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## **1 ARTICLE XVI**

### **1.1 Text of Article XVI**

#### **Article XVI**

##### *Market Access*

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.<sup>8</sup>

*(footnote original)* <sup>8</sup> If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (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 service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>9</sup>

(*footnote original*)<sup>9</sup> Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

- (d) limitations 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 supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

## 1.2 Function of Article XVI

1. In *US – Gambling*, the Appellate Body clarified the function of Article XVI of the GATS as follows:

"Article XVI of the GATS sets out specific obligations for Members that apply insofar as a Member has undertaken 'specific market access commitments' in its Schedule. The first paragraph of Article XVI obliges Members to accord services and service suppliers of other Members 'no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.' The second paragraph of Article XVI defines, in six sub-paragraphs, measures that a Member, having undertaken a specific commitment, is not to adopt or maintain, 'unless otherwise specified in its Schedule'. The first four sub-paragraphs concern quantitative limitations on market access; the fifth sub-paragraph covers measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and the sixth sub-paragraph identifies limitations on the participation of foreign capital."<sup>1</sup>

## 1.3 Article XVI:1

2. The Panel in *US – Gambling* found that paragraph 1 of Article XVI did not contain restrictions on market access beyond those listed in paragraph 2 of Article XVI:

"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."<sup>2</sup>

3. The Appellate Body in *US – Gambling*, noting that Antigua had only made a conditional appeal regarding this issue, left the issue of the relationship between the first and second paragraphs of Article XVI "to another day".<sup>3</sup>

4. In *China – Publications and Audiovisual Products*, the Panel stated that:

"Paragraph 1 of Article XVI sets out the general principle that a Member must accord to services and service suppliers of other Members treatment no less favourable than that specified under the 'terms, limitations and conditions' contained in its schedule. Paragraph 2 is more specific. It defines, in six sub-paragraphs, the measures that a Member, having inscribed a specific sectoral commitment, must not adopt or maintain 'unless otherwise specified in its Schedule'. The six types of measures form a closed or exhaustive list, as indicated by the wording of the chapeau to paragraph 2 ('the measures ... are defined as'). Under Article XVI, a Member undertakes a minimum standard of treatment, and is thus free to maintain a market access regime less

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<sup>1</sup> Appellate Body Report, *US – Gambling*, para. 214.

<sup>2</sup> Panel Report, *US - Gambling*, para. 6.318. See also paras. 6.298-6.299.

<sup>3</sup> Appellate Body Report, *US – Gambling*, para. 256.

restrictive than set out in its schedule, as confirmed in paragraph 1 which refers to a standard of 'no less favourable' treatment."<sup>4</sup>

5. In *China – Electronic Payment Services*, the Panel, referring to the panel reports in *US – Gambling* and *China – Publications and Audiovisual Products*, considered that there was no need to offer additional findings under Article XVI:1 of the GATS after having found a violation of Article XVI:2(a) of the GATS.<sup>5</sup> The Panel observed:

"Bearing the approaches of these panels in mind, we similarly do not consider it necessary to proceed in our analysis under Article XVI:1. We first recall our finding above that the issuer, terminal equipment and acquirer requirements are not among the measures which Article XVI:2 says a Member may not maintain, and more specifically that they do not constitute market access limitations within the meaning of Article XVI:2(a) of the GATS. That being so, as the United States has directed its arguments toward alleging a market access limitation of the type described in Article XVI:2(a), it is difficult to see how the relevant requirements could be subject to Article XVI:1. In any event, in the absence of any meaningful attempt by the United States to demonstrate that the issuer, terminal equipment and acquirer requirements, taken either individually or together, are separately inconsistent with Article XVI:1, we consider that the United States has failed to meet its burden to present a *prima facie* case in respect of its Article XVI:1 claim."<sup>6</sup>

## 1.4 Article XVI:2

### 1.4.1 General

#### 1.4.1.1 Elements of a claim under Article XVI:2

6. In *US – Gambling*, the Appellate Body explained that the text of Article XVI:2 suggests that a complaining party is required to make its *prima facie* case "by first alleging that the [responding party] has undertaken market access commitments in its GATS Schedule; and, secondly, by identifying, with supporting evidence, how the challenged laws constitute impermissible 'limitations' falling within" one of the six subparagraphs of Article XVI:2.<sup>7</sup>

7. The Panels in *China – Publications and Audiovisual Products*, *China – Electronic Payment Services* and *Argentina – Financial Services* followed the approach defined by the Appellate Body in *US – Gambling* when assessing claims under Article XVI:2 of the GATS.<sup>8</sup>

8. For the use of the words "None" and "Unbound" in the "Limitations on Market Access" column of GATS Schedules, see the Section on Article XX:1 of the GATS.

