

REGULATION OF CROSS-BORDER FINANCIAL SERVICES UNDER GATS: IMPLICATIONS FOR DOMESTIC REGULATORY AUTONOMY

By Dr. Delroy S. Beckford*

**Paper presented at the 25th Commonwealth Law Conference under the theme
Globalisation and Legal Practice: Regulation and Monitoring of Cross-Border
Financial Transactions: October 16-19, 2008, Montego Bay, Jamaica.**

INTRODUCTION

Globalization as an economic phenomenon has witnessed the increasing interdependence of economies and the convergence of rules to reduce transaction costs for cross-border transactions that has simultaneously impacted domestic regulatory autonomy. Rule convergence in international trade relations is significantly reflected in the WTO Agreement and several regional trade agreements that derive many of their substantive rules from the annexed agreements. These rules in turn may derive from private authority as much as the state but they increasingly call into question the contemporary role of the state in regulating in-bound and out-bound trade.

In many trade agreements, liberalization of services plays a crucial role in the paradigm of neo-liberal thinking that privileges market access beyond traditional market restricting measures for trade in goods. Financial services are now of growing importance in the thrust for progressive liberalization of services as seen under the GATS.

* Senior Legal Counsel, Fair Trading Commission.

Unlike GATT 1994, with respect to liberalization of trade in goods, GATS arguably provides a greater margin of appreciation for states with regard to regulation of services, not least because it offers much flexibility on core provisions such as national treatment and MFN and Article XIV exceptions, but also Article XVI with respect to market access.

This notwithstanding, the current state of WTO jurisprudence has not conclusively wrestled with the precise nature of the balance between, on the one hand, rights and obligations under GATS as regards regulation of financial services and, on the other hand, domestic regulation for such services.

This paper is an attempt to explore issues of regulatory autonomy under GATS regarding cross-border financial services given the assumption of variable geometry (and by extension greater regulatory autonomy) that is seen as characterizing GATS as opposed to the 'single package' undertaking (and by extension less regulatory autonomy) that is articulated governing GATT 1994, of which GATS is a central component as one of the annexed agreements.

The paper is divided into the following parts. Part I begins with a conceptual framework within which to engage the issue of domestic regulatory autonomy. Part 2 addresses the concept of variable geometry as regards GATS and its relationship to financial services from the standpoint of domestic regulatory autonomy. Part 3 focuses on the relationship between GATS Articles VI, XVI, and XVII and their implication for the distinction

between domestic regulation *per se* and market access *per se* (the suggested distinction settled on for evaluating domestic regulatory autonomy), and Part 4 on the implications for financial services regulation in particular, the prudential carve out provisions and mutual recognition agreements regarding quality standards.

CONCEPTUAL FRAMEWORK FOR REGULATORY AUTONOMY

From a purist view, regulatory autonomy refers to the ability or right to regulate or not to regulate within the domestic sphere. Ability is closely connected to the right to regulate as in a dualist system when the ability and the right to regulate are achievable under domestic law irrespective of the provisions of an international agreement.

In monist systems, on the other hand, ability and the right to regulate are constrained by international agreements because of the agreements' direct effect in the domestic legal order.¹

Where an international agreement is involved and there is a contracting out of the right to regulate, domestic regulatory autonomy may be properly understood to refer to the right to regulate given the limitations entailed in the contracting out or, in other words, what margin of appreciation remains within the domestic sphere. In this sense regulatory autonomy does not mean total freedom to regulate, but requires an interpretation of what rights to regulate are contracted out at the multilateral level.

¹ An extreme example of the monist system exists in Japan where international agreements take precedence to their constitution.

An interpretation of what is contracted out depends on the scope of obligations incurred and the applicable exemptions in the relevant international agreement, but also of the authority to interpret the extent of the rights contracted out.² The General Agreement on Tariffs and Trade (GATT, 1994), which includes the General Agreement on Trade in Services (GATS) as one of the annexed agreements, contains core obligations governing domestic regulation including national treatment³ and transparency.⁴ The Article XX exempting provision also provides room for domestic regulation for measures that are necessary⁵ or the least trade restrictive.⁶

For national treatment under GATT 1994, domestic regulation is permitted provided it does not discriminate against foreign goods. These may, however, be justified under Article XX if the domestic regulation can be captured in any one of the several exemptions.

