

***Trading it away:
how GATS
threatens UK
Higher Education***

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1 Introduction

Political shifts and technological advances have contributed to a situation where Higher Education (HE) is no longer exclusively the preserve of the nation state, and traditional assumptions about the form, delivery, content and purpose of HE are being challenged. The term 'borderless education' has been coined to encompass a broad range of activities and developments, which cross (or have the potential to cross) the traditional borders of higher education, be they geographical, sectoral or conceptual.¹

One of the issues at the very heart of this debate is the desirability (or otherwise) of subjecting HE to the strictures of international 'free trade' agreements. Supporters of such a proposition argue that the development of a lightly-regulated, competitive global market in HE is a benign inevitability, and as a consequence should be positioned within a global trading framework, where the market can be both fostered and kept free of trade-distorting government intervention. Opponents of the idea maintain that the role of education as a public good is threatened by its transformation into a commodity to be bought and sold on the free market. They argue that many contemporary free trade agreements (FTAs) exacerbate social and economic inequalities and promote the primacy of the market over and above the right of governments to regulate in the public interest.

Recently the debate has intensified because of attempts to expand the World Trade Organisation's General Agreement on Trade in Services (GATS). This treaty, which promotes free trade in services, has an extremely wide coverage and there is a distinct possibility that as a result of current negotiations UK Higher Education (UKHE) will become bound by its rules. (Throughout this paper, we use UKHE to refer to degree-awarding institutions in the UK that are publicly funded through the relevant national funding council.²) Our analysis suggests that university administrations, academics and students should all be concerned.

We come to the overall conclusion that GATS is a highly inappropriate framework within which to seek the internationalisation of HE. We use the word internationalisation, rather than globalisation, because it *'reflects the historic tradition of engagement across national borders which has been one of the defining characteristics of the academic profession.'*³ Throughout this paper, therefore, we use the word internationalisation to refer to a desirable process within which relationships between national HE sectors are advanced in a co-operative, 'not-for-profit' manner, with educational priorities acting as the primary driving force. We contrast this with the competitive, commercial and profit-driven processes often associated with economic globalisation, and argue that, in a world where HE is already undergoing rapid restructuring, GATS is likely to steer the sector (both domestically and internationally) down an effectively irreversible, inflexible and excessively market-oriented road, thus severely compromising the viability, ideals and character of UKHE.

Perhaps the most fundamental observation we make is that, while most of the advantages associated with the internationalisation of HE already lie outside the GATS framework, a significant number of dangers specific to the GATS trade regime lie within it. As a consequence, endorsing GATS as a framework in which to pursue the internationalisation of HE is taking a largely unnecessary risk.

We divide our analysis into several sections. In Section 2, we provide a brief introduction to GATS, looking at its structure, the motivation behind its existence and some of the key controversies that are dogging the agreement. We outline 11 general concerns about GATS, and show how each could impact on UKHE.

We then address the central question of the extent to which UKHE is currently protected by the so-called 'public services' exemption in GATS, and find that the exemption is of highly limited relevance to UKHE. This is likely to be of particular significance given that UKHE stands on the very cusp of liberalisation under GATS.

Next, we look at the implications of subjecting HE to GATS rules. Given the pivotal nature of this issue for all UKHE stakeholders, we devote Section 4 to the potential for GATS to have a profound negative impact on the financial viability of UKHE. Following on from this, Sections 5-7 consider GATS from the perspective of university administrations, academics and students respectively; many (but not all) of these concerns are emergent from the funding-related issues described in Section 4. The distribution of stakeholder concerns across three separate chapters should not obscure the significant areas of common concern between the three groups, most notably the deepening public funding crisis that GATS is likely to bring about. Finally, in Section 8 we present our conclusions and set out a series of recommendations as to how UKHE stakeholders might respond to the challenges posed by GATS. The use of some technical language has been unavoidable, but new terms are explained when introduced.

Before continuing, it is necessary to make a technical point about the content of this paper. Where it is necessary to refer to national bodies such as funding councils and quality assurance agencies, we have (for reasons of simplicity) referred only to the relevant English bodies i.e. HEFCE (Higher Education Funding Council for England) and the QAA (Quality Assurance Agency). We recognise that Wales, Scotland and Northern Ireland have their own variations on HEFCE and the QAA.⁴ However, given that these bodies fulfil similar functions to their English counterparts, and that all the home nations are bound by UK GATS obligations⁵, the broad principles of our analysis apply equally to the HE sectors in those countries.

Also, we have unfortunately not been able to extend our considerations to UK Further Education (UKFE), but much of our analysis will also apply to that sector, and we hope that FE stakeholders can use it as a basis from which to conduct their own research.⁶

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Steven Kelk and Jess Worth
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About People & Planet

People & Planet runs national campaigns on social and environmental issues in the UK Higher Education sector. Our previous campaigns have resulted in several notable successes. For example, in 1997 People & Planet founded and co-ordinated the 'Ethics for USS' campaign. In 1999 the campaign achieved a groundbreaking success, by persuading USS (Universities Superannuation Scheme), the £22bn university pension fund, to adopt a socially responsible investment policy.

We began working on GATS in 2000, when we produced the first UK briefing on how GATS could impact on Higher Education. Since then awareness of the issue has spread through the UKHE sector. We are now working closely on GATS with the Association of University Teachers, Natfhe (The University and College Lecturers' Union), the Association of Teachers and Lecturers, the National Union of Students and ESIB (The National Unions of Students in Europe).

We are working on GATS as part of a broader campaign for Trade Justice. We are active members of the fast-growing Trade Justice Movement, which is campaigning for world trade rules to work for the whole world.

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2 What is GATS? Key elements and controversies

2.1 Summary

In this section we:

- 1) Provide a brief introduction to the structure of the GATS treaty
- 2) Explain why GATS is topical at the moment
- 3) Highlight 11 areas of controversy

We begin in **Section 2.2 (Introduction to GATS)** by equipping the reader with a basic understanding of how the agreement works. The main points covered in this section are:

- International trade rules have traditionally focused on tangible goods, but services increasingly fall under their jurisdiction.
- GATS is an international trade agreement, overseen by the World Trade Organisation (WTO) that looks to extend free trade disciplines to the realm of services. GATS dates back to 1994.
- The coverage of GATS is extremely wide: there is no *a priori* exclusion of any service sector.
- GATS covers four different 'modes of supply' i.e. all the different ways a service can be exported from a producer of one country to a consumer of another. (For example, the producer setting up shop in the consumer's country, or the consumer travelling to the country where the producer is based.)
- GATS has a complex structure. Some disciplines are 'top-down' - which means they apply to (virtually) all service sectors - but for the most part GATS is 'bottom-up'. That is, the most far-reaching GATS disciplines only apply to those sectors and modes of supply each government voluntarily undertakes to 'commit'. Governments can specify the extent to which these far-reaching disciplines apply; countries made an initial set of commitments back in 1994.
- The most far-reaching disciplines are Market Access - which prevents governments from putting quantitative (and in one case, qualitative) limits on the amount of trade in the sector - and National Treatment, which requires governments to treat foreign services and service providers at least as well as domestic services and service providers.

In **Section 2.3 (The GATS2000 timeline)** we explain that:

- WTO Members have embarked on a new 'round' of GATS negotiations, called GATS2000.
- The aim of GATS2000 is to secure a new set of commitments from countries to complement the initial set made in 1994.
- The UK government is a very strong supporter of GATS and the GATS2000 round.
- The negotiations began in February 2000, and are set to run on until January 1st 2005, by which time the new commitments should have been finalised.
- EU member states negotiate as a single bloc, although within this structure member states have a degree of flexibility to tailor their individual commitments.
- The trade arm of the European Commission negotiates on behalf of the EU.

Finally, in **Section 2.4 (Key controversies)** we briefly discuss 11 key points which dominate the ongoing debate around GATS. In each case we comment on the explicit relevance to UKHE. The points are:

- **Ambiguity over inclusion of 'public services'**. *Public services may be exposed to the liberalizing pressure of GATS.*
- **Irreversibility**. *Once made, GATS commitments are very difficult to withdraw, to the extent that they are considered effectively irreversible.*
- **Lack of transparency**. *GATS negotiating positions are kept secret from the public. Key documents are either kept restricted or released after extensive delays, preventing democratic discussion of the issues at stake.*
- **Unprecedented depth and onerous obligations**. *Some aspects of GATS go further than other FTAs such as NAFTA.*
- **Loss of right to regulate?** *GATS closes down certain regulatory avenues - does this still allow governments the right to regulate?*
- **Cross-trading (both within GATS and between other agreements)**. *GATS commitments are not made in isolation from other trade negotiations.*
- **Dispute Settlement**. *There are concerns that the WTO's arbitration process could be used to challenge service-related regulation that has traditionally been the preserve of the nation state.*
- **'Progressive liberalisation'**. *GATS is designed to bring about an ever higher level of liberalisation.*
- **Unfinished GATS rules**. *The GATS legal environment is not yet complete - there are potentially highly significant new rules being developed that could well impact upon commitments made prior to their completion.*
- **Disproportionate corporate influence**. *Critics argue that business input into GATS negotiations is excessive.*
- **Adverse impacts on developing countries**. *Critics in both the North and South are worried that GATS will severely damage developing economies by constraining pro-development regulation and exposing under-developed service industries to global market forces.*

2.2 Introduction to GATS

GATS is the General Agreement on Trade in Services, an international trade agreement overseen by the World Trade Organisation (WTO)⁷. The WTO came into existence on 1st January 1995, following the Uruguay Round of trade negotiations, and is the formal successor to GATT (General Agreement on Tariffs and Trade), which persists as one of the agreements supervised by the WTO.

GATT concerned itself primarily with international trade in tangible goods, and looked to promote free trade in such goods through the removal of barriers such as import taxes, quotas, tariffs and so on – a process known as ‘liberalisation’. With the creation of its successor, the WTO, significant power was shifted from national governments to the new trade organization. The WTO was granted unprecedented power to impose sanctions for violations of trade rules. Its scope was also vastly expanded into areas such as intellectual property (the TRIPS agreement) and services (GATS).

GATS⁸ is designed to bring about the liberalisation⁹ of trade in services. The definition of ‘services’ within GATS is very comprehensive; in total 160 service sectors¹⁰ are potentially covered, ranging from business services and telecommunications through to sensitive sectors such as health and education.¹¹ The argument made for free trade in services is that all nations benefit if they scale down protection for their domestic service providers and allow a global ‘level playing field’ in which service providers from all nations can compete. If trade-distorting government intervention in the market (such as preventing foreign service providers from setting up in your country) can be removed, then supposedly this will provide consumers everywhere with the most efficient and competitive services. (Beyond this underlying rationale, the argument is tailored slightly differently in developed countries and developing countries.¹²)

The structure of GATS is complex for several reasons. Firstly, trade in services is defined very broadly to include activities – such as investment - never previously considered to be trade. Trade as commonly understood involves activities like country A exporting steel to country B, with the steel leaving the manufacturer in country A and crossing the border to the purchaser in country B. But under the GATS, this traditional concept of trade is only one of four ‘modes’ of trade and is called ‘*cross-border supply*.’ GATS defines four different ‘*modes of supply*’ as ‘trade’ in services and these are explained (with reference to education) in Box 2.1.

Secondly GATS has what is called a ‘*bottom-up*’ structure. The idea is that to governments can choose the rate at which they liberalise sectors. In particular, governments can choose which sectors to liberalise, when to liberalise them, in which modes of supply to liberalise (see Box 2.1) and how deep the liberalisation should go e.g. to what extent a ‘level playing field’ should be offered to foreign providers. GATS, however, obliges governments to enter into repeated rounds of negotiations to liberalise new sectors and deepen liberalisation in sectors already committed. So the flexibility governments have due to the GATS bottom-up structure disappears over time.

Mode 1: Cross-border supply. Where country A delivers its service out of its own territory and into the territory of country B i.e. by selling the service across the border. For example, Internet-based education courses being produced in country A but purchased on-line by students in country B, or universities in country A selling ‘distance courses’ to students in country B.

Mode 2: Consumption Abroad. Where consumers in country B travel to country A to receive the service. Students travelling to study overseas are a typical example of this. At present this is the main mode of supply by which education is exported.

Mode 3: Commercial Presence. Where a service provider from country A establishes a commercial presence in the territory of country B to sell its service to consumers in country B. For example, where universities of one country set up branches or franchises in other countries with a view to selling their courses to students there. Exports of education in this mode of supply are increasing rapidly.

Mode 4: Presence of Natural Persons. Where professional persons from country A move to country B to sell their service to consumers in country B. For example, when academics and teachers move abroad to teach.

Box 2.1: Different ‘modes of supply’ under GATS.

GATS is also not all bottom up; there are clauses known as *general obligations* (see Box 2.2) that apply 'horizontally' to virtually all service sectors, irrespective of whether the government has chosen to liberalise them or not. (A small number of service sectors - those supplied '*in the exercise of governmental authority*' - are free from even the general obligations, an issue we discuss in depth in Section 3.)

However, the most far-reaching obligations a government can assume with respect to a service sector occur if it makes '*specific commitments*' in that sector i.e. voluntarily undertakes to liberalise the sector as part of the 'bottom-up' process.

When a government makes a specific commitment in a sector it can specify in which modes of supply it wishes to liberalise, and also to what extent it wants to expose the relevant modes of supply to the strictures of two articles called *Market Access* (Article XVI) and *National Treatment* (Article XVII).

Broadly speaking, Market Access is the requirement that a government does not prevent service providers from entering the market *through the imposition of quantitative (and certain qualitative¹³) restrictions* on trade in that sector. National Treatment is the requirement that foreign service providers be treated *at least as well* as domestic service providers i.e. the trade principle of 'non-discrimination.'

We discuss Market Access and National Treatment in detail in Boxes 2.5 and 2.6 respectively. The point to emphasise is that these disciplines only apply if the government chooses to expose a sector to them.¹⁴

A government can initially control the extent it wishes Market Access and National Treatment to apply by specifying 'limitations' on its commitments. We explain how this is done in Box 2.4. (See Table 1 for an example of a schedule.)

Specific commitments are the main means for a government to communicate its GATS commitments, but governments invariably also complement these with '*horizontal commitments*' and '*horizontal limitations*' i.e. commitments and/or limitations that apply across the board to all their service sectors. Hence, the current state of a government's GATS commitments can only be ascertained by looking at both specific and horizontal aspects of their schedules.¹⁵

2.3 The GATS2000 timeline

WTO Members made a first set of GATS specific commitments back in 1994 when the agreement was first established. WTO Members are currently undertaking a new 'round' of GATS negotiations – known as GATS2000 – which aims to secure new, deeper levels of liberalisation. As with all WTO negotiations, EU member states negotiate as a bloc, with negotiations led by the trade arm¹⁶ of the European Commission (EC), under the overall guidance of Commissioner for Trade, Pascal Lamy. Although the EU negotiates as a single bloc, EU GATS commitments are often nuanced with individual EU members specifying different levels of liberalisation within the overall EU schedule. (It is not entirely clear how this process works, however - see Box 2.3.)

The UK government is a firm supporter of the GATS2000 round because of the UK's role as the world's second largest exporter of services. More generally, the trade arm of the EC is ideologically pro-liberalisation and strongly pro-GATS, reflecting the EU's ambition to capitalise on its role as the world's leading exporter and importer of services: '*European services*

Most Favoured Nation (Article II). The principle that a government should treat all foreign service providers the same i.e. it should not discriminate between foreign providers on the basis of their origin.

Transparency (Article III). Broadly speaking, that governments should have transparent, accessible decision-making processes pertaining to trade in services.

Monopolies and Exclusive Service Suppliers (Article VIII). WTO Members should prevent the activities of their designated monopolies from causing GATS violations of the Most Favoured Nation principle or their specific commitments (i.e. commitments under Market Access and National Treatment).

Box 2.2: General Obligations.

These are some of the GATS clauses that apply to (almost) all service sectors, irrespective of whether the government has 'committed' them or not.

*companies are among the most competitive and successful in the world... The EC has a paramount interest in the further liberalisation of services trade and has encouraged the drive to remove barriers to create a truly global market for services.'*¹⁷

The timetable for conclusion of the GATS2000 negotiating round was set at the Doha WTO Ministerial meeting, in November 2001. The deadline for WTO Members to submit initial 'requests' for which service sectors they would like to see each individual WTO Member 'open up' to competition from foreign companies was June 2002. The next deadline is March 2003, when WTO Members are supposed to finalise their initial offers i.e. which sectors they are willing to 'open up' themselves, in return. Both these stages are designed to occur on what is known as a 'bilateral' basis. That is, each WTO Member talks to each other WTO Member individually in turn, generally not letting other WTO Members know what requests and offers have been made between the two countries. Thereafter, WTO Members will engage in negotiations with a view to having a final set of GATS commitments ready by 1st January 2005. It should be noted that requests and offers tabled at the end of June 2002 and March 2003 respectively are only *initial* positions; new requests and offers can be submitted at any time. Furthermore, it is important to remember that, even though a country may liberalise a service sector to gain negotiating credit with one country in particular, the Most Favoured Nation (MFN) general obligation (see Box 2.2) means that the new market opportunities should be open to *all* trading partners.

'The UK, as the world's second largest exporter of trade in services, strongly supports these negotiations.'
**Department of Trade and Industry
GATS Website**

Within the WTO, the European Commission negotiates on behalf of EU member states. Beyond that principle, it is not entirely clear how responsibility for GATS negotiations is divided between member states and the EC. Following the Treaty of Nice the EC has (provisionally) won competence to negotiate for the EU as a whole as long as it has prior authorisation from the EU Council, where decisions are taken by Qualified Majority Voting. However, in sensitive areas such as education the EC requires consensus to negotiate i.e. member states have a veto. It is not clear how the bilateral elements of GATS negotiations involving specific requests and offers from specific countries are managed by the EC.

Box 2.3 - How the European Commission negotiates

When a government commits a sector it does so in the form of a GATS 'schedule', which (roughly speaking) resembles a 2x4 grid (Market Access and National Treatment along the top, the four modes of supply along the side). In each cell of the grid the government writes in any limitations it wishes to specify i.e. where it wishes to derogate from the default strictures of Market Access and National Treatment. The form these limitations take is at the discretion of the government, within certain parameters.

At one extreme a government might inscribe 'Unbound', which means it makes *no* commitments there, and at the other extreme it might inscribe 'None' (i.e. 'no limitations'), which means it is willing to fully expose that mode of supply to all the strictures defined in Market Access / National Treatment requirements (as appropriate.) So if a government writes 'Unbound' in the Commercial Presence [Market Access] cell the government is saying it reserves the right to waive Market Access obligations in that mode of supply and, for example, limit the number of service providers operating in its territory at its discretion. If it writes 'None' in, say, the Commercial Presence [National Treatment] cell then it is saying that foreign service providers operating in its territory will be treated at least as well as domestic service providers also providing that service, without exception i.e. the government will wholly respect the National Treatment strictures described in Box 5.

Box 2.4: GATS schedules

<i>TOUR GUIDE SERVICES</i>	<i>Limitations on Market Access</i>	<i>Limitations on National Treatment</i>
Cross-border Supply (Mode 1)	None	None
Consumption Abroad (Mode 2)	None	None
Commercial Presence (Mode 3)	The number of concessions available for commercial operations in federal, state and local facilities is limited	None
Presence of Natural Persons (Mode 4)	Unbound, except as indicated in the horizontal section	None

Table 1: An example of what a GATS schedule looks like. This is the USA's 1994 schedule for 'Tourism and Travel Related Services - Tourist Guides Services'. This is a fairly liberal schedule: the only limitations specified here (apart from any 'horizontal limitations' the USA has tabled applying to all sectors) are in Commercial Presence [Market Access] and Presence of Natural Persons [Market Access]. Limitations in the Commercial Presence mode of supply often reflect a nervousness on behalf of a country about granting too many rights to foreign companies operating within their territory. Many developed countries have been reluctant to liberalise extensively in the Presence of Natural Persons mode of supply because of sensitivities over possible influxes of foreign labour.

Market Access (Article XVI). Unless a government specifies limitations declaring otherwise, it should ensure that the following situation prevails in committed sectors and modes of supply:

- no limits on the number of service suppliers** whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- no limits on the total value of service transactions** or assets in the form of numerical quotas or the requirement of an economic needs test;
- no limits on the total number of service operations** or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test
- no limits on the total number of natural persons (i.e. foreign employees)** that may be employed in a particular service
- no measures which restrict or require specific types of legal entity or joint venture** through which a service supplier may supply a service; and
- no limitations on the participation of foreign capital** in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

Obligations under Market Access are **absolute**. That is, Market Access violations can occur even if the offending measure applies equally to foreign and domestic providers. So limiting both the number of foreign *and* domestic providers is still potentially a Market Access violation even though the measure does not discriminate between domestic and foreign providers. Thus, Market Access obligations also affect the relationship between the state and its domestic providers. The fact that Market Access disciplines such 'non-discriminatory quantitative restrictions' is an unusual feature and is discussed further in Section 2.4.4.

Box 2.5: Market Access (Article XVI)

National Treatment (Article XVII). Unless a government specifies limitations declaring otherwise, it should ensure that foreign service providers are treated **at least as well as domestic service providers**.

Crucially, a government can be in violation of National Treatment even if it affords formally identical treatment to both domestic and foreign providers. In other words, **'de facto' discrimination is not allowed either**. This is to prevent a situation where a government *in effect* discriminates against foreign providers by maintaining or introducing measures that foreign providers find more difficult to accommodate than domestic providers.

Box 2.6: National Treatment (Article XVII)

2.4 Key controversies

The structure of the GATS agreement itself, and the context within which negotiations are undertaken, has generated significant controversy. Interestingly, much of the debate is not based on the purported truthfulness of the claims set out below - many are indisputably well-defined features of GATS - but rather the differing interpretations that GATS critics and proponents attach to them. In this section we provide a summary of these concerns, and how they relate to HE. Where appropriate we revisit these concerns in greater detail later on in the paper.

2.4.1 Ambiguity over inclusion of 'public services'

It is not clear whether 'public services' are covered by GATS. This is of great concern, because if applied fully to these services GATS could threaten key public sector principles such as universal access to essential services. Most proponents of GATS argue that there is no need to worry because Article I.3 of the agreement excludes '*services provided in the exercise of governmental authority*' - further defined as those supplied '*neither on a commercial basis nor in competition with one or more service suppliers*' - from GATS coverage. However, a growing body of legal and political evidence suggests that the so-called 'public services exclusion' represented by Article I.3 is of questionable value¹⁸.

Of further concern is that, should this debate manifest itself in an actual trade dispute, the final arbiter on the issue would be a WTO Dispute Settlement panel (see Section 2.4.7 below). Thus, the GATS process potentially hands a small panel of trade experts significant power over the fate of public services.

If a public service *is* covered by GATS, it must minimally conform to general obligations such as Most Favoured Nation and Transparency. If, in addition, the government has made Market Access and National Treatment commitments in the sector then the delivery of the public service in question must also respect these more far-reaching disciplines, with potentially major consequences.

UKHE should be concerned because: In the discourse surrounding Article I.3 most talk is of whether basic services such as healthcare and primary/secondary education are covered. Significantly, HE does not figure prominently in this debate, and in Section 3 we demonstrate that - whereas the jury is out over the inclusion of primary and secondary education - the increasingly commercial and competitive nature of HE would suggest that Article I.3 affords the sector little protection.

2.4.2 Irreversibility

In the words of a member of the WTO Secretariat, 'The GATS can and will speed up the process of liberalisation and reform, and make it irreversible.'¹⁹ This effective irreversibility is intentional, in order to provide a stable climate for foreign investment. In theory, if a WTO Member state wishes to modify or reverse one of its GATS commitments, it can, but the process is considered so arduous and costly that such reversals will in practice be extremely rare. A Member state wishing to modify its schedules must wait at least three years from the point the commitment was made, give three months notice and enter into negotiations with all affected WTO Members, with a view to making new, compensatory liberalisation commitments.²⁰ In the event that a WTO Member

'Commitments are intended to be binding and ensure predictability for companies.'
Frequently asked questions about the GATS, DTI

does not follow this process, then the WTO Dispute Settlement procedure can be invoked, with trade sanctions a distinct possibility.

GATS critics argue that this effective irreversibility is an exceptionally onerous obligation, since it closes down the democratic right of future governments to change government policy, and significantly constrains the right to regulate. GATS proponents respond by arguing that all FTAs require a balance to be struck between the regulatory sovereignty of the nation state and the rights of investors and foreign traders. However onerous the outcome, it is claimed, the striking of this balance - through treaties such as GATS - is in itself a sovereign act. This argument, however, glosses over issues of transparency and, in particular, subsidiarity: local authorities, for example, are increasingly concerned that local and delegated regulatory authority is threatened by GATS²¹. Such concerns are hard to dismiss because Article I clearly states that GATS covers all measures taken by 'central, regional or local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities...'

Another argument offered is that GATS does *not* constrain the right to regulate, and as a result the importance attached to the 'irreversibility' of GATS is overstated. This claim is discussed in Section 2.4.5 below.

Finally, it is worth noting that, when combined with its 'progressive liberalisation' element (see Section 2.4.8) GATS is akin to a one-way road towards liberalisation. Many proponents of GATS consider the deep, binding nature of the agreement to be politically as well as economically useful. Indeed, the WTO has stated that '[GATS can help] overcome domestic resistance to change',²² demonstrating an ideological belief that, despite the fact that the debate surrounding service liberalisation is ongoing and in many respects only just beginning, the capacity for GATS to bypass this process is a welcome feature.

UKHE: The effective irreversibility of GATS could cause considerable problems for UKHE if some of the most serious concerns surrounding GATS turn out to be well founded. It will also make it extremely difficult to switch to a less liberal regulatory regime in the event that GATS-compliant regulation proves inadequate to serve the public interest in UK Higher Education.

'GATS rules extend to all forms of international trade in services. This means that the GATS represents a major new factor for a large sector of world economic activity. It also means, because such a large share of trade in services takes place inside national economies, that its requirements will from the beginning necessarily influence national domestic laws and regulations in a way that has been true of the GATT only in recent years.'
An Introduction To The GATS, WTO website

2.4.3 Lack of transparency

Despite the very real relevance of GATS to affected sectors, governmental bodies and other stakeholders, WTO Members have undertaken not to release detailed negotiating positions at any stage of the process. Prior to the June 30th 2002 deadline for submission of initial GATS requests, an EC representative commented that EU requests '*cannot and WILL NOT be made public*'.²³ GATS critics argue that the closed nature of the negotiating process is wholly inappropriate given the extremely profound impact that further GATS commitments could have.²⁴ In April 2002 a section of the EU's preliminary requests were leaked to the press and for many commentators confirmed the controversial character of the GATS process.²⁵ The requests show the EU demanding the liberalisation of basic services in developing countries, such as water, energy and postal services, and the removal of numerous measures used by countries to control and regulate foreign investment. The leaks sparked news stories all over the world²⁶ and secured front-page attention in *The Guardian* newspaper.²⁷

UKHE: Following the deadline for notification of initial GATS requests, the European University Association (EUA)²⁸ learnt only by chance that the EC had tabled a request to the US for HE liberalisation. We discuss this request further in Section 3. An EUA spokesperson expressed regret over *‘the lack of transparency in this phase of the GATS round, in marked contrast with negotiations involving other service sectors where providers are consulted.’*²⁹ As we discuss later, it is extremely likely that the UK is already subject to HE liberalisation requests from other countries but whilst this lack of transparency persists, we cannot know for sure, nor can we get access to any of the relevant details.

2.4.4 Unprecedented depth and onerous obligations

GATS is recognised as being extremely far-reaching in the degree to which it affects government regulation. Because GATS is a service agreement, the argument is made that it has to reach further ‘behind the border’ than traditional goods-based FTAs. Many of what are called ‘barriers to trade in services’ are not measures imposed at the border, but are inherent to everyday domestic regulation e.g. licensing requirements, qualification procedures and technical standards.

However, the range of responsibilities governments undertake through GATS is extensive even by the standards of existing FTAs which cover services, such as NAFTA (North American Free Trade Agreement)³⁰. For example, unlike NAFTA, GATS extends free trade disciplines to the award of subsidies, an issue of central importance to the impact of GATS on public funding for HE. Secondly, whereas NAFTA proscribes measures *‘tantamount to expropriation’*, GATS could preclude a much wider set of measures by requiring that domestic regulation be *‘not more burdensome than necessary.’*³¹ This innocuous-sounding clause is of immense significance, because if GATS is strengthened to enforce this requirement (see point 2.4.9), regulations may thereafter only be valid if they satisfy a WTO-sanctioned *‘legitimate’* objective and are demonstrably the *‘least trade-restrictive’* means of achieving that objective. As another example, GATS Market Access disciplines are absolute in that they prohibit both discriminatory *and* non-discriminatory quantitative³² restrictions i.e. even those quantitative limits on the amount of activity that apply *equally* to domestic and foreign operators.³³ NAFTA only requires that such limitations be listed.³⁴

‘The main barriers to trade in services are found in national regulations...[EC] negotiating positions must reflect UK business priorities.’

Peter Mandelson MP, then UK Secretary of State for Trade and Industry

‘Expansion of trade rules in the WTO into new areas has made the multilateral trading system directly relevant to almost all aspects of economic policy-making. The Services Agreement, for instance, relates to a wide range of policies, including investment, movement of persons as well as covering the whole range of services sectors; from telecommunications to financial services to transportation, distribution, energy and professional services. This gives the WTO a strategic position both in terms of the international economic and the domestic policy agenda of each country.’

Speech by WTO Director-General Supachai Panitchpakdi, 20 September 2002

UKHE: In Section 4 we find that GATS could, through its coverage of subsidies, lead to a sharp reduction in levels of public funding available to UKHE, or even the withdrawal of public funding altogether. The *‘least trade-restrictive’* feature of GATS could, as one of a number of adverse impacts, lead to the potentially negative restructuring of quality assurance in UKHE. Finally, in Section 5.3 we argue that the stringent character of GATS may well compromise the future ability of the UK government to regulate the HE sector in the public interest.

2.4.5 Loss of right to regulate?

A topic of fierce debate is whether GATS impinges upon a government’s *‘right to regulate’*. While proponents maintain that *‘the right to regulate and to introduce new regulations is explicitly guaranteed in the GATS’*³⁵, GATS critics assert that by

‘We are now approaching a new era. The WTO is used to dealing with only external issues and now it is time to deal with the domestic regulations that impede trade liberalisation.’

Incoming WTO Director General Supachai Panitchpakdi,

its very essence GATS is designed to strong-arm governments away from trade-distorting interference in the market.

Clearly this debate reflects a fundamental disagreement regarding the role of government. Certainly, on the basis of the GATS text itself, GATS critics appear to have a point; for example, consider the Market Access and National Treatment disciplines discussed in Section 2.2. These disciplines *do* close down a quite expansive range of regulatory avenues, yet despite this, GATS proponents maintain that the right to regulate is not threatened, and point to a reassurance in the preamble of GATS. But this is in fact less than reassuring, since by the conventions of international law the body of the treaty takes precedence over what is written in preambles.

Given the clear restraints on government regulatory authority represented by the GATS, the implicit argument GATS proponents are making seems to be that the set of legitimate regulatory *objectives* governments can pursue is not diminished by the agreement, that anything needing doing can be achieved in a GATS-compliant manner through (for example) market mechanisms. In this view, regulations that would be GATS violations - such as limiting the number of service suppliers - are not justifiable, because government regulatory involvement in markets should be limited to providing a stable, competitive environment and intervening to prevent market failure. Hence, the message seems to be that governments are only losing the right to undertake measures they would have been wrong to adopt anyway.

On March 21, 2001 Professor Howse (then Professor of Law, University of Michigan) responded to an editorial in the Financial Times in which it had been asserted that the concerns of GATS critics were overstated:

'If, as you suggest in your editorial ('Trade ill-served', March 19), it is a 'fantasy' that services trade liberalisation at the World Trade Organisation may imply domestic deregulation, including the dismantling of monopolies, this is a fantasy that the WTO secretariat has encouraged.'

Howse went on to say, *'To label criticism of the existing [GATS liberalisation] approach as anti-globalisation is, then, unfair and inaccurate.'*

The 'right to regulate' debate

UKHE: As we show throughout this paper, there *are* circumstances in which direct government intervention is and will continue to be necessary in the HE sector to serve the public interest. We give examples of why the GATS permits only a narrow, 'non-trade-distorting' style of regulation. From the perspective of serving the public interest, governments could pay a heavy price for GATS commitments by surrendering regulatory mechanisms that may be necessary now or in the future.

2.4.6 Cross-trading (both within GATS and between other agreements)

It is likely that the decision whether or not to liberalise HE will be highly influenced by the sectors the UK wants other WTO Members to liberalise. From an orthodox free trade perspective the 'mercantilist' notion of a nation state having 'offensive' and 'defensive' interests³⁶ in service liberalisation is redundant, because service liberalisation supposedly brings benefits to both importing and exporting countries. However, the need to secure new export markets coupled with domestic pressure to refrain from liberalisation in sensitive sectors means that many countries do go into GATS negotiations with both 'offensive' and 'defensive' interests. Given the different economic and political significance attached to certain service sectors, and the varying interests of WTO Members, it is inevitable that countries will be tempted to liberalise certain sectors not just because of the perceived benefit it will bring the country *in that sector* but because it will help secure a more valuable liberalisation commitment from trading partners elsewhere in the negotiations. Such 'cross-trading' in WTO negotiations is a fact of life, and has been recognised on numerous occasions by those involved in the process. In the words of EU Trade Commissioner Pascal Lamy:

'If we want to improve our own access to foreign markets then we can't keep our protected sectors out of the sunlight. We have to be open to negotiating them all if we are going to have the

*material for a big deal. In the US and the EU, that means some pain in some sectors, but gain in many others, and I think we both know that we are going to have to bite the bullet to get what we want.*³⁷

This sits uneasily alongside rather theoretical reassurances from DTI officials that no WTO Member is obliged to liberalise a sector unless it believes it will benefit.³⁸

It is also likely that cross-trading will occur not just within GATS but between GATS and other WTO agreements. WTO Members attach varying levels of importance to different parts of the WTO programme, creating a complex web of tensions and negotiating strategies, and making concessions and cross-trading between agreements an inevitability. The argument that as many issues as possible have to be on the table to give every WTO Member something to gain was used regularly by the EU in its attempt to launch a 'broad-based', comprehensive new trade round at Doha in 2001.

UKHE: In summary, therefore, the predicted changes experienced by a sector should it be liberalised under GATS will only be one of a number of factors determining whether or not the liberalisation goes ahead. In an article written in the Times Higher Education Supplement (9 November 2001), Eric Froment - president of the European University Association (EUA) - succinctly summarised the situation. *'[T]he higher education community is largely unaware that universities and colleges may soon be affected by the WTO and, perhaps, become a pawn in negotiations over other parts of world trade.'*³⁹

2.4.7 Dispute Settlement

The WTO 'Dispute Settlement Understanding' is a commitment by WTO Members to respect the rulings of the WTO arbitration process should a dispute between two or more Members not be resolved through negotiations. Dispute Settlement panels are formed at the request of WTO Members, and comprise a small number of trade experts who determine whether the accused Member is in violation of its WTO obligations. Should the accused Member be found guilty yet fail to rectify the problem, the WTO can authorise trade sanctions against the offending Member state. Given the importance of trade in modern economies the threat of sanctions is a serious one, particularly for weaker economies. Though such a system is one way of imposing order on trade relations, critics argue that WTO disciplines now reach so deep into the regulatory heart of national governments that it is inappropriate to cede such power to Dispute Settlement panels, especially given their remote character and the narrow, trade-legalistic criteria by which they adjudicate.⁴⁰

GATS critics are concerned about the Dispute Settlement process for a number of reasons. First, the fate of an essential service - perhaps even a public service - could be determined by trade lawyers. Secondly, the possibility of a 'necessity' test being introduced to evaluate a particular regulation could mean that in a number of sensitive areas, such as licensing requirements, qualification procedures and technical standards, the WTO Dispute Settlement panel rather than the nation state becomes the final authority on what measures are 'necessary'. Thirdly, permitted trade sanctions can be targeted strategically against the offender state, meaning that exports from an 'innocent' service sector may be blocked even if no WTO violations are taking place in that sector. Cross-retaliation mirrors cross-trading in the sense that retaliation may occur wholly within GATS or between GATS and the other two blocs of WTO agreements (goods and intellectual property); cross-retaliation between agreements is considered 'retaliation of last resort'⁴¹ but is not unprecedented⁴².

UKHE: There is a risk that, in the event of an HE-related dispute, the complainant will resort to the WTO Dispute Settlement process for arbitration, where interpretation will be solely on trade-legalistic criteria, and not by HE experts. In addition, the strategic and adversarial nature of WTO retaliation could embroil HE sectors in intergovernmental trade disputes to which they are not

party, potentially causing the sector to suffer trade sanctions and undermining the tradition of dialogue and co-operation between HE sectors.

2.4.8 'Progressive liberalisation'

The GATS text commits WTO Members to achieving a 'progressively higher level of liberalisation' through successive GATS negotiating rounds. Thus, the GATS text is itself not neutral; it assumes liberalisation is generally beneficial and seeks to expand its adoption as economic policy. Critics argue that this feature of GATS means that, even if a country chooses not to liberalise a sector in the current GATS2000 round, it will come under pressure to liberalise that sector - or remove existing limitations if the sector has already been partially liberalised - at some point in the future. A number of GATS proponents argue that 'progressive liberalisation' does *not* mean that the inevitable long-term outcome of GATS is total liberalisation. However, as demonstrated by leaked EU negotiating documents⁴³, ambitious GATS players are likely to target *precisely* those sectors that were left unliberalised (or only partially liberalised) in earlier GATS rounds. In highly sensitive sectors it is likely some WTO Members will pursue a multi-stage strategy, with strategic advances in the present round setting the scene for major liberalisation in future rounds.

'In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalisation.' Article XIX of the GATS text (emphasis)

UKHE: The concern from UKHE's perspective should be the risk of '*gradualism*'. In Section 3 we argue that there is a strong chance that the government may consider deep UKHE liberalisation in the current GATS round. However, even if this deep liberalisation does not materialise this time, each successive GATS round will probably take a bite out of remaining government limitations, taking the sector ever closer to full liberalisation.

2.4.9 Unfinished GATS rules

An important feature of GATS is that it is not actually a finished legal text. A number of GATS Articles are merely 'placeholders' mandating the WTO to develop any necessary new disciplines in accordance with certain objectives. In particular, new disciplines are intended for *Emergency Safeguards*, *Subsidies*, *Government Procurement* and certain aspects of *Domestic Regulation*. All such disciplines would be significant and GATS critics are particularly concerned by the scope of the latter three disciplines to further extend the reach of GATS. It is important to underline that while there is a mandate to negotiate in these areas, the outcome of these negotiations is not predetermined. It appears likely, for example, that an emergency safeguard measure will never become part of the GATS as it is opposed by the dominant powers within the WTO.

The aim is to conclude negotiations on these disciplines before new GATS commitments (in the present GATS2000 round) are completed. In practice, this means conclusion of negotiations sometime before the end of the Doha round (1st January 2005.) Given that any new disciplines would potentially apply, at least in part, across the board to all service sectors, countries making commitments must consider not only the current form of GATS but also its possible evolution over the next few years.

