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CONTENTS

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# The Internet, cross-border trade in services, and the GATS: lessons from *US–Gambling*

SACHA WUNSCH-VINCENT

**Abstract:** The rapid development of the Internet has led to a growing electronic cross-border delivery of services. While the WTO negotiations have not caught up to the reality of such service trade, the first GATS case dealing with the Internet, namely '*United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*', has advanced matters. This paper distils the substantive conclusions of the case and remaining questions in relation to Internet-supplied services and certain core concepts of the GATS. Moreover, it sheds light on the case's implications for the services negotiations under the ongoing Doha Development Agenda. It concludes that the second ever GATS case has provided an encouraging set of answers to the unresolved questions of the WTO's Work Programme on E-Commerce, mainly confirming the applicability of GATS commitments to electronically supplied services and shaping the concept of technological neutrality. While more work or dispute settlement cases are necessary to clarify the remaining questions, the rulings have paved the way for the GATS to be a more effective discipline for cross-border (electronic) trade. The paper also explains that a 'chilling effect' of the rulings on the Doha services negotiations is not warranted.

## Introduction

The rapid development of the Internet and information technology (IT) has led to the growing electronic cross-border delivery of services.[1] Reports and analytical studies on the 'outsourcing' and the cross-border trade of services and digital products, such as software, abound.

Yet this type of electronic service trade is still a relatively new phenomenon when viewed through the lens of international trade rules. In 1998, the Members of the World Trade Organization (WTO) started a comprehensive WTO Work Programme on E-Commerce.[2] Since, the WTO has – in a non-negotiation and

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1 OECD (2004, 2006).

2 The term 'e-commerce' is used within the WTO as the 'production, distribution, marketing, sale, or delivery of goods and services by electronic means'. The electronic supply of services is understood to

non-binding form – started to ask questions on how the multilateral trading system and in particular the General Agreement on Trade in Services (GATS) should be applied in the context of cross-border electronic trade.[3] But while regional trade agreements increasingly innovate as regards the cross-border delivery of services and incorporate chapters on e-commerce,[4] on the multilateral level the WTO Work Programme on E-Commerce never came to tangible conclusions. Furthermore, as WTO Members have been reluctant to bring cases under the GATS, a few of its core concepts remain ill-defined. This significantly weakens the function of the GATS, which is supposed to provide a framework for the ever-growing cross-border service trade.[5]

A recent GATS case under the WTO dispute settlement system has advanced matters. In April 2005, the Appellate Body brought closure to the WTO case '*United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*' (*US–Gambling*).[6] At issue was a complaint by Antigua and Barbuda (hereinafter 'Antigua') concerning certain measures of the US that allegedly make it unlawful for suppliers located outside the US to supply on-line gambling and betting services to its consumers over the Internet. This case marked the first WTO Dispute Settlement Body's (DSB) judgment directly relating to the Internet and only the second case which centered exclusively on the GATS.[7] Consequently, hopes were high that the judgments would bring clarity to the thorniest issues concerning cross-border trade in services and thus maintain the relevance of the multilateral trade framework in a changing technological environment. It has even been suggested that *US–Gambling* could function as the 'last nail in the coffin of the WTO Work Programme on

mean a transaction under the GATS in which the service is supplied to the customer in the form of digitalized information (see General Council (GC), Work Programme on E-Commerce, WT/L/274 (30 September 1998) and Council for Trade in Services (CTS), Work Programme on E-Commerce – Note by the Secretariat, S/C/W/68 (16 November 1998), para. 29). Electronic transactions can take place in all four GATS Modes (e.g. a foreign service supplier established abroad under GATS Mode 3 involved in e-commerce). In this article, however, only the cross-border electronic service delivery is treated (GATS mode 1 and/or mode 2).

3 WTO, Ministerial Declaration on Global E-Commerce, WT/MIN (98)/DEC/2 (20 May 1998) and WT/L/274 (30 September 1998). See Bachetta *et al.* (1998), Mann *et al.* (2000), Hauser and Wunsch-Vincent (2001, 2002), and UN ICT Task Force (2005) on the role of the WTO as regards IT and e-commerce.

4 One of the first agreements on this front – the US–Singapore Free Trade Agreement (FTA) – has been followed by a flurry of regional and bilateral trade pacts containing electronic trade rules (e.g. the Australia–Singapore FTA). See Wunsch-Vincent (2006) for a full treatment of the WTO, the Internet and digital products (e.g. software, audiovisual products) in global and preferential trade talks.

5 See the WTO-Symposium on Cross-Border Supply of Services (April 2005) under www.wto.org/english/tratop_e/serv_e/sym_april05_e/sym_april05_e.htm.

6 See *US – Measures Affecting the Cross-border Supply of Gambling and Betting Services* (*US–Gambling*), Report of the Panel, WT/DS285/R (10 November 2004) and *US–Gambling*, Report of the Appellate Body, AB-2005-1, WT/DS285/AB/R (7 April 2005).

7 *Mexico – Measures Affecting Telecommunications Services* (*Mexico–Telecoms*), Report of the Panel, WT/DS204/R (2 April 2004).

E-Commerce',[8] i.e. effectively resolving most if not all questions raised in the aforementioned Work Programme on E-Commerce and thus leading to its conclusion.

The *objective* of this article is two-fold. It discusses the judgments of the Panel and Appellate Body and distills the relevance of its substantive conclusions in relation to Internet-supplied services, questions raised in the WTO Work Programme on E-Commerce and the GATS. With these insights, it also sheds light on the case's implications for the services negotiations under the ongoing multilateral trade round – the Doha Development Agenda (DDA). The latter negotiations have entered a new phase since the Hong Kong Ministerial Declaration in December 2005 in which WTO Members pledged to expand the specific GATS commitments, while committing to a new deadline for revised offers of 31 July 2006 and to final draft schedules by 31 October 2006.[9]

## 1. What was the 'gamble' between the US and Antigua about?

In 2003, Antigua requested the WTO's DSB to establish a Panel regarding measures applied in the US that affect the cross-border supply of gambling services of foreign providers.[10]

Antigua claimed that a list of US federal and state measures is making unlawful the supply of gambling and betting services on a cross-border basis, mainly violating GATS Article XVI:1 guaranteeing market access. Whereas the cross-border supply of these services was denied by the US claiming that all types of Internet-supplied gambling were illegal (from domestic or foreign providers alike), Antigua claimed that the US could not uphold such a prohibition in the face of GATS mode 1 commitments. Furthermore, it claimed that the US was allowing and/or tolerating US domestic Internet operators to provide these services,[11] effectively discriminating between domestic and foreign service suppliers, despite of full specific GATS commitments.

The US responded that it had never made specific GATS commitments on cross-border gambling services. It argued that any remote supply of such services – no matter if from domestic or foreign suppliers – is prohibited in the US and that this prohibition is enforced equally against domestic and foreign service suppliers. The US also asserted that commitments under GATS Article XVI do not render

8 This alludes to a remark of David Hartridge during the WTO-Symposium on Cross-Border Supply of Services (see fn. 5) who expressed satisfaction at the fact that *US–Gambling* has confirmed and finally clarified the validity of WTO rules and obligations for e-commerce.

9 Hong Kong Ministerial Declaration, Sixth Session, WT/MIN(05)/DEC (22 December 2005), paras. 25–27 and Annex C.

10 WT/DS285/1 – S/L/110 (27 March 2003) and WT/DS285/2 (13 June 2003).

11 Antigua's first oral statement, para. 94, its first written submission, para. 118 and its reply to Panel question No. 19, as cited in the Panel report, para. 6.585 in fn. 1037 (note that all oral statements and the written submissions of Antigua and the United States are cited here as referenced in the Panel and Appellate Body Reports). All related submissions of the US can be downloaded at www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/Section_Index.html

impossible the 'total prohibition' of the electronic supply of certain services, given that this Article is only concerned with avoiding specified quantitative limitations. Finally, the US argued that, in any case, the GATS exemptions under Article XIV would justify the derogation from existing specific GATS commitments due to overriding public policy considerations such as public morals, fraud and security.

The most important aspects at issue in the Panel and Appellate Body decisions were: (i) whether the US GATS Schedule includes specific commitments on Internet-supplied gambling and betting services, (ii) whether a prohibition on the remote supply of gambling and betting services is a limitation within the meaning of Article XVI and whether the underlying US measures thus are inconsistent with these obligations, and (iii) whether the US measures address concerns which fall within the scope of, and are 'necessary' to, protect 'public morals' and/or 'public order' and whether these 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 (*chapeau* of GATS Article XIV).

The Appellate Body supported the Panel's finding that the US GATS Schedule includes specific commitments on gambling services and that these specific commitments under GATS Article XVI prevent it from upholding a prohibition on the cross-border supply of these services. The Appellate Body also supported the Panel's findings that the US prohibition on the remote supply of gambling can be justified as a general exception to the GATS rules, because the US measures attempt to protect 'public morals' and/or 'public order' pursuant to GATS Article XIV. The difference between the Panel's and the Appellate Body's findings lies mainly with the assessment of whether the US measures are 'necessary to protect public morals or maintain public order', in accordance with the chapeau and paragraph (a) of GATS Article XIV. Contrary to the Panel, the Appellate Body ruled that three out of four US laws at stake are 'necessary' to protect public morals. The US can thus continue to maintain these measures and will only have to amend one measure (i.e. the Interstate Horseracing Act – IHT) which seems to permit electronic gambling to domestic service providers.[12] In sum, foreign providers will not be able to supply electronic gambling services into the US.

The DSB adopted the Appellate Body report and the modified Panel report in April 2005. The 'reasonable period of time' for the US to implement the rulings of the DSB expired on 3 April 2006.[13] While the US Administration has, in consultation with the US Congress, been working on appropriate steps to resolve this matter, so far the US has not amended or clarified the measure in question.[14]

12 *US–Gambling*, Appellate Body Report, para. 374.

13 DS, *US–Gambling*, Arbitration under Art. 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS285/13 (19 August 2005).

14 DS, *US–Gambling*, Status Report by the United States WT/DS285/15 (7 March 2006), and 'US Congress closer to ban on online gambling', *Financial Times* (25 May 2006).

According to Antigua, to date the US has failed to comply with the recommendations and the rulings of the DSB.[15]

## 2. GATS now ready for the digital economy and international outsourcing

### *2.1 GATS rules and commitments apply to electronically delivered services*

The rulings in *US–Gambling* have brought about more legal certainty as to the applicability of WTO and GATS commitments to the electronic cross-border delivery of services.

