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USlegislationoncross-border gambling violatestheGATS: has a new era for internet gambling commenced?I would not bet on it!

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Wire Act 1961 (United States)

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United States (Measures Affecting the Cross-Border Supply of Gambling and Betting Services), Re (Unreported, April 7, 2005) (WTO)

***205 Introduction**

Internet gambling has become an important social and economic phenomenon.1In recent years it has grown dramatically owing particularly to the development of new technologies.2The United States is the country where a lot of this growth has taken place: in 2002 the US gambling industry generated over $68.7 billion in revenue,3 while experts predict that in 2006 the global revenue for sole remote gambling (such as internet, phone or television gambling) will exceed £10.1 billion.4

Numerous operators all over the world have been tempted to offer internet gambling services to US residents.US legislation, however, and particularly 18 U.S.C. §1084--commonly known as the “Wire Act”--prohibits the supply of gambling services through “wire communication facilities”.In the absence of specific provisions aimed at addressing the social and moral problems related to internet gambling,5US courts have interpreted the notion of wire communication facility broadly to cover the internet.Moreover, by giving extraterritorial effect to the Act's provisions, they have subjected internet gambling operators established abroad to US prescriptive jurisdiction.6 As a result, the cross-border supply of internet gambling services to US residents has been brought within the scope of the prohibitions of the Wire Act.

The government of the tiny Caribbean islands of Antigua and Barbuda (“Antigua”) is at the forefront of the business of granting internet gambling licences in an attempt to boost and diversify its small economy.7As such, it considered the Wire Act and other US statutes (the “measures at issue”) to be contrary to the full market-access

commitments undertaken by the United States for the supply of cross-border gambling services under the GATS.Article XVI GATS, in fact, envisages a National Schedule of Commitments ("NSC") dealing with market access for each WTO member.8***206** It obliges members to accord services and service suppliers of any other member treatment no less favourable than that provided for in their respective NSC. Accordingly, in 2003 Antigua filed a complaint before the Dispute Settlement Body of the WTO ("WTO DSB").9

Both the Panel and the Appellate Body ("AB") found the Wire Act and other federal statutes to constitute a violation of the commitments undertaken by the United States under Art.XVI.10Interestingly enough though, while in 2004 the Panel had found that the legislation that was the subject-matter of the proceedings was not justifiable under the general exceptions of Art.XIV GATS,11in its 2005 report the AB reversed that finding and ruled that the challenged measures were necessary to protect public morals and/or public order within the meaning of Art.XIV(a).12

In light of the introductory provision of Art.XIV (the so-called chapeau), however, the AB further ruled that the measures at issue could not be justified to prevent the cross-border supply of horseracing betting services.The chapeau of Art.XIV requires members to apply measures necessary to protect public morals and/or public order in a manner which is not discriminatory.13The remote supply of horse-racing betting services in US interstate commerce may be permitted under the provisions of the Interstate Horseracing Act ("IHA") only if the would-be provider is established in the United States.14Before the Panel, the United States had failed to show that, notwithstanding the permissive provisions envisaged in the IHA in favour of US operators, domestic suppliers were not allowed to offer remote horse-racing betting services because of the prohibitions embodied in the Wire Act.As a result the AB found that, when read in connection with the IHA, the measures at issue were contrary to the chapeau of Art.XIV in that they did not ensure that domestic and foreign suppliers of horse-racing betting services were not treated in a discriminatory manner.15

At its April 20, 2005 meeting, the DSB adopted the reports of the Panel and the AB, inviting the United States to bring its legislation into conformity with the GATS.16So far, however, the parties have been unable to agree on the timing for US compliance.As a result, Antigua has recently requested that such timing be determined through arbitration*ex*Art.21.3(c) Understanding on Rules and Procedures Governing the Settlement of Disputes. 17

In this article, after examining the WTO consistency of the measures, the author will analyse the merit of the arguments the Panel and the AB used in reaching opposite conclusions on the applicability of the general exception of Art.XIV(a).The article will also briefly consider the likely impact that the adoption of the AB Report might have on the internet gamblingmarket in the United States in light of the ruling rendered on the chapeau of Art.XIV.

