,

though they may be world class in terms of academic standards, do not have facilities in terms of hostels, classrooms, etc., of international standards. Advanced countries taking full commitment in mode II have been able to attract foreign students and earn huge amount of money. Since restriction under mode II by India does not restrain the flow of students to any other country, but only to its own country, there is no point in restricting mode II. Taking full commitment and developing institutions in India to offer world-class higher education services may have immense potential to attract foreign students in India. Of course, the present scenario is that in the absence of any regulation of foreign education providers, countries like US, UK, Canada and Australia are employing vigorous advertising methods and sales campaigns to attract Indian students abroad.

*Mode III – Commercial presence:* It refers to the actual presence of foreign investors in a host country. This mode covers not only the presence of juridical persons in the strict legal sense, but also that of legal entities, which share some of the same characteristics. It thus includes *inter alia* corporations, joint ventures, partnerships, representative offices and branches (see definitions; Article XXVIII).

The important ways in which this mode can be activated are opening an institution or branch campuses abroad or franchising or even through twinning. Indian higher educational institutions may offer programme or a qualification degree abroad and may allow outside educational institutions to offer educational programmes and qualifications. Opening of this mode, too, has various implications and therefore, it is in the interests of developing countries to make only partial commitments and impose various limitations so that Indian higher education structure is benefited from trade through this mode.

India has some competitive advantages in certain areas of education such as yoga, ayurveda, and sanskrit. Besides it has also the potential to develop many areas such as engineering, management, medical institutions or their branch campuses abroad. Before providing any commitment of trade through this mode, we must assess our strengths and weaknesses in different disciplines. We must open up where we have strengths so that we are not put to disadvantage when we open our market. Besides we can also invest in foreign countries in their areas of strength. In weaker areas, there should be restrictions but where quality institutions are required, they may be permitted to establish institutions provided quality education is provided by foreign education institutions. One limitation that a country like India should impose is that only public education providers should be permitted through mode III provided various other conditions such as mutual recognition of degrees are fulfilled. Of course developed countries want this mode so as to exploit the market of developing economies and therefore prefer to have minimum limitations or restrictions to be imposed by developing countries. For example, MIT in US is in the process of establishing a locally financed subsidiary of its faculty of engineering in Malaysia.

*Mode IV – Presence of natural persons:* This mode covers natural persons who are themselves service suppliers as well as natural persons who are employees of service suppliers.

Mode IV in GATS refers to the ‘supply of a service by a service supplier of one member, through presence of natural persons of a member in the territory of any other member’<sup>2</sup> ‘The annex on the movement of natural persons’ in the legal texts of the Uruguay Round of Multilateral Trade Negotiations specifies that

the mode IV service suppliers are those natural persons who seek non permanent rather than permanent residence or permanent access to the employment market of foreign countries. They also do not intend to obtain permanent citizenship [WTO 1995].

Analysis of the responses of the developed countries indicates that, the movement of natural persons should be linked to mode III, i.e., through commercial presence in the developing economies. Since India has capabilities to provide various professional, technical, skilled services at various levels, it would be in the interests of India to liberalise trade in education services through mode IV without linking it to mode III.

Since developed countries want to restrict the movement of natural persons through mode IV, they want restrictions such as economic needs tests, labour market tests pertaining to mode IV. Secondly, they would also like to process all applications distinguishing work permits from residency permits. It would then be easier to identify work visas under mode IV from residence visas. While the latter categories may be denied access legally under GATS rules, it would be easier to restrict and regulate work visas. Thirdly, developed countries want to open the movement of natural persons to a select category of specialists only.

Furthermore, since developed countries want the movement of natural persons for commercial presence, they have a liberal approach to respective commitments. First, they want under mode IV all those business persons, to be treated as natural persons, who may also have to stay within own or affiliate company for career development or training in business practices, even though these business persons are not service renderers or educators in the strict sense. They also want a commitment to allow for the automatic granting of spousal work rights for the spouses of intra corporate transferees. Second, developed countries also want the 'service sale persons' to be treated as natural persons by virtue of not being based in the territory of the member service. Sales persons are basically negotiators of sales, although not direct sellers to the public. For example, under this category, they may organise business services for education such as 'education fairs', seminars, etc, to attract students for studies abroad.

