

The Marketisation and Privatisation of Education through the EU's "New Generation" Free Trade Agreements?

A Case Study of the Possible Consequences of Including
Education into the Transatlantic Trade and Investment
Partnership

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Abstract

Significant positive and negative consequences across the entire spectrum of issues are expected from the much debated Transatlantic Trade and Investment Partnership (TTIP). This study investigates thoroughly the potential consequences for the education sector based on primary sources of the EU's objectives and reflections for the TTIP negotiations. It approaches the possible consequences from the perspective of normative legitimacy and in particular how accountability standards differ significantly between the public and private sectors. In the education case the different accountability standards have critical implications for the universal provision of quality education. The study shows that at this still rather early stage of the negotiations on services in TTIP the EU generally continues the approach adopted since the General Agreement on Trade in Services (GATS) with the inclusion of privately funded education services. This causes uncertainty as to how the concepts of respectively public and private education will be interpreted with potentially critical consequences of gradual but constantly increasing levels of marketisation and privatisation. Ultimately, the very public nature of education could be at stake. Importantly, the new disciplines and rules intended to be included in TTIP will considerably deepen and extend the scope of how education may be impacted via its possible inclusion in TTIP.

Key words: The Transatlantic Trade and Investment Partnership (TTIP), the European Union, trade in services, education, marketisation, privatisation

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List of Abbreviations

BIT	Bilateral Investment Treaty
CEO	Chief Executive Officer
EC	European Commission
EI	Education International
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MFN	Most-Favoured Nation
MNC	Multinational Corporation
NAFTA	North American Free Trade Agreement
NPM	New Public Management
NTB	Non-Tariff Barrier
OECD	Organisation for Economic Co-operation and Development
PPP	Public-Private Partnership
TiSA	Trade in Services Agreement
TNC	Transnational Corporation
TPC	Trade Policy Committee
USTR	Office of the United States Trade Representative
TTIP	Transatlantic Trade and Investment Partnership
WTO	World Trade Organisation

1 The Tension between Public Services and International Trade

1.1 Introduction

The European Union (EU) and the United States (US) are currently negotiating the Transatlantic Trade and Investment Partnership (TTIP). The negotiations were launched in June 2013 and seven rounds of negotiations have taken place since then (European Commission - SPEECH/13/544, DG Trade, EU-US trade – 7th round of talks on transatlantic trade pact ends in the US). Nevertheless, it is believed that there is considerable way to go before an eventual agreement can be reached. Unlike other trade agreements the EU is negotiating or has negotiated in the past, TTIP has been followed with particular strong public interest. Partly, the interest can be explained by the size of such a trade agreement. If concluded TTIP would cover around 30% of global trade and become the world's largest free trade area. In contrast to other free trade agreements (FTAs), TTIP aims at establishing new rules, standards and procedures in manifold areas. While the political elite argues that TTIP will bring growth and jobs, a broad range of critical voices have raised a number of concerns. In the European context, in particular the concerns of consumer interest groups have been discussed. These concerns focus on the agricultural sector and the risk that for example hormone-treated beef or chlorine-washed chicken from the US could enter the European market (DG Trade, About TTIP, *The Transatlantic Colossus* 2014:44). However, it should be noted that TTIP is not the first attempt to build a Transatlantic Free Trade Area (TAFTA). Since the early 1990s, the EU and the US have initiated a number of initiatives with the aim of institutionalising cooperative economic and trade relations in a bilateral setting, e.g. the Transatlantic Partnership (TAP), the Transatlantic Business Dialogue (TABD), and the New Transatlantic Agenda (NTA) (Fogarty in Eds. Aggarwai – Fogarty 2004:180). Despite the previous failures to establish a Transatlantic Free Trade Area, the current TTIP negotiations are aiming towards this end.

TTIP is characterised by the very broad range of issues that potentially are affected in such a wide-ranging trade and investment deal. Based on its unprecedented character and its likely immense consequences, there are very good reasons to investigate the consequences of a possible TTIP agreement. Services are one of the core issues, which TTIP is to include. The rationale of including services is that they make up a large and increasing part of advanced economies like the US and EU, but also because tariff rates and quotas on goods are already

fairly low between the EU and the US (CEPR 2013:14-15, Social Europe Journal). International trade agreements are controversial in regard to public services because trade agreements reduce the policy space to regulate public services. The aim of trade agreements to reach growing levels of liberalisation and market access tends to increase the commercialisation of public services and lock-in liberalisation measures taken at national level (Krajewski 2011:4). In particular, the inclusion of services like education and health is very controversial based on the broader societal implications of these services. These sectors are so-called sensitive areas” in international trade (Adlung – Mattoo in Mattoo et al. 2008:74). The sensitivity of education can easily be explained by the crucial role it plays in fostering personal and social development as well as reducing inequality. In addition, there is also an economic argument of education. As a result education has so far been one of the least-covered sectors in trade agreements because of legitimate concerns about how legally binding trade rules can restrict the ability of governments to ensure access to quality education. The special role of education as a public good and a human right makes education contentious in the context of trade agreements.

This study will examine the area of education primarily from a European perspective. As mentioned above education is a sensitive sector in the context of trade negotiations. In the European context, it is central that education is the exclusive competence of the Member States, while trade negotiations are conducted by the European Commission (EC) and agreed upon by unanimity in the Council of Ministers by the Member States. The US’ chief negotiator, Dan Mullaney, stated clearly at the chief negotiators' briefing during the fourth round of negotiations that the US aims to include education into the scope of the agreement. Furthermore, education may also be impacted more indirectly, e.g. through investor-state arbitration or regulatory cooperation.

The study’s objective is to have a close examination into the relations between public services and the EU’s “new generation” FTAs, which were outlined in the Global Europe Strategy (Global Europe: Competing in the World). In that strategy it is pointed out that the EU’s new FTAs “*need to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation including far-reaching liberalisation of services and investment. A new, ambitious model EU investment agreement should be developed in close cooperation with Member States*” (Global Europe: Competing in the World 2006:9). In order to approach this objective this thesis is based on a case study on education and consequently it will focus thoroughly on the special characteristics of the education sector. In addition, education is an interesting case because it predominantly contains both public and private elements in terms of its provision and financing, and these elements are not easily separated. For example, some private education institutions are highly subsidised and their services are therefore similar to the ones offered by the public sector, while other private education institutions offer services at market conditions (WTO Education Services Background Note S/C/W/49 1998: 4). In addition, recent domestic reforms

implemented in a number of countries add to the complexity of public and private funding and provision (Scherrer 2005:504-505). In other words, the line between public and private education is inherently a blurred one.

1.2 Research Question

This study will examine the field of tension between on the one hand the state's role of providing essential public services to its citizens and on the other hand the trend of globalisation to gradually open up to international trade, even in such areas that involve the state's regulatory competences and which constitute central elements of its welfare regime.

The tension described above is approached through a case study on the education sector. Education is chosen because this sector until recently has been one of the least covered sectors in trade agreements. This situation can be explained by concerns that the opening of education to trade would restrict the ability of governments to ensure universal access to quality education under legally binding trade rules. Education is recognised to play a crucial role for fostering personal and social development as well as reducing inequality. In addition, there is the economic argument of ensuring quality education. Education as a competitiveness tool is clearly visible in the Europe 2020 (Europe 2020), the EU's growth strategy.

Therefore, the fact that education is subject to discussion in the TTIP negotiations, trigger the interest in what consequences this inclusion can result in. Therefore the following research question will inform the study:

1. *In the case that education will be included into the scope of the "new generation" free trade agreements, such as TTIP, what possible consequences can be expected and what will it imply from a normative standpoint?*

1.3 Methodological Considerations

This section will discuss the main methodological considerations involved in the present thesis. The objective is to address the possible problems that may arise from the research design rather than a general discussion of methodology.

This study has adopted the single case study approach with the aim of studying in depth the education sector and the possible consequences of including the education sector into TTIP. The clear advantage of the case study is that it allows for a high degree of explanatory richness, which concerns well-defined types or subtypes of cases (George - Bennett 2005:31-32). Applied to this case

study the objective is to study comprehensively the potential consequences of including education into TTIP. The purpose of using the concept of “new generation” FTAs is that FTAs currently being negotiated share similar elements, and as result this analysis can be useful in accessing the impact on the education in those similar FTAs, which also include the education sector. Nevertheless, one should of course be vigilant to potential differences between these “new generation” FTAs. The case study design facilitates the knowledge of whether and how a variable matters, however it is much weaker when it comes to how much a variable affected the issue in question (George - Bennett 2005:25). Accordingly, this study does not attempt to measure in any quantitative sense how much TTIP could influence education, but will merely focus on how TTIP could possible affect education. It analyses the consequences by studying how trade rules may challenge the public education sector. The lock-in effect, the treatment of subsidies and the regulatory disciplines are of particular importance. The fact that the TTIP negotiations are still at a rather early stage will also mean that this study must assess the possible consequences in a cautious manner.

The sources used for this thesis is based on primary and secondary sources. The primary sources studied are mainly based on EC documents dealing with the TTIP negotiations. This study does not incorporate any primary sources from the Office of the United States Trade Representative (USTR), which could result in a European bias of the study. This choice was mainly based on the availability of relevant documents and not as such as an intended bias towards EC primary sources. Part of the explanation for the lack of USTR sources can possibly be explained by the fact that the US actually is a federal state and as a result has a more homogeneous approach to handling secret trade negotiating documents. In contrast, the EU does not have a homogeneous approach as the level of transparency differs between the different traditions that exist in the different Member States and this can explain why documents are more likely to circulate than in the US. Due to the relatively early stage of the TTIP negotiations and the secrecy of the negotiations, it was necessary to go beyond the officially published documents available at DG Trade’s homepage concerning TTIP, which mainly serve the purpose of explaining the benefits of TTIP. Therefore, in order to be able to access the possible consequences of a possible TTIP agreement in the area of education this study has examined a number of leaked or otherwise not officially available documents of relevance. It can be argued that it is not the ideal solution to use these “not-officially published” documents, e.g. these document may have been revised since and therefore not the most recent edition. Nevertheless, in the context of the secrecy of the negotiations and the resulting lack of officially published documents, documents not officially published may provide important insights into the work in progress of the TTIP negotiations and therefore these documents are the best possible existing alternative to approach this study. In addition, this study benefits from the expert interview conducted with David Robinson, EI senior advisor on trade. This interview is a semi-structured focusing on the similarities and differences between the approaches in GATS and TTIP and the possible consequences for the education sector.

1.4 Outline Section

The thesis is structured as follows. In chapter 2 the background to the General Agreement on Trade in Services (GATS) will be provided in order to explain the fundamental concepts, which are replicated in other trade agreements including TTIP. Chapter 3 addresses the question of normative standards of legitimacy and how accountability standards differ between the public and private sector, which is employed as the theoretical framework. Chapter 4 discusses the special role and function of education as well as the level of educational spending and the distribution between public and private spending. In chapter 5 the case study of the potential consequences of including education in TTIP is analysed. In the final chapter the results of the analysis is summarised and discussed in chapter 6.

2 Background

2.1 GATS and Education

This chapter will describe the main concepts of the General Agreement on Trade in Services (GATS) as well as the context of its creation. The purpose is to allow for a basic understanding of the fundamental concepts of GATS, which is the foundation of other trade agreement including TTIP. The context resulting in the formation of GATS is similarly significant. In particular, it is important to pay attention to the assumptions surrounding the benefits of liberalisations and how these assumptions play out when services are delivered by the public sector.

Services were included in the multilateral trade architecture of the WTO in the GATS based on the perception that further liberalisation in services was needed due to the increasing share of services in international trade. It is based on the assumption that liberalisation will result in lower prices, improved quality and greater variety through economies of scale. This is largely based on the economics for goods trade. However, trade in services differs in some critical aspects from goods trade. Goods trade focuses on tariff reductions, but this is not a significant issue in the case of trade in services as tariffs are quite rare. Moreover, unlike trade in goods, cross-border trade is not the principal means of operation in international trade in services. From the perspective of trade in services barriers to trade result from so-called non-tariff barriers (NTBs). NTBs are domestic regulations that tend to favour local producers over foreign producers or which restrict or raise the cost of access to domestic markets by foreigners (Copeland - Mattoo in Mattoo et al. 2008:84, 103, 127). More importantly, regulations established by governments serve the purpose of responding to market failures e.g. asymmetrical information and to achieve public policy goals, e.g. provision of universal quality education. In the education sector such market failures derives principally from problems of asymmetrical information, in particular the lack of transparency regarding the quality of the education in question. An individual will only partially be able to access the quality of a particular education offer or institution. As a result liberalisation of trade in services involves critical trade-offs.

Furthermore, services are often provided by the public sector. The liberalisation logic does not take into account the situation when services are provided by the public sector. In this case pre-liberalisation prices are rarely determined by the market but are set administratively. Accordingly, seen from a market perspective the prices are therefore “artificially low” (Mattoo - Stern in

Mattoo et al. 2008:3,6,9,16). It is therefore realistic to anticipate that the price paid for services will not decline, but instead rise due to the different logics at play in the pre- and post-liberalisation circumstances. In addition, the availability might also decline because private actors will focus on the most profitable market segments, the so-called “cream-skimming” and consequently disregard universal access. The market approach will accordingly result in market failures.

