3 A survey of measures

The survey questionnaire that was used to collect information about measures affecting cross-border exchange and investment in higher education is reproduced in Appendix 2. Reasonably complete responses have been received from nine of the 21 APEC economies — Australia, Chile, Indonesia, Japan, Mexico, New Zealand, Peru, Chinese Taipei and Thailand. Incomplete responses were also received from Brunei and Canada.

The questionnaire was designed to cover all forms of higher education services — not just those leading to a university degree or equivalent, but also post-secondary technical and vocation education services. However, it was left to the survey respondents to flag whether their regulations affected these different types of higher education differently. It was also left to survey respondents to flag any differences in regulations across sub-national jurisdictions (eg States, provinces). Some survey respondents, such as Australia, have quite distinct sets of regulations affecting vocational and other post-secondary education, and also have differences across States. In order to fully understand these distinctions, it is necessary to refer to the detailed comments attached to the survey responses, which have been recorded in the spreadsheet that accompanies this report.

The survey questionnaire is divided into three parts. By far the biggest part deals with the policy frameworks that affect *institutions* granting tertiary qualifications in a particular economy. The second part deals with the policy frameworks that apply to the inward and outward movement of individual *students*. The third part deals with the policy frameworks that apply to the inward and outward movement of individual *instructors*.

The institutions granting qualifications in a particular economy can be domestic or foreign. Some of the foreign institutions may have a physical commercial presence in the host economy, and some may not. Thus most of the questions about institutions are answered separately for the following types of institutions:

- domestic — government;
- domestic — private non-profit;
- domestic — private for-profit;
- foreign — online and distance;

- foreign — in partnership (twinning, franchise or other collaborative agreement — see Chapter 2 for definitions) with a local institution;
- foreign — with a physical commercial presence, in a joint venture with a local partner; and
- foreign — with a physical commercial presence, 100 per cent foreign-owned.

The purpose of including all institutions is to highlight the extent to which the policy frameworks governing foreign institutions differ from those affecting domestic institutions.

Trade experts have a particular interest in such discrimination. But which domestic institutions would trade experts include in the comparison? Would they compare the treatment of foreign institutions with private for-profit institutions, or would they also compare the treatment with government and private non-profit institutions?

Note first that the disciplines imposed by the GATS are disciplines on the treatment of *foreign* suppliers of *private* tertiary services (WTO 1998, OECD 2004). The GATS does not pose any disciplines on the way in which *domestic* suppliers of tertiary education services can be regulated, other than the requirement, noted in the previous chapter, that if commitments are made at all, then domestic regulation, including that applied to domestic institutions, must be no more burdensome than necessary.

Nevertheless, if an economy grants 'national treatment' to foreign suppliers, it commits to treat them no less favourably than domestic suppliers. The question arises as to which domestic institutions to use as a basis of comparison.

According to the GATS, the agreement does not cover 'services supplied in the exercise of government authority', where this is defined as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.

Which parts of the education sector qualify as a 'public service' has been a contentious issue. There is no clear dividing line between non-commercial provision and commercial (but subsidised) provision. And whether something is viewed as being in competition with something else can vary, depending on how broad or narrow the relevant market is seen to be.

However, following the discussion in WTO (1998), if domestic publicly funded institutions are free to set fees and are judged to be supplying in competition with private institutions (ie are not supplying a public service), then granting national treatment to foreign suppliers means those foreign suppliers would need to be treated the same as those domestic publicly funded institutions. Nevertheless, economies may include additional language in their trade commitments with the intent of removing government institutions from the comparison. For example, Australia has specified that its commitments are limited to privately funded education services. Japan has listed what types of educational entities are considered to be Formal Educational Institutions.

3.1 Policy frameworks governing institutions

The questionnaire first asks about regulatory restrictions on the *establishment* of institutions, and restrictions on their *ongoing operations,* once established.

Restrictions on establishment include limitations on new entry, various restrictions on legal form, limitations on equity participation (either by private sector shareholders or by foreign entities), restrictions on what the institutions can call themselves or what degrees they can offer, difficulties getting effective intellectual property rights protection for curriculum, and restrictions on access to government funding. In addition to asking about limitations on entry, the questionnaire also asks about the stated reasons for those limitations. They may be for protective purposes, or they may be associated with ensuring quality or equitable access. The significance of this is discussed further in Chapter 5.

