INTERNATIONAL AND REGIONAL TRADE LAW:
THE LAW OF THE WORLD TRADE ORGANIZATION

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Unit XII: WTO Dispute Settlement and Trade in Services

International and Regional Trade Law:
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NOTE: *In this Unit we intend to teach you through the Gambling dispute the most important principles of the General Agreement on Trade in Services and to continue our unit on dispute settlement in the WTO by giving you an illustration of the different stages and procedures of dispute settlement.*

Supplementary Reading

The following are suggestions for supplementary reading on the law of the GATS. For supplementary reading on Dispute Settlement in the WTO see Unit X.

Peter van den Bossche and Werner Zdouc, The Law and Policy of the World Trade Organization, 2013, 156-304; 514-541

Michael J. Trebilcock, Robert Howse, and Antonia Eliasson, The Regulation of International Trade, 4th ed. 2013, 172-227, 472-514.

John H. Jackson, William J. Davey, Alan O. Sykes, International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations, 6th ed. 2013, 271-399, 1035-1105.

1. Introduction

1-1. OVERVIEW

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm

Services: rules for growth and investment

The General Agreement on Trade in Services (GATS) is the first and only set of multilateral rules governing international trade in services. Negotiated in the Uruguay Round, it was developed in response to the huge growth of the services economy over the past 30 years and the greater potential for trading services brought about by the communications revolution.

Services represent the fastest growing sector of the global economy and account for two thirds of global output, one third of global employment and nearly 20% of global trade.

When the idea of bringing rules on services into the multilateral trading system was floated in the early to mid 1980s, a number of countries were sceptical and even opposed. They believed such an agreement could undermine governments' ability to pursue national policy objectives and constrain their regulatory powers. The agreement that was developed, however, allows a high degree of flexibility, both within the framework of rules and also in terms of the market access commitments.

GATS explained

The **General Agreement on Trade in Services** has three elements: the main text containing general obligations and disciplines; annexes dealing with rules for specific sectors; and individual countries' specific commitments to provide access to their markets, including indications of where countries are temporarily not applying the "most-favoured-nation" principle of non-discrimination.

General obligations and disciplines

Total coverage The agreement covers all internationally-traded services — for example, banking, telecommunications, tourism, professional services, etc. It also defines four ways (or "modes") of trading services:

- services supplied from one country to another (e.g. international telephone calls), officially known as "**cross-border supply**" (in WTO jargon, "mode 1")

- consumers or firms making use of a service in another country (e.g. tourism), officially "**consumption abroad**" ("mode 2")

- a foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting up operations in a country), officially "**commercial presence**" ("mode 3")

- individuals travelling from their own country to supply services in another (e.g. fashion models or consultants), officially "**presence of natural persons**" ("mode 4")

Most-favoured-nation (MFN) treatment Favour one, favour all. MFN means treating one's trading partners equally on the principle of non-discrimination. Under GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO members. (This applies even if the country has made no specific commitment to provide foreign companies access to its markets under the WTO.)

MFN applies to all services, but some special temporary exemptions have been allowed. When GATS came into force, a number of countries already had preferential agreements in services that they had signed with trading partners, either bilaterally or in small groups. WTO members felt it was necessary to maintain these preferences temporarily. They gave themselves the right to continue giving more favourable treatment to particular countries in particular services activities by listing "MFN exemptions" alongside their first sets of commitments. In order to protect the general MFN principle, the exemptions could only be made once; nothing can be added to the lists. They are currently being reviewed as mandated, and will normally last no more than ten years.

Commitments on market access and national treatment Individual countries' commitments to open markets in specific sectors — and how open those markets will be — are the outcome of negotiations. The commitments appear in "schedules" that list the sectors being opened, the extent of market access being given in those sectors (e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). So, for example, if a government commits itself to allow foreign banks to operate in its domestic market, that is a **market-access commitment**. And if the government limits the number of licences it will issue, then that is a **market-access limitation**. If it also says foreign banks are only allowed one branch while domestic banks are allowed numerous branches, that is an **exception to the national treatment** principle.

These clearly defined commitments are "bound": like bound tariffs for trade in goods, they can only be modified after negotiations with affected countries. Because "unbinding" is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business.

Governmental services are explicitly carved out of the agreement and there is nothing in GATS that forces a government to privatize service industries. In fact the word "privatize" does not even appear in GATS. Nor does it outlaw government or even private monopolies.

The carve-out is an explicit commitment by WTO governments to allow publicly funded services in core areas of their responsibility. Governmental services are defined in the agreement as those that are not supplied commercially and do not compete with other suppliers. These services are not subject to any GATS disciplines, they are not covered by the negotiations, and commitments on market access and national treatment (treating foreign and domestic companies equally) do not apply to them.

GATS' approach to making commitments means that members are not obliged to do so on the whole universe of services sectors. A government may not want to make a commitment on the level of foreign competition in a given sector, because it considers the sector to be a core governmental function or indeed for any other reason. In this case, the government's only obligations are minimal, for example to be transparent in regulating the sector, and not to discriminate between foreign suppliers.

Transparency GATS says governments must publish all relevant laws and regulations, and set up enquiry points within their bureaucracies. Foreign companies and governments can then use these inquiry points to obtain information about regulations in any service sector. And they have to notify the WTO of any changes in regulations that apply to the services that come under specific commitments.

Regulations: objective and reasonable Since domestic regulations are the most significant means of exercising influence or control over services trade, the agreement says governments should regulate services reasonably, objectively and impartially. When a government makes an administrative decision that affects a service, it should also provide an impartial means for reviewing the decision (for example a tribunal).

GATS does not require any service to be deregulated. Commitments to liberalize do not affect governments' right to set levels of quality, safety, or price, or to introduce regulations to pursue any other policy objective they see fit. A commitment to national treatment, for example, would only mean that the same regulations would apply to foreign suppliers as to nationals. Governments naturally retain their right to set qualification requirements for doctors or lawyers, and to set standards to ensure consumer health and safety.

Recognition When two (or more) governments have agreements recognizing each other's qualifications (for example, the licensing or certification of service suppliers), GATS says other members must also be given a chance to negotiate comparable pacts. The recognition of other countries' qualifications must not be discriminatory, and it must not amount to protectionism in disguise. These recognition agreements have to be notified to the WTO.

International payments and transfers Once a government has made a commitment to open a service sector to foreign competition, it must not normally restrict money being transferred out of the country as payment for services supplied ("current transactions") in that sector. The only exception is when there are balance-of-payments difficulties, and even then the restrictions must be temporary and subject to other limits and conditions.

Progressive liberalization The Uruguay Round was only the beginning. GATS requires more negotiations, which began in early 2000 and are now part of the Doha Development Agenda. The goal is to take the liberalization process further by increasing the level of commitments in schedules.

The annexes: services are not all the same

International trade in goods is a relatively simple idea to grasp: a product is transported from one country to another. Trade in services is much more diverse. Telephone companies, banks, airlines and accountancy firms provide their services in quite different ways. The GATS annexes reflect some of the diversity.

Movement of natural persons This annex deals with negotiations on individuals' rights to stay temporarily in a country for the purpose of providing a service. It specifies that the agreement does not apply to people seeking permanent employment or to conditions for obtaining citizenship, permanent residence or permanent employment.

Financial services Instability in the banking system affects the whole economy. The financial services annex gives governments very wide latitude to take prudential measures, such as those for the protection of investors, depositors and insurance policy holders, and to ensure the integrity and stability of the financial system. The annex also excludes from the agreement services provided when a government is exercising its authority over the financial system, for example central banks' services.

Telecommunications The telecommunications sector has a dual role: it is a distinct sector of economic activity; and it is an underlying means of supplying other economic activities (for example electronic money transfers). The annex says governments must ensure that foreign service suppliers are given access to the public telecommunications networks without discrimination.

Air transport services Under this annex, traffic rights and directly related activities are excluded from GATS's coverage. They are handled by other bilateral agreements. However, the annex establishes that the GATS will apply to aircraft repair and maintenance services, marketing of air transport services and computer-reservation services. Members are currently reviewing the annex.

Current work

GATS sets a heavy work programme covering a wide range of subjects. Work on some of the subjects started in 1995, as required, soon after GATS came into force in January 1995. Negotiations to further liberalize international trade in services started in 2000, along with other work involving study and review.

Negotiations (Article 19) Negotiations to further liberalize international trade in services started in early 2000 as mandated by GATS (Article 19).

The first phase of the negotiations ended successfully in March 2001 when members agreed on the guidelines and procedures for the negotiations, a key element in the negotiating mandate. By agreeing these guidelines, members set the objectives, scope and method for the negotiations in a clear and balanced manner.

They also unequivocally endorsed some of GATS' fundamental principles — i.e. members' right to regulate and to introduce new regulations on the supply of services in pursuit of national policy objectives; their right to specify which services they wish to open to foreign suppliers and under which conditions; and the overarching principle of flexibility for developing and least-developed countries. The guidelines are therefore sensitive to public policy concerns in important sectors such as health-care, public education and cultural industries, while stressing the importance of liberalization in general, and ensuring foreign service providers have effective access to domestic markets.

The 2001 Doha Ministerial Declaration incorporated these negotiations into the "single undertaking" of the Doha Development Agenda. Since July 2002, a process of bilateral negotiations on market access has been underway.

Work on GATS rules (Articles 10, 13, and 15) Negotiations started in 1995 and are continuing on the development of possible disciplines that are not yet included in GATS: rules on emergency safeguard measures, government procurement and subsidies. Work so far has concentrated on safeguards. These are temporary limitations on market access to deal with market disruption, and the negotiations aim to set up procedures and disciplines for governments using these. Several deadlines have been missed. The current aim is for the results to come into effect at the same time as those of the current services negotiations.

Work on domestic regulations (Article 4.4) Work started in 1995 to establish disciplines on domestic regulations — i.e. the requirements foreign service suppliers have to meet in order to operate in a market. The focus is on qualification requirements and procedures, technical standards and licensing requirements. By December 1998, members had agreed disciplines on domestic regulations for the accountancy sector. Since then, members have been engaged in developing general disciplines for all professional services and, where necessary, additional sectoral disciplines. All the agreed disciplines will be integrated into GATS and become legally binding by the end of the current services negotiations.

MFN exemptions (Annex on Article 2) Work on this subject started in 2000. When GATS came into force in 1995, members were allowed a once-only opportunity to take an exemption from the MFN principle of non-discrimination between a member's trading partners. The measure for which the exemption was taken is described in a member's MFN exemption list, indicating to which member the more favourable treatment applies, and specifying its duration. In principle, these exemptions should not

last for more than ten years. As mandated by GATS, all these exemptions are currently being reviewed to examine whether the conditions which created the need for these exemptions in the first place still exist. And in any case, they are part of the current services negotiations.

Taking account of "autonomous" liberalization (Article 19) Countries that have liberalized on their own initiative since the last multilateral negotiations want that to be taken into account when they negotiate market access in services. The negotiating guidelines and procedures that members agreed in March 2001 for the GATS negotiations also call for criteria for taking this "autonomous" or unilateral liberalization into account. These were agreed on 6 March 2003.