In GATS there is no definition of what is to be covered under the term “services”, instead GATS contains an open-ended classification of services involving 12 categories. Education services are included as the fifth category and the classification is open-ended as the twelfth category reads, “other services not elsewhere included”. The approach adopted in GATS takes on an unusually wide view of trade compared with the conventional definition of trade. Trade in services goes beyond the traditional cross-border exchange and involves consumer movements and factor flows i.e. investment and labour. In addition, the scope of disciplines exceeds the treatment of products (services) to cover measures affecting service suppliers (producers, traders and distributors) (Mattoo - Stern in Mattoo et al. 2008:5, Adlung - Mattoo in Mattoo et al. 2008: 48-50). This enlarged approach is defined in GATS article I:2 that includes four modes of supply:

- Cross-border (mode 1) – i.e. services supplied from the territory of one country into the territory of another e.g. distance education.
- Consumption abroad (mode 2) – i.e. services supplied in the territory of one country to the consumers of another e.g. students attending school in another country or studying abroad.
- Commercial presence (mode 3) – i.e. services supplied through any type of business or professional establishment of one country in the territory of another e.g. foreign education providers local branch campuses, subsidiaries or franchises of courses or programmes in local markets.
- Presence of natural persons (mode 4) – i.e. services supplied by either employed or self-employed nationals of one country in the territory of another e.g. foreign teachers.

GATS article I:3(a) lies down the scope of the measures affecting trade in services to cover all levels of government and public authority in addition to non-governmental bodies in the exercise of delegated powers such as government-mandated regulators or licensing bodies (article I GATS). In GATS article XXVII(a) the comprehensiveness is spelt out by explicitly stating that the measure could essentially take any form “*whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form*” (article XXVII(a) GATS). It is noteworthy because it renders the scope so wide that no measures are excluded. As mentioned above even measures adopted by non-governmental bodies are included into the scope of GATS, and accordingly measures by school boards would also be covered (Colas-Gottlieb 2011:9).

Additionally, GATS VI:4 includes the possibility to set up disciplines in order to ensure that qualification requirements and procedures, technical standards and licensing requirement do not to constitute “*unnecessary barriers to trade in services*” (GATS VI:4). In particular, this means that measures must not be “*more burdensome than necessary to ensure the quality of the service*” (GATS VI:4b). Concerning future disciplines under GATS article VI:4, Adlung and Mattoo mention that the discussions have focused on four key concepts.

The first concept resembles the concept just referred above in that it requires the “*necessity in view of a specific legitimate objective*” (Adlung - Mattoo in Mattoo et al. 2008:67). As a result, it is not sufficient that measures are established to achieve a specific legitimate objective, but these measures must not be more trade restrictive than necessary and must be necessary for fulfilling the specific public policy objective. WTO panels considering article XX on General Exemptions of GATT have applied a particularly high standard for the meaning of “necessary”. Accordingly, it must be shown that “*there were no alternative measures consistent with the General Agreement or less inconsistent with it*”, (Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, DS 10/R-37S/200:§ 75).

Furthermore, the concept of ‘affecting trade in services’ (article I:1) considerably broadens the scope, e.g. even if a certain measure is principally aimed at product trade this nevertheless does not prevent it from also affecting trade in services (Adlung - Mattoo in Mattoo et al. 2008:51). In relation to requirements of qualification requirements, licensing and accreditation in the education sector the issue at stake is how to decide or if necessary to demonstrate that measures do not breach the principal of being more burdensome than necessary. It is a difficult task to prove that a particular measure is necessary and that no other less interfering measure could have been introduced instead. Moreover, it must be assumed to require considerable resources. Regulations in general, but standards and rules in the education sector are designed through compromises based on democratic decision-making rather than to meet the requirement to be the least burdensome. More generally, as argued by Scherrer, the simple anti-discrimination rule of GATS infringes severely into the state’s regulations designed to achieve those societal goals that goes beyond merely hindering or facilitating cross-border economic activities. Those regulations are put in place with the aim of guaranteeing that basic services are provided nationwide, are universally accessible and that quality standards are maintained (Scherrer 2005: 489).

Despite this broad scope outlined above GATS includes a certain degree of counterbalance through the exemption of governmental authority. GATS article I.3 exclude “*services supplied in the exercise of governmental authority*”, which is defined as a service “*supplied neither on a commercial basis, nor in competition with one or more service suppliers*” (GATS art I.3). It is nevertheless not evident what is included in the exemption due to the absence of common definitions of the key concepts in the definition. Particularly, the lack of definition

of “commercial basis” and “in competition” is problematic. The WTO Secretariat background note on education services, despite not directly discussing the application of the exemption of governmental authority, it states that “*Basic education provided by the government may be considered to fall within the domain of, in the terminology of GATS, services supplied in the exercise of governmental authority (supplied neither on a commercial basis nor in competition).*” (WTO Education Services Background Note S/C/W/49 1998:4).

As emphasised by David Robinson, EI (Education International) senior advisor on trade, the above quote is significant in not denying that basic education i.e. primary and secondary education may not fall within the exemption depending on the degree of private sector involvement and competition in the education system (interview with David Robinson). Consequently, the ambiguity of the exemption to education is apparent. Similarly, Adlung and Mattoo on the one hand assess that primary education is covered by the GATS exemption, but on the other hand they acknowledge that it is uncertain whether the exemption applies when services are not provided for free, but for a certain fee or charge (Adlung - Mattoo in Mattoo et al. 2008:52). Moreover, in the legal opinion on GATS impact on education in Canada, Colas and Gottlieb point out that while GATS does not contain any definitions of the terms “commercial basis” and “competition”, they are of the opinion that a public university would be likely to be considered as providing service on a “commercial basis” or to be in “competition” with other education service providers and therefore not covered by the GATS exemption.

Due to the lack of definitions of the concepts “commercial basis” and “in competition”, treaty interpretation rules, in particular article 31(1) of the Vienna Convention (Vienna Convention on the law of the treaties, article 31(1)), requires that the concepts are given their ordinary meaning in their context and in light and of their object and purpose. In the context of GATS it will imply a narrow interpretation of the concepts as GATS seeks to reach progressively “higher levels of liberalisations of trade in services”. (Colas - Gottlieb 2011:3,10,13). Consequently, due to the lack of common definitions of the GATS exemption of governmental authority, Robertson et al. question its utility for the education sector, as it is uncertain if there remain any education systems that fulfil the conditions (Robertson et al. in Lauder et al. 2006:234-235). Rather, the education systems of most countries are mixed systems, where the private sector plays a role (to different degrees) and this role is in competition with the public sector.

3 Theoretical Framework

This chapter takes the global governance literature as the point of departure. Global governance explores how to make sense of accountability arrangements in the global context. For the purpose of the present study the global governance literature focusing especially on public-private partnerships (PPPs) is particularly relevant in approaching the inquiry into the diffuse boundaries between public and private education. The concept of PPPs is rather ambiguous and there is no commonly agreed definition. Schäferhoff et al. define PPPs as “*institutionalized transboundary interactions between public and private actors, which aim at the provision of public goods*” (Schäferhoff et al., 2009:455, Bäckstrand in Eds. Bexell - Mörth 2010:147). The category of “private actors” in the definition is broad in scope and can denote everything from multinational companies to civil society organisations. Even so, in line with the purpose of this study “private actors” will be understood in the narrow sense of private companies. Remarkably, PPPs aiming to tackle public policy issues are mutual initiatives that have the effect of increasing the political authority of the private actors involved. This raises the question if and to what extent market sphere norms and public sphere norms come into conflict with each other in such joint configurations (Bexell - Mörth in Eds. Bexell - Mörth 2010:9). Even if the field of study is not a PPP, the PPP literature engages in the questions of the tension between public and private spheres from a normative point of view, and therefore valuable for this study.

The discussion in this chapter will advance through the sections of global governance, the public-private distinction, normative standards of legitimacy, the differences of accountability standards in the public and the private sector and ultimately the choice of the theoretical framework is briefly explained.

3.1 Global Governance

The debates in the global governance literature examine the subject of accountability and democracy at the global level. Grant and Keohane point out that global governance is in need of appropriate accountability mechanisms in order to be legitimate. The difficulty in developing such accountability mechanisms is that these cannot be reproduced from the familiar democratic nation-state setting, but must be based on the particular characteristics of the global context (Grant – Keohane 2005:29,34). Examining accountability from the global perspective focusing in particular on multilateral organisations, Keohane claims that accountability is essentially a power relationship. In the case of power

asymmetries accountability is weakened. Consequently, power holders will seek to avoid accountability when this does not endanger other objectives. Keohane distinguishes between internal and external accountability. Internal accountability is generally related to the delegation of power, whereas external accountability concerns the people or communities affected by the activities in question. In the global setting, it is the external form of accountability that is most critical from a normative point of view (Grant – Keohane 2005:40-41, Keohane 2005:49, Keohane 2006:79).

Held suggests that in parallel with the situation in the nation-state, where democratic accountability signifies that power holders are accountable to the broad publics, then in the global setting democratic accountability must likewise entail that agents whose actions make a sufficient great impact on the lives of people in other places must report and be subject to sanctions from these people. In contrast, Keohane claims that this might not necessarily be the case, e.g. in the case of intergovernmental organisations, the organisations are accountable to the Member States rather than to individuals or communities that are affected by their policies. According to Keohane, the external accountability gaps are most pronounced for entities, which are not traditionally held accountable on a transnational basis, e.g. multinational corporations (MNCs)¹. As a result of the increased economic power of MNCs, these companies are seen as important global actors with substantial political influence. Fuch et al. emphasise the importance of examining the role of TNCs because of the divergence of interests between private economic interest and public interests. The critical question is how to make sense of democratic accountability in connection to TNCs (Fuch et al. in Erman - Uhlin 2010: 43-44). TNCs may cause vast damages when acting only in their own interests. Therefore, arrangements for external accountability is essential if corporations should play a role in the area of public governance (Grant – Keohane 2005:37-38, Fuch et al. in Erman - Uhlin 2010:59), Keohane 2005:48-50, Keohane 2006:77,80-82). In the case of TNCs, it is evident that the nation-state setting is not helpful in developing accountability mechanisms. The reason is that TNCs rather than elected by a demos are controlled by its shareholders. In concrete terms, the key question is how to accommodate the internal accountability of TNCs with the external accountability of people being affected by their actions. This divergence of interests will be considered in detail later in this chapter. Before that the next section will reflect on the critical distinction between the public and private sphere.

¹ Multinational corporations (MNCs) and transnational corporations (TNCs) are here used interchangeable. Despite the difference between the two categories, this is not central to the argument outlined.

3.2 Public versus Private

The demarcation between public and private is not a straightforward exercise. It is primarily an important field of contestation. It is a significant demarcation setting up a constitutive ordering principle of social life. It is deep-rooted and continuous, but nevertheless it constantly evolves over time. Dingwerth and Hanrieder argue that in a globalised context, the distinction of public and private might not be consistent because of the gradual intersection of actor spheres, issue areas, and rules (Bexell - Mörth in Eds. Bexell - Mörth 2010:9-11, Dingwerth - Hanrieder in Eds. Bexell - Mörth 2010:83). Nevertheless, as emphasized by Bexell and Mörth, the public-private distinction has important implication of what is politicised and depoliticised. While the field belonging to the public spheres becomes legitimised as objects of politics and public scrutiny, simultaneously the private field is depoliticised (Bexell - Mörth in Eds. Bexell - Mörth 2010:9-11).

It is suggested that the public-private distinction is often replicated in a superficial manner in the PPP literature as well as in international relations (IR) literature. Frequently, states are automatically associated with “public”, while companies and civil society are associated with “private”. Therefore, a less simplified approach might be to consider “public” in terms of collective characteristics, and not just as associated with the state.

In the policy context of new public management (NPM) Bexell and Mörth highlight that a paradigm shift has taken place in the public sector in recent decades, which has meant the marketisation of sectors that traditionally belonged to the state and the public sector. This trend of marketisation is promoted through the liberal belief that market mechanisms offer the answer to what is regarded as the bureaucratic inefficiencies in the public sector. In particular, decentralisation and competition are promoted on the conviction that the public sector should adopt a business-like model of operation, while simultaneously preserving the public character of democratic accountability (Bexell - Mörth in Eds. Bexell - Mörth 2010:9-11, Bresser - Pereira 2004: 109, Dingwerth - Hanrieder in Eds. Bexell - Mörth 2010:91, Mörth 2009:100-101,104). At the European level, Mörth demonstrates the remarkable changes that have taken place in the public utilities infrastructure. Such liberalisations and privatisations have resulted in a modified role of public actors from that of provider to engaging in supervisory and monitory tasks (Bexell - Mörth in Eds. Bexell - Mörth 2010:9-11, Mörth 2009:100,103). The tension between effectiveness and democratic governance will be considered from the perspective of normative legitimacy in the following section.

3.3 Normative Standards of Legitimacy

Normative legitimacy is based on norms, values and principles of liberal democracy, in particular accountability, transparency, inclusion and deliberation. Accordingly, the governance must be based on values like transparency, the rule of law, accountability, fairness, inclusion, participation, representation and deliberation. In addition, values of effectiveness and policy performance can also be included in a normative concept of legitimacy.