To date, the situation prevailed that no basic affirmation concerning the applicability of WTO rules to cross-border electronic services has been forthcoming from WTO Members. During the Work Programme on E-Commerce, certain GATS Members questioned whether the GATS obligations and commitments undertaken in 1994 apply to services transmitted by a technology that was not yet envisioned at the time of the negotiations (i.e. the Internet). Some WTO Members went as far as stating that new specific commitments may be needed for cross-border electronic service transactions.[16] Other Members called for a common understanding that Internet-supplied services are within the scope of the GATS.[17] Given this confusion, the US also has – so far without success – asked for a positive reaffirmation that electronic transactions are covered by existing GATS commitments.[18]

The greatest progress of *US–Gambling* is the confirmation that WTO rules are indeed applicable to e-commerce and/or to electronically supplied services. Both rulings apply the GATS framework to the concerned electronic cross-border delivery of services without hesitation, finding that the specific sub-sector of the US GATS schedule includes specific commitments on Internet-delivered gambling services. In particular, the Panel finds that the particular US regulations (e.g. the Wire Act) prohibit the use of at least one or potentially several means of delivery included in GATS mode 1,[19] and that, accordingly, these regulations 'constitute a zero quota for, respectively, one, several or all of those means of delivery',[20]

15 DS, *US–Gambling*, Agreement between Antigua and Barbuda and the United States Regarding Procedures under Article 21 and 22 of the DSU, WT/DS285/16 (26 May 2006) and 'Antigua hits back at US gaming laws', *Financial Times* (14 June 2006).

16 See e.g. Committee on Trade in Financial Services, Report of the Meeting Held on 9 May 2001, S/FIN/M/31 (1 June 2001) for a statement by India that the positive list approach to scheduling specific commitments under the GATS requires new commitments for services delivered through new technologies.

17 See CTS, Report of the Meeting held on 28 June and 28 July 2004, TN/S/M/11 (8 September 2004) – especially intervention of Chinese Taipei – and Wunsch-Vincent (2006: 156) for such calls.

18 CTS, Communication from the US, 'Clarification of the Relationship between Existing Services Commitments and the Internet', S/C/W/130 (14 October 1999) and COMTD, Submission by the United States, Work Programme on E-Commerce, WT/COMTD/17 (12 February 1999).

19 *US–Gambling*, Panel Report, para. 6.362.

20 Ibid., paras. 6.363, 6.367, and 6.370.

'constituting a limitation in the form of numerical quotas within the meaning of GATS Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of GATS Article XVI:2(c).'[21] This judgment was confirmed by the Appellate Body.[22]

For the negotiations under the Doha Development Agenda, this means that the GATS rules and – existing and revised – specific GATS commitments fully apply to cross-border Internet-based service transactions. New services that arise through the Internet benefit from a liberal trade treatment, if they are adequately captured by existing specific GATS commitments and thus the corresponding classifications. However, as of now WTO Members making new GATS mode 1 commitments must carefully consider and accept that these commitments extend to services electronically supplied across borders. In fields such as gambling, but also in the educational, medical, and other regulated service sectors, the consequences of these commitments must be taken seriously; especially in the light of Section 3.1 which illustrates that the total prohibition of the electronic delivery of such a service is not compatible with a specific GATS mode 1 commitment.

### *2.2 GATS mode 1 commitments relevant to the cross-border electronic delivery of services*

*US–Gambling* may have brought about improved legal certainty as to which GATS mode and related commitments apply to the cross-border electronic delivery of services. At the minimum, this ruling provides a good starting point for Members to finalise a related understanding.

So far, WTO Members have had difficulties determining whether the electronic cross-border delivery of a service is a service supplied over GATS mode 1 or over mode 2 (see Table 1).[23] In the case of an electronically supplied service, the problem is to determine whether a service supplier was providing a service on a cross-border basis: if one applies GATS Article I:2 the distinction depends on whether the service is produced abroad and sent across borders to a foreign consumer or whether it is the consumer who 'travels' abroad to consume a service. The answer to this categorization is important because the 'quality' of existing specific GATS commitments – i.e. the level of liberalization – differ widely depending on which mode applies. Generally, concessions under mode 2 are more liberal than under mode 1.[24]

In the WTO Work Programme on E-Commerce, this modal classification debate has not been solved.[25] The US sought the most liberal classification and thus

21 Ibid.

22 *US–Gambling*, Appellate Body Report, para. 265.

23 CTS, Work Programme on E-Commerce, Note by the Secretariat, S/C/W/68 (16 November 1998), paras. 6 ff. and Adlung (2004: 9).

24 Bacchetta *et al.* (1998: 52–55); and Berkey and Tinawi (1999: 5, 7–8). In their country schedules, WTO Members have mostly entered 'unbound' in the mode 1 column and 'none' for limitations under the mode 2 column.

25 Drake and Nicolaidis (2000: 413–414).

Table 1. GATS modes of supply: modes 1 and 2

| | |
|---|---|
| Mode 1: CROSS-BORDER SUPPLY | Services supplied from one WTO Member's territory to the territory of another WTO Member (i.e. the service is delivered across borders through the telecommunications or postal infrastructure without the service supplier or the service consumer leaving their host country) |
| Mode 2: CONSUMPTION ABROAD | Service supplied within one WTO Member's territory to a consumer/citizen of another WTO Member (i.e. the service is consumed within the country of the service supplier by another country's service consumer who has travelled to the country where the service is supplied) |

*Source*: Based on GATS Art. I:2 and the 2001 GATS Scheduling Guidelines. Note that in both modes the service supplier is *not present* within the territory of the Member that consumes the service.

questioned whether a mode 2 classification would be preferable, given that there are more mode 2 specific commitments with fewer limitations than mode 1.[26] To support this position, the US argued that the consumer actually 'visits' the website of an Internet service provider in another country – an argument easily applied to the Internet gambling as well.[27]

In *US–Gambling*, it is of interest to find that the concerned parties, Antigua and the US, as well as the Panel and the Appellate Body rulings imply that indeed GATS mode 1 commitments are applicable to cross-border electronic service delivery.[28] Whereas Antigua argues that the uncertainty over mode 1 versus mode 2 classification does not arise in this case,[29] other parties such as the European Communities (EC) also build their arguments on the understanding that GATS mode 1 commitments are applicable to these Internet-delivered services.

The Panel and Appellate Body followed this interpretation. To begin with, the Panel established that 'cross-border' supply must be distinguished from 'remote' supply.[30] It used the term 'remote' supply to refer to 'any situation where the

26 WT/COMTD/17 (12 February 1999), para. 4.

27 Ibid.

28 Antigua states that 'this constitutes ''mode 1'' or ''cross-border'' supply of services, as defined in Article I:2(a) of the GATS'. To guard its position however, Antigua points out that 'in any event whether the gambling … services at issue in this proceeding are supplied in mode 1 or mode 2 does not have a material impact on this dispute because the United States has made the same commitments for both modes of supply'. See *US–Gambling*, Panel Report, para. 3.29.

29 Antigua notes that the 1993 Scheduling Guidelines provide the following explanation about 'consumption abroad': 'This mode of supply is often referred to as ''movement of the consumer''. The essential feature of this mode is that the service is delivered outside the territory of the Member making the commitment. Often the actual movement of the consumer is necessary as in tourism services.' See 'Scheduling of Initial Commitments in Trade in Services – Explanatory Note', MTN.GNS/W/164 (3 September 1993), para. 19 (hereinafter the '1993 Scheduling Guidelines'). This definition is taken over without change in para. 29 of the '2001 Scheduling Guidelines'.

30 *US–Gambling*, Panel Report, para. 6.32.

supplier, *whether domestic or foreign*, and the consumer of gambling and betting services are not physically together'. The logic is that the GATS does not distinguish between remote or on-site supply but between four modes of supply out of which – according to the Panel – only GATS mode 1 can be remote. More importantly, the Panel limits its analysis under GATS Article XVI to the market access column 'mode 1' while clearly stating that '[t]his dispute concerns one of the four modes of supply under the GATS', that is, the so-called 'cross-border supply' of gambling and betting services[31] and while building on paragraph 19 of the 1993 Scheduling Guidelines.[32] The Appellate Body has followed this line of reasoning and has only assessed the US GATS mode 1 commitments.[33] In the light of the concerned gambling services, which are supplied over a foreign web page – a text book example for arguing that a US customer effectively 'visits a foreign service supplier operating under a different legal regime' and thus that GATS mode 2 is applicable – this seeming finding on the applicability of mode 1 seems even more evident.[34]

Based on these facts, it is tempting to conclude that *US–Gambling* has brought closure to this important uncertainty over the applicable GATS mode. But as neither the Panel nor the Appellate Body had been requested to pronounce themselves on the difference between mode 1 and mode 2 this important question may be less than fully settled.[35]

The current negotiations under the Doha Development Agenda have shown increased awareness with respect to eliminating this problem.[36] So far efforts to reduce this modal imbalance and uncertainty have mainly centred on asking for similar and preferably full commitments in both GATS modes 1 and 2 in as many sectors as possible (i.e. in most cases, to increase the commitment level of mode 1 to the one of mode 2).[37] These suggestions have resurfaced as India and other Members are growing more interested in pre-empting protectionism with respect

31 *US–Gambling*, Panel Report, para. 6.29.

32 *US–Gambling*, Panel Report, paras. 6.280 ff. and 6.355. See also the Explanatory Note on Scheduling of Initial Commitments in Trade in Services, MTN.GNS/W/164 (3 September 1993), paras. 18–19.

33 *US–Gambling*, Appellate Body Report, para. 215.

34 This result builds on clarification obtained in the earlier GATS case on telecommunications – *Mexico–Telecoms* – which confirmed that the cross-border supply of a service does not imply the presence of the service supplier in the market into which the service is delivered. *Mexico–Telecoms*, Panel Report, paras. 7.24–7.26 and 7. 44.

35 Note also that in the case the difference between GATS mode 1 and mode 2 did not matter much in the case as the US had identical bindings of 'none' under both GATS modes.

36 Wunsch-Vincent (2006: 65–70, 182) and CTS, Communication from Switzerland, Scheduling Issues, TN/S/W/21 (8 September 2004). The Committee on Trade in Financial Services also discussed a communication from Brazil whose aim was to revisit the issue of the distinction between modes 1 and 2 in the case of cross-border financial transactions conducted through electronic means (see Job(05)/103 as cited in CTS – Annual Report of the Council for Trade in Services (2005), S/C/24 (28 September 2005)).

37 Ibid. and CTS, Communication from Switzerland, GATS 2000: Financial Services, S/CSS/W/71 (4 May 2001).

to services outsourcing.[38] But the Hong Kong Ministerial Declaration only suggests that commitments on mode 2 should be made where commitments on mode 1 exist (which is usually already the case).[39] Moreover, so far the revised GATS offers available in June 2006 had rarely achieved identical commitment levels between both modes.

In this light, WTO Members should use the opportunity of the *US–Gambling* rulings to enter into a final binding agreement declaring GATS mode 1 as fully applicable to all cross-border electronic transactions. Otherwise, further dispute settlement may be needed to bring full legal certainty to the matter.

### *2.3 WTO members responsible for the clarity of their GATS commitments*

*US–Gambling* has provided important guidelines on how to unmistakably schedule commitments for specific service sectors and sub-sectors. At the minimum, it has provided a clear warning to those WTO Members who do not.