#### 1.4.1.2 Scope of Article XVI:2

9. The Panel in *China – Electronic Payment Services* noted that, while the market access obligation under Article XVI:2 of the GATS "applies to six carefully defined categories of measures of a mainly quantitative nature", the scope of the national treatment obligation under Article XVII extends generally to "all measures affecting the supply of services".<sup>9</sup>

#### 1.4.1.3 Relationship between the six subparagraphs in Article XVI:2

10. In *Argentina – Financial Services*, the Panel observed the following with respect to the limitations contained in subparagraphs (a) to (d) of Article XVI:2 of the GATS:

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<sup>4</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353.

<sup>5</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.628-7.631.

<sup>6</sup> Panel Report, *China – Electronic Payment Services*, para. 7.630.

<sup>7</sup> Appellate Body Report, *US – Gambling*, para. 143.

<sup>8</sup> Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1354; *China – Electronic Payment Services*, paras. 7.511-7.512, and *Argentina – Financial Services*, paras. 7.391-7.392.

<sup>9</sup> Panel Report, *China – Electronic Payment Services*, para. 7.652.

"Turning our focus to subparagraphs (a) to (d), which refer to the quantitative limitations on market access, we note that they explicitly identify the elements to be regulated, namely, 'the number of service suppliers', 'the total value of service transactions or assets', 'the total number of service operations or ... the total quantity of service output' and 'the total number of natural persons' that may be employed in a service sector or by a service supplier. On its face, the text of the subparagraphs in question leads us to conclude that subparagraphs (a) to (d) of Article XVI only cover those elements which are explicitly mentioned in them. Indeed, even if it were conceivable that there might be some other element distinct from the four identified in subparagraphs (a) to (d), whose market access could hypothetically be limited quantitatively, such an element would not form part of the limitations regulated by Article XVI:2 because it was not identified by the drafters. In this regard, we consider that an interpretation of Article XVI:2 which made it applicable to measures that do not, on their face, regulate any of the four elements covered by subparagraphs (a) to (d) would unduly broaden the scope of Article XVI of the GATS and thus the scope of Members' specific commitments."<sup>10</sup>

11. The Panel in *Argentina – Financial Services* further noted that "[o]ne other important element to be borne in mind is that any interpretation of Article XVI:2 of the GATS must give effect to each of the six subparagraphs of the provision".<sup>11</sup>

#### 1.4.1.4 Restrictions on part of a sector

12. The Panel in *US – Gambling* stated, in a finding which was not appealed<sup>12</sup>, that if a full market access commitment is given in a particular sector or sub-sector, that commitment applies to the whole of that sector, including all of its sub-sectors:

"In our view, if a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that fall within the scope of that sector or sub-sector. A Member does not fulfil its GATS obligations if it allows market access for only some of the services covered by a committed sector or sub-sector while prohibiting all others. If a Member wishes to restrict market access with respect to certain services falling within the scope of a sector or sub-sector, it should set out the restrictions or limitations on access in the appropriate place in the Member's schedule. Indeed, a specific commitment in a given sector or sub-sector is a guarantee that the *whole* of that sector, i.e. *all* services included in that sector or sub-sector are covered by the commitment. Any other interpretation would make market access commitments under the GATS largely meaningless."<sup>13</sup>

#### 1.4.1.5 Restrictions on parts of a mode of supply

13. The Panel in *US – Gambling* stated, in a finding that was not appealed<sup>14</sup>, that if a full market access commitment is given for the supply of a service through mode 1, that commitment applies to any means of delivery included in mode 1:

"The Panel concludes that mode 1 under the GATS encompasses all possible means of supplying services from the territory of one WTO Member into the territory of another WTO Member. Therefore, a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule. We note that this is in line with the principle of 'technological neutrality', which seems to be largely shared among WTO Members."<sup>15</sup>

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<sup>10</sup> Panel Report, *Argentina – Financial Services*, para. 7.419.

<sup>11</sup> Panel Report, *Argentina – Financial Services*, para. 7.420.