Restrictions on ongoing operations include restrictions on course content or language of instruction, restrictions on recruitment or fee setting, minimum requirements for employing teachers with local citizenship, local residency or local training, restrictions on the use of the internet or the importation of educational materials, restrictions on the repatriation of fee or other income, and differential tax treatment.

The questionnaire then asks about the conditions required to obtain *local licensing or registration*. As noted earlier, these licensing conditions are not necessarily regarded by trade experts as trade barriers. Nevertheless, any significant cross-country differences in the general stringency of licensing conditions may be of interest in its own right, and the reader is referred to the detail contained in the spreadsheet that accompanies this report for such information. Finally, in this section, the questionnaire asks whether there is a requirement for the management of higher education institutions to have local nationality, local residency or local licensing as a professional. This type of requirement can operate as a restriction on foreign supply.

Next, the questionnaire asks a series of questions about *quality assurance requirements*, such as accreditation or audit requirements. Once again, these requirements are not necessarily regarded as trade barriers by trade experts. However, the questions give an indication as to the breadth, depth and transparency of the quality assurance processes, in terms of whether the processes are mandatory or voluntary, what they cover, who they involve and how the results are disseminated. The questions draw on the discussion of the various options for quality assurance processes contained in OECD (2007).

The questionnaire then asks a series of questions about *credit transfer and recognition*. These ask about restrictions on the transfer of course credits between the institutions that grant qualifications within a particular economy, and the acceptance by those institutions of courses granted outside the economy. It then asks similar questions about the recognition of prior qualifications, for the purposes of further study. Finally, it asks about restrictions on the recognition of qualifications by government or private sector employers in a particular economy, either from institutions that grant qualifications within a particular economy, or from outside institutions. While trade experts would agree in principle that such restrictions are barriers to trade, they rarely deal with them in practice.

Nor is it easy for forums of educators to deal with these restrictions. While governments may lay down guidelines about credit transfer and the recognition of qualifications, it is ultimately up to individual institutions and employers to decide which courses or prior qualifications they will recognise. For this reason, some of the EdNET contacts who completed the questionnaire were not able to provide answers to the questions in this section, which remains one of the most unsatisfactory parts of the questionnaire. However, this also suggests that problems with credit transfer and recognition may be best dealt with indirectly, by promoting quality assurance among the higher education institutions, and by promoting the transparency of those quality assurance processes.

Finally, the questionnaire contains a small *other* section asking about the transparency of the regulatory processes affecting higher education institutions — who is consulted and how regulatory and administrative decisions are disseminated.

3.2 Policy frameworks governing individual students and instructors

The two following sections of the questionnaire ask about restrictions on the *inwards* and *outwards* movement of individual *students* or *instructor*s. Many of these restrictions would be beyond the scope of traditional trade negotiations, either because they affect the consumers (ie students) rather than the suppliers of higher education services, or because they apply beyond the regulatory jurisdiction of the particular importing economy which might be concerned about them.

In each case, restrictions on inwards movement can include special visa restrictions that might apply to students or teachers, over and above the general immigration requirements, and quotas (for students) or economic needs tests (for teachers, such as a requirement to prove that there is no locally qualified teacher before an international instructor can be hired). Both students and instructors may be affected by minimum currency requirements. Students may be affected by limited access to employment or to government subsidies while studying. Teachers may be affected by taxation or superannuation requirements. In addition, student mobility may be inhibited by restrictions on local institutions being able to recruit international students.

Individual students and teachers may also be affected by the discriminatory application of general regulation — students by discriminatory enrolment criteria, and teachers by discriminatory registration or licensing requirements for individual instructors.

Finally, both individual students and teachers may be affected by restrictions on outward movement. In many cases, these can be similar to the restrictions on inward movement — visa exit restrictions, quotas, or currency restrictions. Teachers may also be affected by employment bonds, whereby they may be required to work at home for a minimum time before going overseas, particularly if their teacher training costs have been covered by their home government.

3.3 Survey results

The survey results form a three-dimensional data 'cube', with information on various restrictions or regulatory policies, broken down by individual economy and affected entity — type of institution, individual student or individual instructor. Depending on which dimensions of the cube are chosen, it is possible to extract information for each responding economy under the following types of headings:

- regulatory environment;
- licensing and registration process;
- quality assurance process (accreditation, audit);
- credit transfer and recognition;
- teacher/lecturer exchanges;
- partnerships and twinning;
- joint ventures;
- 100 per cent foreign-owned institutions;
- other requirements.

