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EI Briefing Note on the Trans-Pacific Partnership (TPP)

The potential impacts for the education sector



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The Trans-Pacific Partnership (TPP) is a comprehensive trade and investment agreement covering 40% of the global economy. The TPP was concluded on 5th October 2015 after more than 5 years of secret negotiations. On 5th November 2015, the full TPP text was finally released. The following 12 countries are involved: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.

This briefing note looks into the potential impacts of the TPP for the education sector based on the released text. The TPP aims to further liberalise trade and investment through new rules and disciplines that have very little to do with trade in its original sense of reducing tariffs and limiting the use of import quotas. Furthermore, the TPP is a so-called living agreement, which has a build-in agenda committing the Parties to ongoing and cumulative liberalisation.

Direct impacts for the education sector

This section looks into the direct impacts of the TPP for the education sector and is based on analysis of Cross-Border Trade in Services (Chapter 10) and Investment Chapters (Chapter 9). Initially, it is crucial to note that the vision set out for education in the Development Chapter (Chapter 23) is completely focused on its potential to maximise trade and investment, and on the involvement of the private sector. Accordingly, the Development Chapter encourages governments to adopt education policies that pursue trade and investment “opportunities.”

The scope of the measures included in the chapter on Cross-Border Trade in Services is very broad. The Agreement applies to all measures “affecting cross-border trade in services”. This would include all laws, regulations, standards, and rules required for a provider to operate a service. Accordingly, those measures that may not be directly aimed at cross-border trade in services may nevertheless be within the scope of the TPP if they affect cross-border trade in services in any manner. Also, the measures in question apply to all levels of government (central, regional or local), and to non-governmental bod-



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ies, such as accrediting and licensing agencies, who exercise powers delegated by governmental authorities.

The chapter on Cross-Border Trade in Services provides no carve-out for education or other public services, but only an exception for services provided in the “exercise of governmental authority” modelled on language in the WTO’s General Agreement on Trade in Services (GATS), and subsidies and grants provided by a Party. Governmental authority is defined as “any service that is supplied neither on a commercial basis nor in competition with one or more services suppliers.” However, this exemption is extremely narrow and open to conflicting interpretations. This is because government services are defined very narrowly as those that are provided on a non-commercial basis and not in competition with other providers. In other words, if any part of a country’s education system is provided on a commercial or for-fee basis, or if there are private schools that operate, education may not benefit from this general exclusion. Given that most education systems in the TPP countries do in fact contain a mixture of not-for-profit and commercial actors and public and private provision, it is unlikely that the education sector would fully benefit from this general exclusion.

Aside from the general exclusion for services provided in the exercise of governmental authority, specific sectoral limitations are included in the non-conforming measures in Annexes 1 and 2 of the TPP. Regarding education there are quite some different approaches (Annex 2). A number of countries (Australia, Canada, Malaysia, Mexico, New Zealand and Peru) have included a reservation for public education to the extent that it is a social service “established or maintained for a public purpose.” Crucially, however, there is no definition of either public education or public purpose. Accordingly, the reservation remains ambiguous and open to conflicting interpretation. Other countries (Japan and Singapore) have made a reservation for primary and secondary education (public and private), but no reservation of other sectors of education. Countries like Brunei and Chile have no reservation for public education. Nevertheless, Brunei has made reservations for the supply of private pre-primary, primary and secondary education. Chile has two kinds of reservations. The first reservation concerns investors and an investment of an investor of a Party in education. The second reservation relates to natural persons who supply education services in Chile i.e. teachers and support





personnel from the pre-school to university education as well as “sponsors of educational institutions of any kind”. However, this reservation is restricted to investors and investments that receive public resources and furthermore the reservation does not apply to second-language training, corporate, business, and industrial training and skill upgrading including consulting services relating to technical support, advice, curriculum, and program development in education. As a consequence, most of the countries may be opening the door to foreign for-profit education providers and extending new rights to such private investors. Including education services at any level in any trade agreement poses significant risks by restricting public policy space and locking in and intensifying the pressures of privatisation and commercialisation.

Finally, the Intellectual Property chapter of the TPP will have important implications for the education sector. Ensuring access to quality teaching and learning materials is a critical building block in supporting quality education. The TPP requires all signatory countries to extend copyright terms beyond the international norm of 50 years after the life of the author, to 70 years. This means works that would have entered the public domain to be freely used and accessed by teachers and students, will be subject to copyright for a further 20 years. It is estimated this will cost the public and the education sector hundreds of millions of dollars in additional licensing fees¹.

Indirect impacts for the education sector

This section examines a few critical issues of broader characteristics relating to rules and disciplines of TPP, which have also important implications for the education sector.