Special treatment for least-developed countries (Article 19) GATS mandates members to establish how to give special treatment to least-developed countries during the negotiations. (These "modalities" cover both the scope of the special treatment, and the methods to be used.) The least-developed countries began the discussions in March 2002. As a result of subsequent discussions, Members agreed the modalities on 3 September 2003.

Assessment of trade in services (Article 19) Preparatory work on this subject started in early 1999. GATS mandates that members assess trade in services, including the GATS objective of increasing the developing countries' participation in services trade. The negotiating guidelines reiterate this, requiring the negotiations to be adjusted in response to the assessment. Members generally acknowledge that the shortage of statistical information and other methodological problems make it impossible to conduct an assessment based on full data. However, they are continuing their discussions with the assistance of several papers produced by the Secretariat.

Air transport services At present, most of the air transport sector — traffic rights and services directly related to traffic rights — is excluded from GATS' coverage. However, GATS mandates a review by members of this situation. The purpose of the review, which started in early 2000, is to decide whether additional air transport services should be covered by GATS. The review could develop into a negotiation in its own right, resulting in an amendment of GATS itself by adding new services to its coverage and by adding specific commitments on these new services to national schedules.

1-2. RELEVANT PROVISIONS

Read in the Primary Sources:

GATS Table of Contents, Preamble, Arts. I-III, V-VII, IX, XIII-XIV *bis*, XVI-XXIII, XXVIII,XIX

DECISION ON INSTITUTIONAL ARRANGEMENTS FOR THE GENERAL AGREEMENT ON TRADE IN SERVICES

1-3. SCHEDULES OF SPECIFIC COMMITMENTS

http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm

Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions

The General Agreement on Trade in Services consists of the framework agreement — the Articles of the Agreement — and its Annexes, and the schedules of specific commitments and the lists of exemptions from MFN treatment submitted by member governments. The schedules and the exemption lists are integral parts of the Agreement.

Introduction

At the time of the signature of the Final Act of the Uruguay Round, on 15 April 1994, 95 schedules of specific commitments in services and 61 lists of derogations from the MFN principle had been submitted and agreed.

It is only by reference to a country's schedule, and (where relevant) its MFN exemption list, that it can be seen to which services sectors and under what conditions the basic principles of the GATS -market access, national treatment and MFN treatment — apply within that country's jurisdiction. The schedules are complex documents in which each country identifies the service sectors to which it will apply the market access and national treatment obligations of the GATS and any exceptions from those obligations it wishes to maintain. The commitments and limitations are in every case entered with respect to each of the four modes of supply which constitute the definition of trade in services in Article I of the GATS: these are cross-border supply; consumption abroad; commercial presence; and presence of natural persons:

Cross-border supply — the possibility for non-resident service suppliers to supply services cross-border into the Member's territory.

Consumption abroad — the freedom for the Member's residents to purchase services in the territory of another Member.

Commercial presence — the opportunities for foreign service suppliers to establish, operate or expand a commercial presence in the Member's territory, such as a branch, agency, or wholly-owned subsidiary.

Presence of natural persons — the possibilities offered for the entry and temporary stay in the Member's territory of foreign individuals in order to supply a service.

In order to determine the real level of market access represented by a given schedule it is therefore necessary to examine the range of activities covered in each service sector and the limitations on market access and national treatment pertaining to the different modes of supply. In addition, in cases where a country has also tabled a list of MFN exemptions, this must be examined in order to assess the extent to which the country gives preferential treatment to, or discriminate against, one or more of its trading partners.

The purpose of this introduction is to assist users to read and interpret the schedules and exemption lists and to assess their commercial significance.

A. Schedules of specific commitments

A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service. Specific commitments thus have an effect similar to a tariff binding — they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage. Commitments can only be withdrawn or modified after the agreement of compensatory adjustments with affected countries, and no withdrawals or modifications may be made until three years after entry into force of the Agreement. Such modifications of commitments may not affect the application of most-favoured-nation (MFN) treatment. Commitments can however be added or improved at any time.

The national schedules all conform to a standard format which is intended to facilitate comparative analysis. For each service sector or sub-sector that is offered, the schedule must indicate, with respect to each of the four modes of supply, any limitations on market access or national treatment which are to be maintained. A commitment therefore consists of eight entries which indicate the presence or absence of market access or national treatment limitations with respect to each mode of supply. The first column in the standard format contains the sector or subsector which is the subject of the commitment; the second column contains limitations on market access; the third column contains limitations on national treatment. In the fourth column governments may enter any additional commitments which are not subject to scheduling under market access or national treatment.

In nearly all schedules, commitments are split into two sections: First, "horizontal" commitments which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. In the second section of the schedule, commitments which apply to trade in services in a particular sector or subsector are listed.

The terminology used in schedules has also been standardized wherever possible. What follows is a description of the information which has to be inscribed in each column of the schedules and a summary of the terminology used.

The information that is entered in the columns

Sector or sub-sector column: this column contains a clear definition of the sector, subsector or activity that is the subject of the specific commitment. Members are free, subject to the results of their negotiations with other participants, to identify which sectors, subsectors or activities they will list in their schedules, and it is only to these that the commitments apply. It will be seen that committed sectors are sometimes very broad, as in "banking and other financial services" and sometimes very narrow, as in "noise abatement services".

In the great majority of schedules the order in which the sectors are listed corresponds to the GATT Secretariat classification which lists twelve broad sectors as follows:

1. Business;

2. Communication;

3. Construction and Engineering;

4. Distribution;

5. Education;

6. Environment;

7. Financial;

8. Health;

9. Tourism and Travel;

10. Recreation, Cultural, and Sporting;

11. Transport;

12. “Other”.

Furthermore, in most cases, the sectoral entries are accompanied by numerical references to the Central Product Classification system of the United Nations which gives a detailed explanation of the services activities covered by each listed sector or subsector, and on which the secretariat list is based. Where this was not possible, listings are to provide a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.

Market access column: When a Member undertakes a commitment in a sector or subsector it must indicate for each mode of supply what limitations, if any, it maintains on market access. Article XVI:2 of the GATS lists six categories of restriction which may not be adopted or maintained unless they are specified in the schedule. All limitations in schedules therefore fall into one of these categories. They comprise four types of quantitative restriction plus limitations on types of legal entity and on foreign equity participation.

National treatment column: The national treatment obligation under Article XVII of the GATS is to accord to the services and service suppliers of any other Member treatment no less favourable than is accorded to domestic services and service suppliers. A Member wishing to maintain any limitations on national treatment — that is any measures which result in less-favourable treatment of foreign services or service suppliers — must indicate these limitations in the third column of its schedule

Additional commitments column: Entries in this column are not obligatory but a Member may decide in a given sector to make additional commitments relating to measures other than those subject to scheduling under Articles XVI and XVII, for example qualifications, standards and licensing matters. This column is to be used to indicate positive undertakings, not the listing of additional limitations or restrictions.

How commitments are recorded in schedules

In essence, the entries which constitute a legally binding commitment in a Member's schedule indicate the presence or absence of limitations on market access and national treatment in relation to each of the four

modes of supply for a listed sector, sub-sector or activity. In the following cases the entries use **uniform terminology**:

- Where there are no limitations on market access or national treatment in a given sector and mode of supply, the entry reads NONE. However, it should be noted that when the term NONE is used in the second or sector-specific part of the schedule it means that there no limitations **specific to this sector**: it must be borne in mind that, as noted above, there may be relevant horizontal limitations in the first part of the schedule.
- All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment, the Member has entered in the appropriate space the term UNBOUND.
- In some situations a particular mode of supply — such as the cross-border supply of bridge-building services — may not be technically possible or feasible. In such cases the term UNBOUND* has been used, usually in conjunction with an explanatory footnote stating "Unbound due to lack of technical feasibility".

In many cases it will be seen that there are textual descriptions of bound commitments which indicate limitations on market access or national treatment. Such entries, which vary in length considerably, do not use uniform terminology but are based on one of two **common approaches**:

- The entry describes in the appropriate space the nature of the limitation, indicating the elements which make it inconsistent with Articles XVI and XVII of the GATS.
- In some cases, Members have chosen to indicate a limited commitment by describing what they are offering rather than the limitations they are maintaining. Such an approach is often used to indicate the market access opportunities for the entry of certain categories of foreign natural persons who supply services.

B. Lists of Article II (MFN) exemptions

Most-favoured-nation treatment is a general obligation that applies to all measures affecting trade in services. However, it has been agreed that particular measures inconsistent with the MFN obligation can be maintained — in principle for not more than ten years and subject to review after not more than five years. Such measures must have been specified in a list of MFN Exemptions submitted by the end of the Uruguay Round of Multilateral Trade Negotiations or by the conclusion of extended negotiations on certain sectors for which the delayed submission of related exceptions was espressly authorized. Subsequently, requests for exemptions from Article II (MFN) can only be granted under the waiver procedures of the Marrakesh Agreement.

In contrast to the complex nature of schedules of commitments, these lists are largely self-explanatory and are structured in a straightforward manner. In order to ensure a complete and precise listing of a country's MFN exemptions, each country is required to provide five types of information for each exemption:

(i) Description of the sector or sectors in which the exemption applies;

(ii) Description of the measure, indicating why it is inconsistent with Article II;

(iii) The country or countries to which the measure applies;

(iv) The intended duration of the exemption;

(v) The conditions creating the need for the exemption.

It is a basic principle of the Agreement that specific commitments are applied on an MFN basis. Where commitments are entered, therefore, the effect of an MFN exemption can only be to permit more favourable treatment to be given to the country to which the exemption applies than is given to all other Members. Where there are no commitments, however, an MFN exemption may also permit less favourable treatment to be given. It is not necessary to list measures providing for preferential liberalization of trade in services among Members of economic integration agreements, such as Free Trade Areas; such preferential treatment is permitted under Article V of the GATS and must meet the criteria laid down in that Article.

2. United States – Measures affecting the cross-border supply of gambling and betting services (The Gambling Dispute)

2-1. INTRODUCTION

From: D.A. Irwin, JHH Weiler, Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)

In the U.S.-Gambling dispute, Antigua and Barbuda (Antigua) challenged a number of provisions of United States federal and state law, notably the Wire Act, the Travel Act and the Illegal Gambling Business Act[1] that, according to Antigua amounted to an effective ban on internet gambling. This, it was alleged, effectively shut out Antiguan service providers in a sector in relation to which the United States had, in its Schedule, given a commitment namely "recreational, cultural, and sporting services" in violation of, notably, Article XVI GATS.

The United States denied that it had made such a commitment, argued that even if it had given such a commitment, the internal measures in question where origin neutral and of a regulatory nature and therefore did not violate its access commitments under Article XVI. It further argued that the measures in question where in furtherance of policies designed to protect "public morals and public order" and were thus permitted under the General Exceptions ex Article XIV GATS. The United States maintained at all times that it did not discriminate between domestic and foreign-service providers in enforcing the prohibition on internet gambling.

