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Gambling – with Regulation and Market Access in the GATS

From the Board

A basic construct in GATT law is the demarcation between market access and regulation, with the notion that GATT Articles XI (quotas) and III (national treatment) are mutually exclusive and cannot apply to the same measure.[1] If a country imposes a restriction upon importation in a form other than duties or charges, it is a quota and falls within the prohibition. Internal domestic regulations for products can also restrict sale in the market, even to the extent of prohibiting sale, and certainly these internal regulations *affect* importation. However, they are not importation measures and GATT law applies the more relatively benign regime of non-discrimination according GATT Article III.[2]

This 'either or' structure in GATT emphasises 'characterisation' issues at the outset of a case. Complainant will plead that the measure is 'importation' and the respondent will argue that measure is internal and subject only to national treatment. Where a measure is both internal and equally applied to foreign products at the time of importation, GATT Ad Article III appears to tip the analysis in favour of regulatory treatment.

From an EC free movement perspective, this demarcation between market access and regulation may seem quaint if not anachronistic. However, the larger GATT consensus also remains somewhat based upon this notion of a more secure domestic regulatory space and the higher burden placed upon complainants in order to invade it. Especially in light of the continuing rejection of the Singapore (regulatory) issues during this Doha Round, one might safely conclude that WTO Members are not ready for an international trading system whereby the prohibition on quantitative restrictions would also apply to '(internal) measures having equivalent effect.'

Likewise, WTO proponents in the globalisation debate like to point out that the GATT is not *really* so invasive where members retain their authority to impose whatever burdensome (or just clumsy) internal regulations they choose, so long as these do not favour domestic production at the expense of imported like products.

This brings us to the regulatory / market access demarcation as exhibited by the General Agreement on Trade in Services (GATS) and the recent US

1. Canada – FIRA, 30S/140, para. 5.4.
2. For food safety (SPS) and product regulation (TBT) regimes, the Members have installed an additional criteria of 'unnecessary obstacles' to trade.

internet gambling case Appellate Body Report.[3] One of the challenged acts discussed in the case is known as the US 'Wire Act' (18 USC Sec. 1084), which prohibits gambling businesses from receiving or sending bets over interstate (i.e., cross-border within the United States) as well as international wires.

The panel easily found that the Wire Act eliminates the use of at least one of the several means of delivery included in GATS (mode 1, cross border), and therefore constituted a violation of GATS Article XVI 'Market Access' where the US was found to have made a commitment without conditions. Article XVI requires that where market access commitments have been undertaken, that a Member shall then not maintain limitations on the total number of service suppliers in the form of numerical quotas or limitations on the total number of service operations…in the form of quotas. (GATS Article XVI.2 (a) & (c). Although Article XVI is titled 'Market Access', it is also clear that the restrictions prohibited are not permitted to be applied on *either* domestic or foreign providers.

The US act was obviously a restriction on a means of supply and fairly eliminated the cross border mode of delivery. The fact that it prohibits wire transfer outright certainly gives credence to its characterisation as a market access restriction as to that mode where the US was ruled to have made a market access commitment for this activity. The US argued the point of demarcation on the basis of 'form', seeking to draw a difference between laws which regulate the *character* of a service from those which expressly restrict the *quantity* of supply.

The panel and AB reports contain an extended debate on this point with the panel ruling that where the law has the *effect* of regulating the quantity of services or suppliers, then it is within Article XVI's enumerated list of prohibited measures. As the US claimed on appeal, 'these laws represent domestic regulation limiting the characteristics of supply of gambling services, not the quantity of services or suppliers'.[4]

It does not seem as though the regulatory argument was fleshed out in either the panel or the AB report. The relationship between Article XVI and Article VI (GATS Regulation) was ruled mutually exclusive by the panel, but it does not appear that the AB took this up at all. There is a feeling from the report that some coherent expression regarding the legal structure of the GATS in regard to the domestic regulatory space is missing.

Obviously the measure at issue in this case would present a problem for any clear resolution where it did have the effect of a quantitative restriction, but it

3. United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005.
4. More specifically, these laws are 'in the form of' and 'expressed' as non-numerical, non-quota criteria that restrict certain activities, rather than restricting numbers of suppliers, operations or output. Para. 25, AB Report.

would seem from common experience, that all regulation has the effect of limiting or restricting supply to some degree, and the 'effects' approach would negate restrictions whether slight or significant.

