

Cross-Border Gambling and Betting Services
Under WTO Disciplines

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Cross-Border Gambling and Betting Services Under WTO Disciplines

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Abstract

Under GATS, Mode I involves the supply of a service from the territory of one Member into the territory of any other Member. Few negotiators of the Uruguay Round would have imagined the significance that this mode has come to acquire, or that on-line gambling service would flourish so much as to raise a dispute between Members of the WTO. As the first precedent on Mode I of GATS, “US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services” contains important suggestive interpretations of Members’ Schedules as well as general exceptions of the GATS, including burden of proof. The authors review the reports of the Panel and Appellate Body, and explore the implications of the case beyond GATS.

I. INTRODUCTION

Recent technological developments in the information industry have made possible certain commercial transactions that were beyond imagination before the establishment of the World Trade Organization (WTO). On-line transactions are one example; these can be categorised as “mode 1”¹ forms of supply in the General Agreement on Trade in Services (GATS). Although there exists such a category in the GATS, not many of the Uruguay Round negotiators would have imagined that, say, on-line gambling services would flourish to such an extent as to raise a dispute between WTO Members (hereinafter “Members”).

Under the GATS, the provision of Most-Favoured-Nation status is a general obligation for Members. Members are also subject to market access and national treatment to the extent of their specific commitments in their Schedules set out pursuant to Articles XVI, XVII and XX of the GATS. If a Member has so committed itself in its Schedule, it is obliged to provide market access and national treatment for the sectors which are mode 1 forms of supply.

Recently, a precedent in relation to mode 1 has emerged in the WTO dispute settlement system. This case, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (hereinafter “U.S.—Gambling”), is an important precedent not only because it is the first case involving mode 1 of the GATS, but also it includes indicative interpretations of Members’ Schedules as well as general exceptions of the GATS and the burden of proof, which could provide guidance for future cases. The precedential value increased when the case was reviewed by the Appellate Body (hereinafter, “the A.B.”), which is the final quasi-tribunal to decide cases in the WTO. This article discusses this case and its implications.

II. A BRIEF OVERVIEW OF U.S.—GAMBLING

U.S.—*Gambling* involved a dispute between Antigua and Barbuda (hereinafter “Antigua”) and the United States of America regarding measures applied by the U.S. through various means, including federal and state laws, against a remote supply of gambling and betting services from Antigua. Antigua brought the case to the WTO claiming that the U.S. had violated Article XVI² of the GATS, namely, its specific commitment of market access in relation to this service.

1 “Mode 1” is defined in Art. I:2(a) in GATS as follows: “the supply of a service... from the territory of one Member into the territory of any other Member.” “Mode 2”, “mode 3” and “mode 4” are also respectively defined in Art. I:2(b) to (d) as the supply of a service “in the territory of one Member to the service consumer of any other Member”, “by a service supplier of one Member, through commercial presence in the territory of any other Member”, and “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member”.

2 Art. XVI, titled “Market Access”, consists of two provisions. Art. XVI:1 states: “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” [footnote omitted]. Art. XVI:2 provides as follows: “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

The panel hearing the case found that the U.S. had violated Article XVI of the GATS, and that it had failed to demonstrate that the measures were provisionally justified under Articles XIV(a) and (c) nor the “chapeau” of Article XIV. Both parties appealed certain legal interpretations developed by the panel. The A.B. reversed some aspects of the panel’s findings, and found that the U.S. had demonstrated provisional justification under Article XIV(a), but had failed to do so for the chapeau.

The report of the panel was issued on 10 November 2004 followed by the issuance of the report of the A.B. on 7 April 2005, and the Dispute Settlement Body adopted these reports on 20 April 2005.³

In this section, the decisions of the panel and the A.B. on the main issues will be described in the following order: the measure at issue, the interpretation of the Schedule, the application of Article XVI of the GATS, and the general exceptions in Article XIV.

A. Does “Total Prohibition” Constitute a “Measure” at Issue?

This issue arose at the panel stage when Antigua argued that the restrictions imposed by the U.S. through federal and state laws resulted in a “total prohibition” of mode 1 supplies of gambling and betting services from Antigua. The U.S. requested for a preliminary ruling on this issue, contending that a “total prohibition” could not be a “measure”. The panel found that it was too premature to make a ruling on the matter. The U.S. then argued that Antigua, by making its “total prohibition” claim, had not established a *prima facie* case of violation by the U.S. of Article XVI of the GATS. The panel decided that Antigua could not rely on that claim, which simply described the effect of a list of U.S. legislative provisions and other instruments, as a “measure” in and of itself.⁴ The panel divided the federal and state laws cited by Antigua into those that were inconsistent and consistent with the GATS, and recommended only that the former category of laws should be brought into conformity with the GATS by the U.S.⁵ In so doing, the panel found that Antigua had established a *prima facie* case in respect of three federal laws and eight state laws⁶ out of the nine federal laws and 84 state laws listed in Antigua’s panel request.⁷

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; ... (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...” [footnote omitted].

3 Canada, Chinese Taipei, the European Communities, Japan and Mexico were third parties to this case, and were referred to as “participants” in the A.B. proceedings.

4 *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (2004), WTO Doc. WT/DS285/R at paras. 6.175 and 6.185 (Panel Report), online: WTO <http://docsonline.wto.org/gen_search.asp?searchmode=simple> (hereinafter “U.S.—Gambling (Panel Report)”).

5 *Ibid.* at para. 7.5.

6 The federal laws in question were the Transmission of Wagering Information Act, 18 U.S.C. § 1084 (hereinafter “the Wire Act”), the Interstate or Foreign Travel or Transportation in Aid of Racketeering

The A.B. noted the need for a party to demonstrate the exact target of challenge, since the responding party would otherwise be unable to raise its defence. It upheld the panel's finding on "total prohibition."⁸ However, it reversed the panel's ruling on the eight state laws⁹ in accordance with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU)¹⁰ as well as a ruling on this provision¹¹ which stated that "the evidence and arguments underlying a prima facie case must be sufficient enough to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".¹² In its view, Antigua had not sufficiently established these requirements. Thus the scope of the A.B.'s review was limited to three U.S. federal laws.