The transparency obligation applies typically to legislation that does not discriminate against foreign goods. This obligation relates primarily to publication of domestic

² This last represents the agreement among contracting parties as to the applicable dispute settlement procedure, and how interpretations of the relevant agreement are to be treated for contracting parties to a particular dispute and to the contracting parties on a whole.

³ See, Article III of GATT 1994.

⁴ See Article X of GATT 1994 and Article III of GATS.

⁵ Necessary measures under GATT Article XX include those to protect public morals, and to protect human, animal or plant life or health.

⁶ The satisfaction of the necessity test often involves weighing and balancing a number of factors including the importance of the interests or values motivated by the challenged measure, how the measure achieves the ends desired, its restrictive effect on commerce, and whether there is an alternative to the measure that is WTO-consistent and reasonably available. A reasonably available measure is one that satisfies or preserves a Member's right to achieve its desired objective and that does not impose an undue burden on that Member in terms of prohibitive costs or substantial technical difficulties. See, for example, *Dominican-Republic-Measures Affecting the Importation and Internal Sales of Cigarettes*, WT/DS302/AB/R, April 25, 2005.

legislation affecting trade, but also to due process requirements with respect to the maintenance of impartial tribunals for review of administrative action relating to customs matters.⁷

GATS also contains similar provisions notably Article VI, with respect to domestic regulation, Article XVII regarding national treatment, Article XVIII regarding qualifications, standards and licensing matters, and the Article XIV exempting provision.

These provisions cover both discriminatory and non-discriminatory legislation. Article VI of GATS, for example, covers reasonable, impartial and objective administration of measures governing trade in services, whether or not the domestic legislation discriminates against foreign service suppliers.⁸

By contrast, Article XVII of GATS covers discriminatory legislation. Treatment no less favourable than accorded to domestic services and service suppliers must be accorded to foreign services and foreign service suppliers. This obligation exists only to the extent that market access commitments have been made with respect to such services.

Moreover, under both GATS and GATT, there is some scope for regulatory autonomy in the distinction maintained between mandatory and discretionary legislation. Mandatory legislation requires a breach of WTO obligation and can be challenged as such as opposed to discretionary legislation that affords a discretion as to whether WTO

⁷ Article X: 3 of GATT 1994.

⁸ Article VI of GATS is in similar terms to Article X of GATT 1994.

obligations are to be breached, and can only be challenged when the legislation is applied.⁹

Regulatory autonomy in the context of GATS also implicates competition legislation. Like GATT Article III: 4, Article XVII of GATS refers to regulations affecting internal sale of commodities.¹⁰ Neither provision, however, requires the enactment of competition legislation. A specific obligation that may be interpreted as requiring competition legislation is that in Article VIII of GATS. This requires that domestic monopoly service suppliers in the supply of a monopoly service in a relevant market do not act in a manner inconsistent with market access commitments.¹¹ The obligation also extends to ensuring there is no abuse of a monopoly position that is inconsistent with market access commitments where a monopoly service supplier competes in sectors outside the scope of its monopoly rights and market access commitments are made regarding those sectors.¹²

Unlike GATT 1994 with respect to trade in goods, however, GATS arguably provides greater flexibility for non-observance of otherwise core provisions. For example, the national treatment obligation applies only to the extent that a Member has scheduled services to be governed thereby, unlike GATT 1994 for goods, whereby national

⁹ For a discussion of the distinction between mandatory and discretionary legislation see, for example, *United States-Anti-dumping Act of 1916*, WT/DS136/AB/R. The Appellate Body treated the Antidumping Act of 1916 as mandatory because it required the application of remedies for dumping that are inconsistent with the WTO Anti-dumping Agreement.

¹⁰ This is interpreted broadly to include any law or regulation affecting internal sale.

¹¹ GATS Article VIII:1

¹² GATS Article VIII: 2. Article VIII of GATS does not require that there be a multilateral agreement on competition law as a precondition for a WTO Member to ensure that a monopoly service supplier does not abuse its monopoly or dominant position. In any event, it would be difficult to conceive of this requirement being met (i.e. ensuring no abuse of a monopoly position) without the promulgation of some body of law designed to determine if and when a particular conduct constitutes an abuse of a dominant position or abuse of a monopoly position.

treatment is to be observed unless justified under Article XX or other exemptions. This has given rise to the characterization of GATS as an agreement subscribing to a variable geometry framework that allows for substantial regulatory autonomy.