Most GATS Members made sectoral commitments on the basis of the GATS Services Sectoral Classification List (so-called W/120[40] that makes numerical reference to the 1991 Provisional Central Product Classification, CPC).[41] WTO Members are free to include only certain sectors of the less detailed W/120 in their GATS commitment schedules. They also have the choice of committing sub-activities of a certain sector while omitting others.[42]

In *US–Gambling*, it was questioned whether a specific US GATS commitment on 'other recreational services' covered gambling services as supplied by Antigua. Problematically, the US had not used the provisional CPC to enter their GATS commitments, making the straightforward interpretation of its schedule more complicated. In the underlying case, the US has become a victim of this lack of clarity as the Panel decided that gambling services are committed through the US commitment on 'other recreational services' (in CPC, gambling and betting services is a sub-classification of 'other recreational services').[43] This holds true even though (i) the Scheduling Guidelines are facilitative and not normative or

38 See the joint statement on the 'Liberalization of Mode 1 under GATS Negotiations' from Chile, India and Mexico contained in Job(04)/87. The ambition to achieve similar levels of commitments in modes 1 and 2 also found its way into the negotiations just before the Hong Kong Ministerial, see CTS, Special Session, TN/S/23 (28 November 2005), para. 20.

39 Hong Kong Ministerial Declaration, Annex C, 1(b)(ii).

40 Named after the WTO document MTN.GNS/W/120 that contained this service classification.

41 The provisional CPC can be found in UN (1991).

42 For instance, among the 'Computer and related Services'-category 'Data base services CPC 844' is committed but 'Data processing services CPC 843' is not.

43 *US–Gambling*, Panel Report, para. 6.134. Interestingly, it seems that this possible scheduling inaccuracy (i.e. not excluding gambling services from the specific trade commitments) of the US has been repeated in the flurry of bilateral trade agreements which its has concluded in recent years. In neither of these, the US excludes gambling services from its trade commitments (i.e. via explicit scheduling as non-conforming measure); cf. to the section on general GATS exceptions.

mandatory; and that (ii) the US had not indicated in its schedules that it was following the CPC.[44]

The Panel built its argumentation on the 1993 Scheduling Guidelines, which prescribe that the 'greatest possible degree of clarity in the description of each sector and sub-sector is necessary and that where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification'.[45] The Appellate Body ruled in the same way, while using a different methodology.[46]

Considering the ongoing GATS negotiations, this call for precision in scheduling commitments comes at an important time and will – if taken seriously – increase the clarity of future GATS commitments. Practically speaking, Members are assumed to use the W/120 or an equally precise classification system in the Doha Negotiations and to follow the 2001 GATS Scheduling Guidelines or to state clearly if they deviate from these accepted standards.[47] The Hong Kong Ministerial Declaration reiterates the importance of this precision (note that the US has now inserted CPC numbers in its revised GATS offer!).[48]

In times of rapid technological evolution, which increases the tradability and the type of existing services, the clear scheduling of commitments is ever-more important. Since 1994 – the date of the conclusion of the first GATS round – many new services that can be delivered across borders have surfaced.[49] In fact, the CPC was updated twice to do justice to the rapid evolutions shaping economic activities and technologies since the end of the Uruguay Round.[50] Moreover, a final draft of the third revision of the CPC (i.e. CPC, 2007), containing many updates as regards

44 Trebilcock and Howse (2005: 370).

45 Paragraph 16 of the 1993 Scheduling Guidelines, MTN.GNS/W/164 (3 September 1993). 'If a Member wishes to use its own sub-sectoral classification or definitions, it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.' These principles are reiterated in the new 2001 Scheduling Guidelines, para. 23. This adds to the findings in 'European Communities – Regime for the Importation, Sale and Distribution of Bananas', Appellate Body Report, WT/DS27/AB/R (9 September 1997), paras. 225–226 where the Appellate Body had already required that Members using the CPC were required to commit using the sub-classification of the CPC, effectively deciding that a Member cannot invent its own sub-classification or differentiation of activities within a sector as defined by the classification methodology it chooses. Cf. Trebilcock and Howse (2005: 369).

46 It reiterated that it is the responsibility of parties to schedule in a 'sufficiently detailed way' when not following the CPC, and stating that in cases of unclear scheduling the use of the W/120-list and the relevant GATS scheduling guidelines when interpreting GATS schedule becomes legitimate. See *US–Gambling*, Appellate Body Report, paras. 202–205.

47 As Krajewski (2005: 428) puts it 'unless Members specifically state the contrary, it will be assumed that they followed the rules and principals of the 2001 Scheduling Guidelines'.

48 Hong Kong Ministerial Declaration, para 1 (f).

49 See Mattoo and Wunsch-Vincent (2004) for this discussion and a suggested model schedule. See also the related collective GATS request of India, Chile, Singapore, and other WTO Members – a copy of which can be found at www.uscsi.org/publications/papers/collective/CBS.pdf – using such a model schedule.

50 For the latest update see UN (2002).

IT-related services, is now available.[51] However, these changes have not been replicated in the WTO, meaning that the ongoing services negotiations are still based on the provisional W/120 and the CPC of 1991.

If Members feel that new services need special coverage they are well-advised to agree on common classifications (such as in the current discussion on energy services), ideally based on revisions of the CPC or some other internationally recognised and detailed classification. It must be avoided that ambitious WTO Members wanting to commit 'new services' are led to introduce own definitions potentially leading to greater heterogeneity of classifications and commitments across existing GATS schedules. It is also important that the classification methodologies in use allow Members to enter clear and broad commitments (for example on the two-digit CPC level), but that they also provide for the possibility to carefully exclude certain sub-sectors (such as, for example, certain medical services).

In the ongoing negotiations WTO Members could opt for combinations of the positive and negative list approach for scheduling service trade commitments, i.e. entering broad commitments at the two-digit CPC level, while carefully listing certain exemptions using precise CPC codes. Currently, however, the WTO Members show little flexibility to move towards updated UN classification systems or towards negative scheduling methodologies.

### 2.4 *Findings on technological neutrality and 'likeness' of electronically supplied services*

In *US–Gambling*, the Panel has applied a narrow concept of technological neutrality but it has left important questions concerning the debate about the likeness of services (especially between electronic and non-electronic) unanswered.

Under the WTO Work Programme on E-Commerce, the Council for Trade in Services expressed the need for more work on the concepts of technological neutrality and the likeness of electronically versus non-electronically supplied services.[52] In the Work Program, these two concepts were seen in an interrelated fashion when considering the applicability of market access and national treatment commitments towards electronically supplied services. Generally speaking, the question was whether a 'means of delivery', such as the electronic supply over the Internet, affects the nature of specific GATS commitments. Two variations of this problem and two diverse interpretations of the technological neutrality concept have been discussed:

- *Intra-modal technological neutrality*: In the context of GATS market access (GATS Article XVI) and national treatment (GATS Article XVII) obligations, the question was raised whether specific commitments for GATS mode 1 encompass

51 See Internet: http://unstats.un.org/unsd/cr/registry/regrev2.asp?id=4&Lg=1 for the revision of the UN Classifications Registry.

52 CTS, Work Programme on E-Commerce, Interim Report to the General Council, S/C/8 (31 March 1999).

the delivery of services through electronic means, with some delegations arguing that 'in keeping with the principle of technological neutrality'[53] the answer should be yes (cf. discussion under section 2.1).[54] During the Work Program, one delegation noted that in principle intra-modal distinctions based on the technique of delivery could be challenged as inconsistent with most-favoured nation treatment (MFN) obligations.[55] This underlines the idea that in no area of the WTO are there different rules for different techniques of delivery.[56] In this context, technological neutrality refers to the idea that a commitment covers all means by which the service in question might be delivered within a mode of supply.[57]

- *Likeness between electronic and non-electronic services*: In the context of GATS MFN (GATS Article III) and national treatment obligations (GATS Article XVII), the question to be addressed was whether electronically delivered services and those delivered by more traditional means are 'like' services. Given that services can be supplied across borders, the advent of the Internet constitutes a severe test of the bounds of likeness.[58] But the GATS does not provide guidance on when services must be considered 'like' other services[59] and this question also remains untested in WTO dispute settlement.[60] The question is whether the nature of a service can be changed due to the fact that the service is supplied via electronic means or that the supplier is not located in the host country.[61] This is important as the GATS MFN obligations and national treatment commitments only apply to the extent that a foreign service or service supplier is 'like' a domestic service or service supplier.

  In the WTO Work Programme on E-Commerce, some delegations argued that, on the basis of technological neutrality, services provided electronically and services provided non-electronically were like services under the GATS, and thus subject to the national treatment rule. In this instance, the concept of likeness is closely tied to the concept of national treatment. In an explanatory note without binding character, the WTO Secretariat stated that '[a]s discussed in the context of Article II on MFN, likeness in the national treatment context also depends in principle on

53 GC, Work Programme on E-Commerce, Submission by the United States, WT/GC/16 (12 February 1999).

54 WT/GC/16 (12 February 1999).

55 S/C/8 (31 March 1999), Annex.

56 S/C/8 (31 March 1999), pp. 5–6. The Council for Trade in Services had noted earlier that the GATS 'makes no distinction between the different technological means by which a service may be delivered – whether in person, by mail, by telephone or across the Internet'. See also S/C/W/68 (16 November 1998), para. 2.

57 Low and Mattoo (2000: 7 and 24). This term is increasingly used in the face of regulatory coherence in times of converging technologies. Its meaning however often rests unexplained and ambiguous.

58 Arkell (2002: 5).

59 Mattoo (1997).

60 GATT dispute resolution has been unable to provide a predictable, consistent approach to determining when products are 'like'. Current jurisprudence only establishes that the determination of likeness can only be made on a case-by-case basis. See Cottier *et al.* (1999) for a detailed discussion of likeness in the WTO.

61 Cf. Drake and Nicolaidis (2000: 23).

Table 2. Technological neutrality and likeness issues in *US–Gambling*

| | | Domestic service provider delivering gambling services from within the US | Foreign service provider delivering gambling services across the border (GATS Mode 1) |
|---|---|---|---|
| On-site supply (non-electronic) | | Case I | not applicable |
| Remote Supply | *Postal* | Case II | Case III |
| | *Electronic and other means* | | Case IV |

Likeness

*Note*: On-site supply can also entail the service supply by a foreign supplier under GATS Mode 3 and 4. Comparisons between the shaded areas refer to intra-modal technological neutrality. Likeness comparisons take place between the two columns as indicated by the arrow.

attributes of the product or supplier *per se* rather than on the means by which the product is delivered'.[62] In this scenario, technological neutrality refers to the idea that a certain means of delivery does not make 'unlike'.[63] In the WTO Work Programme on E-Commerce no consensus could be found on this point. Only some Members had informally agreed that likeness would not depend on whether a service was delivered electronically or otherwise.[64]

Both these interpretations of technological neutrality are relevant in *US–Gambling* as Table 2 illustrates. First, the concept of technological neutrality surfaced when assessing the applicability of US market access commitments *vis-à-vis* gambling services supplied by foreign service providers using various technologies under GATS mode 1 (e.g. postal service, Internet); the case of case III versus case IV in Table 2 (shaded in grey). Second, the question of 'likeness' arose when assessing the applicability of US national treatment commitments *vis-à-vis* electronically supplied gambling services by foreign service providers. When submitting their case, both Antigua as well as the US raised the issue of likeness between the electronic cross-border supply of foreign gambling services (case IV) to gambling services supplied by domestic service providers; either by traditional casinos and thus non-remote and non-electronically – i.e. case I – or to Internet-delivered gambling services from providers based in the US – i.e. case II.

