

Trading Away Human Rights? The GATS and the Right to Education: a legal perspective

Pierrick Devidal

Chonas L'Amballan, France

Abstract

The right to education is a fundamental human right which also constitutes one of the most precious tools of our societies to face the challenges of the future. In the context of globalization, its progressive realization seems to be hindered by the development of the neo-liberal agenda promoted by international economic organizations. However, international human rights law provides the rules which guarantee the protection of the right to education from the nefarious developments of trade in services. Therefore, education must be protected from economic integration and taken out of the GATS and the realm of action of the WTO. The difficult realization of the right to education can be achieved by international public cooperation based on the human rights principles.

Keywords: International human rights law, GATS, liberalization, educational services, states' positive obligations, conflict of norms.

INTRODUCTION

Education is a fundamental right, set forth in the Universal Declaration of Human Rights and the International Human Rights Covenants, which have force in international law. To pursue the aim of education for all is therefore an obligation for States.¹

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.²

The right to education is one of the most important rights of the “second generation” of human rights.³ It is an essential condition to the full enjoyment of every other economic, social, cultural, and also civil and political rights. Educational systems and

programs are the object of the right to education. They have become a part of the globalization process, and have been influenced by deregulation and liberalization. The internationalization of education has created a very important market, with great commercial potential, that has attracted the interest of many private investors and multinational corporations.⁴ Education has become a service, a sector submitted to increasing international trade and its rules.

The development of trade in educational services is nevertheless constrained by the existence of national legislations and regulations corresponding to the implementation of states' duty to protect the right to education under international law. Like in other sectors of services, corporations and private suppliers of educational services have pushed for the liberalization of the sector and the limitation of national regulations that prevent the development of free trade. The birth of the World Trade Organization (hereinafter WTO) in 1994⁵ has given trade diplomats and corporate lobbyists the opportunity to create an international instrument for the regulation of the liberalization of trade in services: the General Agreement on Trade in Services (hereinafter GATS).⁶ As of today, the GATS is still in construction and its scope of application has not yet been defined. Nevertheless, educational services are already subject to negotiations, under the pressure of important lobbies.

The recent popular movements of opposition has emphasized the limits of the liberalization process. It has also demonstrated that the WTO was suffering an important democratic deficit,⁷ and that an important part of the public opposes, or at least questions, the extension of its mandate. Popular demonstrations have criticized the effect of the WTO policies on fundamental sectors of our lives, like health and education. The relevance of these movements has certainly been affected by their disparity and relative incoherence. However, they have highlighted the existence of serious concerns regarding the current liberalization process and the democratic decline that seems to go along with it.⁸

This paper is divided into two parts. The First part is an introduction on the legal basis of the GATS and of the right to education. It is largely descriptive and is designed for the readers having no background on the subject. Knowledgeable readers can directly skip to the second part of the paper, analyzing the conflict between the trade and the human rights regimes. Part Two will evaluate the potential effects of the GATS on the

right to education and demonstrate the fundamental conflict between the notions of ‘educational service’ and ‘right to education.’ The Final part will introduce perspectives on the evolution of education under the GATS, and call for a radical change in international educational policies.

PART ONE: THE LEGAL BASIS OF INTERNATIONAL TRADE IN SERVICES AND OF THE RIGHT TO EDUCATION.

I. THE GATS: A PROGRESSIVE AND PERPETUAL LIBERALIZATION OF TRADE IN SERVICES.

I.1. Origins, Evolution.

The General Agreement on Trade in Services was a major achievement of the 1986-1994 Uruguay Round. The negotiations reforming the 1947 General Agreement of Tariffs and Trade (hereinafter GATT) and creating the World Trade Organization (hereinafter WTO) had not only succeeded to transform a technical tool into a major international organization regulating trade, but also to widen considerably the scope of international trade regulations by including services and intellectual property rights in its mandate.⁹ The GATS was a real success because it constituted the very first multilateral agreement concerning international trade in services. Its success also lays in its wide scope, *rationae personae* and *materiae*. Indeed, the GATS is binding on the 144 WTO members, as a part of the “package deal” agreements. Moreover, it potentially covers all service sectors, with the exception of air transportation and services supplied by the government.¹⁰ The emergence of an international instrument regulating trade in services corresponds to the ever-increasing importance of this sector, amplified by the development of globalization in transport and communications technologies.

The success of the GATS is now seriously threatened by the general failure of the 1999 Seattle negotiations, and the 2003 Cancùn meeting.¹¹ Nevertheless, the spiral of ever-greater liberalization of trade in services¹² seemed to have overcome the public constraints. Indeed, since February 25, 2000, the GATS has been reactivated through the Millennium Round of negotiations, entitled *GATS 2000*. The failure to reach consensus does not stop the negotiations. The Millennium round was reinforced by

the adoption of negotiation guidelines and procedures at the Doha Conference in November 2001. Currently the member states are submitting their proposals regarding the expansion of the GATS' material scope to the Council for Trade in Services, which is responsible for the supervision of the negotiations.¹³ They should be completed by January 2005.

I.2. Nature, Aims, Objectives.

The GATS is a general international agreement aimed

to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a mean of promoting the economic growth of all trading partners and the development of developing countries.¹⁴

Thus, the GATS has a hybrid nature: it is both a framework convention and a regulatory treaty. It imposes general obligations on its members, and dictates measures to adopt for the liberalization of trade in services. It also obliges members states to adopt a constructive approach and engage in a “built-in” system of continuous negotiations, for an ever-higher liberalization of trade.

As every other WTO agreement, the objectives of the GATS rules are to remove barriers to trade, to “regulate the deregulation” of the international trading system, and ensure the enforcement of the sacrosanct non-discrimination principle. Indeed, the principle of non-discrimination between national and non-national suppliers is fundamental to the WTO scheme and consists in two sub-principles: the “most-favored nation” and the “national treatment” rules. The WTO principle of non-discrimination is different from the non-discrimination standard of human rights law because it is trade-oriented.¹⁵ It is aimed at the development of *free* trade, not *fair* trade. This fundamental difference is at the core of the conflict between the two regimes and will be dealt with later.¹⁶

The GATS is legally enforceable through the general WTO system and therefore benefits from the effectiveness of the WTO's machinery. However, also because it is part of the WTO, the GATS suffers severe criticisms. It has been described as highly complicated, opaque and uncontrollable. Moreover, it is governed by an organization

that is constantly attacked for its bureaucratic nature, lack of transparency and democratic control.

I.3. Structure of the GATS.

The GATS operates on three levels: the main rules and obligations generally applicable, the individual schedules of member states' specific commitments to market access and national treatment, and annexes dealing with rules for each specific sector of service.¹⁷

I.3.i. The main rules and obligations: a “top-down” approach.

The main rules and obligations of the GATS apply to the 144 WTO members and to all services covered by the agreement.¹⁸ They are composed of the Most-Favored Nations clause, the transparency principles and the dispute settlement system.

The *Most-Favored Nations clause* (hereinafter MFN) creates an obligation for all members to treat their trading partners equally. Article II of the GATS states that

with respect to any measure covered by this agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and services suppliers of any other country.

This rule forms an integral part of the WTO non-discrimination principle and is quite simple in practice. Indeed, it obliges a member state to apply any decision or measure regulating trade, positive or negative, equally to all its partners. The MFN clause does not prevent a state that does not open its market to benefit from the equal treatment rule in other countries' markets.¹⁹ The MFN principle can be subject to exceptions. Indeed, as prior commercial agreements preceded the GATS, the MFN rule had to be adjusted to the existence of previous contradictory “preferential commitments.”²⁰ However, these exemptions are challenged at each negotiation round and must be of temporary nature.²¹

The *transparency rule* is part of the general principles applicable to the GATS.²² It is a general obligation to act in good faith, which requires member states to maintain transparent relations with the other WTO members and the WTO Secretariat. The

obligation consists in maintaining communications, providing accurate trade-related information, publishing and communicating legislations, regulations and measures within the scope of the GATS. The Dispute Settlement machinery of the WTO applies to the GATS²³ according to its own Dispute Settlement Understanding (hereinafter DSU). General exceptions are also available within the GATS system.²⁴ These exceptions have originally been interpreted restrictively under other agreements, but are now subject of a more constructive approach (under GATT), notably by the Appellate Body.²⁵

I.3.ii. Individual schedules of specific commitments: the “bottom-up” approach.

The GATS specifies for each member state the extent to which market access and national treatment are granted for specific sectors. It is considered as a “bottom-up” system, which reflects the gradualist nature of the GATS.²⁶ Under this part of the GATS, each member state makes specific commitments concerning each service sector covered by the agreement.²⁷ Each country possesses its own schedule of commitment, in relation to market access and national treatment for each specific sector. The “bottom-up” approach is relatively exceptional, because in other international trade agreements, the opposite approach is usually adopted: every sector is covered, unless specifically excluded.²⁸ Some kind of flexibility was necessary to allow states to “tailor their commitments” to these objectives.²⁹

In the GATS, commitments in services are classified by the mode of supply: *cross-border supply*, in which the service is provided while the provider and the consumer do not leave their country; *consumption abroad*, where the consumer travels to obtain a service abroad; *commercial presence*, where the supplier provides the service abroad through agencies or subsidiaries; and *presence of a natural person*, where a person from one country supply a service in another country.