Scharpf defines legitimacy as to “*imply a socially sanctioned obligation to comply with government policies even if these violate the actor’s own interests or normative preferences, and even if official sanctions could be avoided at low cost*” (Scharpf 2006:1). Consequently, the requirement for legitimation differs according to the salience of the preferences that are potentially infringed. Policies infringing on profoundly held normative preferences of the governed requires particular resilient legitimating arguments. Scharpf claims that in a modern Western context, legitimacy depends predominantly on trust in institutional arrangements, which involves the two dimensions of input- and output legitimacy (Scharpf 1999:6, Scharpf 2006:1). However, the interrelation between the two dimensions may alter depending on the organisational structures in place. Scharpf points out that the dimensions of input- and output legitimacy are complementary and supplementary in a democratic nation-state setting. At the European level, Scharpf suggests that output-based legitimacy can be a viable way of achieving legitimacy in the absence of a European demos due to its potential effectiveness in realising consensual goals (Scharpf 1999:12,23,188).

Input legitimacy, on the one hand, relates to the procedural aspects and requires policies based on transparency, fairness, inclusiveness and accountability. It can also be described as *government by the people*. Consequently, political choices are legitimate if and because they reflect the *will of the people*. This implies that policies are originating from the preferences of the community. Output legitimacy, on the other hand, concerns the effectiveness to achieve collective problem-solving capacity and performance. This can be illustrated as *government for the people*. As a result, political choices are legitimate if and because they effectively promote the common welfare of a particular constituency. In order to achieve this result output legitimacy must accommodate the tension between on the one hand avoiding wrongdoing by governors and abuse of particular interest and on the other hand facilitating the vigorous pursuit of the common interest and effective problem-solving. The principal-agent theory concentrates on preventing the abuse of particular interests through accountability structures. Stephan Ross defines the principal-agent relationship as: “*An agency relationship has arisen between two (or more) parties when one, designated as the agent, acts for, on behalf of, or as a representative for the other, designated the principal, in a particular domain of decision problems.*” (Ross 1973:134). Accordingly, accountability is the mechanism ensuring that the agent does not

abuse his authority and acts in the best interest of the principal. In particular, the accountability mechanism in the principal-agent relationship is put in place to ensure that the agent will not abuse the authority delegated by the principal, which could infringe on the interests of the governed (Grant – Keohane 2005:32, Streets and Blattner in Eds. Bexell - Mörth 2010:61). The accountability mechanism must include the prospect of sanctions, in particular if the tasks have not been properly executed (Grant – Keohane 2005:29-30,39-40, Oakerson 1989:114). However, the control mechanism expressed through the principal-agent relations is just one part of the elements contained in the concept of output legitimacy. As a result, it is suggested that an increase of safeguards to control potential abuse of governmental power will result in a rise of veto points, which imply a decreased capacity for effectiveness (Scharpf 1999:6, Scharpf 2006:1-4).

Keohane suggests that different types of accountability assist different accountability holders (Keohane 2006:81). This subject is examined in the forthcoming section, which looks at the differences in accountability standards of public organisations and private companies.

3.4 Differences of Accountability Standards

Important for the public-private boundary is how legitimacy and accountability principles differ between these two spheres. Hurd suggests that legitimacy is a subjective quality, which is relational between the actor and institution (Hurd 1999:5). Organisation theory emphasises how the organisational form and the institutional surrounding profoundly influence the trait and characteristics of particular organisations (Svedberg Helgesson in Eds. Bexell - Mörth 2010:27). Consequently, it is worth paying attention to the differences in the organisational form of public sector organisations and private for-profit companies in the context of accountability standards.

Dingwerth and Hanrieder suggest differentiating between on the one hand public governance techniques and private governance structures on the other hand. In the case of public governance, the techniques are based on collective decision-making, while in case of private governance it is characterised by the unregulated or self-regulated interactions of individuals and collectives Dingwerth - Hanrieder in Eds. Bexell - Mörth 2010:96).

Svedberg Helgesson focussing on PPPs involving for-profit firms argues that firms “*are situated in a world of their own, ingrained with a specified set of values that differentiate them from other types of organisations embedded in other spheres and values, such as public sector organization*” (Svedberg Helgesson in Eds. Bexell - Mörth 2010:27). Particularly, it means that private businesses are directed by profit-seeking behaviour focusing on economic values. In contrast, public or political organisations must reconcile multiple goals and values. This

division of values between businesses and public organisations have been characterised by Zelizer as “hostile worlds” (Zelizer 2005). Svedberg Helgesson expresses the tension with the less value-laden concept of *separate spheres* (Svedberg Helgesson in Eds. Bexell - Mörth 2010:27). This concept emphasises that businesses enjoy a limited form of accountability, which is mainly directed towards economic values. Accordingly, if the objective of business activities is to harvest profit, this means that accountability to shareholders and investors become the central target for assessments of accountability. Furthermore, Shearer argues that accounting systems encourage or even force businesses to put economic interest first (Shearer 2002 referred in Svedberg Helgesson in Eds. Bexell - Mörth 2010:27). Brunsson highlights that this kind of restrictiveness in business operations, implies that businesses can engage in almost any activity as long as it is profitable (Brunsson 1989 referred in Svedberg Helgesson in Eds. Bexell - Mörth 2010:27).

In addition, Svedberg Helgesson examines the agent-principal relationship (discussed in the above section) in the business situation and compares it to the situation in the public organisation. In the principal-agent situation, the interests of the principal are to be promoted, while the potential opportunism of agent is to be controlled. Such control is achieved through governance structures, and as argued by Miller these arrangements are social practices with fixed constitutive capacities, which frame the way business actors and processes are interpreted and made sense of. Consequently, the way that the governance structure is designed can have important implications on agents and their behaviour. What is seldom considered in the principal-agent context is the control of the principal. This can be explained by the fact that the preferences of the principal are taken for granted. As pointed out by Perrow particularly in the business context such control could be justified due to the “*self-interest assumed to drive the model and obviously greater resources of the monitor, entrepreneur, CEO, or capitalist.*” (Grant – Keohane 2005: 32, Perrow 1986:227, Svedberg Helgesson in Eds. Bexell - Mörth 2010:28-29). It can certainly be discussed if such control should merely be limited to the business principal, or equally should apply to the public principal. On the other hand in the context of different values and the resulting distinctive accountability paradigms it is significant that the interests of business principals and public organisation principals correspondingly diverge, which can be assumed to create tension and conflict (Svedberg Helgesson in Eds. Bexell - Mörth 2010:28-29).

Svedberg Helgesson elaborates on what the divergent accountability standards signify. In particular, she illustrates that the differences in accountability “for what” give rise to important differentiations between the business organisation and the public organisation. Businesses are accountable for and driven by economic interest, which results in high flexibility in the operations i.e. businesses can define and refine their business and relevant market repeatedly as they see fit. As a result, businesses are considered to be relatively more effective and efficient in producing goods and services (Svedberg Helgesson in Eds. Bexell - Mörth

2010:29-30, Peters – Pierre in Eds. Bexell - Mörth 2010:52). This stand in contrast to the situation for the public sector organisation, who from the outset do not choose “their markets” as businesses do, rather they are limited by territorial boundaries and citizenship. More importantly, public organisations are controlled in terms of democratic accountability. Peters and Pierre highlight the crucial importance of democratic accountability, and how it is can create substantial changes in public policy and the style of regimes (Peters – Pierre in Eds. Bexell - Mörth 2010:50). Accordingly, it is essential to place considerable emphasis on the procedural aspects and input legitimacy (discussed in the previous section). The accountability standard for the public organisation must incorporate “to whom”. As such, there is a clear link between government “for the people” and that “of the people”, which does not exist for businesses. By contrast, while businesses may have liberty in choosing their business activities, they are limited by the interests they can serve though the accountability principle of “to whom”.

Consequently, when the two diverging accountability standards are to join forces in PPPs, they are not easily merged. Mörth’s analysis of PPP in the European context suggests that the tension between private efficiency on the one hand and public democratic accountability on the other hand is not addressed by the politicians or public officials. Efficiency is the key focus in the PPPs examined by Mörth. Simultaneously, democratic accountability is taken for granted based on the formal chain of delegation. This is, however, without dealing with the private actors, who are not involved in the formal chain of delegation and their accountability is not touched upon. Consequently, private actors are part of the political process without being part of the democratic process (Mörth 2009:115-116). In fact, the two different accountability models can result in trade-offs between democratic and economic forms of accountability. In the North American context of PPPs, Vaillancourt Rosenau concludes that efficiency and cost reductions frequently is achieved by setting aside gains in criteria like accountability, democracy and equity (Vaillancourt Rosenau 2000:27,220). Furthermore, due to the strong interdependence between the concepts of accountability to whom and accountability for what, the two need to be considered simultaneously. As the accountability concepts differ considerable between the private business and the public organisation, Svedberg Helgesson argues that what is considered commendable from the perspective of the common good can seldom be imagined optimal for securing economic value and vice versa (Svedberg Helgesson in Eds. Bexell - Mörth 2010:29-30).

Despite the clear differences of accountability, Svedberg Helgesson suggests at the same time that private companies might not be a homogeneous as what is frequently believed. Through the notion of “the extended enterprise” she underlines that due to the existence of multiple agency in such companies difficulties can emerge in terms of unity due to several principals with conflicting interests. Therefore, the private business can display a more or less unitary hierarchy (Svedberg Helgesson in Eds. Bexell - Mörth 2010:33-35, 37). While it is constructive to problematize the homogeneity and coherence of private

businesses as proposed by Svedberg Helgesson, the different set of accountability standards highlighting economic interest versus democratic process respectively for the private business and the public organisation as outlined above are critical differences. These distinct accountability mechanisms are very significant to consider in the further examination of the possible consequences of including education in TTIP.

3.5 Choice of theoretical framework

The normative framework has been chosen as the most apt for this study for very good reasons. As will be elaborated in further detail in the analysis, education has important consequences regarding (in)equality, the realisation of the social rights of citizenship and national identity. Consequently, it makes good sense to base the analysis on the normative force attached to education. In this manner, the theoretical framework permits realising the normative weight that education comprises and the role it plays in the construction of social life (Buckler in Eds. Marsh - Stocker 2002:179). Particularly, the differences of accountability standards for respectively the public and private sector have critical implications for the kind of democratic procedures and collective control that can be exercised (Buckler in Eds. Marsh – Stocker 2002:183). Therefore, the normative framework identifies important consequences regarding universally provided quality education.

4 The Education Case

This chapter examines some of the main policy issues in relation to the case of education. The first section looks into the special role and function of education and the second section reflects upon the different arrangements of educational spending in the EU Member States, the US and Canada.

4.1 ‘Education is Special’

This section explores the special role that education plays in the welfare state perspective. Busemeyer and Nikolai examine the relationship between education and the welfare state (Busemeyer - Nikolai in Castles et al. 2010). One important input to this debate was given by Harold Wilensky (1975), who argued that ‘education is special’ and accordingly education should be observed and analysed differently from other parts of the welfare state due to its presumably more indirect effects on equality in contrast to social policies of the welfare state.

Busemeyer and Nikolai acknowledge that there are significant differences between education and social policies, e.g. there are differences in e.g. centralised versus decentralised structures, and education entails both public and private benefits whereas other social policies to a greater extent contain predominantly social benefits. However, at the same time Busemeyer and Nikolai emphasise that education is significant in its role of indirectly and prospectively affecting the main distribution of incomes in the labour market, rather than encompassing income inequalities *ex post* in the arrangement of most social insurance policies. This so-called indirect characteristic is essential for Wilensky’s differentiating of education from other social policies as two different principles of social justice, with education as ‘equality of opportunities’ versus other social policies as ‘equality of outcomes’. Consequently, it can be argued that education is a crucial determinant of (in)equality *ex ante*. Moreover, with the advent of the ‘knowledge’ economy and the enhanced importance of human capital, such a distinction is increasingly flawed. In addition, it is essential to stress the dominant relationship that exists between educational achievements and family background. Therefore, Busemeyer and Nikolai make the case that policy intervention in the field of education is a far more significant determining factor of equality than what is suggested by Wilensky (Busemeyer - Nikolai in Castles et al. 2010: 494-495). Education does however not exist in a vacuum, and consequently the relationship between education and other policies should be considered to be complementary rather than substitutes (Busemeyer - Nikolai in Castles et al. 2010:496).

According to Marshall, the right to education is an important element in the catalogue of social rights. Marshall emphasises that “*the right to education is a genuine social right of citizenship, because the aim of education during childhood is to shape the future adult. Fundamentally, it should be regarded, not as the right of the child to go to school, but as the right of the adult citizen to have been educated*” (Marshall 1964: 81-82).

As such, Marshall calls attention to the fact that the full realisation of social rights of citizenship essentially requires the universal provision of a right to education alongside other social rights. The two different historical approaches to welfare and education of respectively the Bismarckian and the early democratisation phase in the US are illustrative. While in the Bismarckian welfare state, the provision of social insurance was an instrument, which was controlled by the ruling elite with the aim of delaying democratisation and suppressing the increasing power of labour. In contrast, during the early democratisation phase in the US the growth of education opportunities were supported, in line with Marshall’s argument due to the critical factor of education for citizenship (Busemeyer - Nikolai in Castles et al. 2010:504-505).