[1] 18 U.S.C 1084; 18 U.S.C 1952; 18 U.S.C. 1955

2-2. HISTORY OF THE GAMBLING DISPUTE

13 March 2003	Request for consultations by Antigua and Barbuda pursuant to Art. XXII GATS and Art. 4 DSU (WT/DS285/1)
12 June 2003	Request for the establishment of a panel by Antigua and Barbuda pursuant to Art. 6 DSU (WT/DS285/2)
21 July 2003	Establishment of a panel by the DSB in accordance with Art. 6 DSU with standard terms of reference (Art 7(1) DSU) (WT/DSB/M153)
24 March 2004	Transmission of Interim Report to the parties pursuant to Art. 15(2) DSU.
30 April 2004	Final Report of the panel issued to the parties.
7 January 2005	Notification of Appeal by the United States pursuant to Art. 16(4) DSU.
19 January 2005	Notification of Appeal by Antigua and Barbuda pursuant to Art. 16(4) DSU.
7 April 2005	Appellate Body Report circulated.
20 April 2005	DSB adopts Appellate Body Report and Panel Report.
6 June 2005	Antigua and Barbuda requests that a reasonable period of time for implementation of the recommendations and rulings of the DSB be determined by binding arbitration pursuant to Article 21.3 (c) DSU.
19 August 2005	Article 21.3(c) Arbitration Report circulated.
3 April 2006	Expiration of the reasonable period of time for implementation.
6 July 2006	Antigua and Barbuda requests (after failed consultations with the US) the DSB to establish a compliance panel pursuant to Article 21.5 DSB.
30 March 2007	Article 21.5 Panel Report circulated.
4 May 2007	Announcement by the United States that it intends to withdraw its commitment for gambling and betting services under Article XXI of the GATS.
25 May 2007	DSB adopts Panel Report, which finds that United States has failed to comply with the recommendations and rulings of the DSB in this dispute.
21 June 2007	Antigua and Barbuda requests authorization from the DSB, under Article 22.2 DSU, to suspend the application to the United States of concessions and related obligations under the GATS and the TRIPS amounting to an annual value of US$3.443 billion.

23 July 2007	United States objects to the level of suspension pursuant to Article 22.6 DSU.
24 July 2007	DSB refers the matter to arbitration.
21 December 2007	Article 22.6 Arbitration Report circulated.

2-3. APPELLATE BODY REPORT IN GAMBLING

When reading the Appellate Body Report pay specific attention to the method of interpretation used by the AB. Do you find it convincing?

Do you agree with the Appellate Body's distinction between measures and effects and its confirmation of the panel's holding that a total prohibition – as an effect of various measures -- cannot be challenged as a measure itself?

If the AB had found – as many in the literature contend it should have – that the case had to be decided under Art. XVII GATS, how should it have decided the case?

2-3-A. United States – Measures affecting the cross-border supply of gambling and betting services, Appellate Body Report, 7 April 2005, WT/DS285/AB/R

Note that the footnote numbering does not correspond to that in the original report.

Sacerdoti, Presiding Member; Abi-Saab, Member; Lockhart, Member

I. Introduction

1. The United States, and Antigua and Barbuda ("Antigua"), each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "Panel Report").[2] The Panel was established to consider a complaint by Antigua concerning certain measures of state and federal authorities that allegedly make it unlawful for suppliers located outside the United States to supply gambling and betting services to consumers within the United States.[3](…)

IV. Measures at Issue

115. We begin with the participants' appeals relating to the measures at issue. First, we review the Panel's finding that the "'total prohibition' on the cross-border supply of gambling and betting services" (the "total prohibition"[4]) cannot constitute an autonomous measure that can be challenged *per se*.[5] Next, we consider whether the Panel erred in stating that "'practice' can be considered as an autonomous measure that can be challenged in and of itself".[6] Finally, we evaluate the United States' allegation that Antigua failed to make a *prima facie* case of inconsistency with Article XVI with respect to certain federal and state laws and that, therefore, the Panel should not have ruled on these claims.

A. *"Total Prohibition" as a Measure*

116. In its panel request, Antigua identified the "total prohibition" as the "effect" of various United States federal and state laws.[7] In its first written submission, Antigua claimed that it was not necessary to show that these laws produced the effect of a "total prohibition" because the United States Ambassador

[2]WT/DS285/R, 10 November 2004.

[3]Panel Report, para. 1.1.

[4]The Panel refers throughout the Panel Report to the "'total prohibition' on the cross-border supply of gambling and betting services" as the "total prohibition". (See, for example, Panel Report, paras. 6.139 and 6.154) In this Report we use the term "total prohibition" in the same manner.

[5]Panel Report, para. 6.175.

[6]*Ibid*., para. 6.197.

[7]Request for Establishment of a Panel by Antigua and Barbuda, WT/DS285/2, 13 June 2003, p. 1.

had acknowledged, during the DSB meeting considering Antigua's first panel request, the existence of such a prohibition.[8] Therefore, Antigua asserted, "[t]he subject of this dispute is the *total prohibition on the cross-border supply of gambling and betting services*—and the parties are in agreement as to the existence of that total prohibition."[9]

117. In the course of responding to a United States request for preliminary rulings, prompted by alleged deficiencies in Antigua's description of the measures it was challenging, the Panel stated:

> Antigua and Barbuda emphasised that it is effectively challenging the overall and cumulative effect of various federal and state laws which, together with various policy statements and other governmental actions, constitute a complete prohibition of the cross-border supply of gambling and betting services.[10]

In its responses to the Panel's first set of questions, and in its second written submission to the Panel, Antigua asserted that it was challenging the "total prohibition" as a "measure in and of itself".[11] Antigua disputed the United States' contention that the "total prohibition" could not constitute a measure *per se* for purposes of WTO dispute settlement.[12]

118. In its report, the Panel found that, "in the circumstances of this case", a "total prohibition" could not constitute a "measure" *per se*.[13] The Panel based its conclusion on three factors. First, the Panel found that the "total prohibition" did not constitute an "instrument containing rules or norms".[14] Secondly, the Panel stated that Antigua had not sufficiently identified the "total prohibition" in its panel request as a measure at issue, including the precise relevant United States laws that give rise to this prohibition.[15] Thirdly, the Panel stated that it "fail[ed] to see how the United States could be requested to implement a DSB recommendation to bring a 'prohibition' into compliance with the GATS pursuant to Article 19.1 of the DSU when an imprecisely defined 'puzzle' of laws forms the basis of the 'total prohibition'."[16]

119. Antigua appeals the Panel's finding and emphasizes that Article XXVIII(a) of the GATS defines a "measure" broadly, as do the Appellate Body's decisions in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews*. Antigua also relies on the alleged "concessions"[17] made by the United States Ambassador during DSB meetings in her statements

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[8]Antigua's first written submission to the Panel, para. 136 (citing Minutes of the DSB Meeting held on 24 June 2003, WT/DSB/M/151, p. 11).

[9]*Ibid*., para. 136. (original emphasis)

[10]Panel's decision on the United States' request for preliminary rulings, para. 17, Panel Report, p. B-4. The Panel did not grant the United States' request to invite Antigua to file another submission detailing with greater specificity the measures being challenged. The Panel also made no ruling relating to the "total prohibition" as a measure *per se*.

[11]Antigua's response to Question 10 posed by the Panel, Panel Report, p. C-34; Antigua's second written submission to the Panel, para. 8.

[12]Antigua's second written submission to the Panel, paras. 9-18.

[13]Panel Report, para. 6.175.

[14]*Ibid*., 6.176 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82 and 88).

[15]*Ibid*., paras. 6.177-6.180.

[16]*Ibid*., para. 6.182 (quoting Antigua's response to Question 32 posed by the Panel, Panel Report, p. C-58).

[17]Antigua's other appellant's submission, para. 48.

responding to Antigua's panel requests. Antigua argues that, in the light of this statement, the Panel erred in not proceeding to evaluate Antigua's challenge on the basis of the "total prohibition". Antigua therefore requests the Appellate Body to reverse the Panel's finding that Antigua was not entitled to rely on the "total prohibition" as a measure *per se* in this dispute. Antigua further requests the Appellate Body to complete the analysis with respect to the consistency of the "total prohibition" with Article XVI.[18]

120. The question before us, therefore, is whether an alleged "total prohibition" on the cross-border supply of gambling and betting services constitutes a measure that may be challenged under the GATS.[19]

121. The DSU provides for the "prompt settlement" of situations where Members consider that their benefits under the covered agreements "are being impaired by *measures* taken by another Member".[20] Two elements of this reference to "measures" that may be the subject of dispute settlement are relevant. First, as the Appellate Body has stated, a "nexus" must exist between the responding Member and the "measure", such that the "measure"—whether an act or omission—must be "attributable" to that Member.[21] Secondly, the "measure" must be the *source* of the alleged impairment, which is in turn the *effect* resulting from the existence or operation of the "measure".

122. Similarly, consultations at the outset of a dispute are based on:

> ... measures affecting the operation of any covered agreement taken within the territory [of the responding Member].[22]

This provision contemplates that "measures" themselves will "affect" the operation of a covered agreement. Finally, we note that this distinction between measures and their effects is also evident in the scope of application of the GATS, namely, to "measures by Members affecting trade in services".[23]

123. We are therefore of the view that the DSU and the GATS focus on "measures" as the subject of challenge in WTO dispute settlement. To the extent that a Member's complaint centres on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the *measure* that is the source of the alleged effects.

124. Viewed in this light, the "total prohibition" described by Antigua does not, in itself, constitute a "measure". As Antigua acknowledged before the Panel[24] and on appeal[25], the "total prohibition" is the *collective effect* of the operation of several state and federal laws of the United States. And it is the "total prohibition" itself—as the *effect* of the underlying laws—that constitutes the alleged impairment of Antigua's benefits under the GATS.

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[18]Antigua's other appellant's submission, para. 51.

[19]Panel Report, para. 6.175.

[20]Article 3.3 of the DSU. (emphasis added)

[21]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[22]Article 4.2 of the DSU.

[23]Article I:1 of the GATS.

[24]See page 1 of Antigua's Request for the Establishment of a Panel, *supra*, footnote **Error! Reference source not found.**; Antigua's response to Question 10 posed by the Panel, Panel Report, p. C-34; Antigua's first written submission to the Panel, paras. 140-143.

[25]Antigua's other appellant's submission, paras. 5, 43, and 45; Antigua's opening statement at the oral hearing.

125. We note also that, if the "total prohibition" were a measure, a complaining party could fulfil its obligation to identify the "specific measure at issue", pursuant to Article 6.2 of the DSU, merely by explicitly mentioning the "prohibition". Yet, without knowing the precise source of the "prohibition", a responding party would not be in a position to prepare adequately its defence, particularly where, as here, it is alleged that numerous federal and state laws underlie the "total prohibition".

126. Therefore, we conclude that, without demonstrating the source of the prohibition, a complaining party may not challenge a "total prohibition" as a "measure", *per se*, in dispute settlement proceedings under the GATS. Accordingly, we *uphold* the Panel's finding, in paragraph 6.175 of the Panel Report, that "the alleged 'total prohibition' on the cross-border supply of gambling and betting services describes the alleged effect of an imprecisely defined list of legislative provisions and other instruments and cannot constitute a single and autonomous 'measure' that can be challenged in and of itself".

127. Antigua also contests the Panel's finding that Antigua could not rely on the "total prohibition" as a measure in this dispute because Antigua had failed to identify such a measure in its panel request.[26] Having found that, in any event, the "total prohibition", as posited by Antigua, is not a measure that can be challenged in itself, we *need not rule* on whether Antigua's panel request identifies the "total prohibition" as a specific measure at issue in this dispute, as would be required by Article 6.2 of the DSU.