The commitments on Market Access defines the conditions that a state wishes to impose on foreign suppliers of services in a particular sector. The access to a specific sector of service can be totally denied, unrestricted or conditioned, as long as the conditions are applied without discrimination to all other member states.³⁰ The commitments on National Treatment defines the terms and conditions that will be applicable to domestic and foreign “like” service suppliers within the country without

discriminations. The individual schedule permits to evaluate to which degree the national market will be open, and which rules will be applicable. The application of the national treatment principle can be complicated because it supposes a clear distinction of domestic and foreign “like” services, which may not always be easy considering that the text of the GATS does not provide any indication.³¹

Thus, the GATS provide enough flexibility to allow every country to shape its commitments and limit its obligations.³² However, it should be noted that this flexibility is very relative. Indeed, the progressive nature of the GATS implies that every limitation will be renegotiated and progressively restricted. Moreover, “where commitments are made, the government undertakes not to introduce new restrictions,”³³ unless it provides adequate compensation to countries affected by the modifications.³⁴

I.3.iii. The negotiating process.

The GATS has a “built-in” agenda and is, in theory, promised to an ever-greater scope of application. The process functions on the basis of a “request-offer” process³⁵ and the bargaining process is reciprocal, but not symmetrical. The negotiations process is therefore favorable to big economic powers, which possess more “carrots and sticks” than their partners, and are more likely to see their offers accepted.

The permanent negotiation process has created pressure groups and informal agreements that tend to favor the interests of strong service providers which are inclined to develop “top-down” negotiating techniques, “horizontal negotiating modalities,” “formula approaches”³⁶ that accelerate the liberalization process.

If the liberalization of services can have positive effects on the protection of human rights, this nevertheless implies certain safeguards mechanisms that the GATS does not seem to have. The GATS permit constructive flexibility, but no restrictive flexibility. For instance, if an undertaken commitment become threatening for the maintenance of an adequate education system, it can only be withdrawn by ensuring adequate compensations to affected parties.³⁷ This principle is necessary for the legal security of the system and for the protection of every party to the agreement.

However, it is highly complex³⁸ and restricts considerably the ability of State to take necessary measures to restore a potentially damaged system.³⁹

II. THE RIGHT TO EDUCATION: A PROGRESSIVE AND DYNAMIC EMPOWERMENT OF HUMAN RIGHTS.

II.1. Origins, Sources.

The right to education was originally considered as an economic and social right, a right of the “second generation.”⁴⁰ It was a product of the communist ideas on human rights, but has rapidly been accepted as a more fundamental right, irrespectively of its socialist origin.⁴¹ The moral and legal value of the right to education has then been reaffirmed and amplified through several codifications in the major modern human rights instruments,⁴² but also in soft-law mechanisms, guidelines and codes of conduct.⁴³ However, it is Article 13 of the International Covenant on Economic, Social and Cultural Rights⁴⁴ that is “the most wide ranging and comprehensive article on the right to education in international human rights law.”⁴⁵

It states that

the States Parties to the [...] Covenant recognize the right of everyone to education. States agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.⁴⁶

Articles 13 is the longest provision of the ICESCR. Some have argued that it is so widely accepted and recognized that it has become a norm of international customary law.⁴⁷

II.2. Nature, Evolution.

The right to education is an “empowerment right” because it is “both a human right in itself and an indispensable means of realizing other human rights.”⁴⁸ Education is not only an economic, cultural or social right, it is a rather more global concept that reflects “the indivisibility and interdependence” of human rights.⁴⁹ Indeed, the right to

education is considered as “the best financial investment States can make,”⁵⁰ because it allows individuals to evolve in their society, participate to the political and economic life of their community, struggle against poverty or oppression⁵¹ and most importantly benefit from the “joys and rewards of human existence.”⁵² Education is aimed enabling children to develop their personalities and abilities to face the challenge of life. Education “goes far beyond schooling [and] embrace the broad range of life experiences and learning processes which enable children, individually and collectively [...] to live a full and satisfying life within society.”⁵³ The right to education is thus a fundamental right, a tool that makes the realization of political, civil, economic, cultural and social rights possible.

The dominance of the western conception of human rights, emphasizing the protection of civil and political rights, has hindered the emergence of the right to education as a fundamental right.⁵⁴ Because of its socialist origins,⁵⁵ it is not until the decline and the fall of the communist block after the Cold War that the right to education was the object of “serious efforts for the international implementation.”⁵⁶ However, through the development of the modern corpus of international human rights law, and especially through the activities of United Nations human rights bodies, the significance of the right to education has been more widely accepted. Unfortunately, there has been no materialization of these theoretical legal success. Indeed, as noted by the United Nations Special Rapporteur, “the right to education has been marked by retrogression rather than progressive realization as required by the [ICESCR].”⁵⁷

The right to education is of universal application, it is a right to education *for all*. Nevertheless, “the precise and appropriate application of the [right] will depend upon the conditions prevailing in a particular State party.”⁵⁸ Like other human rights, the right to education is dependent on states’ behaviors and policies. However, more than other rights, the right to education is highly dependent on the *action* of states, not only on their *reaction*. The right to education cannot simply be “*exercised*” or “*enjoyed*”. It is not a right “*of*” education, it is a right “*to*” education. Thus, the individual is the recipient of the right, and the State is the bearer of a duty to provide this right. The respect for the right to receive education is measured on several “interrelated and essential features”: availability, accessibility, acceptability and adaptability.⁵⁹

The general characteristics of the right to receive education are “common to education in all its forms and at all levels.”⁶⁰ Indeed, the right to education is a permanent but gradual right, which is exercised throughout the successive steps of life. To each step correspond particular level of education.⁶¹

The enforcement of the normative content of the right to education is dependent on the existence of certain mechanisms and principles that safeguard the integrity of the right and preserve its “essential features.” An educational strategy is necessary to ensure that the “system of schools at all level”⁶² functions efficiently and allows the right to education to be available, accessible, acceptable and adaptable. The strategy developed must provide a system of fellowship that reduce the chances of *de facto* discrimination against disadvantaged groups, and ensure the improvement, or limit the deterioration of material conditions of teaching.⁶³

The right to educational freedom allows the conciliation of the right of the child, the duties of the State and the rights of the parents. The educational programs provided by the state must not interfere with the cultural and religious rights of the child, and the general system must allow parents to choose “schools, other than those established by the public authorities” as long as they “conform to such minimum educational standards as may be laid down by the State.”⁶⁴

The principle of non-discrimination and equal treatment requires states to adopt any measure necessary to eliminate discrimination in practice. This principle can justify certain discriminatory measures, or affirmative actions, by which a State would favor a group of persons, which would otherwise be in an unequal situation.⁶⁵

The principle of academic freedom and institutional autonomy applies to the right to higher education more particularly. It protects the creativity and freedom of expression of teaching staffs, and requires a certain degree of autonomy for the management of the institution.⁶⁶ These principles have to be protected by States, which have a positive obligation to do so under international law.

II.3. Positive obligations, active duties for States.

Article 2 of the ICESCR requires States to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the [covenant] by all appropriate means.” The right to education is progressive and subject to a progressive implementation by states which have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards its full realization.⁶⁷ Therefore, States do not only have an obligation of conduct, but also an obligation of result.⁶⁸

The state is subject to three kind of obligation:⁶⁹ to *respect*, by not interfering with the enjoyment of the right; to *protect*, by ensuring that third parties do not interfere with the enjoyment of the right; and to *fulfill*, by providing the necessary conditions to the enjoyment of the right.⁷⁰

The positive nature of states’ obligations is also marked by the duty to cooperate with other states in the fulfillment of their obligations. In combination with Article 2 of the ICESCR, Article 13 creates an obligation of solidarity that requires states to cooperate for the full realization of the right to education at the international level.⁷¹

Additionally, states have a duty of precaution. They must ensure “that their actions as members of international organizations, including international financial institutions, take due account of the right to education,”⁷² and do not interfere with their ability to perform their obligations. Consequently, at the supranational level, the obligation to consider, respect and protect the right to education also applies to international organizations. States are not relieved of their duty to ensure the right to education by transferring part of their power or sovereignty to a international organization. This latter duty of precaution is particularly at stake with the development of the GATS, which poses serious threats for the protection of the right to education.

PART TWO: THE CONFLICT BETWEEN TRADE AND HUMAN RIGHTS LAW.

The process of globalization also affects education. Expanded personal mobility and worldwide expansion of new information and communications technologies have transformed the world of education into a huge commercial market.

Cross-border supply of education from one country to another via telecommunications, and especially through the Internet, is developing rapidly. It allows a better access to education for communities and regions that do not have sufficient infrastructures, and therefore could contribute to the realization of the goal of international cooperation in the progressive realization of the right to education. However, this would imply that the groups in needs of international assistance have access to the adequate technology, and it is very unlikely that this will be the case if they cannot, primarily, afford efficient educational programs.⁷³

Consumption of education abroad is probably the most common example of the international development of education. Indeed, more and more students are leaving their country to study abroad. This opening of the education system could seem highly favorable to the right to education. However, the risk of the development of “dual market structures” is significant, and there is a chance that the difference between ‘schools for rich’, and ‘schools for poor’ would increase. Indeed, “the education curriculum might direct itself more to satisfying the needs of paying foreign students than non-paying local students, and nationals might suffer.”⁷⁴

The development of *foreign direct investment* in the area of education could also contribute to the elevation of educational infrastructures in countries where government resources are insufficient. However, this would lead to a privatization of the education system that might impair the governments' ability to fulfill its duty to provide the right to education.