UKHE: In Sections 4 and 5 we explain how disciplines emerging from the *Subsidies* and *Domestic Regulation* mandates could impact on HE funding and quality respectively. (We have not explored the possible impact of *Government Procurement* disciplines on UKHE but given that some UKHE income is derived from public procurement contracts it may be important for UKHE to undertake further research in this area.⁴⁴)

2.4.10 Disproportionate corporate influence

The international service industry has played a key role in GATS from the outset.⁴⁵ In 1997 the director of the WTO's Services division revealed that *'without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement'*⁴⁶. Service industry lobby groups such as the US Coalition of Service Industries (US-CSI)⁴⁷ and the European Services Forum (ESF)⁴⁸ continue to be highly influential in Washington and Brussels respectively, and reflect the assertion by the EC that: *'The GATS is not just something that exists between governments. It is first and foremost an instrument for the benefit of business.'*⁴⁹ It is interesting to note that, prior to their demise, both Andersen and Enron were highly influential in the GATS world.⁵⁰

In the US, many of the large for-profit HE providers are grouped within NCITE (the National Committee for International Trade in Education)⁵¹, a body that advises US GATS negotiators on trade in education. NCITE is an affiliate member of the extremely pro-liberalisation US-CSI. In 2000 the President of US-CSI declared the goal of GATS 2000 should be *'to achieve maximum liberalisation in all modes of supply across the widest possible range of services, as soon as possible'* and *'to fully embrace important new sectors in the liberalisation effort. These new sectors...include important, new sectors like energy and environment, and existing ones that have not received sufficient attention, like education and health.'*⁵²

The ESF - which includes major service corporations from (amongst others) finance, telecoms, post, water and distribution sectors - appears to enjoy a particularly privileged role in the formation of the EU's objectives and negotiating strategy. Whereas negotiating proposals are not available to the general public, MPs, MEPs and other stakeholders, the EU has consulted closely with the ESF on a number of occasions, angering GATS critics who argue that the EU's preparatory process is heavily biased in favour of private interests.⁵³

Within the UK, minutes leaked from a set of closed meetings provide further clear evidence of the privileged influence enjoyed by the services industry.

The minutes demonstrate the inner workings of the LOTIS (Liberalisation of Trade in Services) group, which comprises both members of the UK government and representatives from service industry. Critics were angered to find that, amongst other privileges, corporate members of the LOTIS group had been allowed access to the 'inner sanctum' of EU GATS policy-making - the Article 133 Committee - a body closed even to members of the European Parliament. Moreover, critics claim, the minutes showed the government and industry actually resolving to work together to counter (rather than consider) the arguments of GATS critics.⁵⁴

'There is the danger that re-regulation as promoted in Article VI could in fact become deregulation. The EC's Guide to GATS written for business, for example, says that 'The GATS reflects the basic belief of its Members in open economies, deregulation, fair market rules and the protection of the consumer'. Indeed, re-regulation in market-oriented ways, could be fundamentally incompatible with the requirement or the desire of many governments to provide basic public services for their people, especially since certain sections of their population may not be able to afford to pay market prices for these services.'

Communication from 10 Developing Country WTO member states. October 2001

UKHE: Clearly UKHE should consider the potential advantages and disadvantages of further GATS involvement on their own merit. However, it is difficult to dispute the fact that GATS has been (and continues to be) heavily influenced by corporate interests, both in terms of the architecture of the agreement and national negotiating strategies. Such influence at present far outstrips that of other stakeholders in the GATS process, and UKHE should assess how educational objectives will fare in an environment upon which commercial pressures weigh heavy.

2.4.11 Adverse impacts on developing countries

Within the WTO itself developing country negotiators are primarily concerned with remedying harmful obstacles to development that have arisen because of rules in areas like intellectual property and the asymmetric implementation of agreements such as the Agreement on Agriculture. Relative to these entrenched problems the GATS2000 round has thus far been a fairly low priority amongst developing country WTO delegates, mainly because of the degree of freedom afforded by its 'bottom-up' negotiating structure. The bottom-up structure was itself introduced largely because of developing country unease at initial attempts to create a 'big-bang' GATS agreement with immediate and comprehensive coverage.⁵⁵

Bottom-up structure notwithstanding, NGOs from both the North and South⁵⁶ are deeply concerned that, as GATS negotiations become more intense developing countries in the WTO will acquiesce to service liberalisation where it is not in their interests, either as 'down-payment' for reforms elsewhere in the WTO or as a result of inadequate information about the desirability of service liberalisation in various sectors. It is clear that many developing countries have little to gain from service exports⁵⁷ and much to lose from opening their service industries to Northern-based multinational service providers.

Development campaigners and an increasing number of developing countries are calling for an assessment⁵⁸ of the effects of service liberalisation before further GATS commitments are made, and point out that the requirement for such an assessment is enshrined in GATS Article XIX. In October 2001 a communication from Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe⁵⁹ argued that despite repeated calls from developing countries an assessment had not been carried out and requested that *'further negotiations may only commence after conclusions from this first assessment have been drawn.'* Such an assessment has still not been undertaken, whilst negotiations continue moving rapidly forward.

UKHE: Though it is certainly not the case for all service sectors, the traditionally internationalist outlook of UKHE (and the HE sector more generally) means it is well placed to take into consideration issues beyond its immediate horizons when contemplating its stance on GATS. The Joint EUA/ACE/CHEA/AUCC declaration (an excerpt of which is included in Box 5.3 of Section 5.4) stresses that, with respect to education in developing countries, *'Education exports must complement, not undermine, the efforts of developing countries to develop and enhance their own domestic higher education systems.'* UKHE should also be mindful of the potential impact of GATS on developing countries more generally. To quote again from the developing country communication cited above, *'Under conditions of liberalisation, privatisation of services could very easily happen since foreign corporations which are more competitive are likely to enter the new market and take over from the local company. This could have consequences on access to basic services for those who may not be able to afford these commercial prices.'*

On 15th August 2001 the UN Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights) adopted a resolution (Resolution 2001/4), 'Recognizing the potential human rights implications of liberalisation of trade in services, including under the framework of the General Agreement on Trade in Services (GATS).' In August 2002 the Sub-Commission published a report which reaffirmed this sentiment, and in which UN Commissioner for Human Rights Mary Robinson 'encourages interpretations of its scope to ensure that GATS obligations do not constrain Governments from taking action to promote or protect human rights.' The report also urges states to undertake human rights assessments before engaging in further liberalisation under GATS, and requests that Mary Robinson be allowed observer status at the WTO's Council for Trade in Services. Such a request is unlikely to be granted.

UNCHR's concerns about GATS

'...GATS could jeopardise access to vital public services and to other services of general interest for a large part of the world's population. These services are too crucial to human well-being to be subject to private sector competition under WTO disciplines... All parties to the current GATS negotiations should make it absolutely clear that public services (above all, education, health and essential public utilities) including at sub-national levels of government, and socially beneficial service sector activities are not a subject for negotiation... The next WTO Conference should amend as necessary the terms of the GATS agreement to exclude formally such sectors from all further GATS negotiations.'

Global Unions/European Trade Union Confederation/ World Confederation of Labour - Statement on the GATS negotiations. June 2002

3 *Is UKHE covered by GATS?*

3.1 *Summary*

Of pivotal concern is the question of whether, and to what extent, GATS applies to UKHE. This question revolves around the GATS ‘public service’ exemption – Article 1.3 – which exempts entirely those services supplied in the exercise of governmental authority, defined as *neither on a commercial basis nor in competition with one or more service suppliers*.

In **Section 3.2 (The ‘public services’ exemption)** we examine the debate, noting that:

- Various legal opinions throw into doubt the assertion by GATS proponents that Article 1.3 completely exempts public services.
- The UK government now acknowledges potential ambiguity in the definition of Article 1.3.
- WTO Members and the WTO Secretariat do not dispute the possibility of clarification, but no actual attempt has been made to clarify Article 1.3, and none seems likely to be forthcoming.
- The decision as to whether ‘public services’ are included in GATS negotiations seems to hinge, in part, on political expediency.

In **Section 3.3 (Higher Education and Article 1.3)** we provide an in-depth analysis of how far Article 1.3 can be assumed to exempt UKHE from GATS, and how this ties into possible next steps in HE liberalisation. We find that:

- When governments argue that public services are exempt from GATS, primary and secondary education are often mentioned, but the absence of HE from such debates suggests Article 1.3 is of less relevance to HE.
- Most of UKHE's activities are arguably non-commercial, but there is strong evidence to suggest that UKHE institutions do operate in competition with one or more suppliers, both in their core activities (degree provision) and more overtly commercial activities, such as expert consultation. This seems likely to undermine hopes of UKHE being protected by Article 1.3.
- A number of WTO Members have formally announced their intention of requesting further HE GATS commitments from their trading partners, and it seems extremely likely that the EU has been asked to liberalise its HE sectors further.
- In 1994 the EU made extensive GATS commitments in HE but limited these commitments to ‘privately funded services’ only.
- This ‘privately funded services’ limitation, when combined with developments in the GATS negotiations, seems further to reduce the applicability of Article 1.3 to UKHE by suggesting that there is a significant body of HE activity that falls in the gap between Article 1.3 and the ‘privately funded services’ limitation. There are reasons to suggest that UKHE may fall in this gap.
- The removal of the ‘privately funded services’ limitation is a distinct possibility should the UK (or the EU more generally) decide to commit HE to deeper liberalisation. This could leave Article 1.3 as the only barrier between UKHE and far-reaching GATS disciplines.

Given the perceived weakness of Article I.3, further liberalisation of this kind could well see UKHE expected to conform to comprehensive Market Access and National Treatment disciplines.

- Even if the ‘privately funded services’ limitation is not removed, the ‘progressive liberalisation’ requirement of GATS means that any further liberalisation of UKHE will probably be the first step on a road towards more radical levels of liberalisation in future GATS rounds.

In **Section 3.4 (UK Higher Education)** we explain a few technicalities of the UK Higher Education system to assist the reader before moving onto Section 4. The main observations in this section are:

- There are about 100 ‘recognised’ HE providers in the UK - i.e. institutions with their own degree-granting powers. There are also over 300 ‘listed’ providers, which are institutions that have been ‘validated’ by a recognised HE provider and thus can offer degrees (or courses leading to degrees) from that recognised provider. Many private and foreign universities can already offer UK-recognised degrees in this way.
- The government already partially subsidises ‘designated’ courses at private and foreign HE institutions operating in the UK, but the level of subsidisation is far below that currently available to UKHE institutions.
- The University of Buckingham is a domestic, private, *recognised* HE provider and in all probability is classed as ‘privately funded’. It enjoys higher levels of subsidisation than other private HE providers operating in the UK, which would seem to be of relevance to the UK’s 1994 GATS commitments. Buckingham is also voluntarily entering the UK government’s mechanism for quality assuring teaching activities (the QAA.)

3.2 The ‘public services’ exemption

The extent to which UKHE falls under the remit of GATS is an essential factor in considering its potential impact on the sector. As outlined on page 12, Article I.3 excludes services ‘*supplied in the exercise of governmental authority*’ from all GATS disciplines. However, the interpretation of this phrase is not left to the discretion of the Member state, but is instead described in Article I.3(c) as ‘*...any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.*’ This is the root of the issue, because by standard legal interpretation **it follows that a service is only exempt if it is supplied on a non-commercial basis and not in competition with other service suppliers.**

Critics maintain that, because of the current vogue for market-based reforms in public service delivery (especially in countries such as the UK), most ‘public services’ would not be wholly exempted by Article I.3 in the event of a dispute. They point to a number of legal opinions and analyses which contend that Article I.3 is legally ambiguous and probably exempts a far narrower range of services than first appears to be the case.⁶⁰ Under pressure, the UK government’s position has shifted from an initial stance of apparently solid confidence in the protective qualities of Article I.3 to the point where: ‘*We agree that the terms of the exclusion (in Article I:3 of the Agreement) could be ambiguous and accept that they have not been tested in WTO jurisprudence.*’⁶¹

Qualifying this, the UK government goes on to argue that - without exception - the working interpretation amongst WTO Members is that Article I.3 *does* exempt basic public services. This is a common defence offered by GATS proponents. Some also argue that WTO Members might

use the current GATS negotiating round as an opportunity to cement a public services exemption.⁶² The UK government concurs with this: *'The government has no objection in principle to considering a clarification of Article I:3. But care would be needed not to open up new grey areas of interpretation.'*⁶³ This, however, overlooks the fact that amending and clarifying WTO agreements has in the past proven very difficult, primarily because the political consensus required to 're-open' an agreement or secure a comprehensive clarifying declaration is rarely forthcoming and, indeed, often opposed.⁶⁴ (A major difficulty with pursuing such a clarification is that there is no agreement among WTO Members on what constitutes a public service. New Zealand, for example, has argued that basic postal services are open to GATS commitments, whereas the US argues these are exempted public services.) Indeed, the dynamics of international trade politics are such that stating support for such a clarification is worthless unless it translates into legally meaningful actions, and to date there has been no move in the WTO towards securing clarification of Article I.3, with none anticipated.

As things stand, therefore, Article I.3 has not been tested in WTO jurisprudence and, in the absence of further clarification, its full meaning may only become apparent through the ruling of a WTO Dispute Settlement panel.

In addition to the legal perspective it appears that political dynamics play a key role in the 'public services' debate. Given the level of scrutiny GATS negotiations are under, it would be controversial for a powerful Member of the WTO to be perceived as demanding liberalisation of basic services such as healthcare or primary education. (That said, the EU clearly believes that, despite inevitable controversy, the net economic benefit to the EU of securing liberalisation of water services in third countries is worth the political risk.⁶⁵) The WTO Secretariat itself appears conscious of the fact that political expediency is likely to dictate matters in the public services debate: on 27th June 2002 the WTO issued a press release in which it was acknowledged that WTO Members may end up requesting public services from each other⁶⁶. Given the timing of this press release - three days prior to the point at which WTO Members would start to publish executive summaries of their requests - it would appear to have been a defensive manoeuvre in anticipation of WTO Members publicly announcing their intention to request liberalisation of basic public services from their trading partners. (This also brings into focus earlier reassurances about the exemption of public services, which on closer examination are often based on the questionable assertion that 'government' services and 'public' services are synonymous.⁶⁷)

3.3 Higher Education and Article I.3

3.3.1 Little confidence that HE is a 'public service'

The situation as pertaining to Higher Education is less ambiguous for a number of reasons. At the notional level, there is general disagreement over whether HE should be considered a public good or a private good. Proponents of the public good perspective - who may disagree on whether UKHE currently constitutes a 'public service' in the traditional sense, or indeed whether it should⁶⁸ - argue that the benefits of a well-educated population are accrued by the country as a whole. Supporters of the private good perspective claim that individuals derive most of the benefits and that (to a far greater extent than primary or secondary education) access to HE is both exclusory in nature and limited in availability.⁶⁹

Certainly, in discussions regarding the extent to which Article I.3 'carves out' public education, there is a tendency to focus on primary and secondary education only. For example, the WTO Background Note on Education Services⁷⁰ comments that, *'Basic education provided by the government may be considered to fall within the domain of, in the terminology of the GATS, services supplied in the exercise of governmental authority (supplied neither on a commercial basis nor in competition).'* (emphasis added). Similarly, *'Governments have to date chosen not to clarify the scope of the GATS' public services carve-out. But ask any negotiator in Geneva and*

she/he would be prone to regard primary and secondary schooling, so-called basic/compulsory education, as lying outside the scope of the GATS.⁷¹ The value of such reassurances is a separate debate in its own right.⁷² However, in the context of this paper we observe that the conspicuous absence of HE from the Article I.3 debate suggests that the 'carve-out' is, at best, of greatly reduced relevance to HE, and at worst, inapplicable.

3.3.2 Is UKHE both non-commercial and non-competitive?

For Article I.3 to exempt a service, it must be supplied neither on a commercial basis nor in competition with other service suppliers. To what extent do UKHE activities satisfy these criteria?

A prolonged period of underinvestment has forced many UKHE institutions to supplement their core funding in a variety of ways, to the extent that many now receive substantially less than 100% of their funding from public sources. Private revenue is generated, for example, by charging students for supplementary resources, collecting tuition fees from domestic and EU students (since 1998), and engaging in commercial activities such as provision of conference facilities during vacation periods, offering consultation services, licensing/patenting/selling research, forming subsidiary companies and entering into partnerships with private companies. (The government is keen to reinforce the role of UKHE institutions as entrepreneurial, 'wealth-generating' economic drivers through the award of 'third stream' funding, which encourages greater interaction between UKHE, business and the community.⁷³) It is also particularly common for UKHE institutions to maximise income from highly subscribed departments such as MBA business schools. This activity often goes hand in hand with attempts to maximise intake of foreign students, since many foreign students pay full, deregulated fees.⁷⁴

In light of these funding changes, can UKHE still be described as non-commercial? There appears to be a growing belief in trade circles that, loosely speaking, commercial activities are those supplied on a for-profit basis i.e. not-for-profit service provision is exempted by Article I.3. This is certainly the opinion of several senior members of both the WTO Secretariat and the OECD (Organisation for Economic Cooperation and Development) Trade Directorate.⁷⁵ Whilst this belief has of course not been tested in WTO jurisprudence, it does seem relatively uncontroversial, at least in comparison to the levels of disagreement surrounding other parts of the GATS text. Indeed, a legal opinion commissioned by the Canadian Association of University Teachers (CAUT) in 2001⁷⁶ (see Box 3.1) concluded that service provision 'with the intent of making profits' constituted provision on a commercial basis.

'Although there are no definitions in the GATS of the terms 'commercial basis' or of 'competition', we are of the opinion that, for instance, a public university that:

- *Charges fees to provide services with the intent of making profits would be considered as providing a service on a 'commercial basis' and be covered by GATS; or*
- *provides services mainly with the intent of competing for same service users and market rather than in fulfilling a governmental duty*

would be considered to be in 'competition' with other education service providers and also be covered by GATS.'

Box 3.1: 'GATS Impact on Education in Canada', legal opinion by international trade lawyers Gottlieb & Pearson, October 2001

UKHE institutions are legally not-for-profit entities, which suggests that they pass at least the first stage of the Article I.3 test. However, it should be emphasised that Article I.3 says nothing about service providers, only services themselves. That is, a UKHE institution may be legally not-for-profit, but some of its activities could (when viewed in isolation) be construed as explicitly or implicitly profit-making. In this context, consider again the example of MBA business schools and the tuition of international students: UKHE institutions often draw high net surpluses from such activities, which are then re-invested in core activities. Whether such activities are strictly-speaking 'profit-making' and thus (in the sense of Article I.3) commercial is difficult to say. Certainly, though, the more universities are required to make financial flows transparent - a process potentially catalysed by GATS disciplines relating to transparency - the more apparent it

becomes which services provided by UKHE generate 'profits' and which don't. Hence, it remains a possibility that some parts of UKHE activity forfeit the Article I.3 exemption solely on the grounds that they are *de facto* profit-making and hence commercial.

While there is a debate to be had about the extent to which UKHE is non-commercial, matters are somewhat clearer when considering whether UKHE is '*in competition with one or more service suppliers.*'

Do UKHE institutions compete with one or more service suppliers? On the basis of the available evidence, it would seem that the answer is yes. Firstly, UKHE institutions already compete with each other within the domestic arena, for UK students. This may not seem to be traditional competition because UKHE institutions have a common link through their government funding. In practice, however, competition between UKHE institutions for students is intense, making the domestic arena a marketplace in all but name, as evidenced by the increasing insistence by government that students be perceived primarily as 'customers'.⁷⁷

Secondly, UKHE institutions already have a 'competitor' in the form of the University of Buckingham, which is the UK's only private, recognised, degree-granting university⁷⁸. Thus, Buckingham falls outside the UKHE umbrella (because of its independent status) yet competes directly with UKHE institutions for students. (We return to the subject of Buckingham in Section 3.4, where we note that UKHE also competes against listed⁷⁹ private providers.) In addition, UKHE institutions will often compete against specialised private providers operating in the area of professional qualifications e.g. consider that many UKHE institutions compete against the private College of Law⁸⁰ by providing Legal Practice Courses (LPCs).⁸¹

Thirdly, and probably most significantly from a trade perspective, it is clear that UKHE is in direct competition for students on the global market, and in fact this is a central plank of government policy:- in 1999 the UK government resolved to increase its share of the fee-paying international student market (in relation to other English speaking countries) to 25% by 2005⁸². Certainly, fees from international students add a considerable amount to the income of UKHE - approximately £1.5bn during 2001-2⁸³. Again, it could perhaps be argued that on a purely technical level this is not traditional competition because degrees from different countries are not yet easily comparable⁸⁴, but this would seem to be of limited value given that every political and economic indicator acknowledges that the HE sectors of export-minded countries, the UK included, are now in direct competition for students on the lucrative global market.

Fourthly, few people would argue that some of UKHE's more avowedly 'peripheral' activities (such as charging for expert consultation) do not compete alongside specialised private providers in non-educational sectors; it therefore seems extremely unlikely that such activities would enjoy Article I.3 exemption. (More so, given that they could also be construed as 'commercial.')

And finally, by the standard of the CAUT-commissioned legal opinion, UKHE activity could easily be classed as competitive.

It would seem, therefore, that there is strong evidence to suggest that UKHE institutions are indeed in competition with one or more service suppliers. As a consequence, the relevance of Article I.3 to UKHE seems to be in grave doubt. Earlier we mentioned that Article I.3 operates at the level of services rather than providers. Given that the *core* activity of UKHE institutions - i.e. degree provision⁸⁵ - is subject to competition, potentially occurring across the whole spectrum of course provision (i.e. a majority of undergraduate courses are taught at more than one institution), **there can be little confidence that Article I.3 provides UKHE with even *substantial* (rather than total) protection.**

This section has derived its conclusions by considering UKHE in isolation. The following section bolsters the scepticism surrounding the value of Article I.3 by considering certain political dynamics in the GATS negotiating process.

3.3.3 High stakes bargaining

It is no secret that the UK government is looking to consolidate and expand its HE exports, mirroring similar policy developments amongst other market leaders such as the US and Australia.⁸⁶ As we discuss in Section 4, the presence of European HE institutions in the global market has not gone unnoticed across the Atlantic. Various actors in the US have expressed frustration at what they perceive as the 'protectionism' of the European HE sector.⁸⁷ Specifically, they resent the fact that many European countries effectively close their own HE sectors to foreign competition yet allow, and indeed encourage, their publicly-funded ('subsidised') universities to compete for a share of foreign HE markets, either by attracting foreign students to Europe or setting up shop⁸⁸ in other countries. GATS2000 has provided major HE exporters with a platform on which to formalise their ambitions.

Between December 2000 and March 2002 several countries - the US, New Zealand, Australia and Japan - tabled general position papers on trade in education services under GATS.⁸⁹ These were not formal negotiating positions, but rather a declaration of willingness to promote trade in education services. The papers cover a variety of points ranging from market access to classification issues and quality assurance but they have a number of features in common. All the papers invite other WTO Members to make more liberalising commitments in education. The US paper in particular asks for full Market Access and National Treatment in HE, and goes on to identify a large number of barriers to trade in education that it would like to see its trading partners either address or remove, such as the *'Lack of an opportunity for foreign suppliers of higher education, adult education, and training services to qualify as degree granting institutions.'* A second feature is that all four papers at least nominally recognise the important role of governments in the sector. The Australian proposal stresses that governments should not be prevented from regulating and/or providing public funds to meet policy objectives, although as we note in Section 4 such claims are far less reassuring than they first appear. The US notes *'that education to a large extent is a government function and it does not seek to displace public education systems.'* From statements such as these it would not be unreasonable to assume that those Members demanding HE liberalisation were mainly asking for a level playing field with domestic *private* institutions.

'It is likely that other countries, especially members of and applicants for membership in the European Union, may take the view that education and training are noncommercial activities and therefore should be off the table during GATS negotiations. This position reflects their self-interest as competitors and the weight of traditional cultural attitudes on the part of their academic and civil service communities, but is not reflective of the facts. It should be resisted.'

Report-back from Education and Training Roundtable at SERVICES 2000, A Conference and Dialogue on Global Policy Developments and U.S. Business, U.S. Department of Commerce, 1998

3.3.4 'Privately funded services' only...?

This public/private distinction is crucial to the Article I.3 debate. Most European HE institutions are unaware that the EU made HE GATS commitments in 1994 when the treaty was first negotiated. At first sight it seems that the EU's HE sectors have already been almost completely liberalised under GATS, because for most EU member states (UK included) their HE schedule appears almost entirely committed. However, at the time they were tabled the EU took the precaution of stipulating that the EU's HE commitments (and in fact education commitments more generally) apply to *'privately funded services'* only.⁹⁰ (We henceforth call this the PFS limitation.) In other words, *'privately funded'* HE services would henceforth obey GATS disciplines such as Market Access and National Treatment, but EU member states wished to make no such commitments regarding their publicly-funded counterparts. That the EU (and other countries) felt it necessary to reinforce Article I.3 by introducing this PFS limitation suggests that the EU was doubtful about the protection afforded to the public sector by Article I.3. (Indeed, the EC has noted that what it considers a 'similar' exclusion in EU law has never proved effective in protecting what are claimed to be public services.⁹¹)

The PFS limitation appears to introduce a new level of complexity into the Article I.3 debate. In particular, what constitutes a 'privately funded service'? The exact definition would appear to depend on EU domestic legislation. However, immediate questions arising from this include: at what level of private funding does a service become 'privately funded' in the sense of the limitation? 100%, more than 51%, more than 0%? (The University of Warwick, for example, is internationally renowned for its entrepreneurial culture, and claims to receive 65% of its funds from 'earning' sources.⁹²) Are 'privately funded' services that draw on government subsidies still 'privately funded'? What about UKHE courses where a mixture of government-funded (i.e. UK) students and fully privately-funded (e.g. international) students are taught?

It is potentially very significant that, like Article I.3, the PFS limitation applies to services rather than providers. It could therefore be argued that those parts of UKHE institutions which are, in effect, run on private funds (such as the example of the MBA school, or departments that have substantial support from industry) are 'privately funded'. Also, when HE providers (even those that are 'public' in their native countries) cross into other countries for export reasons, they are generally then considered 'private' in the importing country, and in all probability are also 'privately funded'. (See Box 3.2). Combining these two observations raises the following intriguing question: could (say) a foreign MBA provider operating in UK territory *already* claim that MBA schools attached to UKHE institutions are receiving unfair advantage (and thus violating existing National Treatment commitments) as a result of their close association with UKHE institutions?

Importing countries generally view all incoming HE providers as 'private', irrespective of the provider's legal status in its country of origin. The question of whether they are also classed as 'privately funded' - in the sense of the PFS limitation - is important. Clearly the uncertainties around the PFS limitation are highly relevant here. **However, while most foreign HE providers operating in UK territory have zero or minimal access to public funds, it seems almost certain that they are indeed classed as 'privately funded' HE providers supplying 'privately funded' courses.**

Box 3.2: Foreign HE providers - very likely to be classed as 'privately funded'

Clearly there is need to clarify what this PFS limitation actually covers. As we have just shown there are already some areas of UKHE activity that, it could be argued, are 'privately funded' and thus potentially captured by the EU's existing 1994 HE commitments. However, there seems to be confidence that, *for the most part*, UKHE activities are publicly-funded and thus shielded by the PFS limitation.

This raises a fundamental point. Apart from the PFS limitation, the EU's general horizontal limitations, and a handful of country-specific restrictions (from France, Italy, Spain and Greece), the EU's HE schedule is almost completely committed⁹³, as we discussed earlier. If some of our trading partners are requesting further HE commitments from the EU, and suggestions that (amongst others) the UK, Germany and Holland are toying with the idea of pursuing further liberalisation in HE⁹⁴ are true (and reflect a willingness to open up their own HE sectors⁹⁵), it raises the question - **what more is there to commit?** If indeed there are pressures towards deeper EU HE liberalisation, then this would suggest that the EU still has more to give.

As part of the GATS2000 negotiations Member states were required to table their initial *sectoral requests* (i.e. sectors they would like to see liberalised in other countries) with trading partners by the end of June 2002. A number of WTO Members publicly released executive summaries of their requests, and from such summaries it became clear that major HE exporters such as the US, EU and Australia had all tabled HE amongst their requests.⁹⁶ (New Zealand has presumably also done so, because prior to June 30 it reportedly revealed it would 'ask for everything' in education services.⁹⁷) The EU took the unusual step⁹⁸ of announcing which WTO Member state would be on the receiving end of its HE request:- the US. This called for the US to match the EU's existing GATS commitments in HE i.e. commit to the (almost) full liberalisation of their privately-funded HE sector.⁹⁹ (The US currently has no commitments at all in the area of HE.) However, the US did not announce which Member states it was targeting with its HE request, although it reiterated its stance that it did not wish to displace publicly-funded HE and stressed it was not looking for

*'commitments with respect to public institutions, subsidies, or other assistance in the education sector.'*¹⁰⁰ Given the interest the US and other countries have in HE exports, the potential size of the European HE market, and the perceived protectionism of European HE, it seems **extremely likely that the US (at least) has requested further HE liberalisation from the EU**. The fact that the US has nominally indicated a willingness to liberalise its own HE sector¹⁰¹ certainly suggests that some kind of 'HE-for-HE' bargaining is on the agenda.

If certain trading partners of the EU are pushing for deeper HE liberalisation from EU members, what might they ask for? Realistically there are several possibilities, the most likely of which we consider here.

1. Remove individual country limitations of France, Italy, Spain and Greece.

It appears likely that, as a minimum, these four nations will come under pressure to remove the limitations they maintain on the existing EU HE schedule. Although this could be significant for the countries in question, pressing for such commitments would (if unaccompanied by other requests) be a fairly unambitious negotiating strategy for a trading partner of the EU, since the resulting EU HE schedule would not differ significantly from its current state. (That is, the commitments would not win extensive new rights for foreign HE providers operating throughout the EU more generally.)

2. Make 'additional commitments'

This would exploit a feature of GATS schedules that, in addition to Market Access and National Treatment commitments, allows WTO Members to make 'additional commitments' (Article XVIII)¹⁰². At present GATS has only limited disciplines in areas such as domestic regulation (e.g. licensing requirements, qualification procedures and technical standards - see Section 5.2.2) but if a WTO Member wishes to make an additional, *positive* liberalising gesture in this area they can do so. In its December 2000 negotiating proposal, the US (as well as asking trading partners to make full Market Access and National Treatment commitments) asks WTO Members to consider making commitments in this area also.¹⁰³ This mechanism is rarely used in GATS schedules¹⁰⁴, but an EU member could perhaps extend its existing HE schedule by making such commitments e.g. declaring a willingness to enact certain domestic regulatory changes that make it easier for foreign HE providers to operate in its territory. However, any trading partners of the EU pushing for further HE liberalisation by EU member states are unlikely to press for such 'additional commitments' as an end in themselves. It is more likely that a trading partner asking for additional commitments will do so as an accompaniment to making more substantial Market Access / National Treatment requests.

3. Remove the PFS limitation

This is perhaps the most far-reaching HE request that could be made of the EU. As the UK's HE schedule currently stands, HE services in the UK are shielded from Market Access / National Treatment strictures if they qualify for exemption under Article I.3 **and/or** they are not privately funded. Without the PFS limitation, HE services in the UK are shielded only if they are exempted by Article I.3. It follows that, from a legal perspective, there is a difference between a schedule with the PFS limitation and one without. Whether the coverage of the two schedules differs in practice is thus a crucial issue. It is therefore significant that we have demonstrated how there can be little confidence that UKHE institutions are even substantially protected by Article I.3.

Certainly, if the leaked EU negotiating documents are indicative of other WTO Members' requests, asking for the removal of such a conspicuous limitation is standard fare for GATS requests. Indeed, a document summarising requests *received* by the EU (published by the German Ministry of Economy and Technology) **suggests that HE requests have been made which desire EU HE liberalisation beyond the PFS limitation.**¹⁰⁵ (The summary does not

reveal *who* has tabled this request but it would be reasonable to assume it comes from one or more major HE exporting nations.)

Hence, we have established several key points:

- Several major HE-exporting WTO Members (outside the EU) have tabled HE requests.
- The EU is a relatively untapped (but potentially very large) market for HE exports, and it is therefore highly likely that it has received requests in this area.
- EU members who have no individual restrictions on their schedules (such as the UK) appear to only have a limited number of options if they wish to commit to deeper liberalisation, potentially the most significant being the removal of the PFS limitation.
- A number of EU member states (who do not at present maintain individual restrictions on their schedules) have reportedly expressed an interest in liberalising HE under GATS, implying perhaps a willingness on their behalf to commit to deeper liberalisation.
- The EU has received at least one request asking for liberalisation beyond the PFS limitation

These points suggest that, on the basis of available evidence, at least one of the EU's trading partners believes that the EU can liberalise much further than it already has done. Suggestions that several EU member states may themselves be contemplating deeper liberalisation reinforce this perception. Collectively this casts further doubt over the applicability of Article I.3 to UKHE. That is, if Article I.3 offers such strong protection, and the EU's publicly-funded HE services are not even on the table, why is significant further liberalisation by the EU even considered a possibility? We reason, therefore, that further liberalisation by the UK is likely to expose UKHE to substantial GATS coverage.¹⁰⁶

3.3.5 *Where do we go from here?*

In this section so far we have ascertained that Article I.3 is of highly questionable value as a shield for UKHE, and that the EU has already made HE commitments that appear to bring GATS coverage to the very threshold of the EU's publicly-funded HE sectors. The question is, then, what will happen if the EU goes further with HE liberalisation, given that the publicly-funded HE sector appears to be the remaining target for further liberalisation?

There is a distinct possibility that the UK government, or perhaps the EU more generally, will in the near future come under pressure to remove the PFS limitation as a means of deepening HE GATS commitments. In doing so, this would bring the applicability of Article I.3 to UKHE into sharp relief, because Article I.3 would then become the principle remaining barrier between UKHE and inclusion under GATS. As we have shown, legal and political evidence suggests that UKHE stakeholders simply cannot assume that Article I.3 will afford a substantial degree of protection to UKHE, especially given the tendency for derogations from trade agreements to be interpreted narrowly.

At stake, then, is the potential application of far-reaching Market Access and National Treatment disciplines to UKHE.

As we show throughout the rest of this paper, the liberalisation of UKHE at this depth could be profoundly damaging to the sector. If the PFS limitation is to be removed, EU member states could qualify this by individually adding new limitations, but the net result could not be a contraction of existing commitments.¹⁰⁷ Continued flexibility at the member-state level looks likely given the apparent divisions between EU member states on the topic¹⁰⁸ - see Box 3.3.

According to reports dating from May 2002, the UK, Germany and Holland are amongst EU member states keen on the idea of pursuing further HE liberalisation. Non-EU Members such as Norway and Switzerland echo this enthusiasm. By contrast, Belgium appears quite vocally opposed, believing that education should be excluded from GATS - a scepticism that is probably supported by France.

Box 3.3: Divisions within the EU?

If the PFS limitation goes then UKHE would be taking a big step towards liberalisation. While the UK government could control the extent to which Market Access and National Treatment disciplines apply, these would be once-only limitations, and given the 'progressive liberalisation' requirement of GATS, prone to removal in future GATS negotiating rounds. Of even greater concern is that in the present GATS2000 round the UK government may acquiesce to the removal of the PFS limitation without introducing any new limitations, perhaps out of an ideological commitment to liberalisation. This would be very serious because the UK's existing HE schedule is extremely liberal: as discussed, the UK does not maintain any limitations on the application of GATS to privately funded HE services. Hence, if no new limitations were introduced the new schedule would by default inherit this liberal position. Indeed, the UK is notable amongst EU member states for the liberal character of its existing commitments: Patricia Hewitt (Secretary of State for Trade and Industry) has acknowledged that '*the United Kingdom maintains very few restrictions in its GATS schedule of commitments.*'¹⁰⁹

However the UK government proceeds in the GATS2000 negotiations, it seems that the question is not *whether* further liberalisation will expose UKHE to GATS disciplines, but *to what extent*. From Section 4 and onwards, we discuss impacts on UKHE from the point of view of what could happen if it falls under onerous GATS disciplines. In each case we explain what level of liberalisation the UK government would have to acquiesce to for such a scenario to develop. As demonstrated, deep HE liberalisation *is* a distinct possibility, either within the present GATS2000 round - which is obviously the most pressing issue - or within future rounds of GATS negotiations. Higher education is now firmly on the GATS agenda and pressure towards deeper liberalisation is likely to become a recurrent theme of GATS negotiations.

3.4 UK Higher Education and private institutions

The rest of the paper identifies the potential consequences of the UK government acquiescing to UKHE liberalisation. Occasionally it is noted that, without distracting from the potential for deeper HE liberalisation to negatively and profoundly impact upon UKHE, some of the identified scenarios are theoretically possible even under the UK's existing 1994 GATS commitments. Much of this rests on the current status of 'privately funded' institutions within the UK Higher Education system, and in particular the conspicuous role of the University of Buckingham. Hence, in this section we divert briefly from the overall flow of the paper and explore these issues in greater depth.

3.4.1 'Recognised' and 'listed' HE institutions

In the UK there are approximately 100 *recognised* HE institutions. These are institutions that have their *own* degree-granting powers. That is, through the endowment of a Royal Charter or through an Act of Parliament, these autonomous institutions have the power to grant UK degrees. All UK universities and some HE colleges are recognised institutions.¹¹⁰

In addition, there are over 300 *listed* HE institutions. These are institutions which do not have their *own* degree-granting powers, but can still award degrees or provide courses which contribute towards degrees. This is achieved by entering into partnership with a recognised HE institution, a process called 'validation'. For example, the Open University - itself a recognised institution - provides the Open University Validation Service[s]¹¹¹ (OUVS). This is where, for a subscription fee, a non-recognised institution can invite the OUVS to check (and then monitor on a periodic basis) that its courses are of a standard deserving of an OU degree. If so, the non-recognised institution can then offer OU degrees.¹¹² This is a mechanism through which foreign HE providers can offer UK-recognised degrees.¹¹³ Hence, UK-based foreign institutions such as the not-for-profit *Richmond, the American International University in London* and the similarly named (but entirely separate) for-profit *American InterContinental University, London* already offer UK-recognised degrees through the OUVS.

Listed status is therefore available to any institution capable of proving its worthiness to a recognised institution, and as we might expect listed institutions include a mixture of publicly-funded, non-recognised HE providers, domestic private providers, UK-based foreign HE providers and overseas-based foreign HE providers. The University of Buckingham is unique in that it is the only private, *recognised* HE provider in the country; this status was secured in the early 1980s.¹¹⁴

Before proceeding any further we should stress that our focus on Buckingham - which may at times appear disproportionate to its limited domestic significance - is largely motivated by its status as an obvious precedent (in terms of degree-granting powers and, as we discuss shortly, financial support from government.) Indeed, there are numerous other areas of private HE activity in the UK, many of which are economically of greater significance than Buckingham. However, Buckingham's characteristics make it an interesting reference point from a GATS point of view.

3.4.2 Existing financial support for publicly-funded and private institutions

It is interesting to examine the levels of financial support currently available to private institutions, compared to their publicly-funded counterparts. We discount the case of Buckingham for a moment and return to it in a little while. At present, the English¹¹⁵ government is willing to subsidise tuition fee costs for full-time English students studying *designated* courses.¹¹⁶ These include all degree (or equivalent) courses at publicly-funded institutions, irrespective of whether

the institution is recognised or listed. Private HE providers (such as the two American providers mentioned earlier) can also apply to have their courses designated: validation of the course is useful for this purpose. When a student attends a designated course at a publicly-funded institution the English government pays most of the tuition fees, through the Higher Education Funding Council for England (HEFCE). At present, tuition fees at publicly-funded institutions tend to be around £4000 a year; HEFCE pays approximately £2500-£3000 of this. Students are required to pay at most £1,100 themselves (per year), but this is means tested, so in many cases the government pays approximately £4,000 in tuition fees per student. (Students are also allowed access to the subsidised student loan mechanism to support their maintenance.) However, there is much less financial support available for students studying designated courses at private institutions, such as the two London-based universities mentioned earlier. The government contributes a non-means tested grant of about £1,000 per year to such students¹¹⁷, and allows those students access to the subsidised student loan mechanism, but no more support is provided. (The grant is non-means tested to compensate for the fact that fees at private institutions tend to be much, much higher than £4,000 per year.) Hence, private institutions are currently subsidised by as much as £3,000 less per year per student than publicly-funded institutions.

However, the University of Buckingham is a special case. The fact that it is a recognised institution seems to secure it special treatment from the government. UK students studying at Buckingham receive a grant of about £2,500 a year from the government towards tuition fees¹¹⁸, which is clearly a higher level of support than the government extends to most other private HE providers. This funding does not come from HEFCE. (Interestingly, several other private institutions, such as the London Guildhall School of Music and Drama, also receive enhanced grants.¹¹⁹)

Given the high tuition fees at Buckingham (about £10,000 a year), students still have to make significant individual contributions. Thus Buckingham certainly appears to be a domestic, 'privately funded' HE provider. As we mention in subsequent sections it could therefore be argued that, because of the 'level playing field' that the UK's 1994 GATS commitments produced for privately-funded HE providers, foreign HE providers could already ask for similar opportunities to those enjoyed by Buckingham¹²⁰ - financial and otherwise - with unpredictable, but potentially serious consequences.