128. Finally, Antigua challenges, under Article 11 of the DSU, the Panel's failure to accord sufficient weight to the alleged United States admission as to the existence of a "total prohibition". Antigua advances this contention in the context of its broader claim on appeal that the Panel erred in not considering the "total prohibition" as "measure". Because, however, we have upheld this finding of the Panel, we *need not consider* whether the Panel satisfied its duties under Article 11 of the DSU, in its treatment of the alleged "admission" by the United States.

B. *"Practice" as a Measure*

129. In the course of examining what measures Antigua was challenging in this dispute, the Panel relied on certain Appellate Body decisions in support of its view that "'practice' can be considered as an autonomous measure that can be challenged in and of itself".[27] The Panel then observed that certain acts identified by Antigua could constitute "practices", as that term had been understood by the panel in *US – Corrosion-Resistant Steel Sunset Review*. However, based on Antigua's clarification in its comments to the United States' request for preliminary rulings, the Panel concluded that Antigua was "not challenging [any] practice[] 'as such'".[28]

130. The United States challenges the Panel's view that "practice" may be challenged in and of itself.[29] Antigua agrees with the Panel that "practice" can be challenged, as such, in WTO dispute settlement, but submits that in this case "this issue appeared to be without any real context" and, therefore, that the Appellate Body need not pronounce on it.[30]

131. We disagree with the participants' characterization of the Panel's statement on "practice", in paragraph 6.197 of the Panel Report, as a "finding" of the Panel.[31] The Panel itself acknowledged that, in

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[26]Panel Report, para. 6.171.

[27]Panel Report, para. 6.197 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 97; Appellate Body Report, *US – Carbon Steel*, para. 157; and Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 162).

[28]*Ibid*., para. 6.198.

[29]United States' appellant's submission, para. 205.

[30]Antigua's response to questioning at the oral hearing.

[31]See also Appellate Body Report, *US – Wool Shirts and Blouses,* p. 17, DSR 1997:I, 323, at 338.

any case, Antigua was not challenging a practice, as such. In this light, the Panel's statement on "practice", in our view, was a mere *obiter dictum*, and we need not rule on it.

132. We nevertheless express our disagreement with the Panel's understanding of previous Appellate Body decisions. The Appellate Body has *not*, to date, pronounced upon the issue of whether "practice" may be challenged, as such, as a "measure" in WTO dispute settlement.[32]

C. *Antigua's Prima Facie Case*

133. We examine next the United States' claim on appeal that Antigua failed to establish a *prima facie* case of inconsistency with Article XVI of the GATS, with respect to the eight state laws and the three federal laws that the Panel determined were the measures that it should examine.

134. Antigua's panel request listed nine federal laws and eighty-four other laws from all fifty states, as well as from the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands.[33] In seeking to identify, from this list, the measures that were the subject of Antigua's claims, the Panel explained that it had:

> ... perused all of Antigua's submissions, including footnotes to those submissions and exhibits submitted by Antigua, with a view to identifying which of the 93 laws listed in its Panel request we should consider in determining whether or not the United States is in violation of its obligations under the GATS.[34]

135. The Panel found that certain state laws that had been mentioned by Antigua in its submissions, but which were *not* identified in the panel request, were not properly before the Panel.[35] The Panel also found that certain state and federal laws, although mentioned in the panel request, had been only briefly discussed in summaries attached to the texts of the laws submitted by Antigua.[36] In the Panel's view, these brief summaries were inadequate to explain how the laws allegedly resulted in a GATS-inconsistent prohibition on the cross-border supply of gambling services.[37]

136. The Panel then reviewed laws that had been mentioned in the panel request *and* that were discussed in Antigua's submissions. The Panel concluded that the Wire Act, the Travel Act, and the IGBA were identified sufficiently by Antigua because Antigua's "discussions indicate[d] according to which particular provisions and how the laws allegedly result in a prohibition on the cross-border supply of gambling and betting services."[38] On the same basis, the Panel determined that Antigua had identified as part of its case certain laws of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah.[39]

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[32]Indeed, this was said explicitly in paragraph 220 of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*.

[33]See pages 3 to 7 of Antigua's Request for Establishment of a Panel, *supra*, footnote **Error! Reference source not found.**.

[34]Panel Report, para. 6.209.

[35]*Ibid*., para. 6.214.

[36]*Ibid*., para. 6.216.

[37]*Ibid*., para. 6.217.

[38]*Ibid*., para. 6.223.

[39]*Ibid*., paras. 6.226, 6.229, 6.232, 6.235, 6.239, 6.242, 6.245, and 6.248.

137. The United States contends that, in taking this approach, the Panel itself improperly made Antigua's *prima facie* case of inconsistency with Article XVI of the GATS. The United States claims that Antigua did not argue before the Panel how the laws eventually selected for review by the Panel constituted a "total prohibition" on the cross-border supply of gambling services. Finally, the United States argues, as Antigua's case throughout the panel proceedings was based on the existence of a "total prohibition", Antigua's arguments focused on allegations that the "total prohibition" is itself inconsistent with various provisions of the GATS. According to the United States, this meant that Antigua failed to allege that any of the *individual* measures discussed by the Panel is inconsistent with Article XVI of the GATS.

138. The complaining party bears the burden of proving an inconsistency with specific provisions of the covered agreements.[40] With respect to arguments and the production of evidence, we note the following statement of the Appellate Body in *US – Carbon Steel*:

> The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.[41] (footnote omitted)

139. Where the complaining party has established its *prima facie* case, it is then for the responding party to rebut it.[42] A panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case.[43]

140. A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim.[44] A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency.[45] Nor may a complaining party simply allege facts without relating them to its legal arguments.

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[40]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66.

[41]Appellate Body Report, *US – Carbon Steel*, para. 157 (citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335).

[42]Appellate Body Report, *EC – Hormones*, para. 98; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

[43]Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

[44]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323, at 336. (emphasis added) As not every claim of WTO-inconsistency will consist of the same elements, "the nature and scope of evidence required to establish a *prima facie* case 'will necessarily vary from measure to measure, provision to provision, and case to case'". (Appellate Body Report, *Japan – Apples*, para. 159 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335))

[45]In *Canada – Wheat Exports and Grain Imports*, para. 191, the Appellate Body made a similar observation in the context of an appeal under Article 11 of the DSU:

> … it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.

141. In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:

> ... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.[46]

Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case—made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.

142. Antigua's case focused on Article XVI:2 of the GATS and, in particular, its sub-paragraphs (a) and (c). The relevant provisions provide:

> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
>
> ...
>
> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test .... (footnotes omitted)

143. This text suggests that Antigua was required to make its *prima facie* case by first alleging that the United States had undertaken a market access commitment in its GATS Schedule; and, secondly, by identifying, with supporting evidence, how the challenged laws constitute impermissible "limitations" falling within Article XVI:2(a) or XVI:2(c).

144. In the present case, the Panel determined that Antigua could not pursue its claim on the basis of the "total prohibition" as the measure at issue.[47] In our view, the Panel was correct in so concluding.[48] In order for the Panel properly to continue with its analysis, then, Antigua was required to make its *prima facie* case with respect to *specific* federal and state laws identified in its panel request.

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[46]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

[47]Panel Report, para. 6.171.

[48]*Supra*, paras. 0-0.

145. In its written submissions to the Panel, Antigua asserted that the United States had "made a full commitment [in its GATS Schedule] to the cross-border supply of gambling and betting services"[49] along with references to the relevant sector of that Schedule.[50] This assertion, in our view, satisfies the first requirement of Antigua's *prima facie* case under Article XVI:2.[51]

146. As to the second requirement of the *prima facie* case, Antigua's claims under sub-paragraphs (a) and (c) of Article XVI:2, as regards individual laws rather than the "total prohibition", are set out in the following paragraph from its second written submission to the Panel:

> The individual legislative and regulatory provisions, applications thereof and related practices that make up the United States' total prohibition are also caught by both Article XVI:2(a) and XVI:2(c) as separate "measures" ....
>
> - Federal laws specifically prohibiting "cross-border" supply function like an establishment requirement and are therefore the equivalent of a zero quota for cross-border supply
>
> - State laws that prohibit all gambling, in combination with other state laws that exempt specifically authorised gambling without providing a possibility for Antiguan operators to obtain an authorisation to supply gambling services on a cross-border basis, are the equivalent of a zero quota for cross-border supply
>
> - Several state laws or regulations explicitly establish numerical quotas
>
> - Several laws or regulations expressly grant exclusive or special rights to operators of domestic origin
>
> - Several state laws require the physical presence of the operator within the territory of the state and, in doing so, constitute a zero quota for cross-border supply.[52] (footnotes omitted)

147. We begin our examination of the challenged measures with the three federal laws, namely, the Wire Act, the Travel Act, and the IGBA. We observe that Antigua submitted the texts of these statutes and explained its understanding of them.[53] In support of its argument that the three federal statutes prohibited certain kinds of cross-border supply of gambling services, Antigua submitted to the Panel a

[49]Antigua's first written submission to the Panel, para. 181.

[50]*Ibid*., paras. 160-163.

[51]*Supra*, para. 0.

[52]Antigua's second written submission to the Panel, para. 37. The footnotes omitted from this excerpt contain no reference to specific laws of the United States.

[53]Antigua's statement at the first substantive panel meeting, para. 21, 10 December 2003; Antigua's written submission in response to the United States' request for preliminary rulings, footnote 18 to para. 18, 22 October 2003. See also Antigua's response to Question 12 posed by the Panel, Panel Report, p. C-36 (discussing prosecutions under the Wire Act and the Travel Act); and Exhibit AB-82 submitted by Antigua to the Panel (containing texts of the Wire Act, the Travel Act, and the IGBA).

report by the United States General Accounting Office[54]on internet gambling, and a letter from a Deputy Assistant Attorney General of the Department of Justice informing an industry association of broadcasters that internet gambling violates the three federal statutes.[55]

148. In addition, as we noted above[56], Antigua, in its second written submission, alleged the "[f]ederal laws" prohibiting cross-border supply to be inconsistent with Article XVI. The United States argues that Antigua never "specifically alleged" the inconsistency of the three specific federal statutes with Article XVI.[57] Although, Antigua did not expressly mention these statutes by name when alleging inconsistency with Article XVI, we are of the view that, in the context of Antigua's previous statement clearly identifying these three statutes[58] and the Panel's subsequent questioning on these particular measures[59], the reference to "[f]ederal laws" clearly covered the Wire Act, the Travel Act, and the IGBA. As a result, in our view, Antigua's arguments and evidence were sufficient to identify the Wire Act, the Travel Act, and the IGBA, and to make a *prima facie* case of their inconsistency with sub-paragraphs (a) and (c) of Article XVI:2.

149. As to the eight state laws reviewed by the Panel, we note that Antigua made no mention of them in the course of its argument that the United States acts inconsistently with Article XVI of the GATS. In none of Antigua's submissions to the Panel was the way in which these measures operate explained in a manner that would have made it apparent to the Panel and to the United States that an inconsistency with Article XVI was being alleged with respect to these measures. Thus, we see no basis on which we can conclude that Antigua sufficiently connected the eight state laws with Article XVI and thereby established a *prima facie* case of inconsistency with that provision.

