2 Measures affecting cross-border exchange and investment

2.1 How cross-border exchange occurs

Trade and education experts often talk a different language when discussing cross-border exchange and investment in higher education services. The first challenge in promoting cross-border exchange is to bridge the communications gap. What follows is a description of how each side talks about cross-border exchange, and what the relationships are between them.

Trade language

Services are often delivered face to face. This may involve the provider moving to the economy of the consumer, on either a temporary or permanent basis. Or it may involve the consumer moving temporarily to the economy of the provider.

The General Agreement on Trade in Services (GATS) under the WTO defines four modes of services delivery that recognise this phenomenon. The legal text of the agreement is available at www.wto.org/english/docs_e/legal_e/26-gats.pdf. The four modes of delivery are :

- Cross-border trade (mode 1). This is where neither the consumer nor the producer move. In the language of the GATS, the service is supplied ‘from the Territory of one Member into the Territory of any other Member’ (GATS Article I.2(a)). Services delivered via this mode are often delivered via e-commerce. An example in the education sector is distance education courses delivered via the internet or via a video conference link. This is a narrower definition of ‘cross-border’ exchange than used in the title of this study.

- Consumption abroad (mode 2). This is where the consumer moves temporarily to the economy of the provider. In the language of the GATS, the service is then supplied ‘in the territory of one Member to the service consumer of any other Member’ (GATS Article I.2(b)). An example is a tertiary student of one economy moving to another economy to enroll in university.

- Commercial presence (mode 3). This is when the provider sets up a permanent commercial presence in the economy of the consumer. In the language of the GATS, the service is then supplied ‘by a service supplier of one Member, through commercial presence in the territory of any other member’ (GATS Article I.2(c)). An example is a university in one economy establishing an offshore campus in another economy.

- Movement of natural persons (mode 4). This is when the provider moves temporarily to the economy of the customer. In the language of the GATS, the service is supplied ‘by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member’ (GATS Article I.2(d)). An example is an individual university lecturer moving to another economy for a few months to deliver a short course.

Central to these definitions is the concept of a ‘natural’ person, ie an individual, versus a ‘juridical’ person, ie a corporation or other legal entity. Mode 4 concerns the movement of natural persons. They may be individuals working on their own account. Or they may be employees of a commercial entity in their own economy. But when they move, they move as an individual — the institution that employs them does not also move.

By comparison, mode 3 concerns the permanent establishment of a commercial entity. It does not cover the permanent movement of individuals, which is specifically ruled out of the GATS (GATS Annex on Movement of Natural Persons Supplying Services under the Agreement, Article 2). When an institution sets up a commercial presence in another economy, however, it may want staff from the parent institution to work in the new affiliate for a temporary period. This is one subcategory of movement of natural persons covered by mode 4, namely, the movement of intra-corporate transferees (typically defined as executives, specialists or managers).

The definitions of the modes also use the notion of temporary or permanent movement. Temporary movement may occur for more than a year, and so may involve a change in residence, such as when a student moves to another economy to complete a three year degree. But it does not involve seeking access to the employment market of the other economy to deliver a service, nor does it involve *permanent* residence.

Education language

Higher education practitioners tend to talk about ‘exchange’ rather than ‘trade’. They see higher education services being exchanged via the mobility of:

- people — students, instructors, researchers, experts/consultants;

- programs — through arrangements such as twinning, franchising, articulation, joint/double degrees, validation, online or distance education;
- providers — branch campuses, independent institutions, mergers/ acquisitions, virtual campuses; and
- projects — via the transfer or sharing of research, curriculum, technical assistance or other educational services.

A distinguishing feature of program mobility, as distinct from provider mobility, is that the institution granting the qualification does not move, in the sense of establishing a permanent commercial presence in the host economy, but finds other ways to deliver the program content. As noted, these methods have developed in part because of barriers or impediments to commercial presence in some economies. The various other ways of delivering programs are defined as follows (OECD 2007):

1) *Franchise* **—** An arrangement whereby a provider in source economy A authorises a provider in host economy B to deliver their course/program in economy B. The qualification is awarded by the provider in source economy A. The arrangements for teaching, management, etc are customised for each franchise arrangement. They must met the regulatory requirements (if any) of host economy B. They may sometimes also meet the regulations or codes of good practice of source economy A.

2) *Twinning* — A provider in source economy A collaborates with a provider in host economy B so that students take course credits in host economy B and/or source economy A. The qualification is awarded by the provider in source economy A. Arrangements usually comply with the regulations of source economy A.

3) *Double or joint degree* **—** Providers in different economies collaborate to offer a program for which the student receives a qualification from each provider, or a joint award from the collaborating partners. Arrangements are customised for each initiative and meet the regulations of both economies.

4) *Articulation* **—** Articulation arrangements allow students to gain credit for courses/programs offered by all of the collaborating providers. This allows the student to gain credit for work done with a provider other than the provider awarding the qualification, but with a much looser collaboration between providers than in twinning.

5) *Validation* **—** Validation arrangements allow a provider in the receiving economy B to award the qualification of a provider in source economy A. In some cases, the source economy provider may not offer these courses or awards itself.

