

**AN ASSESSMENT OF THE IMPACT OF THE GENERAL AGREEMENT ON
TRADE AND SERVICES ON POLICY, PROGRAMS AND LAW CONCERNING
PUBLIC SECTOR LIBRARIES**

PREPARED FOR

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EXECUTIVE SUMMARY

Providing universal access to information, literature and other artistic and cultural works; promoting literacy and academic excellence; and, supporting Canadian writers are core to the mandates of public sector libraries. These represent the societal goals that libraries exist to serve and which justify the public funding support they depend on. In many ways the rationale for public sector service delivery is in conflict with the principles of trade liberalization that are fundamental to the General Agreement on Trade in Services (GATS).

In simple terms, the GATS seeks to constrain government policy and regulatory options in favour of free market solutions. Public sector libraries on the other hand serve a public policy agenda that intends to correct the failure of free markets to meet broader community goals such as universal access to information and literacy.

Given this inherent contradiction, it is not surprising that the application of GATS disciplines to government measures concerning public sector libraries is consistently problematic. Indeed as the following assessment reveals, there are few features of the policy and regulatory landscape concerning public sector library services that can be easily reconciled with GATS disciplines.

It is conceivable that such conflicts might erupt into full blown international trade challenge. The confluence of economic, strategic and legal events that might give rise to such a challenge are difficult to anticipate. But whether library services ever become embroiled in WTO dispute resolution, it is certain that GATS disciplines will be a ubiquitous feature of governmental policy and legislative processes including those relevant to the future of Canada's public sector libraries.

THE WTO FRAMEWORK

For public sector libraries, the two most important agreements of the World Trade Organization (WTO) are the Agreement on Trade Related Intellectual Property (TRIPS) and the GATS. The TRIPS agreement establishes unprecedented and binding international rules concerning various forms of intellectual property rights (IPRs), including copyright. It also incorporates by reference the Berne and other conventions established under the auspices of World Intellectual Property Organization (WIPO). By doing so, it lends to those conventions the powerful enforcement machinery of the WTO regime.

The implementation of truly binding international disciplines concerning copyright is already shifting the locus of public policy debate concerning such matters to the

international arena. Moreover, the prominent role that the TRIPs will play in transforming domestic policy and law concerning copyright has been made apparent in a recent and successful WTO challenge by the European Union to US copyright legislation. The TRIPs Agreement is likely to be as important to the content of library services as the GATS will be to determining the role of public sector libraries as content providers.

THE GATS FRAMEWORK

It is clear that the GATS is intended to have very broad application. For example, Article I provides: *This Agreement applies to measures by Members affecting trade in services.* The term “measure” is also defined expansively and includes: *any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.*

Furthermore the GATS applies to all levels of government including local municipalities. It also applies to: *non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities* - such as library boards.

At the risk of noting the obvious, the GATS is not about services per se. In fact, with the exception of services delivered by public agencies and crown corporations, the Agreement makes no attempt to regulate the delivery of services. Rather the GATS, as is the case for most WTO Agreements, seeks to constrain government measures that apply to a particular aspect of the economy - in this cases services. In the simplest terms the GATS establishes a catalogue of measures that may not be maintained or established by government to regulate or otherwise affect the delivery of services by the private sector.

Services Defined

While the term services is not explicitly defined by the GATS, the broad application of this Agreement has been brought home by rulings arising from the two WTO disputes to have invoked its rules. Both decisions interpreted the term “affecting trade in services” to include government measures which may only incidentally affect services. This explains how WTO dispute bodies concluded that government measures concerning the production and trade in goods (bananas in one case, automobiles in the other) nevertheless violated GATS disciplines because of their collateral impact on marketing and distribution services related to these goods.

In light of the fact that most government measures, whether concerning goods, intellectual property, or investment are likely to have at least an incidental impact on related services

it may be difficult to identify government policies, programs, or regulation that would not be caught within the ambit of GATS constraints.

An Expansive Definition of “Trade”

Another element of the GATS regime that imparts a broad mandate, arises from the definition of “trade in services” which is defined to include the supply of a service in any one of four modes of supply: 1) cross – border; 2) to consumers abroad; 3) by establishing a domestic commercial presence; and, 4) through the presence of natural persons.

Obviously only one of these modes of service supply actually involves cross border trade in services. It is important therefore to recognize that the concept of international trade is so distorted by this definition that it captures broad spheres of domestic policy, programs and law that may have little if anything to do with international trade in services per se. This point is fundamental to understanding the relevance of the GATS to libraries and library services that operate almost entirely within a local context.

GATS DISCIPLINES

The ambition of the GATS is ultimately to establish a comprehensive and binding international code that will apply to all services. But the GATS is still very much a work in progress as much of its agenda has yet to be completed. As it currently stands, only certain GATS provisions apply across the board to non-exempt services.

Concomitantly, the most onerous constraints of this regime apply only to services which have been specifically and voluntarily submitted to GATS disciplines. This is accomplished through a process of listing a service to country specific schedules which delineate the precise extent to which GATS obligations will be observed with respect to that particular service sector. The complexity of this listing process has generated considerable uncertainty about the extent of commitments made by Canada concerning several service sectors, including public sector libraries.

CANADIAN COMMITMENTS AND LIBRARY SERVICES

The first and most important point to note is that Canada has as yet made no commitments with respect to library services as defined by the service sector classification scheme upon which it is relying. This means that even if not exempt pursuant to Art I.3(c), library services would only be subject to the less onerous GATS disciplines of general application.

However while Canada has declined to list library services, commitments it has made in the service sectors of computer technology, telecommunications, and research and development may expose important public sector library services to the full array of GATS obligations.

CRITICAL ISSUES

Are Public Sector Libraries Exempt Under the GATS?

The only general exception to the comprehensive inclusiveness of the GATS is for services supplied *in the exercise of government authority* - a term which is defined to mean; *any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.*

In other words, to fall within the ambit of this definition a service must satisfy two tests. The first is that it not be supplied on a commercial basis. The second, that it not be supplied in competition with one or more service suppliers. The term “commercial” is not defined. A key question then is whether this exception applies to either some, or all public sector libraries.

There is a reasonably strong argument that public sector libraries would be seen as supplying services on a non-commercial basis. This is most clearly the case for the typical municipal library supplying services either for free or at nominal cost. However, even this picture may be clouded where library fees are more substantial, certain services are offered on a cost recovery or for-profit basis, or there is a public- private partnership involved. The greater these commercial and private sector influences, the more attenuated the claim to non-commercial status. Moreover it is conceivable that some aspects of library service may be deemed to satisfy this test, but others fail.

The more difficult point to establish is that public sector library services are not supplied in competition with the private sector. While the more traditional services provided by public libraries may not compete with other service suppliers, this is not the case for on-line or digital library services. In other words, the bricks and mortar or more traditional library services may be excluded as supplied in the exercise of government authority while on-line and digital information services are not. This coincides of course with the areas of competition with private sector suppliers of e-book and e-library services. The difficulty of characterizing library services in accordance with this static definition is exacerbated by the dynamic character of the technological and business environment within which information and communications services are now converging. Thus, with the proliferation of private information service providers and their ever increasing

incursion into the domain of traditional libraries, satisfying the second *governmental authority* test may become increasingly difficult.

Consider, for example, library services offered by a private company to primary school students and under contract with a public school board. Would the non-commercial status of the traditional school be transformed by such an arrangement? Conversely, would the presence of a private for-profit service provider in one school or school district suddenly place all other school libraries on a competitive footing, thereby undermining their exempt status under the GATS?

Unfortunately the unprecedented scope and character of GATS disciplines make these questions difficult to answer. But this example serves to highlight the shifting terrain that public sector libraries must successfully negotiate. This underscores the importance of preserving the public policy

flexibility that will inevitably be needed to meet new and unforeseen challenges. Unfortunately the GATS was designed to constrain policy and regulatory options but for those that would further liberalize this sector.

Are On-line Library Services Committed ?

If all or some public sector libraries services are subject to the overall framework of the GATS, the next question concerns the extent to which GATS rules would apply to such services. As noted, Canada has made commitments under the headings *Research and Development* and *Communications* that include services which are provided by public sector libraries. But its decision to make no commitments of library services per se raises the question of how this apparent contradiction would be resolved.

This raises the very real concern that on-line library, and certain research and development services would fall within the ambit of current Canadian GATS commitments. In this case, government measures relating to public sector libraries providing such services would be subject to the full array of GATS obligations, subject to any limitation Canada may have declared.

However, as is the case with respect to the definition of *government authority*, the issue of duplication and overlap among GATS classification regimes is the subject of competing interpretations. Accordingly, the CLA may want to urge the federal government to clarify the status of public sector library services like those that have been listed by Canada to its schedule of GATS commitments. The purpose of this clarification would be to more clearly establish the intent to make no commitment of library services, whatever the mode of supply.

THE APPLICATION OF GATS DISCIPLINES TO PUBLIC SECTOR LIBRARIES

Mindful of the considerable uncertainty that exists with respect to the status of public sector library services under the GATS, the following considers the impact of GATS disciplines should they apply to all or some of the services supplied by this sector.

Non-Discriminatory or National Treatment

The first principle of the GATS is non-discriminatory treatment by governments of services and services providers whatever their origin or mode of service delivery. This obligation is engendered in several GATS provisions. Foremost among these is the *National Treatment* obligation that governments accord foreign service providers treatment "*no less favourable than it accords to its own like services and service suppliers.*"

This obligation immediately impugns government policies, programs, regulatory and funding arrangements upon which public services depend, but which inherently discriminate against private sector service providers. In other words, by failing to distinguish between private and public sector services suppliers, the GATS fails to acknowledge the validity of, or provide scope for policies, programs and regulations which may explicitly or effectively favour public sector service providers.

Moreover, governments would not be able to justify such discriminatory treatment as being necessary to the pursuit of such public policy goals as universal service, and literacy. While certain general exceptions are permitted by the GATS, the goals that public sector libraries exist to serve are not among them.

If subject to *National Treatment* obligations government measures that exist for the express purpose of supporting public sector services are vulnerable to a challenge that they discriminate against private sector, for-profit service providers. Potential targets for such complaints would include:

- all forms of public funding support - including direct grants, research and development funding, and the Postal Book Rate;
- the preferential tax treatment that many libraries enjoy including their status as registered charities; and,
- the use of public infrastructure at marginal or no cost.

As we have seen, public sector libraries depend upon a framework of public policy, law, funding and institutional support for their viability. Virtually any element of this framework may *a priori* be seen as violating *National Treatment* because it exists to serve public sector libraries in preference to private for-profit alternatives.

Market Access obligations are additional to those of *National Treatment* and impose a number of substantive constraints on non-discriminatory government measures. One of these constraints is particularly relevant to public sector libraries and prohibits "measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service." This obligation would apparently preclude any specification that particular services be provided by governments, or public institutions such as public sector libraries.