Inconsistency with Art.XVI GATS

Under the Wire Act:

"[w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communicationwhich entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both".18

In*Cohen*19the Court of Appeals for the Second Circuit interpreted the Wire Act as covering the cross-border supply of gambling services to US consumers through the internet if, and in so far as, the state's legislation, where the recipient is located, prohibits gambling.20In so ruling the court disregarded both that the activities carried on by Cohen from his Antiguan establishment were lawful under the law of Antigua, and that US customers placed their bets by using money accounts located within the Antiguan territory.In the court's reasoning, the fact that Cohen had targeted US residents by offering gambling services, in violation of US state law, was enough to trigger the applicability of the Wire Act to***207** regulate conducts and activities which originated and took place abroad.21

Among the measures challenged by Antigua under Art.XVI, the Wire Act is the most important in relation to internet gambling.In its complaint, however, Antigua challenged two other federal statutes: the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (“Travel Act”),22which prohibits individuals from travelling in interstate or foreign commerce or using the mail or any other facility to promote any business involving gambling; and the Illegal Gambling Business Act (“IGBA”),23which prohibits the carrying on of gambling activities in violation of a law of any state of the United States.24

Antigua's Art.XVI case against the measures at issue presupposed that in its NSC the United States had undertaken full and unconditioned market-access commitments for the cross-border supply of gambling services.Both the Panel and the AB upheld Antigua's assumptions in this respect on the basis of the inscription of the word “None” in the column “Market Access Limitation” under Sector 10 (“Recreational, cultural and sporting services”), sub-sector D (“Other Recreational Services (Except Sporting)”) of the US NSC.25On this premise Antigua maintained that the challenged measures violated both Art.XVI:1, and Art.XVI:2(a) and (c) GATS.26As noted above, Art.XVI:1 requires members to accord service providers established in other WTO members treatment no less favourable than the minimum treatment envisaged in their NSC. On the other hand, Art.XVI:2 lays down an exhaustive list of restrictions to market access which members shall not maintain or adopt unless otherwise specified in their NSC. While sub-para(a) of Art.XVI:2 deals with numerical quotas imposed on the total number of service suppliers, sub-para.(c) deals with restrictions imposed on the quantity of services supplied.

Under Art.XVI:1 Antigua argued that the measures at issue imposed foreign operators a treatment less favourable than that undertaken by the United States in its NSC. Since the challenged measures limited the access to the crossborder gambling market--where unconditioned full market-access commitments had been undertaken --Antigua claimed that US restrictive legislation was*per se*contrary to Art.XVI:1. The Panel rejected Antigua's argument and found that, within the context of Art.XVI, the only measures which a member shall not maintain in the presence of full market-access commitments are those listed in Art.XVI:2.27In the Panel's reasoning, Art.XVI:1 did not stand on its own and could not be invoked to prevent the adoption of measures limiting the access to a committed sector if the challenged measures do not fall within the list of limitations specified in Art.XVI:2. Not only does a claim under Art.XVI require the claimant to show that the measures impose on service suppliers of other WTO members a treatment less favourable than that undertaken by the responding party in its NSC, it is further necessary that the measures fall within the restrictions listed in Art.XVI:2.28

The Panel upheld Antigua's claim on the inclusion of the measures at issue within the list of Art.XVI:2(a) and (c), and the AB confirmed that ruling.29The Panel noted that sub-paras (a) and (c) of Art.XVI:2 embraced limitations expressed in numerical forms other than zero, while the measures at issue embodied total prohibitions for the supply of gambling services without referring to any numerical limitation.It then found that the fact that the list provided for in sub-paras (a) and (c) foresaw only restrictions expressed in numerical forms could not warrant members to impose non-numerical limitations amounting to total prohibitions.Interpreting paras (a) and (c)

of Art.XVI:2 premised on numerical expressions would indeed enable members to circumvent their commitments by adopting restrictions to market access greater than those envisaged by the same Art.XVI:2. The Panel thus ruled that the Wire Act, the Travel Act and the IGBA fell within the list of limitations to market access provided for in Art.XVI:2(a) and (c).

***208** In light of its ruling on the existence of marketaccess commitments undertaken by the United States for the supply of cross-border gambling services, the Panel concluded its Art.XVI analysis by finding that the challenged measures violated the GATS.The Panel then went on to consider whether the measures at issue could be justified under Art.XIV(a) and (c) GATS.The following section examines the ruling of the Panel on subpara.(a) of Art.XIV and the different conclusions reached by the AB.