The *international movement of educational service suppliers* could be highly valuable to the development of education expertise worldwide. However, it is also endangered by creating the possibility of a “brain drain,” in contradiction with essential elements of the right to education.⁷⁵

Thus, the liberalization of trade in educational services can have varied impacts on the developments of the right to education, and therefore needs to be controlled. Indeed, some have even come to the conclusion that

the key question from a human rights perspective is not whether liberalization does or does not promote human rights; rather, it is how to determine the right form and pace of liberalization to ensure the protection of human rights and how to reverse policies that are unsuccessful.⁷⁶

The problem is that it is very doubtful that the GATS is the appropriate instrument to ensure this essential task of reconciliation between the development of an education market and the protection of the right to education. In fact, the agenda of the GATS is materially and theoretically incompatible with the agenda of the realization of the right to education according to international human rights law.

I. EDUCATION AND THE GATS: TRANSFORMING HUMAN RIGHTS INTO SERVICES.

I.1. Education and the GATS, an ambiguous relationship.

As we have noted above, the GATS is still a work-in-progress, an instrument in construction. Therefore, its scope and effects remain largely unknown.

Unpredictability is the consequence of the absence of definition of the scope of the agreement. It also results from the ambiguity within the original text. This is especially true with respect to education.

Potentially, the scope of the GATS is quite vast. Indeed, it could eventually covers *all* kind of measures taken by *every* state party at *all* level of government, affecting trade in *all* services. However, a significant restriction exists: services provided “in the exercise of governmental authority” are not covered by the GATS principles.⁷⁷ This exception originally corresponded to the necessity for governments to be free from interference in their ability to supply public services that usually are the materialization of their duty to provide economic and social rights, including the right to education. Nevertheless, this exception is likely to be meaningless in practice. Firstly, because international law exceptions are always interpreted restrictively.⁷⁸ Secondly, there is an exception to the exception that is likely to nullify any practical effects. Indeed, public services provided by governments on a commercial basis, or in

competition with private service suppliers are excluded from the scope of the exception.⁷⁹ There is no clear indication of what commercial competition really means in terms of public services. Even though “the ambiguity surrounding article I.3. has been noted in much of the literature about GATS” there has been no “clear resolution” of the problem.⁸⁰

Modern states have a tendency to rationalize public expenditures and decentralize their powers. These trend, added to the liberalization of the economy has provoked governments to limit their role in the deliverance of public services. Therefore, in practice, very few services provided “in the exercise of governmental authority” actually remain a strict monopoly of public authorities. The private sector has largely infiltrated the domain of public services, and this is also true for education. Thus, it is very likely that education will not be considered as a service covered by the “governmental services” exception.⁸¹ Under the GATS’ definition, education is a commercial activity, and not a public service supplied in the pure exercise of governmental authority.⁸² Indeed, the ambiguity of the GATS’ scope creates suspicion, partly because the strategy demonstrates that education is seen as a commodity, and not as a right.

I.2. Education as a commodity.

The general nature of the GATS and its “built-in” spiral tend to imply that every exception to the GATS is of temporary nature. What is not covered by the agreement today could be included tomorrow. This is especially relevant if one considers the structure of the individual commitments schedules. Indeed, the sector of education is divided into five sub-sectors.⁸³ Specific scheduled commitments are usually undertaken by sub-sectors, or even sub-sub-sectors, as states are free to use additional distinctions.⁸⁴ Moreover, the structure of domestic educational markets are in constant evolution and therefore, definitions of ‘educational service’ under GATS are subject to changes.⁸⁵ The dissolution of education into activities and sub-sectors reveals the economic approach adopted by the GATS negotiations. It also indicates that the built-in agenda might, little by little, sub-sector by sub-sector, cover every educational activity.

The use of business vocabulary, development strategies and management techniques reveals the commercial strategy that is leading the GATS negotiations.⁸⁶ This strategy can conflict with the concept of education as a public good.⁸⁷ Indeed, under the GATS, the risk of transforming human rights into services exists because “the market is the dominant force in policy.”⁸⁸ Some professionals feel that “(e)ducation is treated purely as a commercial, tradable commodity. There is no recognition of its role as a means of nation-building; a local storehouse of knowledge; the vehicle to transmit culture and language; the prerequisite for a vibrant democracy and a contest of ideas; a source of innovation and change, a desirable activity *per se*.”⁸⁹ The large majority of professionals, teachers, professors and students unions have publicly denounced the utilization of education as a commercial product and their opposition movement certainly demonstrates the legitimacy of opposing a trade oriented definition of education.⁹⁰ This concern is shared by organizations of the “civil society”, which have already proclaimed it in an official declaration.⁹¹

I.3. WTO: “a trade’s, trade’s world.”

This problem clearly results from the trade oriented nature of the politics of law at the WTO. Within the WTO, “decisions taken reflect primarily the voice of the main trading nations,” and at the national level,

domestic trade policy formation is marked by similar inequalities in terms of who is inside the process and who is kept outside. (...) For example, the power departments -commerce and finance- are likely to be there, but you will seldom find the weaker environmental or social policy departments. We also see the representation of major commercial interests in national trade policy and investments decisions.⁹²

While civil society groups struggle to have access to the political debate, influential commercial lobbies and “invisible economic actors” are manipulating national policy-making to use human rights as tradable commodities.⁹³

This uncertainty on the relation between the GATS and education is emphasized by the opacity of the negotiations. Negotiations on the development of GATS are led by States, which make proposals, requests and offers. However, final decisions and commitments are the result of secret negotiations held at the headquarters of the WTO in Geneva, behind closed doors.⁹⁴ This lack of transparency is a problem that applies

to the WTO system in general. It creates an issue of democratic control that is particularly concerning with respect to important public goods like education.⁹⁵

Indeed, there is no review mechanism of the negotiations between trade diplomats and corporate lobbyists who “make the deals” in Geneva. Moreover, these negotiators lack *real* legitimacy, because they are not subject to any form of public scrutiny. Indeed, if their *official* legitimacy is not questionable, as they were appointed by democratically elected governments on the basis of their professional and technical competences in the area of international trade, they suffer a lack of democratic legitimacy that results from the very nature of the WTO negotiations process.⁹⁶ This later is so intrinsically opaque that

negotiations are power-driven and all sorts of trade-offs are permissible: even trade offs that national officials have not mandated or national parliaments made aware. (...) This is the crux of the problem. In essence the negotiating process is fundamentally undemocratic. Both parliamentary and citizens’ groups need to be engaged in the determination of national trade priorities and policies *before* things reach the negotiation stage.⁹⁷

Consequently, nothing prevents the negotiators from defining the exceptions narrowly, and the sectors covered by the agreement extensively. A large number of critics have proposed institutional and fundamental reforms of the WTO in order to increase democratic control over the policy-making process. However, because of the trade-oriented nature of the WTO system, it is unlikely that these reforms would suffice.

I.4. Reforms?

Some have argued that, given the inevitability of the WTO, it would be possible to ensure the protection of human rights by reforming its system. They have proposed procedural and institutional reforms in order to increase the legitimacy and transparency of the WTO policies. The requirements of prior human rights impact assessments,⁹⁸ the intervention of NGO’s and representatives of the civil society in the political debate and the creation of national public forums would certainly help to increase the weak legitimacy of the WTO,⁹⁹ which remains one of the less publicly known international organizations. However, beside their benefit for the public information, these reforms would let important human rights, such as education, in the realm of action of the WTO.

At the institutional level, the involvement of United Nations agencies and bodies in trade policy-making has been defended as a solution for the political isolationism of the WTO.¹⁰⁰ The collaboration at the inter-agency level is an excellent way to prevent the conflict between trade and human rights policies. Nevertheless, considering the lack of binding and negotiating powers of human rights bodies, it is unlikely that they would be able to significantly influence the policy making process, where, as we have seen, commercial interests are the driving forces. Simply, education must be taken out of the realm of action of the WTO which have neither the legitimacy, nor the expertise or the competences to deal with such an important human right. Indeed,

the Agreement Establishing the WTO is not a constitutional instrument in the sense of constituting a political or social community,⁸⁵ and its mandate and objectives are narrowly focused around the goal of 'expanding the production of and trade in goods and services'. Despite the expansion of the original GATT mandate into areas such as the services industries and intellectual property rights, and proposals to expand its role to cover the enforcement of regimes at the national level which are favourable to international foreign investment, the basic structure of the Organization has remained unchanged. It is an institution which is dominated by producers, and in which the economic, social, cultural, political and various other interests of a great many people are not, in practice, represented. Its institutional structure, its processes and the outcomes it sanctions are far from what would be required of a body to which significant human rights authority could be entrusted.¹⁰¹

This conclusion does not equal a blank check on education for United Nations bodies. The UNESCO and the Committee for Economic, Social and Cultural Rights have the appropriate expertise and *savoir-faire* with regard to education. However, as WTO supporters could argue, they should not have a monopoly on the protection of human rights vis-à-vis nefarious trade policies. These organs suffers a lack of coherence and efficiency, notably due to the highly politicized nature of the decision making process. They should remain in charge of initiating human rights policies and controlling their application by states, as well as by financial and trade organizations. They also need to achieve better support for other forms of international collaboration in the field of education, by integrating institutionally the participation of education stakeholders more efficiently. The international community as a whole is responsible for the creation of a more efficient human rights régime, in which the supremacy of human dignity over trade must be ensured, to prevent conflicts of norms.