It is not possible to present all this information. Firstly, there is a great deal of it. Secondly, much of it is qualitative.

Furthermore, caution should be exercised in interpreting the responses. Despite efforts to develop a common understanding about the survey questions among the respondents, there is inevitable variation in the ways in which questions have been interpreted, and in the depth and quality of responses. In particular, economies that have provided very detailed responses sometimes run the risk of looking more restrictive, simply because they have provided more complete information. But despite these limitations, some broad patterns emerge.

Broad trends — institutions, students and instructors

The economies that appear to have the highest restrictions on institutions are those, such as Indonesia and Chinese Taipei, which do not allow private for-profit or foreign-invested institutions to establish at all. At the other extreme are economies such as Australia, New Zealand and Peru, which have relatively liberal regimes, although for different reasons. Australia is a major exporter of higher education services, so its regulatory regime reflects its comparative advantage. Peru, on the other hand, has no legal restrictions on foreign-invested institutions, other than those that apply to local institutions, but currently there are no such institutions operating in Peru (although there are two at the project stage). Thus its regulatory regime for these institutions may perhaps be underdeveloped.

The types of institutions where restrictions are most prevalent are private for-profit and foreign-invested institutions. Nevertheless, it is also notable that government institutions also face relatively frequent restrictions. For example, all but one of the responding economies report restrictions on the entry of new government institutions. Six of these economies state that one of the reasons for these restrictions is quality assurance. New Zealand also cites budgetary reasons for some of the restrictions on government institutions. This is evidence of the phenomenon that institutions that are in receipt of significant government funding are likely to face relatively high standards of scrutiny and accountability, some of which will be manifest in regulatory restrictions.

The institutions facing the lowest prevalence of regulatory restrictions on average are private non-profit institutions, those in a partnership arrangement with a foreign institution, and institutions delivering online and distance education. For example, Mexico records no regulatory restrictions on partnership arrangements because it allows foreign commercial presence, an alternative form of service delivery. However, there is considerable variation in the attitude to online and distance education. The education authorities in some economies (eg Indonesia and Mexico) do not recognise online and distance education institutions, and their regimes are accordingly relatively restrictive. Others, such as New Zealand, take a relatively relaxed approach to such institutions.

There is an interesting relationship between the prevalence of restrictions on higher education institutions and the breadth, depth and transparency of quality assurance processes. Many of the responding economies noted that one of the reasons for their restrictions on entry was quality assurance. For example, Australia, Indonesia and Chinese Taipei all cited this as one of the reasons for restricting the entry of the institutions that were allowed to operate in their economies. All of these economies subject such institutions to quality assurance regimes that are relatively extensive, at least in terms of process (more extensive than in Japan or Thailand, for example). Yet neither Indonesia nor Chinese Taipei extend their quality assurance regimes to private for-profit or foreign-invested institutions, choosing to ban them instead. This issue is examined further in the next chapter.

Across all the responding economies, restrictions on the movement of individual students are about as prevalent as restrictions on institutions. Restrictions on the movement of instructors are notably less than on students.

The economy with the highest prevalence of restrictions on students is Australia, the economy with probably the highest international student intake. In part, the extensiveness of its regulations on incoming students reflects that large numbers of students that need to be managed. However, the need for management arises in part because of the close and inevitable links between student exchange and subsequent permanent migration. Furthermore, Australia is one of several economies that has instituted a formal ‘two-step’ migration process, whereby its international students gain extra credit for the purposes of permanent migration. Thus, while international students may be subject to relatively heavy regulatory restrictions, they are also now advantaged for migration purposes.

Hawthorne (2009) argues that using such ‘two-step’ mechanisms in the international competition for skills can lead to instability in student flows. She also notes the scope for migration-driven flows to rapidly distort international student flows by sector and discipline. Another problem is that private sector respondents to the opportunities that migration-driven student flows create add to the problems of quality assurance (see also Findlay and Tierney 2009). While the links between student exchange and migration can potentially work to the benefit of both the home and host economies, managing them needs to be part of a broader agenda.

Regulatory environment

The broad pattern seems to be that regulatory restrictions on establishment are more prevalent than regulatory restrictions on ongoing operation. By far the most prevalent restriction across all responding economies is that on degree/certificate awarding powers. Apparently the only responding economies that do not impose restrictions on such powers are Japan and Thailand. However, where these powers are restricted, they are often regulated for all institutions by the government education authorities. Accordingly, these restrictions rarely operate on a discriminatory basis.