The public morals/public order exception under Art.XIV(a)

Under Art.XIV(a) GATS "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures necessary to protect public morals or to maintain public order".In determining whether the challenged measures were justified under Art.XIV(a) the Panel adopted a two-stage approach: It required the United States to prove both that the measures at issue had been "designed to" protect public morals and/or public order, and; that they were "necessary to" protect public morals and/or public order.30

Before the Panel the United States maintained that internet gambling posed serious social problems related, particularly, to money laundering and fraud,31health (pathological or compulsive gambling)32and children (underage gambling).33The United States submitted that protecting the society from the concerns posed by internet gambling was a matter of public morals as well as one of public order.34It then argued that the measures at issue were both designed and necessary to protect public morals and/or public order.The Panel upheld in part this reasoning.It found that although the challenged measures were designed to address the concerns identified by the responding party in its Art.XIV(a) defence, they were not necessary to protect public morals and/or public order.35

In assessing the necessity of the challenged measures within the second stage of its Art.XIV(a) analysis (*i.e.*the "necessary to" test), the Panel adopted the weighing and balancing approach developed by the AB in*Korea--Measures onBeef*.36It appraised the necessity of the measures by weighing and balancing the following three factors: (1) the importance of the interests and values that the challenged measures were intended to protect; (2) the extent to which those measures contributed to the realisation of the ends pursued; and (3) whether the United States had explored and exhausted WTO-compatible (or WTO-less-incompatible) alternatives before resorting to GATS-inconsistent measures.37

Within this framework the Panel first acknowledged that the measures at issue were intended to protect society against the threat of money laundering, organised crime, fraud and risk to children and consumers.It characterised the underlying protected interests as "vital and important in the highest degree"38and accepted that cross-border gambling posed a sufficiently serious threat to those interests as to justify the adoption of GATS-inconsistent measures within the meaning of Art.XIV(a).The Panel went on to consider the second of the three factors to be appraised in the above-mentioned analysis--namely the extent to which US GATS-inconsistent legislation contributed to the realisation of the ends it intended to pursue.It found that given that the challenged measures imposed a total prohibition in the crossborder supply of gambling services, which had been specifically associated with each of the concerns identified by the United States, they "must contribute, to some extent, to addressing" those concerns.39The fact that, in the Panel's view, the measures at issue contributed to the real-

isation of the purposes they were intended to achieve represented a further point in favour of their justification under Art.XIV(a).In appraising the third factor of its analysis, however, the Panel found that the United States had not adequately "explored and exhausted" WTO-consistent (or WTO-less-inconsistent) alternatives to the measures at issue.40The Panel noted, particularly, "that Antigua has asserted that it has in place a regulatory regime that is sufficient to address the specific concerns identified by the United States"41and "that it has offered to consult with the United States with a view tomeeting any specific concerns that may remain, notwithstanding the Antiguan regulatory regime".42It then found that, by refusing to enter into consultations with Antigua, "the United States failed to pursue in good faith a***209** course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative".43On this ground the Panel concluded its necessity analysis by finding that the challenged measures were not necessary to protect public morals and/or public order and, accordingly, not justifiable under Art.XIV(a).

The AB reversed the Panel finding in this respect.It decided that the:

"Panel's necessity analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order.Engaging in consultation with Antigua, with a view to arriving at a negotiating settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with themeasures at issue".44

Put in the way the AB has put it, it is difficult not to agree with the AB's reasoning.In fact, once it is accepted (as the Panel itself did) that the challenged measures contribute to the realisation of the ends they were intended to pursue and that alternative measures are not reasonably available where they do not allow members to achieve the same level of protection guaranteed by the measures,45it seems logical to suggest that negotiations which might have been entered into between the United States and Antigua would not be relevant for the purpose of understanding whether a reasonable alternative to the challenged measures exists.However, neither the Panel nor the AB has given adequate weight to other factors to be weighed and balanced within the "necessary to" analysis.Particularly, the Panel did not properly appraise the effectiveness of the challenged measures in light of the objectives they were "designed to" pursue.

As noted above,46previous AB reports have made it clear that a key element to consider in determining whether a particular measure is necessary to protect public morals and/or public order is the extent to which the measure contributes to the realisation of the ends it purports to achieve.The greater the effectiveness of a measure in realising those ends, the more easily that measure can be characterised as necessary.Conversely--and, indeed, necessarily--the lesser the effectiveness of a measure, the more difficult it is to justify it in light of the objectives it intended to achieve.In its gambling report the AB has provided some guidance on how to assess the effectiveness of GATS-inconsistent measures within the framework of Art.XIV(a).Particularly, the AB clarified that a Panel is not bound to follow the member's characterisation of a measure's objectives and of the effectiveness of its regulatory approach,47but must reach its own independent and objective finding on the way the measure contributes to the realisation of the ends pursued.Indeed, to justify a GATS-inconsistent measure under Art.XIV(a), a responding party has already ample scope to define for itself what public morals and public order mean in light of the member's own system and scale of values.48Members are also accorded great autonomy in deciding the level of protection to public morals and public order they intend to achieve.49Within this framework it is reasonable to require tribunals to assess the effectiveness of the challenged measures as objectively and independently as possible.To do otherwise would be to say that only the responding party can assess whether its GATS-in-

consistent legislation is justifiable under Art.XIV(a).50In its effectiveness analysis a Panel should therefore look at the structure of the legislation embodying the challenged measures and the way, in practice, the measures contribute to the realisation of the objectives pursued.