Now the question is: what is the scope of gains under mode IV from the stand point of India that it should pursue in the negotiations under GATS. India has a large supply of manpower with varying skills and professional and technical experts.

Therefore, India's strategic approach should be to make a firm stand on the liberalisation of the movement of natural persons. The following points need to be included in the negotiations.

(i) There should be elaborate classification of workers on the basis of ILO list. It should include workers of professional services, construction and related engineering services, computer services, services relating to agriculture and allied activities, hunting, forestry, health, tourism, travel, recreational, cultural and sporting, cleaning, etc. In education services teachers, lab technicians, researchers, professors should be included as natural persons.

(ii) Visa rules for the movement of natural persons should be liberal. In fact GATS visa may be issued by member countries indicating the purpose and period of stay. Besides immigration procedures should be simpler.

(iii) The word temporary should not be rigidly defined in terms of number of months/years. The period may be as per the need of foreign country.

(iv) Quantitative restrictions on work permits should remain as per the clear and stated national interest.

(v) There should also be wage parity in the wages of natural

persons with those of wages of foreign service provider's of similar types.

(vi) Remittances made by natural persons to their host country should not be put to limitation.

(vii) There should also be the provision for multiple entry of natural persons leading to the extension of period of original stay. For example, the entry of a teacher for original six months may further be extended if the same person is required to stay on as researcher again for six months.

(viii) Obstacles to entry in terms of economic needs test or labour market tests need to be rationalised. It should not be prohibitive of the movement of natural persons.

**Reduction of barrier to the movement of natural persons:** Economic Needs Test (ENT) is a significant barrier in the movement of natural persons. ENT is characterised as a provision in national regulation that imposes a test having effect of restricting the entry of service suppliers, based on an assessment of needs in the domestic market [OECD 2000]. In mode IV, the majority of ENTs appear in medical, dental and hospital services, entertaining and financial services. Many developed countries have exempted ENTs in mode IV for select categories only called 'intra corporate transferees' such as persons holding management positions or experts with specialised knowledge of the company. Since a large percentage of developing countries overall service exports constitute the unskilled and low level skilled labour, it would be in the interests of developing countries to remove trade barriers in the form of ENT for these categories of workers.

The economic needs test exemption list could be created based on the occupations approach. The ILO international standard classification of occupations (ISCO) has internationally adopted classification of 9 major groups. These are: (i) legislators, senior officials and managers; (ii) professionals; (iii) technicians and associate professionals; (iv) clerks; (v) service workers and shop and market sales workers; (vi) skilled agricultural and fishery workers; (vii) craft and related trade workers; (viii) plant and machine operators and assemblers and (ix) elementary occupations.

These groups are further subdivided into sub-major, minor and unit group titles. While ISCO classification of occupations could be used simultaneously with UNCPD classification of service sectors to reduce barriers to the movement of natural persons.

## II **Subjectwise Implications of Trade in Higher Education under GATS<sup>3</sup>**

**Management education:** It is generally agreed that India should open up management education under GATS. However, before opening up within a given time-frame some management institutions of excellence should be identified to market management education at graduate, postgraduate and doctorate level. Management education may be opened under all the four modes for supply of management education. A consortium of management education institutions may be established to make a joint effort towards promoting management education abroad particularly in Asian countries in various branches by developing suitable curricula and excellent facilities. It is necessary that IIMs be provided a deemed university status. There should also be a proper mechanism of mutual recognition of management degrees before opening. Domestic regulations in India should be in place for proper recognition of institution and degrees. There should be wage parity for the services rendered by Indian

teachers, consultants and researchers abroad with that of foreign professionals.