As third participant, the EC argued the case consistent with a characterisation of its own internal market regime, where it contended that Article XVI captures measures 'with the effect of a quota' even if not cast in the form of a numerical ceiling.

The AB appears to distinguish from an 'effects' approach by the following paragraph regarding Article XVI:2.

> This is not to say that the words 'in the form of' should be ignored or replaced by the words 'that have the effect of'. Yet at the same time, they cannot be read in isolation. Rather, when viewed as a whole, the text of sub-paragraph (a) supports the view that the words 'in the form of' must be read in conjunction with the words that precede them – 'limitations on the *number* of service suppliers' as well as the worlds that follow them, including the words '*numerical* quotas'. Read in this way, it is clear that the thrust of sub-paragraph (a) is not on the form of limitations, but on their *numerical* or *quantitative*, nature.[5]

May be this will become known as the 'thrust and nature' test. As reflected in the discussion on XVI:2 (c) and the preparatory work, the question of scope for Article XVI does turn on where to draw the line between quantitative and qualitative measures.[6] But, as the AB concluded, 'Yet we are satisfied that a prohibition on the supply of services in respect of which a full market access commitment has been undertaken is a quantitative limitation on the supply of such services.'[7]

It would have been interesting if the Appellate Body would have viewed Article XVI in light of its larger context within the GATS structure, and then demarcating Articles VI and XVI to resolve the question of what falls under regulation and what falls under market access. If this approach had been taken, perhaps the outcome for this measure would have been the same. However, there is a construction for the GATS that also seems evident on its face. Article XVI measures are internal as well as external, but the 'trade agreement' construction for negotiation of specific commitments has 'carved them out' of the regulatory domain for the purpose of expressing the prohibition in the light of a full market access commitment. The fact that both the panel and the AB appear to endorse the notion that the listing of measures to be eliminated as found in Article XVI is exclusive by nature is somewhat supportive of this

5. AB Report, para. 232.
6. AB Report, para. 248, reciting Co-Chairman statement.
7. AB Report, para. 250.

'carve out' which grants 'market access' restrictions to this more limited field of play within the GATS structure.

The sphere of GATS Article VI is critical as it defines the scope of residual regulatory authority for WTO Members, and arguably, Article XVI should be (or could have been) interpreted in the light of Article VI, not as here where Article XVI analysis was undertaken more in isolation. This suggests that Article VI will be determined in the future more by the scope of Article XVI. Regulatory autonomy may appear to be granted a sort of residual character and this may affect the willingness of Members to actively schedule market access in the first place.

While the AB was explicit in claiming that it was not adopting an 'effects approach' to pull measures into Article XVI, it also specifically endorsed the panel's finding that a measure prohibiting the supply of a service is a limitation within the meaning of Article XVI:2 (c) because it '…totally prevents the services operations…through one or more …means of delivery. In other words such a ban *results* in a 'zero quota' on one or more…means of delivery…'[8]

This might suggest that the distinction between regulation and market access in the GATS turns on the difference between the term 'effects of' as contrasted with 'results in' … If so, some seriously advanced linguistics will have to applied to find any space for demarcation between these two synonymous expressions.

Although most WTO Members probably did not consider this at the time of negotiation, they have apparently adopted for international trade in services a regime that resembles, for these aspects, one more like European Community free movement regime then a more traditional trade agreement orientation like the GATT. Of course the significant remaining difference is that for the GATS, parties need not make any market access commitments and fall within this regime.

As the GATS working party on domestic regulation for Article VI is attempting now to fill in the rules that will ultimately govern Member flexibility for services regulation, this case will also have to be distilled in this forum as well. Inevitably someone will ask whether or not Article VI covers regulations of an apparent qualitative nature that 'result' in limitations on the quantity of services provided in whole (or in part?). The answer may be 'No'.

A remedy is possible as well. Just as GATT has an Ad Article III, GATS may need an 'Ad Article VI' to establish a constructive demarcation between market access and regulation.

J.H.M., May 2005

8. AB Report, para. 252, reciting 6.355 panel report, italic added.