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[54]United States General Accounting Office, *Internet Gambling: An Overview of the Issues*, p. 11 (December 2002), Exhibit AB-17 submitted by Antigua to the Panel (describing the Wire Act, the Travel Act, and the IGBA).

[55]Letter from John G. Malcolm to National Association of Broadcasters, 11 June 2003, Exhibit AB-73 submitted by Antigua to the Panel.

[56]*Supra*, para. 0.

[57]United States' appellant's submission, para. 9.

[58]Antigua's statement at the first substantive panel meeting, para. 21, 10 December 2003. In its opening statement at the first substantive panel meeting, Antigua discussed "three federal statutes", which it identified as follows:

> - The 'Wire Act' (18 U.S.C § 1084), which prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires;
> - The 'Travel Act' (18 U:S:C § 1952), which imposes criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including gambling considered unlawful in the United States;
> - The 'Illegal' Gambling Business Act' (18 U.S.C § 1955), which makes it a federal crime to operate a gambling business that violates the law of the state where the gambling takes place (provided that certain other criteria are fulfilled such as the involvement of at least five people and an operation during more than 30 days).
>
> Each of these three laws separately prohibits the cross-border supply of gambling and betting services from Antigua.

[59]Question 32 posed by the Panel to Antigua, Panel Report, p. C-58, where the Panel noted: "In its first oral statement (para. 21), in arguing that a prohibition on the cross-border supply of gambling and betting services exists, Antigua points to three federal laws, namely the Wire Act (18 USC § 1084), the Travel Act (18 USC § 1952) and the Illegal Gambling Business Act (18 USC § 1955)."

150. In Antigua's first written submission to the Panel and in its opening statement at the first substantive panel meeting, none of the eight state laws was named in the context of Antigua's substantive claims.[60] In its second written submission, Antigua alleged merely that "state laws"—without further specification—are inconsistent with Article XVI:2(a) and/or (c).[61] Antigua did, however, make a cross-reference to a preceding section in its submission detailing the operation of various state laws.[62] Yet, *none* of the state laws considered by the Panel is mentioned in that section. Rather, the discussion relates primarily to other states' laws[63], addresses laws that are not in Antigua's panel request[64], or speaks only in general terms.[65]

151. In our view, certain general statements made by Antigua in its second written submission were insufficient to permit the Panel to proceed on the basis that Antigua had established a *prima facie* case regarding the eight state laws identified by the Panel. For example, Antigua's second written submission contains a general discussion of state gambling laws, with footnote citations to, *inter alia* , a report by the United States General Accounting Office and a law review article.[66] The law review article contains a discussion of state regulation of gambling, with reference, primarily in footnotes, to the laws of several states, including California, Hawaii, Illinois, Louisiana, and South Dakota. As we understand it, the Panel followed this trail of footnote references, and then compared the statutes cited in the footnotes of that law review article with Antigua's panel request to determine whether Antigua had identified provisions of those statutes and, thereby, to ascertain which state law Antigua intended to include as part of its claim.[67] This led the Panel to conclude that certain laws of Louisiana and South Dakota were challenged by Antigua under Article XVI.

152. The Panel engaged in a similar multi-step analysis in seeking to discern some connection between the laws of Massachusetts, New Jersey, New York, and Utah, and Antigua's references in its written submissions and various exhibits.[68] Yet we are unable to detect *any* connection, however tenuous, between the relevant laws of Colorado and Minnesota, on the one hand, and the allegation of inconsistency with Article XVI:2, on the other hand. Although Antigua did submit these laws in its exhibits, we see no arguments in any submissions that would have clearly informed the Panel and the

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[60]Two of the state measures considered by the Panel—Section 9 of Article 1 of the New York Constitution and Section 18-10-103 of the Colorado Revised Statutes—are mentioned by Antigua in its first written submission. (Antigua's first written submission, para. 149) However, they are mentioned solely for the purpose of supporting Antigua's assertion that the reason certain measures were identified in its panel request but not in its request for consultations was a typographical error. No description is given of the laws or how they might be inconsistent with Article XVI.

[61]*Supra*, para. 0.

[62]Antigua's second written submission to the Panel, para. 37 and footnotes 46-47 and 49 thereto (citing paras. 22-24 and 28-29 of the same submission).

[63]See, for example, *ibid*., paras. 27-29 (discussing laws of, *inter alia*, Illinois, Iowa, and Nevada).

[64]See, for example, *ibid*., para. 27.

[65]See, for example, *ibid*., paras. 22 ("All states have adopted the same basic legal approach ….") and 24 ("under the laws or the practice of every state").

[66]*Ibid*., footnotes 22 and 23 to para. 22 (citing United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (December 2002), Exhibit AB-17 submitted by Antigua to the Panel; and Antonia Z. Cowan, "The Global Gaming Village: Interstate and Transnational Gambling", *Gambling Law Review*, Vol. 7, pp. 255-257, Exhibit AB-119 submitted by Antigua to the Panel).

[67]Panel Report, paras. 6.228 and 6.244.

[68]Antigua's second written submission to the Panel, footnotes 46, 47, and 49 to para. 37 (citing Antigua's second written submission, paras. 22-24 and 27-29); and Antigua's second written submission, footnotes 22 and 23 to para. 22 (citing, *inter alia*, Enclosure 1 to the Interim Report of the United States General Accounting Office on Internet Gambling, entitled "Gambling Law in Five States and Their Effect on Internet Gambling" (23 September 2002), Exhibit AB-84 submitted by Antigua to the Panel).

United States how those two laws would form part of Antigua's claims under Article XVI:2(a) and XVI:2(c). It follows that, without providing a stronger link between the particular state law being challenged and the obligation alleged to have been infringed, Antigua failed to make a *prima facie* case with respect to any of these eight state laws.

153. In our view, therefore, Antigua established its *prima facie* case of inconsistency with Article XVI, only as to the Wire Act, the Travel Act, and the IGBA. In contrast, with respect to the state laws—that is, certain laws of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah—we are of the view that Antigua failed to identify how these laws operated *and* how they were relevant to its claim of inconsistency with Article XVI:2.

154. Accordingly, we *find* that the Panel *did not err* in examining whether three federal laws—the Wire Act, the Travel Act, and the IGBA—are consistent with the United States' obligations under Article XVI of the GATS. We also *find* that the Panel *erred* in examining whether the following eight state laws are consistent with the United States' obligations under Article XVI of the GATS:

- Colorado: Section 18-10-103 of the Colorado Revised Statutes;
- Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
- Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
- Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);
- New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;
- New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;
- South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and
- Utah: Section 76-10-1102 of the Utah Code (Annotated).

(…)

V. Interpretation of the Specific Commitments Made by the United States in its GATS Schedule

158. The Panel found, at paragraph 7.2(a) of the Panel Report, that:

> ... the United States' Schedule under the GATS includes specific commitments on gambling and betting services under subsector 10.D.[69]

The United States appeals this finding. According to the United States, by excluding "sporting" services from the scope of subsector 10.D of its GATS Schedule, it excluded gambling and betting services from the scope of the specific commitments that it undertook therein. The United States argues that the Panel misinterpreted the ordinary meaning of the text of subsector 10.D, "Other recreational services (except

[69]See also Panel Report, para. 6.134.

sporting)", and erroneously found that the ordinary meaning of "sporting" does not include gambling. The United States also contends that the Panel erred in its identification and analysis of the context in which the terms of subsector 10.D must be interpreted. In particular, the Panel is alleged to have mistakenly elevated certain documents used in the preparation of GATS Schedules (W/120 and the 1993 Scheduling Guidelines) to the status of "context", when they are in fact "mere 'preparatory work'"[70], and, as such, cannot be relied upon when they suggest a meaning at odds with the unambiguous ordinary meaning of the text. According to the United States, the Panel relied on an "erroneous presumption" that, unless the United States "'expressly'" departed from W/120, the United States could be "'assumed to have relied on W/120 and the corresponding CPC references'".[71] Finally, the United States argues, in the alternative, that the Panel should have found that gambling falls under subsector 10.E, "Other", where the United States made no commitment.

159. In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a common agreement among *all* Members.[72] Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the *Vienna Convention.*[73]

160. In the context of the GATS, Article XX:3 explicitly provides that Members' Schedules are an "integral part" of that agreement. Here, too, the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members. Like the Panel[74]—and, indeed, both the participants[75]—we consider that the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the *Vienna Convention.*

161. The contentious issues in this appeal concern whether the Panel erred in the way that it *used* the *Vienna Convention* principles of interpretation in determining the scope of the specific commitments made by the United States in subsector 10.D of its GATS Schedule, and whether the Panel erred in the conclusions it drew on the basis of its approach.

A. *Interpretation of Subsector 10.D According to the General Rule of Interpretation: Article 31 of the Vienna Convention*

162. The United States' appeal focuses on the Panel's interpretation of the word "sporting" in subsector 10.D of the United States' GATS Schedule. According to the United States, the ordinary meaning of "sporting" includes gambling and betting and the Panel erred in finding otherwise. We observe first that the interpretative question addressed by the Panel was a broader one, namely "whether the US Schedule includes specific commitments on gambling and betting services notwithstanding the fact that the words 'gambling and betting services' do not appear in the US Schedule."[76] In tackling this question, the Panel turned to Sector 10 of the United States' Schedule to the GATS, which Antigua claimed included a

[70]United States' appellant's submission, para. 65.

[71]*Ibid*., para. 75 (quoting Panel Report, paras. 6.104 and 6.106).

[72]Appellate Body Report, *EC – Computer Equipment*, para. 109.

[73]*Ibid*., para. 84.

[74]Panel Report, para. 6.45.

[75]Antigua's and the United States' responses to questioning at the oral hearing.

[76]Panel Report, para. 6.41.

specific commitment on gambling and betting services, and the United States claimed did not. The relevant part of the United States' Schedule provides:[77]

Sector or subsector	Limitations on market access
10. RECREATIONAL, CULTURAL, & SPORTING SERVICES	
A. ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section
B. NEWS AGENCY SERVICES	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section
C LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section
D. OTHER RECREATIONAL SERVICES (except sporting)	1) None 2) None 3) The number of concessions available for commercial operations in federal, state and local facilities is limited 4) Unbound, except as indicated in the horizontal section

163. In considering this section of the United States' Schedule, the Panel stated that it would begin by "examining the ordinary meaning of various key terms used in the US Schedule."[78] The Panel examined the term "Other recreational services (except sporting)" in subsector 10.D, as well as the term "Entertainment services" in subsector 10.A. Having consulted the dictionary definitions of various words, the Panel found that "the *ordinary* meaning of 'sporting' does not include gambling".[79] The United States submits that the Panel could not have made this finding had it properly followed Article 31(1) of the *Vienna Convention.*

164. Article 31(1) of the *Vienna Convention* requires a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In order to identify the ordinary meaning, a Panel may start with the

[77]The United States of America – Schedule of Specific Commitments, GATS/SC/90, 15 April 1994 (the "United States' Schedule"). The "National Treatment" and "Additional Commitments" columns of the United States' Schedule are omitted from this excerpt. The relevant part of the United States' GATS Schedule is attached, in its entirety, as Annex III to this Report.

[78]Panel Report, para. 6.47.