II. FREE TRADE AND EDUCATION: A FUNDAMENTAL CONFLICT.

II.1. Regulating deregulation, removing barriers to trade.

As stated in its Preamble, the goal of the GATS is the liberalization of trade in services. Practically, it consists in the application of liberal economic theories in trade of services: restricting governmental intervention and reliance on the “invisible hand” to regulate the market. “GATS is based on the principle of free competition, which says that freedom of trade is the best guarantee for the highest possible quality at the lowest possible cost.”¹⁰² In sum, the GATS aims at reducing national intervention and “increase the decrease” of regulation from the WTO.¹⁰³

In the area of education, there are many “non-tariff barriers”¹⁰⁴ to the development of international trade.¹⁰⁵ Indeed, every measure taken by public authorities, at all level of governance, can constitute a barrier to trade. “For example, requirements for specific local content in courses; or for the presence of a certain number of local staff on the governing board [of a school]; or for teaching in the local language could all be challenged as a ‘disguised trade restriction’.”¹⁰⁶ In any case, every measures “affecting trade” will come under the scrutiny and checks of the GATS, whether it is a barrier or not.¹⁰⁷ The ability of governments to use their power to regulate the educational system is therefore under greater scrutiny, and must comply with rules that are enforceable through one of the most efficient system of international law.

However, it should be recalled that the commitments undertaken by states under GATS are voluntary. Only states can decide which sector or service they want to submit to the GATS’ rules. The WTO is only the forum where states express their will, and it could be argued that education can remain outside the scope of the GATS, if states decide so. Indeed, many have decided to keep their education system, or at least a part of it, outside the negotiations.¹⁰⁸ However, in the practical sense, states do not have absolute control over the level of their commitments. The bargaining process of the continuous negotiations forum has created a lot of pressures that states are simply not always able to resist, depending on their economic force.¹⁰⁹ The result from the request/offer process and the development of horizontal formulas restricts considerably the margin that states have in maneuvering of states in their ability to control the expansion of the GATS’ scope. States might have to make important

sacrifices in order to secure the protection of certain fundamental economic interests. Their ability to control the degree of engagement is impaired by the dynamic nature of the GATS that always requires further commitments. Moreover, the nature of the GATS and the “rollback rule”¹¹⁰ also implies that the ability of future governments to choose their own policy is restricted. Indeed, “once a government has promised to reduce restrictions on foreign education providers, a future government cannot reimpose such measures or new measures that would have a similar effect without breaching the agreement.”¹¹¹ Consequently, “limitations are not cast in stone”¹¹² and the progressive trade-offs resulting from the negotiating process are a permanent threat to the weak safeguards rules already existing.

Nevertheless, the GATS recognize the right of states to derogate from their commitments and legislate or take measures in area of legitimate public policy.¹¹³ First, the general exceptions provisions allow governments to take derogatory measures when necessary to protect, *inter alia*, public morals. A wide interpretation of the notion of public morals could imply the possibility for the government to take derogatory measures necessary to protect the educational system, that contribute significantly to the emergence and protection of public morals. However, considering the restrictive interpretation that is usually given to these general exceptions, it is very unlikely that article XIV of the GATS constitutes an efficient safeguard for education.¹¹⁴ Indeed, within “regulatory globalization,” utility dominates rights.¹¹⁵

II.2. Realizing trade and education: dynamisms in conflict.

The problem is that the possibility for government to regulate service activities is considerably reduced by the GATS. Governments’ measures that affect trade in services are subject to a strict necessity test that will apply to a wide range of domestic regulations.¹¹⁶ Therefore, under the GATS, certain public policies aimed at the promotion of social or educational objectives would be prohibited because they “affect trade” and are not strictly necessary to the maintenance of the education system. The real issue is that the GATS has operated a transfer of democratic governmental authority from the state to the WTO. Indeed, the burden of the proof lies on the government. If a governmental measure is challenged in the WTO system, the government will have to demonstrate that the measures was strictly necessary, and that it does not constitute a barrier to trade.¹¹⁷ Then, “the delicate responsibility for

balancing the public interest with commercial considerations” would be transferred “from elected governments representatives to appointed tribunals or WTO panels.”¹¹⁸

This transfer of authority would not be such controversial if it did not negatively affect human rights. Indeed, the GATS could be considered as a waiver by states of their right to regulate. However, with respect to human rights, and with the right to education in particular, states do not have a right, but a *duty* to regulate. As we have seen, the right to education implies that states must ensure the quality of the school system, the respect for the essential features of education, and the progressive realization of a free education. Under international human rights law, states are required to take any necessary steps to protect individuals from any interference in the enjoyment of their right to receive education. Yet, the measures necessary to ensure availability, adaptability, acceptability and quality are the same measures that constitute barriers to trade under the GATS. If GATS wants to remove these barriers to trade in education services, it also needs to remove the power of governments to regulate in this area. However, under international law, states cannot abandon their duty to regulate and protect the right to education by transferring their powers to an international organization.¹¹⁹ Fundamentally, the right to education implies a dynamic of an increasing intervention of the state until the full realization of the right to education. Under GATS, the dynamic is a decreasing role of states in the regulation of education.

The capacity of the state to control the education system is already impaired. Budget cuts and rationalization of public administration have induced certain states to generally reduce their expenditures in education programs.¹²⁰ Other states are also constrained to strict structural adjustments rules from the international monetary institutions. The need for educational development and investments exists. Therefore, the necessity of external intervention will increase. Private and corporate interests will intervene in the education market to compensate for the defection of public authorities. They will provide funding and apply development strategies to education programs. However, this economic approach seems quite irreconcilable with the nature of the right to education. Indeed, “the *raison d’être* of economic and social rights is to act as correctives to the free market. Governments have human rights obligations because primary education should not be treated as a commodity.”¹²¹

Education is a global concept, a tool for the realization of broad and essential social objectives. When education becomes too centred on its relation with the economy, as it would be under the GATS, it is inevitable that there will be a distortion of these social objectives. The GATS' rationale of free competition equals the increase of private investment in education. This trend does not follow human rights requirements. Indeed, investments are dependents on the evolution of the market and profits. Education programs would therefore be limited to the possibilities offered on the market, which seems irreconcilable with the obligation of governments to develop the possibilities of education progressively.¹²²

II.3. Conflicting norms.

Another problem is the very definition of what constitute discrimination. Indeed, the concept of non-discrimination is a fundamental principle of international law. However, it is a very broad concept that includes a wide range of applications. The ideas of non-discrimination that are embodied in human rights law and in the GATS are significantly different, if not completely conflicting.¹²³ Under GATS, non-discrimination consists in the national treatment of foreign like service suppliers and the application of the MFN clause. Under human rights law, discrimination on grounds of race, color, sex, language, religion, political opinion, birth, national or social origin is strictly prohibited. However, "importantly, the human rights principle does not envisage according equal treatment to everyone in all cases, but rather supports affirmative action in the interests of promoting the human rights of the poor and vulnerable."¹²⁴ Thus, if a government decides to provide public subsidies for a certain class of vulnerable people in order to promote their access to the right of education, it will act in conformity with the principle of non-discrimination under human rights law, but would violate it under GATS law. The issue of "non-discrimination versus affirmative action"¹²⁵ is central to the conflict between the human rights and the trade regimes.

The GATS makes no "attempt to discriminate between subsidies. [But] subsidies can be good or bad. Good subsidies are those which enable (...) affirmative action measures, bad subsidies are those that perpetuate harmful social practices,"¹²⁶ such as development of dual market structures in education. The central issue is that under GATS "both good and bad subsidies are attacked by the WTO without discrimination.

(...) Finally, the human rights principle of non-discrimination is in conflict with the trade principle of non-discrimination. The human rights principle refers to individuals and groups, the trade principle to nations and firms.”¹²⁷ This conflict should be resolved in the favor of human rights law, under which the notion of non-discrimination has acquired the status of a peremptory norm of international law.¹²⁸ However, given the closed nature of the WTO legal system and its trade orientation, it is very likely that if such a case arose under the WTO dispute settlement system, it is the GATS interpretation of the non-discrimination principle that would be favored.

III.2.iii. Conflicting theories, conflicting régimes.

The WTO has been presented as a specific field of international law,¹²⁹ or even a self-contained regime, immune from the interference of general rules of international law.¹³⁰ These arguments are inspired from the functionalist and utilitarianism “normative underpinnings of trade law.”¹³¹ Indeed, the “efficiency model”¹³² of trade law is “exclusively concerned with the twin values of economic efficiency and welfare.”¹³³ Therefore, in the international trade regulatory framework, the objective of an ever-freer trade dominates every other non-trade considerations, because it is allegedly an crucial “precondition for the enjoyment of (...) human rights.”¹³⁴ Consequently, human rights are subject to an economic vision, that integrate them as essential economic instruments to the “proper functioning of economic and political markets,”¹³⁵ and a perfect tool to legitimize liberal economics.