In the present case the Panel failed to conduct such an objective and independent assessment.In appraising the effectiveness of US legislation, the Panel simply stated that since the US measures imposed prohibitions in the supply of crossborder gambling services, those measures must contribute to addressing the concerns for which they had been conceived.51In so reasoning the Panel assumed the effectiveness of the regulatory approach followed by the United States in prohibiting the cross-border supply of gambling services, overlooking a crucial feature of US legislation.The measures at issue purport to protect public morals and/or public order in the United States by prohibiting the conduct of activities carried out abroad.The only way the measures at issue could effectively contribute to the realisation of the ends they purported to achieve would be through the acknowledgement that the United States had a jurisdiction to prescribe and to enforce its legislation abroad, where the carrying on of the activities prohibited in the United States may be--as in the case with Antigua--perfectly lawful.In its effectiveness analysis the Panel uncritically assumed the***210** existence of such a jurisdiction in favour of the United States.Indeed, the whole Panel's effectiveness analysis rests on this untested assumption.

In*Shrimp-Turtle*,52the AB had the chance to appraise the effectiveness of measures purporting to have an extraterritorial effect.In that ruling a worldwide embargo imposed by the United States against the importation of shrimps harvested with fishing technologies adversely affecting sea turtles was considered effective to protect exhaustible natural resources under Art.XX(g) GATT.53The fact that US legislation purported to apply extraterritorially did not prevent the AB from characterising the challenged measures as effective to pursue the objectives they were designed to achieve.54The present case, however, differs from*Shrimp-Turtle*.In*Shrimp-Turtle*the United States had assumed a “jurisdiction to prescribe” towards fishermen established in third countries without the need to assume any “jurisdiction to enforce” its legislation abroad.The embargo was enforceable by the United States within its own territory, through its customs officials, at the time the delivery of the banned shrimps to US importers took place.In other words, notwithstanding its extraterritorial reach, the US ban was effective in achieving US environmental objectives since it was enforceable within US boundaries.In the present case, however, US prohibitions on cross-border gambling are not enforceable in the United States, or not as effectively enforceable as the Panel had assumed in its report.In fact, differently from a delivery of banned goods, the supply of electronic data through the internet from abroad cannot be stopped fromwithin the territory of the state where the recipient is located.55Only by assuming that the United States can enforce abroad the measures at issue could US prohibitions effectively contribute to the realisation of the ends they intend to pursue.

As a matter of fact the United States does not have a jurisdiction to enforce abroad the prohibitions embodied in the measures at issue.Accordingly, US prohibitions cannot prevent operators established abroad from supplying cross-border services to US recipients.It is indeed well established, under basic principles of international law, that the enforcement of criminal statutes against individuals or entities located abroad is--in the absence of special circumstances that in the case of cross-border gambling plainly do not exist--always subject to the authorisation of the state where the relevant individual or entity is established.56This lack of jurisdiction, coupled with the fact that the Wire Act and the other measures challenged by Antigua do not prevent US residents from gambling on the internet, renders the measures at issue largely ineffective to protect public morals and/or public order, in the manner claimed by the United States.

US prohibitions in the past few years have indeed had the effect to induce numerous US would-be gambling suppliers to go offshore, in order to satisfy the huge demand for gambling services coming from within

theUnited States.Developing or less-developed countries like Antigua have exploited the comparative regulatory advantage they had to attract investors, offering them licences to start their internet gambling business within their territories.57Various scholars have noted the global effect of the internet in relation to the prohibitions imposed by the United States for the cross-border supply of gambling services and the moving offshore of US would-be internet gambling providers.They have effectively pointed out that:

"the Internet is global, and if something is outlawed in one country, providers of that service will simply move their operations overseas.Willing customers can still access these services as easily as before, but by forcing consumers to frequent overseas companies for gambling, the law actually makes the activity less safe for consumers, and easier for fraud artists to operate where US laws can't".58

***211** Not only is the extent to which the measures at issue contribute to protect public morals and/or public order in the United States highly questionable, US prohibitions have also the unintended effect of stimulating the growth of the cross-border supply of gambling services, rendering it even more difficult for US legislation to effectively tackle the social problems posed by internet gambling.