[79]*Ibid*., para. 6.61. (original emphasis)

dictionary definitions of the terms to be interpreted.[80] But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation[81], as they typically aim to catalogue *all* meanings of words—be those meanings common or rare, universal or specialized.

165. In this case, in examining definitions of "sporting", the Panel surveyed a variety of dictionaries and found a variety of definitions of the word.[82] All of the dictionary definitions cited by the Panel define "sporting" as being connected to—in the sense of "related to", "suitable for", "engaged in" or "disposed to"—sports activities. Some dictionaries also define "sporting" as being connected to gambling or betting, but others do not. Of those that do, several note that the word is mainly used in this sense in the phrase "a sporting man", or in a pejorative sense, and some note that the word is used in this sense only when the gambling or betting activities pertain to sports. Based on this survey of dictionary definitions, as well as the fact that "gambling" does not fall within the meaning of the Spanish and French words that correspond to "sporting", namely "déportivos" and "sportifs"[83], the Panel made its finding that "the *ordinary* meaning of 'sporting' does not include gambling".[84]

166. We have three reservations about the way in which the Panel determined the ordinary meaning of the word "sporting" in the United States' Schedule. First, to the extent that the Panel's reasoning simply equates the "ordinary meaning" with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach. Secondly, the Panel failed to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word "sporting". Thirdly, the Panel failed to explain the basis for its recourse to the meanings of the French and Spanish words "déportivos" and "sportifs" in the light of the fact that the United States' Schedule explicitly states, in a cover note, that it "is authentic in English only."[85]

167. Overall, the Panel's finding concerning the word "sporting" was premature. In our view, the Panel should have taken note that, in the abstract, the range of possible meanings of the word "sporting" includes *both* the meaning claimed by Antigua and the meaning claimed by the United States, and then continued its inquiry into *which* of those meanings was to be attributed to the word as used in the United States' GATS Schedule.

168. Nevertheless, even accepting that the Panel erred in reaching a conclusion regarding the meaning of "sporting" at such an early stage of its analysis, this alone is not decisive of the United States' appeal. This is because the Panel did not end its analysis once it had considered the dictionary definitions of "sporting". Rather, having found that the word "sporting" did *not* include gambling and betting services,

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[80]We note, in this regard, the words of the panel in *US – Section 301 Trade Act*:

> For pragmatic reasons the normal usage ... is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.

(Panel Report, *US – Section 301 Trade Act*, para. 7.22)

[81]Appellate Body Report, *US – Softwood Lumber IV*, para. 59; Appellate Body Report, *Canada – Aircraft*, para. 153; and Appellate Body Report, *EC – Asbestos*, para. 92.

[82]The 13 different dictionary definitions consulted by the Panel are set out in paragraphs. 6.55-6.59 of the Panel Report. Some of the definitions appear to contradict one another. For instance, the *Shorter Oxford English Dictionary* definition quoted by the Panel defines "sporting" as both "characterized by sportsmanlike conduct"; and "[d]esignating an inferior sportsman or a person interested in sport from purely mercenary motives". (Panel Report, para. 6.55)

[83]Panel Report, paras. 6.59-6.60.

[84]*Ibid*., para. 6.61. (original emphasis)

[85]The cover note is included in the excerpt from the United States' Schedule attached as Annex III to this Report.

it examined whether other words in Sector 10 of the United States' Schedule *did* serve to make a specific commitment on gambling and betting services. To do so, the Panel turned to the terms "recreational services" and "entertainment services". Beginning again with dictionary definitions, the Panel observed that "words such as 'recreational' and 'entertainment' could cover virtually the same types of services activities".[86] The Panel expressed its view that "gambling and betting have, *a priori*, the characteristics of being entertaining or amusing, or of being used as a form of recreation."[87] Having thus consulted dictionaries for "the words 'Other recreational services (except sporting)' and 'entertainment services'", the Panel observed that these left "a number of questions open" and did not "allow it to reach a definitive conclusion on whether or not the US Schedule includes specific commitments on 'gambling and betting services' in sector 10".[88] The Panel then turned to consider the context in which the relevant terms from sector 10 of the United States' Schedule are situated.

169. The United States contests the Panel's identification and use of relevant context for the interpretation of the commitment made by the United States in its Schedule. In particular, the United States argues that the Panel erred in treating two documents from the Uruguay Round of trade negotiations, namely W/120 and the 1993 Scheduling Guidelines, as relevant context within the meaning of Article 31(2) of the *Vienna Convention*.

170. The Panel found that:

> ... both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, not only in the negotiation of their specific commitments, but as interpretative tools in the interpretation and application of Members' scheduled commitments. As such, these documents comprise the "context" of GATS Schedules, within the meaning of Article 31 of the *Vienna Convention* and the Panel will use them for the purpose of interpreting the GATS, GATS schedules and thus the US Schedule.[89]

171. Before turning to the specifics of the United States' appeal, we observe that the second paragraph of Article 31 of the *Vienna Convention* defines "context" as follows:

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

172. We also consider it useful to set out, briefly, the nature of the two documents at issue. On 10 July 1991, the GATT Secretariat circulated document W/120, entitled "SERVICES SECTORAL CLASSIFICATION LIST". This followed the circulation of an informal note containing a draft services sectoral classification list in May 1991, as well as the circulation of an initial reference list of sectors (the

[86]Panel Report, para. 6.63.

[87]*Ibid*., para. 6.66.

[88]*Ibid*., para. 6.67.

[89]Panel Report, para. 6.82.

"W/50") in April 1989.[90] A short cover note to W/120 explains that the document reflects, to the extent possible, comments made by negotiating parties on the May draft, and that W/120 itself might be subject to future modification. Otherwise, the document consists of a table in two columns. The left column is entitled "SECTORS AND SUBSECTORS" and consists of a list classifying services into 11 broad service sectors, each divided into several subsectors (more than 150 in total). The right column is entitled "CORRESPONDING CPC" and sets out, for nearly every subsector listed in the left-hand column, a CPC number to which that subsector corresponds. It is not disputed that the reference in W/120 to "CPC" is a reference to the United Nations' Provisional Central Product Classification.[91] The CPC is a detailed, multi-level classification of goods and services.[92] The CPC is *exhaustive* (all goods and services are covered) and its categories are *mutually exclusive* (a given good or service may only be classified in *one* CPC category).[93] The CPC consists of "Sections" (10), "Divisions" (69), "Groups" (295), "Classes" (1,050) and "Subclasses" (1,811). Of the 10 "Sections" of the CPC, the first five primarily classify *products*. They are based on the Harmonised Commodity Description and Coding System, and are not referred to in W/120. The second five Sections of the CPC primarily classify *services,* and all of the references in W/120 are to sub-categories of these five Sections.

173. On 3 September 1993, the GATT Secretariat, in response to requests by the negotiating parties, circulated an "Explanatory Note" designed to "assist in the preparation of offers, requests, and national Schedules of commitments" and to ensure "comparable and unambiguous commitments" and achieve "precision and clarity".[94] This document, known as the "1993 Scheduling Guidelines", addresses two main questions: (i) *what* items should be put in a Schedule; and (ii) *how* they should be entered. In addressing these questions, the Guidelines provide examples as to the types of measures that should be scheduled or need not be scheduled, and cover a variety of issues, including the scope of coverage under each mode of supply, and the relationship between different modes when making commitments on market access. The document also instructs Members as to the language to use when making a specific commitment,[95] and includes a template indicating the overall structure, and columns and rows that should constitute a Member's Schedule.

174. Bearing the above in mind, we see two main difficulties with the Panel's characterization of these documents as context. First, we see no basis for the Panel's finding that they "constitute an agreement made between all the parties or an instrument[] made between some parties and accepted by the others as such".[96] To reach this finding, the Panel reasoned that, although the documents were "technically" drafted by the GATT Secretariat:

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[90]MTN.GNS/W/50, 13 April 1989.

[91]Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991). The United Nations Central Product Classification has been revised on several occasions. The latest version is the Central Product Classification, Version 1.1, Statistical Papers, Series M No. 77, United Nations (2004).

[92]The main purposes of the CPC are to provide a framework for international comparison of statistics dealing with goods, services, and assets and to serve as a guide for developing and revising existing classification schemes of products. (Preface to the CPC, p. V)

[93]See *infra*, paras. 0 and 0 for further details on the CPC, and for the way in which the CPC classifies the services at issue in this dispute.

[94]Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, at p. 1.

[95]For example, paragraphs 24 to 27 explain that: to indicate a full commitment, a Member should enter "NONE"; to make no commitment, it should enter "UNBOUND"; and to make a commitment with limitations, the Member should enter a concise description of each measure, "indicating the elements which make it inconsistent with Articles XVI or XVII".

[96]Panel Report, para. 6.77.

> ... they can be considered "agreement[s] ... made between all [Members]" or ... "instrument[s] ... made by one or more [Members]" but accepted by all of them as such within the meaning of Article 31:2(a) and (b) of the Vienna Convention. In this regard, it may be recalled that the two documents were prepared by the – then – GATT Secretariat, at the behest of the Uruguay Round participants. The *participants* can thus be considered to be the "intellectual" authors of the documents. Besides, both documents were the object of a series of formal and informal consultations during which Members had the opportunity to amend them and to include changes. Both were circulated as formal "green band" documents with the agreement of the participants.[97] (footnotes omitted)

175. We note that Article 31(2) refers to the *agreement* or *acceptance* of the parties. In this case, both W/120 and the 1993 Scheduling Guidelines were drafted by the GATT Secretariat rather than the parties to the negotiations. It may be true that, on its own, authorship by a delegated body would not preclude specific documents[98] from falling within the scope of Article 31(2). However, we are not persuaded that in this case the Panel could find W/120 and the 1993 Scheduling Guidelines to be context. Such documents can be characterized as context only where there is sufficient evidence of their constituting an "agreement relating to the treaty" between the parties or of their "accept[ance by the parties] as an instrument related to the treaty".

176. We do not accept, as the Panel appears to have done, that, simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty. Indeed, there are indications to the contrary. As the United States pointed out before the Panel, the United States and several other parties to the negotiations clearly stated, at the time W/120 was proposed, that, although Members were encouraged to follow the broad structure of W/120, it was never meant to bind Members to the CPC definitions, nor to any other "specific nomenclature", and that "the composition of the list was not a matter for negotiations".[99] Similarly, the Explanatory Note that prefaces the Scheduling Guidelines itself appears to

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[97] *Ibid*., para. 6.80.