Monopolies and Exclusive Service Suppliers

Article VIII *Monopolies and Exclusive Service Suppliers*, imposes many of the same constraints on public sector service providers that limit the options of government. Public sector service providers are also directed by this rule to "not abuse [their] monopoly position to act in a manner inconsistent with [its] commitments."³

The way in which such constraints may be invoked to challenge public sector services has recently been illustrated by a challenge to Canadian public postal services which has invoked a similar provision included in the North American Free Trade Agreement. That challenge has been made by United Parcel Service of America under the extraordinary enforcement procedures of NAFTA investment rules, but the gist of its argument would be just as applicable under the GATS.

In essence, UPS is arguing that by making its delivery infrastructure and personnel available to support its parcel and package services, Canada Post has abused its monopoly position to support non-monopoly and competitive services. UPS also complains that public postal service infrastructure which has been established at public expense, therefore represents a subsidy when utilized by Canada Post to provide competitive parcel and courier services. It is also challenging the preferential tax treatment that such facilities are accorded by virtue of their status as the property of a federal crown corporation.

While public sector libraries have no monopoly mandate, it is not difficult to imagine similar arguments being made about the use of public sector library infrastructure to support on-line services that may compete directly with the private sector. After all, public libraries enjoy preferential tax status, and rely upon infrastructure established at

public expense. Moreover, unlike Canada Post, public sector libraries operate with the benefit of ongoing public subsidies.

During a time when a great deal of Internet service is still available at low or modest cost, the availability of free on-line information and data base services delivered by public sector libraries may have little impact of private sector companies in the same service space. However, if those private providers begin, as expected, to migrate to a fee for service business model, public sector competition is likely to become more of an issue. It is in anticipation of such developments that libraries should understand the relevance of these GATS provisions.

Subsidies and Grants

Subsidies and grants are explicitly considered government measures under the GATS and subject to *National Treatment* obligations. However, specific disciplines on “trade distortive” subsidies are only now being developed as a component of the current round of negotiations. But consultations may be requested by a WTO member where it considers itself adversely affected by public funding by another WTO party concerning services. The concern here is that GATS rules may be invoked to challenge public funding for library service providers for reasons similar to those just canvassed.

If public sector library services are considered to fall within the ambit of “services supplied in the exercise of government authority” then the question of subsidies is largely moot. However, if public sector libraries services, or some aspect of them are deemed to fall within the GATS framework then the issue of public funding is absolutely crucial to the viability of this sector.

Qualification and Licensing Requirements

The issue of licensing and qualification standards is relevant to the certification of library professionals or the qualifications required for employment. Because the GATS applies to “*non governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities*” it would apply to decisions by library boards and other bodies concerning the professional qualifications of librarians and library personnel. In other words, under the provisions of GATS rules concerning *Domestic Regulation* the judgment of library boards concerning staff qualification would now have to comply with requirements of this GATS provision. This in turn would expose the decisions of these “non governmental bodies” to question or challenge for offending the subjective and vague criteria of this provision.

Conclusions

As we have seen, the full application of GATS disciplines to public sector library services is likely to undermine the institutional, funding, programmatic and regulatory framework upon which this public sector depends. 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 application of GATS disciplines as services delivered “in the exercise of government authority” under Article I: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. As we have seen this may have already occurred with respect to on-line library services because of Canada’s commitments in the area of communications. A commitment of certain R&D services causes a similar problem.

This underscores the importance of clarifying the overlap and duplication among Canada’s service sector listings in favour of preserving the integrity of Canada’s decision not to list library services.

Finally we should note that in the worst case scenario the full application of GATS disciplines to public sector libraries might not produce any immediate impact. However, over the longer term the vulnerabilities we have described are likely to exert a corrosive influence on the public policy, funding, programmatic and regulatory actions that will be needed if libraries are to continue to achieve their mandates in a dynamic information and business environment.

Moreover, GATS disciplines are likely to come to the fore as competition from public sector libraries become more of a factor for e-library or other private sector digital content providers.

Current Negotiations

Despite the failure of the WTO Ministerial in Seattle in 1999, talks geared towards expanding the GATS began early in the year 2000. This is because the GATS is part of what is called the WTO’s “built-in” agenda, and needs no new political mandate to proceed.

The U.S. has a considerable strategic interest in services trade liberalization because of the importance of services to its economy. In May 2000 it put forward a “road map” designed to accelerate GATS negotiations, advocating an “ambitious mandate” for

removing restrictions on trade in services “ across all services sector” and “covering all ways of delivering services.”

In March 2001, Canada submitted its own position papers. Canada’s proposal for the GATS “Negotiating Guidelines and Procedures” states that the negotiations will not “cover those services specifically excluded by the GATS i.e. services supplied in the exercise of governmental authority.” However, for reasons explained above, this statement does not guarantee that public sector services such as those provided by libraries will be off the negotiating table. The Canadian position moreover does not call for any clarification of the governmental authority exemption in the GATS, despite the problems with it that have been raised within the WTO itself.

These are issues with respect to which the CLA may wish to make its views known.

INTRODUCTION

This analysis explores the impact of the WTO General Agreement on Trade in Services (GATS) on government policy, programs and funding arrangements concerning public sector libraries. It describes a landscape which is only now being fully explored and which offers few fixed guideposts by which to chart a certain course.

The GATS was established in 1995 as one of several international agreements housed within the framework of the World Trade Organization. While the basic principles of trade liberalization are firmly established in the GATS, it remains a work in progress with several key elements still to be negotiated. Moreover, most Canadian service sectors have yet to become subject to the full application of those GATS disciplines which are now in place.

We must begin therefore by noting the difficulty of making confident predictions about the impact of an international services agreement that has no precedent and few analogues. Nevertheless certain conclusions can be drawn even as efforts continue to complete the GATS agenda. The most important of these concerns the difficulty of reconciling the trade liberalization objectives of the GATS with the public policies and programs needed to ensure an ongoing and vital role for public sector libraries.

Providing universal access to information, literature and other artistic and cultural works; promoting literacy and academic excellence; and, supporting Canadian writers are core to the mandates of public sector libraries. These represent the societal goals that libraries exist to serve and which justify the public funding support they depend on. But the rationale for public sector service delivery is in many ways at odds with the privatization or "pro competitive" bias of the GATS which is woven throughout its provisions, and apparent in WTO discussion papers and background notes. In our view these conflicts are reflective of a fundamental and underlying contradiction that exists between these respective policy agendas.

Simply put, the GATS seeks to constrain government policy and regulatory options in favour of free market solutions. But public sector libraries are the expression of a public policy agenda that intends to correct the failure of free markets to meet broader community goals such as universal access to information and literacy.

Given this inherent contradiction, it is not surprising that the application of GATS disciplines to government measures concerning public sector libraries is consistently problematic. Indeed as the following assessment reveals, there are few features of the policy and regulatory landscape concerning public sector library services that can be easily reconciled with GATS disciplines.

Therefore if public policy, programmatic and regulatory prerogatives concerning public sector libraries are to be sustained it will be critical to ensure that such measures are exempt from the application of GATS disciplines.

The most satisfactory way to achieve this goal is for Canada to seek a formal clarification of GATS rules to resolve any doubt that all public sector library services fall within the ambit of the general exception allowed under the GATS for services “delivered in the exercise of government authority.”

As a necessary adjunct to such a clarification, it is also crucial for Canada to stipulate that its commitment of communications, and research and development services under the GATS were not intended to apply to such services when supplied by public sector libraries.

Should either of these objectives not be realizable, there are other steps that can be taken to at least ameliorate the impact of GATS disciplines on this public sector. The most important of these being to resist pressure to list library services among the sectors that will be subject to the full array of GATS disciplines.

As the following assessment reveals the advent of binding international agreements concerning investment, services and intellectual property rights is very decidedly shifting the nexus of public policy formulation from domestic to international arenas. For those wishing to participate effectively in shaping future policy, programs and law - a certain measure of international trade literacy has become the price of admission.

PART I: THE GENERAL AGREEMENT ON TRADE IN SERVICES

THE WTO FRAMEWORK

The basic framework of international trade agreements is embodied in the General Agreement on Tariffs and Trade (GATT) which was established in 1947. Those rules have been periodically amended by successive rounds of trade negotiations that have often spanned several years. Prior to the Uruguay Round, which got underway in 1986, the GATT framework only applied to trade in goods.

With the establishment of the World Trade Organization, nine years later, the ambit of international trade disciplines was very substantially expanded to include broad new spheres of public policy and law that may have little to do with international trade in a more prosaic sense. Among the most ambitious additions to the GATT regime were

agreements concerning intellectual property and services. Both Agreements have obvious relevance to libraries and library services.

The advent of these WTO Agreements have ushered in a new era which has dramatically elevated the importance of international trade agreements to what had, prior to 1995, largely been the preserve of domestic policy, programs and laws.

For public sector libraries, the two most important agreements of the WTO are the Agreement on Trade Related Intellectual Property (TRIPS) and the GATS. Both Agreements are legally separate from the GATT itself but nevertheless part of the overall WTO institutional framework.

Trade Related Intellectual Property Rights (TRIPS)

It is beyond the scope of this opinion to consider the impact of the WTO TRIPS Agreement on public sector libraries in any detail. However, because of the critical role it is likely to play, we offer the following brief overview.

The TRIPS agreement establishes unprecedented and binding international rules concerning various forms of intellectual property rights (IPRs), including copyright. It also incorporates by reference the Berne and other conventions established under the auspices of World Intellectual Property Organization (WIPO). By doing so, it lends to those conventions the powerful enforcement machinery of the WTO regime.

Until the establishment of the TRIPS as part of the WTO framework, multilateral rule-making in the IPR area had been dominated by WIPO, which still has administrative responsibility for most of the important IPR conventions.

But like most international conventions and treaties, WIPO agreements lacked effective enforcement mechanisms. For several key WIPO conventions that gap has now been filled because the WTO establishes an effective global enforcement regime to compel adherence to all WTO requirements. When confronted with an adverse WTO ruling, the losing party has two options: shed the offending policy, program, practice, law or regulation – or pay the price in trade sanctions. Moreover because of the principle of cross-retaliation, sanctions can be applied to any aspect of the offending nations international trade economy – in other words, where they will be most keenly felt.

Thus, when the US felt that Canada was moving too slowly to implement an adverse WTO ruling concerning its efforts to protect Canadian publishers from US split-run

magazines, it threatened to impose roughly \$300 million in retaliatory trade sanctions. Among the various exports targeted, was steel made by Heritage Minister Sheila Copps' constituents.

The implementation of truly binding international disciplines concerning copyright is already shifting the locus of public policy debate concerning such matters to the international arena. Moreover, the prominent role that the TRIPs will play in transforming domestic policy and law concerning copyright has been made apparent in a recent and successful WTO challenge by the European Union to US copyright legislation.¹

That case involved a challenge by the European Communities (EC) to provisions of the US Copyright Act establishing certain limitations to the exclusive rights of copyright holders. The "Fairness in Music Licensing Act", created a "fair-use" exemption for small commercial establishments that were not, so the US claimed, "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".²

The case sheds important light on how the WTO might deal with an analogous challenge to other measures also intended to take advantage of the fair use exemption to the rights of copyright owners. Addressing the question of fair-use the WTO tribunal summarily dismissed the notion that it is the non-commercial character of the use that should be determinative. Rather it was the commercial impact of the exemption that mattered in its view. Yet it is the need to balance private proprietary claims and the broader public interest – or, in other words, to reconcile commercial and non-commercial values, that lies at the heart of public policy concerning intellectual property.