B. Applying Vienna Convention Principles in Interpreting the U.S. Schedule

The two disputing parties disagreed with the scope of the U.S.'s specific commitment in relation to gambling and betting services. In the U.S. Schedule, the word "None" was inscribed in respect of limitations on market access for mode 1 and mode 2 supplies under the heading "10. Recreational, cultural and sporting services... D. Other recreational services (except sporting)". The U.S. insisted that since it had used the phrase "except sporting", and since the ordinary meaning of "sporting" includes gambling and betting services, this rendered such services outside of its specific commitments. Antigua argued that gambling and betting services fell within "Other recreational services" in respect of which the U.S. had made a commitment to full market access.

The panel examined ordinary meanings of the key terms "Other recreational services (except sporting)" and "Entertainment services" in the U.S. Schedule, and found that "sporting" did not include gambling.¹³ In so finding, the panel relied

Enterprises Act, 18 U.S.C. § 1952, and the Prohibition of Illegal Gambling Business Act, 18 U.S.C. § 1955 (*ibid.* at para. 6.223), while the state laws were those of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah (*ibid.* at paras. 6.226, 6.229, 6.232, 6.235, 6.239, 6.242, 6.245 and 6.248).

7 *Ibid.* at para. 6.223.

8 United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services from Antigua and Barbuda (Complaint by Antigua and Barbuda) (2005), WTO Doc. WT/DS285/AB/R at paras. 125 and 126 (Appellate Body Report) (hereinafter "U.S.—Gambling (A.B. Report)").

9 *Ibid.* at para. 154.

10 Art. 6.2 of the DSU states: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

11 *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Complaint by Argentina)* (2004), WTO Doc. WT/DS268/R at para. 162 (Panel Report); WTO Doc. WT/DS285/AB/R at para. 141 (Appellate Body Report) (hereinafter *U.S.—Oil Country Tubular Goods Sunset Reviews*).

12 U.S.—Oil Country Tubular Goods Sunset Reviews (A.B. Report), *ibid.* at para. 141.

13 U.S.—Gambling (Panel Report), *supra* note 4 at para. 6.61.

heavily on dictionary definitions, referring to 13 different dictionaries.¹⁴ It considered the fact that the “*déportivos*” and “*sportifs*”, which are the Spanish and French words corresponding to “sporting”, do not include “gambling”.¹⁵ Further, since an examination of the ordinary meanings of “Other recreational services (except sporting)” and “Entertainment services” did not lead to a definitive conclusion in the panel’s view,¹⁶ the panel turned to the context, namely the Uruguay Round—Group of Negotiations on Services—Services Sectoral Classification List—Note by the Secretariat (hereinafter “W/120”)¹⁷ and the Uruguay Round—Group of Negotiations on Services—Scheduling of Initial Commitments in Trade in Services: Explanatory Note (hereinafter “the 1993 Scheduling Guidelines”)¹⁸ which it considered relevant.¹⁹ It found that the U.S. Schedule was to be understood to include a specific commitment on gambling and betting services under sub-sector 10.D.²⁰ To confirm this finding, the panel also examined other Members’ GATS Schedules and the U.S. Schedule, the object and purpose of the GATS, the cover note to the U.S.’s draft Schedules during the Uruguay Round, and U.S. state practice as supplementary sources of interpretation within the meaning of Article 32 of the Vienna Convention on the Law of Treaties (hereinafter “the Vienna Convention”).²¹

14 *Ibid.* at paras. 6.55–6.59.

15 *Ibid.* at paras. 6.59 and 6.60.

16 *Ibid.* at paras. 6.63–6.67.

17 (1991), WTO Doc. MTN.GNS/W/120.

18 (1993), WTO Doc. MTN.GNS/W/164.

19 U.S.—Gambling (Panel Report), *supra* note 4 at para. 6.82.

20 *Ibid.* at para. 6.93.

21 *Ibid.* at paras. 6.97–6.133. The Vienna Convention, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980), sets out the general rule of interpretation which is considered to form part of the “customary rules of interpretation of public international law” in Art. 3.2 of the DSU for clarification of the WTO Agreements: *United States—Standards for Reformulated and Conventional Gasoline (Complaint by Brazil et al.)* (1996), WTO Doc. WT/DS2/AB/R at 17 (Appellate Body Report); *Japan—Taxes on Alcoholic Beverages (Complaint by Canada et al.)* (1996), WTO Docs. WT/DS 8, 10, 11/AB/R at 10–12 (Appellate Body Report) (hereinafter *Japan—Alcoholic Beverages II*). Arts. 31(1), 31(2)(a) and (b), 31(3)(b) and 32 of the Vienna Convention provide as follows:

Article 31: General rule of interpretation

- (1) A treaty shall 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.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including this preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- (3) There shall be taken into account, together with the context:

...

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or

The A.B. viewed this issue as a matter of whether or not panel could legally use the Vienna Convention principles of interpretation when determining the scope of the specific commitments of the U.S. as well as its conclusion drawn therefrom,²² seemingly because the U.S. had argued that the panel had not properly applied Article 31(1) of the Vienna Convention.²³ The A.B. eventually reached the same conclusion as the panel did, albeit for different reasons.

After noting that “dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation”,²⁴ the A.B. viewed the aforementioned panel’s interpretative approach as “too mechanical” and “fail[ing] to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word ‘sporting’”, and also “fail[ing] to explain the basis for its recourse to the meanings of the French and Spanish words” when the U.S. had explicitly stated in the cover note of its Schedule that it was “authentic in English only”.²⁵ In short, the A.B. considered the panel’s finding “premature”, and noted that “sporting” can have both the meanings claimed by Antigua as well as the U.S.²⁶

The A.B. then examined the “nature” of the two documents regarded as providing relevant context by the panel. It came to the opposite conclusion, taking the view that the documents constituted neither “agreement” nor “acceptance” as provided in Article 31(2) of the Vienna Convention. The A.B. went on to examine other materials claimed by the panel as well as the parties to provide the relevant context,²⁷ but these did not assist it in definitively stating which sector or sub-sector in the U.S. Schedule gambling and betting services fell under.²⁸ Therefore, the A.B. turned to the object and purpose of the GATS. It agreed with the panel’s characterisation in this regard but again found that they provided no specific assistance.²⁹

Antigua had argued that the subsequent practice of states as provided in Article 31(3)(b) of the Vienna Convention should be considered, and had opined that such subsequent practice was to be found in the *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services* (hereinafter, “2001 Scheduling Guidelines”).³⁰ Recognising that this was the right

(b) leads to a result which is manifestly absurd or unreasonable.