6) *E-learning or distance* — Arrangements where providers deliver courses or programs to students through distance and online modes. This may include some face-to-face support for students through domestic study or support centres.

Because these methods do not involve the movement of the granting institution, they do not strictly count as delivery via commercial presence, even though some commentators have classed them as such (eg Knight 2002).

More broadly, there is not a simple one-to-one correspondence between the methods of delivery identified by educators and trade specialists. But some links can be made. The teaching arrangements that support online or distance education may include short-term visits by individual instructors from the source economy to the host economy. The teaching arrangements that support either program or provider mobility may include the short- or longer-term transfer of individual instructors from the source to the host economy. The arrangements that support project mobility may include the short- or longer-term exchange of teaching/research staff and/or graduate students.

Thus mobility of:

- *people* can involve exchange via GATS modes 2 (student mobility) and 4 (instructor mobility);
- *programs* can involve exchange via GATS modes 1 (program mobility and distance education), 2 (student mobility) and 4 (instructor mobility);
- *providers* can involve exchange via GATS modes 3 (commercial presence) and 4 (instructor mobility); and
- *projects* can involve exchange via GATS modes 1 (mobility of research, curriculum), 2 (mobility of graduate students) and 4 (mobility of teaching/research staff).

2.2 Measures affecting cross-border exchange and investment

Once again, there are differences in the way that trade specialists and educators talk about measures affecting cross-border exchange.

Trade language

Trade specialists tend to focus on barriers or impediments, because these are the targets of the trade disciplines that have been developed to date.

The GATS recognises two key types of barriers to services trade:

- limitations on market access; and
- derogations from national treatment.

The key distinguishing feature is that derogations from national treatment imply that foreign service providers are discriminated against, vis a vis domestic suppliers. The discrimination can be de facto or de jure (WTO 2001). By contrast, limitations on market access may affect both foreign and domestic suppliers (WTO 2001).

Under the WTO, economies do not have to make any commitments at all about such measures. But if they do, those measures can become subject to progressive liberalisation through successive rounds of multilateral trade negotiations.

Where trade commitments are made, they do not cover all non-discriminatory measures. Instead, they are limited to six specific types of measures (GATS Article XVI.1 and XVI.2):

- limits on the number of services suppliers;
- limits on the total value of services transactions;
- limits on the total number of service operations or total quantity of service output;
- limitations on the total number of natural persons employed;
- measures that restrict or require specific types of legal entity or joint venture; and
- limitations on the participation of foreign capital.

An obvious question arises about the status, in trade terms, of measures that limit the entry of new domestic or foreign service providers equally, but which do not take one of these six forms. According to the Guidelines on Scheduling Specific Commitments (WTO 2001), these measures may be subject to the GATS disciplines on domestic regulation (GATS Article VI.5(a)). In those sectors where an economy has made specific commitments, qualification requirements and procedures, technical standards and licensing requirements must not interfere with ('nullify or impair') an economy's national treatment or market access commitments by failing to be:

- based on objective and transparent criteria, such as competence and the ability to supply the service;
- not more burdensome than necessary to ensure the quality of the service; and
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Thus there may be some legal sanctions on such measures. However, those sanctions are weak, because WTO Members have yet to operationalise the concept of ‘not more burdensome than necessary’.

Education language

In some respects, educators tend to take a broader view of measures affecting cross-border exchange.

Firstly, they are concerned about measures that affect the export of higher education services, not just the import of services. As noted in the study by the APEC Group on Services (2000), key measures reported to inhibit consumption abroad include access to employment in the host economy as well as foreign exchange requirements of the host economy. Visa requirements also affect consumption abroad. These are all measures imposed by the exporting rather than the importing economy, but may be of concern to the importing economy because they limit its access to higher education services.

However, such measures are typically beyond GATS disciplines. The GATS guidelines (WTO 2001) note first that there is no obligation under the GATS for a Member to take measures outside its territorial jurisdiction. They also note that whatever the mode of supply, obligations and commitments under the Agreement relate directly to the treatment of services and service *suppliers*. They only relate to consumers so far as services or services suppliers of other Members are affected. This has implications for measures affecting education exports via mode 2, whereby international students come to a host economy to be educated. Discrimination against those students is only relevant if it somehow implies discrimination against foreign suppliers.

According to educators, a critical barrier to cross-border exchange of higher education services is lack of recognition of the foreign qualifications so obtained (eg Australian Education International 2005, OECD 2007). While this is also recognised by trade experts, in practice few if any economies have scheduled lack of recognition as a trade barrier (WTO 1998).

Educators are also concerned about measures that promote cross-border exchange and investment in higher education. These include subsidies and measures to promote quality assurance.

Trade agreements have yet to develop disciplines on the size of the subsidies available for services, or on the criteria under which they can be obtained. However, they are typically concerned to ensure that availability of subsidies is on a non-discriminatory basis.

Similarly, trade agreements have yet to develop disciplines on quality assurance processes, in the sense of operationalising the concept that they be 'not more burdensome than necessary to ensure the quality of the service'. However, they are typically concerned to ensure that quality assurance processes are applied on a non-discriminatory basis.