3.4.3 Quality Assurance and Buckingham

The funding issue also spills over to the Quality Assurance (QA) issue, which we explore in Section 5.2. Part of the 'contract' that publicly-funded HE institutions (i.e. those that receive HEFCE support as outlined earlier) submit to is that their teaching activities are periodically assessed¹²¹ by the government's Quality Assurance Agency (QAA). As part of its accession to recognised status (in 1983) Buckingham demonstrated that its own internal QA mechanism was strong. This, combined with the fact that it does not draw on HEFCE funds, means the government does not make subjection to the relatively new QAA a condition of Buckingham retaining its recognised status.¹²² However, Buckingham is voluntarily subjecting itself to the QAA in 2004, presumably to convince onlookers that its degrees are at least comparable to degrees from UKHE institutions (and to secure an endorsement of its teaching quality.) As we discuss in Section 5.2, it is very difficult to predict how the QAA might interface with GATS developments. However, if circumstances arise in which foreign HE providers perceive entry to the QAA as desirable, the fact that Buckingham has this right¹²³ would appear to strengthen their argument that (as a result of existing GATS commitments) foreign HE providers should *also* be allowed access to it.

A general point to make about Buckingham is that the government's relationship with it appears unique and ad-hoc. Indeed, in the twenty years since Buckingham achieved recognised status no other private institution has replicated this feat. This is partly why we believe that the

consequences of liberalisation in the current GATS round could be *far* more significant than existing 1994 commitments. Though not entirely implausible, there is unlikely to be a GATS challenge purely on the grounds that a lone domestic, privately-funded institution has somehow fought its way to recognised status and domestic privilege. (It should be noted, however, that if the matter did result in arbitration then a WTO Dispute Settlement panel would probably not care how many UK institutions were involved if even just one precedent could be found.) That said, it is important to realise that if more domestic, privately-funded HE providers emerge of a similar status to Buckingham then political pressure to extend these rights to similar foreign HE providers will increase, along with the prospect of GATS challenges.

In contrast to the above, if UKHE is exposed to liberalisation then - as we discuss in subsequent sections - there is the danger that the UKHE system **as a whole** will be perceived as putting foreign competitors at a disadvantage. Clearly this would be a much more conspicuous anomaly than the fairly specific (and some would argue theoretical) Buckingham-related examples we have identified.¹²⁴

3.4.4 Conclusion

This section has provided a technical backdrop to the existing structure of the UK Higher Education sector in terms of the relationship between publicly-funded and private institutions. This will be of assistance in subsequent sections, and also provides context for some of the concerns aired regarding the existing, 1994 GATS commitments. However, in this regard we stress again the overall aim of this paper, which is to consider the potentially adverse consequences of UKHE being directly exposed to liberalisation as an outcome of the current GATS2000 round, or future GATS rounds.

4 How GATS could affect UKHE funding

4.1 Summary

The issue of funding is of central concern of all UKHE stakeholders: institutions, academics and students. GATS has considerable potential to adversely impact on the funding of UKHE in a number of ways. This section considers mainly the funding consequences of exposing UKHE to liberalisation under GATS. We do not consider the purported financial benefits of gaining access to other countries' HE sectors under GATS:- we leave the 'cost-benefit' analysis to Section 5.4 where we consider if, in light of the evidence in Sections 4 - 5.3, it is worth the risk of UKHE supporting GATS. There we conclude that, in light of the evidence provided, supporting GATS is taking a largely unnecessary risk because most of the benefits of internationalisation lie *outside* the GATS framework.

There are three principle areas in which GATS could adversely affect UKHE funding

- Subsidies
- Cross-subsidisation
- Future domestic policy-making

The first two are discussed in considerable depth. In **Section 4.2 (GATS and 'subsidies')** we find that:

- GATS has several articles that seek to discipline subsidies in accordance with free trade objectives, the two most relevant to this paper being National Treatment (Article XVII) and Subsidies (Article XV).
- **National Treatment** is of immediate relevance to UKHE. If further liberalisation exposes UKHE to National Treatment disciplines (either in the present GATS2000 round or future GATS rounds) the government may be required to make the relatively high levels of public funding currently ringfenced for UKHE available to both UKHE institutions *and* foreign HE providers operating in UK territory.
- Under such a scenario, the government could restructure the dissemination of teaching funds in a number of different ways. The most moderate response would be a switch to 'provider neutrality', where foreign HE providers can also receive substantial government funds for recruiting UK students. The inability to control the number of foreign HE providers operating in UK territory could therefore radically increase levels of competition for students in the UK arena, potentially damaging UKHE institutions. At the other end of the spectrum, the government may choose to completely withdraw public funds.
- The fact that the government has already forfeited the right to control the number of foreign HE providers operating in UK territory could mean public funds that are distributed on a per-institution rather than a per-student basis would probably be restructured (e.g. made subject to competitive tendering) or removed, to prevent unlimited drain on Treasury finances.
- Research funding could also be affected, and we note that academic research funding appears to be covered under a separate section of the GATS agreement. We urge further investigation into this issue as few UKHE stakeholders appear cognizant of it.
- The GATS article **Subsidies** (Article XV) mandates negotiation with a view towards developing new disciplines to curtail 'trade-distorting' subsidisation. Such new disciplines have not been agreed but are intended to come 'on-line' within the next few years; the

nominal goal is completion before new GATS2000 commitments are finalised, making the end of the Doha round - 1st Jan 2005 - the present target for completion.

- These new disciplines could, in the longer term, also lead to the radical re-structuring of UKHE funding.
- Commitments under National Treatment would discipline illegal subsidisation within UK territory, but Article XV provides a mandate to enter into negotiations with a view to developing disciplines necessary to tackle other types of illegal subsidisation, such as export subsidies.
- As a major exporter of HE, the continued public funding of UKHE could be construed as an illegal export-enhancing subsidy. This seems to apply on a general level to European HE sectors, which are considered 'protectionist' by many actors outside Europe. For example, UKHE institutions receive public funding which indirectly assists them in competing for students from other countries, either through setting up branches in other countries or attracting foreign students to the UK.
- Faced with potential WTO violations under any new subsidies disciplines developed, the UK government could come under pressure to profoundly restructure UKHE funding. The 'cleanest' solution would be to fully withdraw government funding, although alternative solutions could include a switch to decentralized demand-side funding (i.e. funding students rather than institutions) combined with strong downward pressure on overall funding levels.

Following on from this, we find in **Section 4.3 (GATS and cross-subsidisation)** that:

- In the absence of adequate government funding, UKHE institutions utilise 'internal' cross-subsidisation as a means of supporting courses and activities which, on their own, are not economically viable. The fact that UKHE institutions enjoy certain economies of scale and receive their funding as a block grant affords them flexibility in this regard.
- GATS could radically increase levels of competition for students, especially if GATS commitments cause a shift to provider neutrality. Existing commitments already prevent the government from limiting the number of foreign HE providers operating in UK territory.
- Heightened competition is likely to (as a minimum) increase pressure on UKHE institutions to shed expensive (but perhaps socially, academically or economically important) courses to minimize risk. Such pressures are likely to be particularly acute if UKHE institutions are faced with the prospect of losing significant numbers of students to foreign HE providers. Faced with this prospect, UKHE institutions may have to either provide the courses at high quality by cross-subsidising - and thus risk a potentially damaging loss of competitiveness elsewhere - or provide the courses without cross-subsidisation and thus at significantly diminished quality.
- UKHE institutions may be disadvantaged when competing with new HE providers because social (and bureaucratic) obligations could render many UKHE institutions inefficient compared to the more stripped-down (and often profit-focused) activities of their competitors. Furthermore, the effective dominance of UKHE at the present time may lead to a scenario where competitors to UKHE can feed off the labour investment of UKHE institutions, thus (in effect) using state expenditure to subsidise their activities.
- UKHE institutions could be particularly disadvantaged if competition causes a collapse in private funding streams from lucrative departments (such as business schools). Such departments (in UKHE institutions) may have an inherent competitive disadvantage because their revenues are used to cross-subsidise core UKHE activities, whereas specialised providers can re-invest revenues as they wish.
- GATS could interfere with cross-subsidisation that occurs as a result of UKHE's increasing involvement in commercial activities beyond its core educational mandate, and similar impacts could be felt in areas that are central to HE activity but which may fall elsewhere in the GATS classification framework, such as libraries. Given the extremely fine-grained nature of sectoral definitions under GATS, UKHE institutions may find themselves operating in non-HE sectors that have been committed under GATS. This

could lead to accusations that UKHE institutions illegally cross-subsidise their activities in these 'spill-over' areas. If challenged, UKHE institutions may be forced to retreat from such activities, severing any revenue streams that flow back from them. Challenges of this nature are not unprecedented in FTA jurisdiction. The unclear delineation between service sector definitions (in the GATS framework) potentially exacerbates uncertainty in this area.

In **Section 4.4 (GATS and future domestic policy changes)** we observe that GATS could interface unpredictably with future *domestic* policy-making. For example,

- Existing 1994 UK GATS commitments in HE promise a level playing field between domestic privately-funded HE services and (in essence) foreign HE services supplied in UK territory.
- UKHE funding mechanisms have, in recent years, been prone to fluctuation.
- Hence, if the government (for whatever reason) started giving substantial subsidies to domestic privately-funded HE services on a systematic basis it might, as a result of 1994 commitments, already be required to make these subsidies available to *all* similar foreign HE services supplied in UK territory.
- Similarly, any radical shift in domestic HE (e.g. elite institutions breaking away from government control) could have the side-effect of bestowing new rights on foreign HE providers.
- Deeper HE liberalisation under GATS will increase the range of unpredictable side-effects that could occur.
- The GATS framework could influence domestic policy-making on several levels. It may entrench domestic pro-liberalisation policies and/or introduce 'regulatory chill' where governments steer clear of certain types of regulation for fear of sparking a WTO challenge.

Finally, in **Section 4.5 (Who wants access to the UK market?)** we bring Section 4 to a close by exploring in a little more depth which foreign HE providers in particular might want access to the domestic UK market. We also explain that liberalisation under GATS could itself be of such significance that the parameters by which HE providers operate on the global market could be changed, thus establishing new trends in economic activity and creating markets in places that are currently the preserve of domestic providers. Related to this, we explain why foreign HE providers might be keen to tap into HEFCE funding, when many teaching-intensive UKHE institutions are at present struggling to make ends meet.

4.2 GATS and ‘subsidies’

GATS disciplines pertaining to *subsidies* could precipitate a radical restructuring of existing public funding mechanisms. Adherence to the trade principle of *non-discrimination* may lead to a situation where foreign HE providers operating in UK territory can compete for public funds alongside UKHE institutions, or alternatively to a scenario where public funding is reduced or even eliminated. Separately, it is possible that (as a result of on-going negotiations designed to address other forms of trade-distorting subsidisation) new disciplines may be developed under which public funding of UKHE is considered to constitute an unfair export-enhancing subsidy, thus exerting downward pressure on public funding.

Several GATS articles affect the way in which a government can award subsidies¹²⁵, the two most relevant to this paper being National Treatment (Article XVII) and Subsidies (Article XV).

As a backdrop to this section (and subsequent sections) Box 4.1 considers briefly some of the main reasons why subsidisation in the form of public funding is an important principle in HE. It is acknowledged that many of these features characterise an ideal and as such are not intended to be an exact reflection of the UKHE sector today. (Indeed, we recognise that chronic underinvestment in the sector, coupled with modern trends in HE policy - such as the increasing emphasis on economic efficiency - has arguably already undermined many of these features.) Nevertheless, these principles continue to be central to the mission of UKHE institutions, and will continue to be of central relevance while public funding constitutes a significant proportion of UKHE income. Additionally, Box 4.1 lists some of the potential dangers associated with the idea that public funding should be retained but used to purchase HE services not just from UKHE but on a neutral, competitive basis from either UKHE or its private sector competitors.

‘The essential contribution of higher education to local communities in Scotland and to Scottish society and its economy requires that publicly funded higher education should be provided from and rooted in Scotland. We oppose any move which would put a profit motive above the educational mission in the public funding of higher education in Scotland... We oppose any moves to amend or alter the General Agreement on Trade in Services which would result in signatory governments being forced to open state-funded higher education delivery to competitive tendering with for-profit educational providers.’
Universities Scotland communication to Scottish Executive, 2002

This list does not claim to be comprehensive, and we recognise that the traditional model of publicly funded, publicly provided HE has many shortcomings in need of attention. However, these problems are often exaggerated and we feel it is important to defend this model of service provision by highlighting some of its unique, highly desirable and largely irreplaceable qualities, many of which are overlooked in modern public service discourse.

4.2.1 National Treatment (Article XVII)

Many commentators fail to recognise that National Treatment disciplines certain types of subsidisation by requiring that, where appropriate specific commitments have been made, any subsidies made available to domestic providers must be also made available to foreign suppliers providing a ‘like’ service in UK territory¹²⁶. The concern is, for example, that a foreign university setting up in the UK and deemed to be providing a ‘like’ service to UKHE institutions could demand (on the grounds of non-discrimination) equal access to public funds.

Subsidies are supposed to be awarded on a non-discriminatory basis in those sectors and modes of supply where a government has made National Treatment commitments but not carved out

‘It is questioned whether higher education can be profitable for private investors without public subsidies.’
WTO Background note on education.

regulatory autonomy in the award of subsidies. At present the UK's HE schedule has no subsidy carve-out but, as we discussed earlier, the schedule only applies to '*privately funded services*'. Hence, foreign HE providers operating in the UK (whose services are therefore considered privately funded) could already, in theory, argue for the same subsidies as awarded to similar privately-funded services provided domestically, irrespective of the legal status of the domestic provider. (Interestingly - as mentioned in Section 3.4 - the UK government *does* subsidise the University of Buckingham relatively heavily, and this raises the question as to whether foreign HE providers deemed to be providing a similar service to Buckingham could cite Buckingham as a precedent and use the 1994 commitments in their efforts to obtain equivalent government funding.)

So what could happen if the UK commits to deeper liberalisation of HE?

If the '*privately funded services*' limitation were to be lifted and the government did not introduce a National Treatment subsidy carve-out in the 'commercial presence' mode supply, there would appear to be a very strong chance that public funding could become constrained by the non-discrimination requirement. There are several comments to make about this. First, the EU retains a horizontal subsidy carve-out which reads, '*The supply of a service, or its subsidisation, within the public sector is not in breach of this commitment.*'¹²⁷ However, the phrasing of this carve-out (which inevitably raises further questions about the EU's confidence in Article I.3) is ambiguous at best, and contrasts sharply with, for example, the much firmer subsidy-related limitations listed by the US.¹²⁸ There are also technical grounds on which its effectiveness can be called into question.¹²⁹ Perhaps more significantly, it is questionable whether UKHE constitutes a public service, even within UK jurisdiction.

Secondly, as we mentioned earlier the US (for example) has explicitly stated that it is not requesting commitments relating to subsidies HE. However, with all due respect to the US and other trading partners, there is nothing binding about such a statement and - given the highly strategic and at times aggressive character of WTO negotiations - all that matters is the new set of formal GATS commitments that emerge at the end of

Why is public funding / subsidisation important to Higher Education?

- Recognises that many subject areas are academically, socially or economically necessary yet unsustainable in a commercial environment.
- Promotes stability by insulating teaching and research from short-term fluctuations in market demand.
- Tends to promote equity of access. (The cost of education in a deregulated market is dictated by demand, thus limiting opportunities for students from poorer backgrounds.)
- Facilitates academic freedom and independence by limiting dependency on private funding.
- Allows the government to promote social goals e.g. widening access, expanding teacher training and so on. (Part of the 'contract' of public funding is service for the wider good of the country.)
- Affords some protection from incessant pressure to cut costs.

Why is it also important *who* provides publicly-funded Higher Education? In other words, what's the problem with 'provider neutrality'?

- UKHE institutions have a tradition of public service which can be expensive and/or difficult to simulate in other providers through (for example) a contract culture.
- Owing to their public service ethos, UKHE institutions are (where funding levels are inadequate) more inclined to utilise cross-subsidisation and economies of scale as a means of preserving economically unviable courses and activities, in contrast to a more market-sensitive outlook which would dictate that such activities be disbanded.
- Filtering public funds to (for example) for-profit operators can reinforce decline of conventional publicly-funded institutions and the growth of a sector hostile to progressive goals. May be particularly acute if (because of social and bureaucratic burden, for example) UKHE institutions find it hard to compete with more stripped-down competitors.
- Government is bound by democratic mandate to ensure certain social goals are met. There is a risk therefore that governments end up 'paying twice' if the state has to underwrite failure or inadequacy when public services are (in essence) contracted out to the private sector. The contraction of the traditional public sector (perhaps because of its inability to compete in a commercial market) increases the government's dependence on private provision and thus heightens the financial vulnerability of government.

Box 4.1: Some reasons why public funding and public provision are important.

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current negotiations. Indeed, the initial set of formal requests (i.e. those tabled at the end of June 2002) and any subsequent requests will not be made public, so it is not possible to predict with any certainty what exactly is being proposed.

Certainly, the US assurance appears to be at odds with its December 2000 negotiating proposal. In this document the US invites its trading partners *'to inscribe in their schedules 'no limitations' on market access and national treatment...'* in HE, adult education and training services. This is an extreme request: - WTO Members acceding to it would in effect be relying on the dubious protection afforded by Article I.3 to avoid the onerous prospect of having to award subsidies on a non-discriminatory basis. Interestingly, in the same document the US also comments that, *'Subsidies for higher education...are not made known in a clear and transparent manner.'* One possible interpretation of the push for transparency in this area is that it makes it easier for foreign HE providers to determine which funds they might (on grounds of non-discrimination) try and lay claim to.

'With respect to establishing commercial presence, potential barriers include... the existence of government monopolies and high subsidization of local institutions.'
WTO Background note on education

More generally, however, it is in a sense academic whether the UK carves out subsidies in the current GATS2000 negotiating round. Suppose the UK extends foreign providers new opportunities to qualify as recognised¹³⁰ degree-granting institutions, but retains subsidies solely for UKHE. This, coupled with the *'progressive liberalisation'* mandate of GATS, will only increase pressure for subsidies to be committed in the next GATS negotiating round, because it will seem 'unfair' that some recognised degree-providers draw on public funding while others do not. (Similar arguments have already been used within the US by resident for-profit providers seeking access to state funding.¹³¹)

Hence, in the remainder of this section we proceed on the assumption that either as part of the current GATS2000 round or during subsequent rounds the UK government could decide to expose UKHE to National Treatment disciplines, thus potentially creating a scenario where public funds traditionally reserved for UKHE thereafter have to also be awarded in a non-discriminatory fashion to foreign HE providers.

Should this occur, and other WTO Members either ask or successfully challenge (at a dispute panel) for non-discrimination in the award of subsidies, the UK government would probably have to radically restructure its HE funding mechanisms (assuming it wished to avoid being hit by sanctions for non-compliance.) Perhaps the area of greatest impact would initially be in the distribution of teaching funds.

4.2.1.1 Teaching funds

In 2002-3 £3,271m was distributed by HEFCE (Higher Education Funding Council for England) for teaching and learning purposes, constituting sixty four percent of the HEFCE total.¹³² Currently HEFCE releases teaching funds to UKHE institutions only, in *rough* proportion to the number of students each institution enrolls¹³³. (As discussed in Section 3.4.2, the government does also subsidise designated courses at private institutions to a limited degree through the provision of a non-means tested grant of about £1000 per year to UK students enrolling on them, or more in the case of Buckingham. This funding is not delivered through HEFCE, however, and is relatively minor compared to HEFCE funding, which at present registers at just under £3000 per year per student, and closer to £4000 if the tuition fee is taken into account.)

In addition to this 'per capita' funding, the government has - at least at the time of writing - a 'safety-net' mechanism where institutions failing to attract sufficient numbers of students are topped-up to a certain basic level of funding to prevent them from sinking.

Compliance with National Treatment disciplines could mean that foreign HE institutions operating in UK territory also have to be included under the HEFCE funding umbrella. **In other words, foreign HE providers could be brought into the fold and funded, like UKHE institutions, on a 'per capita' basis.** We call such a shift 'provider neutrality' because the government would effectively be declaring a willingness to fund teaching irrespective of whether UK students study at UKHE institutions or at foreign HE providers operating in the UK. As we discuss shortly this would mean competition for students inevitably intensifying.

A proliferation in the number of providers operating in UK territory could mean HE 'supply' (the number of providers) significantly outstripping 'demand' (the number of UK citizens seeking HE services.) Teaching funds constitute a large chunk of overall income, so UKHE institutions could be placed in potentially fierce competition for student numbers with their foreign counterparts. Such competition would be particularly cut-throat if the government decided to shift from the current fixed base-rate system (where the amount of money dispensed per student is fixed, albeit adjusted by various weighting factors) to a competitive tendering process e.g. where HE providers submit bids for how efficiently they can teach students. Such a shift could perhaps be undertaken in the name of maximising returns from taxpayers' money.¹³⁴

Certain types of teaching-related funds would potentially have to be removed altogether if foreign HE providers were brought under the HEFCE funding umbrella. To see why this could be so, it is crucial to note that UK GATS commitments from 1994 already prevent the UK government from placing limits on the number of foreign HE providers in UK territory. Hence, there would be pressure to remove unconditional, safety-net funding altogether because, unlike 'per capita' funding, the government's financial obligation with such funding increases proportionally (and hence unsustainably) with the number of providers in the market. This, as well as the desire to avoid bailing-out foreign providers, could be a factor in government reforms announced in August 2002. The government announced plans to retract the university safety-net, complementing an earlier decision to remove caps on the maximum number of students each institution could enroll. For better or for worse, such reforms inevitably discipline the sector along 'sink or swim' lines: *'No institution has a given right to continue to function in its present form.'*

Box 4.2: Complete removal of safety-net funding

UKHE institutions have always competed (mainly with each other) for students but a shift to 'provider neutrality' in an oversupplied market would boost competition to new levels. In particular, since the survival of an institution would (in many cases) hinge on its ability to attract students, it seems inevitable that certain courses would come to be considered unacceptably risky, even if public funding was guaranteed for each student the institution attracted. There are several reasons for this. For example, institutions have to invest funds up-front in faculties (e.g. course development, staff recruitment, infrastructure investment) if they are to attract students, meaning that courses would incur costs for institutions even before any new students were enrolled. Hence, sustaining courses in which intake is volatile or where there exists stiff competition from new providers could become problematic.

More generally, as we discuss further in Section 4.3, UKHE institutions have traditionally managed to ameliorate the varying levels of risk attached to different courses by exploiting efficiencies resulting from economies of scale and using savings from less expensive courses to support more expensive courses.¹³⁵ With the advent of full-blown competition institutions will be under pressure to minimise risk both to enhance survival prospects and to improve their chances of competing with new providers. This would likely be achieved either by jettisoning high-risk courses,

Though it is liberalisation in the 'Commercial Presence' mode of supply which could see funding actually split between domestic and foreign HE providers - and thus is the area in which UKHE stakeholders should show most concern - there could also be a tension in this direction, albeit much weaker, as a result of liberalisation in other modes of supply. GATS commitments in the 'Consumption Abroad' mode of supply mean the government should, in theory, not intervene to make UK citizens more likely to attend a UKHE institution than travel overseas and obtain access to 'like' services elsewhere. As present student funding is (on the whole) tied to the condition that students study in the UK; should deeper liberalisation of HE be undertaken the government may be required to address this distortion, perhaps (as we discussed earlier) by switching teaching funds away from institutions and towards students i.e. a so-called switch from 'supply-side' to 'demand-side' funding. The government already financially supports students who study part of their degree abroad through the SOCRATES-ERASMUS exchange programme, but trade-related reform could see a more radical decoupling of funding from its UK base e.g. so students can more easily study the whole of their degree abroad. **Box 4.3: How liberalisation in other modes of supply could also affect funding.**

securing supplementary private funding (from industry or students) or consolidating market position (through mergers, for example.) To a certain extent these trends are already evident in the sector. However, there is a strong possibility that the restructuring of HEFCE funding in the manner described would radically increase pressure on UKHE institutions to either reorganize their activities along more market-sensitive lines or face the prospect of supplying courses not catered for elsewhere in the market at overall diminished funding levels.

Clearly, faced with the need to remedy a National Treatment violation any number of mechanisms could be plausibly introduced, but broadly speaking they would all lie on a sliding-scale with fixed base-rate, provider neutrality (i.e. the option discussed above) at the more moderate end and induced privatisation (through the wholesale removal of teaching funds) at the other. Between these endpoints variations exist such as switching to decentralized, 'demand-side' funding (i.e. supplying students with vouchers or learning accounts), introducing competitive-tendering into the HEFCE (teaching) award process, and varying or deregulating individual contributions from students. (Implications for students are discussed in Section 7.) In practice, much would depend on *why* the restructuring was taking place. If it was in response to a defeat at a WTO dispute panel, then the motivation for the challenge would probably influence the solution; for example, some foreign HE providers might like to see the elimination of public funding, some might prefer to get a share of it, and so on. However, by the nature of the objective all would at least expose UKHE to a *potential* decline in funding, because of competition from new providers, and at worst see the actual reduction or elimination of government support.

We should add that in light of this possible shift to 'provider neutrality' reassurances found in the initial negotiating proposals (discussed in Section 3) look less comforting. The Australian proposal states its opinion that GATS '*...should not prevent Member countries from providing public funds for education to meet domestic policy and regulatory objectives.*'¹³⁶ Crucially, however, this does not say *who* should receive public funding. Finally, we note that the UK government already uses provider neutrality of its own volition in the NHS¹³⁷, so we should not presume that the government would be opposed in principle to the prospect of extending it to UKHE.

4.2.1.2 Research funding

Most of the debate surrounding GATS and HE centres on teaching. However, it would appear that academic research is also covered by GATS, albeit not under the 'Higher Education Services' classification (CPC923). Academic research seems to fall under 'Research and Development Services'¹³⁸, which is itself a subcategory of the much wider 'Business Services' sector. R&D divides down into several subsectors; the UK has already made fairly liberal commitments in 'R&D Services on Social Sciences and Humanities' but has made none whatsoever in 'R&D Services on Natural Sciences.'¹³⁹

This opens up a new front on the GATS debate. Could foreign HE providers or (more plausibly¹⁴⁰) commercial research organisations bid for HEFCE research funds through the RAE (Research Assessment Exercise) and other research funding boards? At present GATS offers no guarantees in this area, because the EU has carved out the award of subsidies for R&D¹⁴¹, presumably to protect industrial subsidies. However, does the fact that the UK has already committed 'R&D Services on Social Sciences and Humanities' bring UKHE social services/humanities academic departments under stringent GATS disciplines? Is academic research exempted by the EU's 'public utilities' carve-out¹⁴² and/or excluded by Article I.3? That is, GATS disciplines don't apply as long as academic research is neither provided on a commercial basis nor in competition with one or more service suppliers. Pure academic research is non-commercial and (most people would argue) non-competitive, but - as we discuss later - academic research departments increasingly look to consolidate government funding by commercialising their research and expertise, and thus stray from their specified mission and into competition with private companies. Combining this with the blurred delineation between teaching funding and research funding (HEFCE calculates teaching and research contributions separately,

but awards them as a single block grant which institutions can distribute internally as they see fit¹⁴³) further obfuscates an already extraordinarily complex issue. UKHE should undertake further research on this as a matter of urgency since there would appear to be reasonable grounds for concern but little understanding of this issue. In the event of a successful GATS challenge, the government could come under pressure to ‘unbundle’ (i.e. separate) university funding and even the structure of universities themselves, in order to clarify distinctions between teaching, pure academic research and commercialised academic research. (Admittedly it is difficult to even comprehend how this might be achieved. Indeed, though the notion that teaching might be considered a tradeable commodity is an established part of education discourse, albeit a highly controversial one, the idea that academic research should be thought of in this manner is alien to most people.)

As a final comment on this issue, it is curious to note that in the leaked EU requests (see Section 2.4.3) the EU is making the following R&D request of Switzerland: *‘These three [R&D] sub-sectors have not been committed for projects ‘financed in whole or in part by public funds’. EC request: Extend sectoral coverage to all [of R&D].’*¹⁴⁴ (Emphasis added.) Though the EU’s intention here may well have been derived from concerns pertaining to industrial subsidisation, it seems likely that the public funding of academic research could be affected in countries acquiescing to requests such as the above.

4.2.1.3 Miscellaneous funding

There are myriad pools of public funding available besides core HEFCE funding, and these would also have to be distributed in a non-discriminatory manner. In practice this would either mean wholesale removal of the funding, distributing it uniformly across the whole sector (leading to a progressive reduction in amount received per institution as the number of HE suppliers increases) or - more likely - recourse to competitive tendering. In Section 5.3 we examine the case of the partially government-funded ‘e-University’ project which could well fall foul of (amongst others) National Treatment rules should UKHE be exposed to liberalisation under GATS. Indirect subsidies such as preferential borrowing rates or tax-breaks would be more likely to be eliminated outright since they do not lend themselves to rationing or competitive tendering, and the government would be unlikely to tolerate a potentially unlimited drain on its finances. Student maintenance subsidisation (e.g. the low-interest loan mechanisms) could also be opened out more generally to attendees of non-UKHE institutions operating in UK territory. (Students studying designated courses at private institutions already have access to the student loan mechanism, although liberalisation could see its availability widened further.)

‘Like services’?
<p>With respect to teaching in particular the crux of the matter appears to be whether foreign HE providers supply a ‘like’ service to existing UK universities. Certainly, the global trend towards recognition of substantially equivalent foreign qualifications (itself partly driven by the desire to increase staff/student mobility) is likely to increase comparability of HE services. Similarly, the practice by professional bodies and associations of recognising qualifications they perceive as comparable to UK degrees further increases pressure in this direction.¹⁴⁵ However, with regard to the UK in particular, the fact that foreign HE providers can already award UK-recognised degrees (by being ‘validated’ by a recognised institution) makes direct comparison much easier.</p> <p>This could be very significant if the government exposes UKHE to deep liberalisation. For example, suppose a particular degree course at a UKHE institution is deemed ‘like’ a corresponding course at a validated, foreign HE provider operating in the UK. (Indeed, the obvious comparison is between a course at a validated institution and, if it exists, the same course at the validating institution.) The fact that the government subsidises the UKHE course at significantly higher levels than the foreign provider’s course, yet both courses are considered ‘alike’, could constitute a National Treatment violation.</p>

It is important to realise that National Treatment applies to both like services *and* providers, which are separate concepts in WTO law. So favouring domestic service *providers* over 'like' foreign service providers can constitute a National Treatment violation, as can the practice of favouring *services* provided by domestic providers over 'like' services provided by foreign providers. The difference is very subtle but potentially important. (For example, certain parts of HE public funding support the provision of a particular *service* - e.g. degree provision - while other parts could be said to support the provider e.g. funds made available to universities specifically *because* they are universities.) In practice, the concepts of like services and like providers are heavily intertwined. Indeed, within the WTO it is not yet clear how 'likeness' between service *providers* should be determined. The 'Bananas' WTO case has suggested that providers are alike to the extent that they provide like services, although this interpretation is disputed.

Modal neutrality?

The notion of 'like' services and service providers certainly seems to apply, as a minimum, *within* modes of supply. In other words, if the UK government (say) commits to full HE liberalisation in the Commercial Presence mode of supply, henceforth discriminating between like domestic and foreign HE services where both are delivered through HE providers with an established physical presence in the UK is potentially GATS-illegal. However, the National Treatment article may also have the property of 'modal neutrality', which would forbid discrimination on the basis of mode-of-supply.

To elaborate, certain WTO rulings suggest that, despite the physical format of GATS schedules (i.e. the 2x4 grid), it may be GATS-illegal to offer varying levels of National Treatment to foreign HE services purely on the basis of how the course is delivered¹⁴⁶ e.g. on the basis of whether the course is delivered through an e-university or through a branch campus with established physical presence in the country. The WTO Secretariat and WTO negotiators accept that this issue remains unclear.¹⁴⁷ This is discussed later in the context of Quality Assurance (QA). However, it is also highly relevant to subsidisation. WTO negotiators engaged in negotiations about possible new GATS subsidy disciplines (the Article XV mandate, discussed in the following section) have observed that, as part of this process, it is crucial to determine whether this 'modal neutrality' property actually holds.¹⁴⁸ If so, this could be highly significant since it would mean that - once established in the UK market - the government would not be able to differentially subsidise 'like' HE services on the basis, for example, of whether the service is delivered by internet or by a provider operating in UK territory.¹⁴⁹

Box 4.4: 'Like services' and 'Modal neutrality' explained

4.2.2 Subsidies (Article XV)

WTO negotiators have commented that, though National Treatment is a powerful instrument for disciplining many types of trade-distorting subsidisation, it doesn't cover them all.¹⁵⁰ For example, export subsidies definitely distort trade but in general are not a violation of National Treatment because the adversely affected competitors are not operating within UK territory. Though not an export subsidy *per se*¹⁵¹, it could be argued that the distribution of public funds to UK-based institutions, who then export to foreign countries (either through commercial presence, or attracting students from abroad) is an unfair subsidy because it has an export-enhancing effect and thus distorts terms of competition in favour of UK-based institutions.

Whereas compliance with National Treatment could in theory leave public funding levels intact (albeit spread amongst both domestic and foreign providers), compliance with the disciplines currently contemplated under the Subsidies (Article XV) mandate could potentially lead to a more radical restructuring of UKHE funding. This article anticipates the development of new disciplines to address '*trade-distorting*' subsidisation.

'Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.'
Excerpt from Article XV of GATS (emphasis added.)

Negotiations under the Article XV mandate are ongoing and slow-moving but the present aim is completion before the end of the Doha WTO Round (1st January 2005).¹⁵²

These developments need to be followed closely, especially since any disciplines developed may (in part) apply horizontally i.e. to all sectors irrespective of whether a government has made commitments in those sectors.¹⁵³

UKHE should be particularly concerned about the evolution of disciplines under the Article XV mandate because of UKHE's role as a leading exporter of HE: *'The American proposal at the GATS negotiations also reflects a growing irritation¹⁵⁴ on the part of foreign private universities, e-learning providers and corporate universities that they have to compete on the global market with European public institutions that derive a great deal of their income from public sources, while protecting their own European markets for themselves.'*¹⁵⁵ In the event that new subsidy disciplines are agreed to it is possible that this situation will become untenable. Indeed, the WTO Secretariat has noted *'[that] some governments have developed export capacity in health and education services, and subsidies in these sectors may be viewed with concern from a trade perspective.'*¹⁵⁶ The problem is that public funding of UKHE is multifunctional - it serves a social and academic objective but (as its trade-oriented detractors point out) it is the foundation from which UKHE is looking to sustain its role as a world leader in HE exports.

It is not yet clear how any subsidy disciplines mandated by Article XV might turn out; indeed, Members may not reach any agreement at all.¹⁵⁷ However, one possible model that has been suggested for comparison is the WTO's existing Agreement on Subsidies and Countervailing Measures (SCM)¹⁵⁸, which divides subsidisation into 'prohibited', 'actionable' and 'non-actionable' categories. Prohibited subsidies, e.g. those requiring the recipient to use domestic rather than imported goods are completely ruled out (and can be challenged at a WTO dispute panel), actionable subsidies can be challenged only if they can be demonstrated to adversely affect the trading interests of the complaining country, and non-actionable subsidies (such as subsidies to help industries adapt to new environmental laws) cannot be challenged. (Interestingly, the SCM considers subsidies for 'fundamental' academic research to be non-actionable.¹⁵⁹) Though the SCM model only applies to goods, and commentators acknowledge the political sensitivity and increased complexity (because of the four modes of supply) of service subsidisation, it is an interesting model to consider. Could UKHE funding eventually be considered (the equivalent of) an actionable subsidy, and challenged at the WTO? The WTO lists¹⁶⁰ three different types of adverse impact that a complainant can act on for subsidies in the actionable category. In the following table, we list them alongside possible HE-related analogues:

Actionable subsidies as described under SCM	Possible HE-related analogue
1) those that <i>'can hurt a domestic industry in an importing country.'</i>	publicly-funded UKHE institutions drawing US students away from US institutions, for example by setting up in US territory or attracting US students to study in the UK.
2) those that <i>'can hurt rival exporters from another country when the two compete in third markets.'</i>	publicly-funded UKHE institutions competing with private Australian institutions for students from SE Asia.
3) those domestic subsidies that <i>'can hurt exporters trying to compete in the subsidizing country's domestic market.'</i>	requiring UK students to study in the UK; only subsidising UKHE institutions and not foreign institutions operating in UK territory (already disciplined by National Treatment); e-learning issues may also be relevant here.

Table 2: possible 'actionable' forms of subsidisation

Determining whether subsidies are WTO-illegal can be an extremely complex business for goods, let alone services, so any disciplines developed under the Article XV mandate could be exceptionally complicated. However, looking at the above table, UKHE (and in fact any publicly-funded, exporting HE sector) could be perceived as engaging in 'unfair' subsidisation. In the future, therefore, it remains a possibility that UKHE funding could be challenged on these or similar grounds.

Should it be successfully challenged, then the UK government would face a situation where it has to remove whatever component of the public funding mechanism is causing the distortion. We now explore just a few of the many possible scenarios relating to this eventuality.

- **Elimination of government funding.** The most extreme response, but with the advantage that this would address all possible forms of illegal subsidisation.
- **Switching to decentralized, 'demand-side' funding.** For example, crediting UK students with their entitlement and allowing them to study with any (qualified) provider, anywhere in the world. It seems likely that there would be downward pressure on funding levels to avoid a scenario where 'de facto' export-enhancing subsidisation continued e.g. where UK-based institutions exploit their geographical advantage in recruiting UK students and thus continue to receive substantial amounts of trade-distorting public funding. (Recall that a switch to demand-side funding is also one possible solution to a National Treatment violation in this area.)
- **Require UKHE institutions to separate their export arms from their domestic arms.** This would prevent UKHE institutions using public funding to cross-subsidise their activities in other countries. This would partly address subsidy types 1 and 2 from Table 2 (above) but not wholly. For example, UK-based institutions would continue to be subsidised (compared to non UK-based HE providers) in attracting foreign students to study in the UK.
- **Separate UKHE into different groups.** For example, UKHE institutions that engage in export activity (either overseas or attracting foreign students to the UK) could have their government funding reduced or withdrawn. Remaining UKHE institutions could be required to focus solely on the UK domestic market, where funds are distributed on a non-discriminatory basis between these remaining UKHE institutions and UK-resident foreign HE providers. This would not wholly address subsidisation problems, but would go a long way towards doing so.

As the above list demonstrates, the impact on UKHE funding could be significant. It is interesting to note that some of the listed 'options' could be considered solutions to National Treatment violations also. Therefore, combining the influence of National Treatment with any disciplines developed under the Article XV mandate could introduce a momentum towards policy changes similar in nature to the first two in the above list, characterised by a shift to provider neutrality coupled with downward pressure on funding. The downward pressure on funding could emerge both as a result of regulatory convenience (i.e. it solves many of the illegal subsidisation problems) and also the fact that the general free trade outlook on subsidies is one of suspicion, with the preservation of subsidies viewed as exceptions from a general process of subsidy reduction.

There is, of course, the issue of whether it is reasonable for European HE to base its export strength on public funding, and indeed whether it is ever possible for a publicly-funded institution that also exports to avoid accusations of unfair subsidisation. UKHE should be aware that these considerations are to be expected if HE is brought more fully under a free trade regime. In other words, UKHE should not be surprised if, as a result of acquiescing to liberalisation under GATS, some of the described scenarios occur in years to come. Free trade theory aside, it is clear that while public funding continues to serve a social objective, the uncertainty surrounding the Article XV mandate casts a long shadow over the social and academic goals of UKHE.