[Emphasis added]

23 U.S.—*Gambling* (A.B. Report), *supra* note 8 at para. 161.

24 *Ibid.* at para 163.

24 *Ibid.* at para 164.

25 *Ibid.* at para 166.

26 *Ibid.* at para 167.

27 *Ibid.* at paras. 172–177. Other contexts examined by the A.B. were: (a) the remainder of the U.S.’s Schedule of specific commitments, (b) the substantive provisions of the GATS, (c) the provisions of covered agreements other than the GATS, and (d) the GATS Schedules of other Members: *ibid.* at para. 178. From its review of the matter mentioned in paragraph (b) the A.B. held that “the sectors and subsectors in a Member’s Schedule must be mutually exclusive”. This necessarily means that gambling and betting services fall within only one category among “recreational services”, “sporting” and “entertainment services” in the context of the U.S. Schedule: *ibid.* at para. 180.

28 *Ibid.* at paras. 179–186.

29 *Ibid.* at paras. 188 and 189.

30 (2001), WTO Doc. S/L/92.

interpretative element to be considered, the A.B. first noted that “practice” means “common, consistent, discernible pattern of acts or pronouncements”.³¹ However, as it found difficulty in accepting the 2001 Scheduling Guidelines as constituting subsequent practice, it concluded that the application of Article 31 leaves open the question of the scope of the U.S.’s commitment in its Schedule. It was therefore necessary to examine the supplementary means of interpretation in Article 32.

The A.B. turned to W/120 and the 1993 Scheduling Guidelines, which the parties had agreed to regard as preparatory work. It compared the phrase “Other recreational services (except sporting)” in the U.S. Schedule with the similar phrase “Sporting and other recreational services” in W/120 which also shows the corresponding Provisional Central Product Classification (C.P.C.)³² Group 964 and its classes and sub-classes.³³ It observed that C.P.C. Class 9641 does not include gambling and betting services, but C.P.C. Class 9649 (“Other recreational services”) includes such services.³⁴ Since the 1993 Scheduling Guidelines explicitly indicated a preference for using the W/120 and the C.P.C. for scheduling, and taking into account the absence of a clear indication to the contrary in the U.S. Schedule, the A.B. concluded that the U.S. had not excluded gambling and betting services from the scope of its commitments by use of the phrase “except sporting”, which did not include gambling and betting services. It therefore upheld the panel’s finding.³⁵

31 In this regard, the A.B. referred to precedents in this regard such as Japan—Alcoholic Beverages II, *supra* note 21, and Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complaint of Argentina et al.) (2002), WTO Doc. WT/DS207/R (Panel Report): U.S.—Gambling (A.B. Report), *ibid.* at para. 192.

32 United Nations, Statistical Papers, Series M, No. 77, *Provisional Central Product Classification*, 1991.

33 The relevant part of W/120 (*supra* note 17) states as follows:

SECTORS AND SUB-SECTOR	CORRESPONDING C.P.C.
...	964
10...	
D. Sporting and other recreational services	

C.P.C. Group 964 states as follows:

- “964 Sporting and other recreational services
- 9641 Sporting services
 - 96411 Sports event promotion services
 - 96412 Sports event organization services
 - 96413 Sports facility operation services
 - ...
 - 96419 Other sporting services
 - ...
 - 9649 Other recreational services
 - 96491 Recreation park and beach services
 - 96492 Gambling and betting services
 - 96493 Other recreational services”

34 U.S.—Gambling (A.B. Report), *supra* note 8 at paras. 198–201.

35 *Ibid.* at paras. 203–208, 212 and 213.

C. Application of Article XVI of the GATS: Does “None” in the Schedule Mean Unlimited Liberalisation?

Article XVI of the GATS obliges Members to accord services and service suppliers of other Members “treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule”, and prohibits Members, in so far as its specific commitments are concerned, from adopting or maintaining measures defined in the following six sub-paragraphs “unless otherwise specified in its Schedule”.³⁶ In the context of U.S.—*Gambling*, the U.S. had inscribed “None” as its specific market access commitment towards its sub-sector 10.D services.

The measures defined in sub-paragraph (a) of Article XVI are “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”, and those in sub-paragraph (c) are “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”. The panel determined that sub-paragraphs (a) and (c) encompass measures equivalent to a zero quota, such as a Member inscribing its commitments as “None”.³⁷ The U.S. appealed the panel’s finding as to the interpretation of sub-paragraphs (a) and (c), contending that the measures at issue in this case did not contain any limitations that explicitly took the form of numerical quotas or designated numerical units.³⁸

Interpreting sub-paragraph (a) in accordance with the text, object and purpose of the GATS and regarding the 1993 Scheduling Guidelines as preparatory work,³⁹ the A.B. took the view that the three U.S. federal laws prohibiting the cross-border delivery of gambling and betting services were “limitations amounting to a zero quota” which were “quantitative limitations” within the scope of Article XVI:2(a). Thus it upheld the panel’s finding on this point.⁴⁰

The A.B. then examined sub-paragraph (c). It noted that all the types of limitation in that sub-paragraph were quantitative in nature, and all of them restricted market access.⁴¹ It went on to say that where a commitment to full market access for some services had been undertaken, a prohibition on the supply of such services was a quantitative limitation on the supply of such services.⁴² Here, the U.S. had prohibited the supply of gambling and betting services by three federal laws,

36 *Ibid.* at para. 214.

37 The panel made findings on other elements such as limitations on market access in respect of part of a committed sector, and limitations on one or more means of cross-border delivery for a committed service, which were not appealed. It also made findings regarding the various activities that are prohibited under these statutes: *ibid.* at para. 239; U.S.—*Gambling* (Panel Report), *supra* note 4, paras. 6335 and 6338.

38 U.S.—*Gambling* (A.B. Report), *ibid.* at paras. 222 and 264.

39 *Ibid.* at paras. 225–236.

40 *Ibid.* at paras. 238 and 239.

41 *Ibid.* at paras. 245–247.

