

# **Upping the Ante**

**What does the final WTO *U.S.-Gambling* decision mean  
for the democratic regulation of gambling in Maine?**

**Written Presentation**

**to the**

**Maine Citizen Trade Policy Commission**

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## **The GATS Gambling Case and Maine**

My presentation and recommendations concern the regulation of gambling in Maine and the problems that arise from the final ruling of the World Trade Organization's top court in the GATS *Gambling* case against the United States.

### **Overview of the Case**

In the case that concerns us, the small Caribbean island nation of Antigua and Barbuda complained that the United States' prohibition on internet gambling violated the cross-border market access commitments the U.S. made under the World Trade Organization 'services' treaty known as the GATS (the General Agreement on Trade in Services).

The case went to a World Trade Organization dispute settlement panel, which issued its decision late last year that was greatly in Antigua's favor. The panel ruled that four state and three federal laws violated the GATS. The United States appealed, and the WTO Appellate Body issued its final ruling earlier this month.

The final judgment reversed certain aspects of the earlier ruling for largely technical reasons. On the basis of technicalities, the Appellate Body was able to let the U.S. off lightly, thereby avoiding a political firestorm. The Appellate Body faulted Antigua for not proposing alternative ways the US could have met its objectives – something the next complainant will be certain to do. And luckily for US state governments, the Appellate Body found that Antigua had not identified particular state laws and argued why they violated the GATS.

However, the final report, which is binding on the United States and cannot be appealed, gives significant grounds for concern about the potential loss of democratic control over gambling in Maine and throughout the U.S.

## **Examples of the Consequences for Maine**

In most states in the US, state constitutions and gambling statutes require that gambling must be explicitly authorized by a state in order to be legal.<sup>1</sup> Now that the Appellate Body has ruled that the US made GATS gambling commitments, various state restrictions appear to be violations of these commitments.

In Maine, for example, legislation on Games of Chance<sup>2</sup> sets tight limits on this type of gambling. The panel ruled, and the Appellate Body agreed, that when the US committed to open up gambling this meant an obligation to *open up all forms of gambling*. Prohibiting forms of gambling or restricting the number of gambling operations is a clear violation of GATS Market Access rules that prohibit quantitative limits on services.

Another example of Maine law that appears to be a GATS violation concerns electronic video machines. The Chief of the State Police is authorized to grant licenses for gambling via electronic video machines, but only to certain types of organizations listed in the statute, and then only if they have been in existence in the state for two years. This creates “exclusive suppliers” of gambling services, another apparent violation of GATS Market Access rules.

### **Gambling Commitment a USTR Error**

During and after the WTO dispute proceedings, US officials claimed that they never intended to make such commitments on gambling in the services treaty—not for internet gambling, not for land-based, bricks-and-mortar gambling. No commitments on gambling of any kind. Period.

In fact, a press release issued by the office of the United States Trade Representative (USTR) exclaims that (and I quote) “it defies common sense that the United States would make a commitment to let international gambling operate within our borders.”<sup>3</sup>

In its formal report, the Panel states that the United States indicated that it would (and I quote) “under no circumstances concede the existence of a commitment.”<sup>4</sup>

The Panel indicated that it had some sympathy with the U.S. protestations that it never intended to schedule a GATS commitment for gambling and betting services.<sup>5</sup> Whatever its intentions, however, the panel ruled—and, in its final ruling released on April 7th, the Appellate Body agreed<sup>6</sup>—that the U.S. did *indeed* schedule a GATS market access commitment for gambling and betting services.

Our federal government negotiated and signed this treaty. Just months ago, they insist that they would “under no circumstances concede the existence of a commitment.” They must now concede, whatever their prior protestations, that such a binding commitment does in fact exist.

What does this mean in plain language?

To be blunt, it means that USTR negotiators made mistakes that governments at all levels in the US will have to live with.

USTR made binding international treaty commitments they didn't intend to make. This finding means that the U.S. did not win the case. And unless the US Trade Representative takes action to withdraw its inadvertent commitment, Maine and all other states will be confronted with a new reality.

Because of the nature of the GATS; because US trade negotiators made a serious mistake; *notwithstanding our tight domestic constitutional and legislative rules on gambling*; the stringent market access rules - GATS Market Access Article XVI - now apply to gambling in the U.S.