<sup>12</sup> Appellate Body Report, *US – Gambling*, paras. 219-220.

<sup>13</sup> Panel Report, *US – Gambling*, para. 6.290.

<sup>14</sup> Appellate Body Report, *US – Gambling*, paras. 219-220.

<sup>15</sup> Panel Report, *US – Gambling*, para. 6.285.

#### 1.4.1.6 Temporal qualifications inscribed in the market access column

14. In *Mexico – Telecom*, the Panel found that a temporal limitation inscribed in the market access column of Mexico's Schedule does not amount to a market access limitation within the meaning of Article XVI:2 of the GATS:

"We now consider whether Mexico's entry is equivalent to an 'unbound' entry with respect to market access through the supply, through commercial presence, of the services at issue. The wording of the limitation, that 'permits for the establishment of a commercial agency [will not be issued] until the corresponding regulations are issued', does not specify that a numerical *quota* was to be imposed on the issuance of permits. Rather, the sentence seems to introduce a *temporal* qualification as to *when* establishment will be permitted – namely, after the issuance of the regulations.

The six categories of measures in Article XVI:2 refer to the types of market access limitations that can be imposed on the supply of a service. However, none of the six categories relate to *temporal* limitations – such as dates for entry into force or for the implementation of commitments. This suggests that temporal limitations cannot constitute limitations on market access under Article XVI:2 of the GATS."<sup>16</sup>

15. Looking at Article XX:1 of the GATS as context, the Panel in *Mexico – Telecoms* further observed that, pursuant to that provision, "[t]he need to specify entries with regard to the *substantive* elements in Articles XVI (market access), Article XVII (national treatment), and Article XVIII (additional commitments) is dealt with in subparagraphs (a) to (c) of Article XX:1 respectively", while "[t]he need for specificity on the *temporal* aspects of commitments is dealt with in subparagraphs (d) and (e) of Article XX:1". The Panel concluded that "[t]he separate listing of temporal elements of entry into force and implementation in Article XX:1 confirms, in our view, that temporal elements are not part of the substantive elements that can be market access limitations under Article XVI:2".<sup>17</sup>

#### 1.4.1.7 "Routing requirements" in telecommunications

16. The Panel in *Mexico – Telecoms*, observing that Mexico's GATS Schedule required that international telecommunications traffic "must be routed through the facilities" of a Mexican concessionaire, found that this "refers not to a requirement simply to use the equipment or physical assets of a Mexican concessionaire, but to supply the service on a facilities-basis, and not through capacity leased to the cross-border supplier."<sup>18</sup> With respect to the cross border supply of telecommunications services:

"This element of the routing restriction means, therefore, that supply of the service by means of one of the categories (over leased capacity) within Mexico is prohibited, and is subject to a zero quota in the sense of Article XVI:2(a), (b) and (c). We note that, while this limitation prohibits services that originate on a facilities basis from being terminated over leased circuits, it does not prevent these services from being supplied when they fall within the facilities-based category with respect to termination."<sup>19</sup>

17. Likewise, with respect to non-facilities based services supplied cross border, the Panel in *Mexico – Telecoms* found that the routing requirement "prohibits the cross-border supply upon termination within Mexico by means of the very "leased capacity" which defines this type of service. The Panel therefore found:

"While this element of the routing restriction does not expressly prohibit cross-border supply over leased capacity on the originating segment, it means that supply over leased capacity on the terminating segment is prohibited. Therefore, this element of the routing restriction prohibits end-to-end International Simple Resale (ISR), and effectively eliminates the possibility of any cross-border supply of services over leased capacity. In this sense, with respect to cross border services supplied by commercial

<sup>16</sup> Panel Report, *Mexico – Telecoms*, paras. 7.357-7.358.

<sup>17</sup> Panel Report, *Mexico – Telecoms*, paras. 7.360-7.361.

<sup>18</sup> Panel Report, *Mexico – Telecoms*, para. 7.85.