62 S/C/W/68 (16 November 1998), para. 33 (concerning GATS Article XVII). As the Secretariat indicates, this note does not provide authoritative interpretations of these provisions. Cf. CTS, Work Programme on Electronic Commerce – Progress Report to the General Council, S/L/74 (27 July 1999), para. 8.

63 Cf. S/L/74 (27 July 1999), para. 8.

64 Ibid.

In *US–Gambling* the Panel has contributed to a common understanding of the concepts of technological neutrality and 'means of delivery' as understood in the first of the two interpretations of the WTO Work Programme on E-Commerce, i.e. intra-modal technological neutrality. But as neither the Panel nor the Appellate Body ruled on matters relating to national treatment, a classical test for likeness of electronic versus non-electronically delivered services has not been produced. Despite interesting suggestions by the complaining parties, the Panel did not establish that the electronic supply of a service does *not* make it – by definition – unlike a domestic service supplied offline. Also, the rulings did not directly treat the thorniest question, i.e. how the likeness of domestic versus foreign service providers should be assessed.

'*Intra-modal technological neutrality*' *of market access commitments confirmed*

As part of its analysis concerning GATS Article XVI, the Panel developed a new concept of 'technological neutrality' between different 'means of delivery' within a given GATS mode (cf. Table 2, case III versus case IV), thus building on the more restrictive interpretation of the technological neutrality concept.[65] Means of delivery' is used in the Panel Report to refer to the various technological means (mail, Internet, etc.) by which a service can be supplied cross-border or remotely.[66]

Mirroring above discussions on the applicability of GATS mode 1 commitments to Internet-delivered services, the Panel asserts that:

> the GATS does not limit the various technologically possible means of delivery under mode 1[67] … Therefore, a market access commitment … implies the right … to supply a service through all means of delivery … unless otherwise specified in a Member's Schedule.[68]

According to the Panel, any limitation on the means of cross-border delivery would reduce or nullify a standing specific GATS mode 1 commitment:[69]

> [A] prohibition on one, several or all of the means of delivery included in mode 1 thus constitutes a limitation on the total number of service operations or on the total quantity of service output … in the form of quotas within the meaning of Article XVI:2(c).[70]

Both Panel and the Appellate Body find that by limiting the electronic supply of gambling services, the United States fails to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in the market access column of its

65 *US–Gambling*, Panel Report, paras. 6.280 ff. Interestingly – although central to the Panel and Appellate Body analyses – the terms 'means of delivery' and 'technological neutrality' do not appear in the GATS.

66 *US–Gambling*, Panel Report, para. 6.33.

67 *US–Gambling*, Panel Report, para. 6.281.

68 *US–Gambling*, Panel Report, para. 6.285. See also paras. 6.355 and 7.2(b).

69 *US–Gambling*, Panel Report, para. 6.286.

70 *US–Gambling*, Panel Report, paras. 6.355 and 7.2(b). Cf. to S/C/8 (31 March 1999), p. 1.

schedule. This argument is developed by the Panel while referring to the first interpretation of the principle of technological neutrality (i.e. that a commitment covers all means by which the service in question might be delivered within a mode of supply) and while stating that it applies particularly in 'sectors and sub-sectors where cross-border supply is affected essentially if not exclusively through the Internet.[71] This reasoning also extends to other GATS modes, meaning that specific GATS modes 2, 3, and 4 commitments afford foreign service providers operating under these other GATS modes to deliver their services electronically. This entire line of reasoning of the Panel was not put into question by the Appellate Body. Interestingly, the DSB has relied on proposals and background notes of the non-binding WTO Work Programme on E-Commerce to make this point. Importantly, this judgement only reaffirms technological neutrality within particular GATS modes. By definition the GATS is not a fully technologically neutral instrument, as it allows parties to discriminate between the four GATS modes of delivery.

Besides this, it is questionable, whether – within a particular GATS mode – Members can through scheduling under GATS Article XVI exclude certain forms of delivery (allowing the postal but refusing the electronic delivery of a service). The Panel notes, that '[i]f a Member desires to exclude market access with respect to the supply of a service through one, several or all means of delivery included in mode 1, it should do so explicitly in its schedule'.[72] This implies that nothing prevents Members from excluding certain means of delivery from the scope of a commitment. To the contrary, Low and Mattoo (2000) note that 'since the only restrictions that may be scheduled under GATS Article XVI:2 are those that are listed, this implies that limitations on the means by which a service is delivered can neither be scheduled nor directly disallowed'.[73] Effectively and in contradiction to the Panel ruling there may be constraints imposed on WTO Members when scheduling limitations under GATS Article XVI:2. As a result, the question whether within a given GATS mode Members can schedule commitments according to the delivery technology needs further clarification.[74]

Aside this need for clarification, this means that given specific GATS commitments, WTO Members cannot – for one given and fully committed GATS mode

71 *US–Gambling*, Panel Report, para. 6.285. The Panel refers to S/L/74 (27 July 1999), para. 4: 'It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a services may be supplied.' The Panel also notes that the United States seems to agree as is evident from the comments made by it in a submission contained in WT/GC/16, p. 3: 'there should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality'.

72 *US–Gambling*, Panel Report, para. 6.286.

73 Low and Mattoo (2000: 8).

74 Interestingly, WTO Members could maybe limit their commitments to off-line supply only by specifying the service sub-sector in the first column of the GATS schedule narrowly while deviating from the CPC classification, namely, for example, making commitments for 'Adult education services delivered through non-electronic means only'. Thanks go to Markus Krajewski for this remark.

and *ex post* – discriminate between various delivery of current or future technologies. In principle, a GATS mode 1 commitment automatically secures market access for 'like services' independently of the delivery technology. It must be addressed, however, whether in the current negotiations WTO Members can enter new GATS mode 1 commitments while excluding certain delivery technologies. In any case, Members retain the right to discriminate between the different modes of delivery, while making commitments on one mode but not the other.

*Likeness between electronic and non-electronic services in the context of national treatment remains unclear*

As part of the claims and main arguments of the parties to the dispute, Antigua and the US raised issues surrounding the issue of likeness. At stake was whether the US measures prohibiting the electronic cross-border supply of electronic gambling services are compatible with the US national treatment commitments[75] and whether the electronic gambling services offered by Antiguan providers are 'like' the on-site supply (non-electronic) of gambling services offered by US domestic suppliers (i.e. case IV versus case I in Table 2). Antigua argued that – in violation of Article XVII of the GATS – Antiguan services and suppliers are receiving less favourable treatment than providers of like services in the US.[76] As part of this discussion, *US–Gambling* raised fundamental questions and arguments surrounding the issue likeness of cross-border electronically supplied versus non-electronically supplied services.

In sum, Antigua argued that services and service suppliers of Antigua are 'like' those of the US. The fact that services of Antiguan gaming operators are supplied via a different 'mode of supply' than services of suppliers of United States origin (cross-border electronic supply as opposed to on-site supply) does not make these 'unlike'.[77] According to Antigua:

> [b]y definition, cross-border supply requires the use of remote communication – thus if the different mode of supply ipso facto results in a conclusion that services are 'unlike' it would render Members' commitments in respect of cross border supply under the GATS meaningless.[78]

According to Antigua, in the presence of full specific GATS commitments for mode 1 – services cannot be declared unlike and denied market access on the basis that the service delivery under this particular mode requires specific transmission technologies different from those used by domestic service suppliers.[79] In making this argument, Antigua relied on the afore-mentioned note by the WTO

75 Cf. *US–Gambling*, Panel Report, paras. 3.221–3.238 and 6.422–6.426.

76 *US–Gambling*, Panel Report, para. 6.422.

77 *US–Gambling*, Panel Report, paras. 3.148 ff.

78 *US–Gambling*, Panel Report, para. 3.160. See also paras. 3.150 ff.: 'If the use of a different "mode of supply" were sufficient for a WTO Member to escape the obligations of national treatment on the basis of "unlikeness," this would seriously undermine the effectiveness of the GATS.'

79 Antiguan argument at *US–Gambling*, Panel Report, para. 3.161.

Secretariat, which made clear that likeness in the national treatment context depends in principle on attributes of the product or supplier *per se* rather than on the means by which the product is delivered.[80]

The US, in turn, responded that Antigua has failed to prove that its services and service suppliers are 'like' US services and service suppliers, pointing to significant differences between the on-site and non-electronic services and the electronic services:[81] differences in customers and customer experiences, regulatory environment of these services, the risk associated in the different services, etc.[82] According to the US, even if it were to be assumed that likeness could be established between some remotely supplied gambling and betting services and service suppliers and non-remote gambling and betting service and service suppliers, the US may, nonetheless, maintain a regulatory distinction between remote and non-remote supply of such services, given that such a distinction does not afford less favourable treatment to foreign suppliers on the basis of national origin.[83]

While the tension between the opposing views quite clearly shows the breadth of the complexity of the question involved, none of these important issues have been clarified by the case. The question of when electronically delivered services can be considered 'unlike' their non-electronic counterparts has not been answered because, out of judicial economy, the Panel and the Appellate Body did not rule on the claims the parties made under GATS Article XVII.[84] Given the increasing trend to broad specific national treatment commitments and the increasing electronic service delivery, the uncertainty as to how to assert the 'likeness' of services can be considered as one of the greatest challenges facing GATS negotiators.

At the minimum, Doha negotiators should – following the suggestion by the WTO Secretariat and the discussions in the WTO Work Programme on E-Commerce – strive to confirm that the electronic delivery of services does not make 'unlike' by definition.

### 3. Scope of GATS market access commitments clarified

The rulings of the Panel and the Appellate Body have also drastically influenced the meaning of GATS market access commitments. This is the aspect which has drawn most attention in the nascent literature on the case (see Section 3.4).

At stake was whether a prohibition on the remote supply of gambling services is a limitation within the meaning of GATS Article XVI. Whereas Antigua argued that a complete ban on cross-border supply qualifies as a 'limitation on the number of service suppliers' prohibited by GATS Article XVI:2(a), the US replied that its

80 *US–Gambling*, Panel Report, fn. 268 (see original sources in fn. 62 of this article).

81 United States' second written submission, paras. 28 *et seq*.

82 *US–Gambling*, Panel Report, paras. 3.161 ff. and 3.210.

83 *US–Gambling*, Panel Report, para., 6.423 and United States' second written submission, paras. 59 *et seq*.

