

GATS AND HIGHER EDUCATION IN AFRICA: CONCEPTUAL ISSUES AND DEVELOPMENT PERSPECTIVES

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1. INTRODUCTION

The General Agreement on Trade in Services (GATS) has been billed by some enthusiasts as the most user friendly of all the Uruguay Round pacts.² But it has been received with some caution in other quarters. Deacon, for example, has expressed the fear that unless the final outcomes are carefully negotiated, the GATS can easily slip along the difficult path of the Multilateral Agreement on Investments (MAI) under which government subsidies and the provision of support for local persons, in this case students through grants, can be interpreted as unfair trade practices.³ The possibility of the GATS rules barring governments from extending support to students or forcing them to extend the same support to students in local public as well as private institutions, some of which may be foreign owned, has raised speculation that this could spell an end to government support for students altogether.⁴

Most of the critics of the GATS from the education perspective have looked at it as part of the global retreat from social welfare. Deacon, for example, observes that while the IMF, the OECD and the World Bank appear to be increasingly concerned about the negative social impacts of globalization, the ILO seems to be on the retreat about universal public pensions while the WTO seems to be uncritically committed to the privatization of welfare⁵. For many who have always looked at education as a process of human evolution rather than a series of transactions, to equate it to the sale of goods has been difficult to comprehend. The human development processes involved in education including the shaping of human thinking, the conditioning of the cognitive and perceptive capabilities of learners and the socialization and integration functions of these processes, are seen as factors qualifying education to be given differential treatment in the reorganization of the global economy.

A passionate plea has been made by Altbach that, 'Protecting culture, intellectual independence and the values of civil society are simply not at the same level as free trade in automobiles or equal access to market for soya beans or even other services that are included in the GATS agenda'. He adds that, 'To pretend that all intellectual products are

² Pierre Sauve, 2002, 'Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About?' Paper prepared for the OECD/US Forum on Trade in Educational Services, 23-24 May, 2002, Washington DC. P.1.

³ Deacon, B. 2000, 'Globalization and Social Policy.' United Nations Research Institute for Social Development Occasional Paper No. 5, p.13.

⁴ Jess Worth, *The Threat to Higher Education: A briefing on Current World Trade Organization Negotiations*. Oxford, People and Planet, p.3. Quoted in Sauve op.cit. p.13.

⁵ Deacon op.cit p.13.

simply to be bought and sold at a commercial market is an oversimplification that contributes to giving globalization a bad name.’⁶

Some of the criticism stems from the way the negotiations have been conducted under the GATS. To many people these negotiations seem to be very secretive. In many countries the main actors in education have not been consulted or involved. This has led to fears that the emerging system is being shaped by a handful of professionals hired by and working in the interest of a few corporate bodies, which are being given immense powers they are likely to use to undermine the public delivery of education services.⁷ Potential beneficiaries such as students in Canada have expressed fears that if the private school students are given the same treatment as public school students, this may herald the end of preferential tax regimes for public schools and government support for research programmes in them⁸.

African countries have approached the GATS negotiations generally with caution and dissatisfaction. Egypt for example has expressed worries that more emphasis has been put on commercial presence than on the movement of natural persons and negotiations on emergency safeguards have been stalled.⁹ South Africa, which has been approached by several countries including Kenya, has not made any commitments so far. In the majority of cases the African countries have been put on the alert by the creeping GATS conditionality that some donor countries are attaching to aid. For example it has been alleged that the EU has made it clear to its ACP partners under the Cotonou Agreement that it wants negotiations in all services to have begun by 2006. The ACP countries have said in return they do not want to go beyond any commitments made so far.¹⁰ Aid conditionality fatigue on the part of developing countries has the potential of stiffening resistance to any ideas from donors that seem to hinge on paternalism and the tying of aid. Whether these fears are founded or not they are there and influencing debates on GATS and education generally.

This paper seeks to examine the implications of GATS for higher education in Africa. It starts with a section why education has become an important agenda item in the GATS negotiations. Then it examines some operational concepts and the major provisions of the agreement and their implications. Then it discusses the major concerns and the way forward for Africa.

2. The Increasing Importance of Education in the GATS Negotiations

⁶ Philip Altbach, 2002, ‘Knowledge and Education as International Commodities: The Collapse of the Common Good’ *International Higher Education*, No. 28, Summer 2002, p.1

⁷ A view expressed by Marjorie Griffen Cohen in her address to the University of Southern Australia titled ‘The World Trade Organization and Post- Secondary Education: Implications for the Public System’ quoted and cited in Sauve op.cit. p.13

⁸ Canadian Federation of Students, ‘Brief on the General Agreement on Trade in Services’ (October 15, 2001) quoted and cited by Sauve, op.cit.

⁹ WT/GC/W/135

¹⁰ See Karin Gregow, 2004, ‘EU imposes its free trade agenda on Africa’ in *African Agenda*, Vol. 7 No. 1 at p.15. Third World Network, Accra Ghana.

Services generally were initially considered as unproductive and incapable of being traded.¹¹ In the late 1970s and early 1980s, categorizations of services included only financial services mainly banking and insurance. In the late 1980s knowledge processing and electronic transfer of data and information became crucial both for marketing and production. They were therefore included as second generation services in the category. Then in the 1990s education became a key contributor to international trade. In 1995 it was already claiming a contribution of US\$ 27 billion to world trade out of which US\$7 billion went to the US alone.¹² With technological advances involving information technology, distance learning has increased the role of education in world trade. But the ascendancy of education to center stage in the GATS negotiations goes beyond the information revolution. It has also to do with the interconnectedness of services, externalization of services and production, and the globalization process that calls also for the globalization of skills.

