

# International Quality Review, the World Trade Organization and the General Agreement on Trade in Services (GATS)

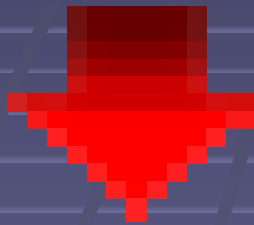
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# Structure of presentation

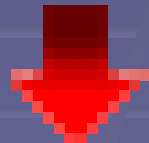
- What is “trade” in education services
  - The threshold issues
- The GATS
  - Scope – governmental services carve out
  - Commitments
    - Modes of supply
    - Market access and national treatment
    - What if I change my mind?
  - The GATS and regulation
    - Article VI.4
    - Recognition
- What’s happening in the current negotiations?

# What is trade in education services?

- Internationalisation



- Cross-border education



- Trade

# Threshold issues

- Public, private or both?
  - Many countries are re-drawing the line between public and private funding and provision of education services
  - Domestic decision based on many factors – e.g., budget priorities, role of government, allocation of costs
    - Who pays? Who benefits?
- Categories become continuums - public/private mixes

# Threshold issues

- **Nationals or foreigners?**
  - Can have only national private for-profit providers
  - Why include foreigners – e.g., to meet growing demand; access other technologies, learning models or skills; academic enrichment; build domestic capacity; introduce competition.
  - BUT how ensure quality, impact on local providers (private and public)
  - Many issues are the same for national, as well as foreign private supply.
- GATS is only interested in foreign supply – not privatisation *per se*.

# Threshold issues

- **Trade vs trade agreements**
  - Trade, and the regulatory challenges that accompany it, will be there without GATS
    - Trade in education grown in near-absence of GATS commitments
    - Lower cost of travel and communication, technological advances, – make already international nature of education easier to pursue in many forms.
    - Many drivers – one important one is student demand, especially in developing countries and including in context of increasingly global labour market for the highly skilled
  - This increase has raised many new regulatory issues
    - especially how to ensure quality.
      - Misfit between national-based regulatory systems and increasingly international nature of education.

# Threshold issues

- Liberalisation and regulation
  - Liberalisation is NOT de-regulation but often requires more regulation
    - re-regulation and regulatory reform
    - Harder to regulate sector with foreign commercial participants
      - But problems also in purely national or public systems
  - Liberalisation must be underpinned by appropriate regulation
    - Regulation – and enforcement – is a major challenge for some countries

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# The GATS

- The General Agreement on Trade in Services (GATS)
  - Entered into force 1995
  - All 148 WTO members are members of GATS
  - Three parts:
    - General obligations (rules)
    - Annexes on particular sectors (e.g., telecommunications, financial services)
    - Schedules of commitments (market opening - one for each WTO Member.

# The GATS

- Agreement is unfinished, negotiating mandates in several areas:
  - Government procurement (currently not covered)
  - Subsidies (currently no specific disciplines)
  - Domestic regulation (Article VI.4)
  - Emergency Safeguard (Article X)

# The GATS

- The GATS is very broad. It covers:
  - All services
    - except air traffic rights and governmental services
  - All measures affecting trade in services
  - All levels of government
    - Includes sub-national, local and regional
    - Non-governmental agencies if they are exercising delegated powers.

# The GATS

- Governmental services carve out
- GATS excludes “services provided in the exercise of governmental authority” (Article I.3)
- Services that are supplied
  - Neither on a commercial basis
  - Nor in competition with one or more service suppliers
- No further elaboration by Members on what exactly this exclusion covers

# Governmental service carve-out

- Problem of trying to find formulation that covers everyone's systems – benefit of ambiguity is that everyone believes their system to be covered.
- Why not just carve out anything with public ownership?
- Because it varies between countries, and has been subject to rapid change (e.g., telecommunications)

# Governmental service carve-out

- Not on a commercial basis
  - Would exclude many not-for-profit activities
  - Problem of categories blurring
- Nor in competition
  - Does co-existence mean competition?
  - Can have different coverage, funding arrangements, and not be actively competing (in terms of marketing etc)