4.3 GATS and cross-subsidisation

In Section 4.2 we discussed problems that could arise if public funding streams explicitly fall under GATS disciplines. There are a number of other ways GATS could adversely affect the financial viability of UKHE which could be highly relevant even if public funding levels are neither opened out nor reduced by GATS. All concern the principle of *cross-subsidisation*, which we have already touched upon briefly but now discuss in more detail.

In its simplest form, cross-subsidisation is the practice where a company or institution uses profits/savings from its commercially viable activities to support loss-making/expensive activities. Cross-subsidisation is an economic tool frequently used in the public sector to fulfill social objectives such as universal provision; in the NHS, for example, people who are rarely ill (and hence commercially viable) effectively cross-subsidise people who are chronically ill (and hence commercially unviable.)¹⁶¹ UKHE engages in cross-subsidisation at a number of levels. This section looks at how GATS could affect this.

'If universities were to lose the capacity, as they would under Gats, to cross-subsidise their teaching to allow delivery of intrinsically unprofitable subjects, then significant swathes of subjects would disappear. The advancement of knowledge in those areas would also vanish...'

'Higher education is not a commodity. Public funding through a variety of algorithms recognises, explicitly or implicitly, national need in specific subject areas, and in the UK it is the vehicle for the delivery of social equity through programmes such as widening access. All this would become more problematic were full inclusion of higher education in Gats enacted; universities would probably have to cease to play this type of higher societal role. The only criterion would be profitability.'

**Andrew Hamnett, Vice-Chancellor,
University of Strathclyde**

4.3.1 Cross-subsidisation: supporting activities that are economically unviable on their own

At the outset, it is acknowledged that cross-subsidisation is a complex and contentious issue for UKHE institutions. For example, the fact that UKHE institutions have to cross-subsidise their activities at all is, in many ways, a stark reminder of the continued inadequacy of teaching (and in some cases research) funding. It also reflects the less than ideal circumstances under which institutions are often forced to cross-subsidise heavily from research to teaching or (perhaps to a lesser extent) from teaching to research.¹⁶² It is understandable, therefore that the term 'cross-subsidisation' often carries negative connotations. (Indeed, at the personal level many academics will recognise that conducting research unpaid and out-of-hours is a form of cross-subsidisation from the individual to his/her department. On a similar theme, short-term research contracts transfer *risk* in the opposite direction.) Hence, it is important to emphasise that this section does not contend that cross-subsidisation is an ideal in its own right, or that academics should work endless hours to compensate for shortfalls in government funding! Rather, the point is that - in the context of inadequate funding - cross-subsidisation is a mechanism through which courses and activities can be supported that (when considered in isolation) are economically unviable, and as such the mechanism (and the willingness to deploy it) is progressive.

Also, in this section we focus primarily on the impact of GATS on cross-subsidisation within the domain of teaching (i.e. not taking into account cross-subsidisation to/from research) because it

'New accounting methods and a recent sector-wide risk assessment exercise have highlighted the extent to which other parts of higher education are subsidising teacher training, according to the Universities Council for the Education of Teachers (Ucet). Institutions that are shedding loss-making activities as part of restructuring exercises under way across much of the sector are asking whether they can afford to continue offering teacher training. Ucet has warned that if many decide to cut their losses and axe teacher training, it will worsen teacher shortages in schools. Mary Russell, secretary of Ucet, said: 'The cost of running teacher-training courses becomes more of an issue each year. Institutions have been asking whether they can afford to stay in the game. Most have held out so far because they feel it is a major commitment to the community. But accounts are now done in such a way that it is getting more difficult to carry anything that is not paying its way. As a result, some institutions are now teetering on the brink of dropping out.'

Box 4.5: 'PGCE 'on the brink'', THES, September 2002

is in this area that GATS is likely to increase competition considerably. (At present research is only of marginal relevance to the international education market.)

Throughout its history UKHE has practiced 'internal' cross-subsidisation. The fact that institutions receive funding from HEFCE in the form of a block grant¹⁶³, that certain courses are more cost-efficient¹⁶⁴ than others and that multiple courses are categorised within the same funding bracket means that, in effect, universities have always cross-subsidised expensive/unpopular courses with savings from inexpensive/popular courses. Cross-subsidisation of this kind allows universities to consider criteria other than commercial viability (see Box 4.1 in Section 4.2.1) when providing courses.

It is recognised that this kind of cross-subsidisation is already under pressure even without the influence of GATS. As the PGCE example (see Box 4.5) demonstrates, the requirement that UKHE institutions engage in Transparency Reviews¹⁶⁵ (within which departments are assessed as standalone economic entities) is highlighting particular areas of activity (both within individual institutions and across the sector as a whole) that are losing money. In itself this could be beneficial because it highlights which areas are in need of funding increases. Unfortunately, in the absence of further funding, the transparency reviews can severely threaten loss-making areas because they heighten the probability of such areas being axed in the pursuit of efficiency.

GATS is likely to radically accelerate trends in this direction even if public funds are not split between UKHE institutions and foreign providers. Greater competition in the sector is likely to force many UKHE institutions to minimize their risk burden and as a consequence those departments and courses that are net beneficiaries from cross-subsidisation will be particularly vulnerable to closure, to a far greater extent than they are at present. A continuing commitment to public service - or, more drastically, the government intervening directly in UKHE activity to prevent certain courses vanishing altogether - means certain commercially unviable courses would probably not vanish altogether. However, it seems plausible to argue that institutions providing such courses would have to resign themselves to fully supporting the course by cross-subsidising from other areas - and thus suffering the potentially serious consequences of diminished overall competitiveness - or, more likely, running the course without cross-subsidisation, thus seriously compromising its quality.

The adverse impact could be reinforced given that UKHE is increasingly reliant on more 'external' forms of cross-subsidisation e.g. bringing fresh teaching revenues in from outside rather than redistributing teaching allocations internally. For example, many universities now support their core activities with revenues from departments that attract a large number of privately-funded (and often international) students, such as business schools. That universities are becoming increasingly reliant on such individually-sourced private funding is a debate in its own right, but in the absence of sufficient government support this practice constitutes a large source of revenue for UKHE.

The problem is that GATS Market Access disciplines prevent governments from limiting the number of providers, or amount of trade, thus encouraging the emergence of a highly populated and fiercely competitive market. Certainly, the UK's GATS commitments from 1994 already prevent the UK government from limiting the number of foreign HE providers in the market. If, as a result of new GATS commitments, the UK is made more attractive for foreign HE institutions then it is likely their numbers will increase rapidly in the next few years, especially with the high projected growth in transnational HE. The concern for UKHE should be that its ability to cross-subsidise could be severely compromised as a result of being plunged into competition in UK territory against new HE providers that may have competitive advantages resulting from economies of scale, status (e.g. local branches of elite universities) or specialisation (e.g. MBA schools.)

It can be argued that if UKHE is not competitive enough to hold its own against such providers then it cannot expect to supplement its public funding with cross-subsidisation of this kind.

However, this neglects fundamental differences between publicly funded universities - which, by definition, are usually bound by social obligations - and their private counterparts. (By 'private' we mean any institution, domestic or foreign, that is not publicly-funded.) The fact that publicly-funded universities are bound to satisfy certain social as well as market criteria - such as providing commercially unviable courses that are nevertheless of social or economic importance (see Box 4.1 in Section 4.2.1) - means they are often 'inefficient' in crude economic terms, and thus risk being outflanked commercially by their relatively unburdened private sector competitors. (UKHE institutions also have a competitive disadvantage in that, as a result of their size, their internal organisation and the need to meet the various obligations associated with public funding, they have to maintain extensive bureaucratic structures.)

In turn, the loss of such surplus funding streams is likely to further increase pressure on UKHE institutions to limit expenditure on unviable activities, with the result that 'internal' cross-subsidisation of the type mentioned at the beginning of this section comes under yet more pressure and course provision is increasingly dictated by the market's current perception of value.¹⁶⁶ To cite a parallel in the postal industry, the rapid transformation of the Post Office from a profitable operation to a loss-making operation can be partly attributed to the exposure of its once highly-profitable courier arm (ParcelForce) to intense competition. Struggling to compete with dedicated courier firms (partly *because* of the need to cross-subsidise other areas of Post Office activity) revenues from ParcelForce have collapsed and as a consequence the Post Office can no longer cross-subsidise its core, letter-delivery obligations from this area,¹⁶⁷ contributing to the current crisis where 'uneconomic' Post Office activities (such as rural post offices) are threatened.

Before continuing any further, we pause briefly to acknowledge that the label 'private' blurs significant differences between institutions. Consider the difference between private not-for-profit and private for-profit HE providers. Indeed, in the US both public and private not-for-profit institutions are worried about GATS, as demonstrated by the support of CHEA (Council for Higher Education Accreditation) and ACE (American Council on Education) for the September 2001 Joint Declaration on Higher Education and the General Agreement on Trade in Services (see Section 5.4.) Letters from CHEA and ACE to the department of the US Trade Representative (USTR) also articulate these concerns.¹⁶⁸

However, in the context of cross-subsidisation we use 'private' to reflect the fact that such institutions are active in the HE arena and thus act as competitors to UKHE institutions. Furthermore, even though foreign not-for-profit providers may be significantly less rapacious in expanding UK market share than foreign for-profit providers, GATS makes it extremely difficult to differentiate between the two. As we discuss in Section 5.3, it would probably be GATS-illegal to make access to the UK market conditional on (say) not-for-profit status, unless an appropriate limitation had been listed. The UK omitted to list such a restriction in its 1994 commitments. Attempts to introduce such a limitation could be highly problematic - recall the effective irreversibility of GATS - and, in reality, unlikely since this would be an enormous rebuff to countries like the US who have a high concentration of exporting for-profit providers.

'The proposed WTO initiatives bring all of the pressures now being felt by universities worldwide into sharp focus. If higher education worldwide were subject to the strictures of the WTO, academe would be significantly altered. The idea that the university serves a broad public good would be weakened, and the universities would be subject to all of the commercial pressures of the marketplace—a marketplace enforced by international treaties and legal requirements. The goal of having the university contribute to national development and the strengthening of civil society in developing countries would be impossible to fulfill. Universities are indeed special institutions with a long history and a societal mission that deserve support. Subjecting academe to the rigors of a WTO-enforced marketplace would destroy one of the most valuable institutions in any society.'

'Higher Education and the WTO: Globalization Run Amok' by Philip G. Altbach, Professor of Higher Education and Director of the Center for International Higher Education, Spring 2001

Returning to the issue of competitive disadvantage, the fact that UKHE is the dominant provider of higher education in this country could perversely also work to its disadvantage. Academics could remain fully employed by a UKHE institution and undertake all original research and teaching course development at that institution, but because of the nature of intellectual

resources then replicate their lecture course at a competing institution (for example) on a part-time basis. The competing institution would thus get most of the advantages of UKHE's investment in the academic but at substantially reduced cost. In effect, therefore, they could 'piggyback' on the labour investment of UKHE institutions and in turn undercut them because their overall outlay for the same product was essentially subsidised by the state. Such a phenomenon has been observed in the health market, where private health companies are heavily reliant on recruiting trained NHS staff both to keep training costs down and ensure a steady stream of labour.¹⁶⁹

Needless to say, the consequences of being challenged in the home market would be most acute (with respect to cross-subsidisation) if HEFCE funding was restructured such that UK students no longer had to study at UKHE institutions to secure substantial government support, which is the 'provider neutrality' scenario we discussed in Section 4.2.1.1 (For example, UKHE institutions would potentially face competition across a wider range of courses because the non-discriminatory award of public funding could draw foreign HE providers into subject areas that they might otherwise consider too risky; we revisit this issue in Section 4.5.)

Finally, it should be noted that, unlike Spain and Italy, the UK government could not deny market access to a foreign HE provider on the grounds that a further proliferation of suppliers would damage the viability of UKHE. Such 'economic needs tests' are forbidden under *Market Access* rules unless the right to utilise them has been carved out at the time the commitment was made, and in 1994 the UK failed to do so.

4.3.2 Possible legal impediments to cross-subsidisation: 'unfair advantages'

As well as the above effects, GATS could actually be legally deployed against certain types of cross-subsidisation. UKHE institutions increasingly engage in commercial activities and thus stray into areas beyond their core teaching/research mandate. Typical activities include provision of conference facilities, consultancy, sale of IP (Intellectual Property), licensing technology and capitalising on research through the setting up of in-house companies, spin-off companies¹⁷⁰ and joint partnerships with the private sector.

The commercialisation of research has been cemented as a cornerstone of government policy and is viewed by the government as integral to the development of the UK 'knowledge economy'.¹⁷¹ Indeed, the introduction of explicit 'third stream' funding from 1999 onwards demonstrates the government's overarching desire to significantly boost the economic significance of UKHE activities. Universities may also engage in educational activities beyond their core mandate e.g. the provision of non-curricular training courses in basic computer skills.

The problem with such mission creep is that UKHE activities increasingly cross boundaries into other service sectors which may be committed under GATS. Sometimes the encroachment is deliberate (such as commercial consultancy) and sometimes it is unwitting, as in the case of the computer training mentioned in the previous paragraph.

Foreign private sector operators in these 'spill-over' sectors could argue that UKHE institutions also operating in these sectors (either individually or in partnership with the private sector) are enjoying the benefit of privileged access to public subsidies. In other words, that (because of cross-subsidisation) the public funding of UKHE institutions equates to a *de facto* discriminatory subsidy of UKHE activities in the 'spill-over' sector and is thus a violation of National Treatment. Recall that measures which formally *or in effect* discriminate against foreign providers can be considered National Treatment violations. There may also be grounds to argue that such activities constitute monopoly abuse, which is also prohibited by GATS.¹⁷² The fact that the GATS sectoral classification system is fine-grained yet somewhat vague in defining boundaries between

service sectors lends itself to problems of this kind, because large-scale institutions such as universities inevitably spread over multiple sectors. For example, UKHE stakeholders may be surprised to find that university libraries may not be classed under Higher Education services (i.e. CPC923), but as a subcategory of 'Recreational, Cultural and Sporting Services.'¹⁷³

Furthermore, UKHE commercial ventures (and companies established with involvement from UKHE institutions) could be said to benefit not just from public funding, but from other exclusive advantages too. For example, UKHE institutions enjoy a number of infrastructural and facilities-based benefits such as plentiful lab space, high-speed internet backbones (JANET - Joint Academic Network), access to comprehensive libraries and so on. Any UKHE-related commercial ventures in 'spill-over' sectors could be said to either directly or indirectly benefit from access to such facilities. This could again be construed as an unfair advantage by competing foreign companies that do not have access to UKHE infrastructure/facilities.

If successfully challenged at the WTO, the government would probably have to either open out the relevant parts of UKHE infrastructure or, perhaps more likely, 'clip the wings' of UKHE i.e. force it to retract from the service sector where the GATS violations had taken place. This would inevitably mean any revenue streams feeding back into UKHE from that sector would be lost. This process of a heterogeneous provider separating out its various functions is sometimes called 'unbundling.' It may sound fanciful but there are two important points to consider.

Firstly, the push to re-position universities at the very heart of national economic activity is a process not just underway in the UK but also in many other post-industrial economies where economic growth is increasingly based on advanced service and knowledge industries. Much has been written about the emergence of 'knowledge economies' (and related topics such as 'academic capitalism') but few commentators have considered the possible impact of FTAs such as GATS on post-industrial economies competing in these areas. As trade grows, and new forms of 'protectionism' become increasingly apparent, will it remain acceptable for the UK to pour large amounts of public funding into its advanced industries via partnerships with UKHE institutions?¹⁷⁴

Secondly, the argument that public-sector infrastructure constitutes illegal cross-subsidisation has already been used in an international trade dispute. In January 2000 UPS (United Parcel Services of America Inc.) notified Canada of its intent to sue for \$160million damages in a NAFTA tribunal, on the grounds that Canada Post (Canada's national postal service) was abusing its monopoly status by illegally cross-subsidising its courier delivery service from its core activities. The charge is that Canada Post's public letter-delivery infrastructure (e.g. postboxes, sorting depots etc.) constitutes a violation of NAFTA because it benefits Canada Post's courier arm but is not available to private providers such as UPS. The case began in July 2002.¹⁷⁵ In addition to constituting a warning to UKHE about complications as a result of involvement with GATS, this case serves to highlight a second point: at the time of signing virtually nobody foresaw that NAFTA would be used in such an aggressive and strategic¹⁷⁶ manner. *It takes time, for proponents and opponents alike, to understand the full implications of trade treaties, and for commercial interests to exercise their new rights.*

4.4 GATS and future domestic policy changes

In this section we note that an often-overlooked aspect of FTAs such as GATS is that they can interface unpredictably with future domestic policy-making. Policy changes that would once only have been relevant in a domestic context now run the risk of 'triggering' new, far-reaching commitments as a result of existing FTA obligations. Given the volatility of the government's UKHE funding mechanisms, there is a high risk that this 'triggering' phenomenon could occur in the future, if the government agrees to the further liberalisation of HE under GATS.

In effect, GATS blurs the distinction between the domestic and global arena, to the extent that regulation intended purely for the domestic market can automatically and unpredictably restructure the legal relationship between the state and the global market. This process is sometimes referred to as 'triggering': where domestic policy changes introduce new obligations as a result of existing international trade agreements, which in turn force further domestic policy changes. For example, given that the EU committed privately-funded HE in 1994, any benefits extended to the UK's domestic privately-funded HE sector would (in theory) have to then also be extended to foreign HE providers (supplying similar services) operating in UK territory, irrespective of whether the UK government liberalises HE any further.

Trigger scenario #1

Suppose the UK develops a competitive domestic privately-funded HE sector in the next few years. Following this, the UK government - keen to introduce competition and thus extract maximum 'value for money' from its HE expenditure - decides to allow domestic privately-funded HE providers to compete for full HEFCE funding¹⁷⁷ alongside existing UKHE institutions, whilst retaining a significant amount of autonomy from government. To maintain compliance with existing GATS commitments that opportunity might also have to be extended to all foreign HE providers (supplying similar services) operating in UK territory.

Again, it could be argued that the relatively high subsidisation of students attending the University of Buckingham (albeit not with HEFCE money) already constitutes a similar trigger. However, as we discuss in the aforementioned section the UK government's relationship with Buckingham appears ad hoc and specialised. The scenario we have just described would become much more likely if there was a more systematic, transparent and pronounced shift towards funding domestic privately-funded HE providers on an equal basis to UKHE institutions.

Trigger scenario #2

Alternatively, suppose a number of UKHE institutions were to break loose from government funding but retain residual regulatory links with the government, for reasons of mutual benefit. Such institutions would then be supplying privately-funded services, and thus the government could - because of its existing GATS commitments - come under pressure to ensure that foreign HE institutions supplying similar services were treated at least as well as the 'newly created' domestic, privately-funded institutions.

The point is that, even under existing GATS commitments, the distinction between the domestic privately-funded HE sector and the global HE market becomes indistinct to the point where government is increasingly faced with an '*all or nothing*' attitude to the private sector. The profound nature of this regulatory restructuring is of exceptional importance.

In terms of UKHE, we have shown briefly how, even with existing GATS commitments, future domestic policy shifts could trigger unpredictable side-effects. Should UKHE agree to deeper HE liberalisation under GATS then the probability of triggering occurring will increase in proportion to the depth of the liberalisation undertaken. More insidiously, the accumulation of obligations under GATS could quite possibly influence future domestic policy-making 'at source':- few governments are willing to incur the wrath of the WTO and this tends to promote and enshrine pro-liberalisation domestic policies. The other side of this coin is 'regulatory chill', where governments deliberately steer clear of certain types of regulation (which may in fact be GATS-legitimate) for fear of unleashing new obligations or WTO challenges. In conclusion, therefore, the further incorporation of HE under GATS could be highly significant for the future evolution of domestic HE policymaking in the UK, both in terms of storing up unpleasant surprises further down the line and steering the government's hand further in the direction of domestic liberalisation.

4.5 Who wants access to the UK market?

Before bringing Section 4 to a close, it is worth exploring briefly one of the issues we have so far only considered at a very general level. We have referred repeatedly to the idea that foreign HE providers may view GATS as an opportunity to extend their existing rights within the UK (see Section 3.4) and thus make significant inroads into the UK market (through virtual or physical presence in UK territory.) This assertion raises a number of questions, most immediately 'Who might these foreign HE providers be?' and, 'Which areas of the HE market are they interested in?' Answers to these questions must inevitably be incomplete. In particular, it is difficult to predict to what extent exposing UKHE (and other HE sectors) to deep, effectively permanent GATS liberalisation will *itself* change the parameters by which international trade in HE is conducted and thus set new trends in the field. For example, GATS liberalisation may enable foreign HE providers to enter areas of the HE market that they would at present consider economically unviable. This is an important point and we return to it shortly. However, with reference to foreign HE providers *currently* operating in the international market, some of the candidates most likely to be seeking enhanced market access within the GATS framework are as follows.

Firstly, a great many column inches have been dedicated to the 'pure' for-profit operators that have grown up in the US, such as the University of Phoenix (see Section 6.4), Sylvan Learning Systems, DeVry and Jones International.¹⁷⁸ Many of these operators are characterised by highly aggressive expansion strategies. Their educational emphasis is often based on flexible HE provision for working adults ('earner learners') in the area of employment-focused professional development. Some mixture of distance-learning and face-to-face provision is standard. As mentioned earlier in the paper (see Section 2.4.10), it seems very likely that the for-profit lobby (grouped within NCITE) has been the driving force behind the US's HE GATS strategy - concern at this influence has been articulated by many US not-for-profit operators.¹⁷⁹ It also seems plausible that foreign HE providers who have had the advantage of operating in the UK for some time (and thus have first-hand experience of the disadvantages faced by private and foreign HE providers) may view GATS as an opportunity to level the playing field.¹⁸⁰

Additionally, an increasing number of traditional universities now have for-profit and distance-learning arms which focus on areas such as management and business administration, and are specifically designed to tap into lucrative overseas markets. In many cases these arms are attached to traditional universities operating within major HE-exporting nations. Other international operators that may be seeking enhanced market access include corporate universities (where corporations integrate their strategic plans and business objectives with the development of curricula for their learning and training programs) and - significantly - the growing number of multi-partner ventures (where existing universities looking to market overseas bind together in a joint venture, often alongside a commercial partner, to share costs and minimise risk).

It is true that, at present, many of the HE providers operating on the global market offer a far narrower array of courses than the typical UKHE institution. This is largely because HE providers operating in foreign territories must at the very least be financially self-sufficient and this naturally leads to an emphasis on high-return, high-demand subject areas. (Business, information technology and management are often core subjects, sometimes alongside inexpensive courses such as psychology.) Subjects that require large capital outlay, such as laboratory-based physics courses, are hardly ever provided.

On present trends, therefore, UKHE institutions can at the very least expect steadily increasing competition in the competitive areas described above. Indeed, competition in privately-funded areas of HE activity (such as the provision of courses leading to an MBA) is already increasing rapidly. Though GATS could impact adversely on UKHE's ability to participate in such growth areas (as we discuss in Section 4.3, in the context of cross-subsidisation), it is not yet a determinant of such growth. However, as we suggested earlier, exposure of UKHE to deep

liberalisation under GATS could facilitate the entry of foreign HE providers into areas of the HE market traditionally thought to be the sole preserve of UKHE institutions. In particular, if funding is opened out on a non-discriminatory basis as a result of National Treatment disciplines (see Section 4.2.1), one of the major barriers to core UK market penetration - the relatively high subsidisation of UKHE institutions - would be neutralised.

It may at first seem puzzling that foreign HE providers would wish to draw on HEFCE funding and be bound by the same fee cap as UKHE institutions, when the base-rate funding level is now so low that many teaching-intensive UKHE institutions are effectively in deficit. At the present time one of the conditions of drawing on HEFCE teaching money is that domestic students are charged no more than £1,100 per student per year, and this prevents institutions from alleviating their financial difficulties by raising fees. (Note that claiming equal financial treatment to that already received by the University of Buckingham, perhaps on the basis of the EU's 1994 GATS commitments, would not have this problem. This is because, though Buckingham students are subsidised relatively heavily compared to students attending other private providers, this is not HEFCE money and Buckingham still has the freedom to set its own fees.)

However, foreign HE providers may nonetheless wish to engage in a funding relationship with HEFCE for relatively inexpensive courses, especially if they have income streams from elsewhere to support them (e.g. from more lucrative, privately funded courses.) One motivation for doing this could be to attain a foothold in the core UKHE market, with a view to expanding further at a later date. Indeed, it is crucial to remember that, though GATS commitments are effectively irreversible, domestic funding arrangements are prone to fluctuation, and - as discussed in Section 4.4 - GATS could interface unpredictably with such policy shifts. While entering into a funding contract with HEFCE may at present seem undesirable for foreign HE providers (apart, that is, from a strategic viewpoint), this situation could change rapidly if UKHE wins the teaching funding increase it has been pushing the UK government for and/or the UK government allows partial deregulation of the existing £1,100 tuition fee cap. Partial fee deregulation would give institutions greater freedom to vary fees for domestic students, without forfeiting public funding, thus increasing the likelihood of a GATS-facilitated influx of foreign HE providers, with all its associated problems.

4.6 Conclusion

Throughout this section we have shown that GATS could have significant adverse impacts on UKHE funding, both directly in terms of obligations arising from the agreement itself, and indirectly in terms of competing in a radically more competitive environment.

Subsidies

We have shown that GATS disciplines pertaining to subsidies could cause a variety of problems. GATS National Treatment rules could see funding split equally between UKHE institutions and foreign HE providers, or perhaps even withdrawn. This could lead to UKHE institutions receiving reduced levels of funding (because of intense competition for students) and thus result in greatly increased pressure on UKHE to either restructure itself along market lines (thus putting economically unviable activities at risk) or struggle along providing economically expensive courses at (in effect) reduced funding levels. Other types of funding could be at risk of being completely removed, and question marks over funding for academic research still remain. Longer term, any disciplines developed under the Article XV mandate might lead to further pressures on public funding because of its *de facto* export-enhancing properties, especially in countries such as the UK where HE exports are pursued aggressively. Both National Treatment and Article XV could create a dynamic in the direction of reduced funding levels, which could be extremely problematic given the fact that public funding serves social objectives as well as being a purported distortion of trade.

Cross-subsidisation

Cross-subsidisation in UKHE is by no means an ideal, being indicative (to a large extent) of chronic underfunding in the sector. However, in the absence of adequate funding it is an important, progressive mechanism for sustaining courses and activities that might otherwise be left to go to the wall. Under GATS, the diminishing viability of cross-subsidisation could seriously impact upon UKHE, as cost-effective and lucrative courses are 'creamed-off' by stripped-down, dedicated HE providers and UKHE is left with those expensive (but often socially, academically or economically necessary) courses that new providers are not interested in. The general point being that UKHE institutions need to retain a certain economic 'mass' in order to secure efficiencies and allow expensive courses to remain viable. GATS could promote the disaggregation of UKHE (and HE provision more generally) and thus put such progressive goals at risk. In addition, GATS could be brought to bear in a legal context against UKHE activities that stray (even unintentionally, or reasonably) beyond their core educational mandate, causing UKHE to withdraw from lucrative peripheral activities and - perhaps more long-term - causing the disaggregation of UKHE infrastructure itself. Problems relating to cross-subsidisation can therefore be summed up by the term 'unbundling', which captures the essence of breaking up of UKHE activity into disparate pieces, and is often (but not always) associated with diminishing economic viability. We have observed, therefore, that GATS could catalyse unbundling at three levels. First, and most immediately likely, the loss of external revenues from lucrative (i.e. revenue generating) courses and activities. Secondly, the further unbundling of core course provision i.e. the situation where courses are separated from one another, causing more expensive courses to suffer. Finally - and most long-term - the acceleration of unbundling of HE infrastructure itself e.g. a retraction of direct UKHE responsibility in areas such as administration, libraries, student support services and so on. This 'unbundling' process dovetails with possible trends towards 'atomisation' which we discuss in Section 5.2.

Future constraints

Finally, we have noted that GATS commitments, as with any FTA, can interface unpredictably with future shifts in domestic policy-making, and funding seems particularly vulnerable. This raises the possibility of 'triggered' side effects, the entrenchment of pro-liberalisation domestic policies and the phenomenon of 'regulatory chill' where governments are overly zealous in their attempts to avoid FTA violations. These constraints would seem to inevitably close down or distort areas of policy-making which may be necessary for the wellbeing of the HE sector; we discuss regulatory constraint more broadly in Section 5.3.

5 How GATS could affect UKHE institutions and regulation

5.1 Summary

In the previous section we discussed how GATS could threaten UKHE funding mechanisms. In this section, we continue with our consideration of potential impacts on UKHE and consider how GATS might otherwise affect UKHE, primarily focussing on the areas of Quality and Regulation. In light of this evidence, we compare the relative advantages and disadvantages that would come with a UKHE endorsement of GATS (both in terms of acquiescing to deeper HE liberalisation and in terms of supporting its capacity to open new export markets), before coming to an overall conclusion in Section 5.5.

In **Section 5.2 (Quality)** we set out with a view to assessing the possible impact of GATS on Quality Assurance (QA) and related mechanisms relevant to UKHE. We find that:

- QA is generally considered a vital component of the HE internationalisation and globalisation processes, to ensure that educational experiences (and subsequent qualifications) that claim to be alike are true to this claim.
- Article VI.4 of the GATS Domestic Regulation article could bring QA/accreditation regimes under the purview of GATS, by requiring that qualification requirements be *'not more burdensome than necessary'*, which translates as *'least trade-restrictive.'*
- Notions of *'necessity'* and trade-restrictiveness in FTAs have in the past led to controversial rulings where reasonable regulations have been attacked on the grounds that, in a trade sense, they are either perceived as unnecessary or overly trade restrictive.
- GATS could interface unpredictably with the QAA. GATS-facilitated shifts towards provider neutrality (in funding) could, for example, push the UK government in the direction of formally extending foreign HE providers opportunities to enter the QAA (Quality Assurance Agency) process.
- The possible requirement under GATS that similar services offered through different modes of supply be afforded equal treatment could - when combined with the *'least trade restrictive'* requirement - lead to the *'atomization'* of quality criteria. This *'atomization'* process could undermine attempts to promote broad, holistic notions of quality by measuring quality in tiny, disconnected chunks. This could erode the all-important links between areas of knowledge and push HE towards becoming a narrow, passive, knowledge-consuming process.
- GATS could seriously undermine the legitimacy of mechanisms such as those leading to the award of *'recognised institution'* status.
- We note with concern that some commentators are discussing the possibility of grafting non-trade QA frameworks such as the Lisbon Convention onto GATS to assuage fears about quality. We argue that such an approach fails to take into account a number of important considerations, most notably the fact that GATS and trade concerns will

potentially undermine and (if disputes arise) override UN-brokered agreements such as Lisbon.

- We outline concerns that GATS could potentially erode progressive aspects of the Bologna Process, which aims to create a European Higher Education Area (EHEA).
- Finally, we argue that the further incorporation of HE within the GATS framework is hazardous because, with transnational HE still young, it is important that governments retain flexibility in areas such as quality assurance. GATS imposes a rigid, one-dimensional worldview of regulation, which may well be insufficient to cope with the regulatory challenges that are likely to arise in the coming years.

In **Section 5.3 (Regulation)** we consider some of the regulatory restraints that GATS could impose upon the sector, in addition to those discussed in earlier sections. We remark that:

- The *'effective irreversibility'* of GATS locks in a set of potentially onerous restraints.
- Lock-in could be highly problematic because - citing the example of how environmental awareness is now mainstream, but was barely thought of 30 years ago - the policy changes needed in the future may not be predictable today.
- GATS proscribes a number of policy options which may in the future be necessary to regulate the sector in the public interest. Though such policy options may be unfashionable at present, UKHE has yet to experience a fully liberalised HE market in UK territory, meaning it is difficult to predict exactly what regulations will be required if the sector is exposed to deeper liberalisation.
- The forfeiting of potentially important policy options could lead to a situation where foreign HE providers can draw on public funding and other benefits but escape some of the social obligations that usually accompany public funding (such as those listed in Box 4.1 of Section 4.2.1.)
- Direct market interventions are sometimes necessary to address chronically malfunctioning markets and/or market mechanisms, yet GATS could make such interventions very difficult.
- There is a disturbing tendency for FTAs to be used in aggressive and surprising ways. We observe that GATS has already been used in an unpredictable fashion against the EU, as part of the WTO 'Bananas' case.
- Finally, we remark that GATS could both directly (through legal constraints) but to a larger extent indirectly (by catalysing the market-oriented restructuring of the sector) undermine the important social and economic links that UKHE institutions have established with surrounding local communities.

In **Section 5.4 (But what about the benefits?)** we assess whether the benefits GATS could bring justify the risk that UKHE will be taking by endorsing GATS.

- There may be opportunities within GATS for UKHE institutions to seek the removal of barriers to their exports. However, different stakeholders in the GATS process have different views on what constitute 'barriers to trade'.

- We examine the different outlooks of trade departments, existing HE institutions in Europe, Canada and the USA, free trade theoreticians and strong advocates of HE liberalisation.
- We find that the education-oriented notion of trade barriers is relatively mild compared to the more radical, ideological free-trade understanding of trade barriers held by various other stakeholders in the GATS process. In particular, those involved in education are unlikely to argue that public HE funding and regulatory activity need to be disciplined under GATS, whereas free trade proponents are more inclined to do so.
- Hence, universities and colleges from Europe, Canada and the USA have called on their Member governments not to make commitments under GATS.
- We quote from a proponent of GATS keen to see its full deployment in HE and show that, beyond the measured assurances of free trade theoreticians, GATS is likely to be deployed strategically by those who have an interest in using it as an adversarial weapon.
- We note that a leading GATS proponent has argued that many of the trade barriers listed by the US would be best tackled *outside* the GATS framework. Hence, it would appear that the main area in which GATS *could* be useful is in securing rights for HE providers operating in other countries' territories (i.e. commercial presence.)
- This leads us to conclude that even considering the benefits, GATS is unnecessarily risky. As the declaration of European/Canadian/USA universities shows, HE institutions at present do not face major problems with their exports. Moreover, the places where GATS is cited as being potentially useful - commercial presence and Domestic Regulation - are precisely the areas in which GATS could cause UKHE and other publicly-funded HE sectors real harm. **Hence, the benefits of internationalisation appear to lie outside the GATS framework, while most of the dangers seem to lie within.**
- The argument that GATS is a convenient multilateral framework within which to pursue the internationalisation of HE does not stand up to scrutiny. There is no reason why HE sectors cannot build on non-trade arrangements, continuing their tradition of dialogue and co-operation.
- Acquiescing to the further liberalisation of UKHE as a way of encouraging other WTO Members to 'open up' is a dangerous strategy.
- The idea that UKHE can hitch a 'free ride' on GATS by exploiting new market openings but remaining protected in the home market does not appear tenable in the long term and is somewhat unlikely in the short term.

5.2 Quality

5.2.1 Background

The issue of *quality* is at the very heart of the dialogue surrounding transnational HE. Generally speaking there are two interrelated strands to this issue. Firstly, there is the question of how quality should be managed on a technical level e.g. how existing quality assurance mechanisms, recognition/validation regimes, international recognition agreements and so on should adapt to the internationalisation (and, in particular, the globalisation) of HE provision. (We have explained some of the terminology used in the last sentence in Table 3 below.) Secondly, there is the question of how quality in the wider sense will be affected e.g. whether the broader, more holistic qualities of HE will be marginalised in favour of a more stripped-down, minimalist approach to HE provision. In this section we largely focus on how GATS relates to the former, although we necessarily touch on the second category. We give further attention to the second category in Section 6.

Before proceeding, we acknowledge that Quality Assurance is a sensitive domestic issue for UKHE. However, at the international level QA takes on a slightly different emphasis, because assumptions that may hold true at the national level simply cannot be extrapolated to the global level with any confidence. For example, HE systems which tend to self-regulate on the basis of shared character, ideals and tradition may struggle to cope when faced with accommodating HE providers from different countries, because newcomers may bring different perceptions of quality and have non-traditional educational goals (as in the case of corporate training universities and for-profit providers, for example.) Indeed, there is general consensus that, if international trade in HE is an inevitability, *some* kind of QA is required to facilitate the comparability of educational experiences and qualifications, if only to prevent the emergence of 'degree-mills'.¹⁸¹

Indeed, the primary concern of those involved in education is that QA keeps pace with developments in transnational HE to ensure that educational experiences (and subsequent qualifications) purporting to be similar do not in fact vary widely in quality. Such variations are highly problematic because they exert downward pressure on quality in a competitive market. The trade perspective largely shares this motivation to the extent that free trade in HE remains difficult whilst international comparability of qualifications is still in its infancy. However, as we discuss in due course, there is no guarantee that educational and trade concerns will remain convergent.

We appreciate that the terminology surrounding QA is complex so we provide a brief summary of the meanings we attach to some of the more frequently-used terms in this chapter:

Term	Understood meaning in this section
QA (Quality Assurance)	The process of actually 'assessing' the quality of HE provision, sometimes on a first-hand basis, with a view to grading the quality of an HE provider or checking that it fulfills certain criteria. Can vary from actual assessment to audits where HE providers' own internal QA mechanisms are checked.
Recognition/ Validation	In the UK, recognised institutions are those that can grant their own degrees. Validation is the process whereby a recognised institution 'validates' a non-recognised institution and thus authorizes it to award a UK-recognised degree. (See Section 3.4.1)
International recognition agreements	International recognition agreements are where an organisation from one country with responsibility for awarding a particular qualification recognises similar qualifications from other countries as broadly comparable to their own. (We use the prefix 'International' to avoid a confusion with the UK-specific notion of a 'recognised institution'.) Mutual international recognition agreements - MIRAs - are where there is mutual acceptance of broad comparability. Hence, recognition agreements tend to operate at a high level and are used to engender comparability between existing qualifications.

Table 3 - explanation of terminology used in this section

5.2.2 GATS and Domestic Regulation

One of the most controversial articles in the GATS text is Domestic Regulation (Article VI), and in particular Article VI.4. This clause mandates the WTO to develop any necessary disciplines so that measures relating to *'qualification requirements and procedures, technical standards and licensing [are] not more burdensome than necessary to ensure the quality of the service.'*¹⁸²

Negotiations to this effect are ongoing but (as discussed in Section 2.4.9) the outcome of these negotiations is not predetermined. The US, for example, is opposed to the development of any new disciplines in this area. However, the EU is very much in favour of new disciplines and is pushing hard on the issue.¹⁸³

The controversy centres on the possibility that new disciplines emerging from the Article VI.4 mandate may legally bind WTO Members to the requirement that their domestic regulation is *'not more burdensome than necessary'*. In domestic regulation disputes between Member states that could not be resolved through mediation, the WTO (or bodies implementing criteria established by the WTO) - *not* the nation state - would become the arbiter of whether the offending measure is necessary.

Such a development would be problematic for a number of reasons. Firstly, it would represent a significant loss of regulatory autonomy because by their very nature many of the measures targeted by Article VI.4 have no international or trade-related component. Secondly, the WTO's narrow focus on liberalisation is such that it has a particular trade-focussed interpretation of *'not more burdensome than necessary'*. In a letter to *The Observer* newspaper in April 2001, the former director of the WTO Secretariat Services division wrote, *'This is the principle that measures affecting trade should not be more restrictive than is necessary to achieve the objective they seek. That is, if two or more measures exist which can achieve the same objective, the one with the least restrictive impact on trade should be chosen.'*¹⁸⁴ Thus, *'least trade-restrictive'* is a reasonable short-hand for the *'not more burdensome than necessary'* requirement.

There is a potentially significant ongoing debate as to whether disciplines envisaged by Article VI.4 are supposed to apply only in committed sectors, or (in the style of GATS general obligations) to *all* sectors and modes of supply, irrespective of whether the sector has been committed or not.¹⁸⁵

At the very least, however, it can be expected that any disciplines developed under the Article VI.4 mandate will apply in committed sectors. Hence, it is clear that, in committed HE sectors, a whole galaxy regulation - covering everything from QA and procedures for securing recognised status, through to funding and student support - could potentially fall under its purview.