In this context, if a conflict of norms arises within the jurisdiction of the WTO, it is an economic methodology of utilitarianism that will be applied in the resolution of the dispute. Indeed, “dispute resolution is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance” and therefore, “dispute resolution tribunals function in part as agents of legislatures.”¹³⁶ “On this view, an act will be judged morally right if its consequences for the aggregate of individual utility. (...) [Therefore] the trade institution will follow its own normative approach, which commits it to sacrificing human rights protection when doing so would yield a greater aggregate satisfaction of human preferences.”¹³⁷ In fact, the functionalist vision of human rights adopted by the WTO clearly appears in the application of the necessity test when evaluating the legality of an article XIV based exception to the GATS’ rules. The necessity test is the ultimate safeguard for

non-trade oriented measures within the WTO dispute resolution system. It functions as a simple “trade-off device” that balance the weight of economic welfare versus human rights and allows to “trade any amount of human rights impairment in exchange for a greater amount of trade welfare benefit.”¹³⁸ This adjudication mechanism is in total contradiction with the theories and principles forming the basis of human rights law.

In the human rights regime, human rights are perceived as a philosophical and legal manifestation of human dignity,¹³⁹ a “transcendental standard of justice” based on “the non-utilitarian liberalism of Locke and Kant.”¹⁴⁰ The justification of human rights is based on moral and philosophical principles that integrate human dignity as a supreme objective, detached from any utilitarian costs-benefits analysis. “The normative arguments advanced for the protection of human rights are deontological: they focus on principles about how people are to be treated, regardless of the consequences.”¹⁴¹ Consequently, in case of conflict of norms, the deontological approach of the human rights regime would favor human rights claims over trade rules, because they “ordinarily trump utility, social policy, and other moral or political grounds for action.”¹⁴² If a conflict of norms between GATS’ rules and the protection of the right to education arose within the human rights regime, the right to education would be protected against the negative effect of trade measures, because human rights are trumping values in conflict of norms.

Considering that “its is a fundamental feature of the landscape of global social policy in the late 20th century that no one institution has the effective jurisdiction to create and adjudicate norms in all aspects of social concern,”¹⁴³ it appears that the human rights regime and the trade regime will remain two different sub-systems of international law, with their own normative underpinnings and judicial system. On the one hand, the human rights regime suffers a critical lack of efficiency that partially results from the political and diplomatic nature of the United Nations human rights bodies. The UN judicial mechanisms for the enforcement of protection of human rights are weak, fragmented and “sadly deficient.”¹⁴⁴ because they are part of an “authoritarian” and “state-centred system.”¹⁴⁵ On the other hand, the trade regime is characterized by one of the most efficient enforcement mechanism of the international system.¹⁴⁶

Naturally, trade lawyers have argued that the most appropriate solution to prevent conflict of norms between trade and human rights law would be to integrate the protection of human rights within the mandate of international economic organizations, such as the WTO.¹⁴⁷ It has also been argued that the inclusion of human rights exceptions within the WTO agreements,¹⁴⁸ the amendment of the necessity test by the proportionality test¹⁴⁹ or other extra-safeguards would allow human rights to benefit from the trade enforcement mechanisms and to be protected from excessive economic utilitarianism. However, the fundamental inadequacies between the competences of trade lawyers and the necessary expertise necessary to the implementation and enforcement of human rights added to the liberal-utilitarian philosophy of trade institutions, demonstrate that it is evident that the WTO is not the appropriate forum for the adjudication of conflict of norms between trade and human rights law.

The international trade regime should not be granted powers on the creation and adjudication of human rights policies because it is based on and functions according to paradigms, principles and rules that are in contradiction with fundamental human rights principles and theories. The solution is to prevent the outbreak of conflict of norms *a priori*, and ensure that human rights realization is given the political and legal superiority that it deserves.

CONCLUSION, EVALUATIONS AND PERSPECTIVES.

The GATS is a very important instrument, necessary to regulate the development of international trade in services, inevitable at the age of globalization. However, it is still a work-in-progress, an “untested process”¹⁵⁰ and there appear to be many ambiguities regarding its scope and effects, especially with respect to human rights. It is possible (although unlikely if the WTO system remains opaque and closed) that the implementation of the GATS principles and rules would have a positive effects on the protection and development of particular human rights. Nevertheless, when facing important uncertainties on the costs and benefits of a system in construction, the reasonable approach is always *to prevent better than to cure*. Therefore, considering the incompatibility of the trade and human rights agenda with regard to education, it appears necessary to stop the current negotiations on trade in educational services

under the Doha Round and ensure *a priori*, that its development will not affect the protection and promotion of human rights.

The present negotiations are defining the fate of education under the GATS. Indeed, they will delineate the starting point of the GATS' coverage of the educational sector, which can only increase in the future. The recent proposals of the main GATS proponents (the United States, the European Union, Japan, Canada, New Zealand and Australia) seem to indicate that at least, the sector of higher education will be included in the GATS.¹⁵¹ Higher education is particularly in the sight of the trade diplomats and corporate lobbyists negotiating in Geneva because it is a developing sector that has a considerable commercial potential. These developments are extremely concerning because they tend to create a trade model for education. This will lead to the transformation of the right to education into a commodity, a commercial service that would be subject to a free market, rather than to rules of international human rights law.

The increasing and uncontrolled liberalization of trade is a danger for education. The privatization of the educational sector would prevent the realization of the objective of a progressive free education for all, by the introduction of fees that would create a dual market, where the best programs will be accessible only to the richest groups of individuals, in contradiction with the principle of availability and non-discrimination. Moreover, the privatization of the education system under the GATS implies a progressive withdrawal of governmental authority and regulation. This would leave the educational sector in the hands of private and corporate interests that would favor economic over social interests. It would also considerably reduce the ability of states to ensure the quality of education and fulfill their obligation under human rights law by transferring their powers to an organization that does not have the expertise nor the capacity to ensure the protection of the right to education, in conformity with international law. Additionally the democratic deficit from which the WTO suffers is a supplementary evidence that an important public good like education cannot be traded away without ensuring that sufficient safeguards and mechanisms will allow the protection of the essential features of this fundamental right. The strong opposition movement raised by education stakeholders demonstrate the urgent need for action.

The GATS is a necessary instrument for the regulation of trade in a limited number of commercial services. However, it is not necessary to education. Indeed, there are other mechanisms of internationalization and globalization than the GATS that would be more adapted to the nature of the educational sector.¹⁵² “(G)iven the tradition of international co-operation in the sector, (...) the rejection of attempts to regulate education through GATS is not equivalent to a rejection of the ‘internationalization’ of education per se. A truly internationalist approach to global education requires that educational goals, and the voices and concerns of education stakeholders, take the precedence over the drive for trade liberalization”.¹⁵³ “Non-profit internationalization”¹⁵⁴ mechanisms already exist in the context of governmental and international public cooperation. They have allowed significant progress in the development of international education systems that function in conformity with the interests of our societies and in conformity with the principles of international human rights law.¹⁵⁵

In sum, “we are in fact demanding no more than governments should respect and fulfill their obligations under international human rights law-binding obligations they have voluntarily undertaken.”¹⁵⁶ Therefore, education must be kept out of the GATS’ scope of regulations. The current negotiations on trade in educational services must be stopped and governments must ensure that their commitments under the GATS will not affect their ability to perform their duty to protect and realize the right to education. Education is too important to our societies to be endangered, traded away without any safeguards. The GATS needs to be transformed to prevent definitively that fundamental public services like education, health and culture be subjected to trade rules and policies; that it would protect the right of governments to exercise their right and duty to regulate for the promotion of quality and social objectives that are interdependent with the right to education; that human rights assessments of trade policies are undertaken to ensure that the implementation and interpretation of the GATS are compatible with human rights law; that democracy and transparency are promoted to ensure the viability of an efficient and constructive dialogue on the promotion of human rights through international cooperation.

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Notes

1. Koichiro Matsuura, UNESCO Director General, *Education for All : The Unfulfilled Promise*, 21st century Debate on Education For All, *available at* (URL) <http://www.unesco.org>.
2. Universal Declaration of Human Rights 1948, G.A. Res. 217 (III), U.N. Doc. A/810 (1948), art. 28 (hereinafter UDHR).
3. Economic, social and cultural rights are rights of the so-called “second generation” in opposition with civil and political rights (right of the first generation) which appeared first chronologically, because of the domination of western countries’ liberal conception of human rights on the codification of international law. They are also opposed to the right of the “third generation” that intend to link human rights with the socio-economical context of their realization (right to development, right to a clean environment...). The main difference between right of the First and the Second generation is the position of the individual vis-à-vis the State. In the former, the State has a duty not to interfere with the enjoyment of civil and political rights by the individual, whereas it should provide the necessary structures for the enjoyment of economic, social and cultural rights by the individual for the later. *See* Patrick Dailler and Alain Pellet, *DROIT INTERNATIONAL PUBLIC*, 6th ed., LGDJ (1999), 641-642.
4. An example of this trend is the creation of a “World Education Market”, in Vancouver, Canada, May 2000. For OECD countries, “export revenue in education

services amounted to an estimated minimum of US\$30 billion in 1999, not much less than the financial services sector.” Kurt Larsen and Stéphane Vincent-Lancrin, *Can Trade in international education work?*, OECD Observer, March 6, 2003, at 2.