*General Education in Arts, Science and Commerce:* Among university academia, intellectuals and also among civil society members and NGOs, there are sharp divisions of opinion about opening up higher education under GATS. Often there are opinions on ideological lines but sometimes opinions are also based on general academic standards in India, which is not ready to withstand competition from abroad. Arguments against opening higher education are also based on grounds of equity. Terms like 'academic colonialism', 'cultural invasion', 'attack on economic sovereignty' reflect ideological sentiments. India's competitiveness in modes II and III is rather too low. No less than a structural reform is necessary if India wants to benefit from different modes of supply under general education. It may be noted that Indian students are going abroad in large numbers through campaigns launched by foreign education providers. The government at present has no regulation to regulate these foreign education providers. Hence there is an urgent need for domestic regulation to check the quality of foreign education providers in India. Because of the prevailing 'mind set' and employment prospects Indian students are going abroad and this can be to a certain extent checked if domestic institutions offer quality programmes in collaboration with foreign institutions with facilities on par with international institutions. Such institutions can also be developed in 'free trade education zones' where all top class facilities can be guaranteed. It is also argued that partial opening under general education in mode III shall generate internal competitiveness among Indian universities and colleges. NAAC in India should also promote process and quality accreditation in colleges and should concentrate now on programmes/degrees. It is also suggested that India should take full advantage of opening mode IV, i.e., permitting teachers, researchers at higher education level to move across borders. Higher education should continue to be a public good and government subsidies should continue to be made available. Subjects like mathematics, sanskrit, philosophy, yoga, ayurveda may be opened under mode III and after gaining sufficient experience progressive liberalisation may be made in other subjects where India can offer competition.

*Law education:* There are strong reservations to open law education, as law education in India is not ready for competition from abroad. Internationalising the curricula in law education is the first step before opening and a time-frame is necessary before opening law education under GATS. Initial commitments under mode IV on limitations to market access and national treatment may be made and when the subject is ready to face competition, modes II and III may be opened. Indian students going abroad for study and acquiring relevant expertise in different dimensions of international law is going to be important in coming days.

## Technical Education

*Engineering education:* It is generally agreed that India is strong in technical education and some branches of engineering education are at par with international standard. IITs and NITs can aggressively market engineering education, computer science and software technology. IIT is a brand name and many countries in Asia would like to set up IIT branches in their own countries. To transform the strength of IIT into an economic value, it is necessary to plan international technical education. The imparting of engineering education through mode I has not been agreed

on. While full commitment in mode II may be given, some branches of engineering education may be opened under mode III. Mode IV under engineering education, too, may be opened. Commercial presence of engineering education in India could be permitted with due approval of AICTE which will ensure the quality, mutual recognition of degrees and have general monitoring and evaluation authority.

*Biotechnology:* This is an emerging area and very few institutions in India can claim to have good education in biotechnology. Mode III can be opened and commercial presence in biotechnology education in India can also be welcome as this would provide opportunities to further develop biotechnology education in India. While opening mode III for biotechnology education in India limitation under market access be also indicated.

*Environment education:* This branch of education too has the same status as in biotechnology and the same stand with respect to environment education as is suggested in biotechnology education can be advocated.

*Medical education:* Medical education in India has grown to maturity. In the past, students from India have been regularly visiting some of the foreign institutions for higher studies and were either taking up employment abroad or coming back in India to join colleges or to do private practice. This process has also helped develop the medical institutions in India, which has acquired strength of its own. Therefore, mode II may be given full commitment. Mode III may be committed partially subject to: (a) Market access limitations and (b) The public providers of medical education from abroad.

Ayurveda education is also a branch of medical science and a country like India has a monopoly in this because of its ancient tradition. Yet this branch of medical science may not have sufficient international exposure to exploit either mode II or mode III supply of education. Hence a definite step needs to be undertaken to encourage some ayurvedic colleges to develop curricula, standards and facilities for international education.

Monghyr, the yoga institute has been provided a deemed university status and the regular yoga education at graduate, postgraduate and doctoral level is being provided here which is now recognised by UGC. The institute has also received international exposure as a large number of foreigners comes to this institute for regular training in yoga. The institute may be assigned an important role to internationalise yoga education. Mode II and mode III may be fully committed to yoga education.

In different areas of higher education, we have strengths as well as weaknesses. How much of our higher education should be committed to GATS depends on our strengths, the level of preparedness to international education in different branches of higher education. Commitment to modes II and III depends on that. We should only commit when a particular branch is ready to face competition; thus there should be slow and progressive liberalisation.