42 *Ibid.* at paras. 248–250.

in respect of which it had undertaken full market access by providing for a zero quota in its Schedule. Therefore, the U.S. measure fell within the scope of subparagraph (c) and, as such, the panel's finding should be upheld.⁴³

D. Can the Violation by the U.S. of Article XVI be Justified under Article XIV of the GATS? The Application of General Exceptions⁴⁴

One of the categories of exceptions provided in Article XIV(a) is “measures... necessary to protect public morals or to maintain public order”. The panel found that the three U.S. federal laws in question fell under this category of measures,⁴⁵ but that the U.S. had failed to provisionally justify that these three laws were necessary measures within the meaning of Article XIV(a).⁴⁶ The panel nevertheless proceeded to examine the consistency of the U.S. measure with the chapeau of Article XIV “so as to assist the parties in resolving the underlying dispute in this case”.⁴⁷ The chapeau of Article XIV sets out the requirements of “arbitrary and unjustifiable discrimination between countries where like conditions prevail” and a “disguised restriction on trade”. The panel found that the U.S. had failed to meet these requirements.⁴⁸ Both parties appealed different aspects of the panel's findings.

1. The Necessity Test

After the panel had interpreted “public morals” as “standards of right and wrong conduct maintained by or on behalf of a community or nation”⁴⁹ and “public order” as a “refer[ence] to the preservation of the fundamental interests of a society, as reflected in public policy and law”,⁵⁰ interpretations that were subsequently endorsed by the A.B., it proceeded to an examination of the so-called “necessity test”.

The panel applied this test, examined whether the measures at issue were “necessary” for the stated interest in Article XIV(a). It found that the U.S. had failed to give provisional justification on the following grounds:⁵¹

- (a) “[T]he interests and values protected by [the three federal laws] serve very important societal interests that can be characterized as ‘vital and important in the highest degree’ ”.⁵²

43 *Ibid.* at paras. 251 and 252.

44 The relevant provision, Art. XIV(a), states: “Subject to the requirement that such 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order” [footnote omitted].

45 U.S.—*Gambling* (Panel Report), *supra* note 4 at para. 6.487.

46 *Ibid.* at para. 6.535.

47 *Ibid.* at para. 6.566.

48 *Ibid.* at para. 6.608.

49 *Ibid.* at para. 6.465.

50 *Ibid.* at para. 6.467.

51 *Ibid.* at paras. 6.477–6.533; U.S.—*Gambling* (A.B. Report), *supra* note 8 at para. 301.

52 U.S.—*Gambling* (Panel Report), *ibid.* at para. 6.492.

- (b) The federal laws had to “contribute, at least to some extent”, to addressing the U.S.’s concerns “pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling”.⁵³
- (c) The measures in question had a “significant restrictive trade impact”.⁵⁴
- (d) In spite of this significant restrictive trade impact, the U.S. had rejected Antigua’s invitation to engage in bilateral or multilateral consultations and/or negotiations. The U.S. had thus “failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative.”⁵⁵

It is notable that the panel explicitly stated that the U.S. was “obliged to explore” such options before imposing a measure inconsistent with the WTO.⁵⁶ The panel assessed the grounds referred to in paragraphs (a) to (c) above as “the articulation of the guiding principles” set out in the A.B. decision *Korea—Various Measures on Beef*⁵⁷ and subsequently in *E.C.—Asbestos*.⁵⁸

The U.S. contested the panel’s findings, arguing that the panel had erroneously imposed a procedural requirement to consult or negotiate based on the necessity test. Antigua claimed that the panel had failed to establish a sufficient “nexus” between the three federal laws and the concerns raised by the U.S., and that the panel had improperly limited itself to examining only those measures that Antigua explicitly identified as alternative measures.⁵⁹

In tackling these appeals, the A.B. first considered precedents,⁶⁰ explaining the standard of “necessity” as follows: whether a measure is “necessary” should be determined through “a process of weighing and balancing a series of factors”⁶¹ where “an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure” is the start, followed by “weigh[ing] and balanc[ing]” the other factors, such as “the contribution of the measure to the realization of the ends pursued by it” and “the restrictive impact of the measure on international commerce”.⁶² It is on the basis of such a “comparison of measures” that a panel determines whether a measure is “necessary” or, alternatively, whether another WTO-consistent measure is “reasonably available”.⁶³

Secondly, the A.B. touched on the burden of proof required. It stated that although a responding party invoking an affirmative defence bears the burden of satisfying the requirements of such a defence, it does not need to show from the

53 *Ibid.* at para. 6.494.

54 *Ibid.* at para. 6.495.

55 *Ibid.* at para. 6.531.

56 *Ibid.* at para. 6.534.

57 *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by Australia et al.) (2000)*, WTO Docs. WT/DS 161, 169/R (Panel Report).

58 *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Brazil et al.) (2000)*, WTO Doc. WT/DS135/R (Panel Report). See the *U.S.—Gambling* (Panel Report), *supra* note 4 at para. 6.477.

59 *U.S.—Gambling* (A.B. Report), *supra* note 8 at paras. 312, 316 and 319.

60 *Korea—Various Measures on Beef*, *supra* note 57; *E.C.—Asbestos*, *supra* note 58.

61 *Korea—Various Measures on Beef*, *ibid.* at para. 164; *U.S.—Gambling* (A.B. Report), *supra* note 58 at para. 305.

62 *U.S.—Gambling*, *ibid.* at para. 306.

63 *Ibid.* at para. 307.

outset that there are “no reasonably available alternatives to achieve its objectives”,⁶⁴ but merely to establish a *prima facie* case that its measure is “necessary.”⁶⁵ However, in the A.B.’s view, if the complaining party raises a WTO-consistent alternative measure that the responding party should have taken, the responding party is required to demonstrate why the proposed alternative is not “reasonably available”,⁶⁶ and if this is demonstrated, the challenged measure must be “necessary” within the terms of Article XIV(a) of the GATS.