<sup>19</sup> Panel Report, *Mexico – Telecoms*, para. 7.85.

agencies, the routing restriction falls within the scope of Article XVI:2(a), (b) and (c)."<sup>20</sup>

#### 1.4.2 Article XVI:2 – Introductory heading or "chapeau"

18. Looking at the chapeau to Article XVI:2 as context for the interpretation of one of the six subparagraphs contained in that provision, the Appellate Body in *US – Gambling* observed:

"[T]he chapeau to Article XVI:2, refers to the purpose of the sub-paragraphs that follow, namely, to define the measures which a Member shall not maintain or adopt for sectors *where market access commitments are made*. The chapeau thus contemplates circumstances in which a Member's Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member's Schedule."<sup>21</sup>

19. In *Argentina – Financial Services*, the Panel recalled that, pursuant to the chapeau of Article XVI:2, the six measures listed in that provision "are defined as" and observed:

"The word '*definir*' (to define) means '*[f]ijar con claridad, exactitud y precisión el significado de una palabra o la naturaleza de una persona o cosa*' (to establish clearly, exactly and precisely the meaning of a word or the nature of a person or thing). In our view, the list of measures in the six subparagraphs of Article XVI:2 is not only exhaustive but also fulfils the function of establishing clearly, exactly and precisely the types of limitation on market access that are prohibited and hence may not be maintained or adopted in those sectors where a Member had adopted specific commitments, unless it has specifically mentioned this possibility in its Schedule. This function is key because it enables Members wishing to undertake specific commitments on market access, as well as all the other Members, to understand precisely the scope of such commitments. Bearing in mind that, in sectors where they make specific commitments, Members have the right to maintain one (or more) of these six limitations provided that they are inscribed in their Schedules, the function of the list of measures, 'to establish clearly, exactly and precisely', compels Members to define and identify clearly and exactly the scope of such limitations – and hence the scope of the specific commitment they have made."<sup>22</sup>

#### 1.4.3 Article XVI:2(a)

20. The Appellate Body in *US – Gambling* observed that the use of the words "number" of suppliers and "numerical" quotas in this provision suggests a focus on "quantitative limitations".<sup>23</sup>

21. Since the dictionary meaning of the word "form" was broad, the Appellate Body in *US – Gambling* reasoned that the meaning of the phrase "in the form of" had to be deduced by reading it together with the four types of limitation which it described.<sup>24</sup> The phrase "in the form of", read together with the words "numerical quota", suggested that Article XVI:2(a) could encompass a zero quota:

"The fact that the word 'numerical' encompasses things which 'have the characteristics of a number' suggests that limitations 'in the form of a numerical quota' would encompass limitations which, even if not in themselves a number, have the characteristics of a number. Because zero is *quantitative* in nature, it can, in our view, be deemed to have the 'characteristics of' a number—that is, to be 'numerical'. "<sup>25</sup>

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<sup>20</sup> Panel Report, *Mexico – Telecoms*, para. 7.86.

<sup>21</sup> Appellate Body Report, *US – Gambling*, para. 233.

<sup>22</sup> Panel Report, *Argentina – Financial Services*, para. 7.418.

<sup>23</sup> Appellate Body Report *US – Gambling*, para. 225.

<sup>24</sup> Appellate Body Report, *US – Gambling*, para. 226.

<sup>25</sup> Appellate Body Report, *US – Gambling*, para. 227.

22. The phrase "in the form of", read together with the terms "monopolies" and "exclusive service suppliers", and bearing in mind the GATS definitions of these terms, suggested that Article XVI:2(a) could include limitations that are "in effect" monopolies or exclusive service suppliers:

"These two definitions suggest that the reference, in Article XVI:2(a), to limitations on the number of service suppliers 'in the form of monopolies and exclusive service suppliers' should be read to include limitations that are in form *or in effect*, monopolies or exclusive service suppliers."<sup>26</sup>

23. The phrase "in the form of", read together with the phrase "the requirements of an economic needs test" did not suggest clearly that such a test needed to take any particular form:

"We further observe that it is not clear that 'limitations on the number of service suppliers ... in the form of ... the requirements of an economic needs test' must take a particular 'form.'<sup>27</sup> Thus, this fourth type of limitation, too, suggests that the words 'in the form of' must not be interpreted as prescribing a rigid mechanical formula."<sup>28</sup>

24. The Appellate Body in *US – Gambling*, in concluding that the words "in the form of" must not be interpreted as "prescribing a rigid mechanical formula", cautioned:

"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 words that follow them, including the words '*numerical* quotas'. (emphasis added) 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."<sup>29</sup>