# Governmental services carve out

- No desire WTO Members to narrow this.
  - Negotiate a clarification?
  - Being considered but danger that could make it worse?
- Where they have chosen to make commitments on education, some countries have specified that they mean only private, commercial activities *as they define them*
  - Australia, New Zealand, Switzerland, some East Europeans have included specific wording on this
  - EU general carve out

# The GATS

- Most GATS obligations only apply where a country has chosen to make a market opening commitment. For the 100 WTO members who have made no commitment on education, the only rules that apply are:
  - Transparency
    - Must publish or make otherwise publicly available all relevant laws etc at the national level
  - Most Favoured Nation (MFN)
    - Treat all other countries equally (can exclude them all)
    - Exemptions possible at time joined GATS
  - Recognition
  - Legal remedies for administrative decisions (but not if it would conflict with the nature of the legal system)

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# The GATS

- What are GATS commitments?
- Minimum guaranteed treatment to all other WTO members
- Commitments can be made for each sector
  - 12 sectors, based on the UN Central Product Classification, or countries can use their own definition
- And for each mode of supply.

# Modes of supply

Source: OECD

Trade Mode of supply	Definition	Example	Non-trade term
Mode 1	Service crosses the border	Distance education	Programme mobility
Mode 2	Consumption abroad	Students study abroad	People (student) mobility
Mode 3	Establishment	Branch campuses, training companies (language, executive)	Institution mobility
Mode 4	Temporary movement of natural persons	Academic teaches abroad	People (academic) mobility

# GATS commitments

- **Market access (Article XVI)**
  - Limitations (including in the form of economic needs tests) on:
    - The number of service suppliers,
    - the value of service transactions,
    - the number of service operations,
    - the number of natural persons employed in a sector,
    - Foreign capital participation
  - Restrictions on types of legal entity
- **National treatment (Article XVII)**
  - Foreigners granted treatment no less favourable than like national services and service suppliers.
  - Can be formally identical or different – key is whether it alters the conditions of competition
  - De facto and de jure discrimination

# GATS commitments

- For both market access and national treatment
  - Can make no commitment to provide (unbound)
  - Can make partial commitment and list to remaining restrictions
  - Can maintain no restrictions (none)
- Complex variable geometry of GATS – can do that for each sector and each mode of supply within that sector.
- Can also make a “horizontal” commitment covering all sectors which a country is including in its schedule of market opening commitments

# GATS commitments

- GATS does not require market opening, but provides a range of options:
  - Exclude education entirely from commitments
    - If make no commitments, only general obligations apply – MFN, transparency etc
  - Exclude some education services from commitments
    - E.g., only make commitments for adult short-term language courses
  - Exclude some modes of supply
    - E.g., permit students to study overseas (mode 2) but prohibit branch campuses (mode 3)
  - Limit market access
    - E.g., restrict the provision of degree courses to national providers;

# GATS commitments

- Options, cont'd:
  - Discriminate in favour of national providers (NT)
    - E.g., restrict provision of subsidies to national suppliers
  - Treat some foreign suppliers better than others
    - If have MFN exemption or are party to an RTA
  - Commit to less than current access
  - Commit to liberalise in the future
  - Developing countries can open fewer sectors and attach conditions GATS does not require market opening.

