IJNRD.ORG ISSN : 2456-4184
INTERNATIONAL JOURNAL OF NOVEL RESEARCH AND DEVELOPMENT (IJNRD) | IJNRD.ORG
An International Open Access, Peer-reviewed, Refereed Journal

Case comment on US - Measures affecting the cross-border supply of Gambling and Betting Services DS-285

Rohit Shibu

Student

O.P. Jindal Global University

Abstract: This piece offers a critical analysis of the World Trade Organisation (WTO) dispute involving the cross-border provision of betting and gambling services between Antigua and Barbuda and the United States. The conflict draws attention the complicated nature of trade agreements, especially when it comes to the exchange of services. With an emphasis on the US's alleged breaches of its obligations under the General Agreement on Trade in Services (GATS), the paper explores the legal interpretations and variables involved in WTO dispute resolution procedures. It provides insight into the sophisticated decision-making process and the ramifications for smaller nations using WTO mechanisms by analysing the panel and appeal body findings. Further, the piece also addresses the conflict between international trade agreements and national regulatory autonomy, highlighting the necessity of striking a balance between domestic and international regulation. It also criticises the WTO's Appellate Body's interpretation in the US Gambling Services case, emphasising the inadequate emphasis placed on contextual and substantive factors.

FACTS

The World Trade Organisation (WTO) dispute between Antigua and Barbuda and the United States illustrates the difficulties of international trade agreements, especially in the realm of services like gambling and betting. The issue centres on Antigua and Barbuda's claim that certain US regulations block cross-border provision of these services, thereby violating US duties under the General Agreement on Trade in Services (GATS). The dispute began when Antigua and Barbuda requested the formation of a panel to adjudicate the matter, a process that was initially postponed but later materialised. Upon assessing the situation, the panel determined that the US had not treated Antigua and Barbuda's services and service providers in accordance with what had been stipulated in the US Schedule, in violation of GATS's Articles and principles. The Appellate Body was then charged with revisiting the matter after the panel's verdict, which supported some of the panel's conclusions while reversing others. The many legal interpretations and factors that are present in WTO dispute resolution procedures were brought to light by the nuanced decision. In response to the adopted reports, the United States publicly stated its intention to adhere to the recommendations put forth by the WTO's Dispute Settlement Body (DSB).[1]

RULES

GATS Art. XVI:1 and 2, dealing with market access commitments, stating that each Member was to accord services and service suppliers of any other Member no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. Further, clause 2 provides for limitations or restrictions that a country may be able to afford such services.

GATS Art. XIV(a), dealing with the general exceptions clause that provides that unless measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, no number of measures taken as necessary to protect public morals or to maintain public order can be construed to be a violation of GATS.

Illegal Gambling Business Act (1955) [2]

The Travel Act (1952)[3]

[1] Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US – Gambling") (2005)
[2] 18 U.S.C. 1955
[3] 18 U.S.C. 1952

The Wire Act (1961)[4]

Interstate Horseracing Act (1978)[5]

ANALYSIS

When looking at the overall dispute between Antigua and the United States, it becomes apparent that the view taken by the Appellate Body in the US Gambling Services case has been one of an interpretative and constructive manner. Both the Panel report and the Appellate Body report have been found to report that the United States was in fact in violation of its obligations to Antigua under the GATS regime and it was required to take measures to comply with the Dispute Settlement Board's (DSB) report as stipulated by the Compliance panel as well.[6]

What is important and pertinent to note, however, is that the DSB has not, within its considerations, given due weightage to the fact that by resorting to "document W/120" (Schedule provided under the GATS regime by the US) and the "1993 Scheduling Guidelines" as "supplementary means of interpretation" under Article 32 of the VCLT instead of considering context under Article 31, they determined the meaning of the entry "other recreational service", they have made an unnecessarily invasive step into the US laws.[7] The WTO decision here, highlights a crucial aspect of international trade: its unpredictable consequences. When nations enter into trade agreements, they inherently relinquish some degree of sovereignty, committing to policies that maintain negotiated levels of market access. This commitment extends to various regulatory domains beyond the immediate borders, such as import licensing procedures, customs valuation, sanitary and phytosanitary measures, as well as labour and environmental standards.[8]

But these trade agreements aren't perfect contracts in that they can't account for every circumstance that may occur in the future. Factors like shifts in industry trends, technological advancements, currency fluctuations, geopolitical realignments, and other unforeseen events can limit signatories' policy flexibility. Yet Governments continue to volunteer, despite these risks and uncertainties in return for the expected advantages of improved market access and other benefits.[9] "Countries try to anticipate future developments when making services trade commitments, but even the United States with its expertise and resources did not predict when it agreed to free trade in recreational services that this might one day be interpreted to include online gambling (a service that did not exist in 1994 when such commitments were scheduled)."At the end of the day, Governments entering into contracts are still looking to protect their country's best interests while ensuring compliance with International Trade provisions as well. There has been no explicit mention of the words Gambling within the schedule of the US provided under the GATS provisions, however, it was read into and interpreted to be included in the schedule.