The issue of interconnectedness of services has two dimensions. First the major services are very much integrated. Communication is as much dependent on financial services as it is on telematics and education and vice versa. Tourism needs financial services as well as information systems. Given the rate of innovation within all the services, education is becoming a major determinant of success and competitiveness. Initially the services were more integrated in developed countries but now with liberalization and privatization in the developing countries integrated activities are taking place in the latter countries too. The second aspect arises from producer interconnectedness.

Liberalization and its consequent globalization have combined with informatics to create new opportunities for producers to operate efficiently and profitably in many markets at the same time. Telematics have made it possible for parent companies to operate satellite enterprises and give directions and instruction from the home base with minimum requirement for physical presence. This however has called for new skills and specialized knowledge. The absorption of these skills and specialized knowledge requires the availability of a well trained and highly educated cadre of workers in the host economies. Gibbs has observed that the demand for such know-how is becoming acute while it remains a key to improved productivity and competitiveness.¹³ As competition increases, this specialized knowledge has to be cultivated both in investor and host economies. As it is becoming cheaper to develop these skills in developing countries, many higher and technical education services suppliers are moving to these countries or struggling to position themselves there.

Externalization of production is another factor. Sub-contracting of services to service providers in lower cost countries is becoming a norm. Publishing and printing industries were the pioneers of these linkages. But data and information processing are major

¹¹ J. Bhagwati, 1989, 'The Role of Services in Development' in United Nations Centre on Transnational Corporations, *Services and Development: The Role of Foreign Direct Investment and Trade*, United Nations, NY, p.5.

¹² PSI, 2004, 'The WTO and the Millennium Round' on www.ei-ie.org/pub/english/epbeipsiwto.htm

¹³ Murray Gibbs, 1989, 'Interlinkages between services and other economic sectors' in United Nations Centre on Transnational Corporations, *Services and Development: The Role of Foreign Direct Investment and Trade*, UN, New York, pp. 9-11 at p.10

services being farmed out to service providers in developing countries. In addition many companies are divesting themselves of expensive operations and transferring them to low cost economies or simply closing them and relying on cheaper service suppliers from developing and transition countries. On the other hand in these host economies, there is growing demand for high-level skills required to tap these emerging opportunities. As a result education and for that matter higher and adult education, have become attractive areas for investment. The quickest adopters of technology formally dominated by developed countries invested heavily in higher education first and positioned themselves to be globally competitive. Brazil, South Korea and Thailand are leading examples and by creating a cadre of highly capable, adoptable and flexible workers they managed to attract direct foreign investment in the dynamic sectors such as electronics.¹⁴ Some of these countries are now positioning themselves to be exporters of services to high cost economies.

The interest in higher education as an area of investment seems to be somehow mutual. For some developing countries it opens up possibilities for capacity building in core skills that are likely to enhance the opportunities for linkages with firms in advanced countries. Some of the developing countries however see a niche in establishing themselves as key and reliable exporters of services. These include for example India, Singapore and Malaysia.¹⁵ Developed countries such as the US on the other hand, see investment in education abroad as a strategy to strengthen the competitive position of US corporations in host countries.¹⁶

Another factor that is shaping the new global skill structure is the imperative to use education to standardize skills. The current expansion in agriculture, manufacturing and services has created a global need for harmonious standardization of skills and qualifications. Already big corporate actors on the global markets such as MacDonaldis and Microsoft have established their own universities, professional training programmes and international qualifications. Many others such as Phillips have their own institutes, and others such as Monsanto, Novartis and Citigroup are linked with universities or higher education funding agencies. Education will increasingly be seen as a medium for the standardization of skills.

In addition is the push for the re-packaging of skills. In the previous technological dispensation, partly dictated by the suspicions of the cold war and partly by hegemonic interests and tendencies of developed countries, the upstream knowledge for product design and engineering and product innovation were reserved for the investor communities. Such knowledge was guarded and the technology involved never devolved except to key allies such as the new tigers who were strengthened as a bulwark against

¹⁴ See Erber, F., 1985, "The Development of the 'Electronics Complex' and Government Policies in Brazil" in *World Development*, Vol. 13: 293-310;

¹⁵ On the strategic perspectives of labour exports as a mechanisms for employment promotion in the South and acquisition of technological capabilities in the North see Allan Findlay, 2002, "From Brain Exchange to Brain Gain: Policy Implications for the UK of Recent Trends in Skilled Migration From Developing Countries" International Migration Branch, International Labour Office, International Migration Papers No. 43.

¹⁶ See Gibbs op.cit at p.10

the then emerging communist states. Some non-core mainstream skills required for production, manufacturing, quality control and troubleshooting were passed to host economies. Downstream skills in packaging, warehouse and inventory management, advertising, marketing and transportation were also passed to host economies.

The new pressure to cut costs, retain market share and become competitive accompanied by increased externalization of production is creating need for the transfer of some of the upstream skills to host countries. These processes started in the seventies and have now been enhanced by the end of the cold war and trade liberalization in developing countries.¹⁷ This is making it necessary to increase educational opportunities in what have been traditionally downstream economies. The emerging demand cannot be met only by distance learning because some of the technical skills involved require learning by doing. The entry of manufacturing companies in the business of technical and higher education is testimony to this trend. To increase downstream capability high quality training will increasingly be required. Hence the rising interest in education as a trade and investment issue. In the absence of a strong rival ideological system and given the processes of globalization, the traditional divides in the global skills structure will rapidly disappear.