84 *US–Gambling*, Panel Report, paras. 6.25–6.18 and 6.425–6.

restrictions on remote gambling services are expressed as limitations on the character of the activity supplied, not as quantitative limits or other restrictions within the ambit of GATS Article XVI:2.[85] According to the US, a commitment under GATS Article XVI only prohibits the use of quantitative measures listed in GATS Article XVI:2.[86] Accordingly, a commitment for cross-border supply of medical services, for example, does not imply that Members must then permit doctors to diagnose patients over the telephone or over the Internet. In its appeal, the US contended that 'the Panel erred in its interpretation of sub-paragraphs (a) and (c) of GATS Article XVI:2 by failing to give effect to certain elements of the text of these provisions, notably to key terms such as "form" and "numerical quotas"'.[87]

At stake was also whether measures aimed at consumers that prohibit certain services are prohibited along the lines of Article XVI of the GATS. Finally, the relationship between GATS Articles XIV and VI was treated by the Panel.

### *3.1 The total prohibition of a service is not compatible with specific GATS commitment*

Unexpectedly for some of the emerging literature on the case (cf. Section 3.4), the Panel ruled that the US measures are a limitation 'on the total number of service operations or on the total quantity of service output … in the form of quotas' within the meaning of GATS Article XVI:2(c) because it prevents the services operations and/or service output through one or more or all means of delivery that are included in mode 1 (i.e. a 'zero quota').[88] The Panel's reasoning was that:

> if a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or sub-sector and, therefore, would not need to schedule any limitation or measures pursuant to GATS Article XVI:2.[89]

The Appellate Body upheld the Panel's finding that:

> [a prohibition on one, several or all means of delivery cross-border] is a 'limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1.[90]

85 The measures listed comprise four types of quantitative restrictions (sub-paragraphs a–d), as well as limitations on forms of legal entity (sub-paragraph e) and on foreign equity participation (sub-paragraph f). The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII).

86 US reply to Panel question No. 15. In its appeal, the US argued that '*none* of the measures at issue states any numerical units or is in the form of quotas and that, therefore, *none* of those measures falls within the scope of subparagraph (a) or (c) of Article XVI:2.'.

87 *US–Gambling*, Appellate Body Report, para. 222.

88 *US–Gambling*, Panel Report, paras. 6.338 and 7.2 (b).

89 *US–Gambling*, Panel Report, para. 6.331. Cf. *US–Gambling*, Appellate Body Report, paras. 234, 239, 252, and 373 (C) (i).

90 *US–Gambling*, Appellate Body Report, para. 223.

On this basis, the Appellate Body maintained the finding that 'by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations under Article XVI:1 and Article XVI:2(a) and (c) of the GATS'.[91]

In the context of cross-border electronic supply, it is also of interest that the Panel emphasized that the value of specific commitments would be seriously impaired if Members could restrict international payment for service transactions in scheduled sectors.[92] This re-affirmed that the importance of the obligations under GATS Article XI on Payments and Transfers is a particularly important outcome for cross-border service transactions.

### *3.2 Measures aimed at consumers not in realm of specific GATS market access obligations?*

Antigua challenged four US state laws under GATS Article XVI that prohibit or regulate electronic/remote betting. These laws are directed at persons who engage in gambling – that is at *consumers* of gambling services rather than at *suppliers* of gambling services. Antigua argued that – given its specific GATS commitments on gambling services – the US cannot maintain a prohibition on the consumption of these services.

But the Panel rejected this line of reasoning while arguing that these state laws of the US are not directed at 'service suppliers' as specified in GATS Article XVI:2(a) nor to 'service operations' and 'service output' as specified in GATS Article XVI:2(c) but rather at persons who make a bet.[93] Consequently, the Panel ruled that these measures aimed at consumers contain limitations which do not fall within the scope of GATS Articles XVI:2(a) and/or XVI:2(c) and that they are thus not inconsistent with the US specific GATS commitments.

Antigua appealed the Panel's conclusion that measures preventing consumers from using services supplied by a service provider in another WTO Member are not inconsistent with sub-paragraph (a) or (c) of GATS Article XVI:2.[94] It argued that a Member who made a full commitment on mode 1 would still be able to eliminate the possibility of cross-border supply of services, thus circumventing that commitment, by imposing restrictions on the ability of its citizens to consume those services, thus leading to an 'absurd' result.[95]

91 *US–Gambling*, Appellate Body Report, para. 265.

92 *US–Gambling*, Panel Report, paras. 6.441–6.442.

93 *US–Gambling*, Panel Report, paras. 6.382–6.383 (Colorado), 6.397–6.398 (Minnesota), 6.401–6.402 (New Jersey), and 6.405–6.406 (New York). Panel in paragraphs 6.383, 6.398, 6.402, and 6.406.

94 *US–Gambling*, Appellate Body Report, para. 253 referring to Panel Report, paras. 6.321 and 6.348–6.349.

95 *US–Gambling*, Antigua's other appellant's submission, para. 57 (as cited in the Panel Report, para. 68 and fn. 79).

The Appellate Body in turn decided that it need not rule on the above findings of the Panel because the former had ruled out consideration of any of the state laws under GATS Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2.[96] Consequently, these findings of the Panel have not been refuted.

While following GATS Article XVI to the letter, the reasoning of the Panel may reveal an interesting inconsistency or desired effect in the GATS itself: i.e. while – given full specific GATS commitments in a relevant mode – a total prohibition of the service supply is not admissible, WTO Members can regulate the consumption of particular services *à volonté*.

Despite this early assessment based on the first-ever GATS case to treat the topic, more WTO cases and legal interpretation will be needed to confirm this interpretation. It also needs to be taken into account that even measures aimed at consumers are likely to fall under other GATS provisions which allow parties to challenge measures that nullify or impair the benefits that can reasonably be expected to accrue under a commitment.

### *3.3 Relationship between market access and domestic regulations clarified*

The Panel ruling specifically addressed the relationship between GATS Article XVI on market access and GATS Article VI on domestic regulation.

The importance of Article VI and domestic regulations in the context of cross-border service delivery was underlined in the WTO Work Programme on E-Commerce.[97] It was judged that the development of Article VI disciplines and their effective application was important in order to ensure that existing specific commitments relevant to e-commerce were not nullified or impaired by measures of domestic regulation.[98] The regulation of services traded electronically is an ongoing debate.[99] Yet the link between GATS Article VI on domestic regulation and Articles XVI/XVII has always been a difficult one as the GATS does not explicitly address their interrelationship.[100]

In *US–Gambling* it was concluded that Articles VI:1–3 are only about the 'administration of certain measures' and not the substance of the measures themselves.[101] Measures themselves cannot be challenged under GATS Article VI:1–3.

96 *US–Gambling*, Appellate Body Report, para. 373 (ii).

97 See on the importance of provisions on domestic regulation for e-commerce the discussions in S/C/W/68 (16 November 1998).

98 Ibid., p. 7.

99 See the presentation of Massimo Grosso (OECD) at the WTO-Symposium on Cross-Border Supply of Services (April 2005), Internet: www.wto.org/english/tratop_e/serv_e/sym_april05_e/geloso_grosso_e.ppt.

100 Pursuing GATS Article VI:1 Members shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. A future discipline under GATS Article VI:4 sets out to avoid certain domestic regulations which constitute unnecessary barriers to trade in services.

101 The Panel is of the view that Article VI:1 does not apply to measures of general application themselves but, rather, to the *administration* of these measures. Therefore, Articles VI:1 and VI:3 contain disciplines of a procedural nature.

And these provisions cannot be understood as a requirement to permit the supply of certain services.

Furthermore, the Panel emphasized the strict separation of GATS Articles VI and XVI while asserting that they are *mutually exclusive*. The Panel notes explicitly that:

> measures are either of the type covered by the disciplines of Article XVI (purpose to prohibit market access limitations) or are domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements subject to the specific provisions of Article VI, paras. 4–5.[102]

According to the Panel, non-discriminatory domestic regulations that address the quality of the service supplied or the quality of the service supplier can be maintained so long as they do not constitute 'unnecessary barriers to trade in services', pursuant to the criteria contained in Article VI:5 or pursuant to the criteria to be developed by the Council for Trade in Services pursuant to Article VI:4.[103]

It remains to be seen, however, whether these affirmations of the Panel will eliminate the potential overlap between the GATS discipline on domestic regulation and GATS Articles XVI and XVII. The literature is certainly concerned by this overlap and suggests that the two articles should be made mutually exclusive.[104]

Unfortunately, as mentioned earlier the judgements in *US–Gambling* have not addressed and resolved the complicated and ill-understood relationship between GATS Articles XVI (Market Access) and XVII (National Treatment) which has lead to many dubious scheduling practices in existing GATS schedules.[105]

### *3.4 Discussion of the scope of GATS market access commitments*

The implications for the interpretation of GATS Article XVI are straightforward: a GATS mode 1 commitment on a particular service sector prevents Members from applying a total prohibition of any delivery form concerning this service. In the case of the US, the GATS market access commitment prevents it from outlawing the electronic supply of gambling services without invoking the GATS general exception.

This interpretation has been met with great scepticism by some of the emerging commentaries on the case that almost exclusively focussed on this matter.[106] Clearly, the fact that Antigua challenged a host of US laws that regulate an activity that many find morally questionably[107] complicates the situation. It is argued that,

102 *US–Gambling*, Panel Report, paras. 6.301–6 and 6.310.

103 *US–Gambling*, Panel Report, para. 6.304.

104 See, for instance, Arkell (2005).

105 See Mattoo (1997), Low and Mattoo (2000: 2) and Adlung (2004: 10, 12–13) on this scheduling problem.

106 See, for example, Pauwelyn (2005a, b), Krajewski (2005), and Trachtman (2005).

107 Chander (2004) and Reidenberg (2005).

by making the total prohibition of a service part of the GATS Article XVI, the DSB introduced a fundamental shift in the understanding of GATS Article XVI and – more importantly – a disequilibrium of the current GATS rules that threatens domestic regulatory autonomy.[108] This line of thought is based on the understanding that the total prohibition of electronically supplied gambling services is a 'qualitative' regulation which is not part of the closed list of numerical limitations that GATS Article XVI requests to be scheduled.[109] If GATS Article XVI were interpreted in this way, qualitative regulations applied indistinctly to foreign and domestic suppliers with a quantitative impact would now be in the purview of GATS Article XVI.[110]

Moreover, it is suggested that the rulings may have blurred the border between GATS Articles VI and XVI/XVII.[111] Earlier, the rule of 'thumb to distinguish GATS Article XVI from Article VI:4/5 measures was that the former relate to the *quantity* or *number* of either services or service suppliers (GATS Article XVI), the latter to the *quality* of the service or the *ability* of the service supplier (GATS Articles VI:4/5)'.[112] It is argued that the case has changed this relationship while interpreting a total prohibition of gambling services under mode 1 as a violation of GATS Article XVI.[113]

As a consequence, this ruling is said to expose a significant amount of domestic non-discriminatory regulations as being incompatible with specific GATS commitments.[114] According to this view, examples of regulations which may now inadvertently fall under GATS Article XVI are, for example, (i) licensing requirements that establish minimum training levels, thereby excluding an identifiable number of suppliers who lack this level of training [115] and (ii) a driving test for taxi drivers keeps taxi drivers that do not pass the test off the market (later: 'the taxi driver test').[116] The loss of local control over public policy and local

108 Pauwelyn (2005a) and Trachtman (2005). While Trebilcock and Howse (2005: 371) do not go as far, they note that the Panel may not have considered carefully or understood the nature of the US arguments.