25. The Appellate Body in *US – Gambling* examined the context provided by the phrase "where market access commitments are made", contained in the chapeau to Article XVI:2. It concluded that this phrase did not imply that a zero quota or a prohibition was outside the scope of the quantitative measures described in sub-paragraph (a), referring to an analogous provision in the GATT 1994, Article II:1(b).<sup>30</sup> The Appellate Body quoted approvingly the Panel's conclusion on this issue:

"The fact that the terminology [of Article XVI:2(a)] embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero. Paragraph (a) does not foresee a 'zero quota' because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or subsector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2."<sup>31</sup>

26. The Appellate Body in *US – Gambling*, finding that "certain ambiguities" remained in the interpretation of Article XVI:2(a), referred to the 1993 Scheduling Guidelines as relevant preparatory work, concluding that a measure equivalent to a zero quota is within the scope of sub-paragraph (a):

"[T]hose Guidelines set out an example of the type of limitation that falls within the scope of sub-paragraph (a) of Article XVI:2, that is, of the type of measures that will

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<sup>26</sup> Appellate Body Report, *US – Gambling*, para. 230. The definitions of "monopoly supplier of a service" and "exclusive service suppliers" are found, respectively, in Article XXVIII(h) and Article VIII:5 of the GATS.

<sup>27</sup> (footnote original) See the WTO Secretariat Note on "Economic Needs Tests", S/CSS/W/118, 30 November 2001, para. 4.

<sup>28</sup> Appellate Body Report, *US – Gambling*, para. 231.

<sup>29</sup> Appellate Body Report, *US – Gambling*, para. 232.

<sup>30</sup> Appellate Body Report, *US – Gambling*, para. 233.

<sup>31</sup> Panel Report, *US – Gambling*, para. 6.331; quoted in Appellate Body Report, para. 233.



be inconsistent with Article XVI if a relevant commitment has been made and unless the Member in question has listed it as a condition or limitation in its Schedule. That example is: 'nationality requirements for suppliers of services (equivalent to zero quota)'.<sup>32</sup> This example confirms the view that measures equivalent to a zero quota fall within the scope of Article XVI:2(a)."

27. The Appellate Body in *US – Gambling* thus concluded that "limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a)".<sup>33</sup> Since the Panel's findings on limitations affecting part of a sector, or part of a mode of supply, were not appealed, the Appellate Body was able to quote and uphold the Panel's combined finding that:

"[A] prohibition on one, several or all means of delivery cross-border] is a 'limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1."<sup>34</sup>

28. The Panel in *Mexico – Telecoms*, observing that Mexico's GATS Schedule required that international telecommunications traffic "must be routed through the facilities" of a Mexican concessionaire, found that this "refers not to a requirement simply to use the equipment or physical assets of a Mexican concessionaire, but to supply the service on a facilities-basis, and not through capacity leased to the cross-border supplier."<sup>35</sup> With respect to the cross border supply of telecommunications services:

"This element of the routing restriction means, therefore, that supply of the service by means of one of the categories (over leased capacity) within Mexico is prohibited, and is subject to a zero quota in the sense of Article XVI:2(a), (b) and (c). We note that, while this limitation prohibits services that originate on a facilities basis from being terminated over leased circuits, it does not prevent these services from being supplied when they fall within the facilities-based category with respect to termination."<sup>36</sup>

29. Likewise, with respect to non-facilities based services supplied cross border, the Panel in *Mexico – Telecoms* found that the routing requirement "prohibits the cross-border supply upon termination within Mexico by means of the very "leased capacity" which defines this type of service. The Panel therefore found:

"While this element of the routing restriction does not expressly prohibit cross-border supply over leased capacity on the originating segment, it means that supply over leased capacity on the terminating segment is prohibited. Therefore, this element of the routing restriction prohibits end-to-end International Simple Resale (ISR), and effectively eliminates the possibility of any cross-border supply of services over leased capacity. In this sense, with respect to cross border services supplied by commercial agencies, the routing restriction falls within the scope of Article XVI:2(a), (b) and (c)."<sup>37</sup>

30. In *China – Electronic Payment Services*, the Panel examined whether, as argued by the complainant, the terms "monopoly" and "exclusive service suppliers" should be interpreted to have the same meaning. Referring to dictionary definitions provided by the United States and recalling the definitions of "monopoly supplier of a service" and "exclusive service suppliers" contained in, respectively, Articles XXVIII(h) and VIII:5 of the GATS, the Panel stated:

"As a general textual matter, the definitions of the term 'monopoly' provided by the United States support the view that the notion of a monopoly service supplier may overlap with that of an exclusive service supplier. However, Article XVI:2(a) of the GATS draws a distinction between these two terms. We must give meaning to all

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<sup>32</sup> (footnote original) 1993 Scheduling Guidelines, para. 6. (Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/64, 3 September 1993).