To sum up, in its report the Panel failed to consider the way, in practice, US prohibitions operated to protect public morals and/or public order.This led the Panel to conduct an investigation into the measures at issue which did not objectively and independently assess the effectiveness of US legislation.As a result the Panel was unable to properly weigh and balance all the factors to be appraised within the framework of its Art.XIV(a) analysis.

Furthermore, by mistakenly finding that the US legislation contributed to the realisation of the ends it intended to pursue, the Panel did not properly assess whether the United States had reasonably available WTO-consistent alternatives to the measures at issue either.Once it is acknowledged that the challenged measures are effective in tackling the concerns they intend to address, the range of options which might be reasonably available to a responding party to effectively address those concerns becomes necessarily narrower.This is so because the existence of reasonably available alternatives which a member is expected to explore and exhaust before resorting to WTO-inconsistent measures must be appraised in light of the effectiveness of the challenged measures.In previous rulings the AB had indeed made it clear that alternatives are reasonably available if they assure the achievement of the same degree of protection guaranteed by the challenged measures.59Accordingly, the more a measure is effective (or so considered), the less probable it is that a reasonably available alternative to that measure exists.

As shown above, the prohibitions embodied in the measures at issue are not effective in dealing with the problems posed by internet gambling, for they are not enforceable abroad, where crossborder suppliers operate.The Panel did not find so and, in appraising the existence of WTO-consistent alternatives, it put particular emphasis on international co-operation.That option was not deemed appropriate by the AB because it would require the establishment of a*process*which, by definition, is "uncertain and therefore not capable of comparison with the measures at issue".However, had the effectiveness analysis conducted by the Panel shown the limits of US legislation, a further alternative to consider by the tribunal might have actually been that of leaving it up to Antigua to regulate the offer of cross-border gambling services.During the past five years Antigua has enacted a comprehensive regulatory scheme which has been considered appropriate to tackle the problems posed by internet gambling, particularly with respect to money laundering and fraud.60Most, if not all, of the concerns identified by the United States in its Art.XIV(a) defence are already addressed by Antiguan legislation.Since providers of cross-border gambling services established in Antigua are subject to the enforcement jurisdiction of Antigua, Antiguan regulation would be enforceable against Antiguan operators either for trial/investigatory purposes, or

for enforcement-of-judgment purposes.This is certainly a more effective way to address and fight the problems posed by internet gambling than that of imposing prohibitions not enforceable abroad.61

In its report the Panel did not have the chance to consider whether the measures embodied in Antiguan legislation were designed and effective to address the concerns posed by the United States with respect to internet gambling.Had it done so, and had it properly appraised the (in)effectiveness of US legislation, themeasures at issue would have been considered unnecessary within the meaning of Art.XIV(a) on more persuasive grounds than those on the basis of which the Panel rendered its 2004 ruling.

The inconsistency of the measures with the chapeau

Notwithstanding that the AB justified the challenged measures on grounds of public morals***212** and/or public order, it did not consider those measures to be consistent with the requirements of the chapeau of Art.XIV.62The chapeau requires members to apply measures necessary to protect public morals and/or public order in a manner which is not arbitrarily or unjustifiably discriminatory, or which constitutes a disguised restriction to trade.According to the AB, the United States had failed to demonstrate that the prohibitions embodied in the measures at issue apply equally to foreign and domestic suppliers of remote gambling services in spite of the fact that the IHA permits*only*domestic service suppliers to provide remote gambling services for horse-racing.63

It is worth noting, however, that the way the United States had implemented the WTO Agreements (including the GATS) makes it impossible for a foreign internet gambling operator to invoke a DSB ruling*directly*before US courts in order to argue that the offer of its horse-racing gambling services to US residents is not illegal.Under s.102(a)(1) Uruguay Round Agreements Act ("URAA"),64 "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect".Similarly, s.102(c)(1)(A) lays down that no person "shall have any cause of action or defence under any of the Uruguay Round Agreements".Accordingly, none of the provisions of theWTO Agreements entered into by the United States, nor any of the recommendations adopted by the DSB, has a direct effect in the United States.