[98] The Panel reasoned that assigning the task of drafting these documents to the Secretariat was simply "the most practical and efficient way to work on such a matter" and that such delegation did not deprive the parties to the negotiations of authorship. (Panel Report, para. 6.80)

[99] Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, para. 19 (24 June 1991) (quoted in Panel Report, para. 3.41 and footnote 117 thereto). The paragraphs of this Note cited by the United States are taken from the minutes from a meeting that was held *after* the Secretariat had circulated its first draft classification list, but *before* the final version of W/120 had been circulated. The content of those paragraphs is as follows:

> 18. The representatives of the European Communities, Canada, Chile, the United States, Japan, Poland, Sweden on behalf of the Nordic countries and Mexico found that the proposed classification contained in the informal note by the secretariat constituted an improvement over the list contained in MTN.GNS/W/50. There was confirmation of the agreement to base the classification of services sectors and subsectors as much as possible on the Central Product Classification (CPC) list. There was some agreement that putting together a classification list of services was an on-going work which required coordination with efforts undertaken in other fora. The representative of Austria stressed the need to involve statistical experts in the work since the classification list resulting from the GNS would in the future serve as the basis for the compilation of statistics on services. The representative of Japan said not only statistical but also sectoral experts should take part in drawing up the list.
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> 19. The representative of the United States did not wish to have extensive discussions on the matter and stressed that the composition of the list was not a

contradict the Panel in this regard, as it expressly provides that, although it is intended to assist "persons responsible for scheduling commitments", that assistance "should not be considered as an authoritative legal interpretation of the GATS."[100]

177. The Panel also reasoned that:

> .... both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, *not only in the negotiation* of their specific commitments, but *as interpretative tools* in the interpretation and application of Members' scheduled commitments.[101] (emphasis added)

In our opinion, the Panel's description of how these documents were created and used may suggest that the parties agreed to use such documents in the negotiations of their specific commitments. The Panel cited no evidence, however, directly supporting its further conclusion, in the quotation above, that the agreement of the parties encompassed an agreement to use the documents "as interpretative tools in the interpretation and application of Members' scheduled commitments."

178. In our opinion, therefore, the Panel erred in categorizing W/120 and the 1993 Scheduling Guidelines as "context" for the interpretation of the United States' GATS Schedule. Accordingly, we set aside this part of the Panel's examination of "context". There is, however, additional context referred to by the Panel and the participants that we must consider, namely: (i) the remainder of the United States' Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of *other* Members.

179. We begin by examining the immediate context in which the relevant entry is found, that is, the United States' Schedule as a whole. The United States admits that it "generally followed the W/120 *structure* in its Schedule of specific commitments."[102] The Schedule makes no reference to CPC codes. The Schedule does, however, refer to W/120 in two instances[103], apparently in order to make clear that the United States' commitment corresponds to only *part* of a subsector listed in W/120. This suggests that, at least for some of its entries, the United States also expressly referred to W/120 in order to define the *content* of a Schedule entry and, thereby, limit the *scope* of its specific commitment.[104] At the same time, the context provided by the United States' Schedule as a whole does not indicate clearly the scope of the commitment in subsector 10.D.

180. We move, therefore, to examine the context provided by the structure of the GATS itself. The agreement defines "services" very broadly, as including "*any* service in *any* sector except services

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> matter for negotiations. This view was shared by the representative of the European Communities. The representatives of the United States, Poland, Malaysia and Austria said that the list should be illustrative or indicative and not bind parties to any specific nomenclature. The representative of Malaysia suggested that it would be important to have the definitions behind individual items in the list, especially where there was a high degree of aggregation.

[100]1993 Scheduling Guidelines, p. 1.

[101]Panel Report, para. 6.82.

[102]United States' response to Question 5 posed by the Panel, Panel Report, p. C-26. (original emphasis)

[103]Sector B of the Schedule is as follows "COMPUTER AND RELATED SERVICES (MTN.GNS/W/120 a) - e), except airline computer reservation systems)"; and the entry in subsector F.r reads "Publishing (Only part of MTN.GNS/W/120 category: 'r) Printing, Publishing')".

[104]The Panel made a similar point in paragraph 6.104 of the Panel Report and footnote 665 thereto.

supplied in the exercise of governmental authority".[105] In addition, the GATS definition of "sector" provides that any reference to a "sector" means—unless otherwise specified in a Member's Schedule—a reference to *all* of the subsectors contained within that sector.[106] Many of the obligations in the GATS apply only in sectors in which a Member has undertaken specific commitments.[107] To us, the structure of the GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Secondly, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive.[108] In the context of the United States' Schedule, this means that, notwithstanding the broad language used in sector 10—for example, "recreational services", "sporting", and "entertainment services"—, gambling and betting services can *only* fall—if at all—within *one* of those service categories.

181. Looking beyond the GATS to other covered agreements, we observe that Article 22.3(f) of the DSU provides that, for purposes of suspending concessions, "'sector' means ....(ii) with respect to services, a principal sector as identified in the current 'Services Sectoral Classification List' which identifies such sectors". A footnote adds that "[t]he list in document MTN.GNS/W/120 identifies eleven sectors." This reference confirms the relevance of W/120 to the task of identifying service sectors in GATS Schedules, but does not appear to assist in the task of ascertaining within which *subsector* of a Member's Schedule a specific service falls.

182. Both participants[109], as well as the Panel, accepted that other Members' Schedules constitute relevant context for the interpretation of subsector 10.D of the United States' Schedule.[110] As the Panel pointed out, this is the logical consequence of Article XX:3 of the GATS, which provides that Members' Schedules are "an integral part" of the GATS. We agree. At the same time, as the Panel rightly acknowledged, use of other Members' Schedules as context must be tempered by the recognition that "[e]ach Schedule has its own intrinsic logic, which is different from the US Schedule."[111]

183. The United States relies on the Schedules of other Members as context seeking to establish that: (i) because many Members refer to CPC codes in their Schedules but the United States does not, the

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[105]GATS Article I:3(b). (emphasis added)

[106]Article XXVIII provides that:

> (e) "sector" of a service means,
>
> (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
>
> (ii) otherwise, the whole of that service sector, including all of its subsectors;

[107]See, for example, Articles VI:1, VIII:1, XVI, and XVII of the GATS.

[108]If this were not the case, and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other. At the oral hearing in this appeal, both the United States and Antigua agreed that the entries in a Member's Schedule must be mutually exclusive. See also Panel Report, paras. 6.63, 6.101, and 6.119.

[109]Antigua's and United States' responses to questioning at the oral hearing.

[110]In paragraph 6.97 of the Panel Report, the Panel stated that it agreed "with the United States that other Members' Schedules comprise the 'context' within the meaning of Article 31:2 of the Vienna Convention."

[111]Panel Report, para. 6.98. By referring to other Members' Schedules here, we are not interpreting such Schedules, but rather using them as "context" for the interpretation of the United States' Schedule.

United States' Schedule cannot be "presumed" to follow the CPC; and (ii) scheduling gambling and betting services in subsector 10.E (rather than 10.D) was one of several accepted approaches used by Members.[112] We are not persuaded that the conclusions the United States argues must be drawn from this context necessarily follow. It is true that a large majority of Members used CPC codes in their Schedules. It is also true that the United States did not use them.[113] However, the United States' Schedule, like the Schedules of nearly all Members, generally follows the structure, and adopts the language, of W/120.[114] These structural and linguistic similarities lead us to conclude, contrary to the United States submission, that the absence of references to CPC codes does not mean that words used in the United States' Schedule *must* have a different meaning and scope than the same words used in the Schedules of other Members.

184. We also note that, unlike the United States, several Members specifically used the words "gambling and betting services", or some approximation thereof, in their Schedules.[115] The fact that the United States did not use any such specific language tends, if anything, to undercut its assertion that it intended to single out such services for exclusion from the scope of its commitment. Whether or not they used the term "gambling and betting services" in their Schedules, several Members also made clear, through reference to CPC codes, that they were making a commitment in respect of "sporting services" and that the services falling within the category "sporting services" did *not* include gambling and betting services.[116] Moreover, the United States did not point to any example in another Member's Schedule where the category of "sporting services" clearly *included* gambling and betting services.

185. We also find unpersuasive the arguments of the United States with respect to subsector 10.E, "Other".[117] Only one Member clearly scheduled gambling and betting services in subsector 10.E, and it used specific words to do so.[118] Another Member specifically excluded "gambling and gambling related services" from the scope of its commitment under subsector 10.A.[119] From these examples it appears that different Members have dealt with gambling and betting services in different subsectors of their Schedules. But the examples also suggest that Members have used specific language in order to make clear the location of their commitments within their own Schedules. Furthermore, as the Panel noted[120],

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[112]Before the Panel, the United States referred to the Schedules of Iceland and Senegal. (See footnote 106 to para. 74 of the United States' first written submission to the Panel)

[113]The Panel observed, in an earlier discussion, that:

> ... most Members chose to refer to CPC numbers to define the scope of their commitments: (i) only 17 schedules adopted a non-CPC approach; (ii) a few schedules have a "mixed" approach, i.e. they include CPC numbers for some sectors only.
>
> (Panel Report, footnote 651 to para. 6.81)

[114]As we observed *supra*, para. 0, the United States admits that it generally followed the W/120 structure, and its Schedule specifically refers to W/120 in two instances.

[115]In most instances, the words appear to be used to exclude these services from the scope of the commitment. See the Schedules of Austria (GATS/SC/7); Bulgaria (GATS/SC/122); Croatia (GATS/SC/130); the European Communities (GATS/SC/31); Finland (GATS/SC/33); Lithuania (GATS/SC/133); Slovenia (GATS/SC/99); and Sweden (GATS/SC/82). In two cases, however, the words appear to be used to make a limited specific commitment. See the Schedules of Peru (GATS/SC/69) and Senegal (GATS/SC/75).

[116]See the Schedules of Australia (GATS/SC/6); Japan (GATS/SC/46); Liechtenstein (GATS/SC/83-A); Switzerland (GATS/SC/83); and Thailand (GATS/SC/85).

[117]Although subsector 10.E, "Other", figures in W/120, no such entry is included in the United States' Schedule.

[118]Senegal listed "Gambling and betting services" under 10.E. However, Senegal also appears to have made a relatively narrow commitment under 10.D, with respect to "Recreational Fishing" only.

[119]See the Schedule of Bulgaria. (GATS/SC/122)

[120]Panel Report, para. 6.101.

the United States' argument that gambling and betting services fall under subsector 10.E appears to contradict its argument that gambling and betting services are comprised in the ordinary meaning of "sporting services" under subsector 10.D. As we have observed above, the same service cannot be covered in two different subsectors within the *same* Schedule.[121]

186. Overall, we find it significant that the entries made by many Members in sector 10 of their Schedules contain text additional to the text found in the headings and sub-headings used by the United States (and used in W/120). Such Members disaggregated their entries beyond the five subsectors identified in W/120 as falling within sector 10. There is a broad range of ways in which this was accomplished. Some Members used CPC codes with more digits than the codes used in W/120, (that is, indicating a more disaggregated service category) and some used (either in addition to the CPC codes or alone) precise wording to indicate that gambling and betting services were somehow treated differently from other services in subsector 10.D. Several Members used CPC codes to distinguish commitments with respect to sporting services from commitments with respect to gambling and betting services. This context indicates that Members seeking to distinguish the commitments they were making regarding gambling and betting services from other commitments they were making in subsector 10.D used specific language and/or CPC codes to indicate this distinction. This context does not, however, provide a definitive answer to the question whether, in the United States' Schedule, gambling and betting services fall within the ordinary meaning of the word "sporting", within the ordinary meaning of the term "other recreational services", or elsewhere.

187. The above examination leads us to the view that an examination of the term "Other recreational services (except sporting)" in its context does not clearly reveal whether, in the United States' Schedule to the GATS, gambling and betting services fall within the category of "other recreational services" or within the category of "sporting services". Accordingly, we turn to the object and purpose of the GATS to obtain further guidance for our interpretation.