We offer this very brief description to make the point that the TRIPS is likely to be as important to the content of library services as the GATS will be to determining the role of public sector libraries as the purveyor of that content. For this reason, the CLA may wish to consider the impact of the TRIPS on public sector libraries more thoroughly at some point.

¹ UNITED STATES – SECTION 110(5) OF US COPYRIGHT ACT, (WT/DS160/5 OF 16 APRIL (1999).

²Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Congress., 2nd Session 75 (1976), as reproduced in Exhibit US-2.

NAFTA

The other international trade agreement that is relevant to Canadian service sector is the North American Free Trade Agreement (NAFTA). NAFTA is a regional agreement dealing with trade and investment among the three NAFTA partners - Canada, the U.S., and Mexico. Chapter Twelve of this treaty sets out various disciplines that apply to services trade and raises some of the same problems and concerns that arise under the GATS.

However, in many ways the scope of NAFTA services disciplines are narrower than is the case under the GATS. For example, there are no direct analogues for some GATS provisions that are particularly invasive of the domestic policy sphere.³ Furthermore, NAFTA services rules do not apply to local governments.

Concomitantly, the scope of Canadian reservations under NAFTA for non-conforming measures are in some ways broader. For example under Annex II to NAFTA Canada has listed a reservation for social services established or maintained for a public purpose, including public education and public training.

However unlike the GATS, unless explicitly excluded all service sectors are subject to NAFTA *National Treatment* obligations. Moreover, NAFTA investment rules accord foreign investors a unilateral right to invoke binding international arbitration to enforce their rights under the treaty by claiming damages for such violations. Investor-state claims are now becoming increasingly common and the availability of such procedures substantially increases the risk of NAFTA disputes that may impact services.

While NAFTA services rules are not directly amenable to such private enforcement procedures, the provision of services particularly through the commercial presence of foreign service providers would necessarily involve investments and therefore be subject to foreign investor claims.

It is true that the right to invoke investor-state procedures under NAFTA is limited to investors of another NAFTA Party. However it will be common for international service providers from non-NAFTA countries that may be providing services in Canada to have a commercial presence in other NAFTA jurisdictions as well. In most cases, this would be sufficient to allow them access to NAFTA's enforcement machinery.

³ For example, there are no NAFTA provisions analogous to GATS rules concerning Market Access (Article XVI) or Domestic Regulation (Article VI).

It is beyond the scope of this assessment to provide a detailed exploration of NAFTA services disciplines as they apply to public sector libraries, nor to consider how this regime might evolve if the Free Trade Area of the Americas (FTAA) initiative does proceed. However the risk of foreign investor claims concerning library services is sufficiently serious in our view to warrant further consideration. If significant disputes are to erupt between private, for-profit library service providers and public sector libraries, there is a good chance that NAFTA's private enforcement procedures will provide the vehicle.

THE GATS FRAMEWORK

Government Regulation of Services

It is clear that this WTO agreement on services is intended to have very broad application. For example, Article I of the GATS provides:

This Agreement applies to measures by Members affecting trade in services (emphasis added).

The term "measure" is also given expansive definition by Article XXVIII which provides that:

"measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

Article I(3) of the GATS further stipulates that it applies to all levels of government, including local municipalities and to:

non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

By explicitly binding non-governmental entities, the GATS represents an important departure from typical GATT practice.

At the risk of noting the obvious, the GATS is not about services per se. In fact, with the exception of services delivered by crown corporations and other public agencies, the Agreement makes no attempt to regulate the delivery of services. Rather the GATS, as is the case for other WTO Agreements, seeks to constrain government regulations, policy, programs and law as these may apply to a particular aspect of the economy - in this case services.

This obvious point might seem unnecessary to make. Indeed the rationale for and benefits of the GATS have often been touted in terms of de-regulation and privatization.⁴ But the WTO has recently contested this characterization of the Agreement's intent.⁵

Notwithstanding recent WTO commentaries however, there should be no confusion about the affect of the GATS which in the simplest terms is to establish a catalogue of measures that may not be maintained or undertaken by government to regulate or otherwise affect the delivery of services by the private sector.

Services Defined

While the term services is not explicitly defined by the GATS, the broad intent of this Agreement has been made clear in the two WTO decisions to have addressed the meaning and application of GATS rules. The first involved a US challenge to certain import preferences accorded by the EU to banana imports from its former colonies. The other arose from a challenge to the Canada-US Autopact by Japan and the EU.

In both cases, GATS disciplines were given very liberal application. For example both rulings interpret the term "affecting trade in services" to include government measures which may only incidentally affect services. This explains how WTO dispute bodies concluded that government measures concerning the production and trade in goods (bananas in one case, automobiles in the other) nevertheless violated GATS disciplines because of their collateral, albeit marginal impact on marketing and distribution services related to these goods.⁶

In light of the fact that most government measures, whether concerning goods, intellectual property, or investment are likely to have at least an incidental impact on related services it may be difficult to identify government policies, programs, or regulation that would not be caught within the ambit of GATS constraints.

Thus to comply with WTO disciplines, government measures will in many cases have to meet the strictures established by several WTO agreements. Thus it is possible that a

⁴Trebilcock and Howse, *The Regulation of International Trade*, Routledge, October 1999, p. 226

⁵ WTO, Trade in Services Division. *GATS Facts and Fiction*, 2001

⁶ See WTO disputes concerning Canada's Auto Pact: *Canada - Certain Measures Affecting the Automotive Industry*, AB-2000-2; and Europe's preferential tariff treatment of bananas imported from certain former colonies under the Lome Convention: *European Communities - Regime for the Importation, Sale and Distribution of Bananas* – AB 1997-3.

measure concerning library services might engage the application of trade in goods (books), intellectual property (copyright), investment (competition) and services disciplines of WTO Agreements. In this fashion, GATS obligations co-exist with those of other WTO Agreements and a particular government measure has to respect the constraints imposed by all relevant WTO Agreements.

Given the protests raised by Canada and the European Union to the application of the GATS in both cases, it may be that the expansive view of these rules which has now emerged from WTO dispute processes was not foreseen. On the other hand the enthusiasm that both parties continue to exhibit for expanding the application of the services regime belies the notion that either is dissatisfied with the result.

The only general exception to the comprehensive inclusiveness of the GATS is for services supplied *in the exercise of government authority* - a term which Article 1.3(c) defines this way:

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.

A key question then is whether this exception applies to either some, or all public sector libraries. Unfortunately the meaning of this key GATS provision is the subject of considerable uncertainty and debate. As one informed critic of the GATS regime has noted, there are very few services that are neither supplied on a commercial basis, nor in competition with other service suppliers.⁷

Even where service providers operate pursuant to statutory mandates that establish public sector monopolies there is often a commingling of commercial and competitive service delivery. We return to consider this critical issue in some detail below.

An Expansive Definition of “Trade”

Another element of the GATS regime that imparts a broad mandate arises from the definition of “trade in services.” Thus, Article 1(2) defines “trade in services” as the supply of a service;

⁷ Sinclair, GATS: *How the World Trade Organization's New “Services” Negotiations Threaten Democracy*, Canadian Centre for Policy Alternatives, 2000.

- (a) from the territory of one Member into the territory of any other Member [cross – border supply];
- (b) in the territory of one Member to the service consumer of any other Member [to consumers abroad];
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member [commercial presence];
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member [presence of natural persons].

Only one of these modalities actually involves cross border trade in services. Because “trade in services” includes services supplied “commercial presence,” foreign service providers are accorded the right to establish businesses in Canada. Thus subsection (c) is really an investment measure more than anything else, which explains why the WTO services secretariat touts the GATS as the first multilateral agreement on investment.⁸

It is important to recognize that the concept of international trade is sufficiently distorted by this definition to affect a broad diversity of government policy, programs and law that may have little if anything to do with international trade in services per se. This point is fundamental to understanding the relevance of the GATS to libraries and library services that operate almost entirely within a local context.

GATS DISCIPLINES

The ambition of the GATS is ultimately to establish a comprehensive and binding international code that will apply to all services. Thus under the heading *progressive liberalization* Article XIX provides:

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 liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the

⁸ Unless removed, this characterization can be found on the GATS homepage on the WTO Internet site.

interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

As it currently stands however only certain GATS provisions apply across the board to services unless otherwise exempt pursuant to Article I(3), Article XIV, or an explicit exemption listed by governments in their scheduled commitments. The more onerous constraints established by the GATS apply only to services which have been specifically and voluntarily submitted to GATS disciplines. This is accomplished through a process of listing a service to country specific schedules which delineate the precise extent to which GATS obligations will be observed with respect to that particular service sector.

As we will see in Part IV of this assessment, the complexity of this listing process has generated considerable uncertainty about the extent of commitments made by Canada concerning several service sectors, including public sector libraries.

Thus GATS obligations fall into one of two categories. The first, are those provisions which apply to all non-exempt services. In trade jargon these obligations are described as “top-down”. The second, apply only to those services with respect to which voluntary commitments have been made - these are “bottom-up” in application.

Expanding the Framework of Trade Disciplines

The first principles of international trade law are those of *National Treatment* and *Most Favoured Nation Treatment*. In the GATS context, these prohibit government actions which discriminate either in favour of domestic or particular foreign services or service providers. These bulwarks of trade liberalization are set out in the first provisions of the General Agreement on Tariffs and Trade (GATT), and provide the foundation for virtually all WTO Agreements.

However, GATS obligations go well beyond the principle of non-discrimination by prohibiting a broad array of government measures however even-handed their design or application. Thus obligations concerning *Transparency* (Article III), *Domestic Regulation* (Article VI), *Monopolies* (Article VIII) and *Market Access* (Article XVI) apply to non-discriminatory government measures of general application.

The inclusion of subsidies within the framework of the GATS represents a similar departure from GATT norms. In reviewing the following core obligations of the GATS it is important to be mindful of the fact that in many instances they capture a broad, but ill-defined domain of public policy and law that has never before been the subject of binding international obligations or trade disciplines

GATS Rules of General Application

Article II: *Most Favoured Nation Treatment*: obligates Canada to make the most favourable treatment provided services and service providers from any WTO member, available to all others.

Article III *Transparency*: effectively establishes an international notice and comment regime whereby all nations must *publish promptly ... all relevant measures of general application which pertain to or affect ... services*, and provide *inquiry points* for those seeking more information. This provision will alert foreign services providers to initiatives they may wish to comment on, discourage or ultimately challenge.

Article VI *Domestic Regulation*:⁹ imposes certain criteria that must be met by non-discriminatory domestic measures if these are to be considered GATS consistent. Work is currently ongoing to develop “any necessary disciplines” concerning “qualification requirements and procedures, technical standards, [and] licensing requirements” to ensure that they do not “constitute unnecessary barriers to trade in services.” Even where such measures are non-discriminatory they are prohibited unless *based on objective and transparent criteria*; are no more *burdensome than necessary*; do not in the case of licensing, impose a *restriction to the supply of the service*; and *are administered in a reasonable, objective, and impartial manner*.