In the following subsections we study some possible impacts of this (in possible combination with other GATS disciplines) on quality, but it is worth highlighting why there is considerable nervousness surrounding concepts such as *'necessity'* and *'least trade restrictive'*. Work on the Article VI.4 mandate occurs in the GATS Working Party on Domestic Regulation (WPDR), and as part of its mandate it is actively considering the development of a *'necessity*

WTO: 1998:EC measures to ban the import of US beef on a precautionary basis (because of fears that hormones used in US beef posed a risk to human health) were challenged by both the U.S. and Canada. The WTO ruled that the EC measure was unjustifiable as it was not 'based on' a risk assessment.

NAFTA: Certain NAFTA rulings have identified that obligations to pursue the 'least trade restrictive' policies come before health, safety and environmental considerations. A NAFTA panel found that a temporary ban of PCB exports from Canada due to health and environmental concerns, though the goals were reasonable, was NAFTA-illegal in part because the ban was not the least trade restrictive manner possible of achieving their goals.

GATT: In 1990 the US challenge to Thailand's ban on tobacco imports (in Thailand's words, an act 'necessary to protect the health of Thai citizens') was ruled against by a GATT panel on the grounds that it was not 'necessary'. Prompted by this Thailand subsequently allowed US tobacco into the country.

Box 5.1: necessity and trade-restrictiveness in the dock

of

test' with which to determine necessity in the event of a dispute. Critics of such devices point to controversial cases under NAFTA, GATT and WTO jurisdiction where legitimate public-interest regulations have been successfully challenged because, in a trade-legalistic context, they were not least trade-restrictive and/or deemed not necessary (see Box 5.1.) In fact, in ten out of the eleven GATT/WTO cases up to 1999 where necessity was tested (in the context of protecting human and animal health or the environment) the defending measure was ruled against.¹⁸⁶

GATS proponents argue that any new disciplines developed under the Article VI.4 mandate would not discipline *objectives*, only *means*. However, governments are rarely challenged on the basis that their regulatory objectives are illegitimate. The usual argument made by commercial interests is that there were less burdensome ways they could have met their objective. An obligation to always regulate in the way that is '*least trade-restrictive*' puts no limits on how much the state should bear financial or risk burden, introduces a tension towards ineffectiveness in regulation and more importantly does not recognise that trade distortions are sometimes the *objective* of legitimate public-interest policy-making, as some of the examples in Section 5.3 show.

5.2.3 GATS and the QAA (Quality Assurance Agency)

The QAA (Quality Assurance Agency)¹⁸⁷ is the government agency charged with assessing teaching¹⁸⁸ quality in UKHE institutions. UKHE institutions must, as one of the conditions attached to HEFCE funding, submit themselves to periodic assessment by the QAA. Hence, the QAA is mainly a device for monitoring teaching at publicly-funded institutions and as a result is not immediately concerned with the quality of foreign HE providers operating in UK territory. Indeed, as discussed in Section 3.4, foreign HE providers can already obtain the right to award UK-recognised degrees by securing 'validation' from a recognised institution, and as a result they can award UK degrees without ever coming into contact with the QAA.

Analysis in this area can get exceptionally complicated, because it inevitably interfaces with an expansive debate on the fundamental purpose of QA regimes. However, if approached from the trade perspective it is possible to identify a number of potential scenarios in which the QAA (and, on a more general level, perceptions of quality) could become embroiled with GATS to unpredictable effect. Against this backdrop, we are aware that many in the UK academic community are deeply sceptical about the value and purpose of the QAA. In particular, many argue that the QAA fails to promote a notion of teaching quality that should be defended, and that it interferes heavily with self-regulating quality assurance mechanisms such as the external examiner system. Our intention is not to advocate a particular position within this domestic QAA debate.¹⁸⁹ Rather, our observations are built on the reality of the QAA's existence and hence its capacity to become entangled with the GATS trade regime, potentially shaping the future evolution of QA in the UK.

The main question appears to be as follows. Under what circumstances might foreign HE providers become involved with the QAA? As we have established, there are already mechanisms available through which foreign HE providers can qualify to award UK degrees, addressing (to a large extent) one of the most frequently-encountered 'barriers to trade' in HE exports. Hence, the idea that a foreign HE provider might push for an audit by the QAA (citing the GATS non-discrimination requirement) purely to demonstrate that its degree courses are UK-comparable seems redundant (though if a foreign HE provider is more ambitious and wishes to become a *recognised* provider, it is possible - as we discuss a little further on - that it might then demand inspection by the QAA.) However, in terms of cultivating public confidence in the quality of the educational product, having the right to award a UK degree is potentially only half the battle. Even with full public funding, becoming a major competitor in the UK market is difficult without some endorsement of teaching quality by which the institution can promote itself in relation to its competitors. This need for teaching quality endorsement is presumably why Buckingham is voluntarily submitting itself to QAA inspection, as mentioned in Section 3.4.3.¹⁹⁰ It

remains a possibility, therefore, that foreign HE providers might use GATS as a means of exerting pressure on the government to also allow them access to the QAA for the same reason. Arguably such a right may already exist under the EU's 1994 GATS commitments (because of Buckingham's entry) but the argument that foreign HE providers should be given access to the QAA would almost certainly be strengthened should UKHE be liberalised under GATS. In particular, refusal by the government to allow foreign HE providers access would then run the risk of being considered a *de facto* violation of National Treatment, because it distorts terms of competition against foreign HE providers.

It is not entirely clear what the consequences would be if foreign HE providers managed to secure entry to the QAA in the coercive manner described above, or indeed how likely the prospect of such a push occurring actually is. However, it is also possible that foreign HE providers might gain access to the QAA from the 'other side'. That is, as well as the possibility that foreign HE providers might *want* to enter the QAA for the reason described above, foreign HE providers may potentially be *required* to enter the QAA if they are successful in winning access to public funds. This is an issue we now explore in more detail.

QAA and funding

Firstly, it is important to emphasise that, for various reasons, access to the QAA is not likely to be a gateway through which foreign HE providers can strengthen any claims they may have on public funds.¹⁹¹ In fact, it seems likely that such a suggestion has cause and effect the wrong way round. Rather, it is necessary to examine the possible implications of foreign HE providers entering the QAA *as a consequence* of winning (at least in principle) access to public funds.

Suppose, as a result of National Treatment obligations arising from deeper HE liberalisation, foreign HE providers are brought under the HEFCE funding umbrella in the manner described in Section 4.2.1.1 (i.e. a switch to 'provider neutrality'.) Furthermore, suppose the government insists - as would not be unreasonable - that foreign HE providers enter and obtain a clean bill of health from the QAA before claiming any HEFCE money. (This would be in keeping with the existing requirement that publicly-funded institutions are accountable to the QAA.) Thus, the QAA would thereafter have the task of assessing teaching not just for UKHE institutions but also for foreign HE providers. This could influence the *criteria* by which the QAA measures quality, as we now show.

At present, foreign HE providers - which are likely to utilise a variety of non-traditional HE delivery mechanisms and philosophies - might struggle within the QAA framework. Despite attempts by the QAA to establish a supplementary, medium-independent QA framework¹⁹² foreign HE providers may nonetheless claim that the QAA discriminates on the basis of mode-of-supply (e.g. possible bias in favour of face-to-face education) and, more fundamentally, by making implicit assumptions about the structure, organisation and content of HE programmes. In light of the recent shift away from direct assessment of course provision ('subject review') towards the so-called 'light touch'/institutional audit QAA regime (where institutions' own internal quality assurance regimes and self-evaluations are audited), this might seem unlikely. However, there remains pressure for institutions to self-evaluate with reference to external quality gauges such as 'subject benchmark statements', so notions of quality are not entirely self-referential. More practically, it seems unlikely that the government would be willing to disseminate public funds to relatively unknown foreign HE providers purely on the basis of an institutional audit, and as a consequence would probably therefore require an initial, more exacting subject-review assessment of such HE providers.

In light of this, the prospect of having to make the QAA '*least trade-restrictive*' (and by implication friendlier to foreign HE providers) could therefore be highly significant, especially if a little-known feature of National Treatment is confirmed by future WTO rulings.

As discussed in Box 4.4 (in Section 4.2.1), the National Treatment article may have the property of 'modal neutrality', which would forbid discrimination on the basis of mode-of-supply. To recap briefly, certain WTO rulings suggest that, despite the physical format of GATS schedules (i.e. the 2x4 grid), it may be GATS-illegal to offer varying levels of National Treatment to foreign HE services purely on the basis of how the course is delivered e.g. on the basis of whether it is supplied through an e-university or through a branch campus with a physical presence in the UK. The WTO Secretariat and WTO negotiators accept that this issue remains unclear.¹⁹³

This could be significant; if the QAA (deployed to assess foreign HE providers applying for public funds) was to be restructured so as to be made completely neutral towards delivery mechanisms then this might contribute to the '*atomization*' of quality criteria. That is, the myriad different forms of HE provision (full-time, part-time, distance, electronic, mixed distance/campus etc.) encapsulate such a variety of delivery mechanisms and education philosophies that direct comparisons are only possible if the learning experience is disaggregated into small, easily quantifiable chunks. This would clearly be of relevance to the debate surrounding the separation of HE from traditional assumptions of full-time, campus-based delivery. However, when combined with the need to measure quality in a '*least trade-restrictive*' manner then atomization refers not so much to the separation of HE from its traditional physical infrastructure but to a more fundamental restructuring process wherein knowledge dissemination itself is fragmented into tiny, separately consumable pieces, irrespective of the medium through which it is delivered.

Such fragmentation might be coupled with a notional shift away from improvement and towards adequacy, reflecting the requirement that quality measurements be the least trade-restrictive to satisfy some given *objective*. While some commentators would laud such an outcome there is a danger that the evolution of the QAA into a mechanism designed to pass or fail the atomized provision of education might mask experienced variations in quality and undermine aspirations towards more holistic notions of education, by eroding links between knowledge areas. It might also encourage a gradual re-definition of HE as a much narrower, more passive process within which advanced, pre-packaged chunks of knowledge are consumed.

One analogy could be the perceived difference between the US and EU accountancy systems in the period before the Enron/Andersen collapse. It is a view held in parts of the accounting industry that the heavily prescriptive US accountancy guidelines were in fact *weaker* than the less detailed, more 'principle'-based EU guidelines¹⁹⁴, because the atomized nature of the US requirements made it (comparatively) easy to satisfy the requirements at a legal level whilst missing the overall point and spirit of the guidelines.¹⁹⁵

Pushing for 'recognised' status?

Another area in which quality could become important is in the process through which an HE provider attains 'recognised institution' status. This highly coveted mantle - which bestows upon the recipient the right to grant their *own* degrees - is currently restricted to about 108 institutions in the UK. (Most are UKHE institutions.) If deeper GATS commitments lead to a further 'levelling of the playing field', some foreign HE providers operating in UK territory might express a desire to secure recognised status. If National Treatment commitments had been made then presumably any explicitly discriminatory legislative barriers blocking the foreign HE provider's way would have been removed. However, the foreign HE provider might nonetheless find it difficult or even impossible to satisfy the relevant domestic regulations. This could lead to the critical gaze of trade diplomats being cast over 'recognised institution' status. In particular, questions may be asked as to the regulatory *objective* underpinning the award of recognised institution status, and what exactly it is about this objective that legitimises such a trade-restrictive process.

Moreover, could this objective not be achieved in a less trade-restrictive way? Given that a significant factor in the award of recognised institution status is no doubt quality - the QAA advises on such matters¹⁹⁶ - a scenario may arise where (as a result of the 'atomization' mentioned earlier) stripped-down, minimalist HE providers somehow manage to become

recognised. This could cause problems if the HE providers in question then start using their recognised status to validate other HE providers, thus propagating their particular model of HE further within the sector.

Such scenarios are just some possible interpretations of a *'least trade-restrictive'* QA regime. Other considerations include the fact that, as the UK has already forfeited the right to limit the number of foreign HE providers operating in the UK, any moves to open the QAA to all foreign HE providers who want it could lead to an increased administrative burden on the QAA and thus in itself precipitate restructuring. Also, there are issues to be explored surrounding the potentially complex relationship that exists between GATS, the QAA, labour mobility and the standards demanded by professional bodies.¹⁹⁷

As we see in the following section, national QA regimes will increasingly be viewed in the context of transnational QA and international recognition agreements, and this increased relevance to trade in HE will inevitably increase the scrutiny afforded to national QA by trade lawyers and WTO negotiators.

5.2.4 GATS, transnational QA and other international mechanisms

There is currently much discussion in the HE QA community as to how QA and related mechanisms such as international recognition agreements should best be tackled in a globalised HE market. Transnational QA is complex because there is no 'obvious' place for QA beyond the confines of the nation state and as such a number of different possible models have already been identified.¹⁹⁸ One model gaining popularity is that exporting nations should be responsible for

ensuring the quality of exporting institutions, and preferably make their quality assessment criteria available to importing countries.¹⁹⁹ This is the approach encouraged by the *Lisbon Convention* on the recognition of qualifications, a joint UNESCO/Council of Europe initiative to which 40 nations (including the major HE exporters) had signed by June 2002.²⁰⁰ Lisbon, coupled with the complimentary *Code of Good Practice in the Provision of Transnational Education*²⁰¹, enshrines

'It remains to be seen whether the Lisbon Convention will be able to cope with recognition issues in the context of trade in higher education services, if the issue of recognition of quality assurance and accreditation is not addressed directly.'
Professor Dirk Van Damme, speaking at OECD/US forum on trade in educational services, 2002

certain principles of good practice and - existing as it does outside a trade regime - is considered benign. There are suggestions that fears surrounding GATS and quality could be assuaged by integrating non-trade QA and recognition mechanisms (such as Lisbon) within the overall GATS trading framework. This would support the perspective that GATS is an obvious environment in which to monitor and cultivate the internationalisation of HE, as much as anything because *'...bilateral agreements under the GATS umbrella certainly have the advantage of increasing transparency and reducing transaction costs as well as providing a degree of certainty which attracts investment.'*²⁰²

However, as we demonstrate throughout this paper, this perspective consistently fails to recognise that the interests of trade and education may prove divergent, in which case trade will almost always take priority. With regard to quality, it may well be tempting to try and graft a framework such as Lisbon onto GATS but there are still considerable areas of concern. For example, a commentary on possible relationships between Lisbon and GATS²⁰³ suggested that an importing nation should *'put its foot down'* if it is dissatisfied with the QA of an exporting nation. This language reflects the presumption in the HE community that relationships between HE sectors in different countries will continue to be non-binding (in the legal sense) and that differences can be ironed out through dialogue and cooperation. However, there is no guarantee that this will be possible within a GATS regime. If the UK makes deep GATS commitments in HE and then has cause to *'put its foot down'* in this manner it may well find itself hauled before a WTO dispute panel by the affected nation, where the outcome will be determined by strict trade-

legalistic criteria. The likelihood of such a scenario is bound to increase as HE becomes an increasingly important export sector for a number of countries.

In addition, there can be little certainty as to how GATS and frameworks such as Lisbon will feed off each other. For example, as comparability spreads (through the expansion of mutual international recognition agreements perhaps) QA regimes will increasingly be considered *'like'*, opening up the possibility that GATS will exert pressure on QA regimes to be harmonized in line with the least trade-restrictive regime to which it is similar. By similar logic reasonable and precautionary unilateral actions such as installing a 'double-check' QA regime (e.g. assessing the quality of incoming HE providers to reinforce assurances of quality given by mutual international recognition agreements or exporting QA regimes) could be challenged on the grounds that they are overly trade-restrictive and/or unnecessary. Yet such precautions may be necessary. For example, our own QAA has already acknowledged budget-related difficulties in maintaining audits of UKHE activities in foreign countries.²⁰⁴ If global HE exports soar in the coming years as predicted, the ability of countries to rigorously assure the quality of their HE exports may not keep up with the growth in these exports, in which case importing countries should be fully entitled to introduce their own import QA as a precautionary measure.

Clearly there is little certainty in this area. It is to the credit of the HE community that it attaches such importance to maintaining quality in HE. However, it is crucial to realise that by definition GATS cannot be brought under the control of education experts - at best the education community can set out co-operative guidelines to minimalise the risks associated with trading under the GATS framework. However, this does not solve the problem that in the event of a dispute, WTO arbitration will be binding and based on solely trade-legalistic criteria. Organisations such as UNESCO have little effective power, contrasting sharply with the enormous power of enforcement enshrined in the WTO. Though it is perhaps difficult to envisage HE-related WTO challenges at the present time, it must be remembered that trade disputes become progressively more likely as economies of scale develop and HE exports constitute an increasing proportion of a country's GDP.

5.2.5 GATS and Bologna

The Bologna Declaration of 1999, signed by 31 European ministers of education, is a commitment to the creation of a European Higher Education Area (EHEA) in order to promote a European dimension in HE, enhance the employability and mobility of citizens and to increase the international competitiveness of European higher education.²⁰⁵

There is concern from a number of quarters that the 'European dimension' and 'international competitiveness' are mutually incompatible and/or unjustifiable. (For example, zealous free traders argue that the 'European dimension' equates to protectionism, whilst certain other parties believe that attempting to fight fire with fire through the pursuit of 'international competitiveness' will only undermine social goals and deliver European HE into the hands of FTAs such as GATS.²⁰⁶)

'Might the process of globalisation, which will be accelerated through the GATS, weaken the European space for higher education and research before it had a chance to function fully and contribute to the construction of Europe?'
'The Bologna Process and the GATS Negotiations' - European University Association (EUA), June 2002

Either way, the fact that education ministers take a lead on the Bologna process (rather than trade ministers) means Bologna does at least have an educational and social dimension absent from trade regimes such as GATS. Indeed, the May 2001 Prague communiqué²⁰⁷ from European education ministers reaffirmed the commitment of European HE towards maintaining HE as a public good. There is concern that GATS could undermine Bologna's aim to create a European Higher Education Area and thus threaten the stated progressive goals of the Prague communiqué. Such fears are exacerbated by the fact that, as discussed in Section 2.4.3, the trade arm of the European Commission is staunchly pro-GATS and has shown itself willing to

involve HE in GATS negotiations without first consulting European HE institutions or their representatives.

5.2.6 Conclusions: GATS and Quality

As we have shown there is considerable uncertainty as to how quality will be affected by GATS. However, there should be real cause for concern because, as identified in Section 5.2.2, GATS is not silent on matters such as QA, but rather enshrines the view that - at least in principle - such regulations should be '*least trade-restrictive*.' This, and the related concept of 'necessity', has already caused controversial decisions to be made in other FTAs where seemingly reasonable regulatory interventions have fallen foul of this strict trade-legalistic requirement. Hence, it is questionable whether educational concerns can be effectively accommodated inside a trade regime which may bind countries to '*least trade-restrictive*' regulation. In terms of how such requirements might affect the UK, we have noted that (in tandem with National Treatment) this could interface unpredictably with the QAA and other mechanisms such as those designed to assess fitness for recognised status. We have noted that one possible interpretation of a least trade-restrictive QA regime could lead to the '*atomization*' of quality criteria, where the measurement of quality at the atomic level erodes attempts to promote meaningful, holistic notions of quality, masks experienced variations in quality and encourages the gradual re-definition of HE as a much narrower, more passive 'knowledge consuming' exercise.

At the international level, there is considerable uncertainty about the possible impact GATS could have on transnational QA and related mechanisms. We note with some consternation that various HE stakeholders are discussing the possibility of assuaging potential quality problems in the GATS framework by grafting non-trade frameworks such as the Lisbon Convention onto it. Though it is a positive sign that HE stakeholders are giving serious thought to quality within the GATS regime, we believe that people in the educational field promoting such an approach are seriously underestimating the extent to which GATS obligations (such as '*least trade restrictive*' regulation) could override any commitments made under mechanisms such as Lisbon. The 'good will' component required to make mechanisms such as Lisbon operational may well be incompatible with the potentially adversarial nature of WTO dispute settlement. These tensions could become much more evident as trade in HE, and the commercial interests involved, increase—making WTO arbitration more likely when such conflicts arise. Under current arrangements, UNESCO-brokered agreements will continue to be of secondary importance to GATS. Also, there is a danger that mixing GATS with processes designed to foster comparability of national HE systems will harmonise quality downwards, removing reasonable yet demonstrably not '*least trade restrictive*' regulatory options from governments.

Finally, we note that there is considerably nervousness throughout Europe as to how GATS and the Bologna Process might tie together, potentially undermining progressive aspects of the under-construction European Higher Education Area (EHEA.)

In conclusion, at such an early stage in the evolution of transnational HE, bringing HE systems within the GATS framework is fraught with risks. At the domestic level GATS could cause the effective weakening of quality controls. Internationally, there is as yet little understanding of which regulatory mechanisms will be needed to preserve quality in the coming years and decades, and the government should retain flexibility in policy-making. To submit to the effectively irreversible, largely one-dimensional regulatory worldview of GATS is risky at any time, but to do so at a point where flexibility may be most required is highly inadvisable.

5.3 Regulation

In addition to concerns over funding and quality, GATS proscribes a number of government measures that, we argue, may in the future be necessary to regulate the sector in the public interest, and as a related consequence foreign HE providers may be able to solicit many of the benefits of 'non-discrimination' (such as access to public funding) but without the social obligations which are part of the contract between the government and UKHE. Furthermore, on occasion direct intervention in service markets - an eventuality that that GATS could make very difficult - is necessary to ensure that services continue to function correctly and fulfil public needs. We observe a worrying tendency towards the use of FTAs such as GATS in aggressive and unpredictable ways, and that GATS has already caught the EU unawares in a WTO dispute. Finally, we argue that exposing UKHE to deep liberalisation under GATS could adversely impact on the important economic and social links that exist between UKHE institutions and their surrounding local areas.

As discussed earlier GATS commitments are *effectively irreversible* once made, and this could significantly impinge upon regulatory activity in the sector. GATS proponents argue that the '*right to regulate*' is not challenged by GATS but this is based on the premise that most (if not all) domestic policy goals can and should be achieved with the minimum distortion to trade. Hence, GATS proponents do not believe that the strictures of National Treatment and Market Access - which a government is bound by in committed sectors unless it explicitly exempts itself - and possible further disciplines developed under the Article VI.4 (i.e. domestic regulation) mandate, constitute an unwarranted erosion of regulatory autonomy. (See Box 5.2 for a recap.)

Many civil society organisations argue that the restrictions detailed in Box 5.2 will be particularly damaging to developing countries, because they pitch service economies in direct competition with foreign service providers that often have the advantage of economies of scale, make it difficult for developing countries to control powerful multinational service providers in their territory, and block measures designed to ensure that inward investment brings benefits to local communities.

The situation is clearly less drastic in a developed economy such as the UK. However, UKHE should consider that, though the proscribed policy options we describe shortly may at present appear unnecessary, or unfashionable, it is hard to foresee what regulatory interventions will be necessary in the future. This is an important point because the UK has yet to experience stiff HE competition from foreign providers in its own territory. Hence, accepting these strictures will mean foregoing what could be important policy options before the UK has had a chance to directly experience how a genuine free market in HE operates. By analogy, consider that thirty years ago few people would have foreseen the need to place hard limits on resource depletion in the name of ecological sustainability. Yet today this is accepted as normal; had the governments of yesteryear bound the right to limitlessly deplete natural resources in international trade law many of today's environmental efforts would simply not be possible. More recently, re-regulating the international accounting sector - long unfashionable - is now after the Enron/Andersen and Worldcom controversies widely seen as necessary.

National Treatment: no measures that formally or in effect discriminate against foreign suppliers. This means that formally identical treatment afforded to domestic and foreign suppliers can still be a National Treatment violation if, in effect, it discriminates against foreign suppliers.

Market Access: no limits on the number of service suppliers (i.e. no quotas, monopolies, economic needs tests), no limit on the amount of trade, no limits on number of foreign employees employed by suppliers, no ceiling on participation of foreign capital, no stipulation that market access is conditional on the constitution of a particular legal entity (e.g. forming joint ventures etc.) For the full list, see Box... Market Access is considered 'absolute' in that market closures of the above kind are GATS-illegal even if they apply equally to both domestic and foreign suppliers.

Domestic Regulation (Article VI.4): measures relating to qualification requirements and procedures, technical standards and licensing requirements may have to be 'not more burdensome than necessary to ensure the quality of the service' (i.e. least trade-restrictive)

Box 5.2: Recap on obligations under major GATS articles

5.3.1 Proscribed policy options

Here we list a number of policy options that the UK government would probably no longer have available should deeper HE liberalisation occur. These assume a scenario where the UK government has exposed UKHE to full Market Access and National Treatment commitments in Modes 1,2 and 3 (i.e. cross-border supply, consumption abroad and commercial presence.) Recall that, because the UK's schedule is currently very liberal, removing the 'privately funded services' limitation but not introducing any new restrictions might well yield this scenario by default. The government can of course introduce new limitations but (because of the effective irreversibility of GATS) these are unlikely to reverse the existing liberal commitments on privately-funded services. Indeed, a number of the proscribed policy options we now list would already in theory be GATS-illegal under the EU's 1994 GATS commitments. Such restrictions have to date not proven controversial because, as discussed in an earlier paragraph, the predominantly publicly-funded UK HE arena is not yet conducive to a genuine free-market.

If the UK government commits the HE sector to deeper liberalisation - which will in all likelihood 'level the playing field' to some extent - some of the proscribed policy options now described may turn out to be necessary to shield UKHE from adverse affects and/or regulate the more autonomous HE sector that will likely emerge.

Proscribed policy options

Policy option: 'Pump-priming' projects.

Aim: 'Pump-priming' is the process where money is injected into a fledgling industry, often to assist its survival in a market already dominated by mature competitors.

Example: The current UKHE 'e-University' project. *'A collaborative project by the UK higher education funding bodies to establish a new way of providing HE programmes through web-based learning. The project is designed to give UK higher education the capacity to compete globally with the major virtual and corporate universities being developed in the United States and elsewhere...'*²⁰⁸ Explicitly designed to benefit UKHE, the government has committed £62 million to the project for 2001-2004,²⁰⁹ although it is also designed to help in 'widen[ing] access to higher education for under-represented groups of students in the UK.'²¹⁰

GATS violations:

- Project is only available to UKHE institutions, so the exclusion of UK-based foreign HE providers could constitute a **National Treatment** violation.²¹¹
- Might constitute a National Treatment violation in the **cross-border mode of supply**, because it is a subsidy that foreign e-Universities (looking to sell their degrees over the Internet to UK students) do not have available.²¹²
- Longer term, such fairly blatant export-enhancing subsidisation could well be considered 'actionable' and subject to challenge if disciplines under the **Subsidies** (Article XV) mandate are developed.

Comment: Projects which serve a social purpose but also distort terms of competition are at severe risk under the GATS framework. The e-University is perhaps not the best example of this, because it quite clearly *is* first and foremost designed to help UKHE make inroads into an emerging market, and UKHE should not be surprised if such projects run into trouble under GATS. However, consider that if UKHE is exposed to liberalisation and (for whatever reason) suffers as a consequence, it may be necessary to 'pump-prime' UKHE not to help its exports but simply to ensure its continued viability.

Policy option: Measures to help maintain the 'character' of the HE sector.

Aim: To promote and protect the educational and social mission that public (and many private not-for-profit) institutions aspire to, which many people argue is largely absent from the growing for-profit HE sector.

Example: Restricting or rationing the entry of for-profit providers into the UK market, to ensure these progressive goals are not overly diluted.

GATS violations:

- **Market Access** prohibits *'measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service'*.
- If the restriction was introduced as a condition that providers must meet to be allowed to award UK-recognised degrees, it could also be a violation of any disciplines developed under the Article VI.4 mandate.
- Many universities are notable for their Senate/Council governance structure, involving academics in running the university. Such structures may be desirable but are superfluous to the core activity of education provision, meaning the **'least trade restrictive'** requirement could loom large over any attempts to stipulate that market entrants have similar governance structures.

Policy Option: Measures to determine whether more HE imports are required.

Aim: To avoid a common danger with liberalised markets - that an excess of providers can overload the market's 'carrying capacity.' This often impacts negatively on consumers because it can be difficult to differentiate between a large number of service suppliers. Alternatively, the establishment of new HE providers in a certain geographical area may be economically impractical or unnecessary as a result of market saturation.

Example: Traditionally, a national or local government might use an 'economic needs test'²¹³ to determine whether new entrants should be allowed into a market.

GATS violations:

- **Market Access** disciplines prohibit economic needs tests.

Policy Option: Measures controlling the course content of HE providers.

Aim: Direct intervention in the market to address an imbalance in educational qualifications of UK citizens caused by liberalisation - for example, as a result of a collapse in demand for certain economically unviable courses, or an explosion in popularity of others.

Examples: Restricting the entry of HE providers marketing courses in which there is already an over-surplus of qualified UK citizens. (For example, Malaysian universities have started to cut back on arts enrolments following an education ministry directive targeted at the high employment rate amongst arts graduates.²¹⁴) Stipulating that new market entrants must include certain courses amongst their portfolio.

GATS violations:

Both examples could well be **Market Access / Domestic Regulation** violations.

Comment: Free trade advocates would argue that, in all cases, market mechanisms could be used to achieve the desired objectives. However, this overlooks the fact that, handled appropriately, the above interventions would constitute a reasonable, inexpensive and (potentially) highly effective exercise of government authority over its own economy.

Policy option: Measures to control the number of HE providers.

Aim: To protect the quality of UKHE from apparently malfunctioning transnational QA experiments.

Example: Blocking the entrance of new HE providers as a precautionary measure.

GATS violations:

Perhaps the most fundamental requirement under **Market Access** disciplines is that no numeric limits may be placed on the number of operators in the market.

Comment: This could be problematic for many of the same reasons that the prohibition of economic needs tests could be problematic. Furthermore the inability to limit the number of HE providers operating in UK territory could aggravate certain funding and quality assurance-related problems, as discussed in the previous sections.

In 2000 the New Zealand government introduced plans to limit the number of universities operating in the country. An independent analysis verified that the proposed limit - which would prevent public non-university tertiary education institutions from seeking university status - would in all likelihood be a violation of New Zealand's Market Access commitments were it extended to private institutions also.

Box 5.3: New Zealand

Policy option: Measures that require incoming HE providers to form partnerships with domestic HE providers or local companies.

Aim: To ensure inward investment in a country brings benefits to the economy.

Example: Stipulating that foreign HE providers must form partnerships with domestic HE providers could both ensure that the UK benefits from revenues earned, and fulfil social goals, since foreign HE providers operating in conjunction with domestic HE providers are more likely to be sympathetic to social objectives than those operating in isolation.

GATS violations:

- Mandating such 'joint ventures' is prohibited by GATS Market Access clause XVI.2(e) (See Box 2.5 in Section 2). Indeed, the US has identified '**Measures requiring the use of a local partner**' as a barrier to trade in HE.
- Specifying that HE providers should enter into a **particular relationship with the local economy** (We discuss this point further in Section 5.3.5.)
- Measures stipulating the employment or training of a certain number of UK academics - in its list of trade barriers the US has observed that '*Minimum requirements for local hiring are disproportionately high, causing uneconomic operations*'. Given that such 'local hiring' requirements effectively limit the number of foreign employees that a foreign HE provider can use in its course provision, such requirements may be considered **Market Access** violations.

Policy option: Measures which, in effect, discriminate against foreign HE providers

Aim: To formalise across the whole sector the need for HE institutions to engage in socially beneficial activities.

Examples: UKHE already naturally undertakes certain types of socially-beneficial practices (e.g. forming links with local communities.) The government may wish to use legislation to formalise such practices and extend them across the whole sector, domestic and foreign.

GATS violations:

- Could be construed as a **de facto National Treatment** violation because it would be experienced more onerously by foreign providers than local providers (who would already be fulfilling the requirements.)
- Another possible example of de facto discrimination is as follows. If the government introduces legislation to benefit not-for-profit providers operating in UK territory (whether domestic or foreign), but most foreign HE providers are for-profit compared to a domestic sector that is largely not-for-profit, this might also be considered a **de facto National Treatment** violation.

5.3.2 Rights without responsibilities?

These restraints, coupled with possible impacts on funding/quality, could cause a '*rights without responsibilities*' situation to develop in the sector. That is, the scenario where foreign providers are entitled to treatment *at least* as beneficial as that afforded to UKHE - subsidies included - but (because of the above restrictions) the government has great difficulty regulating their activities to ensure that their presence brings social, economic, academic or cultural benefits. Thus, as '*providers of last resort*' UKHE may find that, in addition to its traditional public role, it is increasingly burdened with the expensive task of addressing negative social, economic, cultural and academic externalities arising from the more market-driven activities of its competitors, such as having to finance the more unpopular/expensive courses, providing access for poorer students while suffering decreasing financial support from the government and so on. This may be particularly problematic in a climate of declining public funding. Also, in light of regulatory avenues being closed off by GATS, the government may have to resort to financial incentives as a means of coaxing foreign HE providers into behaving in a certain way, putting further stress on public funding levels.

It should be stressed again that GATS Market Access restrictions are *absolute* and as a result effectively redefine the relationship between the state and the market even beyond the context of international trade. The WTO Secretariat has confirmed that measures such as limiting the number of suppliers in the market (where no appropriate limitations have been specified) are Market Access violations even if the measures apply equally to domestic private providers and foreign providers.²¹⁵

5.3.3 Intervening in the market

In recent years a number of high-profile examples have shown how it is sometimes necessary for governments to directly intervene when market mechanisms fail or when the market will not of its own accord bend to fulfil desirable objectives. Also, rather than simply ‘mopping up’ market malfunctions, governments would sometimes have been better advised to pre-intervene with strong regulation to prevent such situations occurring at all. All such interventions could become very difficult under GATS.

‘The Enron-Andersen crisis just shows that governments need to retain the ability to experiment with deregulation and then, if they realize they’ve gone too far, to re-regulate... What the WTO and these agreements seek to do is make deregulation a one-way street.’
Ellen Gould, Georgetown University

Example 1: the Enron/Andersen debacle.

One of the responses considered by the US government in the aftermath of this episode was to pass legislation preventing accountancy firms auditing companies they also had consultancy contracts with. It is reasonable to argue that, prior to the Enron collapse, many people would have balked at such ‘trade-restrictive’ regulation. Yet perhaps it would have been advisable to begin with such regulation. In a different political context, and in a less powerful country, such regulations could be exactly the kind of measures that might be challenged under GATS.

Example 2: the failed Railtrack ‘experiment’

Another example of how direct intervention can be necessary to repair failed market mechanisms: this time to solve the chronic problems associated with the UK’s private rail infrastructure monopoly. In the end, the UK government forced Railtrack into administration. Though this was not technically a re-nationalisation (the assets were purchased and transferred to a new not-for-profit company, ‘Network Rail’) it is interesting because it constituted a decisive (and generally popular) intervention following a disastrous privatisation. In this instance the monopoly status of the market was not changed because Railtrack already constituted a private monopoly. However, GATS critics argue that in general reversals of this kind could be extremely difficult under GATS, because (in committed sectors) forcibly (re-)instating a monopoly is a major Market Access violation. The closure of a market after its liberalisation is not a decision any government takes lightly, but it is occasionally necessary to serve the public interest, particularly where domestic anti-monopoly laws fail and a malfunctioning or abusive *de facto* private monopoly evolves.

Example 3: the infamous ‘Bolivian example’

In 2000 the city of Cochabamba privatised its water supply and awarded the contract to International Water of London Ltd., but the privatisation went disastrously wrong and skyrocketing water prices led to civil strife and riots. Eventually the city government had to take back control of the water supply. GATS critics argue that, had the Bolivian government previously liberalised water distribution under GATS the re-nationalisation could have triggered a WTO challenge against the Bolivian government.

5.3.4 Unpredictability of Free Trade Agreements

One of the more worrying features of modern FTAs is their capacity to be deployed in ways that virtually nobody could have anticipated at the time of signing, save perhaps for a handful of trade lawyers. For example, when NAFTA was signed in 1994 few people would have predicted that NAFTA's 'Chapter 11' - designed to protect companies against expropriation - would be the centrepiece of UPS's strategic offensive against Canada Post six years later.²¹⁶ Similarly, Bilateral Investment Treaties (BITs) have been in existence for decades, but there is evidence to suggest that the number of corporate-state BIT arbitration cases has increased sharply as corporate trade lawyers realise their strategic value.²¹⁷

'Empirical evidence from other trade agreements such as the GATT and the EEC suggests that such agreements often have to mature for a decade or two before either enterprises or governments actively use the agreement in managing their affairs.'
Geza Feketekuty, Distinguished Professor of Commercial Diplomacy, Monterey Institute of International Studies

Generally it may take years or even decades before the full legal meaning of an FTA is realised and in the interim highly controversial rulings may be made. Since its inception in 1994 the WTO has made a number of controversial dispute rulings that have challenged environmental legislation and, in the 'Bananas' case, a pro-development trade arrangement.

The 'Bananas' case

This is particularly relevant because it is one of a handful of WTO goods disputes so far in which GATS has figured, albeit not in a central capacity. In 1996 the US argued that the EU's preferential banana import regime - in which the EU helped smallholding Caribbean banana farmers export to the EU - was WTO-illegal because it discriminated against the massive (mainly US-owned) banana-exporting plantations of Latin America. Part of the successful US argument was that the EU was violating GATS because bananas have to be distributed and 'distribution' is a service covered by GATS. The EU had taken the precaution of securing a waiver under the goods agreement (GATT), but it had not occurred to the EU that it should also secure a waiver under GATS, highlighting the uncertainty that lies ahead.

'I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments.'
Renato Ruggiero, former Director-General of WTO, 1998

Indeed, an extra level of caution is required with GATS because, though it was established in 1994, WTO negotiators have yet to iron out a number of uncertainties about how parts of the legal text relate to each other. Furthermore, as we discussed in Section 2 there are a suite of 'unfinished' GATS disciplines that may appear before 2005.

5.3.5 Local impacts and linkages

UKHE institutions are traditionally of considerable importance not just to the national economy but also to the local economies in which they are resident. Indeed, UKHE institutions are often major generators for local economies, employing significant numbers of non-academic staff and increasing demand for local services and amenities. This generator effect was recently acknowledged by Universities UK in their analysis of the benefits that UKHE brings to the UK economy.²¹⁸ Amongst other observations, it is noted that 60% of employees at UKHE institutions are non-academic, that UKHE institutions have an unusually highly qualified workforce even taking into account non-academic staff (implying that UKHE institutions

'...in order to deliver their teaching and research mission, Higher Education Institutions require a substantial infrastructure, often comprising significant estates and buildings - not only laboratories, lecture theatres and offices, but also residential accommodation, catering facilities, sports and recreation centres. Indeed some of the larger UK HEIs could be compared to small or medium sized towns within themselves, with facilities required to serve populations of c. 60,000 people (staff and students) or more. Such an infrastructure requires a wide range of management, administration, support and maintenance staff. Given this, it is not surprising that individual HEIs are frequently among the largest employers in their locale, with a significant influence on the surrounding area.'
Universities UK, 'The impact of higher education institutions on the UK economy', May 2002

encourage their non-academic employees to upgrade their qualifications), and that UKHE institutions inject huge sums of cash into local economies.

In addition, UKHE institutions may look to consolidate their relationship with the surrounding economy by reaching out to local businesses and by getting involved in 'social' projects such as 'summer camps' for local teenagers who might not otherwise consider attending university. Committing UKHE to further liberalisation under GATS could impact on these relationships unpredictably.

On one hand, an increase in the number of HE providers operating in UK territory could result in a corresponding increase in opportunities for local economies, although more long-term there is a possibility that investing HE providers might prefer to acquire existing infrastructure and institutions rather than introduce a new presence into the market. This increased investment could, however, be offset by a 'de-localisation' process which may occur as UKHE institutions seek to expand or defend their market position through mergers. (In addition, activities where UKHE institutions look to forge links with surrounding communities are often costly but conducted out of a commitment to public service. They would be at immediate risk of vanishing in a more competitive, liberalised environment.) A recent THES article indirectly comments on this issue when it observes that a fear flowing from the aforementioned UniversitiesUK report is *'that the government's desire to expand and diversify provision while streamlining the sector could lead to fewer higher education institutions and to changes in the nature of institutions. Such changes could harm local, regional and national economies.'*²¹⁹ Such fears could be compounded by the likely acceleration of UKHE restructuring that would occur as a result of deeper GATS liberalisation.