Therefore the rapid ascendancy of trade in education services to the top charts in the GATS negotiations can partly be explained in terms of the way in which education has become a critical link required to support horizontal linkages between various inter-dependent services, vertical linkages in the context of decentralized production supported by flexible specialization and subcontracting of production; and technological capability linkages between various sub-sets of knowledge and skills. The new structure of production cannot continue being based on global Taylorism in which the best capabilities are reserved for the top. Domestic capability to absorb new production techniques, adjust to rapid change and effect innovations, requires the creation of an investment and trade regime that allows cheap development and utilization of this capability. Such a regime has the function of reducing the burden on investor economies to keep on importing services at a high cost. The benefits of globalization can easily be reduced to nothing if export driven growth is constrained by services import dependency. To remove that threat, education is being opened up to provide opportunity for the development of local capabilities to serve advanced economies without physically migrating or exporting such services.¹⁸ The GATS is expected to help in this direction.

3. Some Conceptual Issues in the GATS

On reading the GATS one notices that there are few conceptual ambiguities that are likely to cause disputes or obstruct parties as they attempt to develop a common understanding of what is involved. First it is important that the term 'services' has to carry the same meaning for the majority of those involved in the negotiations. But within

¹⁷ See Coe, David T. and E. Helpman, 1995 'International R&D Spillovers' European Economic Review Vol. 39:859-887

¹⁸ This does not imply that developed countries will stop importing highly skilled labour from developing countries. On the contrary, they expect to take more IT experts in the next few years.

the agreement no matter how many times the word 'services' is mentioned it is not well defined. Article 3 (b) defines the term 'services' as follows, ' "services" includes any service in any sector except services supplied in the exercise of governmental authority'. Definitions by inclusion or exclusion normally leave the concepts undefined. Such a definition does not help to determine what a service is. It does not help a student of international trade to understand how services differ from goods. Those who have attempted to differentiate services from goods have said for example that services intangible and cannot be stored¹⁹. But even that distinction does not resolve the problem of transactions that may involve services and goods at the same time.

The lack of clear definition has led to some controversies within the WTO. The attempt to separate electronic commerce from negotiations on trade in services is a clear example of the confusion and many developing countries have been of the opinion that an attempt to negotiate electronic commerce outside the GATS would constitute a breach of GATS²⁰. Another concept that seems clear on the surface but is prone to cause controversy relates to services supplied in the exercise of governmental authority. Direct supply of services by government authorities is exempted from negotiations provided such services are supplied 'in the exercise of governmental authority' and supplied neither on a commercial basis nor in competition with one or more service suppliers. The underlying idea is that governments always supply services in the exercise of their authority. But more often than not it is not authority, which is important but they supply services as part of their obligations. Education and health care for example are services supplied due to state obligations under international covenants and local laws and authority has little to do with these functions. What is not clear is if by emphasizing 'authority' the agreement seeks to accommodate services such as defense and security and not other services such as education, health, environmental management, for example or whether authority merely refers to statutory authority.

The potential impact of this ambiguity was very well summarized in the Joint Declaration of the Association of Universities and Colleges of Canada (AUCC), the American Council on Education (ACE), the European Universities Association (EUA) and the US Council for Higher Education Accreditation (CHEA) signed on the 28 September, 2001 in which it was stated, ' While we applaud senior officials of our respective governments for insisting that public service systems are exempted from the agreement based on article 1.3; we do not understand how this conclusion has been reached given the absence of clear, broadly accepted definitions and more importantly, the fact that the component parts of the system are so inextricably linked. In addition history shows that exemptions to international agreements such as the GATS tend to be interpreted narrowly by trade dispute tribunals. For these reasons, it seems unrealistic to assume that public education at the tertiary level is exempted from GATS.'²¹

¹⁹ See for example J. Bhagwati 1989, 'The Role of Services in Development' in United Nations Centre on Transnational Corporations, *Services and Development: The Role of Foreign Direct Investment and Trade*, United Nations, NY, p.5; B M. Hoekman and M. Kostecki, 1995, *The Political Economy of the World Trade System. From GATT to WTO*, Oxford University Press, Oxford, p.128

²⁰ Dominican Republic and Honduras' posit in see WT/GC/W/119

²¹ Joint Declaration on Higher Education and The General Agreement on Trade and Services signed by the AUCC representing 92 Canadian public and private for profit universities and colleges of higher education,

In addition the requirement that to be exempted the services must not be offered on a commercial basis is also likely to cause confusion because governments in many countries have introduced cost recovery, cost sharing, sub-contracting and commercialization in the delivery of public services including education, while they retain the primary responsibility for these services. If the term 'commercial basis' implies profit making then this needs to be made clear. Otherwise commercialization of public service delivery may be easily construed as offering services on commercial basis even if for the government this is not done for profit. In some cases governments own universities or institutes that deliver services on competitive basis. In such cases even in cases where the competition is only among state owned institutes the agreement will apply. The claim by the WTO that many public services are not provided on competitive basis²² ignores the fact under new public management public services are now organized on the basis of inter-departmental internal competition. They are commercialized although not for profit to the governments themselves.²³

Some of the conceptual ambiguities contained in the GATS are caused by the use of the terminologies of the General Agreement on Tariffs and Trade (GATT), 1948 in the GATS. "National treatment" for example, comes from the 1948 GATT and it seeks to establish standards for equal treatment of foreign and local service suppliers. If 'national treatment' is applied to education generally or higher education specifically, any support rendered to students and staff in local institutions such as student loans and grants, subsidized staff pensions, research grants and contracts, consultancy contracts including those in sensitive areas for the state, will have to be offered to other institutions whether they are local or foreign. The WTO has refuted this claim made by NGOs, students unions, teachers' organizations and the PSI²⁴. But even the WTO itself seems to agree with its critics when it says, 'In so far as subsidies are concerned, at present the GATS contains no specific rules. *However, a country providing a subsidy to national but not to foreign supplier of a service committed in its schedule must have entered a national treatment limitation to that effect*'²⁵. (Emphasis added by the author).