GATS Rules Which Apply to Listed Services

As noted the more onerous constraints imposed by the GATS apply only where specific sectoral commitments have been made. These include:

Article XVII *National Treatment*: this provision requires governments to provide foreign services and service providers with the most favourable treatment it accords to its “own like services and services suppliers.” As we will see, the failure of this provision to distinguish between public non-profit service delivery and private for-profit providers creates significant uncertainty about the impact of this requirement on the government measures concerning public sector libraries.

⁹ Only certain subsections of this Article apply to all services, other requirements only apply to those listed.

Article XVI *Market Access*: this provision requires that market access be provided to foreign service providers with respect to all modes of service delivery in accordance with a country's schedule of commitments. This provision also prohibits various non-discriminatory regulatory controls which might otherwise apply to the provision of services, including limitations on the number of service suppliers, transactions; or service operations; but also *measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service*. This last proviso may impose a significant limit on measures that discriminate in favour of public, not-for-profit service entities, such as public sector libraries.

Article VIII *Monopolies*: this provision requires that monopolies – Crown corporations in Canadian parlance - municipal utilities and others institutions licensed to provide exclusive services – comply with the constraints imposed by the GATS and *not abuse [their] monopoly position*. A similar NAFTA provision has recently been invoked by United Parcel Service of America to assail public postal services illustrating the critical role this constraint may play in determining the future of public sector services.

We will return to consider the application of these disciplines to public sector libraries in more detail in Part V: Critical Issues.

Thus, the extent to which government prerogatives may be subject to GATS constraints depends upon the services it has listed to GATS schedules. Moreover, the listing process is complicated and allows a country to specify which precise GATS disciplines it is willing to embrace with respect to a particular sector. Commitments fall into three broad categories: *Market Access*, *National Treatment* and *Additional Commitments*. Moreover with respect to each of these categories, a country may qualify or limit its commitments to certain modes of supply (e.g. cross border); a certain time frame; or, with respect to particular types of regulatory elements (e.g. controls on the number of service suppliers).

While the complexity of this regime provides ample opportunity for missteps, correcting an error is difficult and likely to be costly.¹⁰ In all of this a country is to be guided by GATS classification schedules which characterize services as belonging to particular sectors or sub-sectors. We return to consider the challenges presented by service sector classification regimes further below.

¹⁰ For example, the creation of monopoly rights with respect to services subject to specific commitments, requires that compensation be paid to foreign service providers who may be affected. See Articles VIII and XXI. Also note that a minor listing error by Canada played an important role in a successful challenge to the Auto Pact.

In addition to this basic framework, two other aspect of this services regime are relevant to this assessment of public sector libraries in the GATS context - these concern procurement and subsidies.

Procurement

Under Article XIII of the GATS, procurement measures are specifically excluded from the core GATS disciplines - *Most Favoured Nation*, *Market Access* and *National Treatment* - unless such services are purchased for commercial resale or to support the supply of commercial services. While this definition introduces some of the uncertainty that attends the meaning of the term “commercial” which isn’t defined by the GATS - it nevertheless may provide some protection for government measures which support public sector library services that would otherwise offend GATS strictures.

Public funding for libraries would not appear to fall within the definition of government procurement. Although there is no authoritative WTO definition of the term, procurement is usually considered to be limited to the purchasing of products and services by governments and government agencies for their own consumption, direct benefit or use. However, there is no agreement on this point and the definition of procurement is a subject of debate within the Working Party on GATS Rules.

However, under both NAFTA and the WTO’s Government Procurement Agreement, which govern rules on procurement by the federal government, the National Library of Canada is specifically included. Thus purchasing by the National Library has to comply with NAFTA and GPA procurement rules. While this may have an impact on library costs, it has no direct relevance to government funding support to the National Library.

Nevertheless procurement policy is important to public sector libraries and could undermine the capacity of libraries to support Canadian writers and foster cultural diversity in Canada through the use of strategic acquisition practices.

Under the GATS negotiating guidelines agreed on in March, 2001, negotiations on procurement will proceed simultaneously with those concerning new commitments. Moreover, there are ongoing and contemporaneous efforts to expand the plurilateral General Procurement Agreement to include not only more countries but subnational governments as well. The CLA may want to maintain a watching brief to ensure that its views are considered as Canada develops its response to these ongoing negotiations.

Subsidies and Grants

Far more important to the future of public sector libraries is the treatment of government subsidies, grants or funding under the GATS. As is the case for procurement, GATS rules explicitly establish a mandate for multilateral disciplines concerning subsidies. Article XV states that: Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services,” and further stipulates that “Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade distortive effects. The development of disciplines concerning subsidies are part of the negotiating mandate established in the March 2001 negotiating guidelines.

The important point is that because subsidies are measures as defined by the GATS they must be allocated in accordance with *National Treatment* in sectors where specific commitments have been made. In such cases, any intention to restrict the availability of subsidies to national as opposed to foreign service suppliers must be specifically indicated in a country’s schedule of commitments.¹¹

The scheduling guidelines make it clear that governments must list limitations on their national treatment commitments if they want to retain “discriminatory” public subsidies:

*Article XVII [National Treatment] applies to subsidies in the same way that it applies to all other measures. Article XV (Subsidies) merely obliges Members to ‘enter into negotiations with a view to developing the necessary multilateral disciplines’ to counter the distortive effects caused by subsidies and does not contain a definition of subsidy. Therefore, any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on national treatment or brought into conformity with that Article.*¹²

As noted, even in the absence of specific commitments *Most Favoured Nation Treatment* must be accorded with respect to subsidy allocations in all sectors where no specific MFN exemption has been lodged. This means that if a subsidy is extended to a service provider from one country, it must be provided on a discriminatory basis to all WTO members. Moreover, Article XV(2) further stipulates that:

¹¹ While GATS subsidies rules are the subject of competing claims and controversy, these basic facts are readily conceded by the WTO GATS Secretariat, see: *GATS - Fact and Fiction*, WTO 2001.

¹² S/L/92, 28 March 2001, Under the General Agreement on Trade in Services (GATS), Adopted by the Council for Trade in Services on 23 March 2001

Any member which considers that it is adversely affected by a subsidy of another member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic treatment.

The decision to include subsidies within the ambit of GATS disciplines represents another marked departure from the approach to subsidies adopted in other international trade agreements. For example, under both NAFTA and the WTO rules concerning trade in goods, subsidies are explicitly excluded. Similarly NAFTA rules concerning services and investment also exclude the application of key disciplines to government subsidies and grants, which accordingly may be provided on a basis that discriminates in favour of domestic not-for-profit service providers.¹³

We return to consider the question of subsidies and public sector libraries in Part V: Critical Issues.

PART II: PUBLIC SECTOR LIBRARIES

OVERVIEW

Canada's not-for-profit libraries are, among other roles, the repositories of Canada's print culture. Public libraries are the only community agency committed to free and unrestricted access for all ages to information resources with the assistance of trained information specialists. They are committed to supporting life-long learning in every Canadian community including the crucial role of developing a love of reading in preschool children.

Canada's libraries in educational institutions, from kindergarten to graduate school, provide the resources necessary for students, faculty and staff to excel. Libraries in government departments and not-for-profit agencies have varying roles with the most important being that played by the National Library of Canada in preserving Canada's print heritage and facilitating cooperation between other libraries in order that citizens have optimum access to library services.

Since the 19th century, Canada's libraries have contributed to Canada's growth and prosperity by fostering a literate and informed citizenry.

Canada's 3400 public sector libraries are diverse in their governance, mandates and sources of funding. Education and special libraries are an integral part of their parent organization, be it a university, community college, school district, government department

¹³ See NAFTA Articles 1108.7 and 1201.2(d).

or not-for-profit agency. Provincial legislation governs education at all levels. Funds for university and college libraries typically come from the province in which they are located with special grants from the federal government, foundations and individual benefactors. Funds for elementary and high school libraries form part of the school budget derived from local property tax and provincial funding.

Municipal libraries, which represent the single largest component of public sector libraries, are typically established by provincial legislation and predominantly funded from the local tax base. A few even operate as quasi city departments. Many public sector libraries are registered as charitable organizations and actively solicit donations.

Irrespective of the type of library, there is a general commitment to resource sharing and cooperative initiatives between libraries, certainly within the type of library groupings and often represented by multi-type library initiatives.

Mandates and Governance Structures

The mandates of public sector libraries are either determined by law, or are established by the institutions they serve. For example, municipal libraries are creatures of provincial statute which will often delineate the service objectives which such libraries must serve and may even stipulate the terms upon which such services are offered.¹⁴

Provincial library statutes will also establish library boards and delineate the basic library governance structure. It is not uncommon for library boards to include community representatives to enhance accountability and increase the responsiveness of public libraries to local needs.

Education and specialized libraries are usually integral components of their parent organizations and operate within the parameters established by the institutions governing board.

Funding

Municipal library revenue comes from a variety of sources but typically 80% or more comes from local property taxes as approved by City Council. Unconditional provincial grants are common and, in a few instances, constitute the largest single component of library revenue. Funds from these two levels of government are supplemented by fines and fees revenue, donations and grants, including short-term project specific funds from the Federal Government. An example of the latter are the significant one-time grants provided by Industry Canada to extend public Internet access in libraries.

¹⁴ For example the BC Library Act provides that library services shall be provided at no cost.

School, university and specialized libraries are predominantly funded through the institutions they serve, or directly by provincial and federal governments. They also receive capital project and other project-specific funding as do municipal libraries.

Many public sector libraries also benefit from tax free status as registered charities, which also provides an incentive for individual donors to support library services. They may also be recipients of indirect government subsidies such as the library book rate¹⁵ that Canada Post provides to libraries operating in rural areas.

PRESSURES

Funding

Like most public and social services, library budgets have suffered during the past decade. In many instances the pressure of budget cuts have become acute leading to service reduction and even library closures. Ongoing pressures continue to adversely affect operating and acquisitions budgets, as well as spending on needed capital and technological infrastructure. One of the more startling indications of the extent to which libraries have been neglected in the ordering of federal spending priorities is the fact that the National Library of Canada building at 395 Wellington Street is so overcrowded that the Ottawa Fire Marshall has declared it a fire hazard.

In response to government funding cuts some public sector libraries have been looking to the private sector for sources of funding. These have resulted in a variety of public-private partnerships including:

- an agreement to include a company logo on a public library card in return for a fee;
- a direct link to Chapters on-line when a book title is displayed on a library webpage in exchange for a percentage of sales that may result; and
- the promotion of for-profit computer training courses on a library webpage, again in return for a percentage of subscription fees.

A number of public libraries also offer research services for a fee including Toronto and Calgary which provide fee-based research services targetted a businesses libraries; or the

¹⁵ Introduced in 1939, the Library Rate (commonly called library book rate) was intended to assist in extending library services to rural areas. The program consists of a subsidy paid to Canada Post by the government of Canada as compensation for the revenue lost by offering lower rates for mailing library books. A new five year contract with Canada Post runs from 1999.

the University of Toronto's business library which provides outsourcing of research services, journal routing, and book circulation to corporations.