The growing importance of human capital transforms the organisation of education. While previously the attainment of an education or training degree played the key role throughout the individual’s life cycle, increasingly the degree must be complemented with continuous training. Accordingly, one should take into account the increased significance attached to education throughout the lifecycle, from early childhood education and care to lifelong learning and further training (Busemeyer - Nikolai in Castles et al. 2010:507).

In the book ‘*The price of inequality*’ Stiglitz addresses the growing problem of inequality in the US. When describing the overall problems of inequality, Stiglitz explains that inequality is strongly correlated with different opportunities to quality education: “*Those who graduated from the best schools with the best grades had a better chance at the good jobs. But the system was stacked because wealthy parents sent their children to the best kindergartens, grade schools, and high schools, and those students had a far better chance of getting into the elite universities.*” (Stiglitz 2012: xiv).

In other words, access to good quality education depends in the US increasingly on the income, wealth, and education of the parents. This means that only the richer part of the population can afford and benefit from quality education. Subsequently, this education is the determining factor in obtaining a quality job. In order to reverse the current trend, Stiglitz emphasises that there is a need for a “*concerted national effort*” (Stiglitz 2012:275).

While, he recognises that such a national effort will require some time, Stiglitz suggests prioritising the efforts to control the for-profit schools. In particular, to promptly introduce and implement regulations of the for-profit schools in order to secure the appropriate employment of public money. The main problem with the

for-profit schools is that while they for the most part do not increase their students' chances and opportunities they heavily indebted the students, often to the degree that students are unable to pay back the debt. At the same time the for-profit schools benefit from state subsidies to fund their education programmes, which in the best case are of questionable quality (Stiglitz 2012: 75, 108, 195-196, 275, US Senate's Health, Education, Labour and Pensions Committee report: For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success).

4.2 Educational Spending

This section will look into the patterns of spending on education in the EU Member States, the US and Canada based on data from the OECD's Education at a Glance 2013 (OECD (2013), Education at a Glance 2013). It is central to look into the differences of educational spending in order to assess the possible impact that trade rules can imply to the provision of education in the event of a TTIP agreement that includes education.

The WTO Secretariat background note on education services observes that education is normally considered a "public consumption" item, which is often provided free of charge or at prices not reflecting the cost of production. Furthermore, the WTO points out that government spending has continued the main source of educational funding in most countries (WTO Education Services Background Note S/C/W/49 1998: 3). Nevertheless, in the assessment of the OECD's Education at a Glance 2013, private resources are becoming increasingly prominent in the funding of education. Nevertheless, public funding continues to represent a very substantial part of the investment in education. This increased private funding is a clear indication that the balance between public and private financing of education is an important and contested policy issue. Private funding is particularly pronounced for early childhood education and care and tertiary education, where private funding mainly comes from households. This fact raises significant concerns regarding the implications for the equality and equity of access to quality education. The OECD raises concerns especially in relation to tertiary education. At this educational level a substantial and a growing share of private funding is apparent (OECD (2013), Education at a Glance 2013:196-198). Nevertheless, it is reasonable not to limit such concerns merely to the tertiary level. As pointed out in the quote by Stiglitz above, the quality of education attained at the previous levels is crucial for the attainment at the forthcoming levels. Furthermore, as mentioned in the above section access to education throughout the lifecycle is increasingly important, in particular lifelong learning and further training.

One key emphasis in the 2013 version of Education at a Glance is that even core sectors like education have been subject to budget cuts following the

financial crisis (OECD (2013), Education at a Glance 2013:182). While the impact of the financial crisis on education is outside of the scope of this study, it is nevertheless important to keep in mind throughout the analysis as liberalisations and privatisations are widespread consequences of such budget cuts and therefore even if the developments are taking place at different levels, such events can have a mutual reinforcing effect.

The educational expenditure includes on the one hand public spending (by governments) and private spending (by enterprises and individual students and their families). The OECD data shows that expenditure on education largely comes from public budgets, although all countries have some degree of private spending. It is, however clearly visible that private spending is considerable more noticeable in the US and Canada compared to the average level of the EU Member States. Table 4.1 displays the picture of spending on education at all levels in respective public and private expenditure as percentage of GDP. Table 4.2 presents the spending on tertiary education divided into public and private expenditure as percentage of GDP. In the case of tertiary education, table 4.2 demonstrates that the position of private spending in the US and Canada is quite pronounced. In the EU Member States the level of private expenditure on tertiary education varies considerable. It ranges from countries such as Austria and Belgium that have very low private expenditure, to countries such as the UK and the Netherlands that have much higher levels of private expenditure. Despite this variation between the EU Member States, the amount of private expenditure is nevertheless substantially less pronounced in the EU Member States on average compared to the situation in the US and Canada. This becomes evidently when comparing the columns of EU average with the ones for the US and Canada. In percentage points the private expenditure on tertiary education is 20% on average in the EU, while 64% of the expenditure on tertiary education is privately financed in the US. Another visible characteristic is the 'top position' that the US and Canada occupy in spending on tertiary education as a result of the high levels of private spending.

Nevertheless, this top position of expenditure this does not automatically correlate into a top position of quality education. In particularly, the concerns with for-profit schools in the US are illustrative in this regard. These for-profit schools charge very high students fees, but deliver education of poor quality. The poor quality can partly be explained by their distribution between profit distribution (19.4 % of revenue), marketing and recruiting (22.4 % of revenue) and teaching and training students (17.7 % of revenue). In addition, the US Senate report on *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* noted the exceptional high amounts of compensations given to the CEOs of the for-profit schools, which on average was \$7.3 million in 2009. In contrast, the five highest paid leaders of large public universities the amount of compensation averaged \$1 million (US Senate's Health, Education, Labour and Pensions Committee report: *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*:3-6).

Table 4.1

Expenditure on education at all levels as percentage of GDP
 Data compiled from "Education at a Glance 2013" (OECD)

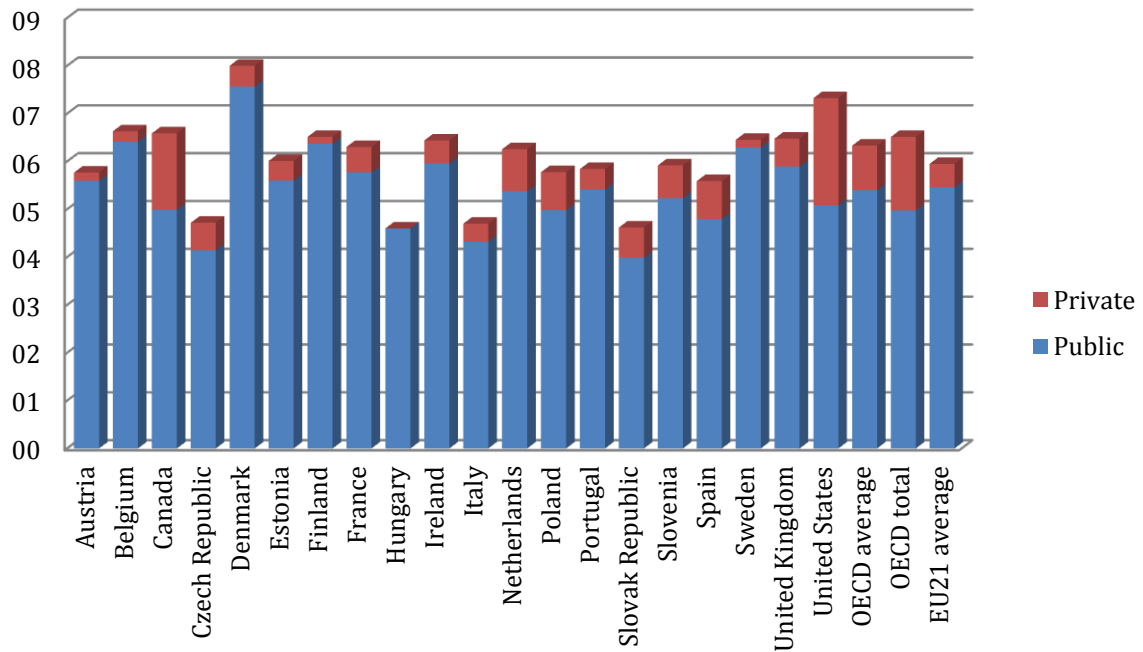
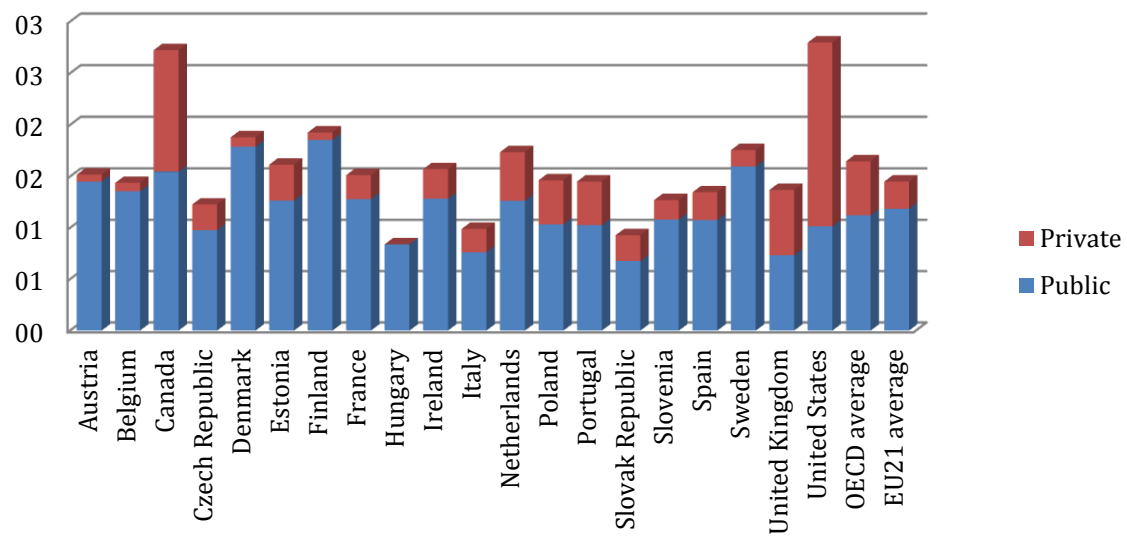


Table 4.2

Expenditure on tertiary education as a percentage of GDP
 Date compiled from "Education at a Glance 2013" (OECD)



5 Education as a Tradable Service

This chapter will analyse the potential consequences of including education into TTIP. The GATS arrangements are helpful to this analysis as TTIP is built on the foundations of GATS. Even so, TTIP are also likely to differentiate from the GATS e.g. in the listing approach to liberalisations. In addition, the intention is to include investment liberalisation and investment protection into TTIP.

5.1 GATS and Education

In this section the effects on education systems deriving from GATS will be discussed. Education is national as a matter of its *raison d'être* through the insertion and definition of ideas of social formation such as national identity, democracy and citizenship (Robertson et al. 2006:231).

In particular, Robertson et al. address education as outlined in the Keynesian welfare regime. Here, the provision of education is a major social policy item that is mainly, but not exclusively, funded and provided by the state. Conditions of universal access are linked to the right of citizenship (Robertson et al. in Lauder et al. 2006:231). As already discussed in the previous chapter education is closely related to the right of citizenship as education is not exclusively, but fundamental to this right (Marshall 1964: 81-82). However, during the last decades a shift from a national to a post-national regime in education can be observed. In particular, this shift is noticeable when examining the change in scale of governance in education. The case in point is the inclusion of education in GATS. Firstly, it involves a change from the national to (either or both) supranational and subnational levels, and secondly it is visible in the coordination of educational governance (Robertson et al. in Lauder et al. 2006:232).

This transformation means that whereas the state previously had full monopoly over all aspects of education, this is currently being limited to an unclear span of options with regulations appearing to be the only necessary element of state monopoly, and even that might be questioned. Education as a public good is decommodified, and therefore decommodified services are by definition not tradable. Fredriksson emphasises that GATS is not dealing with educational issues as educational or political matters, but merely as commercial and trade issues (Fredriksson 2004:426). Nevertheless, its political implication can be tangible. According to Robertson et al. GATS has played a major role in the process of changing the notion of education from primarily a public good

towards gradually a tradable service through the re-articulation of the nature, form and governance of education (Robertson et al. in Lauder et al. 2006:238). As pointed out in the background chapter on GATS the exemption of governmental authority, the GATS article I.3, is ambiguous due to the lack of common definitions. Accordingly, it is not even certain that primary and secondary education fall within the GATS exemption. Education systems are only exempted from GATS if they fulfil the requirements set out in GATS article I.3; which require that they must be entirely financed and administered by the state and without any commercial elements. However, not even the financing criterion is satisfied as figure 4.1 demonstrates. This is despite the fact that the financing predominantly comes from public budgets, even if the amount of private financing varies between countries. As discussed in the previous chapter, there is an apparent difference in the amount of private funding in the case of respectively the US (and to a lesser extend Canada) and the EU Member States. Moreover, it is uncertain if there remain any education systems that satisfy the conditions of the GATS exemption. Rather, most education systems are mixed systems, where the private sector plays a role, although to different degrees, and this role is in competition with the public sector. Robertson et al. furthermore argue that even the public-private test is not enough in defining whether GATS applies as school fees exist also in public systems. As a result, it may be argued that such school fees will imply that public education falls within the category of private commercial activity and therefore covered by GATS (Fredriksson 2004:426, Robertson et al. in Lauder et al. 2006:234-235, Adlung - Mattoo in Mattoo et al. 2008:52).