Carefully construed this means that once commitments are made any public support for local institutions, under whatever obligations has to be extended to foreign institutions.

ACE representing 1,800 colleges and universities in the US, EUA representing 36 National Rectors' Conferences and 537 Universities in Europe and CHEA representing 3000 universities and 60 accreditation organizations in the US.

²² WTO, 2001, 'GATS Facts and Fiction' on www.wto.org, p10.

²³ See A.H.M Bennet, 2000, *Public Enterprises at the Crossroads*, Routledge, London, Chapter 13; Nick Manning, 2001, 'The legacy of the new public management in developing countries' in *International Review of Administrative Sciences*, Vol. 27: 297-312

²⁴ See the joint position of the National Unions of Students in Europe and the European University Association representing 600 universities, 10 million students and 32 rectors in 'Students and Universities: An academic community on the move' EUA and ESIB Joint Declaration, Paris 6 March 2002; On the position of Canadian students and teachers see 'Canadian Federation of Students' Brief on General Agreement on Trade in Services' (October 15, 2001), cited and quoted by Sauve op. cit. and Larry Kuehn, 2000, 'Keep Public Education Out of Trade Agreements' on position of the British Columbia Teachers' Association, quoted and cited by Sauve op. cit.

²⁵ WTO op.cit. p.8.

The only possible exception would be where the GATS provisions expressly allow the national treatment principle to exclude this interpretation. Otherwise national treatment as currently provided creates the obligation to extend the same treatment to all. This is in spite of the fact that, state obligations to give support in social services only extend to local institutions and persons. This is irrespective of whether they arise under international conventions or local policy commitments. In principle it could be easily agreed, that investor communities and their governments should feel free to extend support to their institutions investing in services in other countries. That could reduce the burden on host economies.

Another concept that has been grafted from the agreement on trade in goods and fits uncomfortably within the GATS is that of commitments. In the area of goods, commitments are very easy because tariffication and quantification are less problematic. The GATS provides for commitments to be subject to limitations on the number of service suppliers, the value of transactions, the quality of outputs, the number of employees per sector, the corporate personality and the amount of foreign capital. Some of these concepts apply very easily to some services but may not be easy to determine in the area of education. The core functions in education are teaching, learning and research. The value of transactions in these two areas is very difficult to determine unless it is reduced to monetary value that has very little to do with them. The quantity of outputs if measured in numbers of students rather than the quality of research output or curricula may miss the point. While one can make commitments on quantities it is difficult to commit to quality if the norms and indicators of quality are not clear. The separation between research and teaching is also very difficult to make. Therefore concepts on volumes and quantities of services while easy to determine in other services are difficult to apply to health and education especially higher education where quality matters most.

Last on ambiguous provisions are two issues. The first is on transparency and the other is on provisions relating to the 'increased participation of developing countries'. Under Article III transparency within the agreement refers to the obligation to publish all relevant measures that may impact on the agreement. But the biggest problem relating to transparency has arisen from the cobwebs surrounding the negotiation procedures and the schedules of commitment. Through the negotiation procedures governments are ceding so much ground in terms of their international and national social obligations pertaining to many services including financial, information, health and education services. Consultations are very limited and this is leading to fears that democracy and participation on which good governance is predicated are being undermined. This has led Education International and Public Services International to warn that there is a progressive democracy deficit being widened by the rise of covert world government built upon corporate interests.²⁶ No transparent system can emerge out of a process seriously lacking in transparency and based on cobwebs and opaque procedures.

On the provisions relating to the participation of developing countries contained in Article IV it seems to be assumed that such participation will be enhanced by negotiation of specific commitments relating to capacity building, access to technology on a

²⁶ Quoted by Sauve, *op.cit* p.13

commercial basis, improvement of their access to channels and information networks and market liberalization. The agreement does not establish minimum standards to be followed in the negotiations to allow this participation to take place. It ties access to technology and information networks to capability to pay i.e. on commercial basis and it assumes that developed countries will inevitably take into consideration the interests of developing countries. Already concerns have been expressed that developed countries are resisting transfer of technology even on commercial basis.²⁷

In Article XIX.1 it is provided that the negotiation of commitments shall, 'take place with a view to promoting the interests of all participants on mutually advantageous basis and to securing an overall balance of rights and obligations'. For developing countries the reference to 'rights and obligations' would logically imply the right to development and obligations to the citizens under various international instruments. But the apparent import of the phrase is 'rights and obligations' under the GATS. Under Article XIX.2, it is provided that the process of liberalization shall take place 'with due respect for national policy objectives and the level of development of individual members.' In the absence of actual guidelines to that effect the assumption that developed countries will be mindful of these issues is rather patronizing and ignores the asymmetries of power between developed and developing countries. The negotiations so far have not given any indication as to whether the mutual interests are being promoted. Concerned groups such as Educational International have expressed worries that contrary to expectations the GATS negotiations are diluting national sovereignty.²⁸

4. Obligations under the GATS

This section will concentrate on the provisions of the GATS on obligations and their implications for higher education in Africa. Part II of the agreement covers general obligations and disciplines. Strict obligations relate to provisions on the 'most favoured nation treatment' (MFN), transparency, domestic regulation, monopolies and exclusive services, business practices, emergency safeguards and payments and transfers. Disciplines spell out principles that are not mandatory but should be taken cognizance of during the negotiations and implementation. They include recognition of licenses, qualifications and standards; government procurement; security issues and subsidies.