Another consideration is the *quality* of the local linkages that foreign institutions are likely to make. All providers with a physical presence in the country are likely to require non-academic staff from surrounding communities but beyond this basic economic relationship foreign HE providers may, because their 'roots' lie elsewhere, have less of an inclination towards fostering social links and more advanced economic links with local communities, and this may be particularly pronounced in the case of for-profit institutions. Certainly GATS could make it very difficult to compensate for any resulting 'public service deficit' with legislation. Market Access disciplines could cause problems if the government attempts to make market entry conditional on employing and training people within a certain radius or forming partnerships with local companies. Similarly, making recognition for foreign HE providers conditional on appointing local representatives within their governance structures is clearly the sort of legislation which might be challenged on the grounds that it is not 'least trade-restrictive.'

5.4 But what about the benefits?

We have so far considered some of the potentially adverse impacts of GATS on UKHE. However, GATS could of course bring certain benefits; the question is, do the potential benefits outweigh the potential risks? This is the question we consider in this section. We argue that, on balance, using GATS as the framework in which to pursue the internationalisation of HE - or even as the framework in which to pursue global trade in HE - is an unacceptably risky strategy. In particular, we note that HE institutions from Europe, Canada and the US have declared that, overall, they encounter few serious '*barriers to trade*' in the sector. Furthermore, we suggest (with supporting evidence from a leading GATS proponent) that many of the barriers that do exist are best addressed outside a trade regime. This leaves the main potential use of GATS to HE institutions as a device with which to tackle 'commercial presence' related issues, but as we have shown elsewhere in this paper this is the area in which GATS poses a very real threat to the viability of UKHE. In other words, endorsing GATS is taking a considerable risk for highly limited gains.

5.4.1 Useful for removing barriers to trade?

Throughout this paper we have explained in detail some of the considerable risks that UKHE will be undertaking by acquiescing to further liberalisation under GATS. Of course, there is a flip-side - GATS is useful for tackling 'barriers to trade' in other countries. (This must, of course, be accompanied by an understanding that treating HE solely as a commercial opportunity threatens to erode or even eliminate many of its special qualities.) It could perhaps be argued that the removal of such barriers will smooth the path of internationalisation by putting pressure on countries to remove obstructive and arbitrary checks on transnational education, and that this could benefit UKHE's transnational efforts. However, we now demonstrate that different stakeholders in the GATS process have very different ideas about which 'barriers to trade' need to be tackled within the GATS framework, and *how* they should be tackled. UKHE should be aware that an education-oriented perspective of 'barriers to trade' may be overridden by a more radical (and potentially damaging) free trade interpretation of trade-distortions in the education market.

Which 'barriers to trade' should be tackled within the GATS framework? The perspective of different stakeholders.

1. The trade department viewpoint

A good starting point is to consider the 'barriers to trade' listed by the US in its December 2000 negotiating proposal. The proposal includes a comprehensive list of about 20 barriers it would like to see removed, and (crucially) it also invites WTO Members to make unlimited Market Access and National Treatment commitments in the sector, a typical reflection of the standard 'everything we can get' mercantilist approach taken by most trade departments around the world. Some of their objections are reasonable enough. For example, '*Where government approval is required, exceptionally long delays are encountered and, when approval is denied, no reasons are given for the denial and no information is given on what must be done to obtain approval in the future.*' However, the US also requests that foreign HE providers be given opportunities to qualify as degree-granting institutions, coupled with unlimited Market Access and National Treatment commitments - a somewhat extreme position on trade barrier removal. As we have shown there is a real risk that if publicly-funded HE sectors are exposed to this level of liberalisation then there could be severe repercussions in the areas of funding, quality and regulation.

From an ethical viewpoint, it would be wrong for UKHE to endorse (for its own gain) any efforts of UK/EU trade negotiators to push deep GATS liberalisation onto foreign publicly-funded HE

sectors, when it is itself aware of the damage it could cause. Furthermore, UKHE cannot expect to indefinitely protect itself from liberalisation whilst reaping the benefits of other countries' liberalisation efforts. It is true that the bottom-up nature of GATS does not require reciprocity i.e. in theory the UK can exploit market openings that emerge as a result of other WTO Members making HE GATS commitments whilst continuing to shield UKHE. However, in Section 5.4.4 we argue that such a 'free-rider' policy is unsustainable in the long-term and (on current trends) improbable in the short-term anyway.

2. The viewpoint of existing HE institutions in Europe, North America and Canada

In the Joint Declaration of EUA/AUCC/ACE/CHE (an excerpt of which is included in Box 5.3) the signatory organisations ask their respective governments not to make any HE GATS commitments. The declaration notes that *'While there are currently some barriers to trade in education services, there does not appear to be a major problem overall.'* At first sight this seems odd when we consider that the US managed to produce such a long list of perceived barriers in its December 2000 proposal, but this can partly be explained by the difference between trade and educational perspectives. As we have shown, many of the 'barriers' preventing foreign HE providers from attaining a 'level playing field' with domestic institutions could, if abolished, have very serious consequences for the funding, quality and regulation of UKHE, and as such should be considered high-risk. The EUA et al recognise that the removal of those barriers under the GATS framework might seriously damage the character of existing HE provision - particularly publicly-funded provision - and as a result are antithetical to the vision of internationalisation held by most stakeholders in HE.

Our member institutions are committed to reducing obstacles to international trade in higher education using conventions and agreements outside of a trade policy regime. This commitment includes, but is not limited to improving communications, expanding information exchanges, and developing agreements concerning higher education institutions, programs, degrees or qualifications and quality review practices.

Our respective countries should not make commitments in Higher Education Services or in the related categories of Adult Education and Other Education Services in the context of the GATS. Where such commitments have already been made in 1995, no further ones should be forthcoming.

Box 5.3: Joint declaration by Association of Universities and Colleges of Canada, the American Council on Education, the European University Association, and the Council for Higher Education Accreditation and the International Association of Universities, 2001

3. The viewpoint of the free trade theoretician

Interestingly, at the OECD/US Forum on Trade in Educational Services in May 2002 it was suggested by Pierre Sauvé (a leading GATS proponent and member of the OECD Trade Directorate) that GATS is perhaps not the most appropriate framework in which to pursue the removal of many of the barriers listed by the US proposal. *'To the extent that the promotion of internationalisation of education involves collective actions on the part of governments, these may well be more properly pursued through agreements on educational qualifications, academic and cultural exchanges, and so forth, rather than brokered inside the trading system.'*²²⁰ This revelation was noted by the EUA who shortly after the conference issued a communiqué, an excerpt of which is in Box 5.4 - the emerging consensus seems to be that the only barriers that might be relevant to GATS are those pertaining to 'commercial presence' i.e. levelling the playing field for foreign providers operating inside another country. We return to this issue shortly.

Sauvé argues that many of the barriers listed by the US might best be addressed domestically or through non-trade mechanisms. Interestingly, he lends weight to the idea growing in popularity (discussed briefly in Section 5) that GATS should serve as a framework which will not drive trade in HE *per se* but actually complement and facilitate a process already well underway.

He notes, for example, that though HE international recognition agreements (i.e. recognising foreign degrees as equivalent to your own) are not negotiated under GATS, Article VII (Recognition) provides a useful, centralised framework within which these numerous agreements

could be logged.²²¹ While Sauvé is more moderate than certain private university free trade advocates (see below), he is still proposing regulatory decisions should be disciplined by trade considerations: *‘Two final areas where the GATS could play a useful role in helping achieve greater market openness concerns activities ancillary to education, such as quality assessment and testing, and in ensuring that regulatory measures in this area (as with recognition-related matters), even while non-discriminatory in character, are not unduly burdensome or indeed disguised restrictions to trade and investment in the sector.’* (Emphasis added.)²²² Here again we see the presumption that more trade is inherently desirable and that regulatory measures should be the ‘least trade-restrictive’. As we have shown in Sections 4-5.3, such an approach may seem valid at an abstract level but in practice could have serious ramifications.

Following the US/OECD conference of May 2002, the EUA noted in a subsequent communiqué that the message that seemed to be coming from the conference was, *‘Of the four ‘modes of supply’ defined by GATS, only the third mode (virtual or physical commercial presence) needs to be addressed through GATS negotiations... there is a need for a regulatory framework for e-learning and institutions crossing borders to ensure fair market access. While the other three modes experience ‘obstacles to trade’, these would not be overcome through GATS but through other measures.’*
Box 5.4: European Universities Association communiqué ‘The Bologna Process and the GATS Negotiations’, June 2002

4. The viewpoint of the for-profit advocate

Writing in THES in March 2002, Geoffrey Alderman (then academic dean of the for-profit American InterContinental University in London) argued that, *‘The unfairness of the practices GATS seeks to abolish is so blatant that it is difficult to imagine on what rational grounds British academia would defend them. GATS demands a level playing field for public and private universities.’*

Yet as we have shown, there are very substantial concerns about the impact GATS could have on funding, quality and regulation. Alderman’s perspective is clearly informed by a hostility towards the idea of publicly funded, publicly provided HE. Regarding other aspects he discusses - such as enhancing mobility of staff and students - we have already seen from both GATS sceptics and proponents alike a consensus that such measures are best dealt with outside a trade regime. This brings us to a general point. Alderman’s perspective on GATS is that it is useful as an adversarial mechanism, useful perhaps to *‘abolish’* barriers such as those he identifies in the Greek and Israeli systems. But given the bottom-up nature of GATS, HE sectors are in theory unlikely to willingly expose themselves to WTO challenges **i.e. they will only commit their sectors if they have already decided to undertake the relevant reforms. In which case the political motivation for reform was already evident and could have been undertaken in a non-trade capacity**, through co-operation rather than coercion and without the risks, constraints and unknown ramifications GATS brings with it. Indeed, there is a strong argument that it is counterproductive to pursue the internationalisation of HE through *coercive* mechanisms.

Alderman’s opinion also illustrates that the assurances trade officials such as Sauvé provide downplay the very real economic interests that stand to take advantage of the GATS.

Needless risk...

Perceived barriers to trade appear to fall into two categories. There are those which, if removed, could cause real problems for UKHE - such as those pertaining to commercial presence and domestic regulation - and there are those that, most people are agreed, can and should be dealt with outside the GATS framework. Significantly, the barriers which people suggest GATS may be of use in tackling are one and the same as those in the first category. **It would seem, therefore, that most of the benefits of internationalisation already lie outside the GATS framework, whereas most of the potential dangers lie within, and this is the view corroborated by the EUA et al. Hence, we argue that endorsing GATS as a framework within which to promote the internationalisation of HE is to take a largely unnecessary risk.**

5.4.2 There may be extra risks. But isn't it better that trade in education occurs within a multilateral framework, even if it is a risky one?

We feel we have demonstrated that casting HE within the GATS framework carries significant risks. The idea that GATS is a convenient multilateral framework to adopt should not be overstated. HE institutions and sectors have traditionally worked together on the basis of co-operation and dialogue and there doesn't appear to be any overriding reason why multilateral frameworks cannot be fostered and created outside a trade regime, driven by HE providers rather than trade departments. Indeed, mechanisms such as the UNESCO / Council of Europe *Lisbon Convention* already demonstrate willingness in this regard. The fact that these mechanisms often feel less powerful than GATS is not an indication of inherent inferiority but more a reflection of the disproportionate influence that trade concerns have on domestic policy-making.

5.4.3 But isn't it worth it for the extra export opportunities that might arise?

Acquiescing to the further liberalisation of UKHE under GATS as a means of injecting momentum into HE liberalisation amongst our trading partners - thus opening up new export markets for UKHE - is risky to the point of recklessness. On a general level, it seems likely that attaching such overriding commercial priorities to HE could seriously damage the character and purpose of HE. Purely on a pragmatic level, however, increased exports may initially be the result but at what cost? In Sections 4-5.3 we have shown that committing UKHE to deeper GATS liberalisation could have radically negative effects on funding, quality and regulation. Moreover, benefits from increased exports may well be concentrated and short-lived in nature.

In the initial period post-liberalisation UKHE may be well-placed as a whole to increase its exports, owing to the strong international reputation enjoyed by UK institutions, the strength of the English language, the growing experience of UKHE in borderless ventures and the relatively immature state of the global market. However, given that these competitive advantages are transient, it seems possible that, as competition increases - especially in the home market - a potentially significant number of UKHE institutions may find it increasingly difficult to survive. This tiering of UKHE along Darwinian lines would probably be exacerbated by the impact of GATS on regulation and funding and also heightened competitiveness for markets outside the UK.

In summary, we believe that deeper liberalisation of UKHE may yield 'winners' in the short-term but this could be rapidly outweighed as the market racks up an increasing number of victims. Of course, there could be significant non-economic losses too if effectively irreversible restructuring prompted by GATS leads to the loss of values and aspirations other than those permitted by a competitive, trade-oriented outlook.

5.4.4 What about supporting GATS generally but shielding UKHE by not committing the sector?

Most of this paper analyses the impacts of exposing UKHE to liberalisation under GATS. However, certain UKHE institutions may desire no further UKHE liberalisation but support GATS in principle because of increased opportunities for export and/or the belief that GATS is a reasonable framework within which to internationalise HE. The bottom-up structure of GATS makes this theoretically possible, but it is a hazardous strategy for a number of reasons:

- GATS commits WTO Members to *progressive liberalisation* (see page 17) so there will be ongoing, intensifying political pressure to open the sector up.

- If UKHE is intent on using GATS to boost exports but is determined to remain protected in the home market this will surely increase frustration at European 'protectionism' and heighten attempts by our trading partners to open the sector up - 'free riders' are highly conspicuous. (Consider, for example, anger even within the EU at the expansionist activities of France's state-owned electricity supplier.²²³)
- Disciplines mandated for development by the 'unfinished' GATS rules may end up partially horizontal in character i.e. applying to all services irrespective of whether the sector has been specifically committed by the government for liberalisation.
- A heightened level of aggression in HE exports and a determination to engage in full-blown competition on the global market outside UK territory would require UKHE to become fully hardened against market forces, even if it is protected in the home market. Many of the defensive, 'back foot' reforms which liberalisation can push a sector into (e.g. consolidation by attaining economies of scale) are the same reforms pursued by a sector with an offensive interest in liberalisation, because of the sink-or-swim nature of markets. Hence the 'protectionist' strategy may nevertheless induce GATS-type reforms in the UK market. Depending on the 'market-readiness' of UKHE and the government's analysis of the situation, the government may also see the removal of protection from UKHE as both necessary to enhance the competitiveness of UKHE and a useful negotiating gambit (see below.)
- Political capital in GATS negotiations is maximised by offering to open up a sector yourself that you are asking other countries to open up i.e. 'We're willing to do it, why aren't you?'
- It remains a fact that, as part of the GATS2000 negotiating round, the EU will come under pressure to make *some* kind of liberalising offers if it is to see a corresponding level of generosity from its trading partners. For its part, the EU may be of the opinion that it already has substantial GATS negotiating capital because of its fairly liberal 1994 commitments and, more importantly, the (WTO catalysed) projected dismantling of its Common Agricultural Policy (CAP). However, the EU's trading partners will not necessarily concur with this and the EU is almost certainly going to have to make some GATS sacrifices to achieve its high ambitions. Indeed, the EU is known to be looking for a '*big deal*' in GATS (see Pascal Lamy's comment in Section 2.4.6) to offset a future loss of competitive advantage in goods-based sectors.

5.5 Conclusion to sections 4 and 5

Throughout Sections 4 and 5 we have considered the potential impact of GATS in a number of important areas: funding, quality and regulation, as well as determining how the benefits that GATS might bring shape up compared to the identified risks.

Overall, we conclude that it could be **extremely hazardous to the health of UKHE** if it acquiesces to the further liberalisation of UKHE. Moreover, as we have just discussed, endorsing GATS as a means to open *other* markets, while protecting UKHE in the home market, does not appear to be a sustainable strategy.

We arrive at our conclusion by considering the following risks:

- Funding potentially split between UKHE and foreign HE providers, with downward pressure on funding levels (or even the complete removal of public funds.)
- Increased competition severely limiting the ability of UKHE to fulfil social and academic objectives (through the diminishing viability of mechanisms such as cross-subsidisation)
- Difficult to predict how domestic policy shifts will interface with GATS commitments

- Pressures towards '*least trade restrictive*' regulation and a potential loss of autonomy arising from 'necessity' tests
- QA potentially 'atomised', effectively weakening quality and re-defining HE as a passive, consumer experience
- Highly unpredictable and potentially damaging relationship with fledgling transnational QA arrangements and regional processes such as Bologna
- Loss of regulatory flexibility because of '*effective irreversibility*'
- Loss of potentially important regulatory policy options
- Possibility of novel and aggressive use of GATS against UKHE
- Possibility that important economic and social links with local communities will be damaged

Clearly these are considerable risks. Moreover, we have arrived (in Section 5.4) at the fundamental conclusion that UKHE can enjoy many of the advantages of internationalisation by staying *outside* the GATS framework, and that the only areas likely to be tackled *within* the GATS framework are those that could inflict serious damage on UKHE. In other words, supporting GATS is to take enormous risks for extremely limited gains.

6 How GATS could affect academics

So far, we have discussed the potential for GATS to impact negatively and profoundly on the financial viability of UKHE as a whole, on quality and on future regulation. All of these impacts will have particular knock-on effects for different UKHE stakeholders. In this section we look at the implications of GATS for academics.

HE unions around the world have been among the more vocal critics of GATS since negotiations began. They are concerned that GATS could rapidly accelerate current trends towards restructuring and commodification, and thus threaten conditions, quality and academic freedom, constrict the range of subjects on offer and homogenise learning. In this section we deal with each of these concerns in more depth.

GATS and the commodification debate

The concept of trade in education is viewed with suspicion by many in the academic and student world, because it presumes that education can be packaged and sold as if it is a commodity. This central premise is the foundation of a critical body of thought which maintains that HE in particular is undergoing a process of 'commodification'.²²⁴ This term reflects two intertwined trends in HE provision. First, that education is increasingly referred to as a commodity that can be bought and sold on the free market, with declining attention paid to its particular qualities and wider social considerations. Secondly, that the *delivery* of HE is shifting in accordance with its new definition as a commodity. In particular, that the traditional understanding of HE as a deep, broad educational experience is increasingly challenged by the idea (borrowed from certain sections of industry – see Box 6.1) that HE can be stripped down and 'unbundled' into consumable fragments.²²⁵

Both issues intersect with an understandably sensitive and impassioned debate about increasing access to HE, in which internet technology invariably features. It should be noted that commodification is independent of a technological medium, so a sceptical view towards commodification does not, for example, imply a reluctance to embrace internet technology as a means of expanding access to education. With this in mind, the fear is that commodification - which could seriously retard the character of HE - is reflected and driven by agreements such as GATS while masquerading as an inevitable and benign reform process accelerated by technological advances.

Before proceeding any further we note that the 'commodification' critique is often accused of being rooted in elitism and privilege i.e. an attempt to rubbish learning attempts by people not fortunate enough to study full-time, three-year degrees. Yet such accusations are disingenuous because academic principles such as rigour, breadth, experimentation, critical analysis and a holistic appreciation of knowledge are not wholly exclusive to full-time learning and needn't be

...it seems inevitable that any further EU HE liberalisation will bite deep into the traditional HE sector, with potentially massive repercussions for the financial viability of existing institutions, the quality of the overall HE experience and the sustainability of HE as a public good.

The HE sector should pay urgent attention to this issue and cease pretending that the neoliberal thrust of GATS is anything to do with the benign, 'not-for-profit' internationalisation of HE. Institutions that are inclined towards supporting GATS to boost their export earnings should think long and hard about whether short-term gain justifies exposing the UK HE sector to an irreversible, untested trade agreement of unprecedented scope.

Given that the UK government is no doubt toying with the idea of further liberalising HE, we believe the DfES should launch an immediate enquiry into how these negotiations could impact on the HE sector.

Paul Bennett (Nafhe), David Margolies (AUT), Kevin Steele (People & Planet), Mandy Telford and Chris Weavers (NUS) Times Higher Education Supplement, August 2002

'Conference is alarmed at the stealthy commodification of education, driven by the WTO and the GATS, with post-school education in the forefront. These trends threaten the integrity, diversity and quality of post-school education. The GATS seriously threatens the continued provision of public services by imposing a global market-based process through the WTO. Under GATS, Further and Higher Education are to be seen as tradable commodities open to the 'benefits' of global competition.'

Resolution passed at NATFHE National Conference, June 2002

mutually exclusive with the goal of expanding access to HE to capable people from non-traditional backgrounds or from outside the 18-24 age bracket. (Admittedly, it can be harder to transmit these qualities with new methods of delivery, but it should - with enough effort - be achievable.) These principles may not be strictly necessary if the purpose of HE is seen as a passive exercise in knowledge consumption, but HE has always had a much broader mission than that.

Whilst there are already elements of commodification creeping into HE, we argue that GATS could amplify such trends considerably both directly (e.g. restructuring notions of quality) and indirectly (e.g. exerting severe pressure on public funding forcing UKHE institutions to become more market-responsive.) As a consequence we find the following areas should be of concern to UKHE academics.

In most examples of borderless higher education, curriculum development generally reflects the needs of employment and 'earner-learners'. New providers are positioning their wares as 'just-in-time' learning that can be immediately applied in the workplace as opposed to the 'just-in-case' acquisition of knowledge traditionally supplied by universities. The craft tradition that saw individual academics responsible for the development and delivery of a course is under pressure from a more industrial model where discrete elements (such as subject knowledge, pedagogical expertise, multimedia skills, assessment techniques) are drawn together within course teams of individuals with specific roles. For advocates of the new forms of provision the decline of the cottage industry approach adopted by universities to teaching and learning may be a matter for celebration, however, for many academic staff fundamental questions emerge about key educational processes and values.

Box 6.1: 'The Business of Borderless Education: UK Perspectives', Universities UK

6.1 Conditions and Quality

In the short term, increasing pressure on public funding and the need to remain competitive could well limit the academic community's ability to bargain collectively for appropriate improvements in pay and conditions. A proliferation of HE providers may initially increase individual employment opportunities for academics in 'high demand' areas - especially if competition for academic labour is intense - but we question the desirability and sustainability of this situation for a number of reasons. From a purely collective viewpoint, the employment of academics by a proliferation of employers - with probable variations in pay and conditions - is likely to undermine the ability of the academic community to present a united position on areas of common concern. Furthermore, an increasing proportion of employment opportunities with new HE providers may well be 'de-professionalised' in character, which (as we now show) could damage the academic profession and eventually contribute to a contraction in employment opportunities.

As discussed in Section 5, the potential requirement under GATS that mechanisms such as quality assurance be '*least trade-restrictive*' could reinforce a trend towards 'atomised' notions of quality, where quality assessment criteria become narrower and more prescriptive (to accommodate all forms of HE provision equally) but paradoxically enforce a weaker standard of quality because it 'fails to see the wood for the trees.' This process could be seen as an adjunct to the unbundling of HE provision mentioned earlier, which threatens to reduce HE to a series of minimalist, disconnected components. Greater competition for public funding within a GATS framework could well further compound this process as UKHE institutions are forced to become increasingly sensitive to market demand.

Increasingly, therefore, academics could be called upon to separate teaching into smaller units. This could interface with the growth of new providers, particularly those making extensive use of e-learning technology. The desire of for-profit providers in particular to secure maximum market penetration with minimal outlay means they inevitably look to replicate repeatedly the same core set of teaching materials. The Internet is obviously a key ally in this process, although the process isn't necessarily exclusive to the Internet. This model of HE provision therefore lends itself to the employment of academics on short-term contracts (as one-off course designers) and, in importing countries, as locally-based auxiliary staff supporting fixed curricula designed elsewhere. This is the 'de-professionalism' we referred to earlier - the loss of the right to exercise judgement as knowledge dissemination becomes more of an assembly-line process.

There is a danger that if this fragmented model of education mounts a significant challenge to existing forms of HE delivery and - as has happened in other arenas of globalisation - accelerates consolidation and homogenisation in the sector (see point 4 below) then the academic profession will be transformed. 'Non-elite' academics could be forced to support any research activities they engage in (which may themselves be short-term in nature) by frequently competing for short-term course-design contracts from a declining number of HE providers, or operating as proxy lecturers in branch campuses. Such a significant shift in the balance of power away from academics would almost certainly exert downward pressure on conditions of academic employment, perhaps leading to a re-emergence of the 'casualisation' phenomenon that has plagued UKHE for some time.

6.2 Academic freedom

While the notion of absolute academic freedom has always been an ideal rather than a reality (and often has to give way to pragmatism), public funding has nonetheless afforded academics a high degree of academic freedom. There is concern that if GATS increases the reliance of UKHE on supplementary injections of cash from industry (as a result of intense competition in the student market, declining government funding and the need to engage in public-private partnerships to capitalise on export opportunities) there will inevitably be an increase in tension between academic neutrality and the need to please (or avoid offending) private funders. In recent years there have been a number of notorious cases where academic freedom has been conspicuously constrained as a result of private funding. One such incident was the *Olivieri* case where an academic was sacked (but ultimately reinstated) by her university as a result of pressure from corporate backers because she wanted to publish evidence that the drug she was researching might actually harm patients.²²⁶ Research released by National Association of Teachers in Further and Higher Education (NATFHE) in March 2002 suggested that a marked corrosion in academic freedom was being exacerbated by increasing dependence on commercial funders.²²⁷

These concerns dovetail with those surrounding the sensitive issue of Intellectual Property Rights (IPR). IPR concerns are multifaceted. On the most general level there is the feeling that when knowledge creation and dissemination is viewed through a purely commercial lens the notion that knowledge should be disseminated for the general good comes under pressure. The most well-known instances in which IPR has become a controversial issue are those where researchers operating in publicly-funded universities but under private research contracts cede IPR to the company concerned. As the global HE market matures, however, new forms of IPR controversy are likely to surface. The government-endorsed push for UKHE institutions to commercialise their research could lead to more heavy-handed and restrictive internal management of IPR within departments. The unbundling and mass-reproduction of knowledge that is likely to accompany the restructuring process (see points 1 and 4) could exacerbate tensions over IPR as academic teaching is increasingly perceived as a product rather than a service. Concerns to this effect have already arisen surrounding fledgling 'borderless' projects such as Universitas 21.²²⁸

'The AUT is concerned that extension of the GATS will redefine higher education as a commercial product and open universities to free market competition. Preliminary research by the union shows that GATS may increase the casualisation of university teaching staff, affect levels of government funding, increase commercial pressures on universities and damage traditional academic freedom.'
AUT press release, 9th November 2001

'...opening up higher education to financial competition on the world market could see a reduction in state funding and in the quality of courses. These new moves may well come back to haunt higher education unless there is clear guidance on what free trade and commercialisation means for universities.'

Excerpt of letter from Paul Cottrell (acting AUT General Secretary, November 2001) to Department for Education and Skills.

6.3 Range of subjects

As discussed in Section 4 there is likely to be pressure within institutions to move away from marginal subject areas for economic reasons. Subject areas which are net beneficiaries from cross-subsidisation (either because they don't attract enough students or are expensive to provide) are particularly likely to suffer. Research-side activities could enjoy a degree of immunity from this 'rationalization' process, especially if research in these departments continues to win research funding. Within individual subjects, economic pressures of this kind are likely to influence strongly the teaching-research balance in a department, especially as university departments are increasingly assessed on their financial viability in isolation from other university activities. In those departments where research cross-subsidises teaching, there will be a temptation to close or scale-down teaching activities, especially since heightened competitiveness in the undergraduate market will increase the potential for decreases or sharp fluctuations in teaching revenues. Where teaching effectively cross-subsidises research, or the activities are broadly economically comparable, research departments (and thus - in some universities - entire departments) will be at increased risk of closure, again because of shortfalls and/or fluctuations in teaching revenues. Fledgling research departments could be particularly badly affected, since they often struggle to win adequate (or indeed, any) research funding from the RAE (Research Assessment Exercise) and individual research boards. The option of building up research capacity by cross-subsidising from any departmental teaching funds will potentially be compromised.

Clearly the overarching concern is that, though universities have always had to make difficult economic decisions, there has usually been an acknowledgement that subject areas can have a worth beyond their immediate commercial value, and that such flexibility will become progressively less commonplace. Rather than see courses go to the wall an alternative policy response might be to re-attain economies of scale by seeking mergers with other institutions. This ties in with the next point.

6.4 Consolidation and Homogenisation

As we have already touched upon, the long-term trend towards consolidation and homogenisation could eventually forfeit any short-term gains for academics from GATS. An initially increasing number of suppliers (and employment opportunities) may eventually give way to a period of conspicuous consolidation because of funding pressures; witness the rash of mergers and take-overs that have left (for example) global water and accountancy markets in the hands of a few colossal operators. It may be tempting to paint such scenarios as fanciful; indeed, it has been argued that the progressive character of HE will prevent universities and HE providers from mutating into the equivalent of rapacious, transnational corporations.²²⁹

However, it is difficult to deny the fact that treaties such as GATS intrinsically promote regulatory restructuring and economies of scale by prising back attempts to protect localised economies. (Furthermore, GATS may encourage the ascendancy of an altogether narrower, less 'progressive' educational orthodoxy.)

The University of Phoenix – 'industrialising higher education'

The for-profit University of Phoenix's aggressive expansion strategy appears to be paying off. In a presentation on *'The future of higher education: profits, partnerships and the public good'* in June 2002, Jorge Klor de Alva, president and chief executive of Apollo International (the parent company of the University of Phoenix) told the conference that:

'his university had been the first to industrialise the process of higher education. The University of Phoenix - which offers mainly classroom-based evening classes to American adults - now has 140,000 students at 170 campuses and 300 corporate sites, including a campus in the Netherlands. It also has students taking online programmes in 70 countries. Apollo International is now moving into India and Germany. It is well established in Brazil, where 160,000 school children and 650 higher education students are enrolled.'

'So what are you good at?' Times Higher Education Supplement, June 2002

UKHE academics will no doubt be familiar with the increasing number of domestic mergers within the sector; these can be seen as a foretaste of the much more pronounced consolidation - which would probably include take-overs and buy-outs - that could happen should UKHE be exposed to liberalisation under GATS. In addition to the labour-related concerns expressed in point 1, there is a more general concern that, deployed without care, this process could lead to the mass homogenisation of learning, particularly if the venture is supported by world-renowned branding or an elite reputation. Clearly homogenisation on this scale would seriously undermine the foundations of original, creative and critical schools of thought. There is also the spectre of 'knowledge imperialism' i.e. countries importing knowledge rather than producing their own are at risk of having the outlook and values of the exporting country imposed upon them, to the detriment of their own.

Other education unions' opposition to GATS

Education International is concerned that proposals for a significant increase in the scope of, and degree of, liberalisation of trade, might cover education services. EI's central objective is to have education excluded from the scope of the General Agreement on Trade in Services (GATS).

Education International

'There is mounting pressure for Canada and other countries to make [GATS] concessions that could jeopardize our publicly-funded universities and colleges...Almost every government measure and regulation that affects our institutions — including public funding grants — would be at risk if Canada were to make commitments at the negotiating table...Existing protections are simply inadequate. Canadian negotiators should be working hard to keep education off the table entirely and to seek better protection in the GATS for education and other public services.'

Tim Booth, President of CAUT (Canadian Association of University Teachers), November 2001

ATL (Association of Teachers and Lecturers) believes that GATS represents both an attack on public sector working conditions as well as upon the ideas of a qualified teaching profession. It is in direct contradiction to the 1998 UNESCO Declaration, which states that *'higher education exists to serve the public interest and is not a commodity... GATS will inevitably lead to an erosion of public funding for education, reduction of professional autonomy and increased job insecurity... It used to be said that 'Free Trade is not Fair Trade.'* The extension of GATS to education will prove neither Free nor Fair and should be opposed. Education deserves nothing less.'

ATL urges TUC to oppose government support of GATS, 6 September 2002

7 How GATS could affect students

Further HE liberalisation would also have particular consequences for students, and student organisations across the world have expressed a series of grave concerns about GATS. We begin by revisiting the central problem of funding, and conclude with concerns about how GATS could negatively change the character of Higher Education.

7.1 Impact on funding: the student perspective

'Education is a public good of benefit to individuals and societies, and not merely a tradable service. We consider that current attempts to extend commitments in Higher Education Services within the GATS framework are not in the best interests of higher education institutions, students or society in general. Education is a fundamental human right. Higher education should not be reduced to a commodity. Education should not be covered by an agreement primarily concerned with promoting free trade. EUA and ESIB promote internationalisation. However, a system of regulations must be developed from within the higher education community.'

'Students and universities: An academic community on the move': European Universities Association and ESIB (The

Students have a number of needs relating to funding. First, they require there to be sufficient funding so that courses they wish to study are readily available. Secondly, they require that the service they receive is well-resourced and generally of a high standard. Thirdly, they require there to be sufficient tuition and maintenance support from the government to ensure that access to HE is not conditional on economic background and that participation in HE does not entail the accumulation of large private debts.

Through its capacity to impact upon public funding levels alone, GATS could negatively affect all three of the aforementioned concerns.

In Section 4 we identified a number of principle concerns pertaining to GATS and UKHE funding levels:

- GATS may require the government to make public funds available on a 'non-discriminatory' basis to foreign HE providers operating in UK territory.
- GATS could limit the ability of UKHE institutions to cross-subsidise financially unviable activities.
- public funding may in time be classed (in part) as an unfair export-enhancing subsidy, in which case public funding levels could be radically re-organised and reduced - a more long-term but nonetheless tangible threat.

GATS could dramatically encroach on the UK's ability to make post-16 policy and posit regulations onto colleges and universities to achieve educational aims, rather than commercial objectives.

Owain James, President of National Union of Students, Times Higher Education Supplement, April 2002

7.1.1 The problems of funding HE providers on a 'non-discriminatory' basis

A government faced with treating foreign HE providers the same as domestic HE providers with respect to funding has a number of choices, as we discussed in Section 4.2.1. At one extreme it could completely retract teaching funds from UKHE institutions, leaving both domestic and foreign institutions to compete (in a fiercely-competitive market) for students, and increasing reliance on supplementary private finance. In this scenario many UKHE institutions would inevitably charge full, differential fees at market rates, leaving students with the prospect of enormous debts. The student movement has already

'We reject GATS because it is the wrong way to go about internationalising Higher Education. Higher Education should be internationalised in a manner befitting its tradition as a public good. GATS claims to be the tool with which to achieve this, but is first and foremost designed to serve the profit motive and will ultimately wreck the soul of Higher Education.'

Ogunlana Oludare, Secretary-General of the All Africa Students Union (AASU), July 2002

invested considerable energy fighting the deregulation of fees; it recognises that such a shift could create a tiered sector where, despite the existence of 'safety-net' mechanisms such as bursary and scholarship schemes, personal wealth inevitably becomes a factor in the institution you attend.

Another option the government could pursue is to maintain its per-student funding levels but lift the restriction that students must attend UKHE institutions: the 'provider neutrality' scenario. This could be achieved by shifting funding to the student (i.e. crediting them with their full government entitlement through vouchers or learning accounts) or - much more likely in the case of the UK - transparently extending the existing system to include foreign institutions, whereupon the government releases teaching funds to institutions (as part of the yearly block grant) roughly in proportion to the number of UK students they attract. Such an extension might not immediately change the system from the student perspective, other than an increase in the number of institutions to choose from. From a purely consumer-centric viewpoint this might sound seductive, but a shift of this kind could set in motion a reform process with the potential to severely damage the interests of students.

'It is imperative to ensure that accessibility to higher education is not hindered or dictated by market forces. Degrees are not commercial products. Higher education institutions are not supermarkets and whilst education may be traded, this should not be allowed to prejudice accessibility to education.'
**ESIB (The National Unions of Students in Europe)
Statement on Commodification of Education.**

Switching to provider neutrality would force UKHE institutions into intense competition with a potentially unlimited number of new providers, threatening the viability of existing UKHE institutions and their ability to cross-subsidise economically inefficient courses. Thus, fragmentation caused by the market could result in a decline in the overall diversity of subjects available, and the quality of provision at UKHE institutions could suffer. This is part of the answer to the question: *'Won't an increase in HE providers increase choice for students?'* Liberalisation could, at least in the short-term, lead to a wider choice of *providers* for students studying in certain areas. (That is, those subject areas in which competition for students is intense.) However, offsetting this is the concern that *subject areas* which have a high economic risk attached to them may increasingly be considered unsustainable, challenging the idea that subjects have a value beyond their immediate economic feasibility.

More fundamentally, the process of 'hiring' private sector institutions with public funds generates a political dynamic which is distinct from traditional UKHE provision. Should foreign HE providers be successful in taking market share from UKHE - perhaps because they are more stripped down and less burdened by social obligations - they may be able to co-opt considerable amounts of public funding and increase their influence over government. In the longer term, this could lead to similar problems for students that a more forceful retraction of funding might induce in the short-term. Setting the private sector in ascendancy over the public sector in this way could result in a shift towards greater financial contributions from students, leading to the same problems of access, tiering and so on. (See Box 7.1)

This box explores the scenario of what could happen if provider neutrality results in funding being split between UKHE institutions and foreign providers.

1. It could increase the influence the private sector has over government, because if even a fraction of public institutions suffer in a liberalised market it increases the reliance of the government on private sector provision and - given that the UK government is ultimately accountable for HE provision - this places the private sector in a strong position to influence government policy. For example, some for-profit institutions may be able to co-opt a significant proportion of public funding, thus giving them leverage in the direction of more general privatisation.
2. The diversion of large amounts of public funding towards certain segments of the private market can subsidise the expansion of their activities in several ways. Consider that a for-profit provider receiving public money is well-placed to use this money to cross-subsidise an expansion of its full-fee activities. In other words, public funds can be used to promote trends towards privatisation. Furthermore, the fact that they are teaching students on public funds gives them an audience to whom they can sell 'top-ups' e.g. consider how dentists treating patients on NHS money are (perhaps inadvertently) excellently positioned to sell private dentistry insurance. This promotes a dangerous cycle where patients become desensitized to the idea of paying increased private contributions, which in turn makes government-level policy shifts towards greater private contributions and reductions in public funding more feasible, which in turn makes publicly-funded provision ever less impressive compared to private insurance options. Such a cycle could also happen with 'provider neutrality' in HE.

Box 7.1: Provider neutrality - a dangerous road to go down

7.1.2 Defining public funding as an unfair, export-enhancing subsidy

Of most immediate concern is the potential for GATS non-discrimination rules to require the government to make public funds available to foreign HE providers. However, as discussed in Section 4.2.2, a longer-term threat to public funding could be the development of new GATS disciplines designed to tackle 'trade-distorting' subsidisation. A switch to 'provider neutrality' may not in itself remedy this problem, because the public funding could still afford UK-based institutions an 'unfair' advantage over HE providers operating outside the UK.

If new subsidy disciplines are developed, they could have serious consequences for students, by exerting downward pressure on funding levels. We have identified three key ways this could happen:

1. A complete retraction of public funds, which would solve all GATS-illegal subsidisation problems at once (as we noted in Section 4.2.2). However, such an 'induced privatisation' scenario would have dire consequences for students. For many institutions fee deregulation would become the norm, potentially introducing all the tiering, access, equity and debt problems that the student movement has fought in battles against differential top-up fees.

2. The division of UKHE into two blocs, with one bloc of HE institutions free to engage in export activities - but with no government funding - whilst the second bloc concentrates on the domestic market but receives government funding. This would probably be a more palatable option from the government's perspective, since it would guarantee access to HE for UK citizens. However, from the student perspective such a transformation would in effect be a slightly different form of privatisation, albeit one with a stronger safety-net. The exporting institutions would probably be 'elite', charging high, deregulated fees to students, whilst the 'home market' bloc would teach students unable to afford deregulated fees. Even if the 'home market' could function adequately on government funding it would probably be unable to compare to the funding

leverage of the elite bloc, undermining the core National Union of Students (NUS) principle that intellectual capability should be the determinant of access, not personal wealth.