## III Internationalising Higher Education in India

*Domestic Regulation:* One of the important issues in opening up access to higher education in India by other countries is the issue of domestic regulation concerning higher education. There are two issues:<sup>4</sup>

- (i) What are the domestic regulations in education at the state and central levels, which have to be met, if market access is permitted to foreign suppliers? Should these domestic regulations

and requirements also undergo a change to strengthen the domestic education sector to compete with foreign providers of the education services?

(ii) What are the regulations and the requirements of other countries, that are coming in the way of supply of Indian Education Abroad? Is there a need to develop a common frame of regulations to be followed by member countries? [NIEPA 2002]

Article VI of GATS deals with domestic regulations. As the laws and regulations are normally made by the country to exert influence and control over the service providers so that misuse or exploitation of the consumer does not take place, Article VI stipulates that a member country should regulate services reasonably, objectively and impartially. It further states that when the member country government makes an administrative decision that affect the service, it should also provide impartial means for reviewing the decision. Article VI-4 maintains that domestic regulation with respect to qualification requirements and procedures; technical standards and licensing requirements of foreign education providers should not be such as to put unnecessary barriers to trade in higher education services. To ensure this the council for trade in service may establish the necessary regulations. Furthermore, domestic regulation may also provide for adequate procedures to verify the competence of professionals of any other member in the case of specific commitments regarding professional service.

Article VI on domestic regulation along with article on national treatment furthermore stipulates that foreign higher education providers shall not be discriminated against domestic higher education providers.

Indian higher education system treats education as a public good and as a social sector. The important objective of promoting higher education is also to provide equal access to all. Discriminating protection in the form of reservation has been accorded to scheduled castes, scheduled tribes and backward castes and also girls. There is also reservation in the recruitment of teachers. There are central regulatory bodies to control colleges and universities in general education and technical and professional institutions in India. The degrees are recognised by government institutions even though there may be unaided (i.e., private) colleges and institutions. In recent years there has been domestic private education providers who may be conferring qualifications to students not recognised by any national government body. There is neither any study nor any control mechanism to ensure the recognition or quality education of private institutions. These bodies may not be conferring graduate 'degree' qualification but may be conferring other qualifications, which may be in demand in the market by virtue of which students might also be getting employment in market.

In recent years foreign higher education providers have been quite active in India either to attract students through mode II or to establish some sort of commercial presence in India through mode III or possibly also through mode I. Although NIEPA has undertaken a study granted by MHRD on 'Foreign Education Providers in India', as yet comprehensive control mechanism have not been put in place. AICTE has come out with regulations to control technical institutions. It is stipulated that UGC, too, has framed regulations, which the government has to approve. These regulations will ensure registration, authorisation, approval of degree and that the course is run ensuring the objective of quality. The question to ask is are these regulations specifically for foreign education providers? In these regulation are there

anything, which violates the principle of equal treatment to domestic and foreign education providers except for the 'limitations' on national treatment clause. Is there even the need and desirability of equal treatment to a national and foreign education providers? WTO Working Party on Domestic Regulation (WPDR) was established on April 26, 1999. The emphasis of WPDR is on the development of generally applicable disciplines for all service sectors. It was adopted by the Council for Trade in Services on March 28, 2001 with the aim that members shall complete negotiations under Article VI: 4. prior to the conclusion of negotiations on specific commitments. This should lead to a proposal for a draft Annex on domestic regulations and proposal for disciplines on licensing procedures. On the other hand, from the point of view of national government, it would also be worth examining the regulation of transnational higher education in some countries.

*Recognition:* The issue of recognition is covered under Article VII of the GATS. There are following issues that arise in the context of higher education.

(i) If a certain programme is offered in a host country by foreign education providers through modes I and III, there should be a proper mechanism and recognition of that programme in a host country. This also raises the issue that programme leading to the award of a degree or sub-degree recognised in a host country should also be recognised at least in the foreign country from where the education providers have supplied education programmes. Hence there should be mutual recognition of awards (MRAs). The award may further be accredited by say, in India, by National Assessment and Accreditation Council (NAAC), immediately or afterwards. Although the issue of accreditation may be separate but it is an interrelated issue to the recognition to certify the quality of the programme offered by foreign education providers in India. Whether international accreditation to the programme shall be accepted by the host country or not, is also an important issue to be deliberated upon as various domestic institutions/programmes are applying for accreditation to the US agency [Eaton 2003, Altbach 2003], irrespective of national accreditation which means accreditation is not mandatory for domestic institutions in India. Should national accreditation be mandatory for foreign education providers in India?