Although it can reasonably be argued that public education as such is not automatically excluded from the scope of the liberalisations in GATS, it does not imply that education from one day to another becomes commodified. Rather, the level of liberalisations depends on the specific commitments taken by Member States. In this regard, it is worth to notice that education is the least committed sector only after energy (WTO Education Services Background Note S/C/W/49 1998:10). Nevertheless, Robertson et al. emphasise that the dangers to the education sector consist in the prospect of a process of gradual liberalisation, whereby education will be vulnerable to pressures of commodification over the next decade. Consequently, the inclusion of education can be argued to be consistent with such a process of increasingly commodification of education. In accordance with the GATS' general framework of obligations, this pressure derives from the two key principles of most-favoured nation (MFN) (GATS article II) and national treatment (GATS article XVII). According to the MFN principle there shall be no discrimination between members of the agreement, i.e. trade concessions granted to one country must be granted to all GATS members. It is critical that the MFN principle applies to all services included in GATS regardless of whether a particular service is the object of a commitment. Accordingly, MFN implies that any measure taken by a body covered by GATS, which affects foreign services or service suppliers cannot be treated less favourable than like services or service suppliers from other members of GATS.

In contrast, the obligations of national treatment apply to the sectors listed in the Member's schedule. National treatment implies that no discrimination in favour of national providers of like service and service suppliers is accepted. According to the national treatment principal even formally identical treatment can be regarded as violating the requirement of national treatment if a particular measure still "modifies the conditions of competition in favour of domestic suppliers" (GATS article XVII:3). As national treatment relates to a broad range of national measures including measures involving subsidies, it implies that unconditional commitments on national treatment requires that subsidies must be granted on a non-discriminatory basis between national services and service providers and the "like" service and service providers of other GATS members. Here it is of critical importance that GATS indicates a very narrow definition of public services. Therefore, public services are not considered 'special' compared to other services'. In addition, it is noteworthy that "like service and service suppliers" in article XVII does not take into account the mode of supply. Accordingly, different modes of supply could be employed to offer a "like service". Consequently, if a country has made commitments on national treatment, such subsidies that it provides to its own service or service providers must be made available to foreign services supplied inside its territory regardless of the mode of supply (Colas - Gottlieb 2011:15-19, Robertson et al. in Lauder et al. 2006:235, Scherrer 2005:488,492). In the education sector, such "like services" across different modes of supply could require that the same subsidies are to be given to the local public school as to distance learning from a foreign provider. The implication of granting "equivalent" subsidies to foreign education providers as the to public education system is discussed in more detail below.

As previously mentioned the four modes of supply of GATS (please refer to chapter 2) include cross-border supply, consumption abroad, commercial presence and the presence of natural persons. The most common form of trading education is through mode 2 of consumption abroad, which for instance includes students studying abroad. There is as a consequence an increasing competition for foreign students, which is demonstrated by the marketing of higher education institutions. However, another important way of trading education is through mode 3 of commercial presence, whereby foreign education suppliers set up local branch campuses or institutions (WTO Education Services Background Note S/C/W/49 1998:7-8). According to the WTO, the longest list of barriers to trade in services can be found in the mode 3 of commercial presence. Consequently, it can be expected that it is the mode 3 that will have the greatest impact on public education. In this mode, the WTO identifies in all seven 'barriers'; (1) The inability to be recognised as a degree- or certificate granting educational institution, e.g. inability to achieve the status as a university. (2) Measures that limit direct investment by foreign education investors. (3) National requirements about setting up an institution, including national advantages such as establishment grants. (4) Nationally or professionally controlled needs tests in order to control the supply of particular types of labour. (5) Restrictions on foreign teachers. (6) The existence of government monopolies. (7) High levels of government subsidisation of local

institutions, which are not available to foreign providers (WTO Education Services Background Note S/C/W/49 1998:8, Robertson et al. in Lauder et al. 2006:237).

Two main potential consequences can be expected if these alleged barriers to trade in education as identified by the WTO under GATS, were to be removed. Firstly, the result of the commitment to GATS rules in the education sector, despite subject to the specific commitments, would generally require the right of access and operation to foreign education providers, including guaranteeing the right to invest, to be given degree-granting authority, to be eligible for government grants for their own operations or for their students, or to send in their own labour. Consequently, significant pressures on the public education can be anticipated or at the very minimum, it can be expected to profoundly affect the public nature of education. This can be explained by the very nature of the education sector, which is still primarily organised and funded by the state. Table 4.1 demonstrates that education continues to be mainly publicly funded (OECD (2013), Education at a Glance 2013). Moreover, foreign providers' access to state funding is exceptional in most countries. Therefore, foreign education providers if allowed to operate would essentially be competing with publicly funded education institutions. Consequently, Scherrer argues that foreign educational providers can be considered as discriminated against if not by intent than by the very structure of the education system (Scherrer 2005: 490). The GATS terminology of creating a level-playing field in the education sector would imply that barriers to free trade were to be removed, whereby the private sector essentially would be in a position to undermine public delivery of education by challenging government monopolies and subsidies designated to the public sector. Partly, the challenge to government monopoly in the sector is based on the assumption that government funded institutions is given unfair advantages either via direct subsidies or cross-subsidisation within an institution. As a consequence, public institutions would be exposed to considerable pressures to behave more like commercial enterprises and adopt profit-making motives instead of other motives, notably its mission of providing universal quality education. The non-discrimination concept of GATS sets substantial limitations to the scope for public and democratic choice in education sector.

In fact, Scherrer argues that the risks to public education are intensified by recent reforms implemented at the national level in many countries that tend to 'commercialise' public services due to budget constraints (Scherrer 2005:493). According to this argument, such recent reorganisation of the education sector, where private elements are playing a larger role in the provision of education and which introduces elements of profitability and competitiveness makes education even more likely to be considered to fall under the GATS rule. This is true, despite the fact that education is still predominantly publicly funded. In essence, Robertson et al. contend that the WTO through the GATS process has the potential to institute a new set of global rules in the governance of education to be implemented in national territories. Consequently, such global rules could have

the effect of transforming the state's power and the processes of development within and across nation-states (Robertson et al. in Lauder et al. 2006:237-238, Scherrer 2005:490,505). This argument focusing on the implication of these global rules of education governance resembles well with the argument in the PPP literature, which stresses that within the policy context of NPM the public sector has witnessed a paradigm shift in which it is increasingly subject to adopt business-like models of operations (Bexell - Mörth in Eds. Bexell - Mörth 2010:9-10). In fact, Scherrer even points out that such changes at the national level can reinforce the pressures from GATS on the publicly funded education sector. While it is outside the scope of this study to enter into detail on how these two processes taking place respectively at the national and global level reciprocally influence each other, what becomes clear from the education case is that there is a strong tension between the business model and the public model of supplying education. While the private model focuses on ensuring profits to CEOs and shareholders, the public model must ensure that education is supplied in accordance with democratic values including equality and equity by the universal provision of quality education. Such universal provision cannot be expected under private delivery. Principally, private companies concentrate on the "cream-skimming" markets segments that yield the biggest profit, which is fully logical and natural from the profit logic. Nevertheless, it results in markets failures, as there will be an underinvestment in those areas of education where private companies are not able to extract profits.

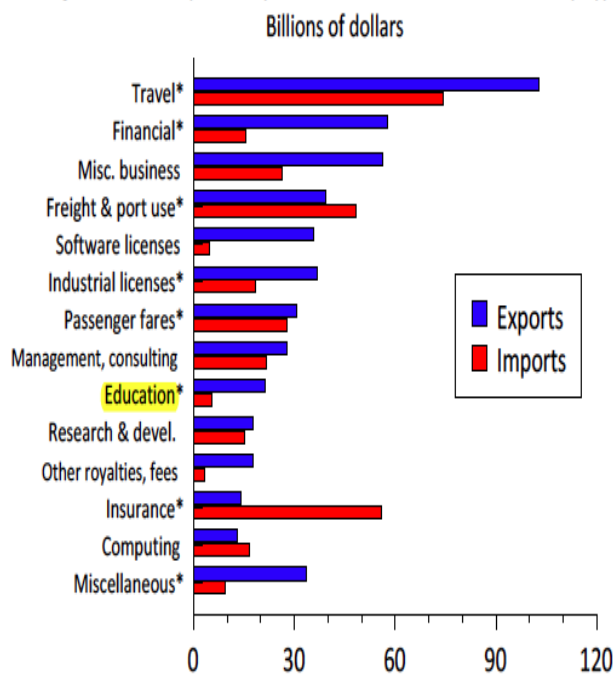
Apparently, it seems to be a puzzle to explain how an area like education, which is closely linked to citizenship and national identity, can be covered by the global rules of GATS, which are legally binding. In explaining the very influential role that GATS plays in the global governance of education, Robertson et al. argue that the main reason that GATS has been so influential is based on the exceptional standing of the WTO as an international organisation. In contrast to other international organisations, the WTO is mandated to establish binding rules governing trade between WTO members. These trade rules stretch into various areas of domestic legislation. In addition, the formation of GATS implied a set of legally enforceable rules on trade in services that included cross-border and the commercial presence in the export market. Furthermore, GATS includes a build-in agenda, which is set out in GATS article XIX stating that WTO members "*shall enter into successive rounds of negotiations to achieve a progressively higher level of liberalisation*". While governments had the option to make exemptions, such exemptions were not meant exceed a period of ten years and they would be subject to period review by the Council for Trade in Services or renegotiation every 5 year (Robertson et al. in Lauder et al. 2006: 233-234). Based on these mandatory elements, the GATS process of liberalisations is nearly irreversible as any kind of withdrawal from WTO is extremely difficult. This is because GATS in practice introduces a standstill clause where once a commitment is undertaken, it cannot easily be cancelled. From a trade perspective "the very purpose of commitments is to enhance the stability and predictability of trade and investment conditions" (Adlung - Mattoo in Mattoo et al. 2008:61). Moreover,

according to this perspective, more relaxed possibilities for modification or reversal would contradict the intentions of stability and predictability (Adlung - Mattoo in Mattoo et al. 2008:62). However, from the perspective of normative legitimacy such stability comes at a very high cost. Even if a new political majority comes to power with a mandate to withdraw certain commitments previously taken by that country, the new government will nevertheless be bound by the commitments taken by its predecessors. Scharpf argue that the requirement for legitimation differs according to the salience of the preferences that potentially are infringed. Accordingly, such policies that are infringing on profoundly held normative preferences of the governed require particular legitimating arguments (Scharpf 1999:6). Since what is at stake essentially is the *will of the people*, it must be presumed that such a permanent lock in would require particular legitimating arguments. In the GATS framework commitments can only be modified three years after the entering into force and must be accompanied by an offer of compensation to other GATS member. In practice, while such a withdrawal of certain commitments is possible they would require liberalisations in other sectors (Fredriksson 2004:428-429, Scherrer 2005:487,491, Woods – Narlikar 2001:572).

Regarding the EU's position it is noteworthy that Robertson et al. point out that until recently the EU aimed to slow down the implementation of GATS despite pressure from the US and business interest groups to accelerate the implementation (Robertson et al. in Lauder et al. Halsey 2006:234). Accordingly, if this is indeed the case, this might also have implications for trade agreements currently being negotiated including TTIP. One of the ways that the EU has held back the implementation of GATS is through its specifications and exceptions on public services in its schedule. In particular, it includes the following three measures; it limited its schedule to include privately financed services, it included a broad and non-exhaustive definition of the public sector and it reserved the right to subsidisation. Nevertheless, the major problem with these safeguards to public services is their lack of definition and specification. As a result, these restrictions only offer limited protection to education and other public services. In particular, there is lack of clarity of what constitutes a privately financed education service. Consequently, will “publicly funded” mean that 100% of the education sector must be publicly funded or should it merely fulfil for example a target of 50% public funding to be considered “publicly funded” education? This is essentially the same problem as discussed above based on the GATS exception on governmental authority. Additionally, the uncertainty of what comprises a privately financed education service is likely to be progressively challenged with an increased role of private participation and funding in the public education system. Similarly, the EU reserves the right to restrict market access to the public utilities sector, however again the problem is the lack of definition and clarity. Consequently the education sector is put in a vulnerable situation because it is not included in any of the examples given of public utilities (Krajewski 2013: 31, Scherrer 2005:504-505).