<sup>33</sup> Appellate Body Report, *US – Gambling*, para. 238.

<sup>34</sup> Panel Report, *US – Gambling*, para. 6.335.

<sup>35</sup> Panel Report, *Mexico – Telecoms*, para. 7.85.

<sup>36</sup> Panel Report, *Mexico – Telecoms*, para. 7.85.

<sup>37</sup> Panel Report, *Mexico – Telecoms*, para. 7.86.



terms and cannot therefore assume that the terms mean one or the same thing. Taking into account the different meaning given to these terms in the text of the Articles VIII:5 and XXVIII(h) of the GATS, and the distinction made in Article XVI:2(a), we consider that a monopoly supplier is a sole supplier authorized or established formally or in effect by a Member, whereas an exclusive service supplier is one of a small number of suppliers in a situation where a Member authorizes or establishes a small number of service suppliers, either formally or in effect, and that Member substantially prevents competition among those suppliers. We have not identified anything in the definitions provided by the parties, or elsewhere, that would lead us to conclude differently. Thus, for the purpose of Article XVI:2, we do not consider that a monopoly supplier is at the same time an exclusive service supplier."<sup>38</sup>

31. In *China – Electronic Payment Services*, the Panel examined whether Article XVI:2(a) should be interpreted to include not only limitations that are "in the form" of monopolies or exclusive service suppliers, but also that are "in effect" such limitations. Recalling the Appellate Body Report in *US – Gambling*, the Panel stated:

"[W]hether a limitation is 'in the form of' a monopoly or exclusive service supplier within the meaning of Article XVI, turns notably on whether it is 'numerical' or 'quantitative' in nature. We understand the Appellate Body to mean that even a measure that is not, for instance, called a 'quota' can fall within the scope of Article XVI:2(a), if it is quantitative in its thrust and therefore, limits the supply of a service as a quota would do. Regarding the form of such a measure, it may be any type of government-imposed law or regulation.

Accordingly, we consider that in our Article XVI:2 analysis of the four requirements at issue we must focus, not on whether they formally or explicitly institute a monopoly or an exclusive service supplier, but on whether they constitute a limitation that is numerical and quantitative in nature. More particularly, we must examine whether they are of such a nature that they limit to one, or a small number, the number of authorized EPS suppliers in China."<sup>39</sup>

32. In *Argentina – Financial Services*, the Panel considered that "a measure will be covered by Article XVI:2(a) of the GATS if it regulates 'service suppliers' as such, that is, when the measure is aimed at persons in their capacity as service suppliers".<sup>40</sup>

### 1.5 Article XVI:2(b)

33. The Panel in *Mexico – Telecoms* examined Mexico's GATS Schedule which required that international telecommunications traffic "must be routed through the facilities" of a Mexican concessionaire. See discussion in paragraphs 28-29 above.

### 1.6 Article XVI:2(c)

34. The Appellate Body in *US – Gambling*, noting that the construction of Article XVI:2(c) was "grammatically ambiguous",<sup>41</sup> focused instead on the language of the provision, finding that it did not necessarily exclude a measure equivalent to a zero quota:

"In our view, by combining, in sub-paragraph (c), the elements of the first clause of Article XVI:2(c) and the elements in the second part of the provision, the parties to the negotiations sought to ensure that their provision covered certain types of limitations, but did not feel the need to clearly demarcate the scope of each such element. On the contrary, there is scope for overlap between such elements: between limitations on the number of service operations and limitations on the quantity of service output, for example, or between limitations in the form of quotas and limitations in the form of an economic needs test. That sub-paragraph (c) applies in respect of all four modes of supply under the GATS also suggests the limitations

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<sup>38</sup> Panel Report, *China – Electronic Payments Services*, paras. 7.585-7.587.

<sup>39</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.592-7.593.

<sup>40</sup> Panel Report, *Argentina – Financial Services*, para. 7.424.