3. A switch to provider neutrality, coupled with downward pressure on funding (to minimise de facto export subsidisation.) The problems described in the previous section would apply but students might find themselves having to pay increased private contributions to offset engineered funding shortfalls. Such a scenario would not remain static for long: many institutions would see no point in remaining tied to government for the sake of inadequate funding, and the fact that students would already be used to paying increased private contributions would probably make the decision to break away from government control and funding fairly easy for many institutions. Thus, a scenario not dissimilar to the above - i.e. the emergence of a two-tier or multi-tier system - may well emerge, with all the attendant problems.

7.1.3 Couldn't GATS be useful for increasing supply i.e. helping to put more people through university?

The idea that the GATS framework could be used to encourage new providers to enter the UK, either to increase supply or to sharpen the market-responsiveness of UKHE institutions by exposing them to the '*controlled burn*'²³⁰ of the market, is (from the student perspective) very dangerous indeed. New providers are unlikely to enter the UK market in significant numbers whilst students are heavily subsidised to attend domestic institutions. That is, while it is significantly more affordable for UK students to study at UKHE institutions (because of higher levels of government subsidisation) new HE providers are unlikely to achieve significant market penetration. Hence, increasing supply in this manner would first require greater financial incentives for new providers. This could be achieved by releasing government funding on a non-discriminatory basis, as discussed above, and/or a shift towards greater private contributions from students.²³¹ (If greater financial responsibility falls on the student then this narrows the gap between the expense of studying at a public institution and at a private institution.) We have discussed some of these issues in Section 4.5.

In other words, liberalising under GATS could actually lead to a narrowing of choice (as a result of commercially unviable courses being jettisoned) and actually *compound* access problems:- direct or indirect shifts to greater contributions from students may well exacerbate problems of inequality of access, elitism and so on. So our overall point to students is this: under GATS, 'consumer choice' could come with a very high price.

7.2 Character of HE

Throughout this paper we have noted that GATS essentially formalises the concept of HE as a tradable commodity and is likely to exert considerable pressure on the sector to move towards being more commercial and competitive. Whilst recognising that UKHE has its own fair share of problems which need to be tackled, liberalisation under GATS will inevitably steer the discourse surrounding HE ever further away from the core concept – shared by many in the sector – of education as a public good and towards its elevation as a private good, with principles such as citizenship, public service and collectivism becoming increasingly marginalised.

The re-definition of quality along '*least trade-restrictive*' lines may reinforce the commodification of HE and could (as we discuss in Sections 5 and 6) fragment, or 'atomize' HE provision into small, independently-consumable pieces. The concern here is that HE has always been about more than consuming chunks of advanced-level knowledge. In particular, studying at a higher level involves creative thinking, rigorous understanding and analysis, experimentation and the generation of new insights and ideas through the examination of links between different areas of knowledge. Should HE be stripped of such 'higher level' education processes then the very nature of HE itself will be threatened. Individuals will lose the opportunity to enjoy a broad

educational experience, and as a result the rigour, judgement and independent thinking which contribute so much to modern society could increasingly be in short supply.¹

In the short-term, increasing pressure on UKHE institutions to internalise market culture is likely to redefine the student-university relationship as a much narrower consumer-provider relationship. For example, the need to secure ever greater efficiencies is likely to increase the frequency with which universities contract out or privatise formerly in-house services (such as halls of residence), potentially putting the needs of students at risk. In the case of halls of residence, for example, UNISON has already documented a trend towards higher costs in privatised halls of residence.²³²

Finally, as we've noted in Section 6, the public funding crisis that GATS could unleash (thus compounding existing funding shortages) would almost certainly require UKHE institutions to develop a greater reliance on funding from private non-student sources e.g. industry. Though potential problems associated with this (e.g. adverse effects on academic freedom) affect academics most directly, students of course have a right to learn in an environment that is not unduly influenced by the interests of their institution's funders.

7.3 Conclusion

It would seem that, like academics, students have little to gain from GATS, and much to lose – access to university places based on their intellectual, rather than financial capability; the intellectual freedom to study whatever subject interests them, rather than what is judged to be most profitable/least expensive; and the opportunity, if they want it, to enjoy the broad educational experience of university.

8 Recommendations

It has been impossible to predict definitively how GATS will affect UK Higher Education. The interface between international trade negotiations, domestic policy making and current trends in the UKHE sector is extremely complex, and many crucial aspects of the negotiating process are kept secret from the public: have the US, Australia and others requested deeper HE liberalisation from the EU? What degree of liberalisation are they looking for? Given the political dynamics of the GATS process, what is the UK willing to offer?

So far we have not been able to elicit adequate responses to any of these pivotal questions from the government, the EU or the WTO. This paper has therefore involved a necessary element of informed speculation. Whilst we believe that we have got as close to the truth as possible under the circumstances, being reduced to speculation about central facts is unacceptable on such a crucial issue. This paper has set out a series of fundamental questions and grave concerns. It is now up to the UK government to answer them.

As we have shown GATS appears to entail serious risks for the UKHE sector, for gains that can for the most part be effectively achieved outside the GATS framework. It could severely impact on UKHE funding, quality and regulation in a variety of ways, with negative knock-on effects for student access, academic freedom, local communities, the character of HE and more. Ultimately it could completely restructure the UKHE sector, effectively tying the regulatory hands of government and shifting enormous power to decide the legitimacy of future policies away from government and the HE sector, and into the hands of international trade experts with an overarching and single-minded commitment to the avoidance of 'trade-distortions', pursued often to the detriment of other concerns. This threat is far too serious to ignore, and yet the Department for Education and Skills (DfES) appears to be doing just that.

We recommend that, as a matter of urgency, all UKHE stakeholders request the following from the DfES:

1. Transparency

The DfES should ask the Department of Trade and Industry to make available full details of all the 'requests' and 'offers' being made and received by WTO member states as part of the GATS negotiating process. These should be openly available for scrutiny by Parliament, key stakeholders in affected sectors, and the general public.

2. DfES Impact Assessment

The government must not participate in any GATS negotiations affecting Higher Education until the DfES has conducted a comprehensive, publicly available impact assessment incorporating full consultation with all relevant stakeholders.

The impact assessment should thoroughly investigate how GATS could affect UK Higher Education. Specifically, it should answer the following questions:

- *Will GATS non-discrimination rules cause UKHE funding to be restructured, resulting in the reduction and possibly ultimately the elimination of public funding?*
- *Will current cross-subsidisation practices be threatened, deepening the funding crisis in UKHE and causing 'unprofitable' courses and departments to become more vulnerable to closure?*
- *Could GATS affect the quality of Higher Education, both in the UK and on the level of transnational HE?*
- *Could GATS interfere with and undermine parallel co-operative attempts by the HE community to 'internationalise' HE?*

- *Will GATS still allow the government to regulate in the public interest in the future, given that certain regulatory avenues are closed off permanently by GATS rules?*
- *Could the knock-on effects of GATS include the erosion of employment conditions for academics, constraints on academic freedom, and the prospect of deregulated tuition fees?*
- *Since the UK government has already made full GATS commitments for 'privately funded' Higher Education services, could these already potentially cause problems? If so how will the DfES rectify this situation?*
- *Given the commitment, built in to GATS, of 'progressive liberalisation', how can the DfES ensure that UK Higher Education is permanently protected from any negative effects brought about by GATS?*

3. Full Government Review

Given that the GATS process fundamentally impacts on a wide range of domestic sectors, government departments and other countries, the DfES should not undertake its assessment of GATS in isolation. It is not just UKHE that could be at risk from GATS. Our HE partners and colleagues around the world, and other services that fulfil a public good (such as healthcare, water and energy) could also be severely affected.

The DfES impact assessment should therefore be part of a broader government review, involving all the relevant sectoral government agencies: DfES, the Treasury, the Department for International Development, the Department for Environment, Food and Rural Affairs, the Department of Health etc, as well as the Department of Trade and Industry which has overall responsibility for the UK's role in the GATS negotiations.

The review should consider whether, in the light of such serious and widespread concerns about GATS, **the UK should take a lead in encouraging the EU to revisit its entire approach to GATS, calling a complete halt to negotiations until the necessary changes have been made in order to genuinely safeguard governments' regulatory autonomy, and the protection of the public interest when it comes to service provision across the world.**

- ¹ See the Observatory on Borderless Higher Education (OBHE), <http://www.obhe.ac.uk/aboutus/>
- ² We stress *'through the relevant national funding council'* because, as we discuss in Section 3.4.2, some public funds are made available to support students studying at certain private HE institutions. However, this support is not delivered through HEFCE (Higher Education Funding Council for England) or the equivalent body in Scotland/Wales/Northern Ireland (see endnote 4.) Hence, UKHE refers only to those degree-awarding institutions that receive funding through their national funding council, thus excluding the University of Buckingham and other private institutions.
- ³ Carolyn Allport, President, National Tertiary Education Union (NTEU), 'Transnational Education and GATS - An Australian perspective', Presentation to Education International (EI) Conference on Higher Education, Montreal, March 13-15 2002, <http://www.nteu.org.au/freestyler/gui/files/file3ca2a8ceab354.pdf>
- ⁴ Wales: funding and quality assurance by HEFCW, Scotland: funding by SHEFC, quality assurance by QAA, Northern Ireland: funding by Department for Employment and Learning, Northern Ireland and quality assurance by QAA.
- ⁵ This is an interesting issue in its own right, because - though the Scottish Parliament (for example) has legislative powers in areas such as health and education - Westminster retains authority on matters pertaining to international trade.
- ⁶ As is apparent from Section 6 (How GATS could affect academics), unions with involvement in UKFE (such as NATFHE and ATL) are increasingly aware of the dangers posed by GATS. See endnote 10 for a discussion of service sector terminology (CPC), but as far as the UK is concerned, FE appears to occupy a grey area between 'Secondary Education' services (CPC 922) and 'Higher Education' Services (CPC 923.) HE Services includes sub-sector CPC 92310 which covers 'Post-secondary technical and vocational education services', but the vocational emphasis here may or may not include A-levels. FE college activities leading to degrees fall, along with the core of UKHE activity, under CPC 92390 ('Other higher education services'), which is described as *'Education services leading to a university degree or equivalent.'* It seems plausible that most FE activity falls under the Secondary Education services subcategory. 'Higher secondary education services' (CPC92220) is described as *'General school education services at the second level, second stage. Such education services consist of general education programmes covering a wide variety of subjects involving more specialization than at the first stage. The programmes intend to qualify students either for technical or vocational education or for university entrance without any special subject prerequisite.'* Other aspects of FE activity could fall under different subcategories. It is crucial that this is clarified, not least because - as we discuss in Section 3.3 - education services considered beyond basic level (i.e. beyond primary and secondary) are potentially far more susceptible to liberalisation.
- ⁷ www.wto.org
- ⁸ The WTO's GATS page is located at http://www.wto.org/english/tratop_e/serv_e/serv_e.htm. The legal text of the agreement is available at http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm
- ⁹ Technically speaking, GATS is a trade liberalisation agreement rather than a free trade agreement (FTA). FTAs are basically agreements that abolish tariffs and other import restrictions between members, and thus have more of an association with trade in tangible goods. However, to enhance readability we refer to GATS as an FTA throughout this paper, on the understanding that exactly correct technical terms could be substituted if desired. Our analysis does not suffer as a result of this simplification.
- ¹⁰ Sectors are listed in WTO MTN.GNS/W/120. This is based on the UN's Central Product Classification system (provisional), otherwise known as CPCprov. The website <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1> is useful for obtaining an *indication* of what services are grouped within each category.
- ¹¹ The WTO GATS negotiating guidelines state that *'There shall be no a priori exclusion of any service sector or mode of supply.'* 'Guidelines and procedures for the negotiations on trade in services', WTO document S/L/93, 29 March 2001, http://www.wto.org/english/tratop_e/serv_e/sl93.doc
- ¹² The argument about free trade enabling consumers to gain access to competitive, efficient services is applied globally. In developed countries, free trade is also promoted as an opportunity to maximise service exports. In developing countries - who, broadly speaking, have little export capacity in services - the argument is made that importing services from the developed world will be of assistance in developing service infrastructure, increasing access to basic services and so on. We return to this point in section 2.4.11.
- ¹³ Article XVI.2(e) is not a quantitative restriction: *'[n]o measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.'* See Box 2.5 in Section 2.
- ¹⁴ It is important to note, however, that services discussed as a single entity in general discourse (e.g. 'higher education') often span multiple service sectors in the GATS framework. The running of universities, for example, involves a large number of auxiliary services in addition to core activities such as teaching and research. Hence, commitments made in one service sector may non-obviously affect services elsewhere. We return to this issue in Section 4.3.2.
- ¹⁵ The core of the EU's existing GATS commitments (i.e. those tabled in 1994) are found in WTO document GATS/SC/31.
- ¹⁶ The trade arm of the EC is called DG Trade i.e. Directorate-General for Trade. DG Trade's website is http://trade-info.cec.eu.int/europa/index_en.php, and the Services section of the DG Trade website is http://europa.eu.int/comm/trade/services/index_en.htm
- ¹⁷ European Commission DG Trade, 'Summary Of The EC's Initial Requests To Third Countries In The GATS Negotiations', 1 July 2002, http://europa.eu.int/comm/trade/services/gats_sum.htm
- ¹⁸ For example, Markus Krajewski, 'Public Services and the Scope of the General Agreement on Trade in Services', Centre for International Environmental Law (CIEL), 2001. www.ciel.org
- ¹⁹ David Hartridge, Director of WTO's Trade in Services Division, speaking at 'Opening markets for banking worldwide: The WTO General Agreement on Trade in Services', London, 8 January 1997. <http://attac.org/fra/libe/doc/clifford.htm>
- ²⁰ Any new compensatory liberalisation commitments must be applied on a Most Favoured Nation (MFN) basis i.e. the new market openings should be available to all countries, and not just the affected parties.
- ²¹ In Canada, the Federation of Canadian Municipalities (FCM), representing over 1,000 Canadian municipal authorities, has called for an exemption from GATS. By August 2002, at least 17 UK local authorities had passed motions of concern about GATS, with GATS-related activity in at least another 28 council areas. (World Development Movement 'Core Voices' update, Autumn 2002.)
- ²² This initially appeared on the WTO's website but has now been removed.
- ²³ Head of the Cabinet of Pascal Lamy, Pierre Defraigne stated in an email to Susan George (3 April 2002) that the request lists *'can and WILL NOT be made public'*. (This was before the draft EC request lists were leaked to the press - see Section 2.4.3)
- ²⁴ See, for example, GATSwatch, 'EU ignores civil society demand for transparency in WTO services negotiations', press release 11 June 2002, <http://www.gatswatch.org/110602pr-en.html>
- ²⁵ World Development Movement, 'Leaked European negotiating documents confirm WDM's fears about the GATS', May 2002, <http://www.wdm.org.uk/cambriefs/updateEULeaks.pdf>
- ²⁶ <http://www.gatswatch.org/ECleaknews.html>
- ²⁷ The Guardian, 'Secret Documents Reveal EU's tough stance on global trade', April 17 2002. <http://www.guardian.co.uk/Archive/Article/0,4273,4395615,00.html>
- ²⁸ 'Founded March 31, 2001, the EUA is the result of the merger between the CRE-Association of European Universities and the Confederation of EU Rectors' Conferences...The European University Association, as the representative organisation of both the European universities and the national rectors' conferences, is the main voice of the higher education community in Europe.' <http://www.unige.ch/eua/>

²⁹ Times Higher Education Supplement, 'V-Cs seek openness in talks on free trade', 12 July 2002, mirrored at <http://www.dcs.warwick.ac.uk/~skelk/GATS/THES16.html>

³⁰ These differences between NAFTA and GATS are partly taken from an article ('Despite their differences, GATS and BITs are part of the same agenda') submitted by Scott Sinclair, senior research associate, Canadian Center for Policy Alternatives to BRIDGES Monthly.

³¹ In other words, the set of measures which could be construed as '*tantamount to expropriation*' is a subset of the set of measures which could be considered 'unnecessarily' burdensome. Tantamount to expropriation includes measures such as overt expropriation of private property (e.g. forced renationalisation) but potentially - and controversially - also measures which wholly or partially threaten the value of an investment or measures that threaten future profit-making. However, the requirement that measures be not more burdensome than necessary sets the bar considerably lower. This can be used to question any relevant measure, whether connected to expropriation (i.e. the actual or effective annexing of private property) or not, which could have been pursued in a less trade-restrictive manner.

³² Recall that most of the measures prohibited by Market Access are quantitative, but not all - see endnote 13.

³³ '*In many cases, a distinction between international and domestic liberalisation would be artificial. From a trade policy perspective, external and internal market opening should normally go hand in hand in order to ensure that the potential benefits of more liberal access conditions are not contravened by persisting internal barriers. This is also reflected in the scope of market access commitments assumed by WTO Members under the GATS. The disciplines of Article XVI extend to both discriminatory and non-discriminatory restrictions, covering measures targeted specifically against foreign suppliers as well as others affecting all market participants.*' WTO Council for Trade in Services, 'Economic Effects of Services Liberalisation - Background Note by the Secretariat', para 11, WTO document S/C/W/26, October 1997.

³⁴ '*The Schedule of a Party sets out the non-discriminatory quantitative restrictions maintained by that Party pursuant to Article 1207.*' <http://www.nafta-sec-alena.org/english/nafta/anx5.htm>

³⁵ See 'GATS - Fact and Fiction,' http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm. The comment about regulation is in the section http://www.wto.org/english/tratop_e/serv_e/gats_factfictionfalse_e.htm

³⁶ In the context of GATS, the 'offensive' interests of a country X are those areas in which the country wants to see other countries make liberalising commitments i.e. so country X can capitalise its exports in those areas. Hence, service sectors where country X enjoys a comparative advantage often form the backbone of a country's offensive interests. 'Defensive' interests are generally those service sectors where country X does not want to make liberalising commitments i.e. wishes to shield from global competition. This may be due (for example) to domestic political sensitivity - or the need to build-up the export capacity of the sector behind protective barriers.

³⁷ Pascal Lamy (EU Trade Commissioner), speech at United States Council for International Business, New York, 8 June 2000.

³⁸ Taken from DTI minutes of Trade Policy Consultative Forum (8 May 2002) '*In response to a question from Save the Children, Baroness Symons [Minister of State for Trade and Investment] confirmed that no WTO Member should respond with an offer unless liberalisation was deemed by that Member (which may disagree with UK-based NGOs) to be to its advantage.*' When government officials argue that a country should not liberalise a sector unless it will benefit it may often be the case that 'benefit' is interpreted as GATS-wide gains minus losses, thus not necessarily closing the door to the possibility that certain sectors will be liberalised against their individual best interests.

³⁹ Erik Froment, 'Help make trade rules or get stung at market', Times Higher Education Supplement, 9 Nov 2001. (Mirrored at <http://www.dcs.warwick.ac.uk/~skelk/GATS/THES3.html>)

⁴⁰ Technically, it is possible to appeal against the ruling of a dispute panel, through the WTO's Appellate Body. (See http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) However, '*Appeals have to be based on points of law such as legal interpretation - they cannot reexamine existing evidence or examine new evidence.*' Though the Appellate Body may adopt a slightly less stringent trade-law perspective than a dispute panel (because some of its members may be lawyers with expertise in other areas of international law) it remains the fact that the AB is nonetheless a small, 3-member panel with a specific mandate to adjudicate solely on legal criteria and, crucially, with the final say on issues of potentially profound importance to society.

⁴¹ '*As a general principle, the complaining party should first seek to suspend concessions or other obligations with respect to the same sector as that in which nullification or impairment has been found. If it is not practicable or effective to do so in the same sector, the suspension of concessions or other obligations may be made under the same agreement. If even that is not practicable and the circumstances are serious enough the complaining party may seek to suspend concessions or obligations under another agreement.*' WTO, 'The World Trade Organisation, A Training Package', http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto08/wto8_65.htm#note5

⁴² As part of the 'bananas' dispute (see Section 5.3) Ecuador was on 24 March 2000 permitted to suspend concessions applicable to EU intellectual property rights, because Ecuador was not deemed to import enough goods from the EU to make goods-based retaliation effective. See WTO document WT/DS27/ARB/ECU.

⁴³ <http://www.gatswatch.org/requests-offers.html>

⁴⁴ Some UKHE income stems from successful bids for public procurement contracts e.g. government contracts relating to research or training. Contracts put out to tender in this way are already subject to the open competition rules of the European single market. For example, contracts above a certain size must be advertised through the OJEC (Official Journal of the European Communities - <http://www.tendersdirect.co.uk/PPF/default.asp>.) Any government procurement disciplines developed under the GATS Article XIII mandate may, in the name of open markets, require public procurement contracts to be opened out to global tender on a MFN (Most Favoured Nation) basis. Such a development could be highly significant since it would further prevent positive discrimination in favour of national or even regional bidders. The EC is pushing hard on the Government Procurement mandate, '*More open and effective competition in procurement markets would enable governments to obtain services at more competitive prices, thus getting better value for money. The EC therefore has a keen interest in moving forward the negotiations on government procurement of services under the mandate of Article XIII-2 GATS.*' (http://europa.eu.int/comm/trade/services/gats_sum.htm) Transparency in government procurement is being pursued separately as one of the 'new issues' within the general WTO body, but the EC has indicated that it believes the GATS mandate to be stronger and as such is pushing for disciplines that go beyond transparency and actually open out government procurement along the lines described.

⁴⁵ Erik Wesselius, 'Behind GATS2000: Corporate Power at Work', May 2002, on behalf of the Transnational Institute. <http://www.tni.org/reports/wto/wto4.pdf>

⁴⁶ David Hartridge, op.cit.

⁴⁷ www.uscsi.org

⁴⁸ www.esf.be

⁴⁹ European Commission, 'Opening World Markets for Services, Towards GATS 2000', 2000, p. 17. [http://gats-](http://gats-info.eu.int/gats-info/g2000.pl?NEWS=bbb)

⁵⁰ According to the article 'Global accounting rules threaten to restrict domestic regulation', Taipei Times, March 2nd 2002, '*Accounting was one of the first services for which detailed [GATS] rules were written. Charles Leonard, a spokesman for Arthur Andersen, said the firm was part of an international accounting group that helped draft them.*' <http://taipeitimes.com/news/2002/03/02/story/0000126091> See also 'A guide to the Enron collapse', Canadian Centre for Policy Alternatives, March 2002,

(<http://www.policyalternatives.ca/publications/enron.pdf>) and 'Enron: Washington's Number One Behind-the-Scenes GATS Negotiator', CorpWatch, October 25 2001, <http://www.corpwatch.org/issues/PID.jsp?articleid=343>

⁵¹ NCITE's homepage is at www.tradeineducation.org. A list of NCITE's founder members (including the University of Phoenix, Sylvan, Education Testing Services etc) is available at http://www.tradeineducation.org/general_info/founding_members.html

⁵² Robert Vastine, President, Coalition of Services Industries, Testimony before the Subcommittee on Trade, House Committee on Ways and Means, US Congress, February 8, 2000. www.uscsi.org/publications/papers/statement_of_robert_vastin.htm

⁵³ Statement criticising close collaboration between EU and ESF, GATSWatch, 28 May 2002, <http://www.gatswatch.org/280502action.html>

⁵⁴ Erik Wesselius, 'Liberalisation Of Trade in Services: Corporate Power at Work', <http://www.gatswatch.org/LOTIS/LOTIS.html>.

⁵⁵ *'The unease and uncertainty of developing country negotiators meant that the deal was not fully completed. WTO members agreed to continue negotiations beyond the Uruguay Round.'* World Development Movement, 'Leaked European negotiating documents confirm WDM's fears about the GATS', May 2002, page 2, <http://www.wdm.org.uk/cambriefs/updateEULeaks.pdf>

⁵⁶ In the North, the UK's World Development Movement (WDM) is a prominent member of the anti-GATS movement (<http://www.wdm.org.uk/campaign/GATS.htm>) and in the South, NGOs such as the Malaysia-based Third World Network (<http://www.twinside.org.uk>) are heavily involved.

⁵⁷ For example, 'South has not benefitted from services exports, says new study', Third World Network, <http://www.twinside.org.sg/title/twe282c.htm>.

⁵⁸ Third World Network, 'GATS talks without mandatory assessment?' <http://www.twinside.org.sg/title/twe282a.htm>

⁵⁹ WTO document S/CSS/W/114, 9 October 2001.

⁶⁰ See, for example, 'Public services and the scope of the General Agreement on Trade in Services(GATS): a research paper', May 2001, written by Markus Krajewski for CIEL (Centre for International Environmental Law), <http://www.ciel.org/Publications/PublicServicesScope.pdf>. Also, 'GATS and Public Service Systems: The GATS 'governmental authority exclusion', discussion paper, Ministry of Employment and Investment, Government of British Columbia, Canada, April 2, 2001. The paper originally appeared at <http://www.ei.gov.bc.ca/Trade&Export/FTAA-WTO/WTO/governmentalauth.htm> and is now available at http://members.iinet.net.au/~jenks/GATS_BC2001.html

⁶¹ DTI website, 'Frequently asked questions about the General Agreement on Trade in Services (GATS)', <http://www.dti.gov.uk/worldtrade/question.htm>

⁶² *'[I]f it were thought desirable to take further steps to make it clear that the liberalisation of services trade is not a threat to the autonomy of governmental services, it would be possible to use the opportunity provided by the new round to make it clear that the co-existence of governmental and private services in the same industry does not mean that they are in competition in the sense of Article I:3c and therefore does not invalidate the exclusion from the GATS of the public sector.'* WTO, 'Market Access: Unfinished Business -- Post-Uruguay Round Inventory and Issues', WTO Special Study No. 6, Geneva, 2001. http://www.wto.org/english/res_e/booksp_e/maccess_e.pdf

⁶³ DTI website, as in endnote 61

⁶⁴ The controversy surrounding the WTO's Intellectual Property agreement and its impact on public health - centering on the question of affordable access to drugs - being a case in point. Even with consensus amidst their ranks, it took developing country WTO Members (who are a majority in the WTO) many years and vast amounts of political energy to secure a clarifying declaration to the effect that TRIPS (the Intellectual Property agreement) does not prevent countries pursuing public health objectives. The bottleneck arose because the desire of developing countries to produce affordable, low-cost generic versions of patented drugs (to treat their people) came up against stiff resistance from countries with a vested interest in preventing any developments that might weaken the global patent regime represented by TRIPS. The clarification was issued at the Doha WTO Ministerial in November 2001.

⁶⁵ The EU's ambition to see 'environmental' services liberalised (including certain water services) is well known, and motivated by the EU's global dominance in the provision of water-related services. It is explicitly referred to in the EU's 'Summary Of The EC's Initial Requests To Third Countries In The GATS Negotiations', Brussels, 1 July 2002, downloadable from http://europa.eu.int/comm/trade/services/gats_sum.htm. It reads, *'The EC's requests are based on the EC's proposal for classification of environmental services and cover all environmental sub-sectors. This includes water collection, purification and distribution services, sewage services, waste management services, services related to protection and clean up of air and climate, soil and water, as well as services related to the protection of biodiversity, and other related services...The EC is seeking the removal of discrimination of, and restrictions to, European companies wishing to supply environmental services.'* Concern over the EU's stance on water services liberalisation was one of several focal points for the Trade Justice Movement's mass lobby of Parliament on 19 June 2002: <http://www.tradejusticemovement.org/briefings/lobby.shtml#water>. *'The Trade Justice Movement is a fast growing group of organisations including aid agencies, environment and human rights campaigns, fairtrade organisations, faith and consumer groups... Concerned with the harmful impact of current international trade rules on the poorest people in the world, on the environment and on democracy, the Trade Justice Movement calls for fundamental change of the unjust rules and institutions governing international trade, so that trade is made to work for all.'*

⁶⁶ *'Director-General Moore said that in the coming days governments will make their first requests for market opening and that it was possible some governments could ask others to open public service sectors to foreign competition. But, he explained, that such requests do not constitute agreements to include such sectors as part of their commitments. 'People can and will ask for the moon during the request stage of the negotiations. That doesn't mean they'll get it. Decisions in the WTO are taken on the basis of a consensus of all member governments. Governments cannot be forced to undertake opening of their public services,' Mr. Moore said.'* WTO, 'Director-general of WTO and chairman of WTO services negotiations reject misguided claims that public services are under threat', 28 June 28 2002, http://www.wto.org/english/news_e/pres02_e/pr299_e.htm

⁶⁷ For example, in a newspaper article lambasting GATS critics, Mike Moore (then Director-General of the WTO) comments that *'Gats explicitly excludes services supplied by governments.'* ('Liberalisation? Don't reject it just yet', The Guardian, February 26th, 2001, <http://www.guardian.co.uk/business/story/0,3604,443063,00.html>) The problem with such reassurances is that they simply re-state the ambiguity in the Article I.3 exemption, which does not protect those services supplied either on a commercial basis or in competition with one or more suppliers. Such careful wording is frequently encountered. For example, in a fact sheet accompanying the press release discussed in endnote 66, 'Services negotiations offer real opportunities for all WTO members and more so for developing countries', http://www.wto.org/english/news_e/pres02_e/pr300_e.htm, it is written that *'Public services. Governmental services — i.e. services provided by governments on a non-competitive and non-commercial basis — are beyond the scope of GATS and not subject to negotiation.'* Note that the sentence is structured such that the exemption is seen to apply to governmental services, not public services.

⁶⁸ That is, just because somebody believes HE should be a public good does not necessarily mean they believe it should be provided like a conventional public service. Indeed, many proponents of the public good viewpoint argue that public sector recidivism is preventing HE from fulfilling its potential as a public good, and that the market should have a much greater role.

⁶⁹ To elaborate, it is argued that HE is not a public good because it is neither *non-excludable* (users cannot be excluded from consuming the goods) nor *non-rival* (consumption by one user does not reduce the supply available to others.) So traditional HE could be argued to fail on both counts because there is not capacity for every citizen to study at the HE level, and access is conditional on intellectual

ability.

⁷⁰ WTO, 'Education Services, Background Note by the Secretariat', 23 Sep 1998, S/C/W/49

⁷¹ Pierre Sauvé (OECD Trade Directorate), 'Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About?', presentation for the OECD/US Forum on Trade in Educational Services, Washington D.C., 23-24 May 2002. <http://www.oecd.org/pdf/M00029000/M00029613.pdf>

⁷² See, for example, Jim Grieshaber-Otto and Matthew Sanger, 'Perilous Lessons: The Impact of the WTO Services Agreement (GATS) on Canada's Public Education System', Canadian Centre for Policy Alternatives, 2002 www.policyalternatives.ca

⁷³ The HEFCE (Higher Education Funding Council for England) website declares, 'One of our strategic aims is to 'promote and support productive interaction between Higher Education (HE) and industry and commerce in order to encourage the transfer of knowledge and expertise and enhance the relevance of programmes of teaching and research to the needs of employers and the economy.'...A key role for universities and HE colleges, alongside the provision of teaching and research, is 'Third Leg' activity to meet the needs of business and the community, contributing to economic and social development both regionally and nationally. We are committed to encouraging and rewarding partnerships between HEIs and business, the transfer of knowledge and expertise, and the development of employment skills.' (<http://www.hefce.ac.uk/Reachout/>) UKHE institutions can bid for third stream funding from mechanisms such as HEROBC (Higher Education Reach Out to Business and the Community), HEIF (Higher Education Innovation Fund) and HEACF (Higher Education Active Community Fund.)

⁷⁴ That is, institutions can determine and set their own fees for international students. (Contrasting with the present arrangement for domestic students studying at publicly funded institutions.)

⁷⁵ 'We need to be clear on what is meant by 'not on a commercial basis' — perhaps the idea is best expressed in the French phrase 'sans but lucratif.' 'Sans but lucratif' means 'non-profit-making'. Taken from a speech by David Hartridge, Director of Trade in Services Division, WTO Secretariat, at the European Services Forum (ESF) conference, 27 November 2000 http://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm. Also, '...'services supplied in the exercise of governmental authority', by which is meant services not supplied on a commercial basis nor in competition with other service suppliers — e.g. economic activities carried out on a not for profit basis.' Sauvé (see endnote 71)

⁷⁶ Gottlieb & Pearson, 'GATS Impact on Education in Canada', October 2001, full report available from <http://www.caut.ca/english/issues/trade/GATS%20Impact.pdf>. Executive summary available from <http://www.caut.ca/english/issues/trade/GATS%20Opinion%20-%20Summary.pdf>. See <http://www.caut.ca/english/issues/trade/gats-opinion.asp> for the CAUT's press release accompanying the report.

⁷⁷ Margaret Hodge, Minister for Higher Education, called students 'customers' in an address to the AUT council, May 2002. <http://education.guardian.co.uk/higher/news/story/0,9830,712885,00.html>

⁷⁸ 'Buckingham is the only university independent of direct government support in the United Kingdom and has used its independence to pioneer a distinctive approach to higher education... on March 29th 1973 the University College at Buckingham (UCB) was incorporated, in the form of a non-profit making company registered as an educational charity...'. Taken from <http://www.buckingham.ac.uk/facts/history/> Also, 'In March 1983 the College was incorporated as The University of Buckingham by grant of a Royal Charter, just seven years after it opened, satisfying the Department of Education and Science and the Privy Council that the standard of education was at the highest level.' <http://www.buckingham.ac.uk/facts/history/more.html>

⁷⁹ Terms such as 'recognised' and 'listed' are explained in Section 3.4

⁸⁰ <http://www.college-of-law.co.uk/home/>

⁸¹ <http://www.ukcle.ac.uk/directory/lpc.html>

⁸² 'Prime Minister launches drive to attract more international students', 18 June 1999, <http://www.britishcouncil.org/ecs/news/1999/0618/>

⁸³ THES, 'Appealing UK nets £1.5bn', 26 July 2002. Some people are surprised that the teaching of international students in the UK constitutes the export of education, but as explained in Section 2 GATS covers all possible 'modes of supply', including 'consumption abroad.'

⁸⁴ Increased comparability of degrees within Europe is one of the objectives underpinning the Bologna Process, which aims to construct a European Higher Education Area (EHEA), and is discussed further in Section 5.2.5.

⁸⁵ As already discussed, UKHE institutions will often engage in competition not just in the provision of degrees but also in the area of professional qualifications.

⁸⁶ Education exports are already the fifth highest export earner for the US and eighth largest export for Australia. 'Positioning Australia's Universities for 2020, An AVCC policy statement', Australian Vice-Chancellors' Committee, June 2002

⁸⁷ See, for example, 'US denounces 'protectionism' of European education market', Jeroen Ansink, <http://www.nuffic.nl/nuffic50years/usdenoun.html>

⁸⁸ That is, establishing a physical or perhaps virtual presence.

⁸⁹ The dates and reference codes for the relevant WTO documents are: US (December 2000, S/CSS/W/23), NZ (June 2001, S/CSS/W/93), Australia (October 2001, S/CSS/W/110) and Japan (March 2002, S/CSS/W/137)

⁹⁰ See endnote 15 for details of the EU's 1994 commitments.

⁹¹ In the British Columbia paper (see endnote 60), it is written that, 'Judging from statements made in WTO meetings, it seems that EC representatives believe that the interpretation of the WTO exclusion may not differ markedly from that of its European counterpart. In this context, it is significant to note that the original Uruguay Round proposal for the governmental authority exclusion reportedly came from the EU. The European exclusion -- upon which the GATS exclusion appears to be based -- has, without exception, been interpreted narrowly.'

⁹² '65% of the University's total income is currently derived from 'earning' activities such as self-financing short courses, research contracts, management training centres, vacation conferences, retail and catering. (2000-2001 finance figures)' <http://www.warwick.ac.uk/about/profile/finance.html>

⁹³ Denmark also has a specific limitation, in Mode 4. The EU's schedule for HE is heavily limited in the Mode 4 (Presence of Natural Persons) mode of supply i.e. largely unliberalised. We tend to exclude Mode 4 from our HE-specific analysis because Mode 4 liberalisation is controlled more at the national level, using horizontal commitments. This is principally because of the political sensitivity surrounding the 'immigrant worker' issue in developed countries.

⁹⁴ David Robinson, Associate Executive Director (Policy and Communications) of the Canadian Association of University Teachers (CAUT) attended the OECD/US forum on trade in education (May 23-24, 2002) and his subsequent report includes the comment that: 'Interestingly, it appears that there is disagreement amongst EU members about including education in GATS. As noted above, Belgium is strongly opposed and there were indications this position was shared by the French delegation. On the other hand, Norway, Germany, the Netherlands, and the UK indicated interest in pursuing commitments to education in the GATS. The Norwegian Minister for Higher Education called for the creation of a coalition of nations to promote TES (Trade in Education Services) during the current GATS talks.' He also notes that 'Françoise Dupuis, Minister for Higher Education and Scientific Research in Belgium, stated very clearly that her government is opposed to including education services, or other public services for that matter, in the GATS.' To be technically precise, Dupuis is actually a minister of the French Community government: Belgium has a federal structure with 3 Communities and 3 Regions. Responsibility for education policy lies at the sub-federal level. Hence, it is not clear whether Dupuis was speaking for the

whole of Belgium or just the French Community; the former seems possible given that Belgium presumably acts with a single voice in international trade matters. A French-language discussion of the French Community stance on GATS (incorporating a discussion of events at the OECD/US forum) is available from <http://www.cfwb.be/gouver/cabinet.dupuis/pg003.htm>, the particular document being <http://www.cfwb.be/gouver/TradeinEducationalServices.doc>

Switzerland's enthusiasm for GATS is apparent from 'Swiss: do not leave us in dark over Gats', THES, 23rd August 2002: '*The Swiss government is preparing to sign agreements on regulation of higher education under the General Agreement on Trade in Services despite opposition from university rector and the European University Association.*'

⁹⁵ Although it is not clear at the present time what the UK government's stance is on this question, there is a little more information available with regard to the German position. According to 'The Globalization of Higher Education: The Trade Regime Dimension', Christoph Scherrer and Gülşan Yalçın, September 2002, the German Minister for Education (Minister Bulmann) indicated in July 2002 a readiness for certain types of education liberalisation. A translation of the article 'Wir dürfen Bildung nicht als Ware dem Handel überlassen' ('We must not entrust education to market forces as a product') in the Frankfurter Rundschau newspaper of July 8, 2002 reads, '*Microsoft, Cisco and others offer [...] the acquisition of certificates on a commercial basis. An international education market is developing here, which inevitably also exerts pressure on public services. We are doing our best to let this market develop subject to certain provisions. Increasing the degree of individual private services and those from abroad in order to ensure high quality and innovation, is a part of these provisions. The educational testing foundation can also be included among these.*'

⁹⁶ **US:** 'U.S. Proposals for Liberalizing Trade in Services, Executive Summary', Office of the United States Trade Representative, July 1st 2002. <http://www.ustr.gov/sectors/services/2002-07-01-proposal-execsumm.PDF>.

Australia: 'GATS to Open Doors for Australian Exporters', Monday, 1 July 2002 - MVT064/2002 http://www.trademinister.gov.au/releases/2002/MVT064_02.html

EU: 'Summary Of The EC's Initial Requests To Third Countries In The GATS Negotiations,' DG Trade 1st July, http://europa.eu.int/comm/trade/services/gats_sum.htm

⁹⁷ 'Ministry of Foreign Affairs and Trade consultation with New Zealand Council of Trade Unions on GATS negotiations', 27 May 2002, <http://www.arena.org.nz/mfatctcu.htm>

⁹⁸ Presumably to head off concerns that the EU might request liberalisation of basic education and/or seek widespread liberalisation of education in (for example) poor countries

⁹⁹ '*The EC is presenting a request to the US on privately funded higher education services, in line with the commitments taken by the EC in the Uruguay Round and the interests of European providers of education services in that market.*' See EC's initial request document in endnote 96.

¹⁰⁰ US initial request document: see endnote 96.

¹⁰¹ The US December 2000 proposal states: '*This paper proposes that WTO Members that have not yet made commitments on higher education, adult education, and training services formulate their commitments based on the list of obstacles identified below. Members are invited to inscribe in their schedules 'no limitations' on market access and national treatment, as some Members already have done. Further, the paper proposes that all Members consider undertaking additional commitments relating to regulation of this sector. The United States has taken commitments for adult and other education, and is willing to consider undertaking additional commitments for higher education and training.*' Given that the US itself has not yet made commitments on HE, it is not clear whether it includes itself in the 'no limitations' invitation. However, the second part of the paragraph unambiguously declares a willingness towards HE liberalisation. The form of this liberalisation is again not entirely clear - does it mean additional commitments in the sense of Article XVIII, or just 'more' commitments, and if it is the former does it mean in addition to Market Access and National Treatment commitments?