Regulatory autonomy then in the context of GATT 1994 and the GATS covers both discriminatory and non-discriminatory legislation, mandatory and discretionary legislation, legislation to meet transparency and due process requirements, in addition to the right to legislate as appropriate for a particular contracting party if no commitments are made for the area for which legislation is made.

For our purposes, however, the concept of regulatory autonomy is applied to the distinction between disciplines covering market access *per se* as opposed to domestic regulation *per se*. Market access relates to the commitments made that implicates border regulations for goods entering another jurisdiction or for services offered for sale in another jurisdiction. By contrast, domestic regulation refers to standards and other specifications governing the sale of goods or services that crosses borders. In brief then, market access concerns border regulations whereas domestic regulation concerns regulations governing the internal sale of the good or service.

This suggested distinction is supported by WTO jurisprudence, at any rate primarily with respect to GATT 1994 regarding trade in goods where the difference between a border a measure and an internal regulatory measure is more apparent.¹³ This distinction is

¹³ See for example, Ad Note to Article III of GATT 1994. This provides that “any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies

important given the presumption favouring domestic legislation that serves legitimate government purposes and that is regarded as within the exclusive purview of governments.

Arguably, this is an arbitrary distinction since market access can affect domestic regulation and vice versa. Specifications with respect to licencing or other criteria as qualification for the provision of a service, albeit domestic regulation affecting the internal supply of such service for domestic service providers, affects a foreign service supplier's ability to enter that market. Similarly, market access commitments influence the nature of domestic regulation that can be employed to ensure there is no nullification or impairment of the benefits conferred in the commitments made where, for example, the domestic regulation would amount to a banning of the provision of the service.

That market access commitments also implicate regulatory autonomy and the fact that GATS allows much room for flexibility in the commitments made have rendered the agreement as one characteristic of variable geometry offering much leeway for regulatory autonomy. In terms of the suggested distinction above, however, the concept of variable geometry as it applies to GATS will be addressed largely from the perspective of the distinction between market access and domestic regulation.

to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III”.

VARIABLE GEOMETRY OF GATS AND PROVISIONS FOR FINANCIAL SERVICES

The idea of variable geometry refers to the flexibility of commitments in agreements such that not all agreements are binding on the entire WTO Membership, but only those agreements to which members have committed themselves. This contrasts with the single package undertaking whereby agreements are negotiated as, and binding as, part of a single package irrespective of differences among members on the degree of acceptability of their provisions.

As applied to GATS, variable geometry involves the flexibility provided for scheduling of commitments that permit not only non-observance of core provisions to the extent there is no scheduling for a particular service sector but also the possibility of unilaterally limiting the scope of the applicability of such provisions even after commitments are made.¹⁴ This may result in individual agreements under GATS that are different among members according to the commitments made, unlike GATT 1994 where flexibility is largely observed in tariff bindings, but core provisions remain applicable except for exempting provisions.

¹⁴ GATS Article XXI. The possibility of varying commitments made is not a sufficient condition for classification of GATS as representing a variable geometry as opposed to GATT 1994. This is because GATT 1994, to which the 'single package' designation is given, also permits variation of commitments under its Article XXVIII.

Both market access and national treatment obligations under GATS offer similar flexibility by permitting Members to choose what sectors they want to have subject to those disciplines.

For market access, conditions may be applied regarding the measures generally prohibited under Article XVI: 2. These measures are as follows:

- (a) Limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) Limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) Limitations on the total number of service operations or on the total quantity of total service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) Limitation on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) Measures which restrict or require specific types of legal entity or joint venture through which a service or service supplier may supply a service; and

- (f) Limitations on the participation of foreign capital in terms of maximum percentage limit on shareholding or the total value of individual or aggregate foreign investment.

In *United States-Gambling*¹⁵, these prohibitions were held to be exhaustive¹⁶, but there are other prohibitions contemplated under GATS for which conditions can be applied in a member's schedule of commitments.¹⁷ Restrictions on capital transfers is not expressly listed in Article XVI, for example, but can be maintained as an MFN condition for market access under Article 1 of GATS.

Conditions may also be applied to the modes of supply with regard to market access commitments.¹⁸ The modes of supply define services in the context of GATS but also provide a means by which to condition or block market access. There is also some flexibility regarding the modification or withdrawal of commitments originally scheduled.¹⁹

This flexibility then allows for much room for domestic regulatory autonomy. Therefore, where no market access commitment is made to a particular sector the disciplines relating

¹⁵ *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R. (Hereafter *US-Gambling*)

¹⁶ The Panel stated that: "The ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article". See, para. 6.138 of the Panel Report.