The MFN treatment provisions create an obligation on all members to provide the same treatment to all others without discrimination. In the area of education this may become immediately problematic where the education standards of some of the members are not up to the acceptable level. Institutions from such countries may be ready to provide services at a lower cost and to even offer courses of a shorter duration. Already some universities in Africa are facing stiff competition from universities based in Asia and even the US that offer shorter courses at a lower cost than those offered in Africa or elsewhere for that matter. If in adhering to the MFN principle it was strictly required

²⁷ See the communication of Dominican Republic and Honduras to the Trade Council, WT/GC/W/119.

²⁸ Education International, 'EI World Congress Resolutions on Education in a Global Economy 2001', on [http://www.ei-ei.org/educ/English/eed trade htm](http://www.ei-ei.org/educ/English/eed%20trade.htm).

that once one supplier is allowed to operate others have to be allowed to do the same without discrimination, we may end up with a situation in which some suppliers may offer services that are not necessarily of acceptable quality. Due to the various factors for which people pursue higher education qualifications such courses are likely to get students or subscribers but their contribution to development may be negative.²⁹

For Africa the alternative to a blanket MFN clause would be to extend particular treatment to countries with similar quality standards as has been agreed within SADC³⁰ and to enter recognition negotiations with countries outside the region under Article VII of the GATS. But in order to be able to negotiate fruitfully the African region has to make a concerted effort to strengthen the regional mechanism established under the Arusha Convention.³¹ The convention provides for a regional framework for mutual recognition of qualifications and accreditation. It is only by utilizing this mechanism that African countries can harmonize their own standards and help each other by setting standards that should guide them in negotiating with other countries. The European countries have managed to set such standards under the Salamanca Agreement and in the context of what is known generally as the Bologna Framework. It is this European mechanism that has enabled European countries to negotiate with the US and other countries the conditions for extending any form of treatment to them. Under Article II.3 there is room for member countries to give preferential treatment to neighbouring or 'adjacent' countries in order to allow utilization of resources locally produced and consumed across borders. In many countries in Africa, borders are very artificial and education services are produced and consumed across borders. This provision should be used to strengthen cooperation under the Arusha Convention and to ensure international recognition that human resources development and utilization is a cross-border phenomenon.

The second obligation is transparency. As mentioned earlier it is confined to the obligation to publish promptly all measures that affect trade in services. As has been the case in the area of notification in the trade in goods, the publication of rules and measures affecting services is going to be problematic. There are explicit laws relating to services in higher education such as those governing universities, accreditation, technical and adult education, evening classes examinations etc. These are very easy to list or publish. But there are many rules in the form of subsidiary legislation and some tend not to be directly related to services or more specifically to education. Most of them relate to land allocation, business licensing, custom duty and taxes on equipment, chemicals, books, censorship, foreign exchange, newsprint, software etc. Most of them impose obligations and regulate rights in such a manner that they affect trade in services. These are published in official gazettes but in some countries this is not done either promptly or for wider

²⁹ Already there is a race for degrees among politicians in many African countries as many constitutions require heads of state to have first degree qualifications or more. In the last five years the number of politicians getting degrees and even Ph.D. qualifications without going through visible training processes has increased especially in Eastern Africa.

³⁰ Refer to the SADC Protocol on Trade Article 23

³¹ The Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States, Adopted in Arusha, Tanzania, 5 December 1981(UN Treaty Series No. 21522)

circulation. The problem is that in the process of competition some that seem unconnected with services in education such as those on land allocation or import duties on equipment and chemicals may be sources of dispute if the foreign suppliers discover they give preferential treatment to local institutions of or certain categories of institutions such as church based or other institutions of higher learning.

The third major obligation is in the area of domestic regulation. Article VI requires that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Furthermore it obliges members to establish judicial, arbitral or administrative tribunals to handle disputes on trade in services. In addition it provides for disclosure without undue delay, to applicants, of information on applications to supply services. Article VIII creates an obligation on members to ensure national monopolies do not abuse their positions or act in a manner inconsistent with the members' obligations and commitments. Article IX makes it mandatory for a member upon request by another or other members to enter into negotiations aimed at eliminating restrictive trade practices or any measures restraining trade in services.

The significance of this obligation is that it creates the obligation to negotiate and to give hearing to members on request. This may be good practice but it has the potential to erode the principle of sovereignty. Other obligations are general such as that contained in Article XI requiring members not to impose restrictions on transfers of funds. But while Article XI is justified in the light of investors to repatriate their legitimate proceeds without restrictions, it states that, 'Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund' (Article XI.2). As not every member of the WTO is expected or supposed to be a member of the IMF, this clause imports into the agreement obligations arising from another agreement that may not be applicable to all members or even relevant to GATS.

5. Commitments

The major commitments provided for in the agreement are market access and national treatment. National treatment provisions have been touched upon in earlier sections and they will not be dwelt upon too much here. In any case they reinforce the MFN principles and call for 'formally identical treatment' between national and non-national suppliers. Although Article XVII allows for non-identical treatment, it can only remain informal because under Article XVII.3 any formally un-identical treatment is deemed to be inconsistent with the GATS.