The A.B. viewed the panel’s “necessity” analysis as flawed since the obligation to consult is a “process”, the results of which are uncertain and not capable of comparison with the measures at issue, and is not an “appropriate alternative”.⁶⁷ As for Antigua’s appeal, the A.B. considered that the panel had properly established the “nexus” between the three federal laws and their contribution towards addressing the concerns of the U.S. since the laws “embody an outright prohibition on the remote supply of gambling services”. It thus found no error in the panel’s finding in this regard.⁶⁸ On Antigua’s claim that the panel had imposed limitations on itself in searching for alternative measures, the A.B. observed that the panel had not limited itself in such a manner, and that in any case the panel was not expected to continue its analysis into additional alternative measures which the complaining party, Antigua, had failed to identify. The A.B. therefore dismissed this ground of appeal.⁶⁹

Thus, the A.B. reversed the panel’s finding with regard to the necessity test, and proceeded to apply its own version of the test. By closely examining the analysis engaged in by the panel, it found that the panel had not placed much weight on the restrictive trade impact of the three federal laws. Rather, the panel appeared to have accepted the U.S.’s assertion that those laws were “indispensable”; but for the U.S.’s refusal to accept Antigua’s invitation to negotiate, the panel would have found that the U.S. had established a *prima facie* case under Article XIV(a).⁷⁰ Bearing these considerations in mind, together with the fact that no reasonably available alternative measure had been proposed by Antigua, the A.B. concluded that the U.S. had demonstrated that its three federal laws were “necessary” and justified under Article XIV(a).⁷¹

2. The Chapeau of Article XIV

Antigua alleged that the panel had erred by examining the consistency of the U.S. measures with the chapeau, despite having found that they were not provisionally justified under Article XIV(a).⁷² The A.B. stated that a panel has the freedom to decide which legal issues to address as long as it assesses a matter objectively and, moreover, such analysis of the panel as going beyond the necessary extent to

64 *Ibid.* at para. 309 [emphasis in original].

65 *Ibid.* at para. 310.

66 *Ibid.* at para 311.

67 *Ibid.* at para 317 and 318.

68 *Ibid.* at para 313.

69 *Ibid.* at para. 320.

70 *Ibid.* at paras. 323–325.

71 *Ibid.* at paras 326 and 327.

72 *Ibid.* at para. 342.

resolve the dispute may assist the A.B. when required to complete the analysis. It thereby rejected Antigua's appeal in this respect.⁷³

In the appeal, the U.S. contended that the panel, by finding that the U.S. had failed to demonstrate that its prohibition on the remote supply of gambling and betting services was applied in a consistent manner between those supplied domestically and those supplied from other Members,⁷⁴ had conducted an inadequate assessment since the chapeau to Article XIV requires the determination of such discriminative treatment to be "arbitrary" or "unjustifiable". The A.B. found no error in panel's finding, since Antigua, at the panel stage, had demonstrated that domestic suppliers were permitted to provide such remote services while foreign suppliers were not so permitted, a fact which the panel had accepted.⁷⁵

When examining whether the three U.S. federal laws had been applied consistently with the chapeau of Article XIV, the panel had considered whether such laws were enforced in a manner that discriminated between domestic and foreign suppliers, and in light of the evidence put forward by both parties had found that the U.S. had failed to demonstrate that its enforcement of the laws was consistent with the chapeau of Article XIV.⁷⁶ In so finding, the panel based its decision on five U.S. cases submitted by Antigua, one of which was a prosecution against foreign supplier,⁷⁷ another being a pending prosecution against a domestic supplier,⁷⁸ and the remaining three being instances of domestic suppliers not having been prosecuted.⁷⁹ The A.B. first observed that the three laws were neutral on their face as to the treatment of domestic and foreign suppliers, but the selective prosecution of persons could rise to the level of discrimination. Secondly, the A.B. viewed the panel's reliance on the limited number of individual instances as inadequate and that evidence as to the overall number of suppliers, the patterns of enforcement and the reasons for particular instances of non-enforcement should have been considered. The panel should have relied on the fact that the three laws were worded in a neutral fashion. The A.B. therefore reversed the panel's finding on this point.⁸⁰

Finally, the A.B. turned to the panel's alleged failure to make an objective assessment as required by Article 11 of the DSU.⁸¹ The particular issue in question

73 *Ibid.* at paras. 343 and 345.

74 *U.S.—Gambling* (Panel Report), *supra* note 4 at para. 6.607.

75 *U.S.—Gambling* (A.B. Report), *supra* note 8 at paras. 348–351.

76 *United States v. Jay Cohen*, where one Antigua-based operator was prosecuted and ultimately convicted under the Wire Act: *U.S.—Gambling* (Panel Report), *supra* note 4 at para. 6.585.

77 The prosecution proceeding against Yobet.com, a U.S.-based operator: *ibid.* at paras. 6.587–6.588.

78 Three U.S.-based operators supplying remote gambling and betting services, namely, TVG, Capital OTB and Xpressbet.com: *ibid.* at para. 6.588.

79 *Ibid.* at para. 6.589.

80 *U.S.—Gambling* (A.B. Report), *supra* note 8 at paras. 352–357.

81 Art. 11 of the DSU, titled "Function of the Panels", states as follows: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

was the “conflicting evidence”⁸² regarding the three U.S. federal laws and the Interstate Horseracing Act (hereinafter the “I.H.A.”).⁸³ Antigua had argued that the I.H.A. textually authorises domestic service suppliers, but not foreign service suppliers, to offer remote betting services of certain horse races, thereby exempting domestic suppliers from prohibitions of the relevant three federal laws.⁸⁴ The U.S. claimed that the I.H.A., as a civil statute, could not repeal the three federal laws, which were criminal statutes, despite the I.H.A. having been adopted subsequent to the federal laws, unless such a repeal was explicitly mentioned in the Act, which was not the case for the I.H.A.⁸⁵ The panel, after considering the text of the statutes, found the U.S. had not succeeded in demonstrating that it had not applied its prohibition of the relevant remote service in such a manner as provided in the chapeau of Article XIV because of the “ambiguity” concerning the scope of application of the I.H.A.⁸⁶ The A.B. found no failure in the panel’s assessment of the facts before it, and ruled that the panel had correctly made its findings based on the limited evidence submitted by the parties. In particular, the A.B. considered that the evidence adduced by the U.S. had not been sufficiently persuasive to enable it to conclude that domestic suppliers were prohibited from supplying the relevant remote service in spite of the language of the I.H.A.⁸⁷

In conclusion, the A.B. modified the panel’s conclusion as to Article XIV, and found that the three federal laws fell within the scope of Article XIV(a), but that because of the existence of the I.H.A. those three laws had not been shown to have been applied in a non-discriminative manner to both domestic and foreign suppliers of remote betting services for horse-racing. The three laws therefore did not satisfy the requirements of the chapeau of Article XIV.⁸⁸

III. SOME IMPLICATIONS OF THE GAMBLING SERVICES CASE

A. How Far Does a Member’s Obligations Extend?

In order to find out whether a Member has violated certain provisions or articles of agreements to which the DSU applies (“covered agreements”),⁸⁹ it is necessary to determine the scope of its obligation under the relevant provisions or articles. This task becomes rather complex in GATS cases, since GATS adopts the so-called “positive list approach” regarding the two fundamental principles of market access and national treatment, which contribute to the liberalisation of Members’ service sectors. This approach means that a Member is obliged to provide other Members with market access and national treatment to the extent of its specific commitments for relevant sectors, with any conditions and qualifications set out in

82 U.S.—*Gambling* (A.B. Report), *supra* note 8 at para. 363.

83 Regulation of Interstate Off-Track Wagering, 15 U.S.C. §§ 3001–3007.

84 *Ibid.* at para 361; U.S.—*Gambling* (Panel Report), *supra* note 4 at para. 6.595.