This does not preclude DSB rulings having other effects within the United States, in light, particularly, of the principle of statutory construction embodied in §114 of the Restatement (Third) of Foreign Relations Law ("Restatement").The Restatement clarifies that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States".This principle was first formulated by Chief Justice Marshal in*Murray v Schooner Charming Betsy*.65It was subsequently adopted and applied by numerous authorities.66Consistently, today's most distinguished US international trade law scholars have made it clear,with specific reference to DSB rulings, that in the case of ambiguities, US law should be interpreted so as not to conflict with such rulings.67

In the case under consideration, the AB has made it clear that the measures at issue are contrary to the chapeau of Art.XIV because the United States had not been able to show, in light of the provisions of the IHA, that the prohibitions embodied in the measures at issue do not apply in a discriminatory manner.In light of the foregoing, ambiguity remains concerning the relationship between the prohibitions embodied in the measures at issue and the permissive provisions envisaged in the IHA.Recourse should be made to the principle of statutory interpretation embodied in the Restatement.Two different solutions are available in this respect.First, it could be argued that, notwithstanding the permissive provisions of the IHA, the Wire Act prohibits both foreign and domestic suppliers from offering horse-racing remote betting services.Alternatively, it could be maintained that because

of the permissive provisions of the IHA, foreign suppliers are entitled to provide cross-border horse-racing betting services as much as domestic suppliers are.Both of these solutions would allow the interpreter to clarify the relationship between the measures at issue and the IHA consistently with the ruling rendered by the AB.Needless to say, in implementing the AB ruling the United States will be free to decide what solution to adopt.Given the arguments the United States had developed before the Panel,68however, it seems reasonable to foresee that the implementation of the AB ruling on the chapeau, if any, will take the form of an amendment to the IHA so as to make it clear that the prohibitions embodied in the measures at issue apply also to domestic providers of horse-racing remote gambling services.

Conclusions

Both the Panel and the AB decided that the prohibitions embodied in the Wire Act and the other measures at issue violated Art.XVI. They found that the challenged measures imposed on foreign suppliers of gambling services a treatment contrary to the obligations on market-access undertaken by the United States in its NSC. The ***213** AB, reversing the Panel, went on to find that US prohibitions were justified as they were necessary to protect public morals and/or public order within the meaning of Art.XVI(a).Nevertheless the AB ultimately decided that the measures were not consistent with the chapeau of Art.XIV in that they were discriminatory when read in connection with the IHA.

The ruling of the AB on Art.XIV(a) has been largely affected by the way the Panel appraised the effectiveness of US legislation in dealing with the social problems posed by internet gambling.By failing to consider whether the measures actually contributed to the realisation of the ends they intended to pursue, the Panel did not adequately assess all the factors to be weighed and balanced within the necessity analysis.Had the Panel given more weight to this factor it would have been more difficult for the United States to justify the measures at issue--particularly in light of the fact that Antigua has in place a comprehensive regulatory scheme aimed at effectively addressing the same concerns identified by the United States with respect to internet gambling.

As for the chapeau ruling, although the URAA excludes that DSB rulings can be invoked before US courts, principles of statutory construction currently applied in the United States might be used to interpret the challenged measures and their relationship with the IHA so as to allow foreign operators to offer cross-border horseracing betting services in the United States.The ruling on the chapeau, however, will not preclude the United States from implementing the DSB recommendation by amending the Wire Act (and/or the IHA) so as to prohibit both domestic and foreign suppliers from offering horse-racing betting services.

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1. In*United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*--Report of the Panel, WT/DS285/R, November 10, 2004 (the “Panel Report”), the Panel defined “gambling” as including “any activity involving the placing of a bet or wager, that is, instances where a person risks something of value (generally money) on the outcome of an uncertain event.Abet or awager can be madewith respect to casinotype games, lotteries and sporting events”; para.6.28 Panel Report.The term “internet gambling” identifies a particular mode of supply of gambling services.Internet gambling is a*specie*of the*genus*remote gambling, which is characterised by the fact that the provider of gambling services and the recipient are not physically located in the same place.Both remote and internet gambling may involve a cross-border transaction--that is a transaction in-

volving the supply of gambling services “from the territory of one Member into the territory of any another Member” (*cf.*Art.I:2(a) GATS).When the remote supply of gambling services occurs through the internet we are within the scope of the definition of internet gambling, irrespective of whether the transaction is cross-border.

2. While in 1996 there were around 400 gambling-related websites, in January 2005 there were over 1800 (*cf. http://online.casinocity.com/jurisdictions*).

3. Citizen Link,*Gambling Casino*,quoting the 2003 Gross Annual Wager of the US, available at *www.family.org/cforum/fosi/gambling/casinos.*

4. KPMG's study on remote gambling, quoted by the Interactive Gaming, Gambling and Betting Association, “Remote Gambling and UK Taxation: an IGGBA Position Statement”, 2004, p.5, available at *www.iggba.org.uk/html/graphics/remote gambling and uk taxation.pdf.*

5. So far the various attempts to pass federal legislation amending the Wire Act with the purpose of expressly banning internet gambling have failed.For commentaries on the relevant proposals*cf.*T. W. Bell, “Internet Gambling: Popular, Inexorable, and (Eventually) Legal”, 1999, available at *www.cato.org/pubs/pas/pa-336es.html*; A. M. Lessani, “How much do you want to bet that the Internet Gambling Prohibition Act of 1997 is not the most effective way to tackle the problems of online gambling?”, 1998, available at*www.gseis.ucla.edu/iclp/alessani.html.*

6. *cf. US v Jay Cohen*260 F.3d 68 (2001).

