

# **GATS: EDUCATIONAL SERVICES**

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**Submitted by**

**Ms. SELVI GANESH**



**INTERNATIONAL LEGAL STUDIES DIVISION  
CENTRE FOR STUDIES IN DIPLOMACY,  
INTERNATIONAL LAW AND ECONOMICS  
SCHOOL OF INTERNATIONAL STUDIES  
JAWAHARLAL NEHRU UNIVERSITY  
NEW DELHI -110067**

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**CERTIFICATE**

This is to certify that the dissertation entitled **GATS: EDUCATIONAL SERVICES** submitted by **Ms. Selvi Ganesh**, is in partial fulfillment of the requirement for the degree of **MASTER OF PHILOSOPHY (M.PHIL)** of this university. It is ~~her~~ original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this university ~~or~~ any other university.

Prof. Manoj Pant.

Chairman (Chairperson)  
Centre for Studies In Diplomacy  
International Law and Economics  
School of International Studies  
Jawaharlal Nehru University  
New Delhi-110067

Prof. Yogesh K. Tyagi

Professor (Supervisor)  
Centre for Studies In Diplomacy  
International Law and Economics  
School of International Studies  
Jawaharlal Nehru University  
New Delhi-110067

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JNU  
New Delhi.  
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Selvi Ganesh

## Chapter 1

### INTRODUCTION

Education has direct attribution over the human development, one of the three indices on which Human Development Index is based. All over the world, there is a resurgence of interest in education. 'Education is seen as the gateway to future economic prosperity, an instrument for combating unemployment, the driving force behind scientific and technological advancement, prerequisite for the cultural vitality of the societies, the spearhead of social progress and equality, the safeguard of democratic value and the passport to individual success.'<sup>1</sup> Above all it helps a State attain the 'civilised' society status in the international law parlance. The benefit of education not just confines to the trading partners but it is the source of development of an economy, society and the individual human being who is the center of all the development concerned.

Consumers of education confer external benefits on those not acquiring education. The social benefits of having a large higher educated population go beyond the increase in GNP. The externalities include improvement in health, reduction in population growth, reduction in poverty, improvement in income distribution, reduction in crime, rapid adoption of new technologies, strengthening of democracy, ensuring of civil liberties, etc.<sup>2</sup>

#### 1.1 Globalising Education

Traditionally, education is considered to be a public good, guaranteed by the State and accessed by everybody. 'Everyone has the right to education' and 'education shall be directed to the full development of the human personality... it shall promote understanding tolerance and friendship

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<sup>1</sup> George S. Papodopoulos, "Learning for the Twenty First Century: Issues" in Jacques Delors ed., *Education for the Twenty-first Century*. Contribution to the work of the International Commission for the Twenty-first Century, UNESCO, 1998.

<sup>2</sup> Tilak, B G J., "Public subsidies in Education in India," *Economic and Political Weekly*, 24 January 2004, p. 343.

among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace.’<sup>3</sup> The International Commission on the Development of Education set up in 1971 put forward a vision called ‘the learning society’ and recommended as the guiding principle for educational policies that ‘every individual must be in a position to keep on-learning through out his or her life’ and that ‘the idea of lifelong learning is the key stone of the learning society’. These were the norms until the late 1970s. This was the time when only the elites sought and acquired higher education and most people in the world were still illiterates and there was a need to promote education to all.

In the later 1980s majority of young people in the world participated in formal education beyond the elementary and fundamental stages of education and there was an ever increasing demand for higher and higher education. Higher education enrollment rose sharply between 1980 and 1995.<sup>4</sup> There was a tremendous need for expansion of higher education. Since the 1980s the policy makers in different parts of the world have increasingly recognized, the traditional methods of educational finance and management are unable to deliver even quality basic education to all children and, that radical changes are required.<sup>5</sup> There was a demographic, economic and financial pressure on education due to increase in demand and hence adjustment have to be made between the demand for education which is linked to the population growth; and supply of education which is linked to the resources available;<sup>6</sup> and also due to increased interdependence of nations or the globalisation feature of the modern world’s mobility of students and personnel had risen considerably. By the end of 1990s the idea of public financing beyond the period of compulsory education started fading ‘the period which witnessed world-wide transition of

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<sup>3</sup> Article 26, Universal Declaration of Human Rights (UDHR), 1948.

<sup>4</sup> World Bank, “Higher Education in Developing countries: Peril and Promise,” *The Task Force Report on Higher Education and Society*, February 2000, p.27.

<sup>5</sup> Serge Peano, “The Financing of Education System” in Delors ed., n.1 pp. 90-95.

<sup>6</sup> *Ibid.*



policies in favour of market economy from planned and state regulated systems'.<sup>7</sup> Educational institutions all over the world started facing slash in government funding, they are under pressure to adapt to rapidly changing social, technological, economic and political forces.<sup>8</sup> Financing cutbacks have already placed many universities under financial crisis, and they are trying to increase revenue through increased tuition fees, royalties, downsizing, etc.<sup>9</sup> But the Task Force on Higher Education believes that the social returns to investment in education is substantial and exceed private returns by wider margin.<sup>10</sup>

## 1.2. Forces behind the Global Trend

Demographic change, income growth, urbanization, and growing importance of knowledge and skills have a combined effect on the expansion of higher education. The consequence of this expansion in higher education brought about creative responses whereby new types of institutions are born and new providers enter the education sector. Private institutions joined the public ones to meet the need of the hour. Not all private institutions are for-profit there are also not-for profit philanthropic, nonprofit organizations and religious entities. The expansion of both public and private higher educational institutions has been 'unbridled, unplanned and chaotic'. The growth of private higher education institutions increased dramatically in many parts of the world from the 1980s but the exact scale of their expansion is difficult to determine.<sup>11</sup> The enrolments in private higher institutions are also expanding (Figure 1.1) and this trend is continuing all over the world.

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<sup>7</sup> Mohammed Mazammil, "Public Support for Education: Market-based approach," *Perspectives in Education*, vol.17 (2), 2001 pp.89-93.

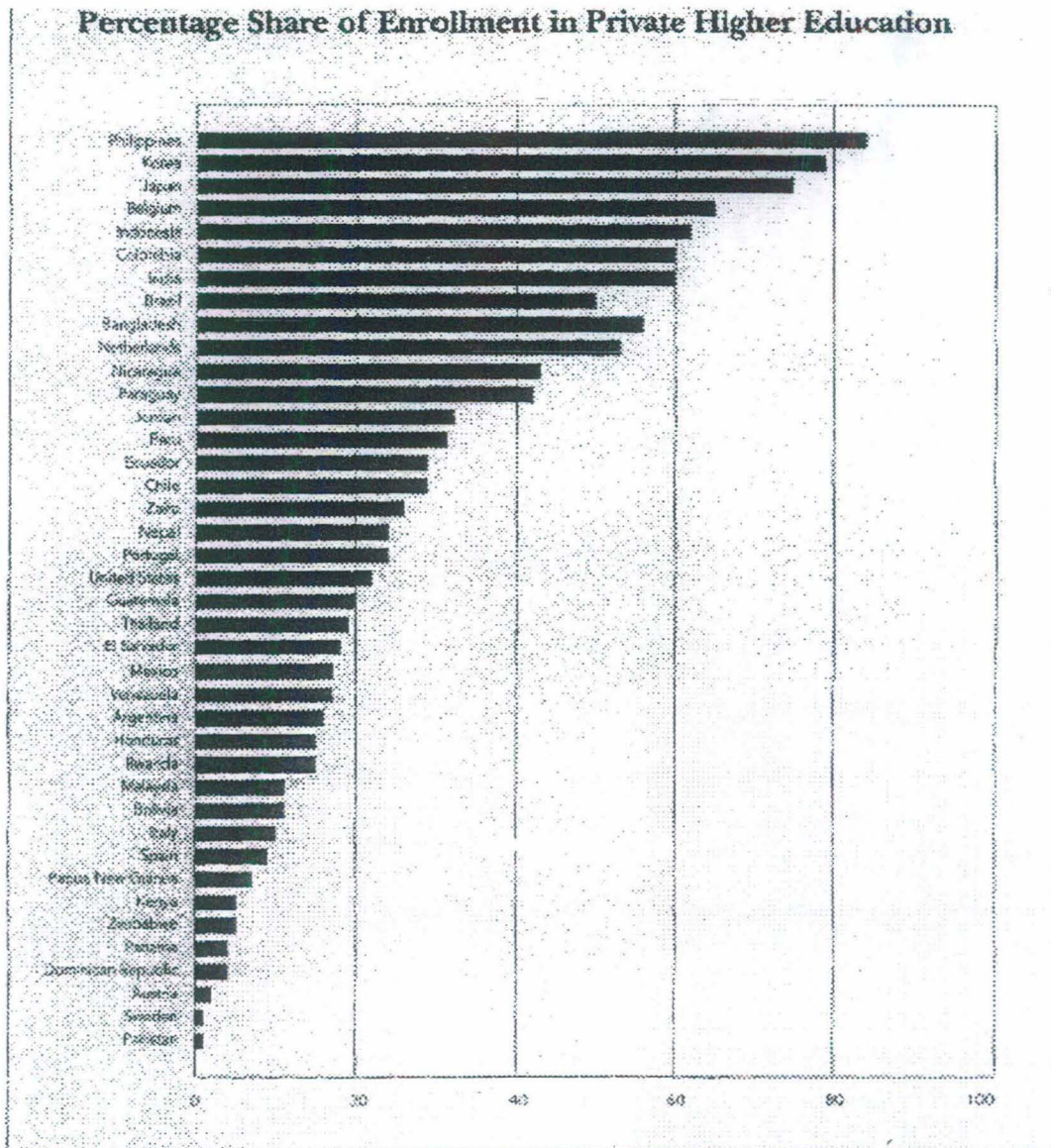
<sup>8</sup> Marvin Bartell, "Internationalisation of Universities: A University Culture based framework," *Higher Education*, vol.45 (1), 2003, pp.43-47.

<sup>9</sup> Carlos A. Torres and Daniel Schugurensky, "The political economy of Higher Education in the era of neo-liberal globalisation: Latin America in Comparative perspective," *Higher Education*, vol. 43, 2002 pp. 429-455.

<sup>10</sup> Task Force Report, 2000, n.4, p.20.

<sup>11</sup> *ibid*, pp. 29-30.

Figure: 1.1



Note: In Japan and the few Western European countries that have a high proportion of enrollments in private institutions (for example, Belgium and the Netherlands), higher education continues to be almost entirely financed by the state, which subsidizes both public and private higher education institutions. Source: World Bank, *Higher Education: The Lessons of Experience*, 1994.

Source: Task Force Report, 2000

Deregulation in many countries is loosening the state's grip on the funding and operation of private institutions. Moreover after the decline of socialistic and welfare state model, neo-liberal regimes have become hegemonic in many parts of the world. The notion that education is primarily a right of citizen and social investment, which has been taken for granted for many decades, is being challenged by neo-liberal agenda that places extreme faith in the market.<sup>12</sup>

As for developed countries the decade of the 1990s has seen consistent worldwide reform agenda for the finance and management of universities and other institutions of higher education. This reform agenda is consistent in all parts of the world with political-economic system and higher education traditions and different stages of industrial and technological development. This reform process was first started in the US. The institutionalised university restructuring in the US "Business-Higher Education Forum" established in 1978 to link the efforts of corporations and universities in science and technology activities for aligning higher education with business corporate sector and to gain international competitive edge.<sup>13</sup> This forum inspired the establishment of "Canadian Corporate-Higher Education Forum" launched in 1983 to harmonize the activities of universities with the market. The Thatcher government in the UK during the 1980s reduced education budget, redirected the education system further towards the needs of industry, promoted strong support to private universities and attempted to transform higher education into private profit-seeking enterprises. The landmark of Thatcher's university policy was the Education Reform Act, 1983 that reduced financial support to higher education and increased accountability for the use of public funds. It required higher education institutions to become consumer friendly, providing the highest quality goods at the lowest price.<sup>14</sup>

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<sup>12</sup> Carlos A. Torres, n.9 .

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

In the process the United States became the leading exporter of education services in the world. US colleges and universities generated a services trade surplus of \$6 billion in 1993. This represents about 19% of the total US services trade surplus.<sup>15</sup> Education services (including training and testing) are the fifth largest traded service in the United States.<sup>16</sup> Other major exporters include the United Kingdom, France, Germany and Australia. Since they have a major stake in education service they want to ensure that their interests in the industry are properly represented and negotiated in international negotiations, especially in the WTO under GATS.

Now, as far as developing countries are concerned, the demand for higher education is much stronger but the investment in education remains either constant or has even declined in many developing countries. China and India are considered to be the main markets for education business where the condition is such that the available number of colleges and universities in these countries could meet only four to six percent of the relevant age group. China is said to be educating 25 percent of the world's students on one percent of the world's budget. In the year 1997, China had 1020 regular colleges and universities with 3.17 million students, which constitute about four percent of the relevant age group;<sup>17</sup> whereas in India there were around 220 universities, 8500 colleges which cater only to the need of six percent of the relevant age group of 16-23.<sup>18</sup> This gave way for private universities growth. By 1998, the number of private (*minban*) colleges and universities was put at 1,800 in China. The Chinese government identifies over 1000 *minbans* enrolling close to one million (950,000) students. However, quality is a problem, and only 37 of these colleges and universities have approval to

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<sup>15</sup> Katherine E. Evans, *Educational Service as National Industry*, United States Trade Commission Publication 2920, September 1995 available at [http://www.opendoorsweb.org/Lib%20Pages/Economic/educational\\_services.htm](http://www.opendoorsweb.org/Lib%20Pages/Economic/educational_services.htm)

<sup>16</sup> <http://www.cqaie.org/Frame2.html>

<sup>17</sup> Gerard Postiglione, "China's Expansion, Consolidation, and Globalization," *International Higher Education*, (The Boston College Centre for Higher education) No.24, (summer) 2001, pp.10-12.

<sup>18</sup> S.P. Malhotra, ed., *Distance Education Problems and perspective*, IGNOU, 1998.

issue standard credentials. Of these 37, only four issue a standard undergraduate degree.<sup>19</sup> The condition in India is also similar but there is no official record as to number and extend of operation of these private universities; the Government of India have, at least, identified 27 fake private universities operating in India.<sup>20</sup>

The other main reason is that in developing countries social and economic policies are regulated by the conditionalities expressed in Structural Adjustment Programmes (SAP),<sup>21</sup> which are part of loans received from international agencies such as the IMF and the World Bank. Under the SAP the indebted states are unable to formulate a university policy compatible with the new economic paradigm.<sup>22</sup> Mean while the importance of the World Bank in education has significantly increased. In the 1970s the dominant donors of multilateral official development assistance were the United Nations and its organs but in the 1980s the World Bank combined disbursement doubled those of the UN and its organs, not so much, however, due to a sizable increase in the World Bank funding in education but due to a significant decrease in the late eighties and early nineties of disbursement to education by the UN and its organs. Patterns of financing for technical co-operation have also changed dramatically over the same period and the World Bank has become the most important single source of multilateral technical co-operation and the leading agency in setting the education and development agenda.<sup>23</sup> The tremendous

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<sup>19</sup> Gerard Postiglione, n.17, p.11.

<sup>20</sup> Rajya Sabha, Department-Related Parliamentary Standing Committee, *Twenty-Ninth Report on The UGC (Amendment) Bill, 1995* Presented in both the Houses of Parliament on 16.8.1995, Rajya Sabha Secretariat, New Delhi.

<sup>21</sup> Acute economic crisis in the mid 80s led many developing countries to adopt Structural Adjustment Programme, first in the economic sector and later in social sector. This strategy was advocated by the International Monetary Fund (IMF) and the World Bank supported by international creditors. Social and economic policy is to a great extent regulated by the conditionalities expressed in the SAP which are part of loan received from IMF and World Bank. The key aims of SAPs are: i) drastic reduction of state sector, ii) The re-orientation of industrial and agricultural production towards exports. The package of conditions are deficit control, reduction of public expenditure, strict monetary policies to diminish inflation, devaluation to promote exports, reduction in import tariff etc.

<sup>22</sup> Carlos A. Torres, n.9.

<sup>23</sup> *ibid.*

power of the World Bank in educational policy making tends to be attributed to its capacity to mobilize funds and to impose conditions.

Moreover, enhanced mobility of students from developing countries to developed countries also led to the growth of international flow of educational services. Not only the students but also programmes and providers started moving across the border to provide educational services.

### **1.3 Vehicles of Globalization**

**1.3.1 English Language:** Use of English is central for communicating knowledge worldwide and it is a factor in globalisation. It facilitates cross border degree arrangement and other programme, large number of students go to universities in English speaking countries. English is the main medium of instruction in many prominent academic systems like in the United States, United Kingdom, Australia, Canada and New Zealand. Singapore, Malaysia, Ethiopia and much of Anglophone Africa use English as the primary language of instruction. English functions as medium of instruction in India, Pakistan, Bangladesh and Sri Lanka as well. International scholarly and research journals are largely published in English and it is at the pinnacle of scientific communication. It gives significant advantage to the United State, United Kingdom and other wealthy English-speaking countries as their authors are writing in their mother tongue and they are familiar with the academic norms- the language and the methodology of writing and editing- but others must communicate in a foreign language and conform to unfamiliar academic norms. English language products of all kinds dominate the international academic market place. Text books written from a US or UK perspectives are sold worldwide, influencing students and academics in many countries and providing profits for publishers who function in English, their-products are priced to sell to American or European buyers and are thus

extraordinarily expensive to users in developing countries. English is the predominant academic language of the current period worldwide.<sup>24</sup>

**1.3.2 Communication and Information Technology (IT):** IT and globalisation go hand in hand. It serves as the primary vehicle for globalisation of knowledge and communications resulting in an unprecedented expansion of distance learning and the emergence of "virtual university campuses". Though distance education is not a new phenomenon IT has expanded distance education in the process contributing to the growth of distance education institutions. This revolution fuelled by the spectacular development of the Internet as it simplifies the obtaining of data and information for scholars and scientists at universities all over the world. Though it allows access to scholars/students in the developing world who otherwise lack good library facility, it is out of reach for many people in developing countries as they have limited access to the Internet as compared to their counterparts in the developed countries. The Internet and the database on it are owned and dominated by the developed countries universities and multinationals. Internet functions mainly in English and the material carried on it is also in English.<sup>25</sup>

#### **1.4 Theories of Globalisation**

**Neo-liberal Theory:** Under the neo-liberal paradigm, state-run services, including education, should be turned over to competitive market forces. It advocates free international markets that will spur competition and economic growth, increase economic efficiency and consumer choice, create jobs, and lower prices. Neo-liberals advocate that the Fordist economies based on the principles of protected national markets, organized labour unions and bureaucratic hierarchical management be replaced by 'neo-fordism'. Neo-fordism in which global competition forces

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<sup>24</sup> Philip G. Altbach, "Globalisation and the Universities: Myths and Realities in the Unequal World" *Tertiary Education and Management*, No.1, 2004, pp.1-20.

<sup>25</sup> *Ibid.*

corporate downsizing, cost cutting and flexibility in labour organization, which reduces wage and shrinks the bargaining power of unions that would facilitate an “enterprise culture” using part-time, temporary and contractual employees. Thus the neo-liberal ideologies legitimise globalisation.<sup>26</sup> This theory appears to be contradicting itself, as it says that the global competition would create jobs and at the same time, it talks of downsizing and wage cutting.

Milton Friedman, an economist, espousing the neo-liberal ideology argues that schools should be cut free from public sector bureaucracies and allowed to sink or swim in a deregulated international market place; parents would receive tuition vouchers or scholarships to spend in the educational marketplace, and schools would be forced to respond to parents/individual demands or go out of business.<sup>27</sup>

**Liberal Progressives (modernizers):** Call for greater investment in educational systems to prepare next generation for high-skill, high wage economy. An updated educational system will not only spur the economic growth but also further the goal of social justice, as governments commit to providing all students—not just the privileged few—with a challenging curriculum to prepare them for a lifetime of creative problem-solving, identifying and brokering. Traditional school curricula, emphasizing rote learning must be altered to accommodate the flexible specialization required by new production techniques. They argue that global capitalism and transnational “state-less” corporations diminishes the power of governments to make necessary investments in citizens’ “brain power”. ‘The proper role of government is to represent the interest of the future to the present, but today’s governments are doing precisely the opposite. They are lowering investments in the future to raise consumption in the present.’<sup>28</sup> The Liberal

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<sup>26</sup> Amy Stuart Wells and others, “Globalisation and Educational Change,” in A. Hargreaves et al, ed., *International Handbook of Educational Change*, (Kluwer Academic Publishers, 1998), p. 325.

<sup>27</sup> *ibid*, p.327.

<sup>28</sup> *ibid*, p.330.



Progressives call upon policy makers to invest more heavily in the state-run educational system and to create higher, more challenging goals and standards.

**Realists:** They see nation-states as playing a significant role in expansion of capitalism; this claim is based on the increasing salience of foreign trade and international flow of capital. They content that even the most powerful multinational corporations are not truly “global”. For instance, they found that two-thirds of these corporations are based in just 14 countries and both their operations and sale are fairly circumscribed to their region, and often home country.<sup>29</sup> They trace the historic relationship between the nation building practices of states and their national education system; they maintain that national education systems have been the pre-eminent author and guardian of national identity and culture, forging principles of common purpose and values. They argue that the trend towards marketisation and privatisation may have led to the devolution of decision-making in education, but not to the end of state control; rather than full-scale globalisation of education evidence suggests a partial internationalisation of educational systems and not the end of national education per se.<sup>30</sup>

## **1.5 Components of Globalisation**

There are two components in globalising education: one, internationalization of education and the other, multinationalisation or transnationalisation of education. Both are different they are not synonym. These transnationals seek liberalization so that they can move freely across borders.

### **1.5.1 Internationalisation of Education**

Internationalisation includes specific policies and programmes undertaken by governments, academic systems and institutions, and even individual departments or institutions to cope with

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<sup>29</sup> *ibid*, p.331.

<sup>30</sup> *ibid*, p.333.

exploit globalisation.<sup>31</sup> Basically it seeks to adopt the curriculum, course material and the syllabi that are of international standard and apply it in the local context. For example, M.B.A degree originated in the US to prepare professionals for work in the multinational corporations or firms engaged in international commerce. This degree programme is copied in other countries with some modification to suit the local context, but the basic degree structure and curriculum remains American.

### 1.5.2 Multinationalisation or Transnationalisation

Transnational/multinational education is not synonymous with international education. It is defined as academic programmes or institutions that go beyond national border. The UNESCO/Council of Europe Working Party, in collaboration with the European National Centres for Academic Recognition and Mobility (ENICs), identified the main types of transnational education: franchises, branch-campuses, twinning degrees, international institutions, distance and virtual universities.<sup>32</sup> Franchising is defined as the process whereby a higher education institution from a certain country authorizes another institution or organisation, from the same or another country, to provide educational services.<sup>33</sup> The authorizing institution lends its name and curriculum, providing some supervision and quality control to the local academic institution. It is also referred to as 'McDonaldisation'. Branch campus: in which a "mother" higher education institution from one country establishes a branch campus in another country in order to offer its own educational programs and qualifications. This model could be applied to Open Universities as they seek to secure the right to award degrees and qualifications.<sup>34</sup> Twinning degrees are inter-institutional arrangements whereby two or more institutions agree to set up a joint study programme with a credit transfer arrangement.

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<sup>31</sup> Philip G. Altbach, n.24.