¹⁷ See GATS Article XVIII.

¹⁸ The four modes of supply are (1) supply of service from the territory of one Member into the territory of any other Member (2) supply of service in the territory of one Member to the service consumer of any other Member (3) supply of service by a service supplier of one Member, through commercial presence in the territory of any other Member (4) supply of a service by a service supplier of one Member, through the presence of natural persons of a Member into the territory of any other Member.

¹⁹ See, for example, Article XXI of GATS and paragraphs 1 and 2 of the Second Annex on Financial Services.

to MFN, national treatment, and Article VI regarding transparency for domestic legislation affecting trade in services would arguably not apply.

RELATIONSHIP BETWEEN ARTICLES VI, XVI, and XVII of GATS.

As discussed above, domestic regulatory autonomy depends on the distinction between market access and domestic regulation. This distinction is significant because it establishes the zone of what regulation can be implemented without violating GATS in order to serve legitimate government interests such as say health, safety, environmental protection, and, in the context of financial services, prudential quality controls.

If there is a clear distinction between the two concepts, a domestic regulatory measure is to be analysed as such and not as a market access measure on the basis that the domestic regulation has an effect on market access. On the other hand, any conceptual confusion or uncertainty regarding the scope of application of provisions expressly addressing domestic regulation or market access risks limiting the regulatory autonomy open to countries. Regulatory autonomy is enhanced by a clear distinction being made because of the implication of a violation being found that would result in a recommendation for a withdrawal of the measure. Assuming a clear distinction is made, a non-discriminatory domestic measure would be home free under Article XVII of GATS, and there would be no need to consider say an Article XIV exemption that presumes discrimination.

Under GATT 1994, there is a clear demarcation between these two disciplines to the effect that a measure that is a market access border measure that also falls under the national treatment obligation must be examined under the national treatment obligation as a domestic regulation. This is confirmed by GATT practice. In *Canada-Administration of the Foreign Investment Review Act*, the GATT Panel noted that measures affecting the importation of products are regulated under Article XI: 1, whereas those affecting imported products are addressed under Article III.²⁰ This means that a non-discriminatory domestic measure would pass muster under GATT 1994 and would not be viewed as a market access restriction in violation of Article XI of GATT even if it has that effect.

WTO jurisprudence in other areas recognizes this distinction and does not prohibit a domestic regulatory measure on the basis that it has an effect on market access. Under the SPS Agreement²¹, for example, a domestic measure conforming to an international standard and that affects market access is treated as a domestic measure where the measure does not discriminate between domestic and foreign goods.

On the contrary, under GATS no such bright line rule exists. Article XVI of GATS, for example, stipulates prohibitions that arguably apply equally to domestic and foreign suppliers of a service²², despite the fact that market access commitments under trade agreements should be presumed to regulate access by foreign suppliers of a good or

²⁰ Panel Report, *Canada-Administration of the Foreign Investment Review Act*, L/5504, adopted February 7 1984, BISD 30S/140. See also, *India-Measures Affecting the Automotive Sector*, WT/DS146/R, adopted April 5, 2002. The Panel noted that Article XI: 1 of GATT 1994 concerns restrictions relating to importation and not to goods already imported. Paras. 7.259 and 7.261.

²¹ See Article 3.2 of the SPS Agreement.

²² For a contrary view, see Mitsuo Matsushita et al, *The World Trade Organization: Law Practice and Policy*, 2nd Edition, Oxford University Press, 2006.

service. Of the six measures mentioned as prohibited under Article XVI only that relating to limitation on the participation of foreign capital may be said to be expressly addressed to foreign service suppliers. In this way, although Article XVI refers to market access, and the presumption of trade agreements on market access is that of setting the conditions of access to a market by foreign providers²³, it also impacts measures that can be taken exclusively within the domestic realm for domestic service providers (e.g. a numerical limit to 20 for banks in the domestic market).

A domestic regulation that is limited to domestic service providers may therefore affect market access commitments and could be interpreted as a violation of Article XVI of GATS, whether or not the domestic regulation is non-discriminatory (i.e. there is no distinction between domestic and foreign service providers with regard to a blanket ceiling of say 20 banks).