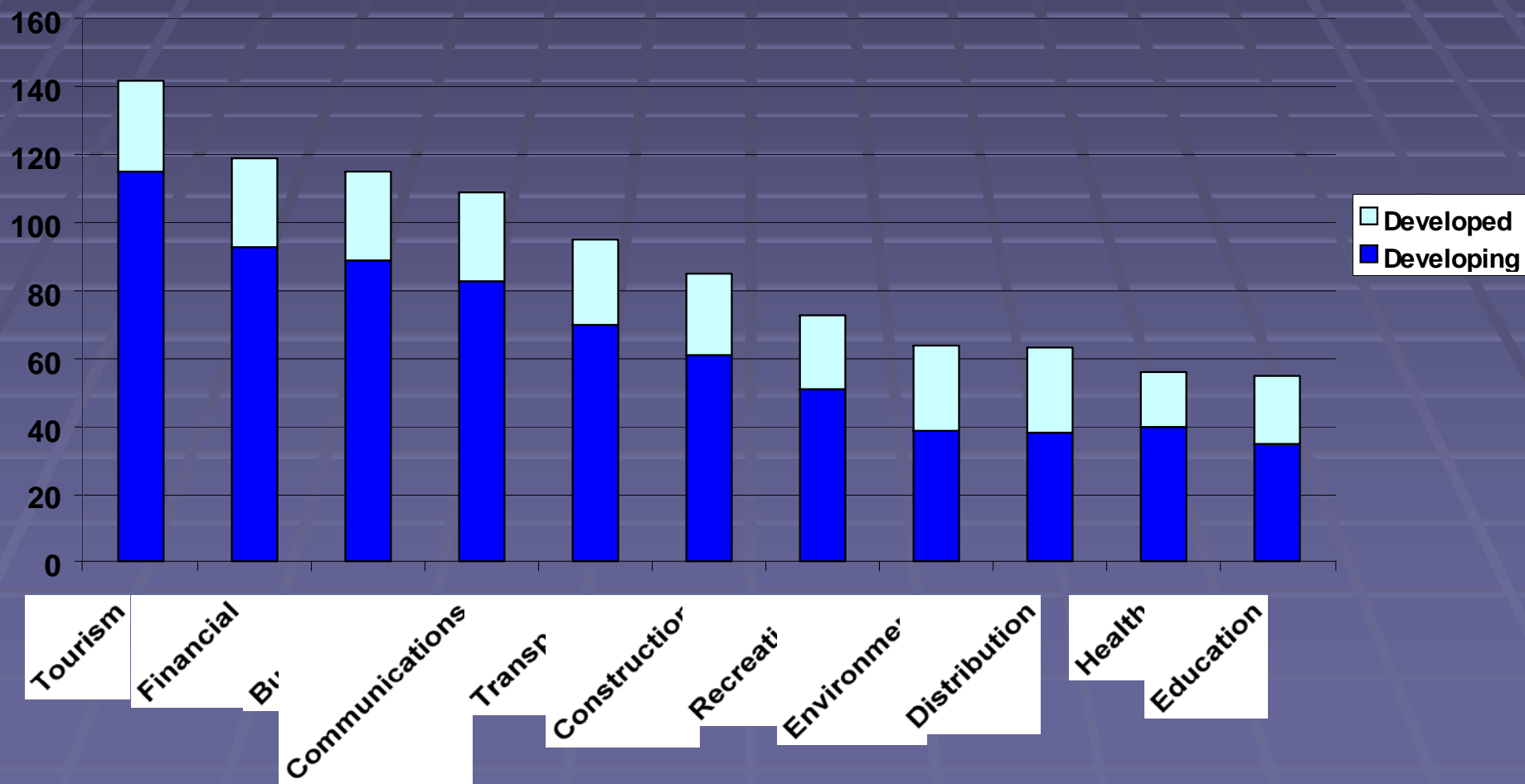
# GATS commitments

- 48 countries have made commitments on education services to date

Education sector	Existing commitments	Developing country or transition economy
Higher education	35	28
Adult education	34	27
Other education	19	16

# Current Commitments (source: WTO)

(Developed/Developing Country Members, August 2003)



# GATS commitments

- Why?
- In many cases, already had foreign providers; commitments reflected situation that had been in place for some years.
  - Happy - revenue for universities; filling graduate places in maths and science courses.; creating capacity; increasing diversity.
- In some cases, commitments are much less than the status quo.
  - Did not commit to the existing level of access, only some parts with which they were most comfortable
- In other cases, countries wanted to attract foreign providers
  - Use GATS commitments to send the signal that they were interested, open and would provide certain policy environment.