<sup>32</sup> UNESCO/Council of Europe, *Code of Good Practice in the Provision of Transnational Education*, 2000.

<sup>33</sup> Birute Mockiene, "Transnational Higher Education in Lithuania," *International Higher Education* (The Boston College Centre for Higher Education), No. 24 (Summer) 2001, pp. 7-9.

<sup>34</sup> *ibid.*

International institutions offer “international” qualifications that are not part of a specific national educational system (e.g. courses offered by the United Nations University, Tokyo, Japan or the one offered by the World Trade Organisation). Offshore establishments are autonomous institutions that belong to no one particular educational system and may not even have a campus in the country (or system) of its origin (e.g. Madrasas).

**1.5.2.1 Liberalization:** It is the process where cross-border trade is promoted through the removal of barriers and free entry without any impediments so that the transnational education providers move freely cross-jurisdictional borders for commercial purpose or economic gain.

The process of liberalisation and globalisation in educational service is complex, contentious, inevitable and irreversible. We need to understand the facts and the phenomenon of these changes and get ready for them especially at the advent of WTO negotiations, which seeks to include education sector. This dissertation/ study makes an attempt to understand the facts and phenomenon of the changes that is taking place in the education sector and also attempts to comprehend the rules and regulations of GATS and tries to co-relate and analyse its impact and effect on education.

Chapter 2 looks at the trend and the modes of flow of education and identifies the problems and issues and also explores the current international legal regime that controls the flow of education.

Chapter 3 attempts to comprehend WTO laws, rules and regulation and how it applies and affects the education sector and the national legal systems, policies and practices.

Chapter 4 accounts the concerns shown by the international organizations, such as the UN, the UNESCO and other teachers and students associations, on their apprehensions over education being included in the WTO.

Chapter 5 discusses the law, policy and practice pertaining to Indian education system and tries to identify if they are in conformity with the WTO regime.

## Chapter 2

### INTERNATIONAL TRADABILITY OF EDUCATIONAL SERVICES

Philip G. Altbach rightly said, "We are now in era of power and influence. Politics and ideology have taken a subordinate role to profits and market-driven policies. Now, multinational corporations, media conglomerates, and even a few leading universities can be seen as the new neocolonialists- seeking to dominate not for ideological or political reasons but rather for commercial gains. Governments are not entirely out of the picture - they seek to assist companies in their countries and have residual interest in maintaining influence as well."<sup>35</sup>

As we know education was always considered to be a 'public good' but at the advent of transnational education providers it is considered to be 'big business' because of the for-profit education providers entering the scene. The 'international market' for educational services are, said to be, a large extent demand-driven, particularly by students from the rapidly emerging countries of North and Southeast Asia. These students face capacity constraint in their own countries, which leads to supply pressure on the 'international market'. Education is said to be a 'big business', but the potential to increase profits, if global corporations were able to open up the vast and hitherto untapped public 'education market', is enormous. This 'market' is promising. OECD says that fee income from foreign students studying in member countries topped \$30 billion in 1999. The massive spread of higher education means even more money can be made in the future. United States investment banker Merrill Lynch predicts today's total of 80 million students will have doubled by 2025. OECD says that there were 1.3 million foreigners studying in its member countries in 1998, rising to 1.5 million the following year.

But, can education be bought and sold like any other services? Are education campuses market places? Does a student enroll himself paying certain amount for consuming the service? Is

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<sup>35</sup> Philip G. Altbach, n.24.

payment the only criteria for consumption of education? Consumers of any other kind of service pay for the services and enjoy the services provided by the seller but when it comes to education the student-‘buyer’ has to put in lot of efforts, sit up late at nights, study hard to qualify for the final culmination of the services in the form of degree/diploma certificates. This is not the requirement in any other kind of services that is being traded. The problem does not end here; certificates/ licenses issued by one educational institution-supplier from a country/federal state may not be recognized by the other, for further education or in the labour market. Education as a service does not get used up in the process of consumption. Many of the market place concepts do not apply to education. Yet it is considered to be tradable in the international market by many scholars, economists and business people, prominent among them are Kurt Larsen, John P. Martin and Rosemary Morris.

As per these scholars, international trade in educational services consists of those services where individual students pay a tuition fee to the education institutions and living cost when studying abroad. Estimates of foreign students’ expenditures in the country are made by multiplying the number of foreign students by an estimate of average expenditure per student. **Receipts** consist largely of expenditures for tuition and living expenses for foreign students enrolled in a country’s universities and colleges —these are treated as service ‘**exports**’ from the perspective of the country in which a student is studying. **Payment** consist of tuition and living expenses of students who study abroad— these are treated as service ‘**imports**’ from the perspective of the country of origin of the student who is studying abroad.

## **2.1 Trends in International flow of Education**

In the OECD database on international trade in services statistics, seven countries (namely, Australia, Canada, Mexico, New Zealand, Poland, UK, US) have reported data on ‘Personal

travel, education-related activities'.<sup>36</sup> Since education service was never considered to be trade, they could find database only for these countries. Moreover, the heading does not indicate trade but 'Personal travel, education-related activities', which are construed as trade in education sector. The incomes from this 'Personal travel, education-related activities' are construed, as 'export' in educational service to prove that trade in educational services exists. According to Kurt Larsen and others, the United States is the biggest 'exporter' of educational services among the seven countries, leading with \$9037 million for the year 1998, followed by the United Kingdom (\$4464 million), Australia (\$1844million) and Canada (\$621 million) (Table 2.1).

**Table 2.1**  
**Exports of 'Personal Travel, Education-related Activities**  
**And a Percentage of Total Trade in Services**

Countries	1997		1998		1999	
	US\$ million	%	US\$ million	%	US\$ million	%
1. Australia	2190	11.8	1844	11.4	2030	11.6
2. Canada	595	1.9	621	1.9	703	2.0
3. Mexico	44	0.5	49	0.4	47	0.4
4. New Zealand	282	6.6	211	5.7	209	4.9
5. Poland	16	0.2	26	0.2	...	...
6. United Kingdom	4080	4.3	4464	4.5	...	...
7. United States	8346	3.5	9037	3.7	9572	3.8

Source: OECD statistics on trade in services

<sup>36</sup> Kurt Larsen, John P. Martin and Rosemary Morris, "Trade in Educational Services: Trends and Emerging Issues," *World Economy*, vol. 25(6), June 2002, pp. 849-68. Tables 1 to 3 in the present study are extracts taken from Tables given in this article.

United States is, again, the largest importer with \$1591 million in 1998, followed by Canada (\$523 million) and Australia (\$337 million), i.e. payments made for students studying abroad (Table 2.2).

**TABLE 2.2**  
**Imports of Personal Travel, Education-related Activities**  
**and a Percentage of Total Trade in Services**

Countries	1997		1998		1999	
	US\$ million	%	US\$ million	%	US\$ million	%
1. Australia	410	2.2	337	2.0	378	2.1
2. Canada	532	1.4	523	1.4	563	1.4
3. Mexico	44	0.3	49	0.4	47	0.3
5. Poland	41	0.7	48	0.7	...	...
6. United Kingdom	182	0.2	217	0.3	...	...
7. United States	1396	0.9	1591	0.9	1840	1.1

Source: OECD statistics on trade in services.

**TABLE 2.3**  
**Revealed comparative advantage in 'Personal Travel, Education-related Activities**  
**(Exports minus Imports as a percentage of total services trade)**

Countries	1997	1998	1999
	%	%	%
1. Australia	9.6	9.4	9.5
2. Canada	0.5	0.5	0.6
3. Mexico	-0.2	0	-0.1
5. Poland	-0.5	-0.5	...
6. United Kingdom	4.1	4.2	...
7. United States	2.6	2.8	2.7

Source: OECD statistics on trade in services.

Comparing Table 2.1 and 2.2 it is clear that Australia, Canada, the United Kingdom and the United States have a trade surplus in educational services and Australia to be the most

competitive exporter of Education as Australia's export percentage minus the import percentage (9.4%) reveals the greatest comparative advantage whereas US export minus import percentage is only about 2.8% (Table 2.3).

Largest demand for educational services comes from China and India. USEFI study in 1998-99 reveals that on an average 42000 students flock to the US alone from India. Thousands of Chinese parents send their children abroad for studies.<sup>37</sup> Foreign institutions are scrambling for booths in China and India. They are also increasingly enrolling in programmes offered by these foreign institutions within the country through distance education, virtual universities and twinning programme. As far as exports from these countries are concerned there is no official document, which reveals the number of foreign students in these countries.

This trend substantiates the realists argument that nothing global about globalisation; as there are about seven countries in the world construed to be 'exporting' their education to few populated countries in Asia; that too only through 'exports' by students moving to their territory for studies and their payment of tuition fees, lodging and boarding are considered to 'export' income.

## **2.2 Modes of Operation in Educational Services**

Unlike goods, more often, services require the supplier of the services and the receiver of the services to be in physical proximity except in cases where the services are 'separated' from both the factors of production and the receiver of services, e.g. electronic transfer of services, consultation services, architectural designs, higher education handled through correspondence

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<sup>37</sup> Yang Rui, "China's Entry into the WTO and Higher Education," *International Higher Education* (The Boston College Centre for Higher Education), No.24 (Summer) 2001, p. 9.



that are produced in the exporting country.<sup>38</sup> This physical proximity can be achieved in two ways:

- i) By the movement of factors of production – labour and capital-across the border of country of consumption.
- ii) Movement of receiver of services - students and tourists visiting the country of supply.

Trade in educational services, as defined in GATS, takes place in four different modes.

a) **The cross-border supply (Mode 1)** of education service from the territory of a country to another. Only the service itself crosses the border. The cross border supply of educational services through **distance learning** in which students take classes via correspondence, radio, television and Internet (virtual universities). The oldest university to offer correspondence course is University of South Africa (1873). The five largest programmes in the world are all based in the developing countries and all of these have been established since 1978 (see Table 2.4). At the advent of communication technology, online courses and educational CD-Roms will continue to grow and revolutionise distance learning. Massachusetts Institute of Technology (MIT), with funding from two private foundations, has decided to put some of its courses online for the benefit of students and teachers all over the world at the click of a computer mouse, to download the content of classes being taught over there. Also Duke University in the United States offers a 'Cross-Continent' MBA programme that has large on-line tuition components, allowing enrolment and participation of foreign students without requiring them to move to the United States. Over 12 percent of the United Kingdom's Open University (publicly funded) students are residents outside the country, with 4000 students per day connecting via Internet. There exist only scattered data on this mode of cross border e-learning activity. There is very little

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<sup>38</sup> G.P. Sampson and Richard H. Snape, "Issues in Trade in Services," *The World Economy*, vol. 8(1), March 1985, pp. 171-182.

information on the scale of these activities and the proportion that is traded cross-border. But it is estimated that cross-border e-learning activities are likely to grow faster than the number of students studying abroad. There are already e-learning initiatives around the world, including UNESCO's African Virtual University,<sup>39</sup> Universitas 21,<sup>40</sup> and the UK's e-university.<sup>41</sup>

TABLE 2.4

**Ten Largest Distance-Learning Institutions**

Institution	Founded	Students
Anadolu University, Turkey	1982	578,000
China TV University	1979	530,000
Universitas Terbuka, Indonesia	1984	353,000
Indira Gandhi National University, India	1985	242,000
Sukhothai Thammathiat Open University, Thailand	1978	217,000
Korean National Open University	1982	211,000
National Centre for Distance Learning, France	1939	185,000
The Open University, Britain	1969	157,000
University of South Africa	1873	130,000
Payame Noor University, Iran	1987	117,000

Note: Students figures are for 1994, 1995 or 1996

Source: World Bank, Task Force Report on Higher Education and Society, 2000.

b) The **consumption abroad (Mode 2)** by the citizens of a country traveling to the territory of another in order to consume services (e.g. **Students traveling abroad**). Students traveling to study abroad account for the largest component of international educational services. It has been discussed earlier in paragraph 2.1 in detail.

<sup>39</sup>Visit <<http://www.avu.org/>>

<sup>40</sup>Visit <<http://www.universitas.edu.au/>>

<sup>41</sup>Visit <<http://ukeuniversitiesworldwide.com/>>

c) **The commercial presence (Mode 3)** of a service supplier from a country on the territory of another, enabling the supplier in question to provide a service on that territory (e.g. foreign universities or other institutions establishing their **branch/franchises, twinning programme**). The recent development of commercial presence across the border in education is seeking the liberalization of the education sector. For the commercial presence education providers the 'international market' for educational services are demand-driven, and this demand is only for specialized and professional courses and their interest would be to provide/supply only those subjects that have high demand, which could fetch maximum profit to this type of 'education suppliers'. They can present serious competition to the local universities on those 'profitable subjects' while the non-profitable subjects in arts, humanities, science and technology that are so vital for a country's development would be abandoned. Moreover the foreign providers offer courses of dubious quality and function as 'diploma mills' since they are commercially motivated and can often exploit and mislead local students. In India there are many such franchises and twinning programmes conducted by US, UK and Australian Universities, but there are no official records as to the number and their scale of their operation. Private universities/institutions providing management, engineering and computer courses get into some sort of understanding with these foreign providers and provide foreign degree to the students in India. This is the gimmick to attract students by the private institutions whereby they advertise that they can complete part of their programme here in India and the remaining in the foreign provider's state and credit would get transferred. Parents and students are lured by the foreign university degree but the credentials of those foreign universities are not known.

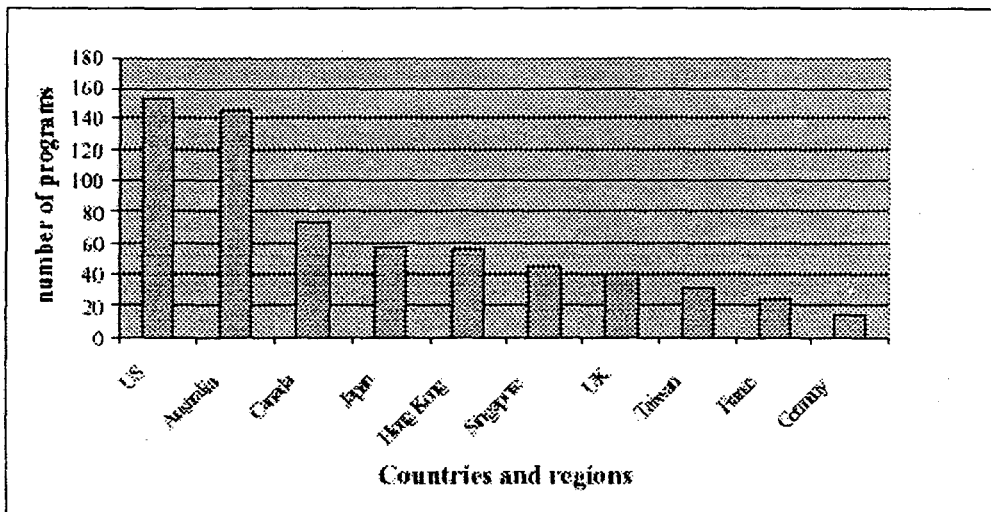
In recent years, the Chinese government has paid increasing attention to a new development that involves international educational cooperation, that is, the joint provision of foreign sourced programmes and degrees through Sino-foreign collaborations. The government has instituted

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regulations for “Sino- foreign joint programs,” which refer to educational undertakings enrolling Chinese citizens as the main objective and run by educational institutions established in cooperation with foreign corporations, individuals, and relevant international organizations and Chinese educational institutions and other social organizations with the status of legal person. According to a rough estimate by the Chinese Ministry of Education, there were 721 joint programs in China at the end of year 2002, an increase of more than nine times compared to 1995.<sup>42</sup> The following graph shows the top ten partner countries running their educational programmes in China under the collaborations.

Figure 1: Top Ten Partner Countries and Regions



Source: Ministry of Education, China, 2003

d) The **presence of natural persons (Mode 4)** where the individual service providers move from one country to another to provide services (e.g. Teachers and scholars traveling abroad to provide educational services). Flow of education under this mode is constrained by many barriers such as immigration-related regulations concerning entry and stay; regulation concerning qualifications and work experience; wage parity and double taxation on earnings etc. These

<sup>42</sup> [http://www.moe.edu.cn/guoji/wsfagui/hzbanxue/01\\_1.htm](http://www.moe.edu.cn/guoji/wsfagui/hzbanxue/01_1.htm)

regulations are not to impede trade per se but intend to protect local consumers, employment, public interest, security reasons and balance of payment reasons. These regulations affect developing countries trade in this mode, since they have comparative advantage over skilled and unskilled workforce. The current movement of persons to teach or research is done under intra-corporate transfers or the exchange programme, which falls under Mode 3 (namely commercial presence) and is also very limited. There are restrictions on recruiting foreign teachers, even if it is done that is based on the needs test, after providing evidence of an extensive search for local person before hiring a foreign national. There is also a requirement of nationality that allows discrimination on the basis of citizenship, residency etc., which is to ensure familiarity with local languages, laws, conditions and culture, and broadly to safeguard the national interest.

## **2.3 Issues and Problems**

### **a) Government Policies**

Government policies can restrict the service transaction per se or movement of factors producing services and/or movement of the receivers of the service. These policies not only affect the form in which a transaction takes place but also whether the transaction takes place or not. Free trade in service is achieved only when there is freedom of movement of factors of production, of 'separated' services (Mode 1) and of service receivers and providers (Modes 2, 3 and 4). Transaction in 'separated' services is much freer as it requires sending and receiving of mails, electronic and telegraphic transmission; it does not even pass through customs house as it crosses the frontier. The other two modes of service transactions, i.e. movement of factors of production and the receiver of the service, face direct restrictions from foreign investment policies visa/migration policies. These policies, regulations and laws are not actually intended to restrict service trade per se but they are adopted for domestic reasons such as protection of consumers, protection against monopolies, security threat, and control over the monetary policies etc.

## **b) Intellectual Property Rights of Learning Materials**

The growing trade in higher education services increases international competition among universities and other higher education institutions across borders. Universities may seek to protect their knowledge and learning materials and reputation through intellectual property rights. These measures restrict mobility of knowledge. The rate at which scientific papers are published has doubled in the past two decades. The advances in computerization, communication and information technology have enhanced the ability of researchers and entrepreneurs to create new knowledge, products and services. In both Industrial and developing countries the number of patent applications has been increasing steadily. For example, in 1996 residents of Brazil, India, and the US filed 42, 66, and 71 percent more application respectively than in 1986.<sup>43</sup> Foreign institutions while imparting education refer to foreign books and materials, which are priced to sell in the American and European economy which developing countries counterpart could not afford,<sup>44</sup> which indirectly increase the sale of their books and materials as well. Not only books and materials but also some foreign computer institutions provide laptops to their students while enrolling for a course with them this again promotes indirectly the sale of laptop-computers manufactured abroad.

## **c) Acculturation**

Education is a process through which cultural assimilation takes place. The massive import of higher education services could have harmful consequences. Hasty opening of the markets increases dependence on foreign educational resources. Acculturation—the issue of culture, indigenous tradition and the local languages, in many countries—is caused by the use of a

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<sup>43</sup> Task Force Report 2000, n.4, p.33.

<sup>44</sup> Philip G. Altbach, n.24.

foreign language for teaching; a tendency to the standardization (or the McDonaldisation) of education in which there would be a standard curriculum throughout the world and this would cause the local languages and the culture to wilt.

## **2.4 Current International Legal Regime**

Cross border exchange of education is not a new phenomenon; it is centuries old. Traditionally the mode of education exchange was only through students and teachers crossing the border and their movement was regulated by the national legal system of each country. To deal with the problem recognition of degree/diploma certificates/licenses provided by one country by the other, there are a number of regional conventions under the auspices of UNESCO, which provide the legal framework to deal with such problem. Following are some of such conventions, which were drafted, in the pre-WTO/GATS era.

1. **Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Latin America and the Caribbean** (Mexico City, 19 July 1974);<sup>45</sup>
2. **International Convention on the Recognition of Studies, Diplomas and degrees in Higher Education in the Arab and European States Bordering on the Mediterranean.** (Nice, 17 December, 1976);<sup>46</sup>
3. **Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab States** (Paris, 22 December 1978);<sup>47</sup>

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<sup>45</sup> UN Treaty Series No. 14287, The signatories are Brazil, Colombia, Cuba, Ecuador, El Salvador, Holy Sec. Republic of Macedonia, Mexico, Netherlands, Nicaragua, Peru, Panama, Slovenia, Suriname, Venezuela, and Yugoslavia. This convention entered into force on 14 June 1975. (Brazil and Chile has denounced this Convention.) It subsequently entered into force for each state one month after the date of deposit of that State's instrument of ratification.

<sup>46</sup> UN Treaty Series No. 16889, The signatories are Algeria, Bosnia-Herzegovina, Croatia, Egypt, Italy, Malta, Morocco, Slovenia, Turkey, Yugoslavia, and the Republic of Macedonia. This convention entered into force on 6 March, 1978.

<sup>47</sup> UN Treaty Series No. 20367, The signatories are Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Socialist People's Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Tunisia, and the UAE. This convention entered into force on 7 August 1981.

4. Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to **Europe Region** (Paris, 21 December 1979);<sup>48</sup>
5. Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the **African States** (Arusha, 5 December 1981);<sup>49</sup>
6. Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in **Asia and the Pacific** (Bangkok, 16 December 1983).<sup>50</sup>

All these conventions are regional in nature; all of them address the problem of recognition of foreign certificates, diplomas, degree or other academic qualifications, their acceptance by the competent authorities of the Contracting States so that the certificate holders, right to access to further education and employment is preserved.

The aims of these conventions are to encourage exchange and freedom of movement of teachers, students and researchers within the respective regions, co-ordinate the entrance requirements, alleviate the difficulties encountered by those returning home or moving abroad within that region, reviewing and harmonizing curricula and planning of higher education, adopt

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<sup>48</sup> UN Treaty Series No. 20966, The signatories are Armenia, Azerbaijan, Australia, Belgium, Bulgaria, Belarus, Bosnia-Herzegovina, Croatia, Canada, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Holy See, Hungary, Israel, Italy, Kazakhstan, Kyrgyzstan, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Russian Federation, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, UK, Yugoslavia, and Republic of Macedonia. This convention entered into force on 19 February 1982.

<sup>49</sup> UN Treaty Series No. 21522, The signatories are Algeria, Benin, Burkina Faso, Burundi, Cote d'Ivoire, Egypt, Equatorial Guinea, Gabon, Guinea, Holy See, Lesotho, Niger, Rwanda, Senegal, Seychelles, Sudan, Swaziland, Togo, United Republic of Tanzania, Zambia. This convention entered into force on 1 January 1983.

<sup>50</sup> UN Treaty Series No. 32002, The signatories are Armenia, Azerbaijan, Australia, China, Holy See, India, Kazakhstan, Kyrgyzstan, Maldives, Mongolia, Nepal, People's Democratic Republic of Korea, Republic of Korea, Russian Federation, Sri Lanka, Tajikistan, Turkey, and Turkmenistan. This convention entered into force on 23 October 1985. For all these convention, it subsequently entered into force for each state one month after the date of deposit of that State's instrument of ratification.



terminology and evaluation criteria that will ensure the comparability of credits, subject of study and degree, certificate and diploma.

All these conventions provide for Implementation machinery to put the convention into effect through:

- a) national bodies;
- b) the intergovernmental committee (e.g. Arab League Educational, Cultural and Scientific organization (ALECSO) and Association of Arab Universities (AAU));
- c) Bilateral or sub-regional bodies.