(ii) In addition to the issue of MRAs referred to above there is an issue of equivalence of qualification and standards. This arises because there is considerable divergence of higher education standards, depending upon local adaptation of courses, in host and foreign country. These differences will remain, yet there is need for bilateral negotiation to settle the issue of equivalence of qualifications and standards mutually. There can also be a situation in which if country A and B mutually recognises a B A in information technology and country B and C mutually recognises B A in information technology, thus according a equivalent standard to the programme, countries A and C should also mutually agree to grant the same standard and status to the programme autonomously or through the logic of transitivity.

(iii) What will happen to those qualifications which are either non-accredited or which relates to work experience. For example in mode IV, the natural person may be a diploma holder of a country and has some experience in a particular service. He may also hold certain licence to carry out particular services. How should his qualification, work experience or licensing right be recognised in a foreign country where his movement to undertake a particular service has to take place? This is indeed a vexed

issue. Mutually the countries have to arrive at some agreement to facilitate the movement of a natural person through mode IV. Could there be an objective criteria or proper machinery to give entitlement to a person to provide services? There could be many examples. A particular example will clarify the point. Assume: An engineer in India has a B Tech degree, has an experience for particular years in civil work. But he does not have a licence, as it is not required in India. If in any other country, a person is demanded for civil work who must hold licence in addition to some qualifications and experience, there should be an agency to consider his application and through some equivalence or otherwise decide his entitlement to trade through mode IV. Lack of licence here should not constitute a barrier to trade in education service.

Article VII under GATS requires that the issue of recognition should not constitute a barrier to trade. It also requires that Council for Trade in Services should be properly informed of its own recognition process or arrangements/agreements with other country. Article VII-5 also provides scope for multilaterally agreed criteria as also for the role of NGOs in establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant service trades and professions.

#### **IV Specific Commitments and Scheduling**

**Market access:** A member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI on market access. The measures listed comprise four types of quantitative restrictions (sub-paragraphs a-d), as well as limitations on forms of legal entity (sub-paragraph f). The quantitative restrictions can be expressed numerically or through criteria specified in sub-paragraphs (a) to (d). All the restrictions noted above do not relate to the quality of the service, or to the ability of the supplier to provide the service (i.e., technical standards or qualification of the supplier). While scheduling the limitations on M A, numerical ceiling should be expressed in defined quantities in either absolute numbers or percentages. Regarding economic needs tests the entry should indicate the main criteria on which the test is based, for instance, if the authority to establish a facility is based on population criterion, the criterion should be described concisely.

Some examples in the context of higher education on limitations to MA may be worth considering.

(a) Limitations on the number of service suppliers: In biotechnology, 4 government controlled universities allowed to establish branch campuses. In different disciplines permission to open mode III subject to ENT.

(a) Limitations on the participation of foreign capital: foreign equity ceiling of X per cent for a particular form of commercial presence.

(a) Restriction on requirements regarding type of legal entity or joint venture: franchise mode of operation not allowed in higher education. In higher education technology services, commercial presence must take the form of a partnership with IITs in India of any government owned universities/institutes from abroad.

**National Treatment (NT):** Article XVII of GATS stipulates national treatment. It specifies that a member grants full national

treatment in a given sector and mode of supply when it accords in that sector and mode conditions of competition no less favourable to services or service suppliers of other members than those accorded to its own like services and service suppliers. The substance of NT is no discrimination between domestic and foreign service providers that alters the conditions of competition particularly in favour of domestic service supplier. However, it is important to notice that a member country may not fully commit on national treatment and corresponding to particular higher education sector, it may schedule some of the limitations to national treatment after opening trade or committing. The scope of the article allows to put limitation on NT covering cases of both de facto and de jure discrimination.