This reading is confirmed by Article XVII of GATS that states that for sectors for which commitments have been made WTO Members are not to implement measures affecting the supply of services that accord treatment less favourable to foreign service and service suppliers than to domestic service and service suppliers. The term ‘measures affecting the supply of services’ includes domestic and market access restrictions since conditions that can be attached to national treatment must be inscribed in a member’s schedule as a market access commitment under Article XVI.

²³ It would be unusual for say Jamaica to inscribe in its schedule of market access commitments a limitation of the number of Jamaican banks or insurance companies.

This reading is also confirmed by Article XX: 2 of GATS. This provides that:

Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

This means that a numerical quota on the number of banks that can be established (e.g. there shall be 20 banks) would apply equally to domestic and foreign banking service suppliers. The regulation as drafted may not refer to foreign banking service suppliers as such but would limit the number of foreign banks to enter the market once the number 20 is attained. Besides numerical limitations, qualification and standard measures can also affect market access.

Therefore, domestic regulation on prudential quality measures can implicate market access commitments and are examinable under Article XVI and Article XVII. Similarly, a measure that relates to qualification for service providers, licensing, or other minimum requirements for the supply of a service could still affect market access.

In those sectors where specific commitments are scheduled and there is a measure identifiable as a domestic regulatory measure that is non-discriminatory (i.e. it does not discriminate between domestic and foreign service suppliers) the measure should

arguably be analysed under Article VI of GATS.²⁴ Here, the substantive content of the regulation is not an issue; rather it is the manner of its administration.

On the other hand, where the domestic regulatory measure is discriminatory it may violate Article XVII regarding national treatment to the extent that it accords to domestic service suppliers treatment more favourable than that applied to foreign service suppliers. Second, it may also violate Article XVI concerning market access because of the overlap between Article XVI and XVII and the absence of a priority rule for the evaluation of domestic measures that have an effect on market access. These violations may be justified under some exempting provision such as Article XIV of GATS.

DOES THE WTO JURISPRUDENCE CLARIFY THE DISTINCTION BETWEEN MARKET ACCESS AND DOMESTIC REGULATION?

The leading case that examined the relationship between domestic regulation and market access and the first to examine cross-border electronic trade in services is *US-Gambling*.²⁵ The importance of this decision for clarifying the distinction between domestic regulation and market access can be seen from the standpoint of how additional obligations under Article XVIII affecting trade in services are to be addressed, in addition to the treatment of regulatory standards under mutual recognition agreements, and domestic regulation covering the prudential carve out for financial services under GATS.

²⁴ GATS Article VI refers to the reasonable, objective, and impartial administration of measures of general application affecting trade in services.

²⁵ WT/DS285/AB/R.

In *US-Gambling* Antigua and Barbuda challenged several US state and federal laws prohibiting the cross-border supply of gambling services. The Panel found all three of the federal laws and four of the eight state laws violated US commitments on market access under Article XVI of GATS and that the measures were not justified under Article XIV exempting provisions as necessary to protect public morals.

The Appellate Body focused on the three federal laws²⁶ and found, contrary to the US submission, that it had made market access commitments for internet gambling services. The US had argued that in its schedule of commitments under “other recreational services (except sporting)” internet gambling was excluded as a sporting service. Relying on the UN Provisional Central Product classification (CPC) to resolve the ensuing ambiguity after applying Article 31 of the Vienna Convention on the Law of Treaties,²⁷ the Appellate noted that the CPC class that relates to sporting services does not include gambling and betting services.²⁸ The CPC, it further noted, was part of the negotiating background of the GATS and it was therefore reasonable to expect WTO Members to rely on it in the scheduling of their commitments.²⁹ The Appellate Body therefore concluded that the US’ schedule of commitments under ‘recreational services’ included gambling, and that the ‘sporting’ exception did not exclude gambling.³⁰

²⁶ These are the Wire Act, the Travel Act and the Illegal Gambling Business Act.

²⁷ Article 31(1) of the Vienna Convention on the Law of Treaties requires that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The US argued that the ordinary meaning of ‘sporting’ includes gambling and, therefore, its exclusion of ‘sporting’ in its schedule of concessions excluded gambling services. The Appellate Body noted that an ambiguity still existed after applying Article 31 of the Vienna Convention and resorted to other documents to resolve this ambiguity. See Appellate Body Report, para. 195.