It is not very surprising to find pressures from in particular businesses to make education and other service sectors subject to the market and free trade given the very substantial expenditures in the education sector and other “sensitive” service sectors. According to UNESCO (2000) global public expenditure on education amounted to \$1386,8 billion in 1997 (Robertson et al. in Lauder et al. 2006, UNESCO 2000:118). While the UNESCO’s estimated number is indeed old, it is used here merely to give a rough indication of the amounts involved in public education. The education sector has been targeted for restructuring given its importance in terms of reproduction of labour power and in structuring national identity. At the same time, education is viewed as a potentially very lucrative sector. In particular US companies hold a strong position in the field of education services, which partly can be explained by the already relatively high percentage of private funded education services, especially in the area of tertiary education as illustrated in table 4.2. The US export of education and training reached \$8.2 billion with a trade surplus in education services of \$7 billion in 1997 (Robertson et al. in Lauder et al. 2006: 230-232). Both the US export and trade surplus in the education sector have increased greatly since the late 1990s. According to the figures (below) from the US Department of Commerce in the Economics and Statistics Administration Issue Brief #01-11, the export of education services passed \$20 billion and the US’ surplus exceeded \$15 billion in 2010 (ESA Issue Brief #01-11, U.S. Trade in Private Services, U.S. Department of Commerce, Economics and Statistics Administration). From these numbers, it is not surprising that the US insists on including education services into multilateral agreements such as GATS or bilateral agreements such as TTIP.

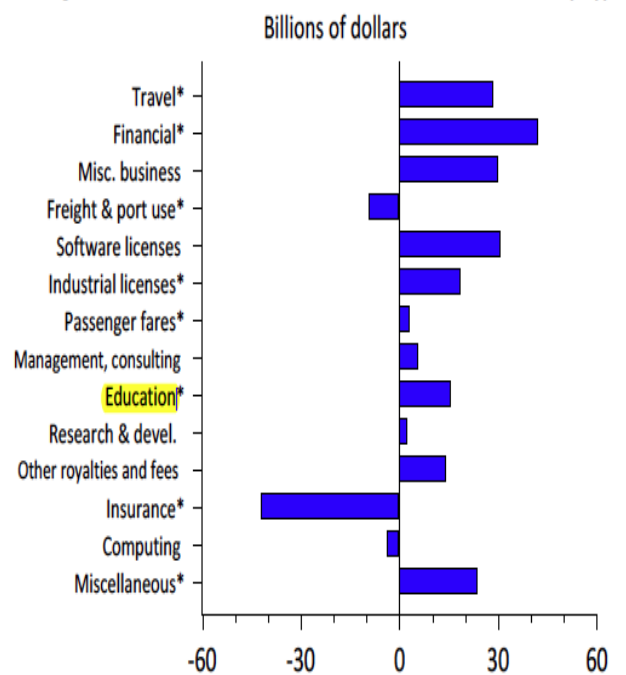
Figure 3a: U.S. Exports, Imports of Private Services in 2009-10 by Type



* 2010 data.

Source: Bureau of Economic Analysis

Figure 3b: U.S. Trade Balance in Private Services in 2009-10 by Type



* 2010 data.

Source: Bureau of Economic Analysis

5.2 TTIP and Education

This section will analyse the potential consequences of including education into the scope of TTIP. The previous section is the foundation to the analysis being carried out here due to GATS' role as constituting the fundamentals to trade agreements such as one analysed here. On top of GATS's basis, further elements of liberalisation are introduced in the "new generation" FTAs currently being negotiated by the EU, which are dubbed "GATS plus". Consequently, in the EU Directives for the TTIP negotiations it states in paragraph 3 that "*The Agreement shall provide for the reciprocal liberalisation of trade and investment in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond the existing WTO commitments*" (Council of the European Union, EU Directives for TTIP negotiations, 2013, paragraph 3, emphasis added).

The US's chief negotiator, Dan Mullaney, has publicly stated the intention of the US to expand liberalisation for all education services in TTIP at the chief negotiators' briefing during the fourth round of negotiations. Similarly, in the EC consultation on education services to Member States via the Council's Trade Policy Committee (TPC) it is stated "*the US flagged interest in privately-operated adult and other education services*" (EC Consultation to the Trade Policy Committee (Services and Investment) on education services 2014:1). Moreover, the consultation clearly sets out the objective of the US to reach a TTIP agreement with no reservations on market access and national treatment (EC Consultation to the Trade Policy Committee (Services and Investment) on education services 2014:1). Before elaborating in detail on the case of education in the currently negotiated TTIP, the broader framework, which the TTIP negotiations is part of, is presented.

Regarding the significance of FTA's on the characteristic of public services Krajewski emphasises that the tension between international trade and public services is not predominantly a highly technical discussion about very specific details. Rather, it concerns the very future of public services, so-called "services of general interest", and the impact on regulatory autonomy and public policy space from trade policy (Krajewski 2011:6, Krajewski 2013:4-5). Public services are part of the public-private contestation, which implies that public services are continuously evolving over time. In the context of NPM, this contestation has resulted in considerable marketisation of sectors that used to be core public service sectors (Bexell - Mörth in Eds. Bexell – Mörth 2010:9-11). However, recently developments point in the opposite direction with re-municipalisation in some countries (Krajewski 2013:4). Moreover, the contestation will play out differently across societies, who will find different solutions to the public-private contestation and consequently the specific character of public services differentiates across space. In other words, public services are characterised by its dynamic and flexible nature both across time and space (Krajewski 2013: 28). The

exemptions of public services in trade agreements must take into account and incorporate these characteristics in order to provide the necessary space for the constant contestation of the public-private sphere, which is a basic condition of politics and democratic decision-making. At the same time, the exemptions of public services must be clear-cut to ensure the de-facto exclusion of public services under legally binding FTAs. The EC has acknowledged that the relation between public services and international trade is controversial and topical in two internal papers (Krajewski 2013:4). In the Reflections Paper on Services of General Interest the problems concerning public services under the GATS approach is affirmed. Consequently, it is mentioned that there is a need for greater legal certainty as no commonly agreed definitions of neither public utilities nor public services exist (European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists) 2011:1). Nevertheless, officially the EC does not acknowledge this uncertainty for public services, but stresses instead that public services are recognised in EU law and therefore protected in international trade (DG Trade, Protecting public services in TTIP and other EU trade agreements). Krajewski similarly highlights that the EC has a legal obligation to respect the special role of Services of General Interest in EU FTAs due to its status as a common constitutional value of the EU and its Member States as specified in article 14 TFEU and Protocol No. 26 on Services of General Interest (Krajewski 2013:3-5). The EU Directives for the TTIP negotiations similarly refers to the obligation of preserving the Services of General Interest (Council of the European Union, EU Directives for TTIP negotiations, paragraph 19).

Nevertheless, the GATS plus agreements aim to undertake further liberalisations, which poses potentially serious consequences for public services. These "new generation" FTAs differ from the GATS approach in the structure of specific commitments, the emergence of new rules on sectoral regulations and competition, and the increasing inclusion of investment and investment protection. (Krajewski 2013:3-4). Before examining the likely consequences of those new elements, the specific commitments proposed for the education sector in TTIP will be discussed in the following part. It is the specific commitments on educational services that provide important indications of the likely consequences for the education sector. Previously, education has been one of the least covered sectors only after energy (WTO Education Services Background Note S/C/W/49 1998:10). Nevertheless, ensuing from the intention to achieve ever-greater levels of liberalisation in GATS, the real vulnerabilities faced by the education sector consists in intensifying the level of liberalisation in a gradual, but ever-increasing manner. While this expected process of gradual liberalisation has received rather disappointing results from a trade perspective in the GATS context (Adlung – Mattoo in Mattoo et al. 2008:74-75), it appears that new fora are being provided for such purposes, particularly in bilateral FTAs like TTIP or plurilateral trade negotiations like the Trade in Services Agreement (TiSA). While, the current analysis is limited to examining the possible consequences of including education into TTIP, there are noticeable similarities, which is apparent from the fact that

while the previously mentioned consultation on education services concerns primarily TTIP negotiations, the consultation states that the issue is similarly relevant for the TiSA negotiations (EC Consultation to the Trade Policy Committee (Services and Investment) on education services 2014:1-2). As previously mentioned the US has clearly stated that the intention is to expand liberalisation for all education services in TTIP. Furthermore, the US aims to reach a TTIP agreement with no reservations on market access and national treatment in privately adult and other education services. On market access, the US aims in particular to excluding quotas and economic needs tests and concerning national treatment the US is particularly keen on excluding nationality or local presence requirements (EC Consultation to the Trade Policy Committee (Services and Investment) on education services 2014:1).

The negotiations are still at an early stage in the service area. So far the EU and the US have exchanged their offer on trade in services and investment and discussed the respective offers. According to the EC's State of Play document published after the 6th round of negotiation in July, these offers need further discussion (EC State of Play of TTIP negotiations after the 6th round 2014:2). The EU's TTIP draft services and investment offer of 26 May 2014 mirrors the EU's horizontal limitation included in GATS. In both schedules the scope of the commitments on education services applies exclusively to privately funded education services. In addition, privately funded other education services are excluded from the obligations (WTO Communication from the European Communities and its Member States, Draft consolidated GATS Schedule S/C/W/273 2006:170-171, 440-441, TTIP draft offer on services and investment 2014:18, 80). As emphasised previously in the context of GATS, the EU's commitment to privately funded education services without defining what is exactly understood by the term causes considerable uncertainty regarding future interpretation. The definition of privately funded education has potentially important consequences for the public education sector. Public education is mainly publicly funded, but contains different levels of private funding as visualised in table 4.1. Furthermore, private financing is on the increase in many public education systems (OECD (2013), Education at a Glance 2013:196). Increased private financing may further complicate the already blurred line between publicly- and privately funded education. Moreover, recent domestic reforms implemented in a number of countries, which tend to 'commercialise' public services and make public services 'profit-oriented', add to the likelihood that public services will be challenged as privately funded education services under international trade agreements (Scherrer 2005:504-505). As a result, the exception on privately funded education gives a limited and possibly even a decreased limited protection to the public education sector based on recent domestic reforms.

In the revised edition of the EU's initial TTIP services and investment offer of 30 June 2014, the limitation to privately funded education services is specified in more detail and reads "*The EU reserved the right to adopt or maintain any*

measure with regard to education services which receive public funding or State support in any form, and are therefore not considered to be privately funded (CPC 92) and with regard to privately funded other education services (CPC 929)” (EU’s TTIP initial offer on trade in services and investment 2014:21). Krajewski points out that some of the uncertainties concerning what constitute publicly funded versus privately funded education and therefore the insecurity exposed to public education by subjecting it to the legally binding FTAs can be avoided by adding “which receive public funding or State support in any form”, as the scope of the exemption would include fully and partially State-funded institutions (Krajewski 2013:31).

However, a complete carve-out would yield better protection to public education. Carve-outs are located in the framework agreement and it applies similarly to annexes and later revisions of the agreement. As a result, the carve-out offers the most far-reaching scope of the possible exemptions in FTAs. In contrast, in the EU’s initial TTIP offer on trade in services and investment the limitation on privately funded education services is spelled out in the horizontal commitments (quote above), while the sector-specific commitments merely state that commitments apply to privately funded services. As explained by Krajewski due to the different application of the exemptions the broadest scope is provided in the carve-out, while the coverage of the exemption decreases first in the sector-specific commitments and then decreases additionally in the horizontal commitments (Krajewski 2013:32-33). Consequently, the exemption provided to public education in the EU’s TTIP offer is rather narrow in scope. Previously in the context of GATS, the US has requested the EU to undertake further commitments in the education sector, however Scherrer argues that so far the US has not made commitments to the same extent as the EU has already undertaken in the education sector (Scherrer 2005:502). During the last round of GATS negotiations other countries, possibly including the US, requested among other things the EU to make commitments in higher education and adult education in general without the limitation on privately financed services (Scherrer 2005:502), thereby essentially open those part of the education sector entirely up to trade. Traditionally, the EU does not take any commitments on other education services due to the open-ended definition of these services “*covering all other education services not elsewhere classified*” (WTO Education Services Background Note S/C/W/49 1998:15, Scherrer 2005:502). This tradition is continued in the EU’s TTIP draft offer on services and investment (2014:18), despite the US interest in privately-operated other education services (EC Consultation to the Trade Policy Committee (Services and Investment) on education services 2014:1).

From the draft TTIP offer and the initial TTIP offer on services and investment it is apparent that negotiations in this area are at a rather early stage. In the EU’s initial TTIP offer on trade in services and investment of 30 June, the offer reserves the right to possible modifications of commitments due to the unprecedented scope of TTIP (EU’s TTIP initial offer on trade in services and investment 2014:1-2). Nevertheless, the early stage of this part of the negotiations,

comparing the Member States' sector-specific commitments in respectively GATS and TTIP expose a trend of decreasing levels of limitations concerning privately funded services. While Member States in GATS² included specific limitations generally on all modes of supply, in the TTIP draft offer such limitations are generally limited to commercial presence and presence of natural persons (WTO Communication from the European Communities and its Member States, Draft consolidated GATS Schedule S/C/W/273 2006:160-171, 432-441, TTIP draft offer on services and investment 2014:18-19,78-80). As previously discussed, commitments in mode 3 would imply the biggest pressures on the education sector. The increased scope of commitments in the education sector is significant on its own, but it could be further increased or decreased during the negotiations, depending on the relative strength between the negotiation partners and the importance attached respectively to preserve exemptions versus to achieve liberalisations in the education sector, but also how the negotiations on other issue areas eventually play out. Previous trade negotiations demonstrate that the critical part of the negotiations take place at the very end of the negotiations and at such a point in time different issue areas are connected into so-called package deals (Scherrer 2005:506). According to comments made by the outgoing EU Trade Commissioner, De Gucht, during a press briefing on 9 September 2014, it is likely that the US prefers the approach of "one big end game". Such an approach would aim at making trade-offs across all sectors in a rather late stage of the negotiations (Inside U.S. Trade 12/9/2014).