The scope of these conventions can be extended to other countries outside the respective regions also, except for the Convention belonging to Europe Region. Countries outside the convention region can accede to any of these conventions by communicating a request to the Director General of UNESCO, but whether to admit any country shall be decided by the contracting parties by two-third majority.

India acceded to the 'Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific, 1983,' on 2 August 2000 i.e. fifteen years after the Convention came into force.

A Review of Quality Assurance and Accreditation Systems in UNESCO member countries was held on 3-4 November 2003 at Trondheim, Norway. It underlines the establishment of national quality assurance and accreditation body in most of its member countries. Now the focus would be to establish nodal agencies, standard setting, capacity building and dissemination of information in the field of quality assurance and accreditation in higher education.

These conventions address problems of traditional educational exchange through the movement of students and teachers, and recognition of studies across the border within the respective region. But, at the advent of corporate education providers and the Internet technology the problems became more complex as transnational corporation education providers face obstacles while entering a market of another state since they require very stringent conditions to be met by foreign corporations. Foreign education providers have to obtain national licenses for establishing commercial presence, rules and procedures for obtaining such documents differ from country to country and most of the time it is a cumbersome process. Moreover generally countries specify upper limit for Foreign Direct Investments (FDI) on foreign education providers. For example, Mexico allows only 49% limit for FDI in commercial presence of education providers.

Internet is subject to cyber laws and a code of conduct for transnational corporation is proposed to govern the transnational corporations. The legal regime for flow of education must catch up with these developments. There has to be national regulations for foreign providers of higher education in every country and those regulations must be harmonized.

In India no law prohibits or regulates the foreign universities in India, the number and extent of the foreign universities activities in India are not known. Of course, there are several such foreign providers operating in India. It is only through newspaper advertisement that one can find out that there are several such education providers. There are several 'fly-by-night' institutions operating freely in India, subjecting the students into many hassles (this aspect is dealt in detail in Chapter 5 of this study).

The other problem is lack of an international framework of quality assurance and accreditation in higher education. There is no global framework to address the problem of recognition of foreign degrees as yet. Without such framework in place, foreign students cannot be confident that they are getting a quality higher education and also whether the qualification has any value in the job market. There is a necessity of translating foreign degree and qualification obtained abroad into national equivalent or pass examination conducted by the host country in order to secure admission for higher education. But in India the situation is reversed, only the local students go through the process of entrance examination and the foreign students get direct admission in universities.

There is no international regulation providing level playing field for the corporate education providers. The existing legal regime is not adequate to deal with the problems faced by the new entrant of education suppliers. It is in their interest of these corporate education providers that the education is included in the WTO/GATS legal regime, which is being dealt in the next chapter.

## Chapter 3

### PROPOSED INTERNATIONAL LEGAL REGIME

At present there is no comprehensive international legal regime in place to regulate the flow of educational services. As a result, trade in education is growing in an environment of chaos leaving the student community in lurch. Even the private educational providers thrive in an unpredictable and challenging environment but again as and when these private providers confront with closure or withdrawal, they dump these gullible students who are left with no effective legal remedy.

#### 3.1 REGULATION

In the absence of comprehensive international regulatory mechanism for all modes of exchange in educational services, interested parties – the giant transnational education providers/suppliers – wanted the education be brought under the WTO regime through the GATS one of the WTO agreements. Education services are covered under chapter 5 of the GATS classification system. GATS is said to provide predictability and a level-playing field for companies to operate across border. GATS relates largely to the conditions under which foreign ‘suppliers’ are granted access to a service market, and the extent to which such ‘suppliers’ are treated equally to domestic ‘suppliers’.<sup>51</sup> This makes it clear that GATS is supplier oriented; it is not concerned about the rights of students and faculties. Not only GATS but also other agreements in the WTO like the Agreement on Subsidies and Countervailing Measures, Agreement on Government Procurement, Agreement on Trade Related Intellectual Property Rights (TRIPs) and the Rules of Dispute settlement will have direct implication over the exchange of education.

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<sup>51</sup> UNCTAD and World Bank, *Liberalizing International Transactions in Services – A Handbook*, United Nations, 1994.

### 3.1.1 WTO Laws

The Agreement establishing the World Trade Organisation (The WTO Agreement) has four annexes. Consists of the following:

#### *Annex 1*

***Annex 1A: Multilateral agreement on Trade in Goods.***<sup>52</sup>

***Annex 1B: General Agreement on Trade in Services.***<sup>53</sup>

***Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).***

***Annex 2: Understanding on Rules and Procedures Governing the Settlement of Dispute or the Dispute settlement Understanding (DSU).***<sup>54</sup>

***Annex 3: Trade Policy Review Mechanism.***<sup>55</sup>

***Annex 4: Plurilateral Trade Agreements.***<sup>56</sup>

Signing the WTO pact would imply signing all the agreements; these agreements are not mutually exclusive.

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<sup>52</sup> It Contains 13 agreements, they are: 1) General agreement on Tariffs and Trade (GATT) 1994; 2) Agreement on Agriculture; 3) Agreement on the Application of Sanitary and Phytosanitary Measures; 4) Agreement on Textiles and Clothing; 5) Agreement on Technical Barriers to Trade; 6) Agreement on Trade related Investment Measures (TRIMs); 7) Agreement on Implementation of Article VI of GATT, 1994; 8) Agreement on Implementation of Article VII of GATT, 1994; 9) Agreement on Pre-shipment Inspection; 10) Agreement on Rules of origin; 11) Agreement on Import licensing Procedures; 12) Agreement on Subsidies and countervailing measures; 13) Agreement on Safeguards

<sup>53</sup> It covers eleven and one "other" service sector and each of these service sectors are further classified into 160 sub-sectors services or activities. 1. Business Services, 2. Communication services, 3. Construction and related Engineering Services, 4. Distribution Services, 5. Educational Services, 6. Environmental Services, 7. Financial Services, 8. Health Related and Social Services, 9. Tourism and Travel Related Services, 10. Recreational, Cultural and Sporting Services, 11. Transport Services.

<sup>54</sup> It provides for Dispute Settlement Body (DSB), which administers the Panel and the Appellate Body for dispute resolution between the members concerning their rights and obligations under the provisions of the WTO agreements. The dispute settlement system is central element in providing security and predictability to the multilateral trading system. It serves to clarify the existing provisions, of all the agreements covered under the WTO, in accordance with customary rules of interpretation of public international law. The aim of dispute settlement mechanism is to secure positive solution to a dispute.

<sup>55</sup> It enables the regular collective appreciation and evaluation of the full range of individual member's trade policies and practices and their impact on the functioning of the Multilateral trading system. The Trade Policy Review Body (TPRB) is established and members are required to report to the TPRB describing the trade policy and practices pursued by them.

<sup>56</sup> It contains four agreements, they are: 1) Agreement on Trade in Civil Air Craft, 2) Agreement on government Procurement, 3) International Dairy Agreement and 4) International Bovine Meat Agreement.

### 3.1.1.1 GATS

General Agreement on Trade in Services is one of the agreements - Annex 1B - of the WTO agreement. GATS negotiations are going on under the auspices of the Council on Trade in Services, and the negotiations are expected to conclude by January 2005. If no sufficient agreement is reached with respect to education, the sector could be part of new round of global negotiations after January 2005.

#### 3.1.1.1.1 Historical Background

In 1947 the Havana Charter was drafted which was supposed to have established the International Trade Organisation (ITO) noted its purposes for trade in goods and services.<sup>57</sup> The ITO never came into existence but GATT one of its components, did not mention services. GATT confined itself to exchange of goods. Successive rounds of trade negotiations under the auspices of GATT reduced tariff rates considerably, liberalised the trade regime and expanded the volume of world trade in goods. In the 1950s and 60s the world economy witnessed a 5% annual average growth rate of GDP and 8% growth in international trade<sup>58</sup> but in the 1970s the world economy experienced a period of turmoil due to delinking of the dollar from gold, currency markets turbulence resulting into a regime of floating exchange rates and the oil crisis (1973-74) adversely impacted the world economy. In the industrialised countries the period since 1973-74 has been characterized by a significant slowdown in income growth and sharp increase in unemployment.<sup>59</sup> In this scenario the GATT Tokyo Round (1973-79) mentioned trade in services to form a part of the future negotiations agenda.

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<sup>57</sup> Article 53 of the Havana Charter provides for special procedures with respect to services. It recognizes services such as transportation, telecommunications, insurance and commercial services of banks, which had substantial element of international trade.

<sup>58</sup> Chawla R.L., "India and EU: from GATT to GATS," seminar paper, International Seminar on *India, the European Union, and the WTO* 16-17 October 2002, New Delhi.

<sup>59</sup> Andre Sapir, "North-South Issues in Trade in Services," *The World Economy*, vol. 8(1), March 1985, pp. 27-42.

The structural change in trade, from goods to services, is caused by; first, the technological revolution in the fields of data processing and telecommunications has generated an explosion in communication and information services. These services activities, in turn, have fostered the expansion of other intermediate services especially in the area of finance and higher education. Second, the rise in income in the industrialized countries has modified the pattern of consumption in these countries in favour of goods and services requiring more service inputs. Finally, the manufacturing sectors is contacting out services to specialized units instead of doing it in house i.e. outsourcing of services.<sup>60</sup> Thus advancement in the information and software technology, increasing demand for services in the developed and the developing countries, growth of multinational corporation and outsourcing of services have contributed to the expansion of the service sector in the world economy.

The United State was making a very strong diplomatic effort since the early 1980s to persuade other countries to prepare for multilateral negotiations on trade in services, as the US is the largest exporter of services in the world. Moreover its merchandise trade balance was running in deficit and the service trade was enjoying the surplus.<sup>61</sup> At the GATT ministerial meeting held at Geneva in November 1982, the US and some other industrialised countries made proposals for the establishment of a working group on services. The proposal was not accepted, but signatory countries with 'interest in services of different types' were recommended to undertake 'national studies' on trade problems in the service sector, and the result to be disseminated through GATT session in 1984 to determine whether any multilateral action on these matters would be appropriate and desirable.<sup>62</sup> The US administration's thinking was formally presented in the *US National Study on Trade in Services* which was submitted to the GATT in December 1983. This

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<sup>60</sup> *ibid.*

<sup>61</sup> Harry G. Broadman, "GATS: The Uruguay Round Accord on International Trade and Investment in Services," *The World Economy*, vol. 17, 1994, p. 281.

<sup>62</sup> Andre Sapir, n.59.

document suggested two separate orientations: there would be a general set of principles, with rights and obligations, that would apply to all services; there would be particular rules for specific services industries.<sup>63</sup>

At the very inception of the preparations for the new round of multilateral trade negotiations, a large number of developing country participants were skeptical and suspicious that the US and a handful of other advanced developed countries wanted to consolidate their present position in the provision of services in the world trade by forcing other countries to accept international rules which would limit the sovereignty and autonomy of developing countries. Nevertheless, an agreement was reached at the GATT session 1984 whereby the chairman of the GATT's CONTRACTING PARTIES with a view to compiling and distributing information on service industries with the support of GATT secretariat established a working group. The agreement also called for a report to be made to the 1985 session with the mandate to decide whether there should be multilateral negotiations on trade in services.

By 1985 most governments had come to recognise the service sector as a high priority agenda of the US and the trade relations of their countries with the US could be affected by their attitude towards this new American priority. As a result most developing countries under the leadership of Colombia and Uruguay (Group of 20)<sup>64</sup> either abandoned their opposition, provided some support to the US on the new round or remained silent.<sup>65</sup> Moreover there had also been a slow process of reassessment about the significance of trade in services by many governments. As a result there was a change in perception and recognition of rapid growth in service sector compare

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<sup>63</sup> Harald B. Malmgren, "Negotiating International Rules for Trade in Services," *The World Economy*, vol. 8(1), March 1985, pp.11-26.

<sup>64</sup> These include ASEAN countries, Bangladesh, Chile, Colombia, Pakistan, Senegal, South Korea, Sri Lanka, Uruguay and Zaire.

<sup>65</sup> C. Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World*, (Third World Network, 1992) pp. 69-80.



to other sectors in the national economies. The traditional views about trade policy started changing, as they perceived that services constitute a major growth sector in their economies and there ought to be a coherent international framework of principles and the rules for governing the international transaction in services.

Not all developing countries were skeptical or offered resistant; countries like Hong Kong and Singapore were keen on the liberalisation of trade in services. On the other hand a small group of countries (Group 10)<sup>66</sup> led by Brazil and India remained together and resisted the US, as they saw it as a threat to their plan for economic development since they were the net importers of services and they also had a consideration of protecting their infant industries and managing their balance of payment difficulties

A day before the opening of the Uruguay round i.e. on 13 September 1986, in a radio address, President Regan called for a new round to include services, intellectual property and investment. These new issues involved prolonged negotiations in which the US, Brazil and India were the central participants. The US representative made it clear that they would walk away from the proposed new round if it did not include these issues,<sup>67</sup> and the effort to block services by the 'group 10' got relegated and a compromise was reached on the services issue. Much of the compromise and understandings were in informal negotiations, and these were brought to record at the very first meeting of the Group of Negotiations on Services (GNS).<sup>68</sup>

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<sup>66</sup> Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia

<sup>67</sup> John Croome, *Reshaping the world Trading System: A history of the Uruguay Round*, (WTO, Kluwer International law, Geneva (2<sup>nd</sup> and revised edition) 1999) pp. 23-24.

<sup>68</sup> *ibid.*

On 14 September 1986 the ministerial meeting opened at Punta del Este, east of the Uruguayan Capital of Montevideo, Chaired by Iglesias, Uruguayan foreign minister. It was a detailed procedural agreement that ensured coverage of all the three subjects proposed by the US.

A compromise was finally reached at the Punta del Este Ministerial Meeting that launched the Uruguay Round. Part II of the Uruguay Round Declaration carefully balanced the US initiative of including services in the Uruguay Round and the developing countries dual objective of maintaining multilateral action on trade in services outside GATT, and obtaining recognition of the priority of development objectives and the supremacy of national legislation. Thus the participants adopted the Uruguay round declaration by separating Part II (concerning trade in services) from Part I (concerning trade in goods).

When the Uruguay round was launched, a separate group on negotiations on services was created (GATT: Ministerial declaration on Uruguay Round 20 Sep 1986 GATT BISD 33<sup>rd</sup> supp. 19 at 28 (1987)).<sup>69</sup> This negotiation culminated into General Agreement of Trade in Services (GATS), which provides a framework for sector specific agreements. This is the first ever set of multilateral, legally enforceable rules covering international trade in services.

#### **3.1.1.1.2 Structure and Scope**

GATS has a three-tire structure:

1. Framework containing fundamental principles, rules and disciplines applying to all members.
2. The national schedules of specific commitments that are also annexes to the Agreement, forming an integral part thereof (Article XX). These enable countries to proceed liberalizing services at their own pace.

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<sup>69</sup> *ibid.*

3. Sectoral agreements, the Annexes addressing the specificities of individual service sectors and modes of supply, and exemptions from Article II (MFN), which form an integral part of the GATS Agreement (Article XXIX). This is to ensure that trade liberalisation in some services is supported by the establishment of compatible regulatory regimes or modification of existing ones.

This agreement consists of six Parts, twenty-nine Articles and eight Annexes, which contains legally enforceable rules and discipline.<sup>70</sup> Part I sets out the scope and definition of the agreement. Part II deals with general obligations and disciplines applicable to all services and all members. Part III sets out rules governing the specific commitments in schedules. Part IV concerns future negotiations and schedules. Part V and VI cover institutional and final provisions.

### **3.1.1.1.3 GATS and Education**

GATS has a very broad reach as it applies to any *measures* taken by WTO members that affect trade in all modes of supply that are possible in exchanging services (Article I).<sup>71</sup> The reach of this definition goes beyond central governments to include *measures* taken by regional and local governments and also includes non-governmental bodies exercising powers delegated to them by governments. This includes self-regulating professional services, professional education institutions and school boards. That means that governments must ensure that their sub national bodies observe GATS obligations and commitments. The concept of *measure* here is an expanding one. Article XXVIII defines it to mean any *measure* by a member, whether in the

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<sup>70</sup> 1. Annex on Article II Exemption, 2. Annex on Movement of Natural Persons supplying services under the agreement, 3. Annex on Air Transport Services, 4. annex on Financial Services, 5. second annex on Financial services, 6. Annex on Negotiations on Maritime Transport Services, 7. Annex on Telecommunications, 8. Annex on Negotiations on Basic Telecommunications.

<sup>71</sup> The four modes of supply discussed in detail in the Chapter 2.

form of law, regulation, rule, procedure, decision, administrative action, or any other form. This expansive approach increases the significance of Article 1 of the GATS.

GATS covers all conceivable forms of services, which are classified into eleven service sectors and further classified into 160 sub-service sectors.<sup>72</sup> The Services Sectoral Classification List (Document MTN.GNS/W/120) was prepared by the WTO Secretariat. Document MTN.GNS/W/120 of service is based on the United Nations Provisional Central Product Classification (CPC).<sup>73</sup> There was not enough thought went behind the inclusion of service sectors in the MTN.GNS/W/120 list; whichever services that the Secretariat could pick from the CPC is included. There was no time to debate and discuss as to which sectors to be include and which one to be excluded, as the GATS was drafted in a great hurry within a limited time frame. Some service sectors like the water supply does not find place in MTN.GNS/W/120. It was argued that water supply is a service and that should have been included in MTN.GNS/W/120. But the list of services in MTN.GNS/W/120 is not exhaustive; its only a point of reference for the national schedule of commitment; members wish to include service sectors that are not included in MTN.GNS/W/120 may do so. Members also have an option of not making national commitment on any of the services sectors enumerated in MTN.GNS/W/120. But the inbuilt mechanism of 'progressive liberalization' would catch up with them sooner or later. The process of 'progressive liberalization' involves two aspects: extending GATS coverage to more service sectors, and decreasing the number and extent of measures that serve as impediment; countries are expected to add sectors or sub-sectors to their national schedule of commitments and to

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<sup>72</sup> 1. Business Services, 2. Communication services, 3. Construction and related Engineering Services, 4. Distribution Services, 5. Educational Services, 6.Environmental Services, 7. Financial Services, 8. Health Related and Social Services, 9. Tourism and Travel Related Services, 10. Recreational, Cultural and Sporting Services, 11. Transport Services.

<sup>73</sup> WTO, The Service Sectoral Classification List, Prepared by WTO Secretariat. Document MTN.GNS/W/120 available at [www.wto.org/english/tratop\\_e/serv\\_e/sanally\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/sanally_e.htm)

negotiate the further removal of limitations on market access and national treatment.<sup>74</sup> That means even if a member keeps the educational service sector outside the national schedule of commitment, member would end up committing it at the later date.

Service does not fall under the purview of GATS if it is 'supplied in the exercise of governmental authority' which is neither supplied on a 'commercial basis nor in competition with other service suppliers' (Article I:3 (b)). This Article is unclear and narrowly interpreted and the exclusion is important to public education because it serves as a basis for excluding education from being subject to GATS. In order for education to be exempted from GATS, it must meet both criteria of neither being supplied on commercial basis nor in competition with one or more service suppliers. However the exclusion remains unclear and subject to possible conflicting interpretation. The situation is complicated in those countries where there is a mixed public/private higher education system or where a significant amount of funding for public institutions in fact comes from the private sector. Another complication is that a public education institution in an exporting country is often defined as private/commercial when it crosses the border and delivers in the importing country.<sup>75</sup>

The Director General of the WTO stated that the liberalization of governmental segments of sectors such as health and education has never come up in the discussions between governments.<sup>76</sup> Even the liberalization of the commercial segments of such sectors has received little attention in the negotiations and the focus of the negotiations has been on other services sectors. According to the Director General: "Each negotiating Government has the unequivocal right to choose which services it wishes to open to foreign competition and under which

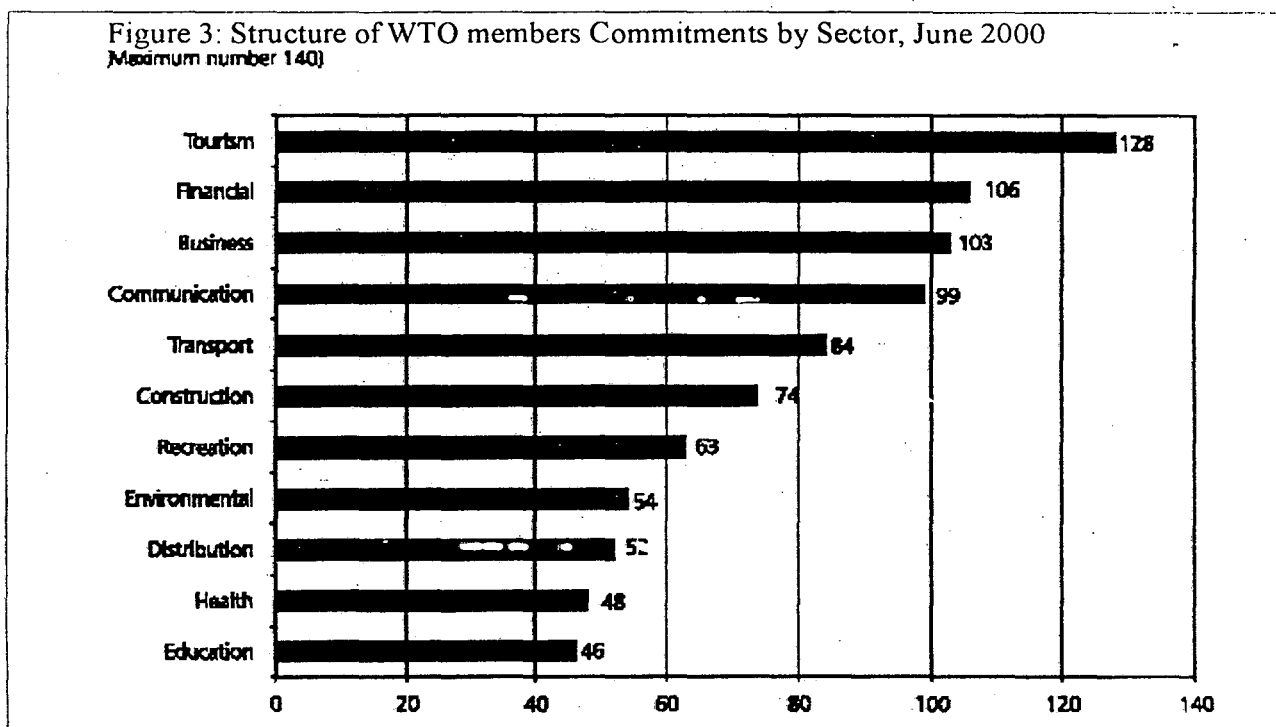
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<sup>74</sup> Jane Knight, "Higher Education and Trade Agreements: What are the Policy Implications?" In Gilles Breton *et al* ed., *Universities and Globalization: Private Linkages, Public Trust*, (UNESCO Publishing, Paris, 2003).

<sup>75</sup> Jane Knight, *Trade in Higher Education Services: The Implications of GATS*, Report by the Observatory on Borderless Higher Education, International Strategic Information Service, March 2002.

<sup>76</sup> WTO NEWS: 2002 PRESS RELEASES (Press/300, 28 June 2002).

conditions and the right to regulate the supply of service in line with national policy objectives. And even for those services provided by governments on a commercial basis, there is nothing in the WTO rules which requires that they be privatized or liberalized.” As such, no state is compelled to commit its sector. Education is the least committed sector; only 46 out of 140 countries have made commitments in one or more sub sectors (Figure 3). India has not committed itself in this sector.