Another prevalent regulatory restriction is on the ability of foreign institutions to access government funds and/or support normally given to institutions. Most of the responding economies that allow foreign institutions to operate impose this restriction on at least some of them, one exception apparently being Australia. In New Zealand, this restriction is stated to be for budgetary reasons. This rationale probably applies at least in part in other economies as well, even if protectionist motives are also at play. Similarly, most of the responding economies that allow foreign institutions to operate also restrict the ability of the students in at least some of them to access government funds and/or support normally given to local students. In New Zealand, it is stated that the enrolment of international students is generally required to be self-funding. Again, this is at least partly for budgetary reasons.

The next most prevalent regulatory restriction is on the use of names or university title. Again, this is often regulated for all institutions by the government education authorities, and the restriction rarely operates on a discriminatory basis.

Another common regulatory restriction is a requirement that institutions must establish in a particular form, reflecting those economies (such as Indonesia) that require higher education institutions to be non-profit. Arguably, in some cases this restriction has the effect of offering protection for domestic institutions, even if the stated rationale is philosophical.

The most common regulatory restriction on operation is limits on the number of students that can be enrolled. Mostly, this is for budgetary reasons (eg in Australia and New Zealand).

It is also relatively common for there to be restrictions on the ability of institutions to charge fees. However, in Australia, New Zealand and Indonesia there are fewer restrictions on charging fees for international students than for local students. This reflects the growing commercialisation of cross-border higher education.

Other types of regulatory restrictions on ongoing operation are relatively infrequent. In particular, there are few restrictions on the operations of online and distance education providers, by way of restrictions on access to the internet or to educational materials. The predominant restriction on this mode of delivery appears to be lack of recognition.

Licensing and registration

As noted earlier, licensing conditions are not necessarily regarded by trade experts as trade barriers, but they certainly vary enormously from one economy to another. Some respondents reported very few requirements. For example, the licensing criteria for domestic non-profit institutions in Japan include a minimum capital requirement and proof of the professional qualifications of the staff. In Mexico, there is a requirement for such institutions to have adequate infrastructure. By contrast, Australia lays down particularly elaborate requirements for either post-secondary technical and vocational education institutions, or for 'other' higher education institutions (including universities), that apply to any provider. New Zealand allows organisations to negotiate individual charters, and requires them to undergo an analysis of corporate form, financial performance, quality management system, fee protection approach, business plan and management commitment.

Some responding economies were able to provide a great deal of information about their licensing regimes, including links to relevant government websites. Other responding economies provided very little information. Some of this may reflect the efforts of individual respondents, but some undoubtedly reflects differences in the general degree of transparency of the licensing regimes.

Quality assurance processes

There is apparently some noticeable variation in the breadth, depth and transparency of quality assurance regimes among the responding economies. Economies with extensive processes include Peru and Australia, followed closely by Mexico, Chinese Taipei, New Zealand and Chile. Economies with less extensive processes are Thailand and Japan. In addition, the quality assurance processes appear to be 'balanced', in the sense that if they are good, they are uniformly good, while if they are average, they are uniformly average. Interestingly, however, most economies report that their processes go beyond an assessment of inputs (eg admissions, faculty numbers) and processes (eg conduct of research, conduct of student assessment), and include an assessment of outputs (eg graduates, publications, research findings) and even outcomes (eg student job outcomes post-graduation, innovation).

Credit transfer and recognition

According to the survey responses, there are relatively few restrictions on the recognition of qualifications for the purposes of employment or further study. Even when the qualifications are obtained outside the economy, there are relatively few recorded recognition problems. However, as noted earlier, this is one of the most unsatisfactory parts of the survey, because of limited responses.

Other

The survey responses highlight the relatively sparse consultation and dissemination processes that operate in many of the less developed APEC economies, including Chile, Indonesia, Mexico, Chinese Taipei and Thailand, but also in Japan.

Restrictions affecting students and instructors

By far the most common restrictions on international students are applied on entry, by the economy that is exporting the higher education services. As noted in Chapter 2, these restrictions are not covered by GATS disciplines.

To the extent that teachers are affected at all, it is through entry restrictions. There are no recorded cases of discriminatory registration or licensing requirements, probably because few economies have any registration or licensing procedures for teachers (as opposed to teaching institutions).