109 The US asserted that the Panel ignored the fact that such prohibitions remain subject to other provisions of the Agreement, including Articles XVII and VI, and contended that, in its approach the Panel improperly expanded the obligations in Article XVI. See *US–Gambling*, Appellate Body Report, para 222.

110 According to Pauwelyn (2005a), 'the Appellate Body stretched the explicit reference to "form" and "numerical" quotas (in GATS Article XVI:2(a)) to include also restrictions that merely have the effect of a quota. Hence, even a US measure regulating how gambling services are to be supplied … becomes a quantitative restriction.'

111 It is noted in Pauwelyn (2005a) that if Article XVI of GATS were interpreted so broadly as to cover also the quantitative effects of domestic regulation, Article VI:4/ 5 of GATS would be superfluous.

112 Pauwelyn (2005a: 23).

113 Ibid.

114 Pauwelyn (2005b: 4).

115 Trachtman (2005: 5).

116 Pauwelyn (2005a: 31) for instance, notes that '[s]o far, a driving test requirement to obtain a taxi license was presumed to fall under the (to date) very lenient provisions of Article VI of GATS on domestic regulation. Under the Appellate Body's logic, however, the mere fact that such a substantive driving

services regulation has been evoked in the emerging literature.[117] WTO Members are urged to re-read and possibly re-negotiate their schedules of GATS commitments[118] and/or to be reluctant to make additional specific commitments during the Doha negotiations.[119]

Only further disputes will show the true extent of this interpretation of GATS Article XVI. The afore-mentioned arguments must be taken serious especially in the context of increased anti-GATS protests and the trend towards more inclusive GATS commitments. It is safe to say that so far the US–Gambling case may have provoked more anxiety than comfort with GATS negotiators. However, one can put forward two key arguments that produce a significantly less alarming interpretation of this ruling and that show that a 'chilling effect' of the rulings on the ongoing Doha Negotiations is not warranted.

*The total prohibition of the electronic service provision is not compatible with a full specific GATS commitment*

The Panel and the Appellate Body had good reasons to disagree with the prohibition of a service covered by full specific GATS commitments.

Following the structure of the GATS, WTO Members are free to decide which service sectors and which GATS modes to commit to. Members freely commit to market access and national treatment obligations only in sectors they have listed in their schedules ('bottom–up' scheduling) and only to the extent that they have not inscribed limitations or specific exclusions under one or more GATS modes of supply.[120] Importantly and as opposed to the GATT, WTO Members thus take these decisions as regards specific GATS commitments mode-by-mode.[121] Once a member has made a commitment on gambling under GATS mode 1, it has agreed to postal, electronic, or other 'remote' way of delivering the service. Given the logic of the underlying WTO ruling on intra-modal technological neutrality (cf. Section 2.4), a total prohibition of the electronic delivery of a service is identical to a significant market access limitation. A government cannot make an open commitment to cross-border supply, then disallow or ban on-line supply (even if other ways of cross-border service delivery like regular postal mail remain allowed).

In this light, it may be a misinterpretation that the Panel and Appellate Body in *US–Gambling* understood GATS Article XVI to prohibit any qualitative regulation which had a quantitative impact. Both in economic as well as legal terms,

requirement has the *effect* of lowering the *number* of foreign taxi drivers (i.e. keeps out those that fail the driving test), may transform the requirement into a *per se* prohibited market access restriction.'

117 See, for instance, Chander (2004) who invokes the 'threat to American democracy from a small Caribbean nation'.

118 Pauwelyn (2005b).

119 Krajewski (2005: 436).

120 WTO (2001).

121 'Trade in services' is defined comprehensively as the supply of services through four modes of supply. See next to the GATS itself: *Mexico–Telecoms*, Panel Report, para. 7.40, Low and Mattoo (2000: 7) and Mattoo (1997: 5).

there is clearly a difference between qualitative regulations with a quantitative impact (i.e. the 'taxi driver test' mentioned at fn. 116) and a total prohibition of a particular service.

It is true that the US has submitted that the Panel's interpretation erroneously includes within the scope of GATS Article XVI:2(a) measures that only have the *effect* of limiting the number of service suppliers or output to zero.[122] But this confusion of a *qualitative measure with a quantitative effect* and a *total prohibition* does not emanate from the Panel nor from the Appellate Body. Rather both organs of the DSB understood the US measures as limitations amounting to a zero quota (not a qualitative regulation!) and ruled that thus these measures are incompatible with specific commitments under GATS Article XVI.[123] The Panel argues that

> [t]he fact that the terminology [of Article XVI:2(a)] embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero.[124]

Finding this argument persuasive[125], the Appellate Body also concludes that a zero quota is a quantitative limitation as understood in GATS Article XVI:2(a). It states that it

> is clear that the thrust of sub-paragraph (a) is not on the form of limitations, but on their numerical, or quantitative, nature'[126] and assesses that 'limitations in the form of a numerical quota … encompass limitations which … have the characteristics of a number. Because zero is quantitative in nature, it can … be deemed to have the 'characteristics of' a number – that is, to be 'numerical'.[127]

Importantly, nothing suggests that the Panel and the Appellate Body would have interpreted qualitative regulations with a quantitative impact (as qualification tests of service suppliers or similar measures) as being in contradiction with specific GATS market access commitments. Had the US – rather than banning remote supply altogether – established certain non-discriminatory security, and/or qualification-related domestic regulations for online gambling service providers,[128] it is unlikely that these measures would have been found to be incompatible with

122 *US–Gambling*, Appellate Body Report, para. 224.

123 1993 Scheduling Guidelines, para. 6. Example is: 'nationality requirements for service suppliers (equivalent to zero quota)'.

124 *US–Gambling*, Panel Report, para. 6.331.

125 *US–Gambling*, Appellate Body Report, paras. 234 ff.

126 *US–Gambling*, Appellate Body Report, para. 232.

127 *US–Gambling*, Appellate Body Report, para. 227.

128 Examples of such requirements could be special registration requirements to ascertain the origin and the quality of remote service suppliers and making sure that all remote gambling suppliers (whether domestic or foreign) are subjected to equivalent rules on identity verification, under-age gambling, fraud prevention, rules promoting responsible gaming and minimising addiction, and the prevention of money laundering or other forms of organized crime. In the case of foreign online gambling suppliers, this would mean to pose conditions on the legal environment under which the latter operate to ascertain that foreign service suppliers receive equivalent treatment than domestic service providers.

commitments under GATS Article XVI. Rather they would have been assessed under GATS Article VI on domestic regulation or GATS Article XVII on national treatment.[129] And the rulings in *US–Gambling* and the language of GATS Article VI on domestic regulation suggest that particular regulations aimed to improve the *quality* of electronically supplied gambling services are deemed legitimate (i.e. WTO-legal).

Furthermore, even if the Panel and Appellate Body had not interpreted GATS Article XVI to prevent a total prohibition, one can argue that other GATS provisions would have done so. Specifically, GATS Article XXIII on Dispute Settlement and Enforcement[130] foresees another lever to address measures falling outside of GATS Article XVI which nullify or impair benefits '[a WTO Member] could reasonably have expected to accrue to it under a specific commitment of another Member'. With such a '*non-violation complaint*' – a special provision also discussed in the WTO Work Programme on E-Commerce – Antigua could have challenged the obvious inconsistency between a total prohibition of a service and a full specific GATS commitment from the side of the US.[131]

Finally, in this context but not directly related to GATS Article XVI, it is important to reiterate the context of Antigua's complaint. In reality and despite the US measures potentially prohibiting Internet-supplied gambling services, the US is the world's biggest market for online gambling. A great variety of US and foreign gambling service providers – some of them listed on the US stock exchanges – are actively catering for the significant US demand for online gambling services. At best, the legal situation of these offerings in the US has been judged 'unclear'[132] because of the complexity and sometimes contradictory nature of US legislations.[133] Until now, it is not clear that US federal gambling restrictions apply to Internet gambling. Moreover, US States have the right to legalise gambling despite federal legislation. Accordingly, Antigua's complaint did not only put into question the mere existence of US legislation against Internet gambling. Rather Antigua claimed that the US legislation is ambiguous and that certain US measures and their selective enforcement discriminate between domestic and foreign electronic

129 Here it is important to note that while GATS Article XVII:1 specifies that 'each Member shall accord to services and service suppliers of any other Member … treatment no less favourable than that it accords to its own like services and service suppliers', a Member may meet this requirement by according to services and service suppliers of any other Member a formally different treatment to that it accords to its own like services and service suppliers (GATS Article XVII:2).

130 The article notes that a Member can complain to the DSU about the application of a measure which does not conflict with the provisions of this Agreement, but which nullifies or impairs benefits it could reasonably have expected to accrue to it under a specific commitment of another Member.

131 Cf. S/C/8 (31 March 1999), p. 4. However, other delegations questioned the relevance of Article XXIII:3 dealing with non-violation complaints, see S/C/W/68 (16 November 1998), para. 32.

132 Cf. GAO (2002).

133 Currently, the US Congress is also considering two new legislative proposals, the Unlawful Internet Gambling Enforcement Act of 2005 (HR 4411) and the Internet Gambling Prohibition Act (HR 4777), to address this situation. The efforts to enforce federal laws against offline and online gambling have been ongoing for the last ten years.

gambling service providers. Both the Panel and the Appellate Body confirmed in their final conclusions on GATS Article XIV that discrimination of some sort was anchored in US measures or practiced through selective enforcement.[134]

From a strictly legalistic perspective, these arguments should not have influenced the DSB's interpretation of the scope of GATS Article XVI. But elements of discrimination have surely influenced both Antigua's decision to bring a case and the WTO rulings as regards the interpretation of the total prohibition of a scheduled service.[135] The forms of discrimination practiced would also have been difficult to maintain in the light of full national treatment commitments under GATS Article XVII; an issue not assessed by the WTO courts out of judicial economy. Even if the WTO courts had found a total prohibition to be a 'qualitative regulation' falling under the GATS discipline on domestic regulation, its discriminatory application could have been challenged under GATS Article VI:1 and VI:5(a).

*The GATS continues to preserve the right to regulate*

Several aspects of *US–Gambling* demonstrate that the relationship between GATS Articles VI and XVI has not been improperly damaged and that the 'right to regulate' of WTO Members is not imperilled.

First, if one looks closely at the Panel's findings on the relationship between GATS Articles VI and XVI some of the suggested problems are resolved if one adopts the viewpoint of the Panel and the Appellate Body, namely that a total prohibition is a quantitative limitation falling under GATS Article XVI. As shown in Section 3.3, the Panel maintains a strict separation between GATS Articles VI and XVI. Had the US measures attempted to regulate Internet gambling services in a non-discriminatory fashion (i.e. certain measures aimed at reducing money laundering, fraud, etc.), then these measures would not have been subsumed under GATS Article XVI but under Article VI.