Source: WTO

Trade in education service is classified into five sub-sectors, based on the United Nations Provisional Central Product Classification (CPC),<sup>77</sup> Primary Education, Secondary Education, Higher Education, Adult Education and Other Education. The following Chart (Chart 3.1) provides details of the five sub-sectors of education services, indicating what is included and what is excluded.

<sup>77</sup> WTO, The Service Sectoral Classification List, Prepared by WTO Secretariat. Document MTN.GNS/W/120 available at [www.wto.org/english/tratop\\_c/serv\\_c/sanally\\_e.htm](http://www.wto.org/english/tratop_c/serv_c/sanally_e.htm)

Chart 3.1

**Education Services in the GATS Scheduling Guidelines and CPC**

Sub-Sector	Comprises	Do not include
PRIMARY EDUCATION SERVICES (CPC 921),	Preschool Education Services (CPC 92110) and Other Primary Education Services (CPC 92190)	Child-care services (considered as social services in CPC 93321) and services related to literary programmes for adults, which are part of the sub-category Adult Education Services (CPC 92400).
SECONDARY EDUCATION SERVICES (CPC 922),	General Secondary Education Services (CPC 92210), Higher Secondary Education Services (CPC 2220), Technical and Vocational Secondary Education Services (CPC 92230), and Technical and Vocational Secondary Education Services for handicapped students (CPC 92240).	
HIGHER EDUCATION SERVICES (CPC 923)	Post-Secondary Technical and Vocational Education Services (CPC 92310) refers to sub-degree technical and vocational education Other Higher Education Services (CPC 92390) refers to education leading to a university degree or equivalent	
ADULT EDUCATION (CPC 924)	education for adults outside the regular education system.	
OTHER EDUCATION SERVICES (CPC 929),	covering all other education services not elsewhere classified	education services regarding recreation matters, for example, those provided by sport and game schools, which fall under sporting and other recreation services (CPC 964)

GATS preamble — the directive provision — emphasizes the goal of *progressive liberalisation* of the trade in services and at the same time acknowledges the right of the members to regulate in order to meet their *national policy objectives*. It also recognizes the particular needs of developing countries and the *desire to facilitate their increased participation in trade in services through strengthening the capacity, efficiency and competitiveness of their own domestic service sectors*.

**3.1.1.1.4 Modes of supply**

Article I sets out comprehensive definition of trade in services in terms of four different modes of *supply of services*. This definition is very crucial. It helps in understanding the special

problems and regulatory issues that arise in international trade in services and that have shaped the principles and rules embodied in the GATS, as well as specific commitments that WTO members have undertaken in their schedules. It also brings in regulatory issues concerning investment policies, immigration and labour market legislation within the purview of GATS. Earlier those issues were outside the domain of the multilateral trading system.

Trade in services takes place in four different modes, as identified by GATS (Article 1). They are discussed in the previous chapter and Chart 3.2 gives explanation of each mode and its application over the educational services. These modes approach to service trade had resulted in a distinctive structure of commitments under GATS.

1. Sectoral schedules of commitments: Countries make commitments on market access and national treatment for specific sectors applicable to particular sectors at hand.
2. Horizontal schedules of commitments i.e. across sectors, applicable to all sectors that could compliment, override or qualify the sectoral commitments.

**Chart 3.2: Modes of Service Supply**

Mode of Supply	Explanation	Example
Mode 1: <b>cross-border supply</b>	-of a service from the territory of a member country to another member country. -where only the services crosses border, does not require the physical movement of the consumer is also known as "separated services"	-Distance education -e-learning through internet - virtual universities, where teacher and the student interact over the internet, as if virtually sitting in a class-room.
Mode 2: <b>consumption abroad</b>	-by the citizens of a member country on the territory of another member country. -involves movement of the consumer	-students going abroad for studies
Mode 3: <b>commercial presence</b>	-of a service supplier from a member country on the territory of another member country, enabling the supplier in question to provide a service on that territory.	-local branch or satellite campuses -twinning franchising arrangements with local insitutions



<p>Mode 4: <b>presence of natural persons</b></p>	<p>- involves the admission of foreign nationals to member country to provide services there. An Annex to the GATS makes it clear, however, that the agreement has nothing to do with individuals looking for employment in another country, or with citizenship, residence or employment requirements. The members still have a right to regulate the entry and stay of the persons concerned, for instance by requiring visas.</p>	<p>-professors, teachers, and researchers working abroad.</p>
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(i) Full commitment: "none" or "no limitations", which implies that the Member does not seek in any way to limit market access or national treatment through measures inconsistent with Article XVI or XVII of the GATS.

(ii) Commitment with limitations: the Member details the measures maintained which are inconsistent with market access or national treatment, and implicitly commits itself to take no other inconsistent measures.

(iii) No commitment: "unbound" indicates that the Member remains free to maintain or introduce measures inconsistent with market access or national treatment.

(iv) No commitment technically feasible: "unbound" indicates that in the sector in question, a particular mode of supply cannot be used.

"Commitments" generally involve the following obligations.

### 3.1.1.1.5 General obligation and discipline

Part II of GATS deal with the general obligations of the members. General obligation means that these are basic rules that apply to all members and to all services. They are also known as unconditional obligations binding on all members and apply to trade in services generally.

***1. Most Favoured Nation (MFN) Treatment:*** It requires each members to accord immediately and unconditionally to services and service suppliers of any other Members treatment no less favourable than that it accords to like services and service suppliers of any other country (Article II). This also implies non-discrimination among like foreign services and foreign service suppliers. It implies that signatories are not permitted to impose measures that discriminate across foreign service suppliers as far as application of measures restricting access to markets or national treatment are concerned. This provision, however, is qualified. Once the GATS enters into force, any measure that does discriminate across different foreign suppliers would violate the agreement but a member is permitted to maintain measures inconsistent with the general MFN requirement if it had established an exception to that effect (Article II: 2) giving justification for giving more favourable treatment to the country or countries specified in the exemption. During the Uruguay round it was clear that unqualified liberalization in some service sectors could not be achieved and that liberalization subject to some temporary MFN exceptions would be preferable to no liberalization at all. As a result WTO members made their scheduled services commitments subject to a further list of exemption from Article II. These exemption lists are governed by conditions laid down in a separate annex to the GATS (Annex on Article II exemptions). The conditions are:

1. Exemption must be listed at the entry into force the WTO agreement.
2. Any new exemption after the entry into force of the WTO agreement would be granted only through waiver procedure.<sup>78</sup>
3. Exemption should not last longer than 10 years (not beyond 2004) and in any case they are subject to negotiations in the future trade-liberalising rounds.

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<sup>78</sup> Article IX:3 of the WTO agreement deals with the waiver procedure. It provides that in the exceptional circumstances the Ministerial Conference may waive an obligation imposed on a Member by a decision granting waiver shall be taken by three fourth of the member.

The possibility of invoking an exemption from MFN-treatment is one way of attempting to ensure that a certain degree of reciprocity is achieved. Although, in principle, this may be beneficial in terms of maintaining pressure on certain countries to liberalize in the industries involved, exemption from the MFN-treatment clearly reduce the value of the GATS as a whole, and neglect the general equilibrium nature of the multilateral negotiation process.<sup>79</sup>

Apart from this exemption list, the only permitted departure from MFN treatment under the GATS is among countries that are members of *regional trading arrangements* that have “substantial sectoral coverage”<sup>80</sup> (rules on “Economic Integration” in Article V of GATS).

**2. Transparency:** This is the second basic principle which is dealt with in Article III of GATS. It requires each member to publish promptly “all relevant measures of general application” that affect the operation of the WTO agreement. Members must also notify the Council for Trade in Services of new or changed laws, regulations or administrative guidelines that affect trade in services covered by their specific commitments under the agreement. It also requires Members to establish enquiry point to respond to requests from other members for information on these matters.

**3. Domestic Regulation:** It must be applied *reasonably, objectively and impartially* (Article VI). It is intended to ensure that benefits under the GATS are not blocked by domestic regulations. There must also be tribunals or other procedures to which service suppliers can apply for a

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<sup>79</sup> UNCTAD and World Bank, *Liberalizing International Transactions in Services: A Handbook* (United Nations, 1994), p. 142.

<sup>80</sup> The term “substantial sectoral coverage” disqualifies regional trading arrangement agreements that exclude any of the four modes of supply. An approved agreement must be designed to help trade among its members, and must not result in increased barriers on trade to non-members. If the establishment of the agreement, or its subsequent enlargement, leads to the withdrawal of commitments made to non-members, there must be negotiations to provide appropriate compensation but no compensation is due in case of benefit gained by the non-members in this process.

review of administrative decisions affecting their trade. Multilateral rules for qualifications for service suppliers, technical standards, licensing requirements are under process, and until they are ready, governments are required to follow the same principles in applying their own requirements and standards, so that these do not 'nullify or impair' specific commitments they have made (Article VI: 5). Once a sector is listed under the specific commitment, in accordance with Article VI of the GATS, it will henceforth become increasingly difficult for a signatory country to adopt new requirements through domestic regulation. In fact, Article VI stipulates that new regulations should avoid hindering trade in services. If any requirements are considered to be discriminatory vis-à-vis foreign suppliers, they will most certainly be treated as non-tariff barriers and will be deemed to contravene the WTO agreement.

**4. Monopoly and Exclusive suppliers' obligation:** Members must ensure monopoly and exclusive service suppliers do not act in a manner inconsistent with the members' obligation under GATS provisions nor abuse its monopoly position. If a country makes specific commitments to allow supply of service and later grants monopoly rights for that supply, it thus negates or impairs the commitments and it will have to negotiate compensation (Article VIII). It also recognizes that "certain business practices" of service suppliers may restrain competition and thereby restrict trade in services and hence members agree to consult on such practices, when so requested by another member, and to exchange information with the view to eliminate them (Article IX).

**5. Non-discrimination while applying safeguard measures:** It permits members, in serious balance of payments difficulties or threat thereof, to restrict trade in services. Such restriction must *not discriminate among members, cause unnecessary damage to the interest of other*

*members* or be *more restrictive than necessary* in the circumstances, and must be *temporary* and phased out as the situation improves (Article XII).

### **3.1.1.1.6 Specific Obligation and the Rules for Scheduled Sectors**

Part III of the GATS, the heart of the agreement, sets out the rules for the process by which members are to make specific commitments to national treatment and market access. Countries are free to decide which service sectors they wish to subject to market access and national treatment. The commitments are essentially voluntary or discretionary. The GATS allows considerable discretion and flexibility not only in deciding which sector to schedule but also in application of general provisions. Commitments once made are specific and binding. The agreements approach to the listing of commitments is said to be hybrid one. Members first choose which sector to list in their schedule of commitment, i.e. positive list approach.<sup>81</sup> Within the inscribed sectors they then decide which limitations or exceptions to place on national treatment and market access. In other words, schedules are presented by each member listing the service industries and sub-industries for which the specific obligations apply, as well as the conditions and limitations on market access and conditions and qualifications on national treatment that are maintained. Once a sector is inscribed, the listing becomes a formal obligation and a decision not to inscribe a sector would express a preference to remain free to make change in the sector with new regulations. They allow members room to move, so that much of real substance of the interface is constructed, sector-by-sector, in a fluid and on-going process.

When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict access

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<sup>81</sup>Under other agreements such as NAFTA there is automatic inclusion of sectors, members must specify the sector that they do not want to be bound i.e. negative listing approach.

into the market or the operation of service. Specific commitments thus have an effect similar to a tariff binding. They are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage. With respect to sectors where such commitments are undertaken, each schedule shall specify: a) terms, limitations, and conditions on market access; b) conditions and qualifications on national treatment; c) undertakings relating to additional commitments; d) where appropriate, the time frame for implementation of such commitments; and e) the date of entry into force of such commitments.

These market access and national treatment commitments are made for each of the four modes of supply, i.e. there are in all eight commitments per sub-sector or activity in both sectoral and horizontal schedules. In addition, countries also specify in their schedules, the limitations and exceptions they wish to maintain which violate market access and national treatment, by mode of supply, such violation is allowed as long as it is listed in their schedule. Market access limitations in the form of quantitative restrictions or limits on the value of transactions are permitted if these limitations are specified in the relevant sectoral commitment schedule. Article XVI sets out six forms of limitation on market access that may be specified in national schedule that *may not be applied to foreign service or its supplier unless their use is clearly provided for in the schedule*. They are:

1. Limitations on number of service suppliers.
2. Limitations on the total value of services transactions or assets.
3. Limitations on the total number of service operations or the total quantity of service output.
4. Limitations on persons that may be employed in a particular sector or by particular supplier.
5. Measures that restrict or require supply of the service through specific types of legal entity or joint ventures; and

6. Percentage limitations on the participation of foreign capital or limitations of the total of foreign investment.

Article XVII deals with national treatment, i.e. non-discrimination between the foreign services/service providers and their domestic services/service suppliers. It states that *each member, in the sectors covered by its schedule, and subject to any conditions and qualifications set out in the schedule, shall give treatment to foreign services, no less favourable than it gives to its own services and suppliers.* That means discrimination is allowed if it is listed in their national schedule, e.g. subsidies and tax treatment applicable to domestic service providers only if a specific commitment is made to that effect. At the same time nothing prevents better treatment being given to foreign services/service suppliers. Article XVIII lays down that members may also negotiate additional commitments, not additional restrictions, concerning other measures affecting trade in services, such as those which lay down required qualifications, standards and licensing.

#### **3.1.1.1.7 Modalities in Negotiation and Commitment**

The main method of negotiations is the Request and Offer process, under which each country tables its demands from its trading partners and its offers to its trading partners sector-wise. India has submitted 'requests' to its trading partners in computer related services, architecture services, health services, audio-visual services, tourism services, maritime services and financial services. On the other hand, India has received requests from 22 countries and have to respond to these requests through an "initial offer". The initial offer would point towards the direction in which a Member is willing to liberalise. However, the initial offer has no legal status and can be withdrawn or amended at any time if the Member feels that the trading partners' offers are not satisfactory or adequate. In formulating the offers, Members are not obliged to respond

positively to any particular request. Nor is there any requirement for reciprocity. That is, a request made by India in one area/sector/activity does not impose any obligation to accept a similar request made of it by other countries.

Countries take “full” commitment, or commitment with limitation or no commitment. A country is said to have taken “full” commitment if it mentions “none” against the Limitation on Market Access and Limitation on National Treatment. Analysis of countries commitments in educational sectors would throw some light on scope, range and the extend of liberalization commitment made by Member countries.

In the educational sector Haiti is said to have made ‘full commitment’ as it places no limitation either on market access or on national treatment. Haiti’s commitment is ‘full’ only with respect to adult education; it is not committing the entire educational sector as such. Though it makes ‘full’ commitment it places a condition that adult education would apply only to rural training centers.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
Haiti D. Training Centre for Adults#1 (CPC 924)	1) None 2) None 3) None 4) None	1) None 2) None 3) None 4) None		#1 Applies only to rural training centres.

It opens up not the entire adult education but just a part of adult education mentioned over here. It has not mentioned any other education sub-sector, indicating that it takes “no” commitment in other sub-sectors, i.e. primary, secondary, higher, or other education.



Romania is another country which takes 'full' commitment only in the adult education sector; it has not placed any condition. Its schedule of commitment is reproduced as follows.<sup>82</sup>

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
<b>Romania</b> 5. Educational services D. Adult education Services (CPC 924)	1) None 2) None 3) None 4) None	1) None 2) None 3) None 4) None		

Some countries have made commitments in the entire educational sector, perhaps with the intent of encouraging foreign providers to help develop their educational systems, but not without limitations. Latvia has taken almost "full" commitment in the entire educational sector except for placing limitation in mode-4 on market access; that is to say it is not opening up its market for foreign personnel. Its schedule of commitment with respect to education sector is reproduced as follows:

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
<b>Latvia</b> 5. EDUCATIONAL SERVICES A. Primary Education Services (CPC 921)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) None		
B. Secondary Education Services(CPC 922, excluding CPC 9224)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) None		
C. Higher Education Services (CPC 923) Covers English language tuition	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) None		
D. Adult Education (CPC 924)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) None		

Estonia and Lesotho have also made commitments similar to that of Latvia. At the same time they have made themselves 'unbound' for foreign personnel for national treatment also.

Czech Republic, though taken commitment on the entire educational sector, placed limitation on commercial presence (Mode 3) on market access saying 'foreign nationals may obtain

<sup>82</sup> All the schedule of commitment reproduced here are taken from WTO web site [www.wto.org](http://www.wto.org), available as downloadable pdf format.

authorization from competent authorities to establish and direct an education institution and to teach. Condition of ensuring quality and level of education and suitability of school facilities' and on National treatment 'none other than: majority of members of the Board must be of the Czech nationality'. Likewise Hungary,<sup>83</sup> Kyrgyz Republic,<sup>84</sup> Liechtenstein,<sup>85</sup> Sierra Leone,<sup>86</sup> Slovak Republic,<sup>87</sup> Switzerland<sup>88</sup> and Norway<sup>89</sup> have taken commitment in the entire education sector specifying limitations. At the same time all these countries made them selves 'unbound' in Mode 4, i.e. for movement of natural persons. These countries place some or the other limitations on cross-border supply, consumption abroad and commercial presence. But they made themselves "unbound" for presence of natural persons 'except as indicated in the horizontal section.'<sup>90</sup>

It is very crucial to place limitations and lay down conditions at the time of making specific commitment since imposing or altering conditions at a later stage is extremely difficult.<sup>91</sup> These conditions must be a well thought about in advance, visualizing consequences that may occur in future.

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<sup>83</sup> It placed limitation for commercial presence (Mode 3) on market access saying 'establishment of schools is subject to license from the local authorities.'

<sup>84</sup> Placed limitation for 'education services funded from State sources.'

<sup>85</sup> Placed limitation on market access in mode 3 saying 'Foreigners may establish commercial presence only when organized as juridical persons according to Liechtenstein law.'

<sup>86</sup> Made itself 'unbound' for Mode 3- commercial presence and 'unbound' in Mode 4 except 'approval shall be obtained from the Ministry of Education.' for Market access; and 'Qualifications are as follows: Possession of a Bachelor's degree or an appropriate professional title (e.g. Professor, senior engineer or lecturer or above, etc.)' for National Treatment.

<sup>87</sup> Placed limitation on market access in Mode 3 saying 'Foreign nationals may obtain authorization from competent authorities to establish and direct an education institution and to teach subject to complying with qualification and material requirements on establishment of such an institution'; and on national treatment: 'None other than: majority of members of the Board have to be of Slovak citizen'

<sup>88</sup> Made itself 'unbound' in primary education in the Modes 1,2 and 4 that implies that it placed no limitation on commercial presence for primary education

<sup>89</sup> Placed limitation on market access on education that leads to the conferring of State recognized exams and/or degree in Mode-1 (Cross-border supply) and Mode 3 (commercial presence) saying 'primary and secondary education are public service functions. Authorization may be given to foundations and other legal entities to offer additional parallel or specialized education on a commercial or non-commercial basis. Financial assistance to educational institutions or to students only available for studies at certified establishments'.

<sup>90</sup> Exception given for some categories of personnel in the horizontal commitment, e.g. managers, senior executives and specialists.

<sup>91</sup> Refer section 3.1.1.1.9 of this study.

Now, looking at the commitment made by Australia, in the education sector, we can say that it has opened up secondary education, higher Education and other education specifying how much of that sector is opened up. It places no limitation on cross-border supply, consumption abroad and commercial presence but it made itself “unbound” for presence of natural persons.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
Australia 5. Educational Services B. Secondary Education Services (CPC 922**)Covers general as well as technical and vocational education at the secondary level in private institutions	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section		
C. Higher Education Services(CPC 923**) Covers provision of private tertiary education services including at university level	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section		
E. Other Education Services(CPC 929**) Covers English language tuition	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section		

Mexico has made an interesting specific commitment; it has opened up all the sub-sectors except adult education, with a foreign direct investment up to 49 percent in the commercial presence; it places no limitation for market access and national treatment in Modes 1 and 2; and like all other countries, Mexico also made itself ‘unbound’ for movement of natural persons.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
Mexico 5. EDUCATIONAL SERVICES A. Primary Education Services (CPC 921)	1) None 2) None 3) Foreign investment only up to 49 per cent of the registered capital of enterprises. Prior authorization is required from the Ministry of Public Education (SEP) or the state authority. 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section		
B. Secondary Education Services (CPC 922, excluding CPC 9224)	1) None 2) None 3) Foreign investment only up to 49 per cent of the registered capital of enterprises. Prior authorization is required from the Ministry of Public Education (SEP) or the state authority 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section		
C. Higher Education Services (CPC 923) - Covers English	1) None 2) None 3) Foreign investment only up to 49 per cent of the registered capital of enterprises. Prior	1) None 2) None 3) None 4) Unbound except as		

language tuition	authorization is required from the Ministry of Public Education (SEP) or the state authority 4) Unbound except as indicated in the horizontal section	indicated in the horizontal section		
E. Other Education Services – Language education, special education and commercial training (CPC 9290)	1) None 2) None 3) Foreign investment only up to 49 per cent of the registered capital of enterprises. Prior authorization is required from the Ministry of Public Education (SEP) or the state authority 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section		

It is interesting to note Japan's commitment on the education sector. Japan committed itself for commercial presence (Mode-3) for primary, secondary and higher education with the condition that an educational institution to be established should be a non-profit institution established under Japanese Law and it makes itself "unbound" for Mode 1- cross-border supply, Mode-2 Consumption Abroad, and Mode-4 presence of Natural Persons, due to lack of technical feasibility. But Japan opens up its market for adult education in all the modes except for the entry of natural persons.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
Japan 5. Educational Services The following Educational Services supplied by Formal Education Institutions established in Japan (Formal Education Institutions are elementary schools, lower secondary schools, upper secondary schools, universities, technical colleges, schools for the blind, schools for the deaf, schools for the handicapped and kindergartens.): A. Primary Educational Services; (CPC 9211, 9219) B. Secondary Educational Services; and (CPC 9221, 9222, 9223) C. Higher Educational Services. (CPC 9231, 9239)	1) Unbound* 2) Unbound* 3) Formal Education Institutions must be established by school juridical persons.#10 4) Unbound	1) Unbound* 2) Unbound* 3) None except as indicated in HORIZONTAL COMMITMENTS 4) Unbound		* Unbound due to lack of technical feasibility #10 A school juridical person is a non-profit juridical person established for the purpose of supplying educational services under Japanese Law
D. Adult Educational Services Foreign language tuition services for adults (excluding services supplied by Formal Education Institutions established in Japan. Formal Education Institutions are elementary schools, lower secondary schools, upper secondary schools, universities, technical colleges, schools for the blind, schools for the deaf, schools for the handicapped, kindergartens, special training colleges and miscellaneous schools.)	1) None 2) None 3) None 4) Unbound except as indicated in HORIZONTAL COMMITMENTS	1) None 2) None 3) None except as indicated in HORIZONTAL COMMITMENTS 4) Unbound except as indicated in HORIZONTAL COMMITMENTS		

It is important here to look at the commitment made by China, as it is one of the largest importers of education. China makes itself 'unbound' with respect to Mode 1 (cross-border supply) and Mode 4 (movement of natural persons) except on invitation by the Chinese government. It takes full commitment without placing any limitation whatsoever with respect to Mode-2 (consumption abroad), i.e. students going to China for studies. China permits market access for foreign capital in the education sector but makes itself "unbound" for national treatment which implies that China would not accord the same treatment that it accords to its domestic educational institutions. China's specific commitment with respect to education seems to be the one of well thought about commitment, very precise and specific.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
<b>China</b> <b>5. Educational Services</b> (Excluding special education services e.g. military, police, political and party school education) <b>A. Primary education services</b> (CPC 921, excluding national compulsory education in CPC 92190) <b>B. Secondary education services</b> (CPC 922, excluding national compulsory education in CPC 92210) <b>C. Higher education services</b> (CPC 923) <b>D. Adult education services</b> (CPC 924) <b>E. Other education services</b> (CPC 929, including English language training)	(1) Unbound (2) None (3) Joint schools will be established, with foreign majority ownership permitted. (4) Unbound except as indicated in Horizontal Commitments and the following: foreign individual education service suppliers may enter into China to provide education services when invited or employed by Chinese schools and other education institutions.	(1) Unbound (2) None (3) Unbound  (4)Qualifications are as follows: possession of Bachelor's degree and an appropriate professional title or certificate, with two years' professional experiences		

The United States which has a very large market in higher education sector, millions of students from all over the world flock to the US for higher education, has not committed itself in the higher education Sector. The US has also very well developed private education providers, two of the biggest firms selling higher education in the United States, Apollo and Sylvan Learning, are quoted on the stock exchange. The US has committed itself only in adult and other education with limitations. It provides market access in Mode 1 and Mode 2 without limitation, places limitation on Mode 3 and makes itself unbound for Mode 4. As far as national treatment is

concerned, foreigners will not be provided with the same treatment as that accorded to domestic education providers and students.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
United States of America 5. Educational Services D. Adult Education (except flying instruction)	1) None 2) None 3) The number of licenses for cosmetology schools in Kentucky is limited to 48 total licenses, with a total of 8 licenses allowed for operation of such schools per congressional district 4) Unbound except as indicated in the horizontal section	1), 2), 3), 4) Scholarships and grants may be limited to US citizens and/or residents of particular states and may, in some cases, only be used at certain states institutions or within certain US jurisdictions.		
E. Other Education Services	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1), 2), 3), 4) Scholarships and grants may be limited to US citizens and/or residents of particular states and may, in some cases, only be used at certain states institutions or within certain US jurisdictions.		