5. Agreement Establishing the World Trade Organization, Apr. 15, 1994, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999).

6. General Agreement on Trade in Services, Apr. 15, 1994, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999).

7. See, *inter alia*, D. C. Esty, *Beyond The Club Model*, in *EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM*, R.B. Porter, P. Sauve, A. Subramarian, A.B. Zampetti (eds.), Harvard University Center for Business and Government, Brookings Institution Press, Washington D.C. (2001), at 1, available at http://www.gets.org/gets/library/admin/uploadfiles/EfficiencyEquity_and_Legitimacy_The_Multilater.htm.

8. “Citizens’ concerns have moved from focusing almost exclusively on the role of the state in respecting, promoting, protecting and fulfilling human rights, to focusing on the supra-national, multilateral bodies and non state actors such as transnational corporations.” Malini Mehra, *The Intersection of Trade and Human Rights*, in *EFFECTIVE STRATEGIES FOR PROTECTING HUMAN RIGHTS: PREVENTION AND INTERVENTION, TRADE AND EDUCATION*, D. Barnhizer (ed.), Ashgate (2001), 75, at 76.

9. Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPs], Apr. 15, 1994, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 International Legal Materials 1125 (1999).

10. See GATS, art. I.

11. “After two such abject defeats in four years, the WTO is in enormous trouble”, *Cancùn’s charming outcome*, *The Economist*, Sept. 20, 2003, at 11.

12. GATS, art. XIX states that “members shall enter into successive rounds of negotiations [...] with a view to achieving a *progressively higher level of liberalization*”(emphasis added).

13. GATS, art. XXIV.

14. GATS, Preamble.

15. On the difference between the two non-discrimination principles, *see generally*, Economic, Social and Cultural Rights, Liberalization of trade in services and human rights, Report of the High Commissioner on Human Rights, June 25, 2002, Commission on Human Rights, Sub-Commission on the Promotion and protection of Human Rights, Fifty-fourth Session, U.N. Doc. E/CN.4/Sub.2/2002/9 (2002), at para. 59 [hereinafter HCHR Report].

16. *See infra*, p.18.

17. *See* Trade in Services Division, *An Introduction to the GATS*, WTO Secretariat (1999), *available at* <http://www.wto.org>.

18. *See generally*, GATS, Part II.

19. Referred to as the “free-rider” problem. *See Canadian Higher Education and the GATS: AUCC Background Paper*, Association of Universities and Colleges of Canada, February 1, 2001, at 4, note 15 [hereinafter AUCC Background Paper], *available at* http://www.aucc.ca/publications/reports/2001/index_e.html.

20. *Id.*

21. GATS, art. XX.

22. *See* GATS, art. IV.

23. *See* GATS, art. XXIII.

24. GATS, art. XIV.

25. For the progressive interpretation of article XX of the GATT in the Appellate Body Reports, *see, e.g., United States- Standards for Reformulated and Conventional Gasoline*, adopted May 20 1996 (WT/DS2), and *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, (WT/DS58/AB/R) October 12, 1998.

26. *See* Trade in Services Division, *The GATS: Objectives, Coverage and Disciplines*, WTO Secretariat (1999), available at <http://www.wto.org>.

27. Business, communication, construction and related engineering, distribution, education, environment, finance, health and social related services, tourism and travel, transport and others. *See id.*

28. *See* AUCC Background Paper, *supra* note 19, at 5.

29. *Id.*

30. Market access can be limited with respect to the number of service suppliers, the total value of service transactions, the total quantity of service output, the number of natural persons in a particular service, the participation of foreign capital or the legal nature of suppliers. *See* Trade in Services Division, *The GATS: Objectives, Coverage and Disciplines*, WTO Secretariat (1999).

31. “Would, for example, a not-for-profit education service provider be like a for-profit education provider?” *See* HCHR Report, *supra* note 15, at para. 24.

32. “The GATS is the most flexible agreement in the WTO system,” *see* Trade in services, *in* Trade Issues, European Commission, Europa, http://www.europe.eu.int/comm/trade/issues/sectoral/services/index_en.htm

33. *See* HCHR Report, *supra* note 15 at para. 25.

34. GATS, art. XXI.

35. *See* AUCC Background Paper, *supra* note 19, at 6.

36. *Id.*

37. See WTO Secretariat, *The Gats: Objectives, Coverage and Disciplines*, Trade in Services Division, 1999, available at <http://www.wto.org>.

38. See AUCC Background Paper, *supra* note 19, at para. 29.

39. See Botho von Kopp, *Education Transformation and GATS, New Paradigms in government and administration*, Contribution to the International Symposium “Transformation of Education in Comparative Perspective,” University of Berlin, January 24-26 2002, at 4.

40. See *supra* note 3, p. 1.

41. “Everyone has the right to education. Education shall be free, [...] and made generally available.” UDHR, art. 26.

42. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. N° 49, U.N. Doc. A/44/25/49 (1989), revised in U.N. Doc. A/Res./44/25/Corr.1 (1990), reprinted in 28 International Legal Materials 1457 (1989), art. 28, United Nations Convention on the Elimination of All Form of Racial Discrimination, GA Res. 2106 A (XX), open for signature Dec.10 1984, 1465 U.N.T.S. 85, art. 3(1), Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. N°21, at 193, U.N. Doc. A/Res./34/180 (Sept. 3, 1981), art. 10. See *e.g.*, European Convention on the safeguard of Human Rights and Fundamental Freedoms, First protocol, art. 2, March 20, 1952; Declaration of the European Parliament of Fundamental Rights and Freedoms, April 12, 1989, art. 16; African Charter on Human and Peoples’ Rights, June 27, 1981, art. 17; American Convention of Human Rights, Additional Protocol, November 17, 1988, art. 13.

43. See, *e.g.*, World Declaration on Education for All, 1990, art.1; Vienna Declaration and Program of Action, Part I, para. 33 and Part II, para. 80; Plan of Action for the United Nations Decade for Human Rights Education, para. 2.

44. G.A. Res. 1514, U.N. GAOR, Supp. N°16, at 52, U.N. Doc. A/6316 (1966), reprinted in 6 International Legal Materials 360, adopted on Dec.19, 1966, entered into force on Mar.23, 1976 [hereinafter ICESCR].

45. General Comment N°13 on the Right to Education, Committee on Economic, Social and Cultural Rights, 21st Sess., U.N. Doc. E/C.12/1999/10 (1999), at para. 2 [hereinafter General Comment N°13].

46. ICESCR, *supra* note 44, art. 13(1).

47. *See* Douglas Hodson, THE HUMAN RIGHT TO EDUCATION, 39-40 (1998).

48. General Comment N°13, *supra* note 45 at para. 1.

49. General Comment N°11 on the plans of action for primary education, Committee on Economic, Social and Cultural Rights, 20th Sess., U.N. Doc. E/C.12/1999/4 (1999), at para. 2 [hereinafter General Comment N°11].

50. General Comment N°13, *supra* note 45, at para. 1.

51. In 1787, Thomas Jefferson wrote that “to educate and inform the whole mass of people is the most legitimate engine of government” because it would enable the people to “see that it is in their interest to preserve peace and order”. Letter to James Madison, December 20, 1787 in THE COMPLETE JEFFERSON, 120-123 (1943), cited by Louis B. Sohn, *The World Bank and the Right to Education*, in LIBER AMICORUM IBRAHIM F.I. SHIHATA, S. Schlemmer-Schulte & T. Ko-Yung, (eds.), Kluwer (2001), 740, at 746.

52. General Comment N°13, *supra* note 45, at para. 1.

53. General Comment N°1 on the Aims of Education, Committee on the Rights of the Child, U.N. Doc. CRC/GC/2001/1 (2001), at Appendix, para. 2 [hereinafter General Comment N°1].

54. *See supra* note 40.

55. However, it should be recalled that “although Socialist States had been on the forefront to put economic, social and cultural rights on the same level as civil and political rights, in the late seventies and early eighties it was them who resisted every initiative to strengthen this extremely weak implementation mechanism”, M. Nowak,

The Right To Education- Its meaning, significance and limitations, 9 Netherlands Quarterly of Human Rights, n° 4, 418 (1991), at 419.

56. *Id.* at 418.

57. Background Paper submitted by the Special Rapporteur on the right to education, Committee on Economic, Social and Cultural Rights, 19th Sess., U.N. Doc. E/C.12/1998/18 (1998), at para. 1 [hereinafter Special Rapporteur's Report].

58. General Comment N°13, *supra* note 45, at para. 6.

59. *See, generally, id.* Availability: the right to education must be made available. States have a duty to ensure that a sufficient quantity of educational facilities and programs are available within their territories. The qualitative requirement concerning what is considered as an “available” institution “depends upon numerous factors, including the developmental context within which they operate.” Accessibility: the available educational institutions must be physically and economically accessible to everyone, without discrimination. Therefore, it has to be affordable to all (including most vulnerable groups), and situated in safe and “reasonably convenient” geographical areas. Acceptability: “(t)he State must ensure that the form and substance of education, including curricula and teaching methods are acceptable to students and, where appropriate, parents.” The right to education must be provided in conformity with the social and cultural context of the recipient of the right, and of appropriate quality and relevance. Adaptability: the State must ensure sufficient flexibility in its educational programs, so that education is adaptable to the social and cultural variables of society.