²⁸ Appellate Body Report, para. 201.

²⁹ Ibid, para. 204.

³⁰ Ibid. para.208.

On the distinction between market access and domestic regulation, the Appellate Body noted that Article XVI of GATS relate to numerical quotas or quantitative restrictions and does not include qualitative measures that are regarded as being within the zone of domestic legislation.³¹

Regarding the distinction between quantitative and qualitative measures in the context of Article XVI, it noted that:

“The market access obligations set forth in Article XVI were intended to be obligations in respect of quantitative, quantitative- type measures. The difficulties faced by the negotiating parties concerned not whether Article XVI covered quantitative measures- for it was clear that it did- but rather how to ‘know where the line should be drawn between quantitative and qualitative measures.’³²

In *US-Gambling*, the Appellate Body did not treat the banning on internet gambling as a qualitative measure, but rather a quantitative restriction because the banning amounted to a zero quota with zero being held a number qualifying as a numerical limitation under Article XVI.

The US, however, argued that the banning of internet gambling was a qualitative measure and should be examined under Article VI of GATS regarding domestic regulation, and

³¹ Ibid., para. 232

³² Ibid., para. 248.

not as a market access restriction under Article XVI of GATS. The qualitative nature of the measure, it argued, was based on its purpose, that is to protect against organized crime, money laundering, fraud, and underage gambling. These it regarded as legitimate domestic regulatory concerns as to justify the measure under Article XIV (similar to Article XX of GATT), if the measure is found to be in breach of Article XVI.

The Appellate Body's ruling (though doubtless satisfying for some as representing a victory of David over Goliath), has not altogether clarified the relationship between Article XVI (regarding market access) and other provisions such as Article VI and Article XVII (for domestic regulation).

There is no indication as to why the measure could not be viewed as a qualitative measure (and therefore subject to Article VI) in the sense that the US laws could be read as possibly indicating *how and in what manner* gambling is to be conducted (i.e. face to face). Nor is there any indication of what the priority rule should be in the event that a measure is classifiable as a quantitative restriction and a qualitative measure.

One objection to treating the measures as qualitative is that the US laws did not define minimum technical standards or requirements to be met for a service supplier to provide internet gambling.³³ There is also the suggestion that 'a blanket prohibition can never be a

³³ See for example, Panagiotis DELIMATISIS, "Don't Gamble with GATS-The Interaction between Articles VI, XVI, XVII and XVIII GATS in the light of the US-Gambling Case", *Journal of World Trade*, vol. 40, no. 6, p.1059-1080.

standard, as a technical standard usually sets technical requirements that at least one supplier can potentially meet'.³⁴

Further, it is argued that "it is inconceivable to qualify as a technical standard a measure that does not define or describe the way of supplying a gambling service in a remote manner, but it merely excludes this mode of supplying gambling and betting services".³⁵

In addition, it is argued that a prohibition limiting potential service suppliers to zero can never be intended to ensure the quality of the service, because quality is concerned with minimum requirements to ensure the supply of the service by a service provider.³⁶

However, if internet gambling is seen as a subset of gambling services, a domestic ban on internet gambling that has the effect of limiting the provision of that service can be conceived as a quality regulation to the extent that the regulation in effect governs *how and the manner* in which gambling is to be conducted. The *how* of the provision of the service then becomes the minimum requirement for the supply of the service.

The Federal and state laws at issue banned internet gambling within the US with an equivalent effect for cross-border internet gambling for foreign service providers. In this sense the domestic legislation was non-discriminatory (i.e. not favouring domestic over foreign service providers) and could have been analysed under Article VI of GATS. Article VI requires that measures of general application to services are to be administered

³⁴ Ibid., p. 1071.

³⁵ Ibid. p. 1071.

³⁶ Ibid.

in a reasonable, objective and impartial manner;³⁷ that when there is an administrative decision that affects a service there is to be an impartial means for reviewing the decision³⁸, and that the affected service provider is to receive a decision within a reasonable period of time.³⁹

While it is argued here that US' laws were non-discriminatory, the Appellate Body found otherwise when examining their justification pursuant to the Chapeau of Article XIV. It did so, however, on the basis of "...the possibility that the Interstate Horse Racing Act exempts only domestic suppliers of remote betting services for horseracing from the prohibitions in the Wire Act, the Travel Act, and the Illegal Gambling Business Act."⁴⁰

This finding, however, seems to confuse the distinction between mandatory and discretionary legislation that is recognized in WTO jurisprudence. Faulting domestic law on the possibility that it could be applied discriminatorily is one thing. Faulting domestic law where it mandates a breach of obligations incurred is quite another. In the former case, the legislation cannot be challenged as such, although this would be the effect of the Appellate Body's ruling.