# GATS commitments

- What if I change my mind?
  - Renegotiation of commitments (Article XXI)
    - Pay compensation (market access is another sector)
  - Balance of payments
  - Exceptions
    - Protect public morals, life and health, fraud and privacy, national security
  - Emergency safeguards
    - Under negotiation
  - Word of caution
    - If removing private rights, GATS not generally the only issue

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# GATS and regulation

- Often see the statement “GATS regulates trade in education services”
- But the emphasis is on *trade*
- It is not the education services that the GATS regulates, but the trade. GATS is an agreement which regulates trade, not education.
- The increase in trade in education has created regulatory gaps, but the GATS will not fill these
- GATS negotiates the liberalisation, but not the regulation that must underpin it.

# GATS and regulation

- What is the impact of GATS on regulation?
- Normal regulatory framework also applies to foreign providers
  - E.g., can require all universities to teach courses on a given subject or to meet a certain standard
- Under GATS, countries can also place additional regulatory requirements on foreigners, provided they list them in their schedule.
- Where commitments for a sector are made, all measures must be administered in a reasonable, objective and impartial manner (Article VI.1).
- Certain types of measures may be subject to additional disciplines under Article VI.4

# GATS and regulation

- Article VI.4 mandates the negotiation of any necessary disciplines to ensure that measures relating to licensing and qualification requirements and procedures, technical standards are
  - Based on objective and transparent criteria;
  - Not more burdensome than necessary to ensure the quality of the service
  - In the case of licensing procedures, not in themselves a restriction on the supply of the service
- These do NOT exist as yet.
- In the interim, Article VI.5
  - Only where commitments made
  - All existing – or reasonably foreseeable measures – excluded.

# GATS and regulation

- What does this cover?
  - Non-discriminatory measures
    - Measures applying equally to both foreigners and nationals
  - Measures which are not market access
    - None of those listed in Article XVI
  - Little progress to date; most controversial is the “necessity test” provision

# The GATS and regulation

- Some WTO members argue that the necessity test is unnecessary, as countries should be free to apply standards as they see fit
  - E.g., requirement that all universities include 30 trained intensive care nurses on their staff
  - Concerned about “second-guessing” national regulators
  - Focus instead on transparency
- Others argue that, because these measures all affect them, they should be able to challenge them
  - Not challenging the objective, just the means to achieve it
  - Other – equally effective and reasonably available – ways to achieve the same objective
    - E.g., in the above example, require First Aid training for all staff.

# The GATS and regulation

- General agreement that “to ensure the quality of the service” is too narrow – other objectives can also be important (environmental, social etc)
- While no final decision made, likely to apply only where commitments made
  - Logic of agreement
  - Article VI.5 precedent
- Any *necessary* disciplines
  - Need to identify interests and inform negotiations.

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# Recognition

- GATS Article VII permits, rather than requires recognition
  - Needs to permit is as is deviation from MFN (can recognise qualifications from some members and not others)
- Quite broad – education or experience obtained, requirements met or licenses or certifications granted in another country.
- Recognises that recognition will happen elsewhere, but aims for transparency.
  - Afford other interested members adequate opportunity to negotiate their accession to agreements or negotiate similar agreements.
    - Notify new agreements or negotiations to facilitate this.

# Recognition

- Little to say on substance - broad discretion to accord recognition as see fit
  - Based on multilaterally agreed criteria – “wherever appropriate”
  - Encouraged “in appropriate cases” to work with relevant inter- and non-governmental organisations to develop international standards and criteria for both trades and professions and recognition.
- Main discipline is that can't discriminate amongst members in the *application* of standards or criteria
  - Can apply any standard you wish, but must apply same standard to all.

# Recognition

- Other main provision is Article VI.6 which requires that, in sectors where specific commitments regarding professional services are made, each Member shall provide for adequate procedures to verify the competence of professionals of any other member.
  - “Adequate procedures” not further defined
  - Procedures, not standards
  - Only where specific commitments made.
    - Tend to have anyway

# Recognition

- Two further caveats
- Not clear that recognition agreements concluded as part of regional trade agreements are covered by these disciplines.
- What is the status of recognition agreements which are not government-to-government agreements?
  - GATS is only a government-government agreement; actions of private bodies are not covered unless....
  - Those non-governmental bodies are exercising powers delegated by the central, regional or local governments and authorities
    - Where not exercising delegated powers, are recognition agreements reached between professional bodies covered by the GATS?