The US horizontal commitment on movement of natural persons allows only certain categories of personnel for a specific period of time. Almost all the 46 countries which have taken commitments on one or the other education sector have made themselves “unbound” - for Mode-4; exception given for some categories of personnel in the horizontal commitment—commitment across the sectors—which allows certain types of professionals, e.g., managers, senior executives and specialists who are not independent professionals but they are associated with an organization/corporation, even specialists, as per US requirement ‘person within an organization’ implies not natural persons/independent professional individuals but movement of persons through commercial presence or intra-corporate transfers which is related to Mode-3.

Modes of supply : 1)Cross-border supply 2)Consumption abroad 3)Commercial presence 4)Presence of natural persons

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
<b>I. HORIZONTAL COMMITMENTS</b>				
ALL SECTORS COVERED BY THIS SCHEDULE: For the purpose of this schedule the "United States" is defined as encompassing the 50 states of the United States, plus the District of Columbia.				
All Sectors: Temporary Entry And Stay of Persons	<p>4) Unbound, except for measures concerning Natural temporary entry and stay of nationals of another member who fall into the categories listed below:</p> <p><b>Services Salespersons</b> - persons not based in the territory of the United States and receiving no remuneration from a source located within the United States, who are engaged in activities related to representing a services supplier for the purpose of negotiating for the sale of the services of that supplier where: a) such sales are not directly made to the general public and b) the salesperson is not engaged in supplying the service. Entry for persons named in this section is <i>limited to a ninety-day period</i>.</p> <p><b>Intra-corporate Transferees</b> - managers, executives and specialists, as defined below, who are employees of firms that provide services within the United States through a branch, subsidiary, or affiliate established in the United States and who have been in the prior employ of their firm outside the United States for a period of not less than one year immediately preceding the date of their application for admission and who are one of the following:</p> <p>a) <b>Managers</b> - persons within an organization who primarily direct the organization, or a department or sub-division of the organization, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions (such as promotion or leave authorization), and exercise discretionary authority over day-to-day operations. Does not include first-line supervisors, unless the employees supervised are professionals, nor does it include employees who primarily perform tasks necessary for the provision of the service. b) <b>Executives</b> - persons within the organization who primarily direct the management of the organization, establish the goals and policies of the organization, exercise wide latitude in decision-making, and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the business. Executives would not directly perform tasks related to the actual provision of a service or services of the organization. c) <b>Specialists</b> - persons within an organization who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organization's services, research equipment, techniques, or management. (Specialists may include, but are not limited to, members of licenced professions.)</p> <p>Entry for persons named in this section is limited to a three-year period that may be extended for up to two additional years for a total term not to exceed five years.</p>	4) Unbound		<p>"Temporary entry" means entry without intent to establish permanent residence under immigration laws of the US and confers no rights with respect to citizenship. US commitments regarding entry and temporary stay in the US do not apply in cases of labour/management disputes.</p>

Moreover, liberalization on the basis of horizontal commitments cannot address the specific needs of individual sectors. The categories of personnel mentioned in the horizontal commitment are not the same as the categories of personnel in the education sector. There are no managers or

executives but teachers, professors and researchers of different kind. Hence the personnel indicated in the exception to 'unbound' cannot be applied to the educational sector.

#### **3.1.1.1.8 Movement of Natural Persons**

Commitments made in the education sector with respect to presence of natural persons reflects no uniformity; categories of personnel are not defined properly; and commitments in this mode are subject to arbitrary interpretation. Most countries made themselves 'unbound' that trade through movement of natural persons (independent service providers and are not employees of any corporation/organization) is almost totally blocked.

The Annex on Movement of Natural Persons supplying services under the agreement and Article VII of the GATS constitute strong framework for Mode 4 – based trade in services. The Annex makes it clear that the GATS shall not apply to measures regarding citizenship, residence or employment on a permanent basis and the GATS shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures do not 'nullify or impair' the benefits accruing to any member. Visa requirements shall not be regarded as 'nullifying or impairing' benefits under a specific commitment.

Article VII on Recognition is pertinent to the movement of natural persons. It grants members the discretion to recognise the education, experience and licensing and certification of a foreign service providers either in whole or in part, and either autonomously or by mutual agreement or by harmonisation.



Article XV stipulates Economic Needs Test (ENT), which puts limitations on market access committed by members in its schedule. Members can limit the number of service suppliers by using the requirement of ENT. ENT is a gray area as no uniform criteria for maintaining ENT exists. Transparency in this regard is also lacking.

It is in this mode in which developing countries have their comparative advantage. There has to be some improvement in the existing framework of commitment so that developing countries' interest is taken care of. Hence, it is proposed that a separate class of visa, a **GATS visa** be established for service professionals temporarily working overseas.<sup>92</sup> How far the GATS visa be feasible is a question when all most all countries made itself 'unbound' as to Mode-4.

Developed countries attach importance to supply of services through commercial presence (Mode-3), they show little interest in movement of natural persons; this is reflected in their specific commitments. Even for developing countries, though Mode-4 is vital in their development, they attach importance to Mode-3 since attracting foreign direct investment is high on their agenda. Hence, the regime for movement of natural persons is much more restrictive than that for foreign enterprises/capital. An analysis of the specific commitments of member countries shows the fact that members have liberalised the mode mainly regarding intra-corporate transferees, thus related to Mode 3 (commercial presence). The Mode-4 operation is totally restricted due to members 'unbound' commitment in this mode.

#### **3.1.1.1.9 Withdrawal and modification of Schedule**

A member may withdraw or modify its schedule as per Article XXI, after

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<sup>92</sup> Rupa Chanda, "Movement of Natural persons and Trade in Services: Liberalising Temporary Movement of labour under the GATS" Working Paper No. 51, ICRIER, November 1999.

- a) lapse of three years from the date on which the commitment entered into force;<sup>93</sup>
- b) notifying three months in advance to the Council for Trade in Services;
- c) the modifying member shall enter into negotiations for compensatory adjustment;
- d) compensatory adjustment must be on a MFN basis;
- e) modification has to be in conformity with the procedures established by the Council for Trade in Services.

If no agreement is reached between the modifying member and the affected member, the matter may be referred to arbitration and the modifying member may not modify or withdraw 'until it has made compensatory adjustments in conformity with the findings of the arbitration.' But if it does so, any affected member who participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings.

#### **3.1.1.1.10 Emergency Safeguard Measures, Government Procurement and Subsidies**

The GATS contains no specific rules on emergency safeguard measures, government procurement or subsidies for services. It is said that the time pressure under which the Uruguay Round negotiations took place and the conceptual differences of approach for service trade made it difficult to come out with the concrete rule. It was therefore agreed that negotiations on these matters should take place after the Uruguay Round and the respective mandates are contained in Articles X, XIII and XV of the GATS.

***Emergency Safeguard Measures:*** Article X mandates Members to "undertake multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination," implying that it is not yet determined safeguard discipline, but adds that the

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<sup>93</sup> In case of emergency safeguard measures modification can be done after a period of one year, provided that the member shows cause to the Council that the modification or withdrawal cannot await the lapse of three-year period. (Article X).

results of such negotiations 'shall enter into effect not later than three years from the date of entry into force of the WTO agreement, i.e. the beginning of 1998, which has already been lapsed.<sup>94</sup> But GATS contains several other provisions which, under certain conditions, allow Member Governments to depart from the commitment while 'serious balance of payment and external financial difficulties or threat thereof' (Article XII), invoking the general exceptions with the aim to 'protect public moral, maintain public order, protect human, animal or plant life or health and to secure compliance with laws and regulation' etc. (Article XIV).

**Government Procurement:**<sup>95</sup> Pursuant to Article XIII, government procurement remains outside the scope of specific commitments under Articles XVI<sup>96</sup> and XVII<sup>97</sup> Similarly, it is not subject to MFN obligation. This means signatories of the GPA need not extend to other WTO Members the benefits of the obligations they have assumed under it. Multilateral negotiations on government procurement in service is not yet concluded; the discussions are on with the Working Party on GATS Rules. However, if the Economic Integration Agreement (EIA) provides for government procurement then a company<sup>98</sup> 'shall be entitled to treatment granted under such' EIA (Article V.6).

**Subsidies:** Article XV mandates Members to enter into negotiations in order to develop the necessary multilateral disciplines to avoid possible trade distortive effects of subsidies. This provision also explicitly stipulates that negotiations will have to take due account of the role of subsidies in relation to development programmes of developing countries, for flexibility in this

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<sup>94</sup> The Working Party on GATS rules proposed, under discussion, two different types of safeguard measures, "horizontal measures" modeled on GATT Article XIX and the Agreement on Safeguards(AS) and which could be invoked in regard to any commitment. The second type, which has been referred to as a "sector-specific" safeguard, would be available only in sectors where the schedule explicitly reserved the right of invocation.

<sup>95</sup> Governments always exhibited desire to exempt their own purchases from the multilateral trade rules in order to be able to favour national suppliers. Government procurement of goods and services is subject to the WTO Agreement on Government Procurement (GPA), which is a "plurilateral agreement" with 26 signatories, mostly developed countries. In 1996, at the first WTO Ministerial Conference, Members established a Working Group on Transparency in Government procurement, whose task is to examine the current practice of governments in relation to transparency in procurement and, on this basis, to develop the elements for a multilateral agreement. It is against this background that the situation of government procurement in the GATS and in the services negotiations must be assessed.

<sup>96</sup> Market Access.

<sup>97</sup> National Treatment.

<sup>98</sup> Service supplier- a judicial person constituted under the laws of a party to EIA.

area. The definition of subsidies<sup>99</sup> to services sectors has not appeared to pose problems in principle. However, it may prove difficult in individual cases to identify the ultimate beneficiary of a subsidy, which may have been destined for downstream users rather than the immediate recipient. Given the importance of educational service as the input in the development process it could be misleading to equate the recipients with actual beneficiaries — the students — belonging to different social or economic group. The Working Party on GATS rules is evolving some rules for subsidies in the tourism, transport and banking sectors. As for education service, the abolition of public funding for national institution, as subsidies will have serious consequences on social welfare and justice.

### 3.1.1.2 Patents and Transfer of Technology

WTO also covers Intellectual Property Rights (Annex 1C) as “Trade related aspects of Intellectual Property Rights (TRIPs)” emphasizes ‘knowledge production’ and its trade. There is increasingly more value attributed to the creative and intellectual content inherent in both products and services. TRIPs cover *inter alia* patents, trademarks and copyright. All of these are salient to the research and teaching/learning functions of higher education.

GATS may have some impact on Intellectual Property Rights (IPR) and student access in terms of national competitiveness. Any IPR generated in a country may belong to overseas education suppliers, at the same time it may not be able to replicate elsewhere due to copyright laws. Obligation to treat overseas suppliers no less favourably may lead to a restructuring of public funding for student access. Supply of higher education may become differentiated on financial ability of the consumers and quality may become more diverse than is at present. If this occurs,

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<sup>99</sup>As defined in WTO agreement on Subsidies and Countervailing duties; Subsidies cover assistance granted in the form of direct transfers of funds, including grants, loans and equity infusions; potential direct transfers of funds or liabilities, e.g. loan guarantees; government revenue foregone; supply of goods and services other than general infrastructure; purchase of goods; payments to funding mechanisms; or income and price support.

inequality of access will become a greater issue. Currently there are domestic regulations that prevent some of the above situations occurring. However, once higher education is committed within the GATS framework, those regulations that protect the higher education sector would have to be changed to allow new entrants to higher education markets.

### 3.2 VIOLATIONS AND SANCTIONS

It is important to comprehend dispute settlement understanding (DSU) of the WTO at this juncture.<sup>100</sup> Once, when the education sector is committed under the GATS its implication on the settlement of dispute, under the WTO dispute settlement system, should be understood in order to acquaint with the problems and the procedures thereto.

Of all the international dispute settlement systems, the WTO system appears to be the most frequently used system.<sup>101</sup> The WTO dispute Settlement system has compulsory jurisdiction<sup>102</sup> and it provides for a single coherent system of rules and procedures for dispute settlement. Those rules are applicable to dispute arising under any of the WTO agreement. DSU is considered 'central' to the overall task of 'providing security and predictability to multilateral trading system' and 'its goal is to secure positive solution to a dispute.'<sup>103</sup> The WTO dispute settlement system provides for three types of complaints: 'violation' complaints, 'non-violation' complaints and 'other situation' complaints.

***Violation Complaints:*** If any provision of GATS or any other WTO agreements is violated or not complied with, the Members must have recourse to and abide by the rules and procedures of

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<sup>100</sup> Annex 2 of the WTO agreement. Refer sec. 3.1.1 of this chapter for more details on DSU.

<sup>101</sup> Other International Dispute settlement mechanisms are the International Court of Justice, International Tribunal for the Law of the Sea, International Criminal Court etc.

<sup>102</sup> A sovereign state has a right not to accept the jurisdiction of any of these international dispute settlement forums but as far as WTO dispute settlement system is concerned a sovereign state has no such right. Once a State becomes a member of the WTO then the Dispute Settlement System has jurisdiction over all its member states.

<sup>103</sup> Florentino P. Feliciano, "The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice," *Philippine Law Journal*, vol. 75(1), September 2000.

the DSU. If a Member has violated an obligation, a prima facie presumption arises, that this violation constitute 'nullification or impairment' of benefit under the agreement (GATS Article 23 and DSU Article 3.8). It is then on the responding Members to rebut this presumption; for example if Pakistan finds that India has violated MFN obligation, i.e. Pakistani education providers/students/teachers were not accorded most favoured treatment or they are discriminated against among the foreign suppliers, whether it causes injury to local education sector or not, Pakistan can drag India to the Dispute Settlement system. Now the onus is on India to prove that no injury is caused to the Pakistani education sector.

***Non-violation complaints:*** Normally a State has recourse to an international dispute settlement system only when it considers that another State has violated its international obligations. WTO members have recourse to the WTO dispute settlement system when they consider that a benefit accruing to them directly or indirectly is being 'nullified or impaired', or attainment of any objective therein is being impeded (GATS Article XXIII) due to any action/measure taken by the respondent state. For example University Grants Commission (UGC) of India comes up with a regulation that may not actually violate any obligation/provisions of GATS but that may cause injury to the Pakistani education sector; Pakistan can take recourse to the DSU.

***Other Situation Complaints:*** Could there be any other complaint apart from the above-mentioned complaints? WTO members wanted 'no stone unturned' hence they included any other situation complaints also.

In case of "violation" complaint, where a Panel or Appellate Body appointed by the Dispute Settlement Body (DSB) rules that a measure is inconsistent with any of the WTO agreements, who recommends that the Member concerned bring the measure into conformity with that agreement by modification or withdrawal of the measure concerned (GATS Article XXIII: 3 and DSU Article 19). In case of "non-violation" complaint, if a measure is found to 'nullify or

impair' benefits under, or impede the attainment of objectives of, any WTO agreement without the violation thereof, there is no obligation to withdraw the measure. In other words, if any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment, under GATS, of another Member is being 'nullified or impaired' as a result of application of **any measure** which does not conflict with the provision of this agreement, it may have recourse to DSU (GATS Article XXIII: 3). In such cases, the Panel or the Appellate Body appointed by the DSB shall recommend that the Member concerned make a mutually satisfactory adjustments of compensation and that shall be the final settlement of dispute (GATS Article XXII:3 and DSU Article 26.1).

In case the Member concerned fails to bring the inconsistent measure into conformity with WTO law, or otherwise fails to comply with the DSB recommendations and rulings within the reasonable period of time, it has an obligation to enter into negotiations with the complaining party with a view to developing mutually acceptable compensation (DSU Article 22.2). If no satisfactory compensation is agreed, the complaining party, upon request, may be granted authorization by the DSB to suspend the application of concessions or other obligations under the agreements in the same sector. For example a measure taken by UGC or AICTE affected the education supplier of the complaining member country, the DSB may authorize the suspension of any concession/obligation granted by the complaining member in the same sector, i.e. the education sector itself; it is the kind of **retaliation within the same sector**. For example, if India fails to provide MFN treatment to Pakistani education providers, Pakistan may seek to retaliate by not providing MFN treatment to Indian education providers. However, if the complaining party considers that it is not practical or effective to suspend concessions or other obligations with respect to the same sector, it may seek to suspend or retaliate in other "sectors" under the same agreement; it is called the **cross-sector retaliation**. For example, if Pakistan considers that

retaliating in the education sector may not hurt India in any way, then she may seek authorization from DSB for the suspension of concession/obligation in any other sector/s within GATS.<sup>104</sup> Moreover, if the complaining party considers that “cross sector” retaliation too is not practicable or effective and the circumstances are serious enough, it may seek to suspend or retaliate under other agreement/s of the WTO like GATT (which contains 13 agreements) or TRIPs; and this is known as the “**cross-agreement**” retaliation (DSU Article 22.3).

### **Conclusion**

An agreement is a result of a proposal from one side and its acceptance by the other, and upon the same thing in the same sense (*consensus at idem*), is at the root of every agreement.<sup>105</sup> The offer made in the specific commitment by members here are diverse, for which no acceptance is necessary, but counter offers are being made by members in their specific commitments. Hence there is no *Consensus at idem*, it has the effect of bringing about more restriction to the current flow of educational services. If a member country wants to export higher education under the GATS framework, it has to look for the country which has made commitment in that sector; a member country can export only to those countries which have made the commitment and that too subject to the conditions specified thereto. GATS permits countries to vary their level of commitments to market access and national treatment; this bargaining structure threatened to undermine the multilateral character of the WTO.<sup>106</sup> In these circumstances there cannot be a free exchange of education. If any of the sub-sectors is not been inscribed in the specific commitment it remains outside the legal regulatory framework. For example, though the U.S has trade surplus in higher education it has not committed itself in this sector; this implies that

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<sup>104</sup> GATS has eleven main sectors further divided into 160 sub sectors/activities. Sectoral Classification list Doc. MTN.GNS/W/120.

<sup>105</sup> Law of Contract.

<sup>106</sup> Christopher Arup, *The New World Trade Organisation Agreements: Globalising Law through Services and Intellectual Property*, (Cambridge University Press, 2000), p.48.



students of higher education studying in the US remain outside the GATS framework, without legal remedies.<sup>107</sup> This does not seem to be an effective framework for regulating flow of educational services. A regulatory framework for international flow of educational service must be comprehensive and equitable. Moreover, the provision for MFN exemption placed no legal restriction on the circumstances in which the exemptions could be taken. The US threatened to take wholesale exemption in the basic telecommunication and financial service sectors and leave itself free to operate exclusively on bilateral and regional basis.<sup>108</sup>

The way in which services are provided under the GATS has potential to undermine the economic sufficiency, political sovereignty and cultural identity and also undermine the competence of local regulation. Certain national legalities are considered barriers to trade; this means local legalities must be receptive to the different legalities foreigners bring with them, which may be local legalities in their place of origin. The onus is placed on national governments to refashion their legalities as trade neutral measures or as legitimate exception to the norms of trade.<sup>109</sup>

According to the Vienna convention on the Law of the Treaties, provisions of the later treaty prevails (Article 30). Hence, GATS will always remain as a “live document” as every new round of negotiation would give birth to new provisions. There is a danger of obligations under other earlier international treaties and conventions, relating to education, getting relegated.

As far as education is concerned, the regulatory regime under WTO/GATS makes it much more complicated and ambiguous. Moreover it leaves out certain sector/s of education and some

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<sup>107</sup> US have made commitment only on Adult education and other Educational services. Document GATS/SC/90, p.51.

<sup>108</sup> Christopher Arup, n.106.

<sup>109</sup> *ibid*, p.43.

countries outside the regime due to their non-commitment in the education sector in their specific commitments undertaken.

As far as India is concerned it has comparative advantage over Mode-4 movement of natural persons, i.e. teachers and researchers going abroad. Almost all the countries have made exemption under this mode. The GATS framework enhances only the capital mobility, and the labour mobility is totally constrained by the specific commitments made by member countries. Developing countries cannot expect any significant benefit from the liberalisation commitments made by major developed countries in the education sector.

The important international bodies such as the UN, UNESCO and the Association of Universities raised their concern over subjecting education under the WTO regime and that would be discussed in the next chapter.

## **Chapter 4**

### **GLOBAL RESPONSES TO GATS**

Since education has always been considered a public good, the moment it was brought into the WTO regime through the GATS, different stakeholders showed their concerns. The main organizations to show its concern is the United Nation, UNESCO, major universities and student unions from the developed countries. At the same time, the global trend was promoted by various pro-liberal organizations such as the International Chamber of Commerce (ICC)- (which represents the business community), European Service Forum (which engaged in high level lobbying), the World Bank, and the Quad group (an informal interstate lobbying group consisting of Japan, Canada, US and the EU).

#### **4.1 Response by the United Nations**

The United Nations was concerned about the human rights aspect of education under the WTO regime. The UN came up with several documents expressing its concern with respect to the concurrent obligations of States under WTO laws and the human rights instruments. Two such documents are discussed: General Comment on the Right to Education,<sup>110</sup> and Liberalization of Trade in Services and Human Rights.<sup>111</sup>

One important point should be noted here, when there is a conflict of obligation of member states under the UN charter and any other international agreement, obligations under the Charter shall prevail. (Article 103, UN Charter). One of the main purposes enumerated in the Charter is to promote human rights and fundamental freedom.<sup>112</sup>

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<sup>110</sup> UN Doc. E/C.12/1999/10 dated: 8 December 1999.