³⁷ Article VI:1

³⁸ Article VI:2

³⁹ Article VI:3

⁴⁰ *US-Gambling*, Appellate Body Report, para. 369.

IMPLICATIONS FOR DOMESTIC REGULATION OF FINANCIAL SERVICES

The Annex on Financial Services provides for domestic regulatory autonomy in two crucial areas, namely services supplied in the exercise of government authority and the prudential carve out, albeit with respect to the latter the uncertainty of the relationship between Article XVI and VI of GATS may limit the autonomy envisaged. Services supplied in the exercise of government authority that are not subject to GATS disciplines include:

- (1) activities conducted by a central bank or monetary authority or by any public entity in pursuit of monetary or exchange rate policies;
- (2) activities forming part of a statutory system of social security or public retirement plans; and
- (3) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government.⁴¹

These activities are not covered by GATS provided that domestic non-governmental service suppliers are not permitted to engage in these activities.⁴² The list would also include a service that is neither supplied on a commercial basis nor in competition with one or more service suppliers.⁴³

⁴¹ Annex on Financial Services, para. 1(b).

⁴² Ibid., para. 1(c).

⁴³ GATS Article 3(c). This provision defines a service supplied in the exercise of governmental authority as one that is not supplied on a commercial basis or in competition with other service suppliers.

Regarding the prudential carve out, the Annex on Financial Services provides that “Notwithstanding any other provisions of the Agreement, a member shall not be prevented from taking measures for prudential reasons, including the protection of investors, depositors, policyholders or persons to whom a fiduciary is owed by a financial service supplier, or to ensure the integrity and stability of the financial system”.⁴⁴

This prudential exemption from GATS, however, does not confer total regulatory autonomy in the sense of a clear distinction between market access and domestic regulation. For example, prudential measures cannot be used as a means of “avoiding the Member’s commitments or obligations under the Agreement”.⁴⁵ The commitments and obligations referred to include those relating to market access and, consequently, a prudential measure could be interpreted as violating market access commitments, although such measures are regarded presumptively as within the exclusive zone of domestic regulation.

There are no disputes as yet on the prudential carve out but a few observations may be made with respect to the SPS Agreement as to how such disputes might be resolved where there is an issue as to whether a domestic regulation on the prudential carve out is to be viewed in the context of Article VI or as an Article XVI violation.

Like GATS with respect to prudential measures, the SPS Agreement contains provisions that permit a margin of appreciation for domestic regulatory standards for sanitary and

⁴⁴ Ibid., para. 2(a).

⁴⁵ Ibid.

phyto-sanitary measures. Under the SPS Agreement domestic phyto-sanitary measures that conform to an international standard are presumptively consistent with the SPS Agreement.⁴⁶ There is no similar provision in GATS, but it is reasonable to assume that international standards developed for financial services, for example prudential standards developed by the Basle Committee, that are incorporated in domestic regulation as constituting or being part of a domestic prudential measure would not be regarded as being ‘unnecessary barriers to trade in services’ under GATS Article VI: 4.⁴⁷

This position is confirmed by Article VI:5(b) of GATS that requires account to be taken of relevant international standards of relevant international organizations when domestic regulations relating to qualification requirements, technical standards and licensing procedures are being evaluated for conformity with the requirement in GATS Article VI:4(a) that such criteria be objective and transparent.⁴⁸

Unlike the SPS Agreement, a prudential measure that conforms to international standards does not create a presumption of consistency with GATS. The distinction between measures ‘based on’ and those that ‘conform to’ an international standard in the SPS Agreement would also presumably apply to mean that prudential measures that are based on, and not necessarily conforming to, an international standard would not enjoy a presumption of consistency with GATS.⁴⁹

⁴⁶ Article 3.2 of the SPS Agreement.

⁴⁷ Article VI:4 of GATS provides that:

⁴⁸ GATS Article VI: 5(b). This provision does not establish a presumption of consistency with GATS where the prudential measure is consistent with international standards.