While still at the margins, such public-private partnerships may complicate the status of public sector libraries under the GATS and weaken the sectors claim to exempt status under the WTO services agreement.

The need for adequate and secure funding has become central to CLA advocacy efforts during this time, and the association has tabled several proposals to enhance public funding for libraries. These have included proposals to:

- make public library buildings eligible for federal infrastructure grants, as are other locally funded capital infrastructure projects.¹⁶
- establish a Universal Access Fund to provide subsidies to public libraries for purposes which include establishing and servicing public access points as one method for achieving equality in Internet access.¹⁷

One of the key concerns that has been raised about the impact of the international intellectual property and services agreements on public sector libraries is the potential for such regimes to increase costs to libraries, while threatening the security of their funding.

Information Technology

Libraries were early leaders in successfully using information technology to enhance the provision of library services. They were also among the first public sector institutions to recognize that the convergence of computers and high-speed telecommunications networks provided significant opportunities to increase public access to information.

Most Canadian public libraries are now committed to ensuring that **all citizens, regardless of their ability to pay, have access to the information resources on the Internet**. The fact that a growing proportion of important information is now only available through the Internet has brought the issue of universal access to the forefront. As early as 1994 the CLA extended its philosophical and services principles to the then relatively new electronic environment. Thus the CLA's Information and Telecommunication Access Principles state that:

¹⁶Brief Submitted to the Standing Committee on Canadian Heritage's Roundtable in Consideration of the Canadian Book Publishing Industry March 14, 2000.

¹⁷ November 4, 1999 Submitted to: The House of Commons Finance Committee 2000-2001 Pre-Budget Consultation .

*All people have the right to: Literacy; Universal, Equitable, and Affordable Access; Communicate; Public Space on the Telecommunications Networks; and, Privacy*¹⁸

Rising to these challenges, libraries have taken on the vital role of providing community access to the Internet for the communities they serve. Public access computers in public libraries are playing an important role in ensuring that we do not devolve into a society of have and have-nots when it comes to access to the rich resources of the Internet.

But technological change in the areas of telecommunications, and computer technologies have also affected the delivery of library services which are increasingly available online.

The importance of telecommunications to the universal service mandate of public sector libraries has also prompted the CLA and other library groups to become active participants in the public policy debate concerning the regulation of telecommunications services. The CLA has been particularly concerned about the impact of telephone service de-regulation, particularly for the poor and those living in remote and rural areas of Canada.¹⁹

As we shall see, the convergence of telecommunications and library services raises a particular challenge because under Canada's existing commitment the former is subject to virtually all GATS disciplines whereas the latter is not.

Competition from Private On-line Information Providers

The past decade has seen the emergence of a number of dotcom libraries based in the US. For example XanEdu, is one of several e-library services targeting students and academic staff. Xanedu is a division of Bell and Howell and has recently announced a strategic alliance with McGraw Hill, a major academic book and electronic book publisher. Houston based Questia went live in January 2001, with 50,000 digitized books, and advertises its plans to build "the first online service to provide unlimited access to the full text of hundreds of thousands of books, journals and periodicals...."

E-libraries join a growing number of on-line information service providers - such a Lexis-Nexis and PCI Full Text - who through the convergence of computer and telecommunications technologies are transforming the notion of information and library services.

¹⁸ Statement of Executive Council, June 18, 1994

¹⁹ Submission to Canadian Radio-Television and Telecommunications Commission in response to Telecom Public Notice CRTC 97-42 *Service to High Cost Serving Areas* May 28, 1998.

Public sector libraries have also become an important portal to an increasing number of specialized and often expensive on-line information service providers. This is raising concern among such proprietary information service providers that libraries not become a gateway for remote access to such on-line services. In fact, eLibrary, which is a division of Rogers Communications has recently objected to a link on public school web sites to the local public library because it might result in unauthorized use of its products.

As digital and on-line services become more and more prominent for the public and private sector, it is reasonable to expect that direct competition between these sectors will intensify. The role of public sector libraries may become a target as private Internet based library service providers seek to expand their businesses. It is in this context that the GATS is most likely to emerge as an important factor in determining the future of public sector library services.

PART III: LIBRARY SERVICES UNDER THE GATS

In scheduling GATS commitments, Canada and most WTO members have used the United Nations Provisional Central Product Classification (UN CPC) categories and respective codes.

A search of the UN CPC, using library as a key word, produces two references which are to "Data base services" and to "Library, archive, museum and other cultural services." A further description of this UN classification regime relevant to libraries is attached as Appendix [A].

An explanatory note to this key classification indicates that the following services fall within this service sector designation:

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.

Services of archives. Documentation services, i.e. collection, cataloguing, whether manually or computer-aided, conservation and retrieval services of documents, mainly for historical and other scientific purposes.

As we shall see, Canada has declined to list library services in its schedule of commitments. However several other countries have done so including Japan and the USA - see Appendix [B]. The fact that two of the world's most influential economic powers have listed library services suggests that other nations are likely to be pressed to follow suit.

As noted, library services are also referenced under the heading *Computer and Related Services*. Of these, the service area that might have the greatest relevance for libraries is that of data base services. However, library services are explicitly exempt under the definitions set out by the relevant CPC code, which stipulates that “documentation retrieval services [are] classified as library services.”²⁰

Telecommunications are another service sector that will obviously be critically important to the future of libraries and this is well understood by public sector libraries. As the on-line provisions of information services has experienced explosive growth over the past few years competition between public and private institutions in this sphere represents an important challenge for public sector libraries.

The key question then is how conflicts will be resolved when commitments are made under the heading communications services that include on-line information and data retrieval, but not of the underlying service - libraries, health care or education with respect to which no commitments have been made. This is another critical issue we will return to consider further below.

Finally, the other service sector that may come into play for public sector libraries is that of *Research and Development* which is also listed under the heading of *Business Services* in the CPC schedule.

With this overview of the service sector classifications most relevant to public sector libraries we next consider the extent of Canadian commitments in these sectors.

PART IV: CANADIAN COMMITMENTS AND LIBRARY SERVICES

The first and most important point to note is that Canada has as yet made no commitments with respect to library services as defined by the relevant CPC classification. This means that even if not exempt pursuant to Art I.3(c), library services per se would only be subject to the less onerous GATS disciplines of general application.

However while Canada has declined to list library services, commitments it has made in the service sectors of computer technology, telecommunications, and research and development may expose important public sector library services to the full array of GATS obligations.

²⁰ See UNCP Classification 96311. Also see, WTO Council on Trade in Services: Computer and Related Services, Background Note by the Secretariat, S/C/W/45, 14 July 1998.

For example, under the heading *Business Services* Canada has made commitments under the sub-headings:

Computer and Related Services

- a) Consultancy services related to the installation of computer hardware;*
- b) Software/implementation services, including systems and software consulting services, systems analysis, design, programming and maintenance services, excluding those listed under Financial Services;*
- c) Data processing services, including processing, tabulation and facilities management services, excluding Communications Services 2Cn and Financial Services;*
- d) Data base services, excluding those listed under Financial Services; and,*
- e) Maintenance and repair services of office machinery and equipment including computers.²¹*

Research and Development

Research and experimental development services on social sciences and humanities, including law, economics, except linguistics and language.²²

Canadian commitments of computer and related services are unlikely to have any significant impact on public sector libraries. The only troublesome area might have been “data base services” which are defined sufficiently broadly to capture at least some of the on-line services that libraries may provide. As we have noted however, the specific cross-reference to the library services classification indicates that such services are intended to fall outside the parameters of the *Business Services* classification upon which Canada has relied.

Canada’s commitment of certain research and development services is more problematic because of the clear overlap with certain library services, and uncertainty about which listing may prevail in the case of such conflicts.

²¹ GATS/SC/16, 15 April 1994: Canada, *Schedule of Specific Commitments*.

²² *Idem*.

By far the most serious potential conflict however concerns Canada's commitments under the heading *Communications Services* because here Canada has listed:

On-line information and database retrieval;

Electronic data interchange; and,

*On-line information and/or data processing (including transaction processing)*²³

As we shall see, these commitments seriously complicate the status of public sector libraries under the GATS.

In addition to service commitments that may apply directly to libraries, there are others that will impact both the public and private sector service environment within which libraries exist. For instance, retail book sales have been committed by Canada, but more important wholesale book services have not. Other service areas such as publishing and education also have considerable and obvious relevance for libraries. As yet Canada has made no commitments in these sectors.

Because of the potential for such commitments to indirectly impact the delivery of library services, CLA may wish to express its views on whether Canada's commitments should be expanded in these spheres.

PART V: CRITICAL ISSUES

The following assessment of critical issues is divided into two parts. The first examines the extent to which public sector library services are wholly or in part exempt from the application of GATS disciplines either because they are excluded as public services, or because Canada has made no commitments that would invoke the application of the GATS most onerous disciplines.

The second considers the potential impact of the GATS should these apply to some or all public sector libraries and the services they provide. As the following assessment reveals, the application of GATS disciplines to public sector libraries would present several significant challenges to the ongoing viability of Canadian policy, funding arrangement, programs and law upon which public sector libraries depend. The conflicts we describe below serve to underscore the importance of determining with certainty the status of public sector libraries under this WTO services regime.

²³ Idem.

ARE PUBLIC SECTOR LIBRARY SERVICES EXEMPT?

The first and most important question to answer is whether public sector library services are excluded either entirely or in part under the GATS because they delivered *in the exercise of government authority* as defined by Article I:3(c).

To fall within the ambit of this definition a service must satisfy two tests. The first is that it not be supplied on a commercial basis. The second, that it not be supplied in competition with one or more service suppliers. The term “commercial” is not defined.

As we have noted, there is considerable and unresolved controversy about the meaning of this key GATS provision. A recent paper by British Columbia’s Ministry of Employment and Investment²⁴ provides an excellent review of the various and inconsistent interpretations that have been proffered about the meaning of this GATS article.

At one end of the continuum are claims that all public services, as these would be understood in the Canadian context, fall within the confines of this exclusion. For example, in materials prepared by the GATS secretariat, services supplied in the exercise of government authority are described this way:

the activities of central banks and other monetary authorities, statutory social security and public retirement plans, and public entities using government financial resources (emphasis added).

At the other end of the spectrum is the view that only completely non-commercial and complete monopolies would fit within the confines of this general exception.

Considerable support for this view can also be gleaned from sources associated with WTO officialdom. This restrictive interpretation of Article I:3 also accords most closely with the interpretation by the European Court of Justice of a similar provision concerning the term “official authority” in the European Community Treaty. As the BC paper points out, this is particularly relevant given the origins of Article I:3 in a proposal by the European Community.

Responding to this controversy the Trade in Services Division of the WTO has very recently offered the following:

Because no question has been raised by any Member about services supplied in the exercise of governmental authority there has been no need for interpretation of this phrase. The issue could only arise if a specific measure which had been

²⁴ Ministry of Employment and Investment, *GATS and Public Service Systems*, Discussion Paper 02 April 2001.