<sup>111</sup> UN Doc. E/CN.4/Sub.2/2002/9 dated: 25 June 2002.

<sup>112</sup> Article 1(3).

#### 4.1.1 General Comment on Right to Education

The Committee on Economic, Social and Cultural Rights (henceforth, the Committee) has set out the content of the right to education in general comment no. 13.<sup>113</sup> Even the Committee on the Rights of the Child has elaborated upon the aims of education in its first general comment (CRC/GC/2001/1).<sup>114</sup> Accordingly education is both human a right in itself and means of realizing other human rights. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Education is recognized as one of the best financial investments States can make.<sup>115</sup>

The International Covenant on Economic, Social and Cultural Rights (ICESCR) has devoted two articles to the right to education, article 13 and 14. Article 13 is the longest provision in the ICESCR. The Committee takes the view that State parties are required to ensure that education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13(1),<sup>116</sup> as interpreted in the light of the World Declaration on Education for All (Article 1),<sup>117</sup> The convention on the Rights of the Child (Article 29(1)),<sup>118</sup> the Vienna Declaration and Programme of Action (Part I, para.33 and Part II para 80),<sup>119</sup> and the Plan of Action for the United Nations Decade for Human Rights Education (para 2).<sup>120</sup> These

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<sup>113</sup> Committee on Economic, Social and Cultural Rights, Twenty-first session, 8 December 1999. Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No.13, The Right to Education (article 13 of the Covenant). UN Doc. E/C.12/1999/10 dated 8 December 1999.

<sup>114</sup> Report of the High Commissioner, Executive Summary, UN Doc. E/CN.4/Sub.2/2002/9, para. 33.

<sup>115</sup> n. 110, para. 1.

<sup>116</sup> ICESCR Article 13(1) : The State parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

<sup>117</sup> Jomtien, Thailand, 1990. It was adopted by 155 governmental delegations.

<sup>118</sup> the convention on the right of the child has been ratified and acceded to by 191 States parties.

<sup>119</sup> Vienna Declaration on Programme of action was adopted by 171 governmental delegation.

<sup>120</sup> United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

texts closely correspond to Article 13(1) of the ICESCR and reflect a contemporary interpretation of article 13(1). While commenting on Article 13(2) the Committee re-emphasized the right to receive education emphasized by the Special Rapporteur on the Right to Education. The Special Rapporteur sets out four essential interrelated features, which the States have obligation to respect, protect and fulfill : 'availability', 'accessibility',<sup>121</sup> 'acceptability',<sup>122</sup> and 'adaptability' of education.<sup>123</sup> The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfill or facilitate requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfill/provide the right to education.

#### **4.1.2 Report of the High Commissioner: Liberalization of Trade in Services and Human**

**Rights:** This report is submitted in response to the Sub-commission resolution 2001/4 which requested the High Commissioner to submit a report on Human rights implications of liberalization of trade in services, particularly in the framework of the General Agreement on Trade in services (GATS).<sup>124</sup> International trade law and human rights law have grown up more or less in isolation from each other. Whenever the human rights treaty obligations are undertaken by particular States, WTO members have concurrent human rights obligations under international law and should therefore promote and protect human rights during the negotiation and implementation of international rules on trade liberalization. The Universal Declaration of Human Rights establishes the civil, cultural, economic political and social needs necessary to

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<sup>121</sup> Accessibility has three overlapping dimensions: (i) Non-discrimination (ii) Physically accessible (iii) Economic Accessibility.

<sup>122</sup> Acceptability implies relevance and culturally acceptable curricula and teaching method

<sup>123</sup> UN Doc. E/CN.4/1999/49, para.50.

<sup>124</sup> Liberalization of trade in services and human Rights: Report of the High Commissioner, Commission on Human Rights, Sub-commission on Promotion and Protection of Human Rights. Fifty-fourth session. Executive summary UN Doc. E/CN.4/Sub.2/2002/9 of 25 June 2002.

human dignity and transforms these needs into legal entitlements or rights to be protected, including, by extension, in the processes of trade liberalization.

The High Commissioner notes “achieving fair and equitable trade liberalisation by adopting human rights approaches to WTO rule will be an important step in establishing a just international and social order and failure to do so could perpetuate or even exacerbate existing inequalities”.<sup>125</sup> A human rights approach to trade liberalization therefore emphasizes the role of the State, not only as negotiator of trade rules and setter of trade policy, but also as the duty bearer for human rights. Under human rights law, States have obligations to respect, protect and fulfill human rights. This obligation requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of human rights.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>126</sup> note the trend in all regions of the world to reduce the role of the State, relying on market forces to resolve problems concerning human welfare, often as a result of efforts to attract investments from multinational enterprises or to respond to the conditions generated by international and national financial markets and institutions. In this respect, the obligations on States to respect, protect and fulfill human rights include responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.

The Special Rapporteur on the right to education stressed the fact that education is a governmental responsibility and a public service that continues to enjoy the support of the overwhelming majority of governments in the world. However, the exporters of education

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<sup>125</sup> UN Doc. E/CN.4/2002/54, para.9.

<sup>126</sup> UN Doc., n.124 para. 10 (c).

services have set the tone of education policy, slanting education towards an internationally traded service. The question posed by the Special Rapporteur is that whether education is heading towards progressive liberalization of trade in education services or progressive realization of the right to education and called for the development of global policy on the right to education.<sup>127</sup>

Human rights laws do not place obligations on states to be the sole provider of essential services. However, States must guarantee the availability, accessibility, and acceptability/quality of essential services, especially to the poor, vulnerable, and marginalised, and to do so requires constant monitoring of policies and targeted action on behalf of independent service providers.<sup>128</sup>

The World Bank noted that unregulated liberalization can lead to the replacement of public monopolies by private monopolies, poor investment decisions and insider trading, as well as no improvement in access to essential services for the poor, and stressed the need for effective competition policy, corporate transparency and policy to ensure universal services to accompany liberalisation.<sup>129</sup> Finally, the High Commissioner made recommendations for

- a) ensuring Equal access for basic services,
- b) ensuring Governments' right and duty to regulate,
- c) encouraging interpretations of GATS that are compatible with human rights,
- d) undertaking human rights assessments of trade policies,
- e) providing international co-operation and assistance,
- f) increasing dialogue on human rights and trade.

The High Commissioner notes that the scope of GATS and the application of its rules remain untested and is still in a process of development and hence the High Commissioner encourages

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<sup>127</sup> UN Doc. E/CN.4/2002/60, para. 20-21.

<sup>128</sup> UN Doc., n.124 para. 45.

<sup>129</sup> *ibid.* para. 50, also see World Bank, *Global Economic Prospects, Trade in Services: Using Openness to Grow*, (Washington D.C, October 2001), p.78.

the Sub-Commission to retain this issue on its agenda and to review the negotiations as they proceed with a view to ensuring maximum coherence between the rules and policies of trade liberalization and the enjoyment of human rights.

## **4.2 UNESCO Convention and the Bologna process**

### **4.2.1 Lisbon Convention 1997**

The Convention on the Recognition of Qualifications concerning Higher Education in the European Region was developed by the Council of Europe and UNESCO and adopted by national representatives meeting in Lisbon on 11 April 1997.<sup>130</sup> This Council of Europe/ UNESCO Convention is referred to as the Lisbon Convention. This convention applies to "European Region" including certain States which do not geographically belong to the European continent. They are Canada, Israel and the United States. The convention states in its preamble that it is "convinced that recognition of qualification is a key element of the right to education." It stipulate that:

- Holders of qualifications issued in one country shall have adequate access to an assessment in another country—whether for access to higher education, periods of study or higher education degrees—as similar to the corresponding qualifications in its own system unless it can show that there are substantial differences between its own qualifications and the qualifications for which recognition is sought.

Recognition of a higher education qualification issued in another country shall have one or both of the following consequences:

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<sup>130</sup> [http://www.coe.int/T/E/Cultural\\_Co-operation/education/Higher\\_education/Activities/Bologna\\_Process/Convention\\_Explanation.asp#TopOfPage](http://www.coe.int/T/E/Cultural_Co-operation/education/Higher_education/Activities/Bologna_Process/Convention_Explanation.asp#TopOfPage)



- a) access to further higher education studies, including relevant examinations and preparations for the doctorate, on the same conditions as candidates from the country in which recognition is sought;
- b) The use of an academic title, subject to the laws and regulations of the country in which recognition is sought.
- c) recognition may facilitate access to the labour market.

- All member countries shall appoint a national information center, one of the important tasks of which is to offer advice on the recognition of foreign qualification to students, graduates, employers, Higher education institutions and all other international bodies interested in the matter.

- All countries shall encourage their higher education institutions to issue the 'Diploma Supplement' to their students in order to facilitate recognition.

*The Diploma Supplement* is an instrument developed jointly by the European Commission, the Council of Europe and UNESCO. Its aim is to describe the qualification in an easily understandable way and by relating it to the higher education system within which it was issued. The Diploma Supplement explains the contents and form of the qualifications delivered by higher education institutions. It does not replace or modify those qualifications. Rather, the Diploma Supplement seeks to explain the qualifications in an internationally understandable form. The Diploma Supplement is therefore useful to higher education institutions in their relations with partner institutions in other countries, e.g., in the framework of student exchanges. The inclusion of the Diploma Supplement as one of the mechanisms for the implementation of the Lisbon Convention underlines its importance and commits the Parties to intensifying their efforts to promote its widespread use. The Lisbon Convention also provides for a implementation

mechanism through (a) the committee of the Convention and (b) the European Network of National Information Centers on academic mobility and recognition (the ENIC Network)

Committing to and abiding by the Lisbon Convention, with the full implication of national accreditation, recognition and information centres and the recognition of the Council of Europe/ UNESCO Code of Good Practice in Transnational Education, should be a precondition for any trade agreement relating to higher education. Countries that have ratified the Lisbon Convention, are bound to recognise qualifications from other parties to the Convention as similar to the corresponding qualifications in their own systems. This implies that they should not build barriers against higher education from such countries. Of course, all countries should have a quality assurance system and authorities in importing countries should put their foot down if there are significant and negative differences in quality.

But the flip side of the Lisbon Convention is that neither UNESCO nor the Council of Europe has any power for sanctions. It also does not cover the transnational education providers. The unregulated transnational education providers would contribute to degree mills and other bogus institutions. Thus, the Lisbon Convention, building on national systems, may secure quality and at the same time hinder the building of barriers against flow of higher education. If the GATS should decide to build on the Lisbon Convention, it could enforce quality assessment and free trade between signatory parties at the same time by enforcing a practice in accordance with the Lisbon Convention, albeit through mechanisms external to the Convention.

#### 4.2.2 Code of Good Practice in the Provision of Transnational Education

It was adopted by the Lisbon Recognition Convention Committee at its second meeting at Rīga, on 6 June 2001.<sup>131</sup> Its contents are to be seen as complementary to the Lisbon Convention thus providing a normative framework to be taken as reference by the national recognition bodies in their specific undertakings. In order to promote good practice in the area of transnational education, the Code intends to meet the expectations of both the sending and the receiving countries, to provide a source of reference on issues relating to the quality assurance and evaluation, to offer "consumer protection" for students, employers and others, to facilitate the recognition of qualifications awarded through transnational arrangements.

The Code applies to **institutions** and programmes provided outside the country of origin; **teaching staff**, regardless of their country of origin, who work in an institution/study programme established through a transnational arrangement; **students**, regardless of their country of origin, who are registered in an institution/programme established through a transnational arrangement; **agents**, that are third parties, acting as brokers, facilitators or recruiters in transnational arrangements; **other stakeholders**, such as employers and the public at large, interested in the quality of higher education qualifications. The Code stipulates the following principles, which should be respected by institutions or organizations involved in the provision of educational services through transnational arrangements:

1. Transnational arrangements regarding higher education should fully respond to the learners' educational demands, contribute to their cognitive, cultural, social, personal and professional development, and **comply with the national legislation in both receiving and sending**

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<sup>131</sup> [http://www.coe.int/T/E/Cultural\\_Co-operation/education/Higher\\_education/Activities/Bologna\\_Process/Code\\_TNE.asp#TopOfPage](http://www.coe.int/T/E/Cultural_Co-operation/education/Higher_education/Activities/Bologna_Process/Code_TNE.asp#TopOfPage)

**countries.** In the case of collaborative arrangements there should be written and legally binding agreements or contracts setting out the rights and obligations of all partners.

2. Procedures and decisions concerning the quality of educational services provided by transnational arrangements should be based on specific criteria, which are transparent, systematic and open to scrutiny.

3. Information given by the awarding institution through transnational arrangements should be appropriate, accurate, consistent and reliable.

4. The awarding institution should ensure that teaching staff members should be proficient in terms of qualifications, teaching, research and other professional experience and for that it has in place effective measures to review the proficiency of staff delivering programmes that lead to its qualifications.

5. Transnational education arrangements should encourage the awareness and knowledge of the culture and customs of both the awarding institutions and receiving country among the students and staff.

6. The awarding institution should be responsible for the agents it, or its partner institutions, appoint to act on its behalf. Institutions using agents should conclude written and legally binding agreements or contracts with these, clearly stipulating their roles, responsibilities, delegated powers of action as well as monitoring, arbitration and termination provisions.

7. Awarding institutions should be responsible for issuing the qualifications through the use of the Diploma Supplement, facilitating the assessment of the qualifications by competent recognition bodies.

8. Examination and assessment requirements for educational services provided under transnational arrangements should be equivalent to those of the same or comparable programmes delivered by the awarding institution.

9. The academic work load expressed in credits, units, duration of studies should be that of comparable, any difference in this respect requiring a clear statement on its rationale and its consequences for the recognition of qualifications.

10. Qualifications issued through transnational educational programmes, complying with the provisions of the present Code, should be assessed in accordance with the stipulations of the Lisbon Convention.

#### **4.2.3 Bologna Process**

The Bologna Process is presently the major process of higher education reform in Europe.<sup>132</sup> It takes its name from the Bologna Declaration, which was signed on 19 June 1999 by the Ministers of Education of 29 countries in Europe. The formal name of the Bologna Declaration is the **European Higher Education Area**. The Ministers' meeting was preceded by a discussion, on 18 June, involving a large number of representatives of the academic community, Ministries and international governmental and non-governmental organizations. At the third Ministerial meeting held in Berlin in September 2003, higher education ministers from 32 European countries launched the **process of creating a "European higher education area" by 2010**. The aim is to continue developing a system of easily 'readable' and comparable degrees, based on undergraduate and postgraduate studies. At the same time, more flexibility would be ensured by a course credit system providing for both transferability and accumulation.

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<sup>132</sup> [http://www.coe.int/T/E/Cultural\\_Cooperation/education/Higher\\_education/Activities/Bologna\\_Process/An\\_overview\\_of\\_the\\_Process.asp#TopOfPage](http://www.coe.int/T/E/Cultural_Cooperation/education/Higher_education/Activities/Bologna_Process/An_overview_of_the_Process.asp#TopOfPage)

The EU negotiates in the WTO on behalf of EU member countries. It is suspected that the EU is taking this action of establishing a **European Higher Education Area**, in preparation for the GATS, otherwise known as harmonisation of higher education provision, through the Sorbonne/Bologna process;<sup>133</sup> in addition a number of EU directives are being implemented in this respect. However, it is not at all certain that all EU member states are in favour of education being included in the GATS.

#### **4.3 Response by Universities, Students and Teachers**

##### **4.3.1 Joint Declaration on Higher Education and GATS**

This joint Declaration was signed on 20 September 2001 by:

- a) Association of Universities and Colleges of Canada (AUCC), representing Canada's 92 public and private not-for profit universities and degree-level colleges;
- b) American Council on Education (ACE), representing 1,800 accredited degree granting colleges and universities in the United States;
- c) European University Association (EUA), representing 30 national Rectors conferences and 537 individual universities across the European continent;
- d) Council for Higher Education Accreditation (CHEA), representing 3,000 accredited, degree granting colleges and universities and 60 recognized institutional and programmatic accreditors in the United States.

The signatories call for freeze on WTO trade negotiations on educational services. In their view, there is no need for trade negotiations, particularly since they might significantly **jeopardize the quality, accessibility and equity of higher education and restrict the right of national authorities to regulate and publicly subsidize their higher education systems.**

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<sup>133</sup> Bologna Declaration builds on the Sorbonne declaration signed in May 1998 by the Ministers of Education of France, Germany, Italy and UK.

#### **4.3.2 Porto Alegre Declaration, 2002**

It was signed by Iberian and Latin American associations and public universities. They are radically opposed to international trade in educational services. They maintain that promoting international trade would lead to deregulation in the education sector with the removal of legal, political and fiscal quality controls, **that national government would abandon their social responsibilities, and that the other outcomes would include an increase in social inequalities, the weakening of ethical and cultural values and standardization of education thus negating the sovereignty of people.**

**4.3.3 Association of University Teachers (AUT) in Europe and students from OECD countries:** AUT has been at the forefront of the campaign for higher education to be excluded from the GATS. European Commission's announcement confirming that the higher education would not be included in the initial offer of market access was considered to be a significant victory for the AUT. Students' representatives from OECD countries see trade and market competition in the education sector as a threat to public funding and intellectual freedom in higher education.

#### **Conclusion**

The content of all these international 'soft law' instruments emphasizes the same concern that the education should be regulated by the national government concerned, and must not be subject to the GATS. None of them are against the trade in education per se; but they lay emphasis on policy coherence between trade, governments right and duty and the right of the individuals.

## Chapter 5

### INDIAN EDUCATION SYSTEM: LAW, POLICY AND PRACTICE

#### 5.1 Constitutional Provisions

India accords special place for education for its social and economic development as it provides in Part IV, the Directive Principles, of the Constitution in Article 45 that “the state shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen”. The period of ten years lapsed ‘without endeavour been made to make this Article reverberate with life and articulate with meaning’.<sup>134</sup> Perhaps the effectiveness of that provision got diluted by Article 41 which states that ‘State shall within the limits of its economic capacity and development, make effective provisions for securing the right to education.

But the constitutional right to education was not accorded on the citizens at the time of adopting the Constitution. Though India had obligation under the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, which India ratified on the 10<sup>th</sup> of April 1979, the initiation for its implementation took more than two decade. It was only in the year 2002 that Article 21-A, Right to education, was inserted in the Constitution by the Eighty-sixth Amendment Act, 2002.<sup>135</sup> Prior to that, the Supreme Court of India, in *Unni Krishnan v. State of Andhra Pradesh*<sup>136</sup> held that the right to education to be a fundamental right under article 21- Right to life and liberty- of the constitution. Education was put on the concurrent list by Forty-Second amendment to the constitution,<sup>137</sup> whereby

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<sup>134</sup> B.P. Jeevan Reddy, J. in the *Unni Krishnan v. State of A.P* (1993) 1 SCC 645.

<sup>135</sup> The right to education- free and compulsory education to all children of the age of six to fourteen-Article 21A was inserted in the constitution by the Eighty-sixth amendment act, 2002.

<sup>136</sup> (1993) 1 SCC 645 also see AIR 1993 SC 2178.

<sup>137</sup> Prior to the amendment education was under the State List. Subs. By the constitution (Forty-Second Amendment) Act, 1976, Sec. 57 for entry 25 (w.e.f. 3-1-1977)



both the Central government and the State Governments regulate the education system in India.<sup>138</sup> Every State has an Education Act and education is regulated through this Act. The Government of India regulates standards in higher education through the institutions set up under the Acts of Parliament, namely; University Grant Commission (UGC),<sup>139</sup> All India Council of Technical Education (AICTE), National Council for Teacher Education (NCTE), Bar Council of India (BCI), Medical and Dental Council of India (MCI & DCI), Pharmaceutical Council and the Council of Architecture and several other councils have been set up in other disciplines for this purpose. These councils are responsible for regulations, maintenance and coordination of standards. The funding of education is made by the Central government and the State government in their budgets that are passed by the Parliament and State Legislature respectively under their Finance Bills. Special provisions of development funding by the Central government are made through five-year development plans and administered by the UGC and other central agencies and State governments.

## **5.2 System and Standards of Education**

### **5.2.1 In Pre-primary, Primary and Secondary Education**

India has pre-primary (Aanganwadi/Nursery/Kindergarten) education for the children from two and a half years to four years.<sup>140</sup> This is followed by primary education for children from five to ten years; then secondary and higher secondary from eleven years to sixteen years; and finally, higher education from approximately seventeen years onwards. India has also National and State Open Schools. There are central and state level boards of schools called the Central Board of Secondary Education (CBSE) and State Board of Secondary and Higher Secondary Education

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<sup>138</sup> 'Education' had been included in Entry 25 of List-III-Concurrent list of the Seventh Schedule to the Constitution by the Forty-Second Amendment, Article 246 accords power both to the Parliament and the State Legislature to make laws with respect to any matter enumerated in the List-III-concurrent list.

<sup>139</sup> UGC was established in 1956 to regulate academic standards, coordinating and grant-giving body for academic purposes.

<sup>140</sup> In urban cities many business people have opened up varieties of Nursery schools, most of them are franchises of the US and European nursery schools. The urban middle class prefer sending their children to these private colorful nursery schools than to the lousy government nursery schools.

(SBSE and SBHSE). Most schools are affiliated to them. These boards regulate, conduct examinations and award certificates to students studying in schools affiliated to them. There are three more organizations that are also recognized for providing school certificates in the country: the Council for Indian School Certificate Examination (ISCE), Cambridge Examination Syndicate (CES), and International Baccalaureate Organisation (IBO). They also regulate, conduct examinations and award certificates to students studying in their schools. There are multiple standards in school education, and the standard of CBSE is considered far better than that of the State Board Schools. The standards need to be harmonized before subjecting them to international arena.

Primary education in India became subject to international scrutiny since 1990s that saw the primary education scene opening up to external assistance on a fairly large scale, possibly as part of the commitments made by the international donor community.<sup>141</sup> These developments in the international scenario have transformed the status of education from merely a public sector activity of the state to that of a legal obligation, societal responsibility and moral commitment.<sup>142</sup>

There are three prominent developments in the line of achieving universal elementary education in India. They are:

- 1) '*Sarva Shiksha Abhiyan*' (education for all) announced by the central government in 2001.
- 2) eighty-sixth constitutional amendment;<sup>143</sup> and
- 3) introduction of 'The Free and Compulsory Education for Children Bill, 2003' to be enacted by the Parliament.<sup>144</sup>

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<sup>141</sup> Govinda R. ed., *India Education Report*, Oxford University Press, 2002, New Delhi, pg.2.

<sup>142</sup> Ibid.

<sup>143</sup> Constitution, n.134.

<sup>144</sup> Bill to provide free and compulsory education for all children from the age of 6-14 years. It provides for 'Basic Education Authority' for the implementation of the provisions of this act (Sec.3). It places obligation on parents and guardians to ensure attendance, if a child is without parents then the local authority within whose jurisdiction the child

Once *Sarva Shiksha Abhiyan* is successfully implemented by providing education to all children in the age group of 6 –14, by 2010 there would be a huge demand for the higher secondary education and eventually for higher education; and it has cascading effect.