The provisions on market access re-affirm the most favoured nation principles (Article XVI.1) and allow room for limitation on market access based on numerical quotas, monopolies, exclusive service suppliers and the requirements of an economic needs test explained earlier on. Limitations can also be imposed on the value of services³², total number of services total quantity of service output in terms of numerical units, quotas or requirements of an economic needs test or limitations on the number and categories of

³² Article XVI.2 (b)

people and limitations on capital.³³ In the case of investors wanting to establish a commercial presence, the provisions on market access leave ample room for host countries to determine the limitations they want to impose. This leaves room for African countries to ensure the negotiations take into consideration a few concerns that have been expressed within and outside the continent.

One set of these is demand and supply related. In the case of goods it is easy to make adjustment to changes in demand and supply. The shortage in one location can be offset by supply from areas where goods are in abundance. In actual fact shortage of supplies can trigger of increase in production. In the case of education fall in supply, for example of students or scholarships, may not necessarily lead to an influx of students from other countries. On the contrary it may lead to either closure of programmes or change in the number of offers or even reduction of staff. The so-called arbitrage advantage that takes place in the case of goods is not automatic in services such as higher education. Therefore allowing one supplier which under the MFN principle means allowing all may lead to closure or dilution of services if the number of students or scholarships fails to meet expectations.

Secondly there is the issue of economic and technical efficiency. While there is an increase in the number of tertiary institutions in many African countries there is not an equal rise in the number of secondary schools.³⁴ In some countries already there is an apparent lack of highly qualified school leavers who can be admitted to universities. The question arises whether given the possibility that the number of tertiary education institutions will not increase at the same rate as that of supply side institutions of education, it is economically efficient to proliferate tertiary education institutions. Apart from that issue of economic efficiency, there is the issue of technical efficiency the African negotiators may have to consider. Education in Africa has been for some time biased towards the social sciences. There is need to strengthen natural sciences generally and science and technology in particular. The negotiations will have to take into consideration this need and given the MFN principles there is a possibility that allowing one supplier may give the right to others to want to be considered. How positive discrimination can be managed in this scenario to limit the super-saturation of existing disciplines without denying other suppliers the right to have market access will be difficult.

Another concern is about unfair competition. The provisions of the agreement limit this only to internal characteristics and internal monopolies. But the threat of unfair trade practices is not going to be posed by small universities in the developing world. It will be at the global level at which vertical integration within for example established distance education suppliers will ensure them monopoly not only of inputs such as materials, books and patented knowledge but will ensure they control cross-border supply systems. Linkages with electronic publishers will give them an upper hand under the protection of the regimes on intellectual property. The easier availability of books, equipment and

³³ Article XVI.2 ©, (d) and (e)

³⁴ NEPAD, 2004, Human Resources Development Initiative: Education' Paper presented at the NEPAD Task Force on Education Meeting, March 22-23, 2004, in Johannesburg, South Africa.

chemicals on the part of foreign institutions is not likely to foster fair competition between them and the cash strapped local institutions. Therefore while monopoly as an obstacle is reduced to the local level in the agreement, its international dimensions should be given seriously consideration by the negotiators.

Social implications of market access within the broader context of unrestricted MFN driven liberalization need to be given taken into account also. These include education and income structures in Africa. The modest gains that were secured in the rise in enrolment for higher education in the late seventies and the eighties in Africa were a result of direct investment in higher education through scholarships by governments, cooperative movements and donors. When the ministers of education met in Khartoum in 1988, worries were already expressed that enrolment was not growing alongside the rate of increase in the eligible population.³⁵ The withdrawal of many governments from funding higher education in many countries is already reducing the access and affordability of education to the poor. Its further internationalization may not redress but aggravate this problem.

In addition, the commercialization of services within public institutions of higher learning is already transforming education from a social to a private good. In a typical university there are normally three types of goods mainly common pool goods, collective goods and toll goods. The common pool goods include recreation grounds and facilities, libraries, laboratories, security facilities, convenience amenities etc. Traditionally collective goods include services such as catering, dispensaries, newsrooms, counseling facilities, examination offices, post examination / graduation services, alumni facilities etc. Toll goods include residence, printing facilities, photographic units, binding facilities, bookshops, photocopiers and transport on private trips. Commercialization has already shuffled these clusters. Health services, cafeterias, inter-library loans for example have been already pushed into the toll goods cluster. With privatization some of the common pool goods such as recreation, laboratories and libraries will be pushed into the toll goods clusters. This has the potential of converting education into a private rather than social good. Negotiators have a dilemma of how they can ensure market access does not facilitate the erosion of the social characteristics of education.

Finally is the issue of education and citizen participation. The Universal Declaration on Human Rights and the Covenant on Civil and political Rights have put emphasis on the rights of citizens to take part in the design of policies that affect their lives and livelihoods. Most of Africa's new constitutions have enshrined the right to participate in their provisions. At a lower level many education laws provide for participation of local councils and local communities in the education boards and committees. The higher education laws provide for representatives of stakeholders to participate on the boards and councils of institutes and universities. Foreign institutes and universities tend to be run from outside. Naturally their boards represent stakeholders in their countries of origin. Negotiations should ensure that foreign institutions operating in African countries

³⁵ UN Economic Commission for Africa, 1991, *Africa's Human Resources Agenda for the 1990s and Beyond. Report of the Fourth Meeting of ECA's Ministers Responsible for Human Resources Planning, Development and Utilization*. Addis Ababa.

will have adequate representation of local stakeholders in order to ensure that local needs and policies are given space in the decisions and activities of these institutions.