In the absence of effective action on the part of the federal government, *WTO panels will have become the ultimate arbiters of state and federal regulation of gambling throughout the land.*

## The Gambling Case – Who Really Won?

The fallout from this case may not be felt right away. Acting U.S. Trade Representative Peter Allgeier claims that “U.S. restrictions on *internet gambling* can be maintained.”<sup>7</sup>

On the other hand, lawyers for Antigua and Barbuda say that the WTO’s final verdict is a “landmark victory for Antigua as the first, and smallest, WTO member to defeat the United States, the largest member...” They claim that it will “pave the way for new ... opportunities for Antiguan gaming operators”<sup>8</sup> International Internet gambling interests may take advantage of ambiguity in the Appellate Body decision to test the limits of U.S. law.

The USTR representatives concluded that the ruling means Internet gambling laws are largely safe, although they acknowledged that one federal law would have to be altered to conform to the decision. But what about bricks-and-mortar gambling?

It is clear from the ruling that the US has committed the entire gambling sector, that GATS market access rules apply here, and that key state regulations are vulnerable to GATS challenge.

The respected professor at George Washington University Law School, Steve Charnovitz, states (and I quote) “The decision sets a terrible precedent.”

Professor Charnovitz adds that the ruling ...

“is vindicating those critics of the WTO around the world who have been saying for years—I have always thought wrongly—that the GATS is a threat to legitimate domestic regulations. It’s just not acceptable to tell a country that you can have whatever regulation you want *as long as you justify it under Article XIV [of the GATS].*”

“Both sides got something out of this ruling, but the United States did lose this case and there will be implementation issues. The fact is that Internet gambling is rampant, and to meet the requirements [of the GATS rules interpreted by the Appellate Body] will require a huge

amount of enforcement by U.S. authorities against internet gambling domestically.”<sup>9</sup>

The broader issue of market access rules being applied to bricks-and-mortar gambling is the ‘sleeper’ issue. The US argued in the case with Antigua that Internet gambling posed particular problems that did not exist with bricks-and-mortar gambling, so even if its regulations were violations of its GATS commitments, such regulations were justifiable. But this line of argument in the Antigua case will make it very difficult for the US to justify restrictions on bricks-and-mortar gambling if these are challenged under the GATS.

### **The Broader Implications of the Gambling Case**

During the proceedings, the United States was adamant not only that it had made no market access commitments but also that the Panel’s interpretation of the GATS market access rules in Article XVI was wrong. In its submission to the Appellate Body, the United States used strong language. It said:

“[T]he Panel’s interpretation unreasonably and absurdly deprives Members of a significant component of their right to regulate services by depriving them of the power to prohibit selected activities in sectors where commitments are made.”<sup>10</sup>

The Appellate Body quotes the use of those stark terms -- “unreasonably and absurdly” – in its final report.<sup>11</sup>

But here’s the critical point: The Appellate Body upheld the Panel’s interpretation of Article XVI Market Access in its final report on the case.

Thus, based on the position it advanced during formal WTO dispute settlement proceedings, **in the opinion of the United States federal government, GATS Article XVI rules on Market Access “[u]nreasonably and absurdly deprives Members of a significant component of their right to regulate services...”**

For the State of Maine, and other states that are intent on regulating gambling in the public interest, the results of this case are ominous.

As a result of actions taken by the federal government during GATS negotiations, Maine and other state legislatures must now contend with the prospect that tough market access rules in international trade agreements will be applied to their gambling laws and practices ... without their consent.

## **Recommendations**

This very brief overview of the U.S.-Gambling case leads to several recommendations.

- **First, as a matter of priority, I urge all members of the Commission and of the State Legislature to examine the GATS Article XVI Market Access rules and to seek expert legal guidance to begin to understand their significance in relation to our state laws on gambling.**

As part of this process, I would urge an examination of the possible interaction between these GATS rules and the rules contained in the proposed CAFTA and other treaties that contain extreme 'expropriation-compensation' provisions and binding 'investor-to-state' dispute settlement. (The concern here is that foreign corporations could use GATS rules to establish and expand bricks-and-mortar gambling in Maine, and CAFTA's investment rules could then 'lock-in' this expansion by allowing them to sue if the state in any way reduced the value of their investment. This is particularly important in gambling, since some of the proposed parties to the CAFTA treaty may soon become or may already be —like Antigua—bases for the expansion of gambling activities, including bricks-and-mortar gambling *in Maine*.)

