

GATS and Financial Services Seminar
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**Panel 4: GATS dispute settlement and financial services,
Implications of the *Gambling* report**

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Lessons from US - Gambling

- Significance of *US - Gambling* for services disputes:
 1. content and scope of a Member's schedule of specific commitments;
 2. status of W/120 and the 2001 Scheduling Guidelines for ongoing services' negotiations;
 3. interpretation of the market access provision (Article XVI GATS);
 4. recognition of Members' regulatory sovereignty under GATS;
 5. delimitation of scope of Article XVI GATS in relation to international transfers and payments (Article XI GATS);
 6. justification of otherwise GATS inconsistent measure under the general exception provision (Article XIV GATS);
 7. potential constitutional implications of GATS for sub-federal entities.

**Financial Services – ad 1) content and scope of a
Member's schedule of specific commitments**

Relevance of decision for:

- defining content and scope of a WTO Member's market access commitments in financial services (schedule of specific commitments + list of MFN exemptions possibly coupled with market access commitments under the Fifth Protocol (1997);
- classification purposes, *in casu* cross-border electronic delivery of services (viz. work of Committee on Trade in Financial Service (CTFS) re: modes 1 and 2).

Financial services – ad 2) status of W/120 and the 2001 Scheduling Guidelines for ongoing services' negotiations



Relevance of decision for scheduling of GATS specific commitments:

- Members should be clear about what they are scheduling especially when deviating from the Central Product Classification (CPC);
- the extent to which Members are free to deviate from the CPC in order to include only certain sectors on basis of W/120;
- the role of the 2001 Scheduling Guidelines in current and future negotiations.

Financial services – ad 3) interpretation of the market access provision (Article XVI GATS)



Relevance of decision for interpreting function and scope of market access and permitted restrictions / limitations:

- Panel clarified the relationship between market access (Article XVI GATS) and quantitative restrictions / limitations (including a total prohibition) on supply of a service under Article XVI:2 GATS (exhaustive list of limitations), which is of relevance to all services' sectors;
- the standard of market access, as set out by the panel (not appealed) appears to give deference to national regulatory autonomy; but
- some ambiguity as to whether the prohibition on the supply of a service in a (sub-) sector needs to be scheduled as a specific limitation.

Financial services – ad 4) recognition of Members' regulatory sovereignty under GATS



Relevance of decision for Members' regulatory sovereignty:

- Panel sought to maintain a strict separation between Article XVI:2 GATS (*quantitative* restrictions / limitations on market access) and Article VI GATS (*qualitative* restrictions in accordance with domestic regulation);
- in *obiter dicta* the Panel recognised Members' sovereign right to regulate under Article VI GATS;
- for financial services Members' regulatory sovereignty is further endorsed by the prudential carve-out for domestic regulation contained in Financial Services Annex (unilateral or mutual recognition of prudential measures – *Quaere* use of international minimum standards and codes of good practice for prudential regulation).

Financial Services – ad 5) delimitation of scope of Article XVI GATS in relation to international transfers and payments (Article XI GATS)



Relevance of decision for market access in relation to prohibition on certain restrictions:

- Market access in financial services may be tempered by the application of Article XI GATS which prohibits Members' restrictions on payments and transfers;
 - in other words liberalisation of financial services is (or may be) closely related to liberalisation of capital movements; and
 - in the case of cross-border (financial) services freedom of capital movement often (but not always) integral to delivery of service.

Financial Services – ad 6) justification of otherwise GATS-inconsistent measure under the general exception provision (Article XIV GATS)



Relevance of decision for Members' policy space:

- Appellate Body ruling on Article XIV GATS is generally to all service sectors – first invocation of public morals / public order exception in GATT/WTO;
 - gives deference to:
 - national policy and regulatory autonomy;
 - recognition of public policy area that relates to fundamental values and interests of society, i.e. policy flexibility;
- interpretation and application of Article XIV GATS upholds Article XX GATT case law / applicable standard of review
- for financial services potential extension of Article XIV GATS exemptions to consumer protection would be welcome (not on Doha Agenda)

Financial services – ad 7) potential constitutional implications of GATS for sub-federal entities



Relevance of decision for Members' regulatory systems:

- As the *Gambling* case demonstrates GATS applies to measures of sub-central governments and regulatory entities
 - potentially of importance in financial services sector for those Members with federal systems or where regulatory power has been devolved to bodies at regional or local level;
 - in certain areas of financial services, e.g. banking, where multi-level regulation is more prominent there may be a greater need to involve regulators from different levels of government in negotiations in order to avoid scheduling mistakes.