# Recognition

- 39 notifications made by 19 WTO Members (EC as 1) covering 144 agreements.
- Neighbouring countries or part of broader regional integration.
- Countries with close historical (linguistic, education) ties
- Most between developed countries.
- Most progress in industry managed and enforced agreements, mostly the internationalised professions – engineers, architects, accountants.
- Most trade agreements simply encourage the development of recognition agreements by competent authorities.

# Why limited progress?

- Wide range of practices and cultural assumptions
- Fear of loss of regulatory sovereignty
- Absence of formal licensing or qualification systems in some countries
- Absence of recognition frameworks or experience
- Recognition often led by industry associations – may be lacking or not interested in facilitating access
- Lack of awareness in the professions of the benefits of recognition agreements
- Resource intensive and complex negotiations
- Lack of incentive to negotiate in absence of real market access interests or where foreigners are not permitted to provide the service anyway.

# The GATS and regulation

- The key point is that GATS has had little impact on recognition.
  - Although increased trade and investment can lead to an increased demand for foreign qualifications and increased pressure for recognition of qualifications.
- This demand will increase the need for frameworks for quality assurance
  - And for increased dialogue amongst quality assurance and accreditation bodies about how they work.

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# What's happening in the current negotiations?

- GATS negotiations commenced 1 January 2000.
  - “Built in agenda” GATS Article XIX, along with agriculture
  - Negotiating proposals tabled but not much movement until
- WTO Ministerial Conference, Doha, 2002
  - Launched broader round of negotiations
  - Overall deadline 1 January 2005

# Phase 1: negotiating proposals

- General proposals on education tabled by Australia, Japan, New Zealand and the United States
  - Limited to adult and higher education
  - Acknowledge the central role played by governments in providing and regulating education
  - Private education complements, but does not replace, public systems

# Phase 1: negotiating proposals

- Increase number and quality of commitments on education
- Work on definition and classification of education activities (New Zealand + US)
- Focus on barriers to trade (Australia)
- Ensure that the quality of the service is maintained and improved, and that national differences are recognized (Japan)

# What's happening in the current negotiations?

- What sorts of barriers exist?
  - Equity ceilings for foreign providers (mode 3)
  - Restrictions on real estate (mode 3)
  - Inability for foreign providers to apply for a license or accreditation (mode 1, 3)
  - Discriminatory provision of subsidies to national commercial providers (mode 3) or discriminatory tax treatment.
  - Economic needs tests or nationality requirements for staff (mode 4)

# What's happening in the current negotiations?

- What sorts of barriers exist cont'd
  - Foreign institutions only permitted to enrol foreign students
  - Discriminatory licensing and accreditation requirements
    - BUT not non-discriminatory ones
      - If want to require all providers, domestic and foreign, to teach certain courses, OK.
- Lack of recognition of foreign qualifications (mode 4, but also mode 2)

# Phase 2: request offer negotiations

- Submission of initial requests by 30 June 2002
- Submission of initial offers by 31 March 2003
- The request / offer process is continuing
  - 40 initial offers received so far
    - 9 propose commitments on education; of which 7 are developing countries
  - Some countries (Canada, EU) have indicated that they will not be making or seeking commitments on education

# What's happening in the negotiations?

- WTO Ministerial Cancun September 2003 ended in failure
  - Attempts to re-start the negotiations this year, but deadline of 1 January 2005 increasingly unlikely to be met.
  - Some new GATS offers being received (Bulgaria, India) but pace is slower and progress depends on broader round
- Time to debate, consider and research the GATS and education.

# Concluding thoughts

- Trade in education will continue with or without GATS
  - Important regulatory challenges will arise
  - GATS will not – and should not – address them.
- Education community will need to continue to address them
  - And to increase their international dialogue
- Also increase their dialogue with trade negotiators to ensure their input on those areas of the GATS yet to be negotiated
  - Current negotiation
  - Rules – Article VI.4.

Thank you

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