60. *Id.* at para. 8.

61. *See generally, id.* The right to *primary education* has the particularity of being a compulsory right that every individual must receive. Therefore, it must be made absolutely universal and “available free to all.” The right to *secondary education* varies among countries, but should generally prepare students for vocational and further educational opportunities. It “shall be made generally available an accessible to all by every appropriate means, and in particular by the progressive introduction of

free education.” Therefore, although free primary education is the primary objective, it does not relieve the state of its obligation to adopt any appropriate measure to develop free secondary education that will be available to everyone without discrimination. The right to *higher education* is not universal, because it depends on the capacity of individuals. Access to higher education will be conditioned to expertise and relevant experience of candidates, but must be generally available to everyone with the same capacity, “and in particular with the progressive introduction of free education.” The right to *fundamental education* is a safety right, by which State must ensure that individuals who have not completed their primary education nevertheless receive sufficient education to satisfy their “basic learning needs.” The right to fundamental education is of universal application, and “extends to children, youth and adults, including older persons.”

62. ICESCR, *supra* note 44, art. 13.2(e).

63. *See* Comment N°13, *supra* note 45, at para. 27.

64. ICESCR, *supra* note 44, art. 13.3.

65. *See* Comment N°13, *supra* note 45, at para. 32.

67. General Comment N°3 on the nature of the obligations of the parties, Committee on Economic, Social and Cultural Rights, 5th Sess., U.N. Doc. E/C.12/1991/23 (1990), at para. 9.

68. “An obligation of conduct points to a certain action or measure the State should adopt. An obligation of result is less concerned with the choice of the line of action taken, but more concerned with the results the State should achieve”, *see* Nowak, *supra* note 55 at 422.

69. *See generally*, A. Eide, *Right to Adequate Food as a Human Right*, United Nations Human Rights Study Series 1, New York, 14 (1989).

70. *See* Comment N°13, *supra* note 45, at para. 48.

71. *See id.*

72. *Id.* at para. 56.

73. *See* HCHR Report, *supra* note 15, at para. 41.

74. *Id.* at para. 42.

75. *See id.*, at para. 47.

76. *Id.* at para. 50.

77. *See* GATS, art. I.

78. “International law has a special interpretive principle for the interpretation of exceptions. This rule is expressed in Latin as *exceptio est strictissimae applicationis* which means exceptions to treaty obligations are construed restrictively. Similarly, within the decisions of the GATT and the WTO, exceptions to trade obligations have been narrowly interpreted.” AUCC Background Paper, *supra* note 19, at para. 31.

79. *See* GATS art. I.3.

80. *See* Julie Nielson, *U.S. Update on GATS: January 2004*, American Council on Education, available at <http://www.acenet.edu/programms/international/gats/2004-update.cfm>.

81. *See* Kurt Larsen, John Martin and Rosemary Morris, *Trade in educational Services: Trends and emerging Issues*, OECD Working Paper, at 3, available at <http://www.oecd.org> [hereinafter OECD Working Paper].

82. *See* *The WTO and the Millennium Round, What is at stake for Public Education?*, Education International/Public Services International Joint Publication, available at <http://www.ei-ie.org>.

83. Primary education, secondary education, higher education, adult education, and other education services. *See* *Education services, Background Note by the Secretariat*, Council for Trade in Services, WTO, S/C/W/49, September 23, 1998, at para. 3 [hereinafter WTO Background Note].

84. See AUCC Background Paper, *supra* note 19, at para. 25-26.

85. “Given the pace of change in the sector, definitional issues may be an important consideration in any forthcoming negotiations on additional commitments in this area.” WTO Background Note, *supra* note 83, at para. 4.

86. “Thus, in trade language, nations are ‘importers’ or ‘exporters’ and education is delivered through ‘modes’. Many in higher education are uneasy with this trade language, but that discomfort does not signify opposition to cross-border education, rather, it indicates anxiety about whether the future of cross-border education will be dominated by a trade model or a model that emphasizes higher education’s enduring contribution to the public good of all nations.” Julie Nelson, *supra* note 80.

87. “There is a problem in thinking about trade in services, particularly public services. To be traded, a thing has to be a specific commodity on which a price can be put. Most of us don’t think of social services or education in that way. We tend to think of them as social and cultural relations with a general overall cost, but not as segmented economic units.” Larry Kuehn, *Globalization, Trade Agreements and Education: Trade deals prevent governments from protecting education*, at 1, <http://www.policyalternatives.ca/edumon/article23.html>.

88. Julie Nelson, *supra* note 80.

89. Jane Kelsey, *Ten Reasons why the GATS is bad for public education*, Association of University Staff of New Zealand, November 22, 1999, at para. 2.

90. “...As stakeholders in education, we have reached the conclusion that it is inappropriate for education systems to be regulated within the GATS framework. Education is of such critical importance to the social, cultural and economic development of society that it should not be subjected to the binding rules of an international treaty that prioritizes trade liberalization over other goals...” Joint Declaration “*Get Education out of the Gats*” signed by a large number of professional unions [APFL (aktive pflichtschullehrerInnen), Austria; A Asduerj (Associação de Docentes da Universidade do Estado do Rio de Janeiro), Brazil; Anakbayan, Philippines; ANDES-SN, Brazil; Association of University Staff of New Zealand,

Association of University Teachers (AUT), UK; Attac-University of Ghent, Belgium; Centro dos Professores do Estado do Rio Grande do Sul-Sindicato dos Trabalhadores em Educação - CPERS/Sindicato, Brazil; Centro Educazione alla Mondialita' / Global Education Centre, Brescia, Italy; Confederação Nacional dos Trabalhadores em Educação (CNTE), Brazil; Le Conseil départemental des Parents d'Elèves des Hautes-Alpes (CDPE05), Gap, France; Dansk Magisterforening (Danish Masters' Association), Denmark; Fórum Nacional em Defesa da Escola Pública (FNDEP), Brasil; Gender and Education Office (GEO) of the International Council for Adult Education, Uruguay; Grenada Community Development Agency (GRENCODA), Grenada; Human Scale Education, UK; International Council for Adult Education, Uruguay; League of Filipino Students, Philippines; National Association of Teachers in Further and Higher Education (NATFHE), UK; National Tertiary Education Union (NTEU), Australia; National Union of Students, Australia; National Union of Students in Europe (ESIB) ; National Union of Students of the Philippines; National Union of Teachers, UK; National Union of Teachers (Ealing branch), UK; OELI/UG (Oesterreichische LehrerInnen Initiative/Unabhaengige GewerkschafterInnen) - Austrian Teacher's Initiative, Austria; Observatório Latino-Americano de Políticas Educacionais, Brazil; Pakistan Association For Adult/Continuing Education (PACADE), Pakistan; Parteiunabhängige LehrerInnenliste (Austrian teachers' union), Austria; People and Planet (Student campaign group), UK; Quality Public Education Coalition (QPEC), New Zealand; Red de Educacion Popular entre Mujeres (REPEM), Uruguay ; ADUFU-SS (Seção Sindical dos Docentes da Universidade Federal de Uberlândia), Brazil ; SDEN CGT 05, France ; SUD éducation 05, Hautes-Alpes, France ; , Italy; Unione degli Universitari, Italy; UT Watch, University of Texas, USA; Vorarlberger Lehrerinnen- und Lehrer-Initiative (VLI), Austria]. *See*, <http://www.gatswatch.org>. *See also*, the International Association of Universities' GATS web page *available at* (URL) <http://www.unesco.org/iau/globalization/wto-gats.html> and the Joint Declaration of the American Council on Education, the Council for Higher Education Accreditation, the Association of Universities and Colleges of Canada and the European University Association *available at* (URL) <http://www.eua.be.eua/>

91. "1. Education is a right, not a commodity." *See*, Principles of guidance of the Education Group Charter of the European Social Forum in Florence, Italy, 2002.

92. Mehra, *supra* note 8, at 81. *See also*, David Barnhizer, *Human Rights Strategies for Investigation and 'Shaming,' Resisting Globalization Rhetoric, and Education*, in Barhnizer (ed.), *supra* note 8, at 5.

93. “They can use their global power to manipulate national policy-making, to influence both corrupt and honest political leaders, and move their resources and bases of activity freely if they see better deals elsewhere or are resisted in their efforts to gain concessions. (...) The very concept of democracy is threatened by the scale on which such enormously powerful and unaccountable economic leviathans operate and by the equivalent scale of institutions such as (...) the World Trade Organization.” Barhnizer, *supra* note 92, at 5.

94. *See* Raoul Jennar, *GATS: Six Reasons to Fear the Precise Threats on Education*, L’Humanité, October 12, 2000.

95. “The system operate outside the ability of any nation’s citizens to control. They [trade negotiators] take decisions, create policies, and implement actions that have never been agreed to by the citizens of a particular nations. (...) The result is that the mechanisms of citizen participation and political control over decisions that impact their lives in the most fundamental ways are becoming increasingly remote.” David Barnhizer, *supra* note 92, at 6.

96. “As it stands, the WTO remains a private club, devoid of any serious democratic checks and balances”, A-C. Habbard and M. Giraud, in Federation Internationale des Droits de l’Homme (FIDH), Position Paper, *The World Trade Organisation and Human Rights*, November 1999, available at <http://www.fidh.org/ecosoc/rapport/2001/ang/omc320a.pdf>.

