

The GATS' Article I, paragraph 3....

Introduction

As the World Trade Organization continues to forge ahead with its negotiations on the General Agreement on Trade in Services (GATS), the public is beginning to sit up and take notice. This increased awareness stems from the fact that more and more writers and political observers around the world are focusing on the topic of the GATS and its potentially harmful effect on the public services sector worldwide. In addition, public lectures, public demonstrations, email listservs and Internet web sites have all done their part to bring the issue into a more public light. GATS supporters have been responding consistently with the assurance that public services like libraries will not be affected by the GATS because they will be protected under Article 1:3 of the agreement, which exempts "governmental services." According to GATS proponents, there is nothing to worry about.

What they fail to point out however, is that Article 1:3 of the GATS is far from explicit in its goals. The text is ambiguous, rendering several interpretations possible, each with very different potential consequences for the public sector.

Individuals trying to understand what the GATS agreement means and what its consequences could be will likely find themselves swimming in a sea of legal-ese that obscures the real significance of the text. The explanation that follows, focusing on Article 1:3 and its potential impact on libraries, will hopefully serve to clarify some of the most salient points and assist readers in drawing their own conclusions regarding the GATS and its potential impact on the public services sector.

What is Article 1:3?

Article 1, Paragraph 3 of the GATS defines the scope of the agreement as follows:

- (b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
- (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

What it really means...

Clause (c) above constitutes the potential danger to libraries and the public sector. It appears to mean that "if a service is provided on a non-commercial basis but in competition with other suppliers or on a commercial basis but without competition, it is not a service supplied in exercise of governmental authority." (1)

Two possible examples of Article 1:3:c in action in libraries could include i) a fee-based business/market research service attached to a library's reference department. While this kind of service would most likely find itself competing with companies in the private sector offering similar services, Article 1:3:c seems to indicate that it wouldn't matter if that were the case; simply offering a service on a commercial basis could make the library in question ineligible for "government service" status. Secondly, ii), according to Article 1:3:c, public libraries' provision of free Internet service could make libraries "competitors" of for-profit companies operating in the same sphere. In both examples above, these libraries would presumably no longer be considered to be services "supplied in the exercise of governmental authority." The crux of the matter revolves around how Article 1:3 is interpreted.

Possible interpretations

As Steven Shrybman, a Canadian lawyer noted for his work on the GATS and other WTO agreements points out, the wording of the clauses in Article 1:3 means that their interpretation is open for speculation. (2) One interpretation in the event of a challenge from the private sector might view the public role of the library as a whole to be the overriding factor, despite the commercial or competitive nature of any of its parts, and might overturn the challenge, ruling that libraries provide services "in the exercise of governmental authority." On the other hand, it could just as easily be decided that if any aspect of the service being provided is operating commercially and/or in competition with another provider, the GATS rules apply. In this case, the public service role provided by libraries would not enter into the equation. The problem is that we simply do not know how the clauses in question would be interpreted in the event of a challenge.

Should a foreign service provider bring forth a challenge against a library, the interpretation of these clauses would rest with the WTO's Dispute Settlement Body (DSP) which is made up of trade experts and is known for its corporate-friendly rulings. If the WTO chose to follow its own precedent, set over the course of numerous past dispute resolutions, the clauses of Article 1:3 could be interpreted in such a way that any evidence of a library's provision of commercial and/or competitive service could disqualify it from government service status.(3)

According to Ellen Gould, GATS researcher for the Transnational Institute in Paris, and Murray Dobbin, "at the October 14, 1998 meeting of the Council for Trade in Services, the body responsible for services at the WTO, it was agreed that: 'exceptions provided in Article I:3 of the Agreement [the exemption for governmental services] needed to be interpreted narrowly.'"(4) This means that libraries' public role and provision of equitable access to information would not be taken into consideration and the GATS rules would be applied to libraries in strict accordance with clause (c) of Article 1:3.

How can public services like libraries be protected?

The goal of the GATS, explicitly stated in the preamble of the agreement, is simple: "the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations." (5) By introducing fee-for-service arrangements in their efforts to survive the funding challenges of our times,

libraries have unwittingly opened themselves up to the potential of a challenge from the private sector under the GATS. Furthermore, libraries' provision of equitable access to the Internet, in competition with private sector providers of the same service, could also bring libraries into the GATS' line of fire.

As Shrybman suggests in his exhaustive report on the GATS, prepared for the Canadian Library Association and other interested parties,

“The most effective way to guard against the corrosive influence of this regime would be to establish that public sector libraries are entirely exempt from the GATS disciplines as services delivered ‘in the exercise of government authority’ under Article 1:3 of the text. Should this effort fail, it would then be critical to ensure that measures concerning public sector libraries remain free from *National Treatment, Market Access* and other GATS commitments that would be invoked if commitments are made that affect the services provided by this public sector.”
(6)

Conclusion

Clearly, there is something to worry about where the GATS is concerned. GATS proponents like to cite the governmental exemptions clause (Article 1:3:b) in defense of the agreement and to calm those worried about privatization of the public sector. As we have seen however, Article 1:3 is far from clear about its role in the protection of public services and may in fact open the door to successful challenges from the private sector. As Steve Shrybman suggests, the solution (short of canceling the GATS altogether) is to carve out a guarantee in clear, unambiguous language, that public services will be protected from GATS rules and will remain, without question, in the public sphere.

It is my hope that, armed with this knowledge, more and more people will be able to participate in the debate raging over this issue, and to contribute, in whatever way they deem appropriate, to its resolution.

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