While in any case, the trend in WTO jurisprudence to minimize the hermeneutic relevance of dictionary definitions is seen to be a welcome change, the applicability of the same changes with the context applied to it. When interpreting terms within the individual schedules of WTO members this definition changes. An interpretation of a document that is essentially unilateral in nature (like the US Schedule under the GATS in the ongoing dispute) differs somewhat from interpreting a document that is multilateral (such as a provision of the GATS). Members' GATS Schedules are an essential component of the GATS, as provided for in Article XX:3. Therefore, determining the meaning of a member's concession, much like interpreting any other treaty text, would require discerning the shared intention of all members to the text. The process of identifying this shared intention varies between the two contexts, however. While interpreting a single treaty text requires a focus on that text alone, understanding the common intention behind a member's concession must also consider the unilateral nature of that concession, as well as the concessions made by all other members.[10] Further, in comparison to tariff negotiations in the goods area, which are usually proceeded in mechanical ways, negotiations in trade in services under the GATS proceed in a country-specific manners enabling countries wider and broader scope of selection of their obligations under the schedule.[11]

The inclusion of and reading into the US schedule can be seen to be an overstep into the bounds of the local legislation and regulation of the US system. In the United States, state and federal laws govern gambling regulation. A number of States have outright banned online gambling, and a number of federal regulations limit the use of the technology used in online gambling. The Wire Act, the Travel Act, and the Illegal Gambling Business Act were the pertinent federal laws. It is illegal to "knowingly use any "wire communication facility" to transmit bets or wagers, use information to aid in betting or wagering on a sporting event or contest, or send any communication that gives the recipient the right to money or credit as a result of betting or wagering, according to the Wire Act of 1961. Nevertheless, the tension between national regulatory autonomy and international trade agreements has frequently surfaced in disputes. Light can be thrown upon the US-EU Beef Hormone Dispute[12] wherein the need for a balancing of domestic and international regulation was emphasized time and again.

[4] 18 U.S.C. 1084
[5] 15 U.S.C.3001 et seq.
[6] n. at 1.
[7] n. at 1.
[8] Irwin DA, Weiler J, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7(1) World Trade Review 71.
[9] Ibid.
[10] Ortino F, "Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique" (2006) 9 Journal of International Economic Law 117 http://dx.doi.org/10.1093/jiel/jgi052

[11] Ibid.
[12] Measures Concerning Meat and Meat Products (Hormones) ("EC — Hormones (US)") (1998)

Further, the Restrictions set under Article XVI of the GATS has created a looming space for interpretivism in the most broad senses. Since there requires to be a zero quota on the provision of services. There has been "a failure to deal with an indispensable step in the legal reasoning, a step necessary before one may arrive at the conclusion that an origin-neutral regulatory measure having a 'zero effect' does in fact and in law violate Article XVI."[13] In case of a commitment made to internet gambling and betting services, along with hypothetically a creation of a US Statute applicable both to domestic and foreign Internet gambling service providers that banned, for reasons of consumer protection, the placing of Internet bets paying for such bets without automatic encryption of consumer credit-card information by the service provider, or that it even required every software provider to mandatorily verify the age of every person accessing the service to ensure that minors do not end up gambling. This would open the door for unnecessary disputes, when a foreign provider offering unencrypted or wireless gambling services would make the argument that these regulations are unfairly restricting market access and the only recourse available would be under Article XVI.[14] While the argument under Article XVI could be contended that since these are simply origin-neutral legitimate regulation of the Internet pursuant to public policy, there has been no discussion made into this by the appellate body, creating a gaping hole in the idea of whether Internet gambling could, on its own, constitute a "zero quota" on a covered commitment, or whether, it was merely an origin-neutral internal regulation of the gambling sector in response to specific public-policy considerations.[15]

The decision has also made a relatively positive dent in the International Trade Perspectives, in so far as to understand that a smaller country like Antigua was able to leverage its position by making use of the WTO mechanisms to get a ruling in its favour against a bigger country like the US. Further, the use of remedies under Article 22 of the DSU by Antigua on the non-compliance of the AB order has also improved WTO jurisprudence for smaller countries.

CONCLUSION

The precedent set by this dispute creates more problems than it solves, in essentially a forceable move toward obligations not initially undertaken or intended to undertake by Member states.

A careful review of the case's numerous weaknesses, the possibility may not be very far-fetched that the US – Gambling case's application of the principles guiding treaty interpretation "is merely an ex post facto rationalisation of a conclusion reached on other grounds or serves as a cover for judicial creativeness".[16] The sheer lack of importance given to the contextual and holistic approach to the case has been apparent from the get-go and the ignorance of such contextual and teleological dimensions is counteractive to the purposes and authority of the WTO and its dispute resolution body.

[13] n. at 10.
[14] n. at 1.
[15] n. at 1.
[16] n. at 12.