Ratchet clause and standstill clauses

The ratchet clause (Annex 1) means that future liberalisations become automatically locked in and therefore contains a strong tendency towards increasing liberalisation, while the standstill mechanism applies to both annexes and locks-in the level of liberalisation of the agreement. Concretely, it implies that if a country listed a specific measure in its Annex I reserva-

¹ New Zealand has estimated that the extension alone will cost its economy NZ\$55 million per year (corresponding approximately to US\$37 million per year)



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tions and later revised the measure in a more liberalising manner, it would then be unable to reintroduce the original measure. In accordance with the trade agreement such a change, essentially to the initial status, would be a modification of the measure and thereby decrease the conformity of the measure. The measures in Annex I can only be revised toward increasing levels of liberalisation. As a consequence of the standstill and ratchet mechanisms, a new government is unable to undo liberalisations of a previous government and the only policy choice is the status quo or further liberalisation. Thereby, these mechanisms create a one-way street to ever-increasing levels of liberalisation.

ISDS (Investor-State Dispute Settlement) mechanism

ISDS gives foreign investor exclusive rights to challenge laws and regulations, which they feel are unfavourable to their business, in private arbitration. The ISDS system gives arbitrators the power to review all decisions by legislatures, governments, and courts, and importantly it does not observe the separation of powers. ISDS arbitration lacks basic institutional safeguards of judicial independence, and ultimately undermines democratic decision-making. One critical problem with the Chapter on Investment is that the definition of investment² is so broad that practically everything can be considered an investment. The rights given to investors are similarly broad and undefined, thereby leaving lots of room for interpretation on the part of ISDS arbitrators. At the same time, there are no obligations demanded in return. The Investment Chapter (Chapter 9) specifies merely that the Parties are invited to encourage investors to voluntarily incorporate corporate social responsibility. There is no general carve-out for education or other public services to ISDS except for one single subparagraph, where it is clarified that education services are not covered in the case of investors supplying services on behalf of a Party for consumption by the general public for power generation or distribution, water treatment or distribution, telecommunications, or other similar services. In other words, education may still be targeted through ISDS arbitration in the rest of the Investment Chapter.

² "Investment means every asset that an investor owns or control, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." (TPP Chapter 9)





Labour rights

The Labour Chapter (Chapter 19) stands in stark contrast to the ISDS provisions included in the Investment Chapter (Chapter 9). While ISDS creates clear obligations on the part of governments this is not the case when it comes to labour rights. There is no effective and legally enforceable mechanism in case of violations of labour rights. Any dispute must be dealt with first through cooperative labour dialogue and consultations before any recourse to state-state dispute mechanism. Furthermore, it must be demonstrated how and to what extent the issue affects trade or investment. Accordingly, if there are no effects related to trade and investment a violation of labour rights would potentially not be considered valid. The language on forced or compulsory labour including forced or compulsory child labour (article 19.6) is considerably weak. The article states that the Parties shall “discourage, through initiatives it consider appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour”.

Domestic Regulation

The domestic regulation section sets clear limitations to the policy space of governments. It requires that regulations and in particular qualification requirements and procedures, technical standards and licensing requirements do not constitute so-called an “unnecessary barrier to trade in services.” Furthermore, regulations shall be based on “objective” and “transparent” criteria. These rules on licensing procedures and requirements could call into question regulations related not just to professional licensing, but also to the accreditation of schools and education institutions.

Applying these restrictions on domestic regulation ignores the reality of how educational regulations are developed. Rules and standards are designed and implemented through compromises that impose neither the greatest burden nor the least burden on service providers. Requiring all regulations to be the least burdensome would limit both the content and the process for democratic decision-making.

The TPP also bans certain digital protections. For example, it restricts legislative initiatives that require storage of personal



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information domestically or that limit data transfers outside the country. In the education sector, Google and Microsoft have been offering schools and other educational institutions email and cloud computing services that are raising serious privacy concerns. The TPP would undermine efforts to prevent the cross-border transfer of data on teachers and students who use these services.

Living Agreement

The TPP is a so-called living agreement meaning that the Parties are committed to progressive liberalisation, aiming to expand the scope of sectors covered. The TPP establishes a Commission, including several sub-Commissions (Chapter 27), to consider ways to further enhance trade and investment by updating the agreement. Also, it states that the Commission may seek the advice of non-governmental persons and groups on any matter. This enables big businesses and lobby groups access to the Commission.

Market access

As a general rule the market access disciplines (Article 10.5) set out that the government cannot make limitations on the number of suppliers, the total value of service transactions, the total number of service operations and cannot make restriction or requirements of specific types of legal entity. In addition, governments cannot require any local presence of a services supplier in its territory. If applied to the education sector, rules around market access could restrict the ability of member countries to limit the entry and regulate the operations of private and for-profit schools and institutions. Any attempt to do so by imposing new accreditation and quality assurance requirements could be interpreted as a disguised barrier to trade. Even the absence of an accreditation scheme for foreign educational providers could be seen as a violation of the TPP commitments.





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