85 U.S.—*Gambling* (A.B. Report), *ibid.* at para. 362; U.S.—*Gambling* (Panel Report), *ibid.* at para. 6.597.

86 U.S.—*Gambling* (Panel Report), *ibid.* at para. 6.607.

87 U.S.—*Gambling* (A.B. Report), *supra* note 8 at para. 364.

88 *Ibid.* at para. 372.

89 These are defined by the DSU, Art. 1(1), as the agreements listed in Appendix 1 of the DSU.

its Schedule, as provided by Articles XVI and XVII⁹⁰ of the GATS. Thus, when the consistency of a Member's actions with these Articles becomes an issue, the scope of the Member's commitment has to be determined.⁹¹ This task involves a detailed assessment of the Member's Schedule, together with the interpretation of the relevant words appearing in the Schedule.

In *U.S.—Gambling*, the focus was on the scope of the U.S.'s commitment in its Schedule in relation to mode 1 supplies of "gambling and betting services". Unsurprisingly, Antigua argued that the U.S. had made a commitment to full market access of such services by inscribing "None" in the relevant column of its Schedule. The U.S. argued otherwise on the basis that it had also used the phrase "except sporting" which, in its view, included gambling and betting services. The panel therefore faced the issue of how to interpret the Schedule to establish the scope of the U.S.'s market access obligations with respect to those services. As detailed above, pursuant to Article 31 of the Vienna Convention, the panel found that the ordinary meaning of the word "sporting" did not include gambling, arriving at this conclusion by using a large number of dictionaries as well as by comparing the meaning of similar words in Spanish and French. However, the A.B. considered the panel's approach to be "too mechanical" and, instead, applied Article 32 of the Vienna Convention by examining W/120 and the 1993 Scheduling Guidelines as preparatory works, concluding that the U.S. had not excluded gambling and betting services from the scope of its market access commitments.

The panel's approach seems rather confused. On the one hand, the panel stated that although it had "some sympathy" for the statement made repeatedly by the U.S. that it did not intend to schedule a commitment for gambling and betting services, the scope of a specific commitment cannot depend on a Member's intention, "except as reflected in the treaty language."⁹² Thus, the panel made clear its reliance on the text of the treaty. On the other hand it found that "sporting" does not cover gambling, although it was of the view that "[t]he word 'sporting' encompasses various definitions, relating to different activities or characteristics (sports, gambling...)"⁹³ as a result of its survey of English dictionaries and its reference to the equivalent of the word "sport" in French and Spanish. This was in spite of the explicit statement of the U.S. that the terms of its Schedule were "authentic in English only". It is respectfully submitted that the panel's approach is not only difficult to follow but also leads to uncertain interpretations.

In contrast, the interpretative approach taken by the A.B. is more persuasive as it better reflects the structure and characteristics of the GATS. The GATS impacts on

90 Art. XVII:1 of the GATS sets down the national treatment obligation thus: "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers" [footnote omitted].

91 In one well-known GATS precedent, *Mexico—Measures Affecting Telecommunications Services (Complaint by Australia et al.)* (2004), WTO Doc. WT/DS204/R (Panel Report) (hereinafter *Mexico—Telecoms*), the panel also made an effort to set the scope of Mexico's commitment by closely examining its Schedule: *U.S.—Gambling* (Panel Report), *supra* note 4 at paras. 7.46–7.91.

92 *Ibid.* at paras. 6.136 and 6.137.

93 *Ibid.* at para. 6.59.

the domestic measures of Members having cross-border effects by placing specific commitments on 12 service sectors and more than 150 sub-sectors as regards the four modes of market access and national treatment. Some of these sectors and sub-sectors may involve services that are unique to particular countries' cultures and traditions, and therefore can be properly expressed only in the languages used in those countries. Under such circumstances, the panel's strict textual interpretation achieved by comparing the three official languages of the WTO may have limitations. In contrast, it is submitted that the A.B., in considering preparatory work, employed a more appropriate approach to interpreting the GATS.

B. Prohibition Considered as "Zero Quota"

An examination of GATS Schedules shows that many Members inscribe "None" in the market access and national treatment columns in respect of mode 1 forms of supply, irrespective of the service sectors. Thus, when it comes to a dispute, the meaning of the word "None" is significant. In this regard, the panel, based on text and context, found that the ordinary meaning of this term, when inscribed in the market access column of the Schedule of a Member, meant that a Member "must maintain 'full market access' within the meaning of the GATS, i.e. it must not maintain any of the six limitations and measures listed in the second paragraph of Article XVI."⁹⁴ Articles XVI:2(a) and (c) were at issue in *U.S.—Gambling*. Both provisions prohibit a Member from limiting the number of service suppliers, the total number of service operations, or the total quantity of service output in such a form as numerical quotas, with regard to the sectors where market access commitments are undertaken. Thus, these provisions relate to the quantitative criteria.

The U.S. argued that the three federal laws in issue, which prohibited the remote supply of gambling and betting services, did not limit the "quantity" of service or service suppliers but rather the "characteristics" of the supply of the gambling services,⁹⁵ and thereby fell outside of the scope of both provisions. However, both the panel and the A.B. considered that such prohibitions amounted to a "zero quota", which were quantitative limitations under Articles XVI:2(a) and (c).