⁴⁹ The distinction between measures based on and those that conform to an international standard and the implication for this distinction in terms of the presumption of consistency with the SPS Agreement arose in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R., para. 165.

A prudential measure may, however, be conceivably set at a standard higher than the relevant international standard as is contemplated with respect to sanitary and phyto-sanitary measures under the SPS Agreement.⁵⁰ In this scenario there is no indication as to whether such a prudential measure would satisfy the requirement under Article VI that a domestic quality measure affecting services shall not constitute unnecessary barriers to trade. Similarly, it is unclear whether a domestic prudential standard that is above an international standard would violate Article XVI of GATS as inconsistent with market access commitments because the measure has the effect of preventing foreign service providers from providing the relevant service.

This uncertainty also extends to mutual recognition agreements for financial services under GATS.

MUTUAL RECOGNITION UNDER GATS AND REGULATORY AUTONOMY

Mutual recognition agreements may enhance market access by recognizing an exporting country's regulation as being compatible with, similar to, or as good enough as, the regulation of the importing country. Such agreements may also be concluded without compatibility or similarity with the importing country's regulation provided there is some oversight mechanism within the agreement for ensuring that over time there is consistency with the regulation of the importing country.

⁵⁰ Article 3.3 of the SPS Agreement.

Here it is assumed that an oversight mechanism would be included given that there is no obligation in WTO law for a country to abandon the regulatory standards it chooses (provided the choice of regulatory standard is not a means of disguised protectionism) because other countries with respect to which it has made market access commitments maintain lower standards.

Yet, mutual recognition may in one sense involve the compromise of domestic regulatory autonomy by choosing another country's regulatory standard, to the exclusion of the importing country's regulation, as governing market access.

This balance between maintaining regulatory autonomy and ceding it, in the context of recognition agreements, has not been resolved. Unlike the SPS Agreement, GATS contains no obligation to enter into recognition agreements,⁵¹ although such agreements if entered into would arguably entail restrictions on regulatory autonomy as has been contemplated under the SPS Agreement.

For example, Article 4.1 of the SPS Agreement provides that "Members shall accept the sanitary and phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that

⁵¹ Paragraph 3 of the Annex on Financial Services permits but does not mandate mutual recognition agreements.

its measures achieves the importing Member's appropriate level of sanitary and phytosanitary protection."⁵²

By contrast, under paragraph 3 of the Annex on Financial Services to GATS, mutual recognition is permissive, but it requires that equivalent opportunities be given to other countries if undertaken. It is, however, unclear how this is to operate in practice when the mutual recognition agreement is between countries with substantially different regulatory standards, but with a provision for oversight.

Administrative costs generated by oversight responsibilities may reduce the incentive to conclude recognition agreements with countries with lower or less than equivalent standards.

The obligation to offer equivalent opportunities may impact the extent to which mutual recognition arrangements for countries within an RTA can be concluded. Given the presumption of market integration as a central purpose of RTAs, recognition agreements with oversight responsibilities for countries with lower regulatory standards within an RTA are to be expected. Conclusion of such agreements may however require similar agreements to be concluded with third parties to avoid a breach of MFN to the extent that the third party standards are similar to that of those within the RTA with whom such agreements are concluded.

⁵² Article 4.1 of SPS Agreement.

CONCLUDING REMARKS

Domestic regulatory autonomy in the context of trade agreements depends on what is contracted out or what margin of appreciation exists given the provisions of the international agreement.

Though the concept of regulatory autonomy may be understood in this sense, the approach taken in this paper is to treat regulatory autonomy in the sense of the distinction between provisions governing market access per se and those governing domestic regulation. Under GATT 1994 there is a clear distinction between these provisions in terms of their scope of application, unlike under GATS where such bright line rules do not exist.

This implies less scope for regulatory autonomy despite the presumption to the contrary given the categorization of GATS as representing variable geometry in terms of the flexibility permitted to WTO Members in the commitment they can make that ultimately impact domestic regulation.

The tension between variable geometry (and the corresponding implication of regulatory autonomy), on the one hand, and the unclear distinction between market access and domestic regulation, on the other hand, affects the regulation of financial services as for other service sectors under the GATS.

The prudential carve out, together with measures on quality, licensing and technical standards, and also recognition agreements relating to these areas would appear to offer little scope for regulatory autonomy since by definition the unclear distinction between market access and domestic regulation under GATS would affect their operation as exclusively domestic measures.