2.3 Assisting translation between educators and trade experts

Table 2.1 gives some practical examples of the types of measures that may be familiar to education experts. They have been chosen to be at least potentially GATS-relevant, and have been classified according to whether they are limitations on market access or derogations from national treatment. They have also been classified according to the four GATS modes of service delivery, as they affect imports of higher education services.

If an economy chooses to make WTO commitments at all in the higher education sector, it can still reserve the right to maintain such measures, by listing them as limitations in its GATS schedules. Otherwise, full commitment means that such measures would need to be phased out.

Table 2.2 gives some practical examples of trade barriers as they affect exports of education services. Restrictions typically affect exports delivered via mode 2 (the inward movement of foreign students to take courses locally) and mode 4 (the outward movement of local teachers to deliver courses overseas). These restrictions can have very real effects on trade in education services. But as noted, in most cases, they would not have to be scheduled in an economy's GATS schedule, because they do not affect the viability of local service *providers* (either domestic institutions or the local campuses of foreign institutions).

Table 2.1 **Examples of barriers to imports of education services**

Mode	*Limitations on market access*	*Derogations from national treatment*
Cross-border trade, eg downloading course from the internet	Restrictions on downloading educational material from the internet, be it from a domestic or foreign supplier	Restrictions on downloading educational material from foreign internet sites
	Requiring foreign suppliers of internet education courses to be in a partnership or joint venture with a local institution	Restrictions on which courses foreign suppliers of distance education can provide
	An economic needs test attached to registration, authorisation or licensing of all education providers, including those supplying via distance education	Restrictions on the import and distribution of educational materials or software from foreign institutions providing distance education
	Restrictions on the recognition of qualifications obtained from any distance education supplier	Restrictions on the local accreditation of foreign distance education suppliers, or on the recognition of qualifications obtained from a foreign distance education supplier
		Restrictions on cross-border payment or credit card transactions
Consumption abroad, eg home students moving overseas to study	Since the home economy has no jurisdiction over the foreign service supplier, it can mostly limit foreign supply only *indirectly* by restricting the local consumer. Such restrictions on consumers are unlikely to also affect local suppliers. Hence it is unlikely that there would be limitations on market access for *imports* of education services delivered via this mode.	Restrictions on foreign education institutions advertising locally or recruiting local students
		Quotas on the number of local students going overseas to study
		Foreign currency restrictions on local students studying abroad
		Restrictions on the recognition of overseas qualifications for institutional credit
		Restrictions on the recognition of overseas qualifications for professional licensing and accreditation

Continued

Table 2.1 Continued

Mode	*Limitations on market access*	*Derogations from national treatment*
Commercial presence, eg foreign institutions establishing a local campus	An economic needs test attached to registration, authorisation or licensing of all education providers	An economic needs test attached to registration, authorisation or licensing of foreign education providers
	A requirement that the foreign institution incorporate locally	A restriction that prevents foreign tertiary institutions from using the term 'university' in the title of their local campus
	A requirement that the foreign institution operate in a joint venture with a local institution	Restrictions on the scope of services that the local campus of a foreign institution can provide
	Restrictions on the number of foreign teachers that local institutions can employ	Restrictions on the number of students that the local campus of a foreign institution can service
	Limits on foreign equity in local institutions	A residency requirement on the management of the local campus of the foreign institution
		Discriminatory quality assurance requirements on the local campuses of foreign institutions
		Restrictions on the ability of the local campuses of foreign institutions to grant degrees, or restrictions on the recognition of those degrees
		Restrictions on the ability of the local campuses of foreign institutions to charge fees
		Restrictions on the ability of local campuses of foreign institutions to gain access to producer subsidies
		Restrictions on the ability of the students of local campuses of foreign institutions to gain access to consumer subsidies
Movement of natural persons, eg international teachers coming to deliver short courses	An economic needs test attached to registration, authorisation or licensing of all education providers, including international teachers	Nationality or citizenship requirements to teach locally
	Quotas or economic needs tests on the numbers of temporary staff employed by local institutions	A prior residency requirement to teach locally
	Labour market testing for the contract employment of international teachers	Restrictions on the recognition of the qualifications of international teachers

Source: WTO (1998), WTO (2001), IDP Education Australia (2002).

Table 2.2 **Examples of barriers to exports of education services**

Mode	Restriction
Consumption abroad, eg international students entering to take local courses	Numerical limits on the entry of international students
	Limits on what courses international students can enrol in
	Discriminatory enrolment criteria for international students
	Restrictions on local institutions recruiting international students
	Restrictions on international students gaining access to local employment while studying
	Restrictions on international students gaining access to tuition or other (eg transport) subsidies while studying
Movement of natural persons, eg local teachers moving overseas to deliver courses	Exit restrictions on domestic teachers
	Education or employment bond requiring teachers to serve a minimum term of employment locally before they can go overseas
	Restrictions on funds transfers overseas by domestic teachers

Source: WTO (1998), WTO (2001), IDP Education Australia (2002).