What is clear in this finding is that the panel and the A.B. interpreted the criteria in Articles XVI:2(a) and (c) in a broad manner. According to their interpretation, a "prohibition" against supplying certain services by any means, including fax or e-mail, can be considered as a "zero quota" subject to relevant provisions of the GATS. One may argue that such an interpretation is too wide. However, if the word "prohibition" is taken as limiting the characteristics of a supply of gambling services rather than the quantity of services, as argued by the U.S., the scope of Articles XVI:2(a) and (c) would be too narrow and would cause all prohibitions to fall outside the scope of these provisions. Therefore, it appears to be more constructive for "prohibition" to be understood in terms of quantitative rather than qualitative criteria, and thus to amount to a "zero quota" as the panel and the A.B. found.

⁹⁴ *Ibid.* at paras. 6.268–6.279.

⁹⁵ *U.S.—Gambling* (A.B. Report), *supra* note 8 at para. 25.

C. Application of General Exceptions

A striking feature of *U.S.—Gambling* is the fact that the A.B. considered the general exceptions of the GATS and, in particular, examined for the first time the exceptions relating to “public morals”.⁹⁶ Thus, this case is an important precedent in that it shows how the general exceptions are treated under the GATS as regards the allocation of the burden of proof and the standard for the necessity test and the chapeau of Article XIV.

The first issue was the relevance of Article XX of the General Agreement on Tariffs and Trade (GATT)⁹⁷ which sets out the general exceptions. In this regard, the panel and the A.B. found similarities in the language and the content of the Article XX and Article XIV of the GATS, and held that previous decisions regarding Article XX of the GATT were relevant to interpreting Article XIV. Under the two-tier analysis established by these decisions, the panel first has to determine whether the challenged measure falls within the scope of one of the provisions of Article XIV, including whether there exists a sufficient nexus between the measure and the interest protected. Secondly, if a nexus is found, it must consider whether that measure satisfies the requirements of the chapeau of Article XIV.⁹⁸

In relation to the first part of the analysis, the focus in *U.S.—Gambling* was on Article XIV(a),⁹⁹ which sets out “public morals” and/or “public order” as the interests to be protected. The panel, the decision of which was endorsed by the A.B., interpreted these two phrases thus: “public morals” denotes “standards of right and wrong conduct maintained by or on behalf of a community or nation”,¹⁰⁰ and “public order” refers to “the preservation of the fundamental interests of a society, as reflected in public policy and law”.¹⁰¹ As noted above, since this is the first case under any covered agreements, where the meaning of “public morals” is addressed by the A.B., the interpretation is certain to influence future cases.

Turning to the necessity test, the relevance of the presence of negotiations and/or consultations before a measure is imposed to the “necessity” requirement was at issue in this case. The panel stated that when Antigua had invited the U.S. to engage in bilateral or multilateral consultations and/or negotiations the U.S. had been “obliged to explore” such options.¹⁰² By failing to do so, the U.S. was found not to have “explored and exhausted” all reasonably available WTO-compatible alternatives, and thus not to have satisfied the necessity requirement under Article

96 *Ibid.* at note 351.

97 Art. XX(a) of the GATT sets out the general exception relevant to this case as follows: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals...”

98 *U.S.—Gambling* (A.B. Report), *supra* note 8 at paras. 291 and 292.

99 Although Art. XIV:2(c) was also at issue in this case, the A.B. ultimately did not make findings as to whether the measures were justified under this provision in light of its previous findings that the three federal laws fell under Art. XIV:2(a): *ibid.* at para. 337.

100 *Ibid.* at para. 296; *U.S.—Gambling* (Panel Report), *supra* note 4 at para. 6465.

101 *U.S.—Gambling* (A.B. Report), *ibid.*; *U.S.—Gambling* (Panel Report), *ibid.* at para. 6467.

102 *U.S.—Gambling* (Panel Report), *ibid.* at para. 6534.

XIV(a).¹⁰³ The A.B. reversed this finding of the panel. It considered that for the U.S. to engage in consultations with Antigua was not an “appropriate alternative”, but by definition simply a “process” towards a settlement.¹⁰⁴

According to the panel, the requirements of Article XIV(a) would have been satisfied if the U.S. had engaged in consultations and/or negotiations. However, neither consultations nor negotiations ensure any firm result, much less a settlement. From this perspective, the reversal of the panel’s decision by the A.B. was appropriate as it established that consultations and negotiations are beyond the scope of the necessity requirement. Instead, the A.B. set its own standard for the necessity test by clarifying the extent of the burden of proof which a responding party bears when invoking an affirmative defence. According to the A.B., a responding party does not have to “identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective”.¹⁰⁵ However, if a WTO-consistent alternative measure is proposed by the complaining party, the responding party needs to “demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed measure is not, in fact, ‘reasonably available.’”¹⁰⁶ It is submitted that the A.B. has rightly allocated the burden between the complaining party and the responding party. Imposing a burden on the responding party to fully identify alternatives and then to demonstrate that they are not reasonably available for the purpose of satisfying the necessity requirement of Article XIV(a), would nullify the effect of this clause.

Lastly, we touch upon the A.B.’s key rulings with regard to the chapeau of Article XIV. In this case, whether the three U.S. federal laws were enforced in a manner that discriminated between domestic and foreign service suppliers was addressed by the panel and the A.B. These laws were not discriminatory on their face.¹⁰⁷ It will be recalled that the panel examined only five cases in which these laws had been applied, finding that one of them was a prosecution against foreign supplier, another was a pending prosecution against a domestic supplier, and the remaining three showed there was no evidence that domestic suppliers had been prosecuted. While the panel deemed such five cases sufficient counter-evidence against the U.S.’s argument of non-discriminative application, the A.B. considered them inadequate. Instead, it noted that such isolated instances of enforcement must be placed in their “proper context” for proper significance to be attached to them by evidence, including the “overall number of suppliers”, “patterns of enforcement”, and “the reasons for particular instances of non-enforcement”.¹⁰⁸ The A.B. went on to state that when such evidence is lacking, what should be focused on is “the wording of the measures at issue”.¹⁰⁹

103 *Ibid.* at paras. 6.528, 6.534 and 6.535.

104 U.S.—*Gambling* (A.B. Report), *supra* note 8 at para. 317.

105 U.S.—*Gambling* (A.B. Report), *supra* note 8 at para. 310.

106 *Ibid.* at para. 311.

107 *Ibid.* at para. 354.

108 *Ibid.* at para. 356.

109 *Ibid.* at para. 357.

The A.B.'s ruling is in line with precedents¹¹⁰ which do not allow findings based on individual, sporadic instances, and hence it establishes an important principle for the demonstration of non-discriminative treatment.