Second, in *US–Gambling* the Panel repeatedly stressed the WTO Members' right to regulate.[136]

Third, it must be recalled that the GATS rules governing – and thus limiting in some way – domestic regulations are comparatively weak.[137] GATS Article VI:4 only calls on WTO Members to develop a related discipline which has since not been concluded.[138]

134 See, for instance, *US–Gambling*, Panel Report, paras. 6.607 and 6.588 and Appellate Body Report, paras. 364–366.

135 The Panel in particular noted that their conclusion 'are directly linked to the particular circumstances of this dispute', an indication for the specificity of their ruling to this case. *US–Gambling*, Panel Report, para. 7.3.

136 *US–Gambling*, Panel Report, paras. 5.17, 6.316 and 7.4. Cf. *Mexico–Telecoms*, Panel Report, para. 7.2.

137 Mattoo (2001: 4 and 12). As Adlung (2004: 2) notes, '[t]he GATS offers wide scope for the excessive use of regulations, including the non-recognition of foreign educational degrees, licences, and certificates, to cushion the trade effects associated with the reduction of formal barriers falling under GATS Articles XVI and XVII'.

138 Sauvé (2002).

Fourth, as will be discussed in more detail in Section 4 – despite violation of full specific GATS commitments – the WTO's dispute settlement system has afforded the US relatively straightforward access to qualifying for an exception of its GATS commitments.

Fifth, the Panel ruling has shown that the measures regulating the consumption of gambling services (including the total prohibition of consumption) can potentially be maintained despite of full specific GATS commitments (cf. Section 3.2). This is particularly interesting as the general exception to the GATS under Article XIV does not provide explicit exceptions for consumer protection measures.[139]

Finally and irrespective of all prior arguments, it is useful to mention that, through GATS Article XXI, the GATS has a built-in method for the modification of a schedule. It can be used by a Member who wants to withdraw commitments out of specific policy considerations and who cannot invoke the general or other exceptions to justify its measure.

### *3.5 New findings relating on GATS market access obligations and the Doha services negotiations*

The *US–Gambling* ruling on GATS Article XVI calls on GATS negotiators to pay particular attention to avoid scheduling specific services or specific service delivery forms that are prohibited or heavily restricted.

While in most cases, there are no dangers of committing scheduling mistakes with respect to illegal services (with most illegal services not being part of traditional service classifications), some examples can been raised where clarifications may be necessary. For instance, in one submission the US argued that the Panel's reasoning implies that a specific market access commitment on advertising services could prevent Members from outlawing spam (i.e., unsolicited email advertising).[140] Another example would be the case of prohibitions of online pornography in the case of a full market access commitment on audiovisual services. Furthermore, it may well be that – in the context of the Internet – certain services arise in the future which might be deemed illegal (e.g. certain online games) but which potentially would be covered by broad existing specific GATS commitments made in the past.

After *US–Gambling*, Doha Round negotiators will want to make sure to avoid scheduling commitments for specific illegal or unwanted services rather than mechanically making full commitments across-the-board with little attention to the detail. This is particularly important if current initiatives in the negotiations that aim at broader and more inclusive GATS commitments (e.g. model schedules, scheduling on the two-digit CPC level) succeed. One option would be to pair broad

139 As Krajewski (2005: 436) notes this could have important implications as '[i]t would allow governments to regulate the consumption of a services to a greater extent than its supply'.

140 US appellant's submission, para. 128 at www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file50_5581.pdf.

service trade commitments with specific exclusions of particular services. Then the logic behind the scheduling methodology would move more towards the negative list approach, increasingly used in bilateral service trade agreements (i.e., opening most services up for trade, while making sure that very specific ones are excluded). Interestingly, the quest for more precision could lead GATS negotiators to consider using more modern services classification such as the CPC 1.1 or the recently finalised CPC 2007 to enter clear and unmistakable GATS commitments (cf. section 2.3).

But this is easier said than done. The coordination effort of trade negotiators with the myriad of domestic service regulators at both federal and state levels is a daunting task, including even for the best-equipped WTO Members as evidenced by *US–Gambling*. The impossibility of predicting future services and new delivery forms increase the related complexity. In the absence of knowledge on the very specific services to be excluded and to preserve regulatory flexibility, negotiators could – following the principle of '*better safe than sorry*' – be led to enter new commitments for very specific sub-services, e.g. at the four-digit CPC level, leaving the remaining services unscheduled. Ideally, this outcome, which would further complicate GATS schedules by increasing their heterogeneity and which would in most cases produce a non-liberal outcome, should be avoided.

To conclude, it can be reiterated that these particular findings of *US–Gambling* have only a very limited field of application; namely, areas where Members with a specific GATS market access commitment have prohibited the supply of this particular service. GATS negotiators can be reassured that regulations that aim at the quality of service in a non-discriminatory fashion continue to be permissible, if they satisfy the criteria set out in GATS Article VI. An additional layer of comfort is provided by the fact that even mistakes or unforeseen events in terms of scheduling can in special cases be addressed while invoking the GATS exemptions (cf. Section 4) or even modifying a GATS commitment.

On a more general note, a concern in *US–Gambling* and elsewhere seems to be that specific GATS commitments on market access go beyond eliminating discrimination between domestic and foreign service providers; i.e. a WTO Member with full market access commitments is not free to impose certain strictly non-discriminatory measures, such as prohibitions, unless they can be justified under the exceptions provision.[141] This is clearly not the responsibility of the DSB and its ruling in *US–Gambling*, but of the WTO Members who have crafted these measures with the specificity of the services sector in mind (e.g. addressing situations of monopoly in particular service sectors, such as telecommunications).

Nevertheless, in the view of regulators, the specific GATS commitments may thus tie WTO Members' hands beyond what would be necessary to permit a common level playing field for international trade (i.e. the elimination of non-discrimination through applying the principle of national treatment). It is true that

141 Mattoo (2005).

WTO Members may feel much less reluctant to advance the services negotiations under the Doha Development Agenda with specific GATS commitments while not giving away the possibility of creating *ex post* regulations with quantitative impact as defined under GATS Article XVI.

This idea of making non-discrimination the focus of GATS commitments has recently surfaced in the context of the WTO negotiations. Specifically, there have been several calls for GATS negotiators to consider the elimination of discriminatory market access barrier across the board (i.e. on all service sectors except some minor exceptions) a priority – rather than focussing on the traditional specific commitments under market access and national treatment.[142] Members would only assume additional, separate obligations with regard to non-discriminatory measures and regulations where politically feasible and economically desirable.[143] The Hong Kong Ministerial Declaration now also calls for GATS 'Mode 1 commitments at existing levels of market access on a non-discriminatory basis across sectors of interest to Members', a formula which aims at a similar outcome of deep and broad commitments securing non-discrimination.[144]

## 4. General GATS exceptions permitting policy flexibility

*US–Gambling* constitutes the first occasion for a member to invoke and clarify the GATS exemptions under GATS Article XIV (General Exceptions) in a WTO dispute.[145] The US had invoked the GATS exemptions when it became clear that its total prohibition of gambling services conflicts with its specific GATS commitments.

Measures falling under GATS Article XIV are exempted from all obligations and commitments under the Agreement.[146] To qualify for this exemption a measure must (i) fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (e) of GATS Article XIV in order to enjoy provisional justification[147] and (ii) meet the requirements of the introductory provisions of GATS Article XIV (*chapeau*).[148] Measures taken by Members must not be more trade restrictive than necessary to fulfil such objectives and they should not be applied in a manner which constitutes unjustifiable discrimination between Members or a disguised restriction on trade in services.

Exemptions under the GATS and related policy goals (e.g. privacy, public morals, deceptive, and fraudulent practices) have received a great deal of attention

142 For details, see the presentation of Mattoo and the author at the WTO-Symposium on Cross-Border Supply of Services, Internet: www.wto.org/english/tratop_e/serv_e/sym_april05_e/mattoo_wunschvincentII_e.ppt and Mattoo (2005).

143 Ibid.

144 Hong Kong Ministerial Declaration, Annex C, para 1(a).

145 *US–Gambling*, Panel Report, para. 6.447.

146 Cf. to GATS Scheduling Guidelines 2001, para. 20.

147 The list of recognized exemptions is a closed list.

148 *US–Gambling*, Appellate Body Report, paras. 286 ff.

in the context of cross-border (electronic) trade.[149] In fact, during the WTO Work Programme on E-Commerce the EC came to the conclusion that '[m]easures to curb obscenity or to prohibit Internet gambling might well be justified on the grounds of Article XIV'.[150] Online content regulation as well as measures applied to the protection of privacy and public morals were also identified as regulations likely to be permissible under GATS Article XIV.[151]

Interestingly, in its many recent bilateral FTAs the US does not exclude gambling services from its free service trade commitments (i.e. via explicit scheduling as non-conforming measure). Rather these agreements are sometimes accompanied by side letters or Understandings which permit the regulation of gambling despite full service trade commitments (e.g. US–Bahrain, US–Australia, US–Costa Rica).[152]

In *US–Gambling*, the Appellate Body ultimately found the US gambling laws in question to fall under the public morals/public order exception of GATS Article XIV and to be compatible with the *chapeau* of the same GATS article. It was shown that WTO Members can – despite of full specific GATS commitments – rely on this provision to exempt them from their GATS obligations when trying to achieve certain public policy objectives. Both the Panel and the Appellate Body avoided ruling directly on the legitimacy of US regulatory objectives, while pointing to cultural differences in policy choices. The Appellate Body was not exceedingly restrictive when assessing whether the US policies are compatible with the 'necessity test' and the chapeau of GATS Article XIV, displaying significant sensitivity to domestic regulatory concerns.[153]

Furthermore – for the first time – the occasion was used to make explicit the methodology the DSB uses to assess whether a regulation can be justified under the GATS exemptions. The rulings showed that the responsibility of governments defending certain regulations under GATS Article XIV in a dispute settlement case is limited.

### *4.1 When do measures fall within the scope of one of the recognized exceptions?*

In the underlying case, the US claimed that the remote supply of gambling services raised significant concerns relating to the maintenance of public order and the protection of public morals.

149 Drake and Nicolaidis (2000). See CTS, Work Programme on E-Commerce, Communication from the EC, S/C/W/98 (23 February 1999), para. 26 and S/L/74 (27 July 1999).

150 Cf. S/C/W/98 (23 February 1999), p. 2

151 S/C/8 (31 March 1999), pp. 9–10. CTS, Communication from Australia, S/C/W/108 (18 May 1999).

152 A side letter to the US–Bahrain FTA, for instance, specifies that regulations to protect public morals, preventing fraud, and deterring crime that underlie much regulation of gambling and betting services 'will generally fall within the exceptions provided under subparagraphs (a) and (c)(i) of Article XIV of GATS'.