7. For a survey on that business*cf. http://online.casinocity. com/jurisdictions.*

8. In the relevant part, Art.XVI GATS reads as follows: “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. 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; … (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”.

9. *cf.*the request for the establishment of a Panel by Antigua dated June 12, 2003 (WT/DS285/2).

10. *cf.*paras.6.134, 6.421, 7.2(a) and 7.2(b) of the Panel Report, n.3 above.See also paras. 213, 265, 373(B)(i), 373(C)(i) and 373(C)(ii) of the AB Report (WT/DS285/AB/R, April 7, 2005).

11. *cf.*paras. 6.608 and 7.2(d)(i) Panel Report, n.3 above.

12. Paras 327, 373(D)(iii)(b) and (iv)(a) AB Report, n.12 above.

13. The chapeau makes it clear that GATS-inconsistent measures may be justified under the list of exceptions provided for in Art.XIV “[s]ubject 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”.

14. 15 U.S.C. §§ 3001-3007.

15. Para.373(D)(v)(c) AB Report, n.12 above.

16. *cf.*the communication of the DSB dated April 25, 2005 (WT/DS285/10).

17. *cf.*the request for arbitration by Antigua dated June 9, 2005 (WT/DS285/11).

18. *cf.*18 U.S.C. §1081.

19. *cf.*n.8 above.

20. *cf.*18 U.S.C. §1084(b).

21. A case similar to*Cohen*was decided by the Court of Appeals for the 10*th*Circuit in*US v Albert John Blair Jr*

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54 F.3d 639 (10*th*Cir. 1995).There §1084 was used to uphold the illegality of gambling activities carried on from the Dominican Republic over the phone via a tollfree number.For other analogous cases see D. Starkman, "U.S. Indicts 14 over Gambling on the Internet",*Wall Street Journal*,March 5, 1998, p.A8.

22. 18 U.S.C. §1952.

23. 18 U.S.C. §1955.

24. Antigua also challenged various US states' laws prohibiting the cross-border supply of gambling services.In its report, however, the AB found "that the Panel erred in examining whether eight state laws are consistent with the United States' obligation under Article XVI" (para.373(A)(iii) AB Report, n.12 above) because Antigua had "failed to identify how these laws operated and how they were relevant to its claim of inconsistency" (para.153 AB Report,*ibid.*).The merit of the dispute on the consistency of these laws with Art.XVI was therefore left undecided.

25. *cf.*para.6.134 Panel Report, n.3 above; para.213 AB Report, n.12 above.

26. *cf.*n.10 above.

27. Paras 6.279, 6.299, 6.318 Panel Report, n.3 above.*cf.*M. Matsushita, T. J. Schoenbaum and P. C. Mavroidis, *The World Trade Organization--Law, Practice, and Policy*(2004), p.247.

28. Antigua had appealed that finding in the event that theAB reversed the Panel's ruling onArt.XVI:2. Since--as will be seen in a moment--the AB has upheld that ruling, the dispute on the relationship between the first and the second paragraph of Art.XVI remained undecided.*cf.*para.256 AB Report, n.12 above.

29. *cf.*paras 6.319*et seq.*Panel Report, n.3 above, and paras 234, 238 and 373(C)(i) AB Report, n.12 above.

30. Para.6.455 Panel Report, n.3 above.

31. *ibid.*,paras 6.499-6.505 and 6.506-6.059.

32. *ibid.*,paras 6.510-6.514.

33. *ibid.*,paras 6.515-6.519.

34. *cf. ibid.*,para.6.457.

35. *cf. ibid.*,paras 6.481 and 6.535.

36. *Korea--Measures Affecting Imports of Fresh Chilled and Frozen Beef*--Report of the AB, WT/DS161/AB/R--WT/DS169/AB/R (2000), para.164.*cf.*para. 6.477 Panel Report, n.3 above, and para.305 AB Report, n.12 above.

37. *cf.*para.6.488 Panel report, n.3 above.

38. *cf. ibid.*,para.6.492.

39. *cf. ibid.*,para.6.494.

40. *ibid.*,paras 6.526-6.530.

41. *ibid.*,para.6.522.

42. *ibid.*,para 6.523.

43. *ibid.*,para.6.531.