- **Investigate what specific steps the State of Maine can take to ensure that its state prerogative to regulate gambling remains unfettered by the GATS or any other international treaty, and assertively pursue all available avenues to achieve this.**

- **Investigate and pursue options to win the support of other states to ensure the state prerogative to regulate gambling remains unfettered by the GATS or any other international treaty.**
- **Determine what steps the United States Administration can take to ensure that the prerogative of the State of Maine to regulate gambling remains unfettered by the GATS and any other international treaty. In other words, we need to know: what concrete steps can the federal government now take to undo or mitigate the damage it has caused?**

It must be recognized that mistakes made by federal trade negotiators may not be limited to gambling. Their misunderstanding or underestimation of GATS Article XVI during negotiations may have resulted in other critical sectors becoming vulnerable to GATS challenges. It is thus important to....

- **Ascertain if the federal government has rendered existing Maine state measures in service sectors other than gambling vulnerable to GATS challenge.**
- **Ask USTR to notify the WTO that the US will not give its consent to new GATS restrictions on domestic regulation and wants an end to the GATS negotiations devoted to creating new restrictions on domestic regulation ( under Article VI.4 of the agreement).**

Looking to the future, the United States is currently engaged in negotiations to expand the GATS in a number of ways, including possible broader constraints on domestic regulation. It is also seeking to conclude negotiations on a proposed Free Trade Area of the Americas treaty, and numerous bilateral and regional treaties. It is also currently proposing passage of the CAFTA. All of these treaties are complex, and the potential for federal negotiator error significant. Maine should strive to become more actively engaged in issues that are subject to these ongoing trade treaty negotiations.

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Thank you, the Members of the Commission, for your efforts in examining this and other impacts of international trade treaties.

We expect that you will want to investigate this matter further.

We urge you ...

- to act decisively to maintain control over the regulation of gambling in our state.

We also ask you ...

- to do everything in your power to protect the vital interests of the citizens of Maine in other areas.,

Finally, we greatly appreciate your work, as a Citizens' Commission, to cooperate with and work with citizens so that we may begin to do everything in our power, together,

- to enhance, not diminish, our ability to govern ourselves democratically.

## ENDNOTES

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<sup>1</sup> In 1999 the New York State Assistant Attorney General published an article that provides valuable background information on state and federal laws on gambling. See: Joel Michael Schwarz (1999) *The Internet Gambling Fallacy Craps Out*, available at <http://www.law.berkeley.edu/journals/btlj/articles/vol14/Schwarz/html/text.html>, notes for the paper are found at <http://www.law.berkeley.edu/journals/btlj/articles/vol14/Schwarz/html/note.html>.

<sup>2</sup> See Title 17, Chapter 14 Games of Chance, available at: <http://janus.state.me.us/legis/statutes/17/title17ch14sec0.html>

<sup>3</sup> Office of the United States Trade Representative, Statement of Richard Mills, USTR Spokesman, Regarding the WTO Gambling dispute with Antigua and Barbuda, November 10, 2004. (Available at [www.ustr.gov](http://www.ustr.gov)).

<sup>4</sup> World Trade Organization, United States – Measures affecting the cross-border supply of gambling and betting services, Report of the Panel, WT/DS285/R, 10 November 2004, para. 3.144 (To gain access to this and other WTO documents, go to: [http://www.wto.org/english/docs\\_e/docs\\_e.htm](http://www.wto.org/english/docs_e/docs_e.htm), select 'Documents Online search facility' and, where possible, search by document code (in this case WT/DS285/R and in the case of the Appellate Body Report, WT/DS285/AB/R)

<sup>5</sup> U.S.-Gambling, Panel Report, para. 6.136.

<sup>6</sup> U.S.-Gambling, Appellate Body Report, para. 213.

<sup>7</sup> Richard Waddington, Antigua, U.S. Both Claim Win in WTO Gambling Row, Reuters News, April 7, 2005. (<http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=8117129>)

<sup>8</sup> Ibid.

<sup>9</sup> WTO Body Rules on Internet Gambling; Both Sides Find Advantages in Decision, WTO Reporter, April 8, 2005. (<http://pubs.bna.com/ip/BNA/WTO.nsf/is/A0B0R6P7P2>)

<sup>10</sup> United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (AB-2005-1) Appellant Submission of the United States of America, January 14, 2005, para. 129. ([http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file50\\_5581.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file50_5581.pdf))

<sup>11</sup> U.S.-Gambling, Appellate Body Report, para. 26.