6. Modes of Supply

Four modes of supply are provided for in the agreement. They include cross border supply, consumption abroad, commercial presence and presence of natural persons. The most dynamic form of cross-border supply has been distance learning. It has increased the opportunities for life long learning, widened chances for 'learn as you earn' programmes, allowed to a limited extent opportunities for women to access higher education in situations where family commitments would reduce their chances for going away or abroad for a long time and it has facilitated wider choice in terms of courses and various packages of knowledge. The advantage of distance learning for institutions of higher education is that some overseas providers are still keen to work through African universities and this has stimulated partnership and partial transfer of technology and skills in the area of distance learning.

While this mode is well suited to partnerships in higher education, it is important to note its limitations. One major limitation is the capability of national authorities to regulate the content of programmes delivered through this mode. If it is accepted that education performs a developmental role, for least developed countries the provision of education has to reflect national goals and a developmental mission. While most advanced countries have designed their policies to ensure that science and technology dominate higher education, the temptation of overseas suppliers using distance learning as a medium for dumping upon developing countries modules, courses and degrees that are no longer marketable in their own economies are very high. In the absence of auditing capability distance learning programmes may be introduced without linking them to development objectives and because there are many people in developing countries who need a degree of any sort to advance their career such courses may become very popular. But their contribution to capacity building for development may be limited.

The second limitation is about quality assurance for distance learning programmes. As was observed at The Third Congress of Education International meeting in Jomtien, Thailand in July 2001, there are limited rigorous mechanisms for quality assurance that can ensure courses are taught by tenured faculty with a record of publications and with hands on knowledge of their fields of specialization.³⁶ Even at local levels there are problems in this area. The use of freelance academics and consultants in the design of distance learning courses and materials is increasing. So is the use of local freelance experts, some of whom are not academics, by international distance learning services suppliers. Sometimes it shocking to find that such consultants are retired soldiers offering courses on business management or single degree holders offering courses to and supervising graduate students. If this mode has to be effective the quality assurance systems have to be strengthened and agreements have to be reached between overseas and regional accreditation bodies on how to avoid this form of intellectual dumping.

³⁶ *ibid.*

Consumption abroad is another mode of supply. Being the most traditional it has always involved one-way consumption. Students have in the majority of cases moved from developing to developed countries. But in the last decade the movement of students within the African continent has increased thanks to some donors such as the Ford Foundation, IDRC, DAAD, Rockefeller Foundation and the African Capacity Building Foundation only to mention a few. For African countries it will be beneficial if this mode is combined with the third mode, which is about movement of natural persons. The two are separated within the agreement but there is nothing that prevents them from being linked. There is no reason why provision and consumption of services abroad should be separated especially for Africa because they are very much inter-linked.

Negotiations with developed countries have not yielded much on the movement of natural persons as service providers. Emphasis has been on commercial presence. The categories of natural persons eligible for movement under the GATS have been limited to 'independent professionals' (another vague term), intra-corporate 'transferees' (which reads logically as 'employees') and those not seeking employment although employment involves personal services. Most of the developed countries will insist on the economic needs test, which requires that movement of natural persons as providers should be possible only if the economic needs of the host population require the services being negotiated and there should be a shortage of service suppliers for that service.

Between African countries there is room for broadening the negotiations in the area of consumption abroad if linked with movement of natural persons. The major barriers to both modes relate to cumbersome visa and non-transparent work permit regulations, restrictive foreign exchange and money transfer regulations, procedures and practices, discriminatory immigration policies that selectively bar citizens of some countries while allowing easy entry to others.³⁷ In some cases it is easier for African citizens to get visas to travel to the US and the UK than to travel to neighbouring African countries. Lack of mutually agreed recognition of qualifications between various sub-regions is also a serious impediment to consumption of education services abroad and movement of education services suppliers within the region. Given the high rates of labour mobility within the region African countries could also include movement in search of employment within these two modes. This will provide room for academics moving easily across borders without necessarily having to be 'corporate transferees'.

This is to recognize what is already going on for example between South Africa and the BOLESWA countries,³⁸ within the Great Lakes Region, and within ECOWAS areas in which movement of natural persons for supply of employment services in the various education sectors is so developed that it has helped for example in the Great Lakes region to break the traditional divides between Francophone and Anglophone countries. It has

³⁷ Examples here include regulations requiring at least three months period for citizens of Sudan to get entry visas to Kenya and the refusal of some immigration authorities to accept visas issued by their own embassies in West Africa to citizens of some West African countries or the easy admission of citizens of Zambia and Zimbabwe into South Africa and refusal of the same treatment to citizens of other SADC countries.

³⁸ Botswana, Lesotho and Swaziland

eased pressures of unemployment among highly skilled persons in the Southern African regions and it has helped to build blocks between the Roman-Dutch systems of education formally dominant in higher education in Namibia, and South Africa and Commonwealth based systems found in other SADC countries. At a later stage suggestions will be made on how to develop and strengthen the African Area of Higher Education not only to be able to strengthen regional cooperation on quality assurance and harmonization of qualifications and standards but also to form bases for better and coordinated negotiations and cooperation within the region and with other regions of the world.