### 5.2.2 In Higher Education

There are 16 central universities set up under the Act of Parliament and 178 universities set up under the Act of State legislature. There are about 12 thousand colleges affiliated<sup>145</sup> to these Universities.<sup>146</sup> they cater to the need of only about 6% of the population of the relevant age group of 16-23 years.<sup>147</sup> Each University has its own Act and Statutes and is governed by them. There are two types of Universities: one, unitary universities, which have a single campus and largely concentrate on post-graduate studies and research; and the other, affiliating universities, which have variable number of colleges affiliated to them. There are also “deemed universities”<sup>148</sup> and ‘institution of national importance’.<sup>149</sup> There are also open universities providing higher Education.<sup>150</sup> Higher education includes the education imparted after the 10+2 stage (ten years of primary and secondary education followed by two years of higher secondary

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ordinarily resides shall deemed to be guardian (Sec 6.3). The ‘attendance Authority’ to issue ‘attendance order’ to parents/ guardians who has failed to cause the child to attend school (Sec 11). In case of non-compliance with the attendance order, the attendance authority shall refer the matter to a conciliatory body-Village Education Committee set up under Sec. 9. The conciliatory body would discuss the issue with the parents and attempt to convince the parents to send the child to school. It prohibits employment of a child which prevent the child from attending school (Sec 12), contravention of this provision shall be punishable with fine to the extend of Rs.500/- in case of continuing offence additional fine of Rs. 50/- per day during the period of contravention (Sec.18). It also provides for Grievance Redressal Mechanism in case the Basic Education Authority fails to provide schooling facility. It also makes it obligatory for the Basic Education Authority to lay an annual report to the general council of the local authority and by the State Government to the State Legislature (Sec. 22).

<sup>145</sup> The concept of affiliated college is that colleges provide education, follow the curriculum ad methodology as prescribed by the university. Students are assessed through the central examination conducted by the university and universities award degrees.

<sup>146</sup> UGC Annual Report, 1999-2000.

<sup>147</sup> Where as the ratio is 40% in the developed countries as per ‘Higher Education in India Vision and Action Country Paper’ presented by Indian National Commission in cooperation with UNESCO at the UNESCO World Conference on Higher Education in the Twenty-First Century, Paris, 5-9 October 1998.

<sup>148</sup> The deemed university status is granted by the University Grant Commission (UGC) with the approval of the Department of Education, Ministry of Human Resource Development

<sup>149</sup> such as Indian Institute of Technology (IITs), Indian Institute of Management (IIMs), Indian Institute of Foreign Trade (IIFT) Indian Institute of Chartered Accountants etc., The institution of national importance are established, or so designed, through Acts of Parliament.

<sup>150</sup> One national Open University i.e. Indira Gandhi National Open University (IGNOU) established in 1985 and several State open universities are also functioning for the benefit of part-time or working students.

education). The first degree, the Bachelor's degree, is obtained after three years study in case of liberal arts, and four years in the case of most professional degrees, four and a half in case of medicine and five/six years in case of law. The Master's programme is usually of two years duration. The research degree (M.Phil and Ph.D) take variable time depending upon the individual student.

### 5.3 Current trend and scenario with respect to higher Education

Higher education in India is in deep financial strain, with escalating costs and increased needs on the one hand and shrinking budgetary resources on the other. The share of higher education in the First Five Years Plan was 0.71% (total share of education expenditure 9%) that increased up to 1.24% (total share of education expenditure 25%) in the Fourth Five year plan and then started declining since then and has declined to 0.35% (total expenditure on education 7%—lowest compared to all the five year plans) in the Eighth Five Year Plan (1992-97) though the actual expenditure has increased hundred times from Rs.14 crore in the First Five Year Plan to Rs.1516 crore in the Eighth Five Year Plan at current prices.<sup>151</sup> There was an effort to correct this in the Ninth Five Year Plan (1997-2002) when percent to total education expenditure stood at 8% (Rs. 4350 crore in current prices).<sup>152</sup>

The growth in government expenditures was very slow during the 1990s after the economic reforms policies were introduced. The sector of education also came under reforms with the launching of the Structural Adjustment Programme<sup>153</sup> in India in 1991.<sup>154</sup> Since then the period

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<sup>151</sup> Abhilaksh Lekhi, "Issues in Financing Higher Education in India," *Indian Journal of Public Administration*, vol. 44(4), 1998 p. 856.

<sup>152</sup> Tilak, n.2.

<sup>153</sup> The acute economic crisis that had overtaken most of the developing countries in the mid 80s immediate justification for adoption of SAP- structural Adjustment Programme first in the economic sector and later in social sector. This strategy was advocated by IMF and the world Bank and supported by international creditors.

<sup>154</sup> Muzammil, n:7.

witnessed world-wide transition of policies in favour of market economy from planned and State regulated systems.

Though the Punnayya Committee report stated that the government cannot give up its responsibility in the higher education sector, it laid emphasis that the universities will have to increase their earnings up to 25 percent over a period of 10 years.<sup>155</sup> A discussion paper titled "Government Subsidies" in India,<sup>156</sup> in December 1997, brought out the fact that in 1994-95 the subsidies<sup>157</sup> for services provided by the Central and State Governments constituted 14.4 per cent of the GDP. It emphasized the need to reduce the subsidies by 50%. It made a distinction between merit and non-merit subsidies based on the externalities associated with goods and services. It classified higher education as a non-merit good based on the assumption that the benefit of higher education accrues primarily to its recipients and not the society at large, and that the middle class will be able to afford unsubsidised professional education.

Although higher education in India is characterized by massive public investment, this investment is regarded as much below optimum. Among 116 countries, India ranks 82<sup>nd</sup> in terms of proportion of public expenditure on education to GNP. The overall education index, one of the three indices on which human development index is built, and which is based on the adult literacy rate and the combined primary, secondary and tertiary gross enrolment ratio has a value

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<sup>155</sup> UGC, *Funding of Institutions of Higher Education*, Report of Justice Dr. K. Punnayya Committee 1992-93, New Delhi.

<sup>156</sup> Government of India, *Government Subsidies in India*, Discussion Paper, Department of Economic Affairs, Ministry of Finance, New Delhi, 1997.

<sup>157</sup> Subsidies are provided for public goods and merit goods; in the form of concession in tariff and taxes, provision of land at a concession, transfer of payment etc., Subsidies has effect of reducing prices so that they are available to large section of the population.

of 0.57 for India for the year 2000 which gives it the extremely low rank of 141 out of total 173 countries.<sup>158</sup>

The enrolment ratio in higher education was 6.0% in India for the year-1985, which was slightly increased to 7.2% in the year 1997. Higher education expanded much faster in all other countries as compared to India. There could be two reasons for this: first, elementary/primary education is a pre-requisite for students to seek admission in higher education. Elementary/primary education was made compulsory only in the year 2001 through the 'Sarva Shiksha Abhyan'. Secondly, the existing number of universities and colleges are not able to meet the demands for higher education. The admission process in India is not of selection process but of rejection process; for one seat there are more than hundred eligible candidates; the college authorities are unable to give admissions to all of them; and they have to reject them on some basis or the other. For instance, the University of Delhi has about 43,000 odd seats for which it receives more than 2 lakh applications. This is also the reason why there is so much pressure on the high school students to secure high percentages/grades. We read news about high school students going through tensions and psychological problems and some of them even commit suicide.

Moreover the quality and standard of education provided in Indian universities and colleges are steadily going down. A high degree of absenteeism and indifference to work is noticed among teachers and there was also lack of accountability and commitment.<sup>159</sup> There is a view that higher education also suffers from too much political and bureaucratic control. Liberalization process

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<sup>158</sup> Ravi Kumar T, Vijender Sharma, "Downsizing Higher Education-An Emergent Crisis," *Economic and Political Weekly*, February 15, 2003. see also Task Force Report 2000, n.4.

<sup>159</sup> Asok Mukhopadhyay, "Liberalisation and Higher Education in India," *Indian Journal of Public Administration*, vol. 42, 1996, p. 496.

would do away with both party politics and rule-obsessed bureaucracy and promote efficiency and genuine academic accountability.<sup>160</sup>

In this context, private education institutions are seen as a must. They are also growing in numbers. Also owing to the fact that there is a marked difference in quality of education between government and private educational institutions, the latter are gradually being preferred by students and parents alike.

#### 5.4 Status of Private Education Institutions

Eleven member constitutional bench of the Supreme Court on 31 October 2002 stated, in *T.M.A. Pai foundation and others v. State of Karnataka and others*, that 'education is per se regarded as an activity that is charitable in nature. Education has so far not been regarded as a trade or business where profit is the motive'.<sup>161</sup> Observers argued that the above statement 'implied that education has been regarded as a charitable activity (without a profit motive) so far leaving the door open for education to be considered as a for-profit activity in future'.<sup>162</sup> But according to Justice B. P. Jeevan Reddy, in the *Unni Krishnan's case*,<sup>163</sup> the activity of establishing an educational institution can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g) of the Constitution of India.<sup>164</sup> Education has never been commerce in India. Making it one is opposed to the ethos, tradition and sensibilities of this nation. Education cannot be allowed to be converted into commerce by relying upon the wider meaning of "occupation". Imparting of education is not and cannot be allowed to become commerce. A

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<sup>160</sup> Ibid.

<sup>161</sup> *T.M.A. Pai foundation and others v. State of Karnataka and others*, (2002) 8 SCC 481. Para 20.

<sup>162</sup> *Why should education be run purely as a charitable and not for profit in India?* Article in the web site: [http://prayatna.typepad.com/education/2004/02/why\\_should\\_educ.html](http://prayatna.typepad.com/education/2004/02/why_should_educ.html)

<sup>163</sup> (1993) 1 SCC 645, paras 164,167 also see AIR 1993 SC 2178.

<sup>164</sup> All citizens have the right to practice any profession, or to carry on any occupation, trade or business Art. 19(g).

law, existing or future, ensuring against it would be a valid measure within the meaning of Cl. (6) of Article 19.<sup>165</sup>

In the Unni Krishnan's case<sup>166</sup> the Supreme Court held that 'commercialisation of education is impermissible in law' and private educational institutions merely supplemented the effort of the State in educating the people. No private educational institution could survive or subsist without recognition and/or affiliation granted by bodies that were the authorities of the State. The Court then formulated a scheme and directed every authority granting recognition/affiliation to impose that scheme upon institutions seeking recognition/affiliation, even if they were unaided institutions. The scheme postulated, *inter alia*, the following:

a) that a professional college should be established and/or administered only by a society registered under the Societies Registration Act, 1860, or the corresponding Act of the State, or by a public trust registered under the Trusts Act, or under the Wakfs Act, and that no individual, firm, company or other body of individuals would be permitted to establish and/or administer a professional college.

b) 50% of the seats in every professional college should be "free seats" filled on the basis of merit determined by a common entrance test; the remaining 50% of the seats or "payment seats" should be filled by those candidates who pay the fee prescribed therefore.

c) that it would be appropriate for the UGC to frame regulations under its act regulating fees that the affiliated colleges operating on a no-grant-in aid basis were entitled to charge. AICTE, the Indian Medical Council and the Central Government were also given similar advice.

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<sup>165</sup> State is not prevented from making law imposing, in the interest of general public, reasonable restriction on the exercise of right conferred in Art 19(g) of the Constitution.

<sup>166</sup> (1993) 1 SCC 645, also see AIR 1993 SC 2178.



The constitutional bench in the T.M.A. Pai case,<sup>167</sup> referred to the scheme proposed in Unni Krishnan's case<sup>168</sup> and said that it **"has the effect of nationalising education** in respect of important features, viz., the rights of a private unaided institution to give admission and to fix the fee.<sup>169</sup> By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be fair nor reasonable. The Constitutional Bench,<sup>170</sup> reiterated the necessity of private institutions by quoting the observation made by Justice Jeevan Reddy, in the Unni Krishnan's case.<sup>171</sup> The quote as follows:

**"The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand - particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions - including minority educational institutions - to have a role to play."**<sup>172</sup>

The Constitution bench<sup>173</sup> continues: "In view of the discussion hereinabove, we hold that the decision in Unni Krishnan's case, insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct, and to the extent, the said decision and the consequent directions given to UGC, AICTE, Medical Council of India, Central and State governments, etc., are overruled."<sup>174</sup>

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<sup>167</sup> (2002) 8 SCC 481.

<sup>168</sup> (1993) 1 SCC 645.

<sup>169</sup> (2002) 8 SCC 481, Para 38

<sup>170</sup> *ibid.*

<sup>171</sup> (1993) 1 SCC 645, pg. 749, para 194.

<sup>172</sup> *ibid.*

<sup>173</sup> (2002) 8 SCC 481.

<sup>174</sup> *ibid.*, Para 45, pp. 541-2.

Observers argue that when the necessity for private investment in education has been accepted, what is the need to insist on education being purely a charitable activity? When other basic needs like food, clothing and shelter have not be classified as purely charitable activities, with private investment in all these sectors through for-profit entities, why should education alone be run only on a non-profit basis? Government regulation is acceptable in education to maintain some consistent norms and standards, but there is no reason to make it compulsorily a charitable activity. Indeed, this may well be suffocating the system. The reality today is that most educational institutions are run in the name of charity but are means for the trustees to make money for themselves.<sup>175</sup>

It was also observed by the eleven member constitutional bench of the Supreme Court<sup>176</sup> “that the scheme framed by this court in Unni Krishnan’s case was not warranted” the cost incurred in an unaided professional college was more than the total fees realize on the basis of the formula fixed in that scheme. This has resulted in the revenue shortfalls. The court by interim orders<sup>177</sup> subsequent to the decision in the Unni Krishnan’s case had permitted within the payment seats, some percentage seats to be allotted to Non-resident Indians (NRI), against payment of a higher amount as determined by the authorities. Even thereafter sufficient funds were not available for the development of those institutions. Another infirmity which was pointed out was that experience has shown that most of the “free seats” were generally occupied by students from affluent families, while students from less affluent families were required to pay much more to secure admission to “payment seats”. It was for this reason that students from affluent families had had better school education and the benefit of professional coaching facilities for the common entrance examinations and were, therefore, able to secure higher merit position in the

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<sup>175</sup> *Why should education be run purely as a charitable and not for profit in India?* Article in the web site: [http://prayatna.typepad.com/education/2004/02/why\\_should\\_educ.html](http://prayatna.typepad.com/education/2004/02/why_should_educ.html)

<sup>176</sup> (2002) 8 SCC 481 Para 30, p.538.

<sup>177</sup> (1993) 4 SCC 111; (1993) 4 SCC 112 and (1993) 4SCC 276.

common entrance test, and thereby secure free seats. The education of these more affluent students was in a way being cross-subsidised by financially poorer students who, because of their lower position in the merit list, could secure only “payment seats”. That is why it has been alleged that the “implementation of Unni Krishnan scheme has in fact (1) helped privileged from richer urban families, and (2) resulted in economic losses for the educational institutions’ and that the scheme had failed to achieve its object.”<sup>178</sup> ‘(T)he “payment seats” student would not only pay for his own seat but also finance the cost of a “free seat” classmate. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.’<sup>179</sup>

Great numbers of colleges, about 70% of the total, have been founded by privately managed trusts and societies.<sup>180</sup> There are also many for-profit and not-for-profit private institutions providing education in the areas of management, information technology and other professional fields. Many foreign institutions have also started providing education in India in collaboration with private providers without going through any kind of regulatory measures.

It is also held ‘that private educational institutions are a necessity’ as it is ‘evident from the fact that the number of government-maintained professional colleges has more or less remained stationary, while more private institutions have been established.’<sup>181</sup>

Whether education could be a commercial activity is in a state of flux. It was held in the Unni Krishnan’s case that ‘no educational institution can run or survive unless it is recognized by the Government or is affiliated to one or the other universities in the country’ as it is the ‘very life

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<sup>178</sup> (2002) 8 SCC 481, Para 33, p.539.

<sup>179</sup> *ibid.* Para. 37.

<sup>180</sup> AIU, Universities Handbook, 27<sup>th</sup> Edition, December, 1997.

<sup>181</sup> (2002) 8 SCC 481, Para 39, p.540.

blood of a private educational institution' and 'unless it is recognized and/or affiliated' 'no one would join such educational institution'.<sup>182</sup> But a decade later the scenario is just the contrary. Some reputed institutions (offering management courses) have chosen to be autonomous and independent without going in for recognition from the Central or State Governments or other Government bodies like the AICTE and UGC. These institutions are typically set up by corporates and banks on their reputation to gain credibility with the student community and the employer community as well (so the students graduating from such institutes will be hired by the employer community). The Times School of Marketing (TSM), run by the Times of India Group, is offering a Post-Graduate Diploma in Marketing Management and provides placement in the Times Group and other corporates. TSM states very clearly in its advertisements in the print media that "this Diploma is not recognised by Govt. of India, State Govt. UGC & AICTE."<sup>183</sup> The TSM has chosen to avoid all the constraints that come with the tag of recognition, but claim to have been able to place their students in the Times Group as well as in other companies

The Kirloskar Institute of Advanced Management Studies (KIAMS),<sup>184</sup> set up by the Kirloskar Group at Harihar in North Karnataka, is another example. It offers a two-year fully residential Post Graduate Diploma in Management Programme and states clearly in their application form<sup>185</sup> that "KIAMS is an independent autonomous body and is not affiliated to any University and is not regulated by the AICTE Act or any other State Act."

As long as the institutions are able to ensure (through placements) that there are job opportunities available for the students graduating from those institutions, government recognition is irrelevant. Recognition will only matter if one wants a job with a government organization. But which government organization hire MBAs? The challenge for such private unrecognised

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<sup>182</sup> (1993) 1 SCC 645, Para 169.

<sup>183</sup> <http://tsm.timesjobs.com/news.htm>

<sup>184</sup> <http://www.kiams-hrr.org>

<sup>185</sup> [http://www.kiams-hrr.org/Documents%5CAppl\\_Form\\_PGDM\\_B7.doc](http://www.kiams-hrr.org/Documents%5CAppl_Form_PGDM_B7.doc)

institutions is to offer courses that are accepted by potential employers as being of sufficiently high standard. This would be good enough to attract students. But how are students to find out for themselves if the institutions offering the courses are credible and have the necessary infrastructure, facilities and staff of high quality and if the courses offered are really accepted by the potential employer community? This is one of the major challenges that will need to be addressed.

Business Standard reports quoting officials from the Ministry of Human Resources Development, that it will be mandatory for all institutes and universities to obtain the approval of the All-India Council for Technical Education and the University Grants Commission. An amendment to the UGC Act, 1950, and the AICTE Act, 1987, is proposed - providing the two with penal powers to be able to de-recognise an institution, take it to court, and even demand its closure if specified norms are not met.<sup>186</sup> The amendment will apparently not apply in retrospect, but existing institutes and universities, which do not have approval from the AICTE or the UGC, will be asked to take one. As of now, an AICTE approval is optional. Also, a university can be set up by a state government without UGC approval as long as it does not take a grant. Many state governments, notably the Chattisgarh State Government, have allowed private universities and institutes to be set up without UGC or AICTE approval and all these institutes will be affected if the new amendment to the UGC Act becomes law. In the meantime, private universities and bogus universities are thriving to the glory at the cost of ignorant students and parents.

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<sup>186</sup> UGC and AICTE approval required for higher educational institution, dated: November 2, 2003 also see at <http://www.business-standard.com/today/story.asp?Menu=19&story=26401>

## **5.5 India's Response to GATS**

India has not made any commitment on the educational sector under the GATS as yet. Ministry of Commerce in India is the body responsible for the negotiations in the WTO forum. It cannot act *suo moto* and commit the education sector under the WTO regime. Its decision will be based on the recommendations of the Department of Education, Ministry of Human Resource Development (MHRD). In August 2001, the MHRD constituted a Technical Committee to study the viability of making specific commitment with respect to the education sector under the GATS and the work was assigned to higher education unit, National Institute of Educational Planning and Administration (NIEPA). NIEPA has come up with two documents based on the Report on Policy Perspective Seminar on Internationalization of Higher Education and Operation of Foreign Universities in India; Internationalisation of Higher Education: Issues and Policy Suggestions, and Trade in Education Services under the WTO regime – A Proposal of India. Reports of these deliberations were sent to the MHRD and respective agencies with a request to consider policy recommendations. It is said that government is seriously considering the recommendations, though these two documents brings out disadvantages opening up education sector, the overall recommendation made in them is to make specific commitment under the GATS. Whether India will make specific commitment on the education sector in the next round of negotiations will entirely depend on the recommendation of the MHRD to the Ministry of Commerce. So far, the MHRD has not decided on the matter, as it is looking for further study in this regard.

Meanwhile the government is considering the following two reports that are specifically relevant in this context.

### **5.5.1 Report on Policy Framework for Reforms in Education**

This report by Mukesh Ambani, Kumaramangalam Birla and others, was presented to the Prime Minister's Council on Trade and Industry, Government of India.<sup>187</sup> This report points out that the prevailing systems of education—spending and management often protect the interests of teachers and the government rather than those of parents, students, communities and the poor. Teachers, administrators, textbook publishers—all have reasons to prefer things to remain as they are, or to change only gradually. The Report suggests higher education must involve private initiatives, including setting up of private universities. Grants have to be linked to achievements of individual educational institutions. Business and industry have a vital role to play in establishing world class institutes of higher learning. Leading business houses must be encouraged to establish such institutes and universities. The universities must be strongly encouraged to form partnerships with industries. Such a linkage would entail several benefits for the university. It would give the university opportunities to attract additional funds for teaching and research, thereby facilitating financial autonomy, access to latest technology, improved employment prospects for students, continuous up gradation and adaptation of curriculum and improved motivation in students. The Report advocates that the responsibility of the Government must be confined only to the following:

- a) funding and ensuring that primary education is compulsory and free,
- b) funding and ensuring that secondary education is compulsory,
- c) funding and bringing about 100% literacy,
- d) supporting disciplines that have no market orientation,
- e) selectively supporting and part funding centres of higher learning,
- f) providing financial guarantees for student loans,
- g) ensuring uniformity in content and quality, and planning.

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<sup>187</sup> <http://indiaimage.nic.in/pm-councils/reports/education/>

The report suggests that succeeding levels of education, the Government should play the role of a facilitator. The Government must exercise its regulatory role to streamline higher education to ensure that it is meaningful, purposeful and cost effective. In essence, the Government's role should be maximum at the primary stage and minimum at the higher education stage.

The report observes that India is being seen by the UK, the USA, Canada and Australia as a huge market for their educational services. The quality of educational services rendered by some of the foreign universities is questionable, but such concerns get clouded in the Indian society's blind charm for foreign labels and degrees. The report suggests that this process has to be reversed. Indian institutions and universities must be able to attract overseas students as there is a good demand for Indian education in Asia, Africa, South America and East Europe. Cost levels will easily be less than one-fourth of those in the developed world with comparable quality. The Indian education system, once reformed, will have the ability to attract a large number of foreign students. This will have to be encouraged in order to generate additional finances and earn goodwill.