¹⁰² 'Additional commitments column: Entries in this column are not obligatory but a Member may decide in a given sector to make additional commitments relating to measures other than those subject to scheduling under Articles XVI and XVII, for example qualifications, standards and licensing matters. This column is to be used to indicate positive undertakings, not the listing of additional limitations or restrictions.' Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm

¹⁰³ In its December 2000 proposal (see endnote 89) the US says: '*This would entail countries considering to apply existing GATS market access and national treatment disciplines, as well as additional GATS disciplines addressing sector-specific regulatory issues, including transparency and fairness of administration...the paper proposes that all Members consider undertaking additional commitments relating to regulation of this sector.*' (Emphasis added.)

¹⁰⁴ They have been used, however, in service sectors where special 'annex' agreements have been reached: additional commitments often appear in telecommunications and financial services in the form of an attachment.

¹⁰⁵ The Ministry's website is <http://www.bmwi.de>, although the summary document is mirrored at <http://www.attac-netzwerk.de/gats/summary-gats-forderungen-an-eu.rtf>. A translation by Attac France (www.attac.org/france/) of the section discussing requests to the EU in the area of Educational Services reads, '*Educational services: Many demands relate to special objections of other EU members (not Germany) against the existing EU commitments. Besides that demands regard categories like 'other educational services' not included in EU obligations and not specifically defined. Finally there are demands dealing with 'higher education' and adult education in common, where the limitation of the EU to privately financed services is concerned. Other demands refer specifically to testing of educational services.*' (Emphasis added.) The authors' own translation further suggests, '*The ministry actually writes, that there are requests targeting higher education services and adult education services 'in general', i.e., irrespective of the EU's limitation to privately funded services. In other words, there have been requests which go beyond privately funded HE services.*'

¹⁰⁶ Some might argue that the EU's horizontal limitation on Market Access [Commercial Presence] protects UKHE: '*In all EC Member States services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.*' An explanatory note reads, '*Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations.*'

(Taken from the EU's 1994 commitments, see endnote 13.) However, in the context of further liberalisation this horizontal limitation would appear to be of little relevance to UKHE. Firstly, it is highly questionable whether UKHE is considered a *public utility*. Perhaps more importantly, the act of liberalising UKHE would (it seems likely) imply a belief that this will expose the sector to some level of foreign competition. However, if there is uncertainty over whether this '*public utility*' limitation exempts UKHE then any commitments in the commercial presence mode of supply - potentially the most valuable mode of supply - could be perceived as being of limited value, since the UK would retain the possibility of closing down competition from foreign HE providers by imposing a monopoly on the sector.

¹⁰⁷ If the PFS limitation was removed, EU member states opposed to going any further than existing 1994 commitments (such as Belgium - see endnote 94) could attempt to achieve 'stand-still' by inscribing, for example, 'Belgium: Unbound for publicly-funded services' in the relevant parts of the EU's schedule.

¹⁰⁸ See endnote 94 for report on OECD/US forum on trade in education services, by David Robinson, Associate Executive Director (Policy and Communications) of the Canadian Association of University Teachers (CAUT).

¹⁰⁹ Patricia Hewitt, Secretary of State for Trade and Industry, answering a GATS-related question from MP Nigel Jones [47418], 10 April 2002.

¹¹⁰ For general background on 'recognised' and 'listed' institutions, see <http://www.dfes.gov.uk/recognisedukdegrees>. As a general point of information, a convenient central repository of information about UK-based universities and colleges is the HERO (Higher Education and Research Opportunities in the United Kingdom) website, <http://www.hero.ac.uk>

¹¹¹ <http://www.open.ac.uk/validate/validation.html>

¹¹² 'A clear distinction is made between validated awards and degrees gained through undertaking the Open University's own distance courses. The autonomy of the accredited institutions is recognised and reflected in the design of validated degree certificates. This encourages students to identify with the accredited institutions where they follow their validated degree courses.'

¹¹³ The OUVS, for example, validates over 200 institutions both in the UK and abroad.

¹¹⁴ See endnote 78

¹¹⁵ This section focuses on England because financial support mechanisms are different in other parts of the UK. Crucially, however, the basic principle of government paying most (or all) of the tuition fees for students studying at publicly-funded institutions is common across the home countries, although in Scotland (for example) students make no up-front contribution to their tuition fees. (Thus contrasting with the situation in England, described later on in the section.) There are also variations in student maintenance support; this is the jurisdiction of the devolved Parliaments and assemblies. The generic term 'student support' is often used to encompass both tuition fee support and maintenance support, even though in practice the relevant funding originates from different parts of government. For a full explanation of student support in England and Wales see <http://www.dfes.gov.uk/studentssupport> (Welsh residents can also visit www.learning.wales.gov.uk), in Scotland see the Student Awards Agency for Scotland (SAAS - <http://www.student-support-saas.gov.uk>) and in Northern Ireland see Department for Education and Learning (Northern Ireland.)

¹¹⁶ 'You should be eligible for support if you are on any course which comes within the definitions of a publicly-funded college. You should also be eligible for limited support towards your tuition fees and for a student loan if you are taking a course at a private college which has been specifically named for student support. For you to receive this support, the course needs to have been specifically designated for student support purposes.' 'Financial support for higher education students in 2002/2003 - A Guide', <http://www.dfes.gov.uk/studentssupport/uploads/finance2002.doc>

¹¹⁷ This was established through personal communication with Warwickshire County Council Local Education Authority (LEA). To see evidence of this, consider the following extract from the website of Richmond, the American International University in London: 'The Open University Validation Service has validated all of Richmond's undergraduate degree courses. As a result, UK and EU nationals who have been permanently resident in the EU region for at least 3 years are eligible to receive a UK Government grant of approximately £1000 each year towards tuition fees.' <http://www.richmond.ac.uk/admissions/undergraduate/scholarships.html#gov>

¹¹⁸ See <http://www.buckingham.ac.uk/study/fees/grants.html>. 'A grant towards tuition fees for full time students from the UK or elsewhere in the EU is available from the Student Loan Company (SLC)... For eligible students this grant is mandatory and not subject to any means test. In 2001/02 the value of the award is £630 per term, i.e. £2,520 a year.' The above information, and the availability of the student loan mechanism to Buckingham students, confirmed by personal communication with SLC.

¹¹⁹ 'Eligible students attending private institutions, i.e. which are not maintained from public funds, will have non-means-tested fees of £1,025 paid by the SLC. (The fee rates payable by the SLC for students attending the University of Buckingham, Guildhall School of Music and Drama, and Heythrop College are, however, higher than £1,025.)' (emphasis added.)

<http://www.richmond.gov.uk/depts/ops/eal/education/services/awards/studentssupport.htm#06>

¹²⁰ It could be argued that this equal treatment argument does not hold because Buckingham is a recognised institution and therefore its services are 'unlike' those provided by foreign HE providers operating in the UK, who are not recognised. However, Buckingham has not always been a recognised institution; the government endowed it with degree-granting status in the early 1980s after it proved that its qualifications were worthy of degree status. Foreign HE providers could argue that they too should at least have the chance to ascend to recognised status and if successful receive the same privileges as Buckingham. This gets complicated because the issue then becomes whether degree-granting status is a one-off process or something that has to be periodically reaffirmed. If the latter, then this strengthens the argument that foreign HE providers should be allowed in on the process. (In addition, it is worth noting that Buckingham and foreign HE providers do potentially occupy the same, committed GATS sector, because the category that core HE activity falls under is defined as education 'to degree level or equivalent.' - emphasis added.) There is also an interesting issue here pertaining to likeness. If a foreign HE provider awards, for example, Open University degrees, is it really fair (in the trade sense) to argue that it provides a different service to the University of Buckingham? Such questions bring the regulatory nuances of the UK Higher Education sector into sharp relief.

¹²¹ As discussed in Section 5.2.3, the QAA is currently in transition from a 'subject review' mechanism (i.e. assessing actual teaching quality) to an 'institutional audit' mechanism, where an institution's own internal quality assurance mechanism is checked instead.

¹²² The following exchange in Parliament (Nov 2000) demonstrates this fact:

'Mr. Bercow: To ask the Secretary of State for Education and Employment what assessment he has made of the work of the University of Buckingham. [134796]

Mr. Wicks: The Quality Assurance Agency for Higher Education (QAA) carries out reviews of the effectiveness of institutional arrangements for the management of the quality and standards of academic provision in all higher education institutions that receive public funding from the Higher Education Funding Council for England (HEFCE) and therefore subscribe to the Agency. The University of Buckingham is an independent university which does not receive any public funding from the HEFCE. There are, therefore, no requirements for any assessments of the work of the University of Buckingham to be undertaken by the QAA. However, the University of Buckingham is a voluntary subscriber to the QAA for academic quality audit.'

<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo001102/text/01102w08.htm>

¹²³ It is potentially also significant that two of the other private institutions that receive enhanced grants (London Guildhall School of Music and Drama, and Heythrop College) have already had at least some of their courses put through the QAA. For example, Heythrop College had its Theology and Religious courses assessed in November 2001 (http://www.qaa.ac.uk/revreps/subjrev/All/q445_01.pdf) and LGSM&D was subject to the QAA in May 1999 (<http://www.qaa.ac.uk/revreps/instrev/Guidhall/foreword.htm>)

¹²⁴ Also, any successful WTO challenges based on the Buckingham precedent could be (relatively) easily neutralised by withdrawing financial (and other) privileges from Buckingham. Successful challenges to UKHE could not be so easily addressed because of the number of institutions involved (and their importance.)

¹²⁵ Article II - Most Favoured Nation (MFN) - is also mentioned occasionally in the context of subsidies. MFN's non-discrimination between trading partners requires that, if subsidies are made available to services and suppliers of one WTO member, the same subsidies be made available to like services and suppliers of all WTO Members.

¹²⁶ 'Thus national treatment commitments free of subsidy-related limitations require that any subsidies granted are non-discriminatory as between national services and service suppliers and the like services and service suppliers of other Members.' WTO document S/WPGR/W/9

¹²⁷ EU's 1994 commitments, see endnote 15

¹²⁸ In its 1994 schedule the US demonstrates a much firmer line on protecting subsidies. Among its horizontal limitations, the US lists 'All Sectors: Subsidies [Mode] 1) Unbound, [Mode] 2) Unbound' in both the National Treatment and Market Access categories. (WTO document GATS/SC/90) Such a mechanism could be used to shield subsidies in Mode 3 (i.e. Commercial Presence), if desired.

¹²⁹ In 'Perilous Lessons' (see endnote 72), p.112-3, a number of technical criticisms are levelled at this horizontal limitation. (The Canadian schedule employs the same wording as the EU schedule.) Apart from the inherent ambiguity of the limitation, the most serious omission of the limitation seems to be that it is entered into the National Treatment column only, and not the Market Access column. It could be argued that differential subsidization based on 'specific type of legal entity' (e.g. public or not public) constitutes a Market Access violation, because it has the effect of limiting market access for providers of a particular legal nature. (Article XIV.2(e))

¹³⁰ As discussed in Section 3.4.1, foreign HE providers can currently offer UK-recognised degrees but only through a validation partnership with a recognised UK institution. It seems plausible to argue that the lower levels of subsidisation received by most private (and thus also foreign) HE providers is one of the major remaining trade barriers in the UK HE sector.

¹³¹ 'Student aid is the logical next step for us,' says Omer E. Waddles, executive vice-president of ITT Educational Services, a for-profit company with institutions in 27 states enrolling about 25,000 students. 'If we're good enough to pass state standards, to meet the bar where states raised it, then our students should have fair standing to access taxpayer dollars to finance their education.' The Chronicle of Higher Education, 'For-Profit Colleges Aim to Take a Share of State Financial-Aid Funds', September 24, 1999.

¹³² <http://www.hefce.ac.uk/Learning/>

¹³³ See 'Funding higher education in England: How the HEFCE allocates its funds', Reference 01/14, March 2001.

http://www.hefce.ac.uk/Pubs/hefce/2001/01_14.htm Degree courses are split into several categories, and some degree courses (e.g. laboratory-based subjects) receive more funding per student than others. There are various other weighting mechanisms, but the underlying principle is that institutions are funded on a per-capita basis.

¹³⁴ This question is raised in Universities UK, 'The Business of Borderless Education: UK Perspectives (Summary Report)' p.32

<http://www.universitiesuk.ac.uk/bookshop/downloads/BorderlessSummary.pdf>: 'An associated question is the extent to which it is the role of the higher education funding bodies to protect existing institutions or to obtain optimal value for money, perhaps by creating the conditions for private providers to enter the undergraduate marketplace.'

¹³⁵ In Section 4.3.1 we note that UKHE institutions may also use research funds to offset risks in teaching activities.

¹³⁶ See endnote 89

¹³⁷ David Price, Alyson M. Pollock, 'Extending choice in the NHS: Implications for national sovereignty and trade rules have not been realised', British Medical Journal, Volume 325 (10 August 2002), p. 293-4

¹³⁸ Research and Development Services are covered in the UN Central Product Classification (CPCprov) system - the classification system upon which the WTO's list of service sectors has been based (see endnote 10) - as sectors CPC 851-853, see <http://millenniumindicators.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=85>, and described as 'Research and development services consisting in scientific progress achieved in the various fields of natural or social sciences in the three areas of R&D, i.e. basic research, applied research and experimental development.' The sector sub-divides into R&D for 'Research and experimental development services on natural sciences and engineering' (CPC 851), 'Research and experimental development services on social sciences and humanities' (CPC 852) and 'Interdisciplinary research and experimental development services' (CPC 853). Each sector further sub-divides into individual subject categories. For example, under CPC 851 there is the category 'Research and experimental development services on physical sciences' which reads, 'Research and experimental development services on physical sciences, including research and experimental development services on heat, light, electromagnetism, astronomy, etc.'

¹³⁹ The EU's 1994 commitments, see endnote 15.

¹⁴⁰ At present, few foreign HE providers have an interest in undertaking research.

¹⁴¹ The EU's 1994 GATS commitments, (see endnote 15), declares that (across all sectors) National Treatment afforded to foreign providers established by commercial presence is 'Unbound for subsidies for research and development.'

¹⁴² See endnote 106

¹⁴³ 'Funds for teaching and research are provided as a block grant. Institutions are free to distribute this grant internally at their own discretion, as long as it is used to support teaching, research and related activities.' (See the HEFCE document discussed in endnote 133, p.4)

¹⁴⁴ Leaked request from EU to Switzerland, <http://www.gatswatch.org/docs/EU%20requests/046-02.pdf>

¹⁴⁵ The University of Buckingham website, for example, notes that: 'From the outset it was essential that the academic standards for Honours degrees were directly comparable with those of the established British universities. The term 'Licence' was used to describe the qualifications of Honours level awarded by the University of Buckingham... As a result of the high standards set, recognition by distinguished associations followed swiftly. The Law Society, Institute of Chartered Accountants in England and Wales, the Institute of Bankers and many more, all accepted the Licence.' <http://www.buckingham.ac.uk/facts/history/more.html>

¹⁴⁶ Jessica Woodroffe, 'GATS: A Disservice to the Poor', World Development Movement, January 2002, p. 27-28, www.wdm.org.uk

¹⁴⁷ Throughout minutes of Working Party on GATS Rules meetings this issue comes up time and time again, particularly (and crucially) in the context of subsidies. For example, in July 2001 WPGR meeting (S/WPGR/M/33), the Brazilian delegate comments that, 'Existing [subsidy] disciplines were not sufficient to address trade-distortive effects of subsidies, in particular because the scope of national treatment across modes was not clear'. In the April 2001 WPGR meeting (S/WPGR/M/31) the Brazilian, Swiss and China / Hong Kong delegates all refer to this question. The Chinese / Hong Kong delegate, for example, comments that 'there was a lack of jurisprudence concerning the likeness of services supplied under different modes.' The Brazilian delegate refers back to document S/WPGR/W/9 - a background note by the WTO Secretariat - where the question (as yet unanswered) is asked, 'There remains a crucial question: does the national treatment obligation extend across modes of supply, or do members retain the freedom to discriminate between identical services supplied in their territory through different modes?'

¹⁴⁸ 'If "likeness" of a service is defined independent of the mode of supply, then there is built-in protection within the Agreement for foreign suppliers of services through all modes against national subsidization in a particular mode. In effect, if a Member were to subsidize its own service or service supplier, the national treatment obligation would make it necessary to provide an 'equivalent' subsidy to the services of other Members supplied within its territory, irrespective of the mode of supply. Otherwise, it could be argued that the subsidy had modified the conditions of competition in favour of services or service suppliers of the Member.' WTO, 'Subsidies and Trade in Services', Note by the Secretariat, S/WPGR/W/9, 6 March 1996. Although there have been rulings related to this 'likeness' question since the Note the issue remains unresolved and is frequently referred to in the minutes of Working Party on Gats Rules (WPGR) meetings. (See, for example, WTO documents S/WPGR/M/31 - S/WPGR/M/34.)

¹⁴⁹ For example, if one foreign HE provider has access to the UK market through the 'cross-border supply' mode of supply (e.g. an e-University) and similar provider has access through the 'commercial presence' mode of supply (e.g. a franchise operating in UK territory) then it may be a violation of National Treatment to discriminate between their services, including the disbursement of subsidies, if the services are considered alike. WTO negotiators acknowledge that this may contradict existing GATS schedules where WTO Members often inscribe different National Treatment limitations in the four modes of supply. It also ties in with a related question about the limits of national jurisdiction in the award of subsidies: could a government ever be called on to subsidise service providers or services operating outside their national territory? WTO documents suggest not - 'There is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member.' (Scheduling of Initial Commitments in Trade in Services: Explanatory Note, WTO document MTN.GNS/W/194.) However, this appears to leave open questions about how subsidies should be dealt with when a provider is based outside national territory but delivers its service within

national territory (e.g. internet courses.)

¹⁵⁰ See WPGR (Working Party on GATS Rules) minutes S/WPGR/M/30-34, for example.

¹⁵¹ An actual export subsidy might be (for example) where the government gives foreign students studying in the UK much higher maintenance subsidies than domestic students.

¹⁵² The WTO document 'Guidelines and procedures for the negotiations on trade in services' (WTO Document S/L/93, 29 March 2001) declares that, 'Members shall aim to complete negotiations under Articles VI:4, XIII and XV prior to the conclusion of negotiations on specific commitments.' (emphasis added.) Given that specific commitments will be finalised before the end of the Doha round, this sets the 1st January 2005 as (at present) an outside completion date. The July 2002 document S/WPGR/7 (setting out the future work programme for the Working Party on GATS Rules) reports that, on the issue of subsidies, future work will include, '(a) to continue discussion on subsidies on the basis of submissions from Members and materials available; (b) to encourage Members to put forward submissions on subsidies as early as possible before 31 March 2003, without prejudice to Members' right to put forward further suggestions and raise relevant issues; (c) the Chairperson to circulate a note by 30 June 2003 to report on the progress of work; and (d) to prepare for the opportunity provided by the Fifth Ministerial Conference to take stock of progress made in the negotiations.' (The Fifth WTO Ministerial Conference is in Cancun, Mexico, September 10-14, 2003.)

¹⁵³ At the time of writing the Subsidies negotiations have mainly comprised general discussion, so it is by no means clear how any disciplines emerging as a result of the Article XV mandate would be structured. However, a number of WTO negotiators have acknowledged that the disciplines could apply across the board; in the May 2001 WPGR meeting (S/WPGR/M/32) the Argentinean negotiator comments that, 'Subsidy disciplines could apply to all measures which were not captured by the schedules of specific commitments.'

¹⁵⁴ See, for example, Jeroen Ansink, 'US denounces 'protectionism' of European education market', <http://www.nuffic.nl/nuffic50years/usdenoun.html>

¹⁵⁵ Prof. Dr. Dirk Van Damme, 'Convergence in European higher education: confronting or anticipating the global higher education market?' President of Vlaamse Interuniversitaire Raad (VLIR), Belgium. Presented at Nuffic 50 Years conference, 'The global higher education market', March 2002. <http://www.nuffic.nl/nuffic50years/index2.html> Speech available from <http://www.nuffic.nl/nuffic50years/pdf/dammespeech.pdf>

¹⁵⁶ WTO, 'Working Party on GATS Rules: - Subsidies and trade in services - Note by the Secretariat', 1996. Document S/WPGR/W/9.

¹⁵⁷ Indeed, it is possible that any new disciplines developed might in some areas extend the power of GATS to discipline subsidies, while in other areas extend national autonomy in the award of subsidies. Whilst some WTO Members have made positive suggestions that protection for subsidies in socially sensitive areas could be introduced under the Article XV mandate, it seems politically unlikely that negotiations under the Article XV mandate will extend protection beyond that currently afforded by the GATS text. (In particular, the possibility of withdrawing certain types of subsidisation from the reach of National Treatment would probably be strongly resisted.) Notably, the Article XV mandate leans in the direction of tackling trade-distortions rather than re-opening the existing agreement.

¹⁵⁸ WTO. See http://www.wto.org/english/tratop_e/scm_e/scm_e.htm. 'The WTO Agreement on Subsidies and Countervailing Measures disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. Under the agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty ('countervailing duty') on subsidized imports that are found to be hurting domestic producers.'

¹⁵⁹ Article 8.2 of the SCM comments that, 'The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term 'fundamental research' means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.'

http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#ftnt25

¹⁶⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

¹⁶¹ Where revenues are negative (i.e. supplying the service costs money rather than makes money) cross-subsidisation is sometimes called *risk pooling*. However, for simplicity we use cross-subsidisation to refer to both revenue-positive and revenue-negative activities.

¹⁶² It seems likely that UKHE institutions that attract significant research funds (through the RAE for example) cross-subsidise heavily from research to teaching. UKHE institutions which struggle to win sufficient research funds through the RAE - a problem exacerbated in the 2001 RAE by heavy redistribution in favour of high-scoring research departments - probably attempt, where possible, to use teaching revenues to support their research activities.

¹⁶³ As endnote 133.

¹⁶⁴ For example, some courses may 'scale' more efficiently than others e.g. after high initial outlay there is a net saving for every extra student attracted to the course, up to a certain point.

¹⁶⁵ See <http://www.jcpsg.ac.uk/transpar/>

¹⁶⁶ For a good introduction to such concepts, see 'What's good about the NHS and why it matters who provides the service', UNISON, April 2002, <http://www.unison.org.uk/acrobat/B325.pdf>

¹⁶⁷ BBC News on-line, 'Q&A: The Post Office crisis', 13 June 2002, <http://news.bbc.co.uk/1/hi/business/1792069.stm> Lists nine reasons for the present difficulties faced by the Post Office. Two are related to the introduction of competition into the sector. 'The sudden plunge into the red reflects a combination of events that have rapidly changed Consignia's balance sheet over the past two years... The partial opening of the postal delivery market to private competition... Stiff competition in the Parcelforce business has caused spiralling losses from its international division.'

¹⁶⁸ For example, see the CHEA/ACE letter of June 2001 to USTR, http://www.chea.org/international/papovich_wto.html and the ACE letter of June 2002, <http://www.acenet.edu/washington/letters/2002/06june/papovich.gats.cfm>

¹⁶⁹ See, for example, 'Call for private sector to pay for training NHS staff', The Guardian, September 27, 2001.

<http://society.guardian.co.uk/conferences/story/0,9744,559097,00.html> 'Currently the NHS invests in training Britain's doctors and nurses and therapists. Many of whom are lured into the private sector from the NHS... In no other area of business practice does one bidder for a contract underwrite all the training costs of its main competitor.'

¹⁷⁰ According to 'More to third mission than counting pounds', THES, 9 August 2002, there were 199 spin-off companies created in the 1999-2000 academic year, compared with 338 in the previous five years

¹⁷¹ 'Blair backs bid to commercialise research', The Guardian, July 26 2002, <http://education.guardian.co.uk/higher/news/story/0,9830,763884,00.html>

¹⁷² GATS Article VIII (Monopolies) stipulates that a designated monopoly should not interfere in sectors beyond its monopoly rights if this causes a violation of the member's GATS commitments in those sectors. This also applies to exclusive service suppliers; it could be argued that UKHE institutions (plus the University of Buckingham) are exclusive service suppliers because, with respect to degree-granting powers (i.e. recognised status), the government '(a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.' The crux of the matter is whether UKHE satisfies condition (b); this clearly intersects with the 'in competition with one or more suppliers' debate surrounding Article I.3. (See Section 3.3.2.)

¹⁷³ CPC 96311 - 'Library Services' - is described as, 'Services of libraries of all kinds. Documentation services, i.e. collection, cataloguing, whether manually or computer-aided, and retrieval services of documents. The services may be provided to the general public or to a special clientele, such as students, scientists, employers, members, etc.' (emphasis added)

¹⁷⁴ As a parallel, the (still contentious) idea that domestic regulation can constitute protectionism is a relatively new development that emerged as a direct result of growth in international trade in services.

¹⁷⁵ 'Council of Canadians, Canadian Union of Postal Workers find little comfort in decision to open NAFTA hearings to observers', press release, Council of Canadians, 24 July 2002, http://www.canadians.org/display_document.htm?COC_token=024PK24&id=423&isdoc=1&catid=103

¹⁷⁶ UPS are using Chapter 11 of NAFTA as the basis of their suit. This was intended to be a *defensive* mechanism to discourage countries from expropriating the assets of companies investing in their territory e.g. by nationalising private assets.

¹⁷⁷ Recall that in Section 3.4 we showed how foreign HE providers can already secure minor levels of subsidisation, but that this is significantly less than levels of subsidisation made available to UKHE institutions.

¹⁷⁸ The US Chronicle of Higher Education (www.chronicle.com) maintains a site dedicated to the activities of the for-profits at <http://chronicle.com/indepth/forprofit/>

¹⁷⁹ 'Colleges, Fighting U.S. Trade Proposal, Say It Favors For-Profit Distance Education', Chronicle of Higher Education, January 18, 2002

¹⁸⁰ This seems particularly likely if their UK presence is just one arm of a global operation. Such multinational economies of scale are often indicative of an expansionist strategy inclined to aggressively promote the 'level playing field' agenda. Also, economies of scale increase the influence that the HE provider enjoys within its country of origin, thus strengthening the dialogue between the provider and the trade officials mandated to maximise national exports.

¹⁸¹ It should be noted that a small number of commentators take a somewhat extreme view on QA (in the international sense) and argue that QA is unnecessary in a completely consumer-driven education market. That is, consumers will 'vote with their feet' and simply withdraw their custom if they perceive the quality of the education product to be unsatisfactory. However, this extreme, market-oriented view is rejected by the vast majority of HE stakeholders, who recognise (albeit for different reasons) that some level of regulation in education systems is necessary.

¹⁸² Article VI.4: *'With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.'*

¹⁸³ As an example of this, a DG Trade official has reportedly commented that Article VI.4 is viewed as a good opportunity (by DG Trade) to discipline the 'protectionist' tendencies of local planning law, *within* the EU. Anonymous source.

¹⁸⁴ David Hartridge, former Director of the WTO Secretariat Services division, Letter to the Observer, April 26 2001, http://www.wto.org/english/tratop_e/serv_e/hart_letterapril01_e.htm

¹⁸⁵ The wording of other clauses of Article VI is such that they definitely only apply to domestic regulations in *committed* sectors and modes of supply. However, the wording of Article VI.4 is ambiguous: it could be interpreted as applying horizontally to *all* sectors and modes of supply.

¹⁸⁶ Michelle Swenarchuk, 'From Global To Local: GATS Impacts on Canadian Municipalities', Canadian Centre for Policy Alternatives, p.7, May 2002, www.policyalternatives.ca

¹⁸⁷ To recap, the QAA is the quality assurance agency (mainly for teaching) in UK Higher Education and describes its function as, 'promot[ing] public confidence that quality of provision and standards of awards in higher education are being safeguarded and enhanced.' (<http://www.qaa.ac.uk/aboutqaa/aboutQAA.htm>) Throughout this paper we use the term QAA fairly loosely to refer to both the agency and the quality assurance process it undertakes.

¹⁸⁸ The government seeks to promote accountability and (its perception of) quality in *research* through the competitive Research Assessment Exercise (RAE). An institution's performance in the RAE determines the amount of research money it is allocated by HEFCE. As discussed later on in the Section, the QAA also has a role *'advising on the grant of degree awarding powers and university title'*, and it has a role in the process through which institutions apply for *research* degree awarding powers.

¹⁸⁹ There is a separate discussion to be had regarding the collision of the domestic QAA debate with that surrounding international trade in HE. Within the mainstream these debates are conducted separately and an amalgamation of the debates appears long overdue. The factoring in of the international trade dimension has the potential to radically change the parameters by which the domestic QAA debate is conducted and thus warrants further attention.

¹⁹⁰ Recall that domestic, private HE providers other than Buckingham have already been through the QAA.

¹⁹¹ Firstly, audit by the QAA is for the most part a process that UKHE institutions (and other publicly-funded institutions) go through as a *consequence* of their publicly-funded status. Secondly, validated foreign HE providers operating in the UK would (arguably) have quite a strong claim on public funds solely on the grounds that the UK already has a number of publicly-funded domestic providers (e.g. degree-granting FE colleges) which are listed i.e. validated but not recognised. Perhaps most importantly, subjection to the QAA is only one of many conditions tied to public funding. So the idea that the QAA might be the principle gateway to public funding does not quite hold up.

¹⁹² *'The Quality Assurance Agency for Higher Education in the UK has developed detailed guidelines for the quality assurance of distance learning. It distinguishes between the qualities of the means of delivery, course content, communication, administration and student support'* Taken from a piece by Simon Marginson (Monash Centre for Research in International Education, Australia) as part of the CHEA (Council for Higher Education Accreditation) occasional paper, 'International Quality Review: Values, Opportunities, and Issues.', June 2002. The relevant QAA paper is 'Guidelines for the Quality Assurance of Distance Learning', at www.qaa.ac.uk

¹⁹³ Throughout minutes of Working Party on GATS Rules meetings this issue comes up time and time again, particularly (and crucially) in the context of subsidies. For example, in July 2001 WPGR meeting (S/WPGR/M/33), the Brazilian delegate comments that, *'Existing [subsidy] disciplines were not sufficient to address trade-distortive effects of subsidies, in particular because the scope of national treatment across modes was not clear'*. In the April 2001 WPGR meeting (S/WPGR/M/31) the Brazilian, Swiss and China / Hong Kong delegates all refer to this question. The Chinese / Hong Kong delegate, for example, comments that *'there was a lack of jurisprudence concerning the likeness of services supplied under different modes.'* The Brazilian delegate refers back to document S/WPGR/W/9 - a background note by the WTO Secretariat - where the question (as yet unanswered) is asked, *'There remains a crucial question: does the national treatment obligation extend across modes of supply, or do members retain the freedom to discriminate between identical services supplied in their territory through different modes?'*

¹⁹⁴ See 'Europe's Bean Counters Are Sneering', January 28, Business Week Online, 2002 http://www.businessweek.com/magazine/content/02_04/b3767714.htm

¹⁹⁵ See, for example, 'Now audit fears hit UK', The Observer, July 14 2002, <http://www.observer.co.uk/economy/story/0,1598,754714,00.html>

¹⁹⁶ On the QAA's website, it mentions that one of its functions is, *'advising on the grant of degree awarding powers and university title.'* <http://www.qaa.ac.uk/aboutqaa/aboutQAA.htm>

¹⁹⁷ In many areas of work a condition of employment is that the person's relevant qualifications are recognised by the relevant professional body. (In the case of law, for example, the Law Society.) As such, endorsement of an academic course by the QAA may not in itself be helpful if the relevant professional body refuses to recognise the qualification. In some ways, then, this tradition could be

viewed as a guarantor of quality even if national standards are eroded under trade regimes. However, professional bodies may themselves be implicated under GATS. Mode 4 liberalisation - allowing professionals and workers from other countries to work in your country - could lead to a situation where the need for workers to secure recognition from the relevant national professional body is considered protectionist and unduly trade restrictive. This brings into sharp focus the tension between the right of a country to determine its own professional standards and the deregulation of labour mobility. There have already been arguments on this theme regarding an EU directive designed to allow foreign healthcare professionals the right to work within the UK (or other EU member states) without first securing recognition from the relevant UK professional body.

¹⁹⁸ For an excellent introduction see Prof. Dr. Dirk Van Damme, 'Trends and Models in International Quality Assurance and Accreditation in Higher Education Services in Relation to Trade in Educational Services', presented at OECD/US forum on trade in educational services, Washington, May 23/24, 2002, <http://www.oecd.org/pdf/M00029000/M00029607.pdf>

¹⁹⁹ The QAA currently assesses the quality of UKHE activities in other countries. See QAA Handbook for institutional audit: England, July 2002, p.3, http://www.qaa.ac.uk/public/inst_audit_hbook/audit_handbook.pdf This model has also been adopted by the Australians.

²⁰⁰ UNESCO is the United Nations Education, Scientific and Cultural Organisation.
http://www.unesco.org/education/studyingabroad/tools/conventions_e97_cover.shtml

²⁰¹ See Explanatory Memorandum to The UNESCO/Council of Europe Code of Good Practice in the Provision of Transnational Education.

²⁰² From the summary of presentation by Professor Drummond Bone (Royal Holloway, University of London), 'The GATS Talks – Should Higher Education be Liberalised or Protected?' at 'The Future of Higher Education: Profits, Partnerships and the Public good' conference, 14 June 2002, <http://www.neilstewartassociates.com/jb137/evtAgenda.htm>

²⁰³ Dr. Per Nyborg, 'The Lisbon Convention and a possible relation to GATS in higher education', Chairman, Committee for Higher Education and Research, Council of Europe, 16 April 2002, <http://www.uhr.no/internasjonalsamarbeid/utskrifter/LISBON%20and%20Gatts.htm>

²⁰⁴ 'Foreign Audits Under Threat', THES 1st Feb 2002

²⁰⁵ 'The European Higher Education Area' Joint declaration of the European Ministers of Education, convened in Bologna on the 19th of June 1999, <http://europa.eu.int/comm/education/socrates/erasmus/bologna.pdf>

²⁰⁶ Concerns have also been raised (especially in the UK) that Bologna is somewhat top-down and thus attempts to commit HE sectors to a particular academic structure that they may not feel is appropriate.

²⁰⁷ See <http://europa.eu.int/comm/education/prague.pdf>

²⁰⁸ <http://www.hefce.ac.uk/Partners/euniv/>

²⁰⁹ e-University introductory flyer, http://www.ukeuniversitiesworldwide.com/docs/eUni_leaflet.pdf

²¹⁰ As previous endnote, p. 3.

²¹¹ This again raises the question of whether the degree courses provided by foreign HE providers operating in the UK (e.g. those that have been validated by a recognised institution) are 'like' the degree courses provided by UKHE institutions. Certainly, if foreign HE providers attain recognised status and access to public funds then the chances of their courses being considered 'like' UKHE courses increases significantly.

²¹² The omnipresence of e-Universities makes them potentially extremely significant in the GATS framework. A UK student looking to pursue an internet-based degree could use the HEFCE e-University or a foreign one, but the HEFCE version would have a subsidy that the foreign version does not. This probably wouldn't mean the UK had to release the subsidy to the foreign e-University also - since that would, it seems, fall outside the UK's territorial jurisdiction - but it might require the subsidy to be removed. This question is linked to our discussion of subsidies and Article XV (Section 4.2.2.)

²¹³ The US has identified economic needs tests as barriers to trade in HE that it would like to see removed. (US December 2000 proposal, see endnote 89)

²¹⁴ 'News in brief', THES, August 23, 2002.

²¹⁵ Such measures are called 'non-discriminatory quantitative restrictions' and are prohibited by GATS.

²¹⁶ Other unpredictable NAFTA features have since emerged. For example, 'The Canadian government assertion that public education is 'not negotiable' mirrors the government's statement during the FTA and NAFTA debates, when it was claimed that water was not covered in either treaty as it had not come up in negotiations. More recently, the Canadian government has quietly acknowledged that many types of water are indeed covered by NAFTA; in fact, representatives have pointed to NAFTA coverage as a key impediment to the introduction of federal legislation to prevent bulk water exports.' 'Perilous Lessons: The impact of the WTO Services Agreement (GATS) on Canada's Public Education System', Jim Grieshaber-Otto and Matthew Sanger, p.182

²¹⁷ Luke Eric Peterson, 'Dusted-off trade treaties ensure there is no such thing as a free riot', The Guardian, May 6 2002, <http://www.guardian.co.uk/business/story/0,3604,710620,00.html>. See also 'Challenges Under Bilateral Investment Treaties Give Weight to Calls for Multilateral Investment Rules' (http://www.iisd.org/pdf/2001/trade_law_commentary.pdf) and 'Changing Investment Litigation. Bit by Bit' (http://www.iisd.org/pdf/2001/trade_inv_litigation.pdf) by the same author.

²¹⁸ See Universities UK, 'The impact of higher education institutions on the UK economy', May 2002 <http://www.universitiesuk.ac.uk/bookshop/downloads/economicimpact.pdf>. (See 'Dynamic demands respect', THES, June 21 2002 for an overview.)

²¹⁹ 'Dynamic sector demands respect', THES, June 21st, 2002

²²⁰ See endnote 71, page 24

²²¹ Article VII: Recognition also requires WTO Members to allow other WTO Members to seek access to those recognition agreements

²²² See endnote 71, page 28

²²³ 'EU to review the opening of public services', Financial Times 8th August 2002. 'But France has been attacked by other EU member states angry that state-controlled Electricité de France made acquisitions in their countries while the French market remained largely closed.'

²²⁴ See, for example, 'Commodification of education and GATS', website of ESIB (NUSes in Europe), <http://www.esib.org/commodification/documents/index.htm>, 'The General Agreement on Trade in Services: An Impact Assessment for Higher Education in the UK', Alex Nunn, on behalf of the AUT (Association of University Teachers) <http://www.esib.org/commodification/documents/AUTImpact.pdf>

²²⁵ 'GATS and Resistance: The Case of UK Higher Education and Knowledge-Based Restructuring in an International Context', Alex Nunn.

²²⁶ 'Free and Fair', The Guardian, May 29, 2001, <http://www.guardian.co.uk/Archive/Article/0,4273,4193905,00.html>

²²⁷ 'Research restrained', THES, 8 March 2002

²²⁸ '...staff are to be employed through U21 Global as instructors, designers, markers and managers. Such staff are to be hired through a tendering process, and on individual contracts. As such intellectual property would remain with the employer U21 Global. Affiliates are quite rightly concerned about the unbundling of academic work that accompanies such an approach, as well as the loss of intellectual property rights. The experience of online learning in our own country suggests that some academics do not have intellectual property rights over their own course materials.' Extract from presentation referenced in endnote 3

²²⁹ 'The limits of the market: universities and the knowledge economy', speech by Peter Scott (Vice-Chancellor of Kingston University) at 'The Global Higher Education Market: Shifting Roles, Changing Rules' Nuffic conference, The Hague, March 19, 2002. <http://www.nuffic.nl/nuffic50years/pdf/scottsspeech.pdf>

²³⁰ See Frank Newman and Lara K. Couturier, 'Trading Public Good in the Higher Education Market', January 2002. Report produced for the Observatory on Borderless Higher Education (OBHE).

²³¹ For example: *'The dilemma that, if widespread virtual provision is felt to be desirable in the existing undergraduate market, only the entry of private sector competitors, or exceptionally strong central decision-making, will give enough impetus to drive change within the existing sector. This could only happen if a body such as DfEE were to increase fees to a level which would attract new market entrants.'* page 32, 'The Business of Borderless Education: UK perspectives' (Summary Report), CVCP/HEFCE, July 2000. <http://www.universitiesuk.ac.uk/bookshop/downloads/BorderlessSummary.pdf>

²³² 'Privatising Halls of Residence', UNISON paper, February 2002, <http://www.unison.org.uk/acrobat/B308.pdf> . See also: 'Students 'priced out' of privatised halls', BBC news on-line, <http://news.bbc.co.uk/1/hi/education/1928471.stm>