44. Para.317 AB Report, n.12 above.

45. *cf. ibid.*,para. 308.*cf.*para.6.461 Panel Report, n.3 above.

46. *cf.*n.38 above.

47. *cf.*para.304 AB Report, n.12 above.

48. Para.6.461 Panel Report, n.3 above.

49. Para.308 AB Report, n.12 above.

50. A similar approach had been adopted in*India--- Patent Protection for Pharmaceutical and Agricultural Chemical Products*--Report of the AB, WT/DS50/AB/R (1997), at para.66.

51. Para.6.494 Panel Report, n.3 above.

52. *United States--Import Prohibition of Certain Shrimp and Shrimp Products*--Report of the AB, WT/

DS58/AB/R (1998).

53. Art.XX(g) GATT reads as follows: “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures … relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

54. *cf. Shrimp-Turtle,*AB Report, n.52 above, at para.133.

55. *cf.*Bell, n.7 above.

56. *cf.*S. Masoud, “The Offshore Quandary: The Impact of Domestic Regulation on Licensed Offshore Gambling Companies” (Summer 2004) Whittier L. Rev. 989; A. Z. Cowan, “The Global Gambling Village: Interstate and Transnational Gambling” [2003] Gaming L. Rev. 251; R. D. Crisco, “Follow the Leaders: a Constructive Examination of Existing Regulatory Tools that Could be Applied to Internet Gambling” (Fall 2003) N.C.J.L. & Tech. 155; R. August, “International Cyber-Jurisdiction: a Comparative Analysis” (Summer 2002) Am.Bus.L.J. 561; A. N. Cabot and R. D. Faiss, “Sports Gambling in the Cyberspace Era” (Spring 2002) Chap.L. Rev. 30.It may be worthwhile to note that in all cases where US courts have convicted cross-border gambling operators under the Wire Act, either the prosecuted had voluntarily submitted to US jurisdiction (this was the case with Cohen), n.8 above, or he had been found within the territory of the United States (this was the case-with Blair), n.23 above.In neither case had the convictions prevented the business from continuing.As of today, Cohen's World Sport Exchange website is still accessible from the United States and toll-free numbers are available for US residents,*cf. www.wsex.com.*

57. J. D. Andrle, “A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States” (November 2004) Vand.J. Transnat’l L. 1390.

58. *cf.*J. M. Kelly, “Internet Gambling Law” [2000] Wm. Mitchell L. Rev. 116.

59. *European Communities--Measures Affecting Asbestos and Asbestos-Containing Products*--Report of theAB, WT/DS135/AB/R (2001), at para.174 and the previous rulings therein quoted.

60. For a survey of the Antiguan legislation on internet gambling*cf.*C. Bisset, “All Bets are Off(line): Antigua's Trouble in Virtual Paradise” (Spring 2004)*University of Miami Inter-American Law Review*387.

61. A similar approach has been followed by other countries, which have acknowledged the inefficacy of any legislation purporting to prohibit the cross-border supply of gambling services.In the United Kingdom, subs.3 of s.36 (“Territorial application”) of the recently approved UK Gambling Act 2005 provides that s.33--which makes it an offence for a person to provide gambling services without having a regular UK gambling permit--“applies to the provision of facilities for remote gambling only if at least one piece of remote gambling equipment used in the provision of the facilities is situated in Great Britain”.“[T]his means that, where gambling takes place remotely, the person providing the facilities for the gambling will not be capable of falling within the scope of the offence if he does not have relevant equipment within Great Britain”.*cf.*paras 117 and 118 of the Explanatory Notes to the Gambling Bill as introduced in the House of Commons on October 18, 2004.

62. Para.369 AB Report, n.12 above.

63. *ibid.,*at para.371.

64. 19 U.S.C. §§ 3501-3624.

65. 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804).In that ruling Chief Justice Marshal made it clear that “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”.

66. *cf.*the notes to §114 of the Restatement.

67. *cf.,*particularly, D. W. Leebron, “Implemetation of the Uruguay Round Results in the United States”, in*Implementing the Uruguay Round*(Jackson and Sykes ed., 1997), p.212: “[t]he agreements, including any statutory interpretations by the WTO or decision dispute settlements panels, might still be applied either by a court to re-

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solve ambiguities in the language of a statute or by administrative agencies in promulgating rules and regulations”.

68. *cf.*,particularly, para.362 AB Report, n.12 above.In challenging Antigua's submissions on the chapeau the United States claimed that the IHA was a civil statute and, as such, it could not repeal the challenged measures, which are criminal in nature.According to the United States, therefore, the prohibitions embodied in the measures at issue applied against domestic providers of horse-racing betting services irrespective of the provisions of the IHA.

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