In the context of higher education services, the domestic service providers may be either pure government or private aided institution. Government institutions such as colleges or universities receive full grants. These grants are in the nature of subsidy, which the government may not like to provide to the foreign education providers. In such a case while scheduling commitments, under limitations on NT, it is necessary to write 'eligibility for subsidies reserved to nationals' for all sectors/modes of supply.

There is a need to look at some of the NT limitations more carefully in the context of higher education service. The reason is that it is a social service sector and allowing competition from foreign service providers may do harm to existing domestic institutions. Hence the government is free to alter the conditions of competition in favour of domestic suppliers of higher education. The same must be scheduled as NT limitations. Care must be taken while scheduling for any measure, which falls under the jurisdiction of domestic regulation under Article VI of the GATS, should normally not be scheduled as NT limitation, for instance, a subject like Indian philosophy. Either this subject may not be opened or if opened, the NT limitation must be sufficient to restrict the entry of foreigners by stipulating nationality requirements or the third alternative is to provide the scope of domestic regulation to deny the entry of foreign education providers by UGC.

**Table: Model Schedule of Commitment on Higher Education Services**

Modes of Supply: (1) Cross-Border Supply, (2) Consumption Abroad, (3) Commercial Presence, (4) Presence of Natural Persons

Sector/ Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
Higher education services Disciplines Such as Yoga, Ayurveda, Sanskrit, Mathematics	1 None 2 None 3 None 4 None	1 None 2 None 3 None 4 None	
Technical education	1 Unbound 2 None 3 None 4 None	1 Unbound 2 None 3 Partnership of foreign government controlled universities with IITs restrict to four foreign universities 4 None	
Horizontal commitment (i.e., across all sectors)		1 Public providers of education 2 None 3 Public providers of education 4 Subject to ENT	

Since the only limitation on NT that should be scheduled relates to measures that restrict conditions of competition in favour of domestic service suppliers, it is not clear what such measures are. For example, in the case of law education there should be NT limitation stipulating that lawyers in national law are required to be graduates of national universities or this provision should be taken care of under the domestic regulation. In any case, there is a need for exploring NT limitations subject-wise and mode-wise.

**Additional Commitments:** Article XVIII stipulates that a member may in a given sector, make commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI and XVII (i.e., MA and NT). Such commitments can include, but are not limited to undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI. Additional commitments are expressed in the form of undertakings not limitations. In the schedule, the additional commitments column would only include entries where specific commitments are being undertaken, and need not include those modes of supply where there are no commitments undertaken or any entries at all where no article XVIII undertakings are made.

**Exceptions:** All measures falling under article XIV (general exception) are excepted from all obligations and commitment under the agreement, and therefore should not be scheduled. Similarly measures falling under article XII (restriction to safeguard the balance of payments) are also exceptions and should not be scheduled. Moreover article XIV allows measures to protect public morals, maintain public order and national security and prevent fraudulent practices.

**Specific Commitment and MFN Exemptions:** A member taking a national treatment or a market access commitment in a sector must accord the stated minimum standard of treatment specified in its schedule to all other members. The MFN obligation requires that the most favourable treatment actually accorded in all sectors, whether the subject of a commitment or not, must also be accorded to all other members. Where an MFN exemption has been granted for a measure, a member is free to deviate from its article II obligations, but not from its article XVI and article XVII commitments. Therefore, in such cases, a member may accord treatment in that sector more favourable than the minimum standard of market access and national treatment appearing in its schedule. In such cases, it is not possible for a member to