*challenged in dispute settlement were to be defended on the ground that it applied only to services supplied in the exercise of governmental authority and was therefore outside the scope of the GATS. There is no requirement to notify such services.*²⁵

Quite to contrary of this WTO assurance, questions *have* been raised about the meaning of this provision by WTO Members.²⁶

But more to the point, questions about the application of this exception can arise, as they already have, in many contexts other than trade dispute resolution. Perhaps the most important of these is the public policy development processes of governments striving to reconcile non-commercial policy objectives - such as literacy or the provision of universal social services - with their obligations under international trade, services and investment agreements. To simply leave the result to the vagaries of international dispute resolution is hardly a satisfactory response given the significance of the consequences of miscalculating the scope of GATS application.

A charitable characterization of the WTO response to questions about Article I:3 is that it is unhelpful. A more skeptical view might regard it as an evasion intended to obscure an interest in narrowing the ambit of this key safeguard. This latter assessment is of course more closely in accord with the explicit liberalization objectives of the GATS. When the issue of the scope of the governmental authority exemption was discussed at a WTO meeting, the EC expressed the opinion that it “needed to be interpreted narrowly.”²⁷

In light of this controversy it is unnecessary to provide a more detailed account of the respective views that have been expressed on this subject in order to draw the conclusion that the scope of the public authority is highly uncertain. Moreover the range of estimates available sketch dramatically different parameters for the application of this exemption.

²⁵ WTO, Trade in Services Division. GATS Facts and Fiction, 2001.

²⁶ The report of a meeting by Council for Trade in Services held on November 12, 1998 includes the following: “Members drew attention to the variety of policy objectives governing the provision of health and social services, including basic welfare and equity considerations. Such considerations had led to a very substantial degree of government involvement, both as a direct provider of such services and as a regulator. However, this did not mean that the whole sector was outside the remit of the GATS; the exceptions provided in Article I:3 of the Agreement [the exemption for governmental authority] needed to be interpreted narrowly.” WTO Document Symbol: S/C/M/30, C4478. Also see the commentary of the European Community questioning whether the meaning of ‘services supplied in the exercise of governmental authority’ was sufficiently clear. Working Party on GATS Rules; Report of the Meeting 6 October 1998 S/WPGR/M/18, 13 November 1998 (98-4548).

²⁷ Idem.

Despite the uncertainty surrounding this issue, it may nevertheless be useful to at least briefly canvass the potential outcomes for public library services should no clarification be forthcoming. With this rather significant qualification, we hazard the following opinion.

In our view there is a reasonably strong argument that public sector libraries would be seen as supplying services on a non-commercial basis. This is most clearly the case for the typical municipal library supplying services either for free or at nominal cost.

However, even this picture may be clouded where library fees are more substantial, certain services are offered on a cost recovery basis, or there is a public- private partnership involved. The greater these commercial and private sector influences, the more attenuated the claim to non-commercial status. Moreover it is conceivable that some aspects of library service may be deemed to satisfy this test, but others fail.

The more difficult argument would be to establish that public sector library services are not supplied *in competition with one or more service supplier*. While the more traditional services provided by public libraries may not compete with other service suppliers, this is not the case for on-line or digital library services.²⁸ Thus the bricks and mortar or more traditional library services would be excluded as supplied in the exercise of government authority while on-line and digital information services would not. This coincides of course with the areas of competition with private sector suppliers of e-book and e-library services.

Yet a further subdivision is possible with respect to on-line services that would distinguish between those available through a terminal physically located in a library institution, and those that could be accessed from remote locations.²⁹ This result would create significant issues for the sharing of information among libraries that has been so fundamental to the sector.

As we note below, there is further support for such an interpretation that derives from the way library services are defined in the services classification schedules, and from the

²⁸ However competition with the private sector isn't limited to on-line services. Take for example the fact that libraries also loan videos and dvds.

²⁹ Typically access to a licenced database can be negotiated with different levels of access including;

- in library use for anyone in the library building;
- in library use for your "members" only: ie. you have to have a student or faculty card to access some databases in university libraries;
- remote access via the library web page which usually requires that you have a library card number to gain access;
- the right to transmit digital content to other libraries, often not available in licence agreements and this inter-library cooperation is now threatened.

manner in which Canada has listed its commitments. In our view therefore, this bifurcation of the status of public sector library services under the GATS is a significant risk.

The difficulty of characterizing library services in accordance with fixed classifications regimes is exacerbated by the dynamic character of the technological and business environment within which information and communications services are now converging. Thus, with the proliferation of private information service providers and their ever increasing incursion into the domain of traditional libraries, satisfying the second *governmental authority* test may become increasingly difficult.

Consider, for example, the case of library services being offered by a private company to primary school students and under contract with a public school board. Would the non-commercial status of the traditional school be transformed by such an arrangement? Conversely, would the presence of a private for-profit service provider in one school or one school district suddenly place all other school libraries on a competitive footing, thereby undermining their exempt status under the GATS?

Unfortunately it is impossible to answer these questions with any degree of confidence. But the examples serve to highlight the dynamic character of the environment within which public sector libraries are now situated. This underscores the importance of preserving the public policy flexibility that is likely to be needed to meet new and unforeseen challenges. The GATS is explicitly intended to have the opposite effect.

From this assessment we offer the following conclusions. First, with the exception of the National Library which arguably operates with a mandate so unique as to place it squarely within the parameters of Art.I:3(c), it would be imprudent to assume that public sector libraries would have the benefit of this safeguard.

Accordingly, seeking an explicit recognition of the exempt status of public sector libraries under this Article should be considered a critical priority. This might be accomplished in a number of ways, but to be binding on the WTO Dispute Settlement Body, this clarification would have to be given formal expression as part of the GATS text, or as an annex or schedule to the Agreement.

ARE PUBLIC SECTOR LIBRARY SERVICES BOUND?

On the assumption that all or some public sector libraries or public sector library services may not be considered exempt under Article I:3, the next question is whether they will be subject to the more onerous obligations of *Market Access*, *National Treatment* and the *Monopolies* provisions of the GATS. As we have seen this depends in large part upon whether Canada has made commitments with respect to library services and as noted, it has not.

However, given the commitment of library services by two of our most important trading partners it is reasonable to expect that Canada will be under pressure to do so. But more problematic is the fact that Canadian commitments of communications and research and development services may already mean that some library services are already fully bound.

The Problem of Classification

Our review of the classification schedules upon which Canada has relied in listing its commitments to GATS schedules reveals significant overlap or duplication among the services listed. This is particularly true with respect to the data base and information services that may be provided on-line. Such services may variously be regarded as computer, communications or more substantive services, or all three. When commitments are made with respect to on-line information services but not of the underlying information being conveyed - a digital book or media, telemedical monitoring or diagnosis, or financial accounting - which classification is to prevail?

Answering this question is made more difficult by the rapid convergence of telecommunications, computer technology and software with more content-oriented broadcasting, publishing and library services. For example, with respect to on-line electronic or digital information services, there may only be a fine line that distinguishes computer, value-added telecommunications, and library services.

The complexity and uncertainty surrounding services classification has become a major focus of present GATS negotiations where significant differences have emerged as to how conflicts arising from overlapping services commitments are to be resolved. These issues however remain unresolved.

At the same time however, frustration about the slow progress of GATS negotiations in some quarters have yielded proposals that would substitute broad service clusters to apply across all sectors, and accelerate the expansion of GATS commitments.

For example, a European industry lobby group is advocating an "e-commerce cluster" which could include "sectors that are critical to initiating and completing an e-commerce transaction, including all forms of commercial communications (advertising, sales promotion, direct marketing etc), computer, data processing and software services, telecommunication services, certain transport and delivery services, certain financial services and some distribution services."³⁰

³⁰ See proposals by the European Services Forum described in the *Second European Services Forum Position Paper on GATS and Electronic Commerce*, 16 June 2000, page 2

Finally, it must be noted, that WTO dispute bodies may be unsympathetic to claims that GATS commitments were made in error.³¹

Are On-line Library Services Committed?

As we have seen, Canada has made commitments under the headings *Research and Development* and *Communications* that include services which are provided by public sector libraries. But its decision to make no commitments of library services per se raises the question of how this apparent contradiction would be resolved.

While it is possible to argue that this conflict should be decided in favour of respecting Canada's decision to make no commitment of library services, it is clear that private sector telecommunication companies or R&D firms are likely to make the counter argument.

Moreover, the failure of the communication services classification to cross reference library services, as was done for computer services, suggests that this classification was intended to apply to library services as well. Furthermore, the explicit listing of library services under certain UN CPC codes for telecommunications services adds significant support to the argument that only the more conventional aspects of library services were intended to be sheltered from the full brunt of GATS disciplines.³²

Indeed there is an argument that online service provision simply falls outside the definition of library services as set out in the classification schedule upon which Canada has relied. We have already reproduced the description of library services that is delineated by the relevant CPC code. That classification indicates that it includes *services of libraries of all kinds. Documentation services, i.e. collection, cataloging, whether manually or computer-aided, and retrieval services of documents.*

Thus while computer-aided services are explicitly included, there is no reference to on-line service delivery or to the use of communications networks generally as a delivery mode for library services. Furthermore, this characterization seems to correspond with the cross reference to library services set out in the computer service classification concerning data base services. This in turn also lends support to the argument that on-line library services fall within the parameters of *on-line information and database retrieval; electronic data interchange; and, on-line information and/or data processing (including*

³¹ See Auto Pact

³² CPC V1.0 sets out the following classification description: Division: 84 - *Telecommunications services; information retrieval and supply services*, of which - Group: 845 - *Library and archive services* and Class: 8451 - *Library services* - are both subclassifications.

transaction processing) which are classified as communications, not library services.

A similar problem exists with respect to research and development because public sector libraries are involved in providing services that would overlap with the commitments Canada has made of *research and experimental development services on social sciences and humanities, including law, economics, except linguistics and language*.

In our opinion, there is reason for substantial concern that on-line library, and certain research and development services would be considered to fall within the ambit of current Canadian GATS commitments. In this case, government measures relating to public sector libraries providing such services would be subject to the full array of GATS obligations, subject to any limitation Canada may have listed to its schedule of commitments (see discussion following).

However, as is the case with respect to the definition of *government authority*, the issue of duplication and overlap among GATS classification regimes is at this point unresolved. Accordingly, in our view, the CLA should identify the need to clarify the status of public sector library services when providing services like those subject to commitments that have been made elsewhere in Canada's schedule. The obvious intent of that clarification would be to make clear that no commitments have been made with respect to public sector library services whatever the mode of delivery.

Canadian Reservations

There are several limitations that Canada has listed to its schedule of commitments that may ameliorate the impact of GATS disciplines on public sector library services that may be subject to them. These include both horizontal limitations which apply to all sectors with respect to which commitments have been made, and sector specific limitations as well.