153 See also Pauwelyn (2005b) and Trebilcock and Howse (2005: 371–372).

Both the Panel and Appellate Body found that the US measures constitute measures to protect public morals and public order and that they serve societal interests that can be characterized as 'vital and important in the highest degree'.[154] According to Antigua, the Panel even 'constructed the GATS Article XIV defence on behalf of the United States' as it identified interests relating to public morals and public order that went beyond the US arguments.[155] Importantly, the Panel and the Appellate Body stressed the sensitivity of these regulatory objectives and announced – while building on previous GATT cases – that

> the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, … Members … have the right to determine the level of protection that they consider appropriate.'[156]

### 4.2 *When are measures 'necessary' to achieve policy objectives and meet the requirements of the Chapeau?*

The Appellate Body reversed the Panel's findings and ruled that the measures are 'necessary to protect public morals or to maintain public order' under GATS Article XIV(a).[157]

The procedure by which both the Panel and the Appellate Body determined 'necessity' ('weighing and balancing' test) in the case of the GATS was borrowed from the approach used in the GATT.[158] Accordingly, the following must be assessed to determine whether a measure is 'necessary' to protect public morals or to maintain public order:

- the importance of interests or values that the challenged measure is intended to protect;[159]
- the extent to which the challenged measure contributes to the realization of the end pursued by that measure;[160]
- the trade impact of the challenged measure.[161]

154 *US–Gambling*, Appellate Body Report, para. 299 and *US–Gambling*, Panel Report, para. 6.487.

155 Antigua's other appellant's submission, para. 80 (as cited in *US–Gambling*, Appellate Body Report, para 278 and fn. 326). Antigua claims that the United States identified only *two* interests relating to 'public morals' or 'public order', namely: (i) organized crime; and (ii) underage gambling. Antigua argues that the Panel, however, identified an additional three concerns on its own initiative: (i) money laundering, (ii) fraud, and (iii) public health. Quoted from *US–Gambling*, Appellate Body Report, para. 278.

156 *US–Gambling*, Panel Report, para. 6.461. Cf. *Korea–Various Measures on Beef*, Appellate Body Report, para. 176 and *EC–Asbestos*, Panel Report, para. 168.

157 *US–Gambling*, Appellate Body Report, para. 326.

158 One of the shortcomings of the necessity test is that it has often been less than clear what criteria are to be used in determining whether a measure can be judged 'necessary' in relation to alternative interventions.

159 *Korea–Various Measures on Beef*, Appellate Body Report, para. 162.

160 Ibid., para. 163.

161 Ibid., paras. 163 and 166.

The 'weighting and balancing' takes place when comparing the challenged measures with the 'reasonably available' WTO-consistent alternatives and the relationship to the interest pursued.[162] Importantly it is the party maintaining these WTO-inconsistent measures that must demonstrate that their measures are necessary in the light of above points.[163] The case demonstrated that this responsibility was however reasonably limited. The Appellate Body noted that:

> a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective … Rather, it is for a responding party to make a prima facie case that its measure is 'necessary'.[164]

Antigua had argued that the unwillingness of the US to engage in consultations was in itself a demonstration of the fact that the US had not demonstrated the 'necessity' of the measures in question. As opposed to the Panel,[165] the Appellate Body affirmed that the refusal to enter into consultations with the complaining party does not translate into the measures not being 'necessary'. While consultations are encouraged, only suggested and available 'alternative measures' can be a testing criteria for necessity. As the US had made a prima facie case for necessity, it was upon Antigua to identify a reasonably available alternative measure to which the US had to react.[166]

Finally, so as to satisfy the chapeau of the GATS exemptions, WTO Members must avoid discrimination which is 'arbitrary' or 'unjustifiable' in character, and thus discrimination which occurs 'between countries where the same conditions prevail'.[167] In this context, it suffices to say that the Appellate Body has – for most measures at stake – confirmed that the measures were in conformity with the requirements of the chapeau of GATS Art. XIV. The Appellate Body only found one possible form of discrimination in the US *Interstate Horseracing Act* that seems to permit domestic but not foreign service suppliers to offer remote betting services on horse races and that consequently does not satisfy the requirement of the chapeau.[168]

162 *US–Gambling*, Appellate Body Report, paras. 305 ff. while making reference to *Korea–Various Measures on Beef*, Appellate Body Report.

163 *US–Gambling*, Appellate Body Report, para. 309.

164 *US–Gambling*, Appellate Body Report, paras. 309–311.

165 *US–Gambling*, Panel Report, paras. 6.531 and 6.562. The Panel notes in para. 6.531: 'In rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the US 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.'

166 *US–Gambling*, Appellate Body Report, para. 326. The Appellate Body notes that 'Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling'.

167 *US–Gambling*, Panel Report, para. 6.578.

168 *US–Gambling*, Appellate Body Report, paras. 368–369 and section VIII, Findings and conclusions.

### *4.3 New findings on GATS exemptions and the Doha services negotiations*

In principle, the findings on GATS Article XIV of *US–Gambling* are reassuring. As long as the pursued policy objectives meet those listed in GATS Article XIV (e.g. public morals) and certain conditions are satisfied, WTO Members are entitled to contravene their market access obligations.

The question, however, is whether the scope of GATS Article XIV is sufficient for cross-border (electronic) trade. The existing provisions of the GATS exemption article seem to cover the most prominent e-commerce concerns, such as fraud and privacy. But in the literature, the closed list of policy objectives mentioned in GATS Article XIV has been considered as problematic.[169] In the context of domestic regulations imposed on services supplied electronically, Drake and Nicolaidis (2002) have suggested that it would be useful to add an 'explicit exception for consumer protection to Article XIV'. Going beyond the scope of GATS Articles XIV and VI, in the WTO Work Programme on E-Commerce, the EC suggested that it might be desirable to draw up a list of policy objectives (e.g. consumer protection, universal service, and security) which might justify regulatory measures on services supplied electronically.[170] In the recently concluded US–Australia FTA, Article 16.6 even specifies provisions on online consumer protection which recognise the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices.

Although the scope of GATS Article XIV is not included in the negotiation mandate of the Doha Round, these considerations merit attention. At the same time, one must remember that under the GATS very many 'legitimate objectives' can be advanced by 'domestic regulation' (i.e. any non-discriminatory measure not defined as limitations under GATS Article XVI) for which there are minimal GATS obligations, i.e. only MFN and transparency.

## Conclusion: GATS on its way to a modern and effective discipline

The main objective of this paper was to distil the substantive conclusions of the WTO's *US–Gambling* case and their relevance to Internet-supplied services and certain core concepts of the GATS. The paper also shed light on the case's implications for the Doha services negotiations.

Overall, *US–Gambling* has provided an encouraging set of answers to the unresolved questions of the WTO's Work Programme on E-Commerce and cross-border service delivery. This holds mainly true in fields such as the applicability of

169 See, for example, Trachtman (2002: 2 and 37) and Krajewski (2003: 160–161).

170 S/C/8 (31 March 1999), pp. 9–10. See also S/C/W/98 (23 Feb. 1999). Interestingly, at the time it was mainly the US which was against establishing such a list of measures for fear of over-regulating e-commerce.

GATS commitments to Internet-supplied services, the settlement of important classification issues, an initial clarification of concepts such as 'technological neutrality', the scope of the market access article of the GATS (i.e. that the prohibition of a service cannot be maintained with full GATS commitments), and the GATS exemptions. It is important to retain that particular regulations aimed at improving the quality of electronically supplied services continue to be perfectly legitimate. WTO Members also have relatively straightforward access to qualifying for a GATS exemption. Looking ahead, the *US–Gambling* case should inspire negotiators to strive for clarification of rules and obligations and, evidently, also to submit new specific GATS commitments which – according to the Hong Kong Ministerial Declaration – had to be finalised before 31 October 2006.

Understandably, *US–Gambling* could not clarify all open questions as regards the cross-border (electronic) delivery of services and the GATS. Further questions arise as to matters such as the 'likeness of services', the relationship between GATS Articles XVI and XVII, etc. A good deal of work also remains on other technical questions raised in the WTO Work Programme on E-Commerce (e.g. the duty-free moratorium on electronic transmissions, the classification of digital products, the implications of Article VI for domestic regulations affecting e-commerce). Despite progress, it is thus premature to speak of 'the last nail in the coffin of the WTO Work Programme on E-Commerce'.

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## Annex 1. Main lessons from *US–Gambling*

*WTO and GATS rules and obligations are applicable to e-commerce*

- WTO and the GATS rules and obligations are applicable to e-commerce and to electronically supplied services. Specific commitments undertaken in GATS Schedules extend to such as cross-border electronically supplied gambling services. New services that arise through the Internet benefit from a liberal trade treatment, if they are adequately captured by existing specific GATS commitments and thus the corresponding classifications.

*GATS Mode 1 commitments are applicable to cross-border electronic service delivery*

- The WTO rulings seem to confirm the view that indeed GATS Mode 1 and not Mode 2 commitments are applicable to cross-border electronic service delivery.

*Precise scheduling is the responsibility of WTO Members*

- Members are assumed to use the W/120 or an equally precise classification system in the Doha Negotiations and to follow the 2001 GATS Scheduling Guidelines or to state clearly if they deviate from these accepted standards.

*Technological neutrality and likeness*

- Within a mode of supply, a service is to be regarded as 'like' independently of the various technological means by which a service can be supplied cross-border or remotely. A prohibition on one, several or all of the means of delivery included in mode 1 constitutes a limitation which is not compatible with a full GATS market access commitment. However, it has not been confirmed that an electronically supplied service is not – by definition and due to the mere fact of electronic delivery – 'unlike' a service supplied on-site and non-electronically. Much work remains to clarify the scope of 'likeness' of on-site (non-remote) versus electronically delivered services from abroad.

**Annex 1. (*Cont.*)**

***Delimitation of the scope of GATS Article XVI and related international payments***

- A prohibition on one, several or all means of delivery cross-border is a 'limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article XVI and cannot be maintained with full GATS commitments (i.e. unless a GATS exemption is invoked).
- Measures aimed at consumers (and thus are not directed at 'service suppliers', 'service operations' and 'service output') may not be in the realm of specific GATS market access obligations under GATS XVI.

***The GATS continues to preserve the right to regulate* (*incl. services delivered across the border!*)**

- The separation of GATS Articles VI and XVI is maintained. Measures are either of the type covered by the disciplines of Article XVI or are domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements subject to the specific provisions of Article VI, paras. 4–5.
- Non-discriminatory domestic regulations that address the quality of the service supplied or the quality of the service supplier can be maintained so long as they do not constitute 'unnecessary barriers' to trade in services. Particular regulations aimed to improve the *quality* of electronically supplied services from overseas are deemed legitimate (i.e. WTO-legal) and fall under GATS Article VI.

***General exceptions of the GATS permitting ample policy flexibility***

- WTO Members can – despite of full specific GATS commitments – rely on the general exceptions of the GATS to exempt them from their obligations when trying to achieve certain public policy objectives covered by the closed list specific in GATS Article XIV.