#### **Appendix: Education Services in the GATS Scheduling Guidelines and CPC**

Sectoral Classification List	Relevant CPC No	Definition/Coverage in Provisional CPC
<b>Educational services</b>		
Primary education services	921	<p>Preschool education service: Pre-primary school education services are usually provided by nursery schools, kindergartens, or special sections attached to primary school, and aim primarily to introduce very young children to anticipated school-type environment. Exclusion: Child day-care services are classified in subclass 93321</p> <p>Other primary education services: Other primary school education services at the first level. Such education services are intended to give the students a basic education in diverse subjects, and are characterised by a relatively low specialisation level. Exclusion: Services related to the provision of literacy programmes for adults are classified in subclass 92400 (Adult education services n.e.c.).</p>
Secondary education services	922	<p>General secondary education services: General school education services at the school level, first stage. Such education services consist of education that continues the basic programmes taught at the primary education level, but usually on a more subject-oriented pattern and with some beginning specialisation.</p> <p>Higher secondary education services: General school education services at the second level, second stage. Such education services consist of general education programmes covering a wide variety of subjects involving more specialisation than at the first stage. The programme intends to qualify students either for technical or vocational education or for university entrance without any special subject prerequisite.</p> <p>Technical and vocational and secondary education services: Technical and vocational education services below the university level. Such education services consist of programmes emphasising subject-matter specialisation and instruction in both theoretical and practical skills. They usually apply to specific professions.</p> <p>Technical and vocational secondary school-type education services for handicapped students: Technical and vocational secondary school-type education services specially designed to meet the possibilities and needs of handicapped students below the university level.</p>
Higher education services	923	<p>Post-secondary technical and vocational education services: Post-secondary, sub-degree technical and vocational education services. Such education services consist of a great variety of subject-matter programmes. They emphasise teaching of practical skills, but also involve substantial theoretical background instruction.</p> <p>Other higher education services: Education services leading to a university degree or equivalent. Such education services are provided by universities or specialised professional school. The programmes not only emphasise theoretical instruction, but also research training aiming to prepare students for participation in original work.</p>
Adult education	924	<p>Adult education services nec: Education services for adults who are not in the regular school and university system. Such education services may be provided in day or evening classes by schools or by special institutions for adult education. Included are education services through radio or television broadcasting or by correspondence. The programmes may cover both general and vocational subjects. Service related to literacy programmes for adults are also included. Exclusion: Higher education services provided within the regular education system are classified in subclass 92310 (Post-secondary technical and vocational education services) or 92390 (other higher education services).</p>
Other education services	929	<p>Other education services: Education services at the first and second level in specific subject matters not elsewhere classified, and all other education services that are not definable by level. Exclusion: Education services primarily concerned with recreational matters are classified in class 9641 (Sporting services). Education services provided by governess or tutors employed by private households are classified in subclass 98000 (private households with employed persons)</p>

Source: United Nations, Provisional Central Product Classification, 1991.

accord less favourable treatment to certain members other than that specified in schedule (for example, on grounds of reciprocity or the lack of it).

*Scheduling and Recording Commitments:* A model schedule of commitments on higher education services is presented in the table as an example to understand how to record commitment.

Column 1 in the model schedule refers to sectors/subsectors along with UNCPC number or own definition. Columns 2 and 3 refer to limitations on MA and NT and Column 4 refers to additional commitments. While for disciplines such as yoga, ayurveda, Sanskrit and mathematics, no limitations are specified; in subject such as technical education, mode I is unbound, mode II has no limitation, in mode III under limitations on NT there are two limitations such as four foreign universities are allowed and that, too, it must be government controlled and in partnership with IITs in India. Mode IV has no limitations. Yet in horizontal commitment, mode IV is subject to ENT, which is binding on all disciplines. It is also important to note that India can give special treatment to students of SAARC and NAM countries without giving the same special treatments to others.

The thrust of the argument is that any form of education that is beyond the purview of national education system should not be considered for negotiations. There is a need to restructure domestic regulations. Domestic regulations must be put in place to protect the domestic educational institutions and to allow the entry of foreign educational institutions only in subjects and conditions, which favour national interests thereby also putting an end to unrestricted entry of foreign education providers. It is the movement of natural persons under mode IV which should be liberalised without linking it to mode III by developed countries. The movement of students through mode II leads to

the outflow of foreign exchange and the policy-makers must try to understand this phenomenon of students outflow. [EPW](#)

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## Notes

[I am indebted to G D Sharma for the views documented at WTO Cell in higher education unit, NIEPA, New Delhi. The paper heavily relies on the documentations of this unit.]

- 1 See Appendix 1 for detailed coverage under each subsectors contained in Provisional CPC.
- 2 GATS Article 1 (2) (d).
- 3 This section is based on the opinions of the different Technical Committee meetings on WTO at NIEPA.
- 4 See Trade in Education Services under the WTO Regime – A Proposal of India; NIEPA Cell on WTO: GATS Education Services, May 2002.

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