However, the most important horizontal limitations relevant to public sector library services apply only to *National Treatment* obligations and then only where commercial presence is the mode of supply. These limitations stipulate that:

The supply of a service, or its subsidization, within the public sector is not in breach of this commitment;

Subsidies related to research and development are to be unbound; and

*Measures conferring a tax exemption or reduction of tax to, or in respect of services supplied by a service supplier which is a part of or is directly or indirectly owned by government.*³³

³³ GATS/SC/16, 15 April 1994: Canada, *Schedule of Specific Commitments*.

Because the public sector is not defined, the first of these limitations introduces the same type of uncertainty that attends the definition of governmental authority. However, the inclusion of this limitation suggests that some public sector services will clearly fall outside the governmental authority exemption, otherwise the limitation would be unnecessary.

Because these limitations are most pertinent to the question of public funding for library services, we will consider their scope and application more fully when we address the question of subsidies below.

Canada has also listed a broad horizontal limitation concerning the movement of natural persons providing services. But for temporary situations, Canada has reserved its right to regulate the provision of services through the presence of natural persons of a foreign service supplier.

The sector specific limitations that may be relevant to public sector libraries are those listed for communications and R&D services. But here the only public policy and regulatory options Canada has reserved, simply reiterate those concerning the presence of natural persons as foreign service providers.

THE APPLICATION OF GATS DISCIPLINES TO PUBLIC SECTOR LIBRARIES

Mindful of the considerable uncertainty that exists with respect to the status of public sector library services under the GATS, we now turn to consider the affect of GATS disciplines should they apply to this sector.

Non-Discriminatory or National Treatment

The first principle of the GATS is non-discriminatory treatment by governments of services and services providers whatever there origin or mode of service delivery. This obligation is engendered in several GATS provisions.

Foremost among these is the *National Treatment* obligation of Article XVII which imposes the requirement that a government accord foreign service providers "*no less favourable that it accords to its own like services and service suppliers.*"

This obligation immediately impugns government policies, programs, regulatory and funding arrangements upon which public services depend, but which inherently discriminate against private sector service providers. In other words, by failing to distinguish between private and public sector services suppliers, the GATS fails to acknowledge the validity of, or provide scope for policies, programs and regulations which may explicitly or effectively favour public sector service providers.

Moreover, governments would not be able to justify such discriminatory treatment as being necessary to the pursuit of such public policy goals as universal service, and literacy. While certain general exceptions are permitted by the GATS,³⁴ the goals that public sector libraries exist to serve are not among them.

It is however possible to argue that government measures that favour public sector service providers are nevertheless consistent with *National Treatment* requirements because they discriminate against foreign service providers to no greater extent than they impact their domestic private sector counterparts. This would effectively require the term “like services and services suppliers” to be differentiated in terms of the character of the service provider - public non-profit as opposed to private for-profit- rather than the services actually provided.

But this would require creating a distinction between service suppliers and services which the text of the GATS does not support. Moreover, WTO jurisprudence interpreting the meaning of the term “like” in the services or other contexts reveals the considerable difficulty such an argument would confront. This is because the WTO has consistently taken the view that “like” must be understood with the character or specific quality of the good or service, and not with the manner in which goods are produced or services provided, nor with the character of the producer or service provider.

For example, in the Autopact case the panel concluded that “to the extent that the service suppliers supply the same services, they should be considered ‘like’[service suppliers].”³⁵ In the split-run magazine case, the WTO rejected Canada’s argument that Canadian periodicals and other publications not be considered “like” U.S. publications with different content and editorial perspective.³⁶ The dispute body adopted a purely commercial test for making that determination. This is the same approach the WTO Dispute Body exhibited in the U.S. copyright case we briefly described above. If goods compete in the market place, they are “like” for the purposes of *National Treatment* obligations.

While it is not inconceivable that a WTO panel might adopt a different view in a case involving public sector services, such a result would clearly cut across the grain of the

³⁴ These are set out in Article XIV and include measures such as those needed to protect public morals, or human, animal or plant life or health.

³⁵ Canada: Autos, Panel Report, para. 10.248.

³⁶ Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body June 30, 1997 - WT/DS31/AB/R.

GATS liberalization objectives. It would be imprudent in our view therefore to gamble the fate of public sector services on such a determination.

Thus unless otherwise exempt from GATS disciplines government measures that exist for the express purpose of supporting public sector services are vulnerable to a *National Treatment* challenge that they discriminate against private sector, for-profit service providers. Potential targets for such complaints would include:

- all forms of public funding support - including direct grants, research and development funding, the Public Lending Right program, and Postal Book Rate;
- the preferential tax treatment that many libraries enjoy including their status as registered charities; and,
- the use of public infrastructure at marginal or no cost.

As we have seen, public sector libraries depend upon a framework of public policy, law, funding and institutional support for their viability. Virtually any element of this framework may *a priori* be seen as violating *National Treatment* because it exists to serve public sector libraries in preference to private for-profit alternatives.

Finally on the subject of *National Treatment* it must be noted that a measure that treats foreign and domestic services identically may still be considered discriminatory *if it modifies the conditions of competition in favour of services or services suppliers of the Member compared to like services or service suppliers of any other Member* [Article

XVII.3]. Thus, formally identical treatment can nevertheless represent *de facto* discrimination in favour of domestic services or service providers.

The principle of *National Treatment* clearly illustrates the fundamental contradiction between the free-market objectives of trade liberalization and the non-commercial goals that provide the rationale for most public services including those provided by libraries.

Market Access

Market Access obligations impose a number of constraints on government policy and law that may also be relevant to public sector libraries. In fact, the very existence of public sector libraries may be seen as an impediment to market access for competing private sector services.

While this argument is an echo of the *National Treatment* complaint that might be made in the same circumstances, it is clear *Market Access* obligations require more than *National*

Treatment and impose a number of substantive constraints on non-discriminatory government measures [Article XVI.2]. One of these constraints is particularly relevant to public sector libraries and prohibits *"measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service."*

This obligation would apparently preclude any specification that particular services provided by governments, or public agencies such as public sector libraries. But it may also be given broader application on the grounds that any measure which favours public sector service providers or even joint public/private partnerships, would necessarily offend this proscription. While such a constraint might arguably be unnecessary given National Treatment constraints, this apparent redundancy is common to many WTO agreements and explains why WTO dispute bodies routinely find impugned government measures to have offended several trade disciplines.

Monopolies and Exclusive Service Suppliers

Article VIII *Monopolies and Exclusive Service Suppliers*, imposes many of the same constraints on public sector service providers that limit the options of government. Public sector service providers are also directed by this rule to *"not abuse [their] monopoly position to act in a manner inconsistent with [its] commitments."*

The way in which such constraints may be invoked to challenge public sector services has recently been illustrated by a challenge to Canadian public postal services which has invoked a similar provision included in the North American Free Trade Agreement. That challenge has been made by United Parcel Service of America under the extra-ordinary enforcement procedures of NAFTA investment rules, but the gist of its argument would be just as applicable under the GATS.

In essence, UPS is arguing that by making its delivery infrastructure and personnel available to support its parcel and package services, Canada Post has abused its monopoly position to support non-monopoly and competitive services. UPS also complains that public postal service infrastructure which has been established at public expense, therefore represents a subsidy when utilized by Canada Post to provide competitive parcel and courier services. It is also challenging the preferential tax treatment that such facilities are accorded by virtue of their status as the property of a federal crown corporation.

While public sector libraries have no monopoly mandate, it is not difficult to imagine similar arguments being made about the use of public sector library infrastructure to support on-line services that may be in direct competition with private sector providers. After all, public libraries enjoy preferential tax status, and rely upon infrastructure established at public expense. Moreover, unlike Canada Post, public sector libraries operate with the benefit of ongoing public subsidies.

During a time when a great deal of internet service is still available at low or modest cost, the availability of free on-line information and data base services delivered by public sector libraries may have little impact of private sector companies in the same service space. However, if those private providers begin, as expected, to migrate to a fee for service business model, public sector competition may become a real issue. It is in anticipation of such developments that libraries should understand the relevance of these GATS provisions.

Subsidies and Grants

As described in Part 2 of this assessment, subsidies and grants are explicitly considered government measures under the GATS and subject to *National Treatment* obligations. However specific disciplines on “trade distortive” subsidies are only now being developed as a component of the current round of negotiations. But, pursuant to Article XV(2) consultations may even now be requested by a WTO member where it considers itself adversely affected by public funding by another WTO party concerning services. The concern here is that GATS rules may be invoked to challenge public funding for library service providers for reasons similar to those we have just canvassed.

Again, Canada’s horizontal limitation from *National Treatment* obligations for public funding arrangements represents an acknowledgment of the exposure it has to such complaints and challenges. We have already described the limited nature of this reservation which only applies to one of the four modes of service delivery - commercial presence.

This raises the somewhat implausible spectre of claims that Canada subsidize service providers located outside the country. The GATS secretariat has recognized this

difficulty and inserted in the scheduling guidelines, the proviso that *a subsidy granted to service suppliers within the national territory would not have to be extended to suppliers selling into the territory from outside.*”³⁷

Acknowledging that a scheduling guideline may not be an effective response, the Secretariat has also indicated that “*if a subsidy modifies the conditions of competition*

³⁷ World Trade Organization, Committee On Specific Commitments, “Revision Of Scheduling Guidelines,” Note by the Secretariat, 5 March 1999 (S/CSC/W/19), p. 11. For a more complete discussion of the difficulties presented by the GATS approach to subsidies see Sinclair, *GATS: How the World Trade Organization’s New “Services” Negotiations Threaten Democracy*, Canadian Centre for Policy Alternatives, 2000.

against an imported service it is liable to constitute a violation of national treatment and needs to be scheduled for the relevant modes.”³⁸

However, the Secretariat’s caution is somewhat misleading because Article XV applies to all subsidies and grants concerning services, whether listed or not. It is not possible for Canada to schedule subsidies but for services with respect to which it is making a commitment. As it stands, Article XV applies to non-scheduled services as well.

If public sector library services are considered to fall within the ambit of “services supplied in the exercise of government authority” then the question of subsidies is largely moot. However, if public sector libraries services, or some of them, are deemed to fall within the GATS framework then the issue of public funding is absolutely crucial to the viability of this sector.

In our view therefore, it would be essential to ensure that government funding to public sector libraries remain entirely unencumbered by GATS *National Treatment* and other obligations. This would require that establishment of rigorous safeguards in any subsidies agreement that might be forthcoming in the GATS context.

Qualification and Licensing Requirements

Another potential problem area arises from GATS disciplines concerning domestic regulation (Article VI). As is the case for the Market Access requirement, these GATS rules explicitly apply to non-discriminatory domestic measures of general application. Among the obligations set out by Article VI is the requirement that:

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.

³⁸ *ibid.* p. 11.

While the criteria articulated by this provision may seem manageable, there is a growing body of WTO jurisprudence that has interpreted similar provisions in a manner that has imposed substantial constraints upon governmental authority.³⁹ Thus the term “necessary” has been interpreted to mean “least trade restrictive.” According to this standard, a measure will be considered “necessary” only where its author can demonstrate that all other possible policy or regulatory options were considered, evaluated to determine their respective impact on WTO liberalization goals, and discarded in favour of the least trade restrictive option.