The analysis will now turn to how these new elements of the "new generation" FTAs will affect the education sector. The method of scheduling, the ratchet and standstill mechanism, regulatory cooperation and investment protection will be analysed below. In order to comprehend the possible consequences of including education into the scope of the TTIP agreement, it is critical to access the impact of the method of scheduling. The two main approaches to scheduling are the "positive list" and "negative list". Krajewski emphasises that the differences between the two approaches is significant, in particular in the case of public services, even if the exact scope of the disciplines will depend on the level of the commitments adopted (Krajewski 2013:9). In contrast, the EC argues that these two different approaches of scheduling do not have implications on the protection of public services (DG Trade, Protecting public services in TTIP and other EU trade agreements). The EU has previously used the positive list in accordance with the GATS approach as described above, however this is not the case with TTIP and CETA. In CETA a negative list approach is adopted, while in TTIP the EU's service offer applies a hybrid approach consisting of a negative list regarding national treatment and a positive list regarding market access.

² The consolidated GATS schedule referred to here covers 25 of the EU's Member States. Nevertheless, this schedule has not yet entered into force. As the EU's previous GATS schedule covers just 15 of the EU's Member States, the consolidated schedule of 2006 is used here in order to compare the EU's TTIP offer on services with the EU's GATS schedule.

Nevertheless, the US generally adopts the negative list approach in its FTAs including in the North American Free Trade Agreement (NAFTA) (Krajewski 2013:9-10, 37-38). Therefore, it can be assumed that the US prefers to maintain this approach in the TTIP negotiations. The US's chief negotiator, Mullaney, showed dissatisfaction with the EU's hybrid approach highlighting that the US thinks TTIP should be based on the negative list approach during the press conference of the sixth round of the TTIP negotiations on 18 July. The EU has defended its approach based on the US's refusal to give a detailed list of sub-federal restrictions to service providers in states and local jurisdictions (Inside U.S. Trade 25/7/2014). In other words, the EU has signalled that its hybrid approach is not definite, but part of the negotiating tactics and consequently could be changed depending on the level of market access to the US sub-federal level.

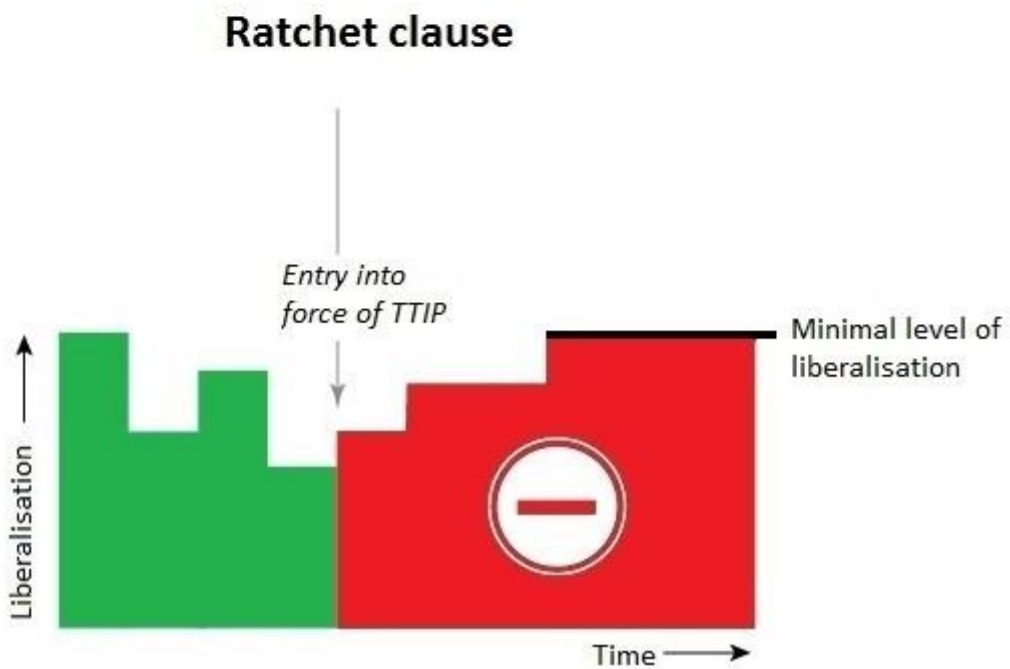
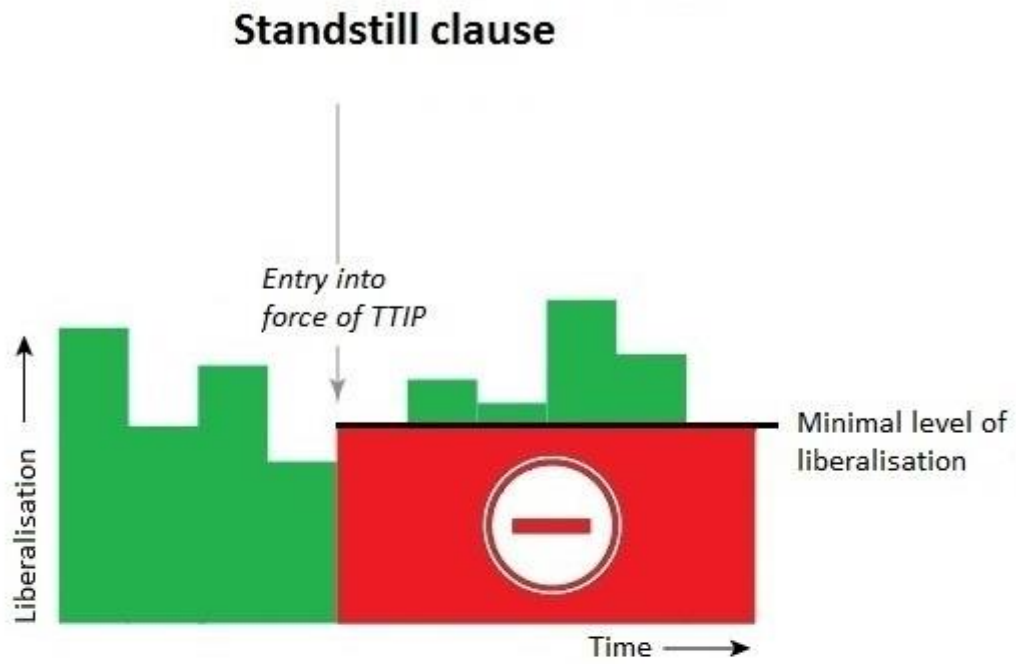
In the positive list approach the sectors to be liberalised are listed. This means that core obligations like market access and national treatment apply only to the sectors listed, and these sectors are subject to the conditions included in the list. In contrast, the negative list applies the core obligations in an overall manner, and sectors will only be excluded if explicitly listed in annexes to the agreement. Moreover, regulatory flexibility is restricted because current and future policy space will merely apply to those measures that are positively listed in the annexes. This is the reason why the negative list is termed "list it or loose it". Typically, the negative list differentiates between two kinds of reservations, which are linked respectively an Annex I and Annex II of the agreement. The measures listed in Annex I contain the existing measures that do not follow the core obligations. Countries can maintain, reintroduce and revise the measures, however only as long as they retain the same level of conformity to the obligations of the agreement. This results in the so-called "ratchet effect", which means that future liberalisation measures become automatically locked in and therefore it contains a strong tendency towards liberalisation. The EU Directives for the TTIP negotiations are quite clear in this respect, it reads: "*The aim of the negotiations on trade in services will be to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTA*" (Council of the European Union, EU Directives for TTIP negotiations, 2013, paragraph 15). In concrete terms it means that if a country listed a specific measure in its Annex I reservations 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, which would decrease the conformity of the measure. The measures listed in an Annex I can only be revised in accordance with trade agreement i.e. in a more liberalised way (Krajewski 2013:9-11, 31). Essentially, the reservations made to protect public services will gradually disappear over time (Krajewski 2011:11) In the education sector, a possible scenario could be that a government in EU decides to privatise part of its education sector due to financial constraints following the entry into force of TTIP. As a result of that privatisation the government would have increased its level of commitments in TTIP and continuously be bound by this increased level

of privatisation. In the EC consultation on education services, it asks specifically to which other education services Member States have autonomously liberalised (EC Consultation to the Trade Policy Committee (Services and Investment) on education services 2014:3). In the context of the ratchet clause, the issue of autonomous liberalisations is highly important given that such autonomous liberalisations would be automatically locked in TTIP. The ratchet mechanism is displayed in the lower part of figure 5.1.

In the Annex II existing and future measures inconsistent with the core obligations are listed. The future policy space depends on the reservations made in the Annex II. In the case, that no reservations are made in the Annex II, this would mean that the country is bound to keep the status quo (Krajewski 2013:11). As argued by Krajewski the ratchet clause is of particular importance for public services (Krajewski 2013:10). In particular, because public services have been subject to policy reforms in many EU Member States, where traditional public service sectors have been subjected to privatisation or marketisation. Such changes at the European level is also emphasised by Mörth, who demonstrates the remarkable changes that have taken place in the public utilities structure based on the conviction that the public sector ought to adopt a business-like model of operation (Mörth 2010:9-11). More broadly, public services are part of the constant policy contestation over the demarcation between public and private (Bexell - Mörth in Eds. Bexell - Mörth 2010:9-10), and consequently such a lock-in would essentially freeze the possibility for continued contestation in this important policy field.

The standstill mechanism requires that the level of liberalisation be locked in at the level set out in the FTA. GATS also contained a de facto standstill mechanism because commitments are vastly difficult to change. The GATS framework contains the requirement that such modifications must be accompanied by an offer of compensation to other GATS members (Fredriksson 2004:428-429, Scherrer 2005:487, 491, Woods - Narlikar 2001:572). The standstill mechanism is presented in the upper part of figure 5.1. Both the standstill and ratchet clause restrict very considerably the government's decision-making powers. Essentially, the democratic decisions of a particular country are fixed according to the commitments previously undertaken, and even a new democratically elected government cannot change commitments made by its predecessors. The public policy space is accordingly confined to that of ever increasingly liberalisation. While, the de-facto standstill mechanism included in GATS implied a very considerable encroachment of the public policy space based on democratic decision-making, this encroachment is further intensified with the inclusion of the ratchet clause in TTIP. While stability and predictability may be desirable from a trade perspective, it comes at exceptionally high costs in terms of normative legitimacy, in particular in terms seen from the perspective of input legitimacy. Such cast-iron predictability appears problematic even from the standpoint of output legitimacy focusing on the effectiveness in promoting the common welfare of the constituency.

Figure 5.1 - Standstill and Ratchet Clause



As this form of normative legitimacy focuses on the collective problem-solving capacity and performance, it is critical that there exists policy space to adjust to new development and changes of the constituency, however with the standstill and ratchet clauses such possibilities are substantially limited.

It is suggested that the main economic benefits of TTIP will come through regulatory cooperation in the form of common rules, standards and procedure and in particular by reducing regulatory barriers to trade (DG Trade: About TTIP, DG Trade: The Regulatory Part, OECD TTIP: 3). According to an EC publication such gains would come from cutting red tape and having more coordination between regulators (DG Trade, The Regulatory Part 2013:2). The EU's Directives for the TTIP negotiations says in this regards that TTIP "*will aim at removing unnecessary obstacles to trade and investment, including NTBs, through effective and efficient mechanisms, by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators*" (Council of the European Union, EU Directives for TTIP negotiations, 2013, paragraph 25, emphasis added).

In the EC position paper on regulatory cooperation the methodology of such cooperation is explained rather detailed: "*Upon a specific request of one Party the other Party should offer to enter into a dialogue, providing information on possible options and impacts, and react to written comments of the requesting Party. Parties shall explore possible concrete means to get to compatible outcomes or coordinated approaches, where appropriate, which achieve their respective regulatory objectives pursued, including the level of protection deemed appropriate on either side, while avoiding negative impacts on international and in particular transatlantic trade*" (DG Trade: Position Paper – Chapter in Regulatory Coherence 2013:2). Furthermore, it is made clear that the transatlantic discussion on future legislation shall take place as early as possible and importantly these discussions shall take place before the adoption of the legislation (DG Trade: Position Paper – Chapter in Regulatory Coherence 2013:3). Moreover, there is a proposal to establish a *Regulatory Cooperation Council* as part of the regulatory cooperation. Such a Council would bring together representatives of regulatory agencies in the EU and US in order to monitor the implementation of commitments made as well as to consider new priorities for regulatory cooperation including joint development of future regulations and early consultations on regulations (Council of the European Union, EU Directives for TTIP negotiations, 2013, paragraph 25, DG Trade: Position Paper – Chapter in Regulatory Coherence 2013, The Transatlantic Colossus 2014:86-88).

This objective of "removing unnecessary obstacles to trade" is highly controversial as it implies the need to access whether a particular regulation is "unnecessary" or "more burdensome than necessary". GATS (GATS art. VI:4)

also included the possibility to set up such regulatory disciplines. While none of these disciplines were included into GATS except for accountancy services (Krajewski 2011:14), GATS article VI:4b sets out that measures shall not be “*more burdensome than necessary to ensure the quality of the service*” (GATS VI:4b).