<sup>41</sup> Appellate Body Report, *US – Gambling*, para. 245.

covered thereunder cannot take a single form, nor be constrained in a formulaic manner. Nonetheless, all types of limitations in sub-paragraph (c) are quantitative in nature, and all restrict market access. For these reasons, we are of the view that, *even if* sub-paragraph (c) is read as referring to only *two* types of limitations, as contended by the United States, it does not follow that sub-paragraph (c) would not catch a measure equivalent to a zero quota."<sup>42</sup>

35. In order to resolve any ambiguity that Article XVI:2(c) covers measures equivalent to a zero quota, the Appellate Body in *US – Gambling* resorted to supplementary sources. It noted references, made in 1991 in the group negotiating the GATS, to the "quantitative" nature of measures covered by Article XVI. It also noted a relevant example in the 1993 Scheduling Guidelines of a type of measure covered by Article XVI:2(c): "[r]estrictions on broadcasting time available for foreign films", a measure that does not mention numbers or units.<sup>43</sup> If this were not the case, the Appellate Body stated, Article XVI:2(c) "could not cover, for example, a limitation expressed as a percentage or described using words such as "a majority"."<sup>44</sup>

36. The Appellate Body in *US – Gambling* was thus able to conclude that "limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a)"<sup>45</sup>. Since the Panel's findings on limitations affecting part of a sector, or part of a mode of supply, were not appealed, the Appellate Body was able to quote and uphold the Panel's combined finding that a measure prohibiting the supply of certain services where specific commitments have been undertaken is a limitation within the meaning of Article XVI:2(c) "because it totally prevents the services operations and/or service output through one or more or all means of delivery that are included in mode 1. In other words, such a ban results in a "zero quota" on one or more or all means of delivery include in mode 1."<sup>46</sup>

37. The Appellate Body in *US – Gambling* declined to go beyond a ruling on the measure at issue, and stated that "[i]t is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures, and we do not do so here."<sup>47</sup>

38. The Panel in *Mexico – Telecoms* examined Mexico's GATS Schedule which required that international telecommunications traffic "must be routed through the facilities" of a Mexican concessionaire. See discussion in paragraphs 28-29 above.

### 1.7 Article XVI:2(f)

39. Recalling that "limitations on the participation of foreign capital" within the meaning of Article XVI:2(f) "must be 'in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment'", the Panel in *China – Publications and Audiovisual Product* found:

"Thus, limitations within the meaning of Article XVI:2(f) would need to take one of two forms: (1) a maximum percentage of capital that can be held by foreign investors; or (2) a total value of foreign investment, either by an individual investor or foreign investors as a whole."<sup>48</sup>

40. The Panel in *China – Publication and Audiovisual Products* examined the distinction between "holding a dominant position" and "holding a majority of shares". The Panel found:

"'[H]olding a dominant position' suggests that one has a 'controlling' position in an entity, while 'holding a majority of shares' means simply that one must hold over 50% of the shares. These notions are not the same. In an entity in which shares are owned by a number of different persons, a single shareholder may, due to the dispersal of ownership interests, have a 'dominant position' while holding far fewer

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<sup>42</sup> Appellate Body Report, *US – Gambling*, para. 247.

<sup>43</sup> Appellate Body Report, *US – Gambling*, para. 249.

<sup>44</sup> Appellate Body Report, *US – Gambling*, para. 250.

<sup>45</sup> Appellate Body Report, *US – Gambling*, para. 238.

<sup>46</sup> Panel Report, *US – Gambling*, para. 6.355, cited by the Appellate Body at para. 252.

<sup>47</sup> Appellate Body Report, *US – Gambling*, para. 250.

<sup>48</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.1360.

than 50 per cent of the shares. Thus 'holding a dominant position' does not necessarily imply 'holding a majority of shares' in an entity.

We note in this respect that the GATS, in its origin rules for service suppliers of another Member, makes a similar distinction between ownership and control of an entity. According to Article XXVIII(n), a juridical person is 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member, while a juridical person is 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions."<sup>49</sup>

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<sup>49</sup> Panel Report, *China – Publication and Audiovisual Products*, paras. 7.1392-7.1394. In that dispute, the Panel also found that measures whereby the domestic joint venture partner "shall hold no less than 51% equity in the contractual joint venture" or whereby the provision of the service is "limited to contractual joint ventures where the [domestic] partner holds majority share" amount to "limitations on the foreign equity participation in terms of maximum percentage limit on foreign share-holding" within the meaning of Article XVI:2(f). See Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1376 and 7.1388.