Moreover, this process would have to be carried out not only for all service specific measures, but for those that might only have an ancillary impact on services or service suppliers. This proscription would obviously bring the machinery of government to a grinding halt if it were to be strictly observed.

Nevertheless, WTO dispute bodies have shown no hesitation in applying this test rigorously and have consistently substituted their judgement for that of public officials and governments on this question of whether the impugned measure was necessary or not. In virtually every case, governments have failed to satisfy this fluid and subjective standard in defense of their domestic measures.

The issue of licensing and qualification standards is obviously relevant to the certification of library professionals or the qualifications required for employment. We understand that the qualification standards for professional librarians are currently the subject of non binding guidelines. Unlike lawyers, doctors, engineers and other professionals, there is no statutory body charged with responsibility for regulating library professionals or for certifying their competence.

Recall however that GATS disciplines apply to “*non governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.*”

In our view this is very likely to include decisions made by library boards and other bodies concerning the professional qualifications of librarians and library personnel. In other words, under the provisions of GATS rules concerning *Domestic Regulation* the judgment of library boards concerning staff qualification would now have to comply with requirements of this GATS provision. This in turn would expose the decisions of these “non governmental bodies” to question and even challenge for offending the subjective and vague criteria of Article VI.

³⁹ Shrybman, *The World Trade Organization: A Citizen Guide*, Lorimer and CCPA, 2001.

Here is yet another aspect of the GATS agenda that is in progress and which warrants attention. The CLA may wish to add this issue to its list of concerns in order to avoid the imposition of disciplines that may frustrate the capacity of its members to determine the appropriate job qualifications for librarians and library staff without having to measure their judgement against the trade liberalization objectives of the GATS.

To Sum Up

As we have seen, the full application of GATS disciplines to public sector library services is likely to undermine the institutional, funding, programmatic and regulatory framework upon which this public sector depends. 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 application of GATS disciplines as services delivered “in the exercise of government authority” under Article I: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. As we have seen this may have already occurred with respect to on-line library services because of Canada’s commitments in the area of communications. A commitment of certain R&D services causes a similar problem.

This underscores the importance of clarifying the overlap and duplication among Canada’s service sector listings in favour of preserving the integrity of Canada’s decision not to list library services.

Finally we should note that in the worst case scenario the full application of GATS disciplines to public sector libraries might not produce any immediate affect. However, over the longer term the vulnerabilities we have described are certain in our view to exert a corrosive influence on the public policy, funding, programmatic and regulatory actions that will be needed if libraries are to continue to achieve their mandates in a very dynamic information and business environment.

Moreover, GATS disciplines are likely to come to the fore should competition from public sector libraries become more of a factor for e-library or other private sector digital content providers.

Just how keenly felt these pressures will be is difficult to judge and is ultimately a question that your membership is better equipped to answer than are we. There can be no doubt however that the WTO’s services agenda is one from which public sector libraries stand to gain little but may lose a great deal.

PART VI: CURRENT NEGOTIATIONS

Despite the failure of the WTO Ministerial in Seattle in 1999, talks geared towards expanding the GATS began early in the year 2000. This is because the GATS is part of what is called the WTO's "built-in" agenda, and needs no new political mandate to proceed.

The U.S. has a considerable strategic interest in services trade liberalization because services represent virtually the only sector in which it enjoys a substantial trade surplus. In May 2000 it put forward a "road map" designed to accelerate GATS negotiations, advocating an "ambitious mandate" for removing restrictions on trade in services "across all services sector" and "covering all ways of delivering services."

The U.S. road map called for WTO members to submit their initial bargaining positions in December, 2000. The U.S. and the European Community both met that target date submitting detailed papers on their overall negotiating goals and specific interests in each sector. Of particular relevance to the library sector are sweeping proposals the U.S. has made for the telecommunications sector.⁴⁰ This following excerpt provides a sense of the US view on e-commerce:

Globally linked networks are emerging as a primary medium of economic activity - both as a place to transact business and as a vehicle for distributing electronic information and other digitized products. The annual value of global electronic commerce is now estimated to be approaching one trillion dollars and is expected to continue to grow rapidly. The WTO can help this trend continue upward and outward, through further liberalization of all activities which are relevant to electronic commerce. In order to do so, it must foster a liberalized and competitive trade environment in WTO economies that is conducive to expanding the networks both locally and globally.⁴¹

In March 2001, Canada submitted its own position papers. Canada's proposal for the GATS "Negotiating Guidelines and Procedures" states that the negotiations will not "cover those services specifically excluded by the GATS i.e. services supplied in the exercise of

⁴⁰ Council for Trade in Services Special Session "Communication from the United States: Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy" S/CSS/W/30 18 December 2000(00-5571).

⁴¹ "Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy" states:

governmental authority.”⁴² However, for reasons explained above, this statement does not guarantee that public sector services such as those provided by libraries will be off the negotiating table. The Canadian position moreover does not call for any clarification of the governmental authority exemption in the GATS, despite the problems with it that have been raised within the WTO itself.

After considerable conflict between developing and developed members of the WTO, guidelines for the GATS negotiations were finally adopted on March 28, 2001. All services will be part of the negotiations, with no a priori exclusions.

No fixed date is set in the guidelines for conclusion of the negotiations. Since many nations perceive they have little to gain from further liberalization under the GATS, they want to tie negotiations to a comprehensive round of WTO talks. The feasibility of launching a broader round will be discussed by WTO members in July, 2001, and, if this seems promising, will be taken up by WTO Ministers at their meeting in November in Qatar.

Steven Shrybman
Sack Goldblatt Mitchell
May 15, 2001

With the able assistance of Ellen Gould.

⁴² S/CSS/W/46 14 March 2001 (01-1402) Council for Trade in Services Special Session
COMMUNICATION FROM CANADA Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals

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CPCprov code 84400

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Hierarchy:

- Section: 8 - Business services; agricultural, mini manufacturing services
- Division: 84 - Computer and related services
- Group: 844 - Data base services
- Class: 8440 - Data base services
- Subclass: 84400 - Data base services

*data base
services*

Explanatory note

All services provided from primarily structured databases through a communication network.

Exclusions: Data and message transmission services (e.g. network operation services, value-added network services) are classified in class 7523 (Data and message transmission services).

Documentation services consisting in information retrieval from databases are classified in subclass 96311 (Library services).

This code corresponds to the following:
ISIC Rev.3 code(s) 7240
[Click here to see the Registry entries for this code](#)

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CPCprov code 9631

[Profile](#) [Top level structure](#)

Hierarchy:

- Section: 9 - Community, social and personal services
- Division: 96 - Recreational, cultural and sporting services
- Group: 963 - Library, archive, museum and other cultural services
- Class: 9631 - Library and archive services

Breakdown:

This Class is divided into the following Sublasses:

- 96311 - Library services
- 96312 - Archive services

No explanatory note available for this code.

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CPCprov code 96311

[Profile](#) [Top level structure](#)

Hierarchy:

- Section: 9 - Community, social and personal services
- Division: 96 - Recreational, cultural and sporting services
- Group: 963 - Library, archive, museum and other cultural services
- Class: 9631 - Library and archive services
- Subclass: 96311 - Library services

Explanatory note

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.

This code corresponds to the following:
ISIC Rev.3 code(s) 9231

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CPCprov code 96312

[Profile](#) [Top level structure](#)

Hierarchy:

- Section: 9 - Community, social and personal services
- Division: 96 - Recreational, cultural and sporting services
- Group: 963 - Library, archive, museum and other cultural services
- Class: 9631 - Library and archive services
- Subclass: 96312 - Archive services

Explanatory note

Services of archives. Documentation services, i.e. collection, cataloguing, whether manually or computer-aided, conservation and retrieval services of documents, mainly for historical and other scientific purposes.

This code corresponds to the following:
ISIC Rev.3 code(s) 9231

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CPCprov code 963

[Profile](#) [Top level structure](#)

Hierarchy:

- Section: 9 - Community, social and personal services
- Division: 96 - Recreational, cultural and sporting services
- Group: 963 - Library, archive, museum and other cultural services

Breakdown:

This Group is divided into the following Classes:

- 9631 - Library and archive services
- 9632 - Museum services including preservation services of historical sites and buildings
- 9633 - Other cultural services

No explanatory note available for this code.

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| Code | Description |
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| 7240 | Data base activities |
| 923 | Library, archives, museums and other cultural activities |
| 9231 | Library and archives activities |

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ISIC Rev.3 code 9231

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Hierarchy:

- Tabulation Category: O - Other community, social and personal service activities
- Division: 92 - Recreational, cultural and sporting activities
- Group: 923 - Library, archives, museums and other cultural activities
- Class: 9231 - Library and archives activities

Explanatory note

This class includes a wide variety of documentation and information activities provided by libraries and archives. Activities of libraries of all kinds, reading, listening and viewing rooms, public archives, etc.

This usually involves the organization of a collection whether specialized or not, making catalogues, lending and storage of, e.g. books, maps, periodicals, films, records, tapes, retrieval activities in order to comply with information requests, etc. The services may be provided to the general public or to a special clientele, such as students, scientists, staff, members, etc.

Exclusions: Data base activities are classified in class 7240.

[Click here to see the Alphabetical index for this code](#)



Opening World Markets for Services

GATS Commitments by Sector

The following countries have made commitments covering the sector:

Recreational, Cultural and Sporting Services - Libraries, archives, museums and other cultural services

| | | |
|----------------|------------------------|-----------------|
| ■ Bolivia | ■ Central African Rep. | ■ Ecuador |
| ■ Gambia | ■ Guinea-Bissau | ■ Hong Kong |
| ■ Iceland | ■ Japan | ■ New Caledonia |
| ■ Sierra Leone | ■ Singapore | ■ USA |
| ■ Venezuela | | |



Opening World Markets for Services

GATS Commitments by Country

USA: Recreational, Cultural and Sporting Services - Libraries, archives, museums and other cultural services

Modes of Supply: 1) Cross-border, 2) Consumption Abroad, 3) Commercial Presence, 4) Presence of Natural Persons

| Sector | Limitations on Market Access | Limitations on National Treatment |
|---|--|--|
| C. LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES | 1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section | 1) None 2) None 3) None 4) None |



Opening World Markets for Services

GATS Commitments by Country

Japan: Recreational, Cultural and Sporting Services - Libraries, archives, museums and other cultural services

Modes of Supply: 1) Cross-border, 2) Consumption Abroad, 3) Commercial Presence, 4) Presence of Natural Persons

| Sector | Limitations on Market Access | Limitations on National Treatment |
|---|--|---|
| C. Libraries and Archives Services (96311, 96312) | 1) Unbound *27 2) None 3) None 4) Unbound except as indicated in HORIZONTAL COMMITMENTS | 1) Unbound* 2) None 3) None except as indicated in HORIZONTAL COMMITMENTS 4) Unbound except as indicated in HORIZONTAL COMMITMENTS |
| Footnote(s): *27) Unbound due to lack of technical feasibility. | | |