The fourth mode of supply is commercial presence. While there are many institutions of higher education already registered and operating in the African region, there is need to take precautions about this mode. The choice of legal form needs to be made more carefully. Joint ventures seem to have a better chance of minimizing concerns about content regulation. They also help to build capacity for local institutions.³⁹ Commercial presence may also entail welfare distortions. Usually foreign institutions tend to give better and more attractive packages to their staff. This allows them to employ the best leaving the others to share the rest. Consequences may be the creation of wage havens employing and retaining a very happy few while at the same time creating conditions for internal brain drain. African countries already suffering from resource strain may be pushed into deeper problems of skills drain or may have to reduce staff in order to remain in the race to the top in possible wage competition. On the contrary for most of the partnerships that have been operative there has been no evidence of such wage competition or push factors for internal skill drain. This is because the income structures of the host institutions have remained determined by these institutions while the project funds have been used to provide incentives for staff without changing their basic salaries.

However, irrespective of the mode of delivery performance assessment will continue to be an issue. In many African countries education is a core sector and the future of many generations depend on it. As result assessing its performance is very important. With the public institutions of higher education assessment is through enrolment rates, gender equity, access to facilities, relevance of curriculum, budgetary and non-budgetary management of resources; student performance and chances for employment; staff development; research funding; quality of research and publications. In spite of the existence of these criteria and institutions for performance assessment, resources to support effective assessment have been lacking. One key issue that will have to be negotiated is the criteria for performance assessment and resources to support it. This could be through joint funding of such assessment.

7. Conclusion: Towards an Area of Higher Education in Africa (AHEA)

³⁹ Some of the partnerships supported by the African Capacity Building Foundation at the University of Namibia, some joint programmes supported by DAAD in Eastern Africa and joint Ph. D. programmes between African and European institutions seem to contributed more to capacity and institution building than universities that have relocated to the region because while they help in capacity building they do not contribute to strengthening capacity within local institutions.

Most of the concerns expressed in this paper and elsewhere by others relate to some gaps in the coordination of the initiatives of African countries to be part of the emerging global order. The issues of trade are now firmly coordinated by the ECA but trade in services is still an issue over which there are no agreed positions. Within services education is beginning to feature in the preliminary negotiations but as has been shown by Kwasi Anyemedu⁴⁰ and Jane Knight⁴¹ the number of African countries that have made specific commitments is still very small. However this should not be seen as a setback because it gives them time to reflect and even harmonize their approach. A meeting of ECOWAS ministers of trade took place in Accra early March 2004 and the issue of GATS was discussed. It is too early to predict at what pace the African countries will move in the negotiations on education, but common frameworks are slowly being developed.

As these discussion and consultations continue the Association of African Universities, NEPAD and UNESCO need to design a programme that can be used to support the consultation activities and to organize workshops to facilitate the development of a common framework on the issue. Building on existing mechanisms the three could look for ways of establishing an Area of Higher Education in Africa. This could be based on the Arusha Convention. It should seek to intensify the process of ratification of the convention that was stalled not because the issue was not seen as priority but because there has been increasing shrinkage of capacity in the field of drafting and high rates of turnover within ministries of education. These two factors have delayed ratification by many members of the African Union.

The three partners therefore could and should revive the process on a fast track basis including the possibility of designing a sample legislation such as the one designed on the ratification of the Convention on Biodiversity, which was adopted by the OAU in the Ouagadougou Resolution in 1998.⁴² Fast track activities could also involve advocacy through meetings of African ministers of education and both ministers of education and those of trade on the one hand and advocacy within and involving regional economic communities and the ECA on the other. The objective could be to launch an Area of Higher Education in Africa (AHEA) to supplement the work of ADEA (Association for the Development of Education in Africa) and the Working Group on Higher Education (WGHE). The AHEA could be used to deal with issues specific to trade in education services and related issues such as quality assurance, accreditation, certification, standards harmonization and the general implementation of the Arusha Convention.

The development of an Area of Higher Education in Africa could be further enhanced if a second track of activities were designed and launched. These could include the completion of the AAU quality assessment programme that has been going on and the use of the results of that programme to design a programme for concerted progress

⁴⁰ Kwasi Anyemedu, 2002, 'The General Agreement on Trade and Services (GATS) and Africa' in Briefing Paper No.1 2002, Third World Network, Accra Ghana p.8/

⁴¹ J. Knight, 2004, 'Crossborder Education in a Trade Environment: Complexities and Policy Implications. A Background Report for Discussion at the AAU Workshop' Paper presented at this workshop only seven countries in African have expressed interest in negotiations.

⁴² This is known as the Sample Legislation on the Utilization of Biodiversity.

towards the implementation of the Arusha Convention. The second track activities could also bring on board other partners especially CAMES, the Inter-University CouncilUC, the South African Vice Chancellors' Association, CODESRIA and the African Association of Student Unions. The second track activities should be organized in such a way that they can help the Arusha mechanism to move and form the basis of harmonization and quality standards and accreditation and examination systems. They should also aim at providing support to policies on the movement of natural persons both as providers of higher education services and as consumers of these services. These can help students and staff to move easily within the region.

The formation of an Area of Higher Education in Africa will go a long way to facilitate formulation of common policies on higher education, using the Arusha mechanisms to develop common standards and approaches and supporting policy makers in regulating the entry of other suppliers of higher education from outside region. Only if we have such a mechanisms can we be able to ensure recognition of our own weaknesses and strengths in our systems of higher education. Only when such strengths and weaknesses are recognized by ourselves and our partners can we negotiate fruitfully with the latter in which areas we need complementary support. Then our education system can be opened up on the basis of complementarity rather just a rush to meet the demand for increased liberalization.