97. *See* Mehra, *supra* note 8 (emphasis added).

98. “A procedural approach can become an effective method of challenging disregard of human rights in macroeconomic policies through a requirement that a human rights impact assessment be carried out before such policies are developed and implemented.” Special Rapporteur’s Report, *supra* note 57, at para. 10.

99. Mehra, *supra* note 8, at 83.

100. Mehra, *supra* note 8, at 83.

101. Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 14 *European Journal of International Law* (2002), at 30.

102. A. Oosterlinck, *Trade in Educational Perspectives: A European Perspective*, Spreekversie, Washington, May 23, 2002, at 1.

103. “Liberalization does not mean de-regulation, on the contrary, further liberalization requires an appropriate regulatory framework to sustain it.” B.K. Zutchi, *WTO Symposium on Issues Confronting the World Trade System*, WTO Headquarters, Geneva, July 6-7, 2001.

104. “Because services are not object, barriers to trading services are referred to as non-tariff barriers.” Peter Frase and Brendan O’Sullivan, *The Future of Education Under the WTO*, at 2, available at <http://www.corporations.org/democracy/wtoed.html>.

105. They consist in immigration requirements, foreign currency control measures, credit and credential recognitions, monopoly on national licenses, limits on foreign direct investment, nationality requirements, needed tests, restriction on foreign recruitments, or national subsidies rules. *See* WTO Background Note, *supra* note 94, at para. 30.

106. *See* Kelsey, *supra* note 89, at para. 7.

107. “In sum, we believe that, consistently with their general approach, the drafters [of the GATS] consciously adopted the terms ‘affecting’ and ‘supply of services’ to ensure that the disciplines of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service.” *European Communities-regime for the importation, Sale and Distribution of Bananas: Complaint by the United States*, Report of the Panel, WT/DS27/R/USA (1997).

108. For instance, only 42 of the 144 WTO members had made commitments in the area of education as of May 2002. *See* OECD Working Paper, *supra* note 81, at 3. *See*

also, Documents concerning the negotiations and new proposals on education, available at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm.

109. “Countries are increasingly coming under pressures to open their education market to foreign services providers. Moreover, much of this pressure is coming from three of the Quadrilateral governments- the United States, the European Union, Japan and Canada- the countries with most influence at the WTO.” AUCC Background Paper, *supra* note 19, at para. 37.

110. *Id.*

111. Kelsey, *supra* note 89, at para. 9.

112. Julie Nelson, *supra* note 80.

113. The GATS Preamble recognizes, *inter alia*, “...the right of members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives...”

114. “Finally, availability of the public morals (...) exceptions depends upon whether article XX would be interpreted as available for ‘outward-oriented’ measures designed to influence the human rights policies of another jurisdiction, which existing GATT jurisprudence calls into question”. Frank J. Garcia, *Protecting the Human Rights Principle in a Globalizing Economy*, in Barhnizer (ed.), *supra* note 8, at 85.

115. *See id.*

116. “No government measure ‘affecting trade in services,’ whatever its aim- environmental protection, consumer protection, enforcing labor standards, promoting fair competition, ensuring universal service, or any other goal- is in principle, beyond GATS scrutiny.” *See* Scott Sinclair, *GATS: How the WTO’s new “services” negotiations threaten democracy*, at 3, available at <http://www.policyalternatives.ca/publications/gatssummary.html>.

117. “Governments would be compelled to demonstrate, first, that non-discriminatory regulations were ‘necessary’ to achieve a WTO-sanctioned legitimate objective and,

secondly, that no less commercially restrictive alternative measure was possible.” *Id.* at 7.

118. *Id.*

119. *See supra* p. 10.

120. *See, inter alia*, D. Van Damme, *Higher Education in the Age of Globalization: The need for a new regulatory framework for recognition, quality assurance and accreditation*, Introductory Paper for the UNESCO Experts Meeting, at 3.

121. Special Rapporteur’s Report, *supra* note 57, at para. 7.

122. “A definition of education as ‘efficient production of human capital’ may well be cited as an argument for such investment but excludes the concept of education embodied in human rights law and classifies it in ‘externalities.’ The increasing change of terminology from ‘primary’ to ‘basic’ education might imply the lowering of the child’s right to education, both quantitatively and qualitatively. As is well known, the effects of such innovations are likely to be discriminatory unless specific policies are in place to prevent this.” *Id.* at para. 14.

123. MEHRA, *supra* note 8 at 78-79.

124. HCHR Report, *supra* note 15, at para. 59.

125. *See* MEHRA, *supra* note 8 at 78-79.

126. *Id.*, at 80.

127. *Id.*

128. *See* HCHR Report, *supra* note 15, at para. 59.

129. *See* P.J. Kuyper, *The Law of GATT as a Special Field of International Law*, 25 Netherlands Yearbook of International Law 227 (1994).

130. A self-contained regime is a system “embracing, in principle, a full (exhaustive and definite) set of secondary rules (...) intended to exclude more or less totally the

application of the general legal consequences of wrongful acts.” B. Simma, *Self-Contained Regimes*, 16 *Netherlands Yearbook of International Law* 111 (1985), at 111.

131. *See* Frank J. Garcia, *supra* note 114, at 88.

132. *See* Jeffrey L. Dunoff, *Rethinking International Trade*, 19 *University of Pennsylvania Journal of International Economic Law*, 347 (1998).

133. Frank J. Garcia, *supra* note 114, at 88.

134. Ernst-Ulrich Petersmann, *From ‘Negative’ to Positive Integration in the WTO: Time for ‘Mainstreaming Human Rights into WTO Law?’*, 37 *Common Market Law Review* (2000) 1363, at 1365.

135. *Id.*, at 1376.

136. J.P. Trachman, *The Domain of WTO Dispute Resolution*, 40 *Harvard International Law Journal* 333 (1999), at 336.

137. *See* Frank J. Garcia, *supra* note 114, at 89-91.

138. *See id.*, at 94.

139. *See* Philip Alston, *supra* note 101, at 5.

140. *See* Frank J. Garcia, *supra* note 114, at 88.

141. *Id.* at 89.

142. Jack Donnelly, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989), at 10.

143. Frank J. Garcia, *supra* note 114, at 96.

144. A.H. Robertson, *The Implementation System: International Measures, in THE INTERNATIONAL BILL OF RIGHTS*, 350, Louis Henkin (ed.) (1981), at 350.

145. Ernst-Ulrich Petersmann, *Constitutionalism, International Law and “We the Peoples of the United Nations”*, in H.-J. Cremer (ed.), *TRADITION AND WELTOFFENHEIT DES RECHTS: FESTSCHRIFT FÜR HELMUT STEINBERGER* (2002), at 291.
146. “The WTO promotes the rule of law more effectively than any other worldwide treaty.”, Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 *Journal of International Economic Law* (2000), at 25.
147. See Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European integration*, 13 *European Journal of International Law* (2002), at 621. See also Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 *American University Journal of International Law and Policy* 1, (1996)33-39.
148. See Salman Ball, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 *Minnesota Journal of Global Trade* 62, 76-79 (2000).
149. See, *inter alia*, Frank J. Garcia, *supra* note 125, at 100.
150. Julie Nelson, *supra* note 91.
151. See Julie Nelson, *supra* note 91.
152. For example, “properly understood globalization present new opportunities to address human rights problems. It represents expanded capabilities for human rights cooperation among governments, as well as among far-flung non-governmental organization. It allows the enhanced flow of information and technology needed to identify and respond to human rights threats.” David Barnhizer, *supra* note 103, at 7.
153. See Joint declaration, *Get Education Out of Gats*, *supra* note 90.
154. See Kelsey, *supra* note 89.

155. For example, *see* The Bologna Joint Declaration of the European Ministers of Education of June 19, 1999. *available at* <http://www.unige.ch/cre/activities/Bologna%20forum/Bologne1999/bologna%20declaration.htm>

156. Nowak *supra* note 55, at 425.

Author's Details

Pierrick Devidal holds a *Master in Laws* (LL.M.) from the Dean Rusk Center for International Graduate Legal Studies, University of Georgia School of Law, Athens, GA, USA; a *Diplôme d'Etudes Supérieures Spécialisées* (D.E.S.S.) in International Affairs and a *Maîtrise* in International Law from the Faculté de Droit, Université Jean Moulin Lyon III, Lyon, France. He has also studied at the Faculty of Law of Leiden Universiteit and at the Hague Academy of International Law in the Netherlands.

Pierrick Devidal is currently Rapporteur at the Appeal Commission for Refugees (Commission des Recours des Réfugiés) in Paris. He has worked as a legal intern for the Regional Unit of the United Nations High Commissioner for Refugees in San Jose, Costa Rica; for the Office of Legal Affairs of the United Nations Secretariat in New York City, USA; and for the General Consulate of France in New York City, USA.

His LL.M. thesis, "*Reservations and Human Rights Treaties in the 21st Century: from Universality to Integrity*" is available at the Law Library of the University of Georgia and at www.libs.uga.edu

Correspondence

Pierrick Devidal
Lot. Les Iris
38121 Chonas L'Amballan, France
pierrickdevidal@hotmail.com