CHAPTER TWELVE

GATS ARTICLE XVI AND NATIONAL REGULATORY SOVEREIGNTY: WHAT LESSONS TO DRAW FROM US—GAMBLING?

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INTRODUCTION

In US—Gambling, a World Trade Organization (WTO) Panel and WTO Appellate Body applied, for the first time, Article XVI of the General Agreement on Trade in Services (GATS), prohibiting restrictions on ‘market access’ (WTO 2005; WTO 2004). More specifically, the Panel and Appellate Body found that the United States (US) violated Article XVI by maintaining laws prohibiting the supply of gambling and betting services, via the Internet, by a gambling business in Antigua, to consumers in the United States.¹

This interpretation of Article XVI by the Panel and the Appellate Body has been strongly criticised by United States officials and also by academics (Pauwelyn 2005; Ortino 2005). The critics argue that the Panel and the Appellate Body have blurred a crucial distinction between ‘market access’ restrictions, which are per se prohibited by Article XVI, and ‘domestic regulation’ which, it is argued, receives a less rigid treatment under Article XVI and, in case of discriminatory effect, under Article XVII. It is further argued that the Appellate Body’s interpretation will unduly limit the national legislator’s discretion to regulate services, affecting a potentially wide range of domestic regulation, and undermining legitimate policy objectives.

¹ In the United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Antigua v United States, 7 April 2005), the WTO Appellate Body ruled that US federal laws prohibiting internet gambling violated the US market access commitments for services trade made under Article XVI of the GATS. As an additional argument, the US had tried to justify its violation of market access commitments based on an exception in Article XIV of GATS for measures ‘necessary to protect public morals or to maintain public order’. The Appellate Body agreed that the US measures could be justified under such an exception, but that the US had failed to demonstrate that its measures were not applied in a discriminatory manner, based on evidence of a separate US law that exempted US domestic service suppliers—but not foreign service suppliers—from the ban on internet betting services for horse racing.
This article suggests that this criticism is misguided. In order to draw lessons from the reports in *US—Gambling*, this article argues that Article XVI market access commitments should be interpreted in their proper context that takes account of the unique facts of the case at the expense of a more textual approach that applies GATS principles without giving much weight to the effect to the factual context. This approach is the most appropriate way to give effect to the intentions of the parties to the treaty. The article also suggests that the Appellate Body Report in *US—Gambling* has provided more clarity to the meaning of Article XVI market access commitments and has narrowed the range of permitted interpretive approaches that can be used to understand the scope of a member’s commitments.

**Market Access Restrictions under Article XVI GATS, as Interpreted and Applied by the Appellate Body in US—Gambling**

*The Measures to which the Appellate Body Applied Article XVI GATS in US—Gambling*

Academic lawyers are usually better than private practice lawyers at distilling general principles for future guidance from individual judicial decisions. Practitioners, however, have more of an eye for the specific facts of a case that have had a significant impact on its final outcome. Therefore, one of the most important contributions that a practitioner can make to the academic debate is, quite probably, their ability to highlight the specific factual circumstances that give rise to a case. In the debate about the systemic implications of the Appellate Body’s interpretation of Article XVI GATS in *US—Gambling*, one of the most important issues of fact is the specific nature and content of United States laws that were considered by the Panel and Appellate Body.

Antigua challenged a long list of state and federal laws of the United States, arguably prohibiting the supply of cross-border gambling and betting services to consumers in the United States. Ultimately, the Appellate Body only considered three federal laws: the Wire Act, the Travel Act and the Illegal Gambling Business Act. Each of these laws was adopted in the 1960s to assist in the enforcement of state laws prohibiting gambling, in the face of growing involvement of organised crime in illegal gambling (WTO 2004, paragraphs 3.261–3.267). It is important to note that, in the United States, the regulation of gambling is primarily a competence of the individual states. It is, therefore, the states that decide who can offer what type of gambling on their territory and who cannot. However, because it is difficult for state authorities

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2 Section 1084 of Title 18 of the United States Code.
3 Section 1952 of Title 18 of the United States Code.
4 Section 1955 of Title 18 of the United States Code.