#### **5.5.2 PIHEAD Committee Report 2004**

The UGC appointed a special committee on higher education. The Committee suggests the concept of Special Economic Zones. The idea is to create infrastructure where both Indian as well as foreign universities and other educational institutions can set up 'shops' in these Special Economic Zones that will offer a wide 'menu' of courses, both in sciences and humanities. The committee had short listed 25 universities to participate in a series of global education fairs. It also recommended that the IITs and IIMs be allowed to set up 'shops' in global shores, believed that these efforts are necessary in view of the change in scenario due to the general agreement on trade in services (GATS). The Hindu reported that the UGC has big plans for "exporting" Indian



education. As per UGC's Tenth Plan profile, it will encourage universities to set up campuses abroad apart from regulating collaborations between Indian and foreign universities. The UGC also plans to earmark special grants for universities trying to export Indian education. The UGC views this project as part of its policy to make universities generate at least 25 per cent of their own budgetary needs. According to the UGC, such projects would help universities generate more finances. In the first phase, universities have already been asked to reserve 15 per cent of the seats for "international students". The logic is that at a time when students are in demand the world over, it makes sense to sell Indian education.<sup>188</sup> Over 18 months after The Hindu report, The Times of India reported that the UGC has set up marketing programme, "Promotion of Indian Higher Education Abroad" (PIHEAD) aimed at attracting overseas students to Indian shores.<sup>189</sup> It calls for the creation of world-class special educational campuses at selected places all over the country. While a final decision is yet to be taken by the UGC, the Pihead committee member P J Lavakare, who was also instrumental in preparing the draft, said the idea was conceived after receiving requests from several foreign universities and institutions with an outstanding academic record and prior experience with foreign students will be taken to several countries, including the US.

In India there is no law to regulate the establishment and maintenance of private universities yet. There are mushrooming private universities with no law in place to regulate them; as such there are many 'fly by night' institutions. Many students and parents suffer after enrolling in these private universities, paying hefty amount just to realize that they are closed down. One of the foreign institutions, Sylvan, a corporate education provider listed in a stock exchange in America, started its operation in Hyderabad. Within few years they closed down leaving the students in lurch. There are other bogus universities operating in the country, which have no

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<sup>188</sup> Pranab Dhal Samanta, "Now UGC to "export" Indian education," *The Hindu*, February 25, 2002, New Delhi.

<sup>189</sup> Siddhartha Kashyap, "UGC committee recommends SEZs for higher education," January 27, 2004, Pune.

authority to issue degrees. They are self-styled universities. A university can only be so if it is established either through the Act of a Parliament or through the Act of a State legislature; others cannot call themselves as universities. A Report by Department-Related Parliamentary Standing Committee on Human Resource Development came out with a list of 27 such fake universities operating across India which exploit the gullible youth by resorting to illegal methods; the report laments that even after so many years, there has been no effective law against fake universities, there is no regular mechanism or system either with the UGC or the Department of Education to detect such institutions and curb their activities; no survey has been conducted on the extend of operation of these fake universities. The list of 27 fake universities also is based on the complaints received from the public or the aggrieved persons and not as a result of any survey conducted by the Government or UGC.<sup>190</sup> The report pointed out there being a lacuna in the UGC Act 1956, which requires to be rectified with at most priority. More than a decade has passed since report pointed out that the 'lacuna requires to be rectified with at most priority' nothing has been done in this regard. India committing itself to the education sector under the GATS would be on its own detriment unless it regularises the private education institutions and adopt a mechanism to check their activities.

The following enactments have been adopted to fall in line with the GATS development, more so to regulate the private education providers. Unless and until there is a legal regime in place to control and regulate the private and foreign education providers, committing itself under GATS would be like cutting the branch on which one is sitting. The following bills and new enactments are in line with current liberalization process, which also envelops the education sector.

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<sup>190</sup> Department Related Parliamentary Standing Committee on HRD, Twenty-ninth report on The UGC (Amendment) Bill, 1995. Presented to the Rajya Sabha and Laid on the Table of Lok Sabha on 16.8.1995 Rajya Sabha Secretariat, New Delhi.

### **5.5.3 The University Grant Commission (Amendment) Bill 1995**

According to Section 3 of UGC Act, 1956, only those universities, which are established under the Act of Parliament or a State Legislature, or are granted deemed to be university status, are entitled to call themselves a “University” and confer degrees. Thus, any university which has not been created under the Act of parliament or a State Legislature, or are granted deemed to be university status under Section 3 of the UGC Act cannot call itself a university or award degree. The penalty for a violation of the above provision is maximum Rs. 1000/- (Rupees one thousand only) under section 24 of the UGC Act, 1956. Since the penalty for running “fake” universities and awarding degrees is nominal, a large number of such institutions have been operating in the country and duping students. The Committee on Petitions (VIII Lok Sabha), in its 9<sup>th</sup> Report, had examined the question of fake universities and made the following recommendations in its report in 1989:

- 1) amendment to the UGC Act so that there is a self-working system aimed at checking the activities of institutions/organizations which tend to exploit while resorting to illegal means; and
- 2) enhancement of the penalty provision in the Act as also for making a provision for imprisonment.

Pursuant to the recommendations of the Committee of Petitions, the UGC had appointed a Committee to examine the question of enhanced penal action against fake institutions. The said Committee has recommended that Section 24 of the UGC Act may be amended so as to provide for minimum punishment of imprisonment of not less than six months but which may extend to three years and a fine of not less than one lakh rupees but which may extend to ten lakh rupees and further to provide the Court may award lesser punishment for reasons to be recorded in writing.

This bill seeking enhanced penalty was originally introduced in the Rajya Sabha on 11 December 1991. It was titled 'the University Grant Commission (Amendment) Bill, 1991' but it was later withdrawn from the Rajya Sabha on 1 June 1995, on the second last day of the session.<sup>191</sup> On the last day of the session a fresh bill titled 'the University Grants Commission (Amendment) Bill, 1995' was introduced on 2 June 1995 in the both the Houses of Parliament without any argument, as it was the last day of the session. This fresh bill is also pending till date.<sup>192</sup>

A self-working system for arresting the activities and growth of fake institutions/organizations recommended by the Committee on Petitions in the year 1989 has not been implemented by the UGC. The Report by the Department Related Parliamentary Standing Committee on HRD feels strongly that unless a self-working system within the UGC is created to act as a vigilance machinery/cell and to monitor the activities of such institutions, the objective sought to be achieved by the present Amendment will not be accomplished in its true spirit.

At present, neither the UGC nor the Department of Education owns the responsibility for taking action against the fake institutions coming to their notice. The UGC feels that the State Government machinery will take cognizance of the offence *suo motu*. The State Government machinery, especially the police authorities, is already preoccupied with other problems and seldom take cognizance. Therefore, neither the UGC nor the State Government takes action against these institutions. The UGC often writes to the State Governments to take action against such institutions. Some kind of action is initiated which is neither effective nor considered to be deterrent.

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<sup>191</sup> Parliamentary Debates (1995), Rajya Sabha, vol. 173, no. 40, col. 377-383.

<sup>192</sup> Generally Bill lapses after six months but the same bill can be reintroduced any time by a Member of Parliament.

This shows the governments' lethargy in this matter. In the meantime there are many more fake institutions flourishing and they have been liberally giving advertisements in the newspapers tempting the unsuspecting youth of the country to join their institutes for obtaining degrees/diplomas very easily and duping the students.

#### 5.5.4 Private Universities (Establishment and Regulation) Bill, 1995

This bill was introduced in the Rajya Sabha on 25<sup>th</sup> of August 1995;<sup>193</sup> even this Bill is pending,<sup>194</sup> it is important to note the salient features of this Bill. It could be a law if it is re-introduced at any time. This Bill provides for the establishment and incorporation of self-financing universities and for regulation of their functioning. A "sponsoring body"<sup>195</sup> is to make application of the proposed establishment of the university along with the project report shall be submitted through the State Government in which the University is proposed to be established and the State Government shall furnish the same to the Central Government along with its comment. On receipt of the application, the Central government shall make such enquiry and shall consult the UGC. Upon the recommendation of the UGC, the Central Government, if satisfied, may allow the establishment of the University subject to certain conditions and specification. The sponsoring body is directed to establish a permanent endowment fund, a sum of ten crores of rupees or a sum equivalent to recurring expenses of three years for the fully operational University. That money shall be kept invested in securities issued or guaranteed by the Central Government. If a sponsoring body proposes its dissolution, it shall give six months notice to the Central Government. Upon receipt of such notice, in consultation with the UGC, the Central government may make arrangement for the administration of the University from the

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<sup>193</sup> available at [http://www.education.nic.in/htmlweb/pvt\\_uni\\_bill.htm](http://www.education.nic.in/htmlweb/pvt_uni_bill.htm)

<sup>194</sup> n.192.

<sup>195</sup> A sponsoring body is: i. A society registered under the Societies Registration Act, 1860 or any other corresponding law for the time being in force in a State, ii. A public trust, or iii. a company registered under section 25 of companies Act, 1956.

date of dissolution until the last batch of students in regular courses of the University complete their courses. The expenditure of the administration of the University during the taken over period of its management shall be met out of the Permanent Endowment Fund.

The Bill also provides for the officials to be appointed and the manner in which the university must be administered etc. It also specifies the role and the powers of the Central Government with respect to such universities.

A report on this Bill was laid on the tables of both the Houses of Parliament a year later, on 26 August 1996, by the Parliamentary Standing Committee on Human Resource Development.<sup>196</sup> It emphasizes the need for the private investment in the higher education. At the same time it stresses the need that the commercialization and only for-profit motive needs to be curbed. The report suggests that more autonomy be given to private universities. The safeguard measures in this bill are too stringent that would discourage the private investors. Dissolution and winding up of universities is not warranted etc. A minute of dissent was received against these suggestions by some Members of Parliament.

The Bill is silent about the existing private institutions and programmes; there are hundreds of such institutions and programmes operating across the country. The Bill would not be of much help. Not many would come forward to invest 10 crores of rupees, they would be comfortable operating as small institutions and colleges with or without the required affiliation or accreditation as long as students flock to them and pay the fees quoted. They use lots of gimmicks, taking advantage of student and parents psychology for getting a “foreign degree”.

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<sup>196</sup> Department Related Parliamentary Standing Committee on HRD, Forty-First Report on Private Universities (Establishment and Regulation) Bill, 1995; laid on the House of Parliament on 26<sup>th</sup> August 1996, Rajya Sabha Secretariat, New Delhi, 1996

They advertise that they would provide foreign degree/diploma and they can go abroad for completion of the programme in the final year etc. Many self-styled universities would be closed down once the Bill becomes law, as many such universities will not be able to comply with the amount and norms prescribed in the Bill. It is going to be a decade since the introduction of the bill. This again shows the lethargy of the government in this matter.

#### **5.5.5 UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003**

Private universities generally do not fall within the ambit of UGC, as most of them either avoid recognition/affiliation or set up through State Act like the Societies Act or Trust Act of the respective State Government. UGC regulation 2003 lays down conditions specifically for the establishment and operation of private universities for safeguarding the interests of the student community with adequate emphasis on the quality of education and to avoid commercialization of higher education. It defines a “private university” as “a university established through State or Central Act by a sponsoring body viz. a society registered under the Societies Registration Act 1860, or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 25 of the Companies Act 1956.”

According to Unni Krishnan’s case<sup>197</sup> ‘no individual, firm, company or other body of individuals would be permitted to establish and/or administer a professional college; a professional college should be established and/or administered only by a society registered under the Societies Registration Act, 1860, or the corresponding Act of the State, or by a public trust registered under the Trusts Act, or under the Wakfs Act.

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<sup>197</sup> (1993) 1 SCC 645.

Private universities established under a State Act should operate within the State. Off-campus centers are permitted only after five years of coming into existence and only with the prior approval of UGC and that of the State Government/s where off-campus centers is/are proposed to be opened. If the functioning of the said center(s) remains unsatisfactory, the private university shall be instructed to close down and in such situation the interest of the students already enrolled therein shall be protected.

The regulation fails to mention in what ways the students enrolled in these private universities are to be protected. Private universities failing to comply with this regulation would render its degree/diploma unspecific or invalid, which is going to hurt the students. Non-compliance to this regulation would invite penalty under section 24 of the UGC Act, which is merely one thousand rupees unless and until the UGC amendment Bill, 1995 comes into force.

#### **5.5.6 AICTE Foreign Universities Regulations, 2003**

This regulations seeks to facilitate collaboration, systematize the operation, ensure uniform standards and norms of foreign universities/institutions, and also safeguarding the interest of students and take punitive measures wherever necessary on a case-to-case basis. It applies to foreign universities, Indian universities and private education providers interested in collaboration arrangement with a foreign university or already having collaboration with a foreign university. It prohibits franchising. A foreign university seeking to operate in India directly or through collaboration shall make an application along with a no-objection certificate and a certificate of genuineness of the educational institution of their respective countries willingness to offer study programme in India by the concerned Embassy, and a project report, as specified, to the AICTE. A standing committee of the AICTE shall consider the proposal, an Expert Committee is formed to visit the institution concerned. The Standing Committee and the



Expert Committee decide conclusively on the application regarding grant of approval or otherwise for registration. During the period of operation the institution shall be treated at par with other technical institutions in India. If the registration of a foreign university/institution is withdrawn, the AICTE shall make attempts in co-ordination with concerned State Government to re-allocate the students enrolled into such programmes to other approved institutions of the Council. The foreign university/institution in such case shall have to return the entire fee collected from such students to the allotted institutions in which such students are accommodated.<sup>198</sup>

### **5.5.7 Competition Act, 2002**

Discussing the Competition Act, 2002 is very essential at this juncture because the only effective remedy available to the aggrieved parents and students against the education providers is under this Act. The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 was repealed by the Competition Act, 2002. India has, in pursuit of globalisation, responded to opening up its economy, removing control and resorting to liberalization. As a natural corollary of this the Indian market has to be geared to face competition from within the country and outside. The MRTP Act has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is need to shift the focus from curbing monopolies to promoting competition.

There were conflicting interpretations as to whether education is service that a student can buy from the institution. In 1988 the MRTP Commission for the first time held that education was a service and that schools, colleges and other institutions imparting education were covered under

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<sup>198</sup> AICTE Regulations for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India, April, 2003 New Delhi.

the regulatory control of the MRTP Commission. However, in 1998, a full bench of the MRTP Commission suddenly did a complete turnaround and in the case of Holy Angels School held that education was not a service—giving rise to action under the MRTP Act. Education is a service under an Act only if education comes within the definition of ‘services’ under that Act. The definitions in the MRTP Act did not include education as a service. Hence there was a reversal of judgment by the MRTP Commission. All pending cases against schools and colleges were summarily dismissed.<sup>199</sup>

The Competition Act provides under section 2 (u) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, **education**, financing, insurance....” Hence, both educational institutions and the consumers of educational services must realise that imposing high cost on the consumers will lead to cause of action under the Competition Act, 2002, by the Competition Commission of India (CCI). The CCI is a quasi-judicial body, which has a Principal Bench and Additional benches and one or more Mergers Bench/Benches. The Commission may enquire into any alleged contravention of this Act.<sup>200</sup>

i) on its own motion,

ii) on receipt of a complaint made by any person,<sup>201</sup>

iii) reference made to it by the Central Government or the State Government or a Statutory authority.

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<sup>199</sup> Hence a number of complaints against educational institutions were filed in various district consumer disputes redressal forum under Consumer Protection Act, 1986. Remedies provided under this Act are inexpensive and speedy, unlike the MRTP Commission, but do not possess *suo moto* powers and can deal only with individual complaints. They cannot pass interim injunctions and their impact is therefore not significant.

<sup>200</sup> Section 19(1).

<sup>201</sup> *Ibid.* Any person may make an application to the commission for an order, for any loss or damage shown to have been suffered as result of any contravention of this Act. Where any damage or loss is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the commission, make an application for and on behalf of, or for the benefit of, the persons so interested.

While enquiring the Commission shall give due regard to social obligation and social cost of an enterprise providing services.<sup>202</sup> The main functions of the Commission are: to prevent practices having adverse effect on competition; to promote and sustain competition in the markets, to **protect the interest of consumers** and to ensure freedom of trade carried on by other participants in markets.<sup>203</sup>

This Act brought about an effective forum to protect the interest of the students by including education as services in its definition.

The education system in India is in a state of flux; there are several reports and Bills lay before the Government of India, which are in the right direction in tune with the changing time. Now, it is in the hands of the government of India to take up the matter and come up with appropriate policy and law that would protect the interest of the students, bring about social justice and economic development. And the government must pay immediate attention to all the pending bills which are pending for decades.

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<sup>202</sup> Section 19(4)(k).

<sup>203</sup> Section 18

## Chapter 6

### CONCLUSIONS AND SUGGESTIONS

The GATS is still an untested agreement and a certain amount of confusion exists on how to interpret the major rules and obligations. It took many years to iron out the inconsistencies in the GATT and the same will likely to be true for GATS.

The primary effect of GATS when implemented will be to reduce uncertainty for suppliers of services by increasing the transparency of regulatory regime.<sup>204</sup> The GATS regime is supplier based; it seeks to facilitate movement of transnational corporations and their profitability. Movement of students and faculties would still be subject to Visa and immigration laws of member countries. Only in the definition does the GATS mention movement of 'service consumer' and the rest of the entire agreement is silent on the 'service consumers'. It neither provides for quality of education standards nor grants recognition of qualification and transfer of credits in member countries. There has to be a comprehensive legal framework to address all the aspects of exchange of education.

Once education is committed under the GATS the member country has a set of obligations. When a foreign corporate university from one member country establishes a branch campus in their territory, it must allow/permit all other WTO member countries the same opportunity and treatment. If we look from the realist point of view, there are only a few universities from the US, Australia and some European countries which are actually already in the education business and they too are the only ones which are interested in providing/supplying to countries like India

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<sup>204</sup> UNCTAD and World Bank, *Liberalizing International Transactions in Services* 'United Nations, 1994.

and China where the demand is huge. Hence the trade in this sector is not truly a global one; only few universities from selected countries would be exporting to selected countries.

India is very excited about exporting its IITs and IIMs abroad. It wants to have a pie in the international trade in education. When India goes with its courses/programmes to a country where already other international providers from the US and the British are operating, will they opt for Indian education when the quality of education from the British and US are considered superior. Unless and until there is harmonization of standards and quality of education and subsequent recognition of qualification and transfer of credit thereof by an international body there cannot be a free flow of education across the borders.

Free trade in education implies supply of education across borders for 'commercial purpose' or 'economic gain' and the GATS seeks to remove/reduce barriers that impede free trade of education. The connotations 'commercial purpose', 'economic gain', 'free trade' applies only to the commercial presence, i.e. Mode 3 operations. The phenomenon of students traveling abroad through Mode 2 is taking place for centuries without the 'commercial purpose', 'economic gain' and 'free trade'. Now, at the advent of GATS economists and the business community (e.g., Merrill Lynch) construe it as the largest mode of trade in education. Students traveling abroad through Mode 2 are always subject to national legal regime, and this will remain so even after GATS. In fact increase in Mode 3 – commercial presence – would diminish the other modes, especially movement of students and faculties. Till date the exchange of education is taking place largely through the Mode 2 – 'consumption abroad'. Mode 3 – commercial presence—has the consequence of diminishing the Mode 2 operation. It is very clear that the GATS seem to facilitate only the commercial operation mode, which could sabotage the social development goals of education.

The *raison d'être* of GATS is to eliminate the impediment/barriers in international trade in services, whether the barriers are seen from the perspective of an exporting or importing country. Country whose interest is in exporting through commercial presence is well facilitated, but a country that has its interest in exporting through movement of persons is not as much facilitated.

In spite of the right of each country to determine the extent of its commitments, with each round of negotiations, countries are expected to add sectors or sub-sectors to their national schedules of commitments and to negotiate the further removal of limitations on market access and national treatment. The intention of GATS is to facilitate and promote ever-more opportunities for trade and decreasing the number and extent of measures that serve as impediment to increased trade. GATS only focuses on 'trade' and traders; how effective will it be in combating the problems of students, quality of education and the recognition thereof in member countries remains to be a question.

International trade in education is very peculiar in nature compare to other types of trade. In all other types of service trade the supplier and the recipient/consumer from different member countries belong to particular category of industry. For example, in Aircraft maintenance service, engineers and architects, financial consultants, etc. are the service supplier and the consumers belong to same set of industry. The students who are termed as 'consumers' in the trade parlance do not belong to any industry, though the education providers more or less remain to be the same the body of so-called consumers are ever changing body of students.

Consumption of all other services is exhaustible and does not lead to any certification. For example, a tourist traveling abroad enjoys the services provided by the home country's

hospitality industry, and there is no need for the tourist getting certification. Consumption of education is not end in itself. At the completion of the course or the programme of study the supplier has to provide a certificate to the recipient of the service. The problem does not end there. The certificate issued by the supplier must be of some quality and it must be recognized by the employer, and other higher education institutions for further studies in all the countries.

In case of other services the supplier and the consumer more or less belong to the same category of industry. But in case of education the supplier may remain more or less the same but the consumer i.e. the student body is fluctuating from one generation to the other. Hence the trade in educational service is very peculiar and sensitive in nature and not suitable for being dealt with in the WTO/GATS forum.

The most important factor in the exchange of education is the recognition of degrees, diplomas, certificates and licenses issued by the education providers in different countries. These degrees diplomas be recognized in all the countries. It is not only important in the educational service but also all the 160 sub-sectors of service industries identified in the GATS list. Trade through Mode 4 – movement of natural persons—depends on the recognition qualification and licenses of education. Lack of recognition of education is going to affect all the service industries under Mode 4 operation. UNESCO has done a considerable amount of work on this matter at a regional level.

The hard reality that emerges is that private educational institutions are a necessity in the present day context and there are a large number of private international education providers on the scene. Hence there must be a regulatory regime in place to control and monitor the activities of education service providers. The regulatory mechanism under the WTO/GATS would

complicate the already complicated education sector. Therefore the international communities must come up with a different—existing or newly created—forum/treaty appropriate to discuss and deal with the problems related to the exchange of education at the international level. Liberalizing education —movement of education across the border— is not bad, but subjecting it to trade agreement would commercialise education and consequently escalate the cost of education that would sabotage the socio-economic development goal of the society.

We have one set of regional international treaty under the auspices of UNESCO which emphasises academic mobility between parties through the movement of individuals. And we have another set of international agreement under the auspices of the WTO that emphasises mobility of education through movement of education suppliers/institutions. Both are necessary for the development and movement of education across the border. At the same time both the regime do not provide any appropriate regulatory framework to control and monitor the activities of the transnational corporations (TNCs) providing education across the border hence the international community must come up with new international regime, and that regime must take care of the following:

***Quality of education standards*** – there has to be a harmonization of quality of education.

***Recognition of education*** – education received in one country be recognized over all the world.

***Compatible with human right treaties and declarations*** – as we have seen that countries have concurrent obligations under trade agreements and human rights treaties.

***Obligation under the UN Charter*** – the obligations under the UN Charter shall prevail over obligations under any other agreement.

***Socio-economic development goal*** – Social justice must prevail over economic gain.



***Monitor the activities of transnational corporate education providers*** – There must be a proper code of conduct in place on the operations of TNCs.

***Institutional mechanism to monitor the functioning of the treaty*** – the treaty must have a implementation machinery with sanctions.

As we have seen UNESCO has done considerable amount of work in this area and it also has a mandate to deal with education. UNESCO could be the right forum to regulate international exchange of education as it would be sensitive to human rights, the right to education, and the general socio-economic developmental concerns. As seen in chapters 2 and 4, UNESCO has brought about a regime for recognition and quality of higher education in the respective regions.

UNESCO, being a global organization having mandate to deal with educational matters, can extend the Bologna process to make it a universal process.

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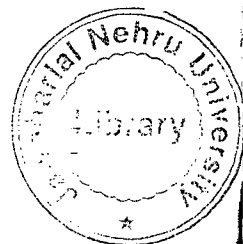
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