IV. IMPLEMENTATION

The DSB adopted the reports of the panel and the A.B. on 20 April 2005. The US stated that it intended to implement the DSB recommendation, but that a reasonable period was necessary for it to do so. Consultations between Antigua and the US regarding this implementation failed, and an arbitration with regard to a reasonable period for changing the three US federal laws took place pursuant to Article 21.3(c) of the DSU.¹¹¹ The US argued that a 15-month period was necessary from the day of the adoption of the recommendation; Antigua contended that immediate implementation was required for gambling services other than those relating to sports, while a six-month period should be applied to sport-related gambling services. The arbitrator noted that a legislative measure generally requires more time for implementation than other measures and decided that a period of 11 months and two weeks running from 20 April 2005 was appropriate.¹¹²

Antigua argued in the arbitration proceedings that the arbitrator should take into account the interests of Antigua as a developing country Member in accordance with Article 21.2 of the DSU.¹¹³ The US responded by stating that Article 21.2 of the DSU applies only when a developing country Member is required to implement a recommendation but does not apply when a non-developing country Member is required to implement it, as was the case here.

The arbitrator decided that there was no language in Article 21.2 which explicitly stated that this provision applied only to a situation in which a developing country Member was required to implement a recommendation and, in any event, that there had to be a nexus between the implementation period and the interest of a developing country in a particular case.¹¹⁴ The arbitrator further decided that Antigua had not adduced evidence to show that the domestic industry of Antigua would be damaged by the implementation period decided to be appropriate in this case.¹¹⁵

110 *E.C.—Asbestos*, *supra* note 58 at para. 100.

111 Art. 21.3(c) of the DSU states: “[The reasonable period of time for implementation shall be] a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances” [footnote omitted].

112 United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services— ARB-2005-2/19—Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Complaint by Antigua and Barbuda) (2005), WTO Doc. WT/DS285/13 (Arbitrator’s Award) (hereinafter “U.S.—Gambling (Arbitrator’s Award)”).

113 Art. 21.2 of the DSU states: “Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.”

114 *U.S.—Gambling (Arbitrator’s Award)*, *supra* note 112 at paras. 56–60.

115 *Ibid.* at paras. 56–63.

Although the arbitrator refused to apply Article 21.2 of the DSU in this case, in light of his interpretation of Article 21.2 as well as his consideration of the evidence supporting Antigua's claim, it is suggested that the application of Article 21.1 of the DSU¹¹⁶ is not necessarily limited to a situation in which a developing country Member is required to implement recommendation.

V. CONCLUDING REMARKS

It is submitted that important implications can be drawn from *U.S.—Gambling*. It bears repeating that as this is the first case relating to mode 1 forms of supply of the GATS, the rulings that were made might have an impact on other service sectors such as financial services, telecommunications and the information industry in general, given the rapidity of today's technological developments that enable the supply of services on-line, which is a mode 1 form of supply. These services, when supplied via mode 1, are able to cross the borders of WTO Members far more easily than before, giving rise to conflicts with national regulations. Moreover, when a dispute arises under such circumstances, the main issue that arises is the consistency of such services with the Schedule of the recipient country. This case has cast the first rays of light on how such disputes will be handled from the perspective of the WTO.

Turning to specific issues raised by *U.S.—Gambling*, the A.B.'s emphasis on the application of Article 32 of the Vienna Convention to the interpretation of the GATS should be noted. In relation to Article XVI, the panel elaborated upon the meaning of "None" inscribed in a Member's Schedule, and also held that a "prohibition" against supplying the service at issue amounts to a "zero quota" – a quantitative limitation within the meaning of the relevant provisions of Article XVI:2. It should also be recalled that the general exceptions set out in Article XIV were applied for the first time. In this case, the two-tier analysis which had been used in earlier cases in relation to Article XX of the GATT was adopted because of the similarity between Article XIV of the GATS and Article XX of the GATT. In addition, the A.B. indicated how the burden of proof with respect to the necessity test should be allocated between the complaining party and the responding party.

U.S.—Gambling has implications beyond the GATS, as the meanings of the terms "public morals" and "public order" in the general exceptions clause were clarified. With respect to the chapeau of this clause, in line with prior case law, certain evidential standards were set for the requirement of non-discrimination.

Finally, some systemic implications suggested by this case will be touched on. The case reaffirmed that even a small developing country may challenge a much larger country before the WTO and win its case. However, although Antigua won the case at the end of the day, given the insufficiency of Antigua's submissions to the panel and the A.B. it seems that there was a significant experience gap between Antigua and the U.S., which has been a major user of the WTO dispute settlement system. This lack of experience may disadvantage small developing countries in

¹¹⁶ Art. 21.1 of the DSU states: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

persuading panellists or members of the A.B if their submitted documents or the oral responses are not sufficiently elaborate, and may hamper the smooth progress of proceedings.

As we have seen in previous parts of this article, in *U.S.—Gambling* the Schedule of the responding party was examined in detail to establish the scope of its specific commitments. Such an approach was in line with a prior case, *Mexico—Telecoms*, in which the GATS was directly addressed.¹¹⁷ From these two cases, one can see the significance of the specific commitments in a Member's Schedule in terms of the light that it sheds on the scope of rights and obligations of the Member. This has a serious impact on developing countries, given the complexity of the GATS which encompasses numerous service sectors and where a positive list approach is adopted for specific commitments of market access and national treatment.¹¹⁸ In the scheduling process, "request and offer" negotiations on a bilateral or plurilateral¹¹⁹ basis are conducted for each service sectors, which as a whole require substantial resources, including experts with high levels of skills and knowledge for drafting schedules as well as for negotiations. Are all Members of the WTO equal in this regard? If a Member's capacity to participate in scheduling has an impact on the outcome of the process, an inequality in capacity will lead to an inequality in outcome, which would disadvantage developing countries that lack the necessary resources. Therefore, this case can be said to underline the need for capacity-building for developing countries, both by the developing countries themselves as well as by developed countries.

117 *Mexico—Telecoms* (*supra* note 91) is the only prior case in which consistency with the GATS was an upfront issue.

118 To be more precise, this approach is also taken for Art. XVIII in Part III of the GATS, together with Art. XVI.

119 In the Ministerial Declaration adopted in Hong Kong in December 2005, the request-offer negotiation on plurilateral basis was agreed by Members in addition to the bilateral negotiations.