The disciplines on domestic regulation are potentially reducing the government’s regulatory autonomy substantially. This is because the purpose of regulatory cooperation is to make sure that domestic regulations including licensing rules and technical standards are no more burdensome, i.e. no more trade restrictive than necessary (Krajewski 2011:14). Essentially, such regulatory coherence would require that governments, if challenged, would have to prove that their regulations are not more trade restrictive than necessary and that they are needed to achieve a specific public policy objective. In a trade agreement aiming at increasing liberalisations the threshold for what is considered necessary may be set at a very high level. Accordingly, in the case of Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, the WTO panel ruled considering the implication of “necessary” to mean that “*there were no alternative measures consistent with the General Agreement or less inconsistent with it*” (Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, DS 10/R-37S/200:§ 75). Despite the fact that the EU Directives also states that regulatory cooperation “*shall be without prejudice to the right to regulate*” (Council of the European Union, EU Directives for TTIP negotiations, 2013, paragraph 25), it is nonetheless very controversial to include regulatory cooperation as such procedures implicate that the trading partner will be given at least some say concerning the regulations of its sovereign partner. Regulations are essentially the political choices of its community and achieved through democratic deliberation and decision-making. Moreover, regulations aim to achieve certain societal objectives, e.g. delivering nationwide universal quality education. However, regulatory coherence with its insistence on the necessity of the regulation may consider that those domestic regulations like universal service obligations could be too excessive to ensure the quality of the service (Krajewski 2011:14). Especially, if the ruling in the WTO case referred above is to be applied to public services, including the education sector, with the requirement that there were no other alternative measure consistent or less inconsistent with TTIP, it would result in significant constraints on the liberty of action concerning domestic regulations. More generally, it would imply considerable constraints on the input side of political legitimacy with its focus on inclusion, participation, representation and deliberation to reflect the preferences of the community.

Scharpf argues that output legitimacy can play a more important role in the absence of input legitimacy at the European level (Scharpf 1999:12,23,188). Consequently, if it can be argued that regulatory cooperation can effectively achieve the common welfare, it would be able to compensate for the lack of input legitimacy that such regulatory disciplines imply. Still, it is questionable that the common welfare of the EU and US will effortlessly coincide. Moreover, while

Scharpf argues that the political legitimacy is based on the two dimensions of respectively input- and output legitimacy, he simultaneously points out that such policies that interfere with profoundly held normative preferences would need particular resilient legitimating arguments (Scharpf 1996:6,12,23,188). As regulations goes to the heart of the sovereign state's autonomous decision-making it would likely require very resilient arguments as to why the state should engage in regulatory cooperation that gives the other party the possibility to question the design and content of its regulation.

Investment is the last element relating to the “new generation” FTAs of the EU being considered here. After the entry into force of the Lisbon Treaty investment is part of the EU's Common Commercial Policy, which is an exclusive EU competence (TFEU article 3(1)). Accordingly, investment is also included into the scope of TTIP. The aim in TTIP is to “*negotiate investment liberalisation and protection provisions including areas of mixed competence, ..., on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date.*”(Council of the European Union, EU Directives for TTIP negotiations, 2013, paragraph 22).

Investment protection is one of the main controversies in TTIP, in particular the possible inclusion of the investor-state dispute settlement (ISDS) mechanism. Following the huge amount of criticisms to include ISDS into TTIP the EC launched a public consultation on the issue on the 27 March 2014. The public consultation was closed on 13 July 2014. However, the EC does not expect that the analysis of the public consultation will be finalised before November 2014 as it received the unprecedented number of submission of 150.000 (DG Trade, Primary Report: Online Public Consultation on ISDS in TTIP:1,5). The EC argues for the inclusion of ISDS in TTIP by pointing out that EU Member States already are party to approximately 1400 international investment agreements (IIA) and that nine Member States also have bilateral investment treaties (BITs) with the US (DG Trade, Questions and Answers, Why is the EU including Investor to State Dispute Settlement in TTIP). However, all of these EU Member States that have BITs with the US concluded them before their accession to the EU (EPC Policy Brief 2014:2). Moreover, the inclusion of ISDS in TTIP would mean an extensive expansion of ISDS. Currently, the BITs in place between EU Member States and the US cover as little as 1% of US foreign direct investment (FDI) stock and 0.1% of the EU FDI stock in the EU (UNCTAD IIA issues note 2014:1). ISDS is so controversial because foreign investors through ISDS provisions are enabled to sue the host state based on before arbitration panels, established under the aegis of arbitration centres such as the International Centre for the Settlement of Investment Disputes (ICSID) (The Transatlantic Colossus 2014:76-79). An investor can make claims under ISDS based on perceived violations of rights given to the investor, such as protection against discrimination, direct and indirect expropriation, and unfair and inequitable treatment (EPC Policy Brief 2014:1).

The contrast between ISDS arbitration on the one hand and international human rights law is striking. In the latter there is no mechanism to force the government to meet its commitments to for example ensuring the child's right to education, but the only instrument available is to make suggestions and general recommendations to the government (Frederiksson 2004:429), while under ISDS a private company can by the use of ISDS eventually force the government to pay huge amounts in compensation based on the alleged deprivation of market access following e.g. the tightening of quality standards to be fulfilled in order to provide education services. Moreover, ISDS gives exclusive rights to foreign investors that are not available to domestic investors or citizens. In particular, foreign investors do not need to exhaust the domestic court system, before taking its case to ISDS.

In addition, there are concerns that the vast cost of defending ISDS cases, which on average is \$8 million, as well as the very high amounts of ISDS awards, may deter governments from pursuing future policy goals or taking regulatory measures that may have an impact on foreign investors and it therefore will result in a regulatory chill effect. In order to assess the possible consequences for the education sector it is particularly relevant to consider that the education sector is a highly regulated sector consisting of quality assurance requirements and licensing requirement. Considering ISDS cases of the past where investors were awarded tremendous amounts based on very limited or no real investment, it makes such possible challenges in the case of the education sector all the more problematic. This can be illustrated by the Al-Kharafi versus Libya case, where the investor was awarded \$935 million in lost profits based on an investment of \$5 million (EPC Policy Brief 2014:2).

As demonstrated by Van Harten in the analysis of 140 known cases under investment treaties until May 2010, there have been a strong tendency towards expansive rulings in previous ISDS arbitration, which enhanced the compensatory awards to investors and, in turn, the risk of liability for respondent states (Van Harten 2012:214,251). The possible inclusion of ISDS in TTIP could therefore have critical implications on the education sector. ISDS would expose Member States and education systems to private sector initiated legal disputes. With ISDS private education providers would be given new legal rights to challenge ambiguities and inconsistencies in the application of TTIP rules, and consequently the likelihood of claims against Member States for alleged infractions of such disciplines are expected to rise. As demonstrated by Van Harten's study there is a strong tendency towards expansive rulings in ISDS arbitration, which results in greater risk of liability for sovereign states (Van Harten 2012:214,251), and therefore a costly affair for states. The difference between ISDS arbitration and WTO's dispute settlement procedure is significant. In contrast to ISDS, the WTO dispute settlement requires that a WTO member take action and demand that the other WTO member fulfill its obligations. The case can only be referred to the WTO's settlement mechanism after the other WTO member has had the possibility give its answer to the complaint. As pointed out by Scherrer there have

only been very few cases of dispute settlement under GATS and of those only two went to the formation of a dispute panel. Also, there has been no single case based on education (Scherrer 2005:488). It is arguably the case that the member-to-member dispute settlement process built into the WTO agreements, including GATS, prevents many frivolous or vexatious cases. Furthermore, it has been speculated that the lack of any dispute over the interpretation of GATS article I.3 may be due to the perceived self-interest in all states of protecting their own regulatory space. However, the self-interest of individual investor would not bar ISDS cases concerning the state's regulatory competences, rather the opposite as cases from particular developing countries have demonstrated.

In summery, while the commitments on privately funded education services give rise to uncertainty concerning what will be understood to constitute public education, the new disciplines and rules of the TTIP significantly deepen and extend those commitments and therefore taken together exposes the education sector to serious risks. More broadly, taking together these elements of the “new generation” FTAs they constitute very substantial constraints on the autonomous decision-making of the sovereign state. Such constraints are of particular importance in the case of the education sector as it is a highly regulated sector.

6 Conclusions

The objective of this thesis has been to examine the potential consequences of including the education sector into a future TTIP agreement. The analysis found that serious consequences in terms of marketisation and privatisation could be the result of including education into TTIP based on two circumstances.

Firstly, the level of commitments on education is fundamental to the possible risks posed to the education sector. The EU's commitments follow the EU's approach to education since the GATS, which is to include privately funded education services. At first sight this seems a rather good approach and seems to indicate that public education would not be assigned to perform pursuant to the trade regime. Nevertheless, the safeguards to the public education sector based on this approach is actually limited due to the lack of definitions of what constitutes respectively privately funded education and publicly funded education. The resulting uncertainty may be further challenged due to recent reforms at the national level introducing elements of "competitiveness" in the public sector including education. Even in the improved and more qualified version included in the EU's initial services and investment offer (EU's TTIP initial offer on trade in services and investment 2014:21) the problems are not evaded, as this criterion would not apply to the agreement in its integrity. Furthermore, the analysis has shown that there is a silent erosion of the limitation taken by individual EU Member States. While the Member States in GATS included limitations across different modes of supply, in the TTIP offer on services such limitations apply mainly to the commercial presence and presence of natural persons. This demonstrates the process of gradual but increasing commitments in the education sector.

Secondly, TTIP intends to include new disciplines and rules with the aim of increasing the level of liberations. In particular, it concerns the ratchet and standstill clause, the regulatory cooperation and finally the ISDS mechanism. Taken together these new elements are deepening and extending the commitments made in the education sector with potentially serious consequences. It is the case that such rules and disciplines are not particularly intended for the education sector, but applies horizontally to all issue areas to be covered by TTIP. The very unique characteristics of education explain why its inclusion under such rules is very unfortunate. Firstly, education plays an essential role for the fulfilment of the social rights of citizenship. Accordingly, the full realisation of social rights requires universally provided education. Education also plays an important role in structuring national identity. Secondly, education works as an influential deterrent of (in)equality *ex ante*. Moreover, with the appearance of the

'knowledge' economy and the enhanced significance of human capital, education is becoming increasingly important. US companies hold a strong position in the field of education services, which is apparent from the growing export and surplus of these services since the 1990s. It can be argued that the US advantage in education services can be explained by the already relatively high percentage of private funded education services, especially in the area of tertiary education. Also, it is no coincidence that the US is particularly interested in including adult and other education services in the context of TTIP and similar trade negotiations, as the potential future profits in these areas of education are likely to be very substantially based on the need for continuous education and training and lifelong learning.

However, markets have proved to be inefficient in providing universal education and result in market failures based on asymmetrical information concerning its quality. The framework of normative legitimacy gives insight into how public organisations and private companies pursue distinct forms of legitimacy with important consequences for the provision of universal quality education. It is particularly critical in this respect that the private for-profit firm is "*situated in a world of their own*" (Svedberg Helgesson in Eds. Bexell – Mörth 2010:27). In concrete terms it implies that private for-profit businesses pursue the profit-seeking behaviour focusing on economic value. As a result, the private companies follow a limited kind of accountability compared to the accountability mechanism of public organisations based on democratic accountability standards. Accountability standards of private for-profit companies focus on the economic values of reaping profits and such accountability is directed towards the shareholders and investors of the private companies rather than to the broad publics affected by the activities of these companies. As business activity focuses on the profitable market segments this implies that when applied to the education sector the market mechanisms will result in inadequate provision of universal quality education. Moreover, there is the issue of how the principal i.e. the CEO is controlled in the case of for-profit companies. The example of for-profit schools in the US shows some clear unbalances based on the extraordinary high amounts that were rewarded to the CEOs. When combined with rather low levels of expenditure towards the actual teaching and training of students, such extravagant rewards of CEOs becomes very problematic and shows how for-profit companies are not the effective and efficient actors they are sometimes assumed to be.

In contrast, the accountability standards for public organisations are markedly different with the emphasis on democratic accountability based on democratic procedural characteristics and the importance of input legitimacy. Consequently, with the marketisation and privatisation of education this results in a distinct kind of accountability, which focuses on economic values rather than democratic procedures and equity that public organisations are directed by. In the case of MNCs, the accountability discrepancy is particularly pronounced based on these companies' significant economic power, which translate into substantial political influence. Nevertheless, MNCs are not democratically accountability for their

activities and as a result there is an accountability gap regarding the activities of MNCs. While it is beyond this scope of this thesis to solve the lack of democratic accountability for for-profit companies in general and MNCs in particular, this is an important area to consider for further research.

This study is constrained in the way that the material underlying the analysis is mainly based on EC sources, however it attempts to engage as much as possible with the US side of the TTIP coin. However, it is obvious that in order to succeed in showing the complete picture it would have been valuable to have more insight into the US' position, goals and possible sensitivities in the area of education. Nevertheless, despite this limitation it is still worthwhile to evaluate how education may be affected in crucial ways by TTIP at this still rather early stage of the negotiations.

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