188. The Panel referred to the requirement of "transparency" found in the preamble to the GATS, as supporting the need for precision and clarity in scheduling, and underlining the importance of having Schedules that are "readily understandable by all other WTO Members, as well as by services suppliers and consumers".[122] The Panel also referred to the Appellate Body Report in *EC – Computer Equipment* as follows:

> The Appellate Body found that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994." This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS.[123] (footnote omitted)

189. We agree with the Panel's characterization of these objectives, along with its suggestion that they reinforce the importance of Members' making clear commitments. Yet these considerations do not provide specific assistance for determining where, in the United States' Schedule, "gambling and betting services" fall. Accordingly, it is necessary to continue our analysis by examining other elements to be taken into account in interpreting treaty provisions.

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[121] *Supra*, para. 0.

[122] Panel Report, para. 6.107.

[123] *Ibid*., para. 6.108.

190. In addition to context, the third paragraph of Article 31 of the *Vienna Convention* directs a treaty interpreter to take into account, *inter alia*, subsequent practice establishing the agreement of the parties regarding the interpretation of the treaty. Antigua argues that the "subsequent practice" of Members demonstrates that W/120 and the Scheduling Guidelines must be used to interpret the United States' GATS Schedule.[124] Antigua asserts that such relevant subsequent practice is found in the 2001 Scheduling Guidelines[125], in a submission made by the United States regarding the classification of energy services[126], as well as in a publication by the United States International Trade Commission ("USITC").[127] The Panel did not reach these arguments by Antigua as it had found W/120 and the 1993 Scheduling Guidelines to be context.

191. In *Japan – Alcoholic Beverages II* and *Chile – Price Band System*, respectively, the Appellate Body referred to "practice" within the meaning of Article 31(3)(b) as:

> ... a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.[128]

> ... a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the interpretation of [the relevant provision][129]

192. Thus, in order for "practice" within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision.

193. We have difficulty accepting Antigua's position that the 2001 Scheduling Guidelines constitute "subsequent practice" revealing a common understanding that Members' specific commitments are to be

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[124]Antigua's response to Question 1 posed by the Panel, Panel Report, pp. C-1 to C-3.

[125]Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services, S/L/92. The 2001 Scheduling Guidelines serve, in the current round of services negotiations, the same function as the 1993 Scheduling Guidelines served in the Uruguay Round negotiations. The former reproduce the 1993 Scheduling Guidelines almost in their entirety, and contain some additional provisions. The 2001 Scheduling Guidelines were adopted by the Council for Trade in Services on 23 March 2001.

[126]Antigua referred to document S/CSC/W/27, a proposal submitted by the United States concerning the classification of energy services. (Antigua's first written submission to the Panel, footnote 301 to para. 173) Paragraph 2 of this document states that:

> These numerous energy-related activities are closely interrelated and, taken as a whole, can be said to comprise the "energy sector." Some of these activities cut horizontally across *existing GATS sectoral classifications (W/120)*, such as business services, communications services, construction services, financial services, and transportation services, among others. Others may involve activities that are not yet specified in existing GATS classifications, are deeply embedded in existing GATS classifications, or are not within the scope of the GATS. (emphasis added)

[127]*US Schedule of Commitments under the General Agreement on Trade in Services*, United States International Trade Commission, May 1997, p. 25.

[128]Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at 106. The Appellate Body, in that case, found that panel reports adopted by the GATT contracting parties do *not* constitute subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention*.

[129]Appellate Body Report, *Chile – Price Band System*, para. 214.

construed in accordance with W/120 and the 1993 Scheduling Guidelines. Although the 2001 Guidelines were explicitly adopted by the Council for Trade in Services, this was in the context of the negotiation of *future* commitments and in order to assist in the preparation of offers and requests in respect of such commitments. As such, they do not constitute evidence of Members' understanding regarding the interpretation of *existing* commitments. Furthermore, as the United States emphasized before the Panel, in its Decision adopting the 2001 Guidelines, the Council for Trade in Services explicitly stated that they were to be "non-binding" and "shall not modify any rights or obligations of the Members under the GATS".[130] Accordingly, we do not consider that the 2001 Guidelines, in and of themselves, constitute "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention.*

194. Nor do the two other documents relied on by Antigua constitute "subsequent practice". Although they may be relevant in identifying the United States' practice, they do not establish a common, consistent, discernible pattern of acts or pronouncements by Members as a whole. Nor do they demonstrate a common understanding *among Members* that specific commitments are to be interpreted by reference to W/120 and the 1993 Scheduling Guidelines. Accordingly, we do not find that Antigua has identified any relevant subsequent practice that can assist us in the interpretation of subsector 10.D of the United States' Schedule.

195. The above reasoning leads us to the conclusion—contrary to the Panel[131]—that application of the general rule of interpretation set out in Article 31 of the *Vienna Convention* leaves the meaning of "other recreational services (except sporting)" ambiguous and does not answer the question whether the commitment made by the United States in subsector 10.D of its Schedule includes a commitment in respect of gambling and betting services. Accordingly, we are required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the *Vienna Convention.*[132]

B. *Interpretation of Subsector 10.D in Accordance with Supplementary Means of Interpretation: Article 32 of the Vienna Convention*

196. We observe, as a preliminary matter, that this appeal does *not* raise the question whether W/120 and the 1993 Scheduling Guidelines constitute "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". Both participants agree that they do, and we see no reason to disagree.[133]

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[130]United States' response to Question 39 posed by the Panel, Panel Report, pp. C-63 to C-64.

[131]The Panel concluded, at para. 6.110 of the Panel Report, that:

> The US Schedule, read in the light of paragraph 16 of the Scheduling Guidelines, can be understood to include a specific commitment on gambling and betting services under subsector 10.D (*Recreational services (except sporting)*). (original italics)

[132]The Panel also had recourse to such means in order to "confirm" the meaning that it had reached through application of Article 31. (Panel Report, para. 6.112)

[133]Some of the reasoning employed by the Panel in order to conclude (erroneously in our view) that these documents constituted "context" nevertheless confirms that they constitute "preparatory work", and are relevant "circumstances" relating to the conclusion of the GATS within the meaning of Article 32:

> ... both W/120 and the 1993 Scheduling Guidelines are "in connexion" with the GATS. Both documents were drafted in parallel with the GATS itself, with the stated purpose of being used as "guides" for scheduling specific commitments under the GATS ... In that sense, they can be considered to have been "drawn up on the occasion of the conclusion of the treaty". (footnote omitted)

(Panel Report, para. 6.81)

197. The United States argues, however, that, because the "ordinary meaning" of subsector 10.D of its Schedule is clear from an examination of the text, context (not including W/120 and the 1993 Scheduling Guidelines) and object and purpose, it is neither necessary nor appropriate to have recourse to Article 32 of the *Vienna Convention*. We disagree. As we have explained, the Panel erred in characterizing W/120 and the 1993 Scheduling Guidelines as "context". Yet, we have also seen that a proper interpretation pursuant to the principles codified in Article 31 of the *Vienna Convention* does not yield a clear meaning as to the scope of the commitment made by the United States in the entry "Other recreational services (except sporting)". Accordingly, it is appropriate to have recourse to the supplemental means of interpretation identified in Article 32 of the *Vienna Convention*. These means include W/120, the 1993 Scheduling Guidelines, and a cover note attached to drafts of the United States' Schedule.

198. Turning to the question of how the subsector 10.D entry "Other recreational services (except sporting)" is to be interpreted in the light of W/120 and the Scheduling Guidelines, we consider it useful to set out the relevant parts of both documents. The relevant section of W/120 is as follows:

SECTORS AND SUB-SECTORS		CORRESPONDING CPC
[...]		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)	
A.	Entertainment services (including theatre, live bands and circus services)	9619
B.	News agency services	962
C.	Libraries, archives, museums and other cultural services	963
D.	Sporting and other recreational services	964
E.	Other	

199. Thus, W/120 clearly indicates that its entry 10.D—"Sporting and other recreational services"—corresponds to CPC Group 964. W/120 does not, however, contain any explicit indication of: (i) whether the reference to Group 964 necessarily incorporates a reference to *each and every sub-category* of Group 964 within the CPC; or (ii) how W/120 relates to the GATS Schedules of individual Members.

200. With respect to the first issue, we observe that W/120 sets out a much more aggregated classification list than the one found in the CPC. Whereas W/120 contains 12 sectors (11 and one "other") and more than 150 subsectors, the CPC classification scheme is comprised of 10 Sections, 69 Divisions, 295 Groups, 1,050 Classes and 1,811 Subclasses. The first draft classification list prepared by the GATT Secretariat, W/50, explained that one of the reasons for selecting the CPC as a basis for classification in the services negotiations was that such a product-based system "allows a *higher degree of disaggregation and precision* to be attained should it become necessary, at a later stage."[134] Thus, the CPC's level of disaggregation was one of the very reasons it was selected as a basis for a sectoral classification list. As the CPC is a decimal system[135], a reference to an aggregate category must

[134]MTN.GNS/W/50, para. 6. (emphasis added)

[135]The CPC hierarchy consists of Sections designated by one-digit codes, Divisions designated by two-digit codes, Groups designated by three-digit codes, Classes designated by four-digit codes, and Subclasses designated by five-digit codes.

be understood as a reference to all of the constituent parts of that category. Put differently, a reference to a three-digit CPC Group should, in the absence of any indication to the contrary, be understood as a reference to all the four-digit Classes and five-digit Sub-classes that make up the group; and a reference to a four-digit Class should be understood as a reference to all of the five-digit Sub-classes that make up that Class.

201. In the CPC, Group 964, which corresponds to subsector 10.D of W/120 (Sporting and other recreational services), is broken down into the following Classes and Sub-classes:

964 Sporting and other recreational services

9641 Sporting services
96411 Sports event promotion services
96412 Sports event organization services
96413 Sports facility operation services
96419 Other sporting services

9649 Other recreational services
96491 Recreation park and beach services
96492 Gambling and betting services
96499 Other recreational services n.e.c.

Thus, the CPC Class that corresponds to "Sporting services" (9641) does *not* include gambling and betting services. Rather, the Sub-class for gambling and betting services (96492) falls under the Class "Other recreational services" (9649).

202. W/120 does not shed light on the issue of how it relates to individual Member's Schedules. That issue is, however, addressed in the 1993 Scheduling Guidelines:

> **HOW SHOULD ITEMS BE SCHEDULED?**
>
> 15. Schedules record, for each sector, the legally enforceable commitments of each Member. It is therefore vital that schedules be clear, precise and based on a common format and terminology. This section describes how commitments should be entered in schedules. ...
>
> **A. How to describe committed sectors and subsectors**
>
> 16. The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or subsector scheduled. In general the classification of sectors and subsectors should be based on the Secretariat's revised Services Sectoral Classification List. [W/120] Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. 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 (e.g. Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each subsector, is contained in the UN Provisional Central Product Classification.

> Example: A Member wishes to indicate an offer or commitment in the subsector of map-making services. In the Secretariat list, this service would fall under the general heading "Other Business Services" under "Related scientific and technical consulting services" (see item 1.F.m). By consulting the CPC, map-making can be found under the corresponding CPC classification number 86754. In its offer/schedule, the Member would then enter the subsector under the "Other Business Services" section of its schedule as follows:
>
> Map-making services (86754)
>
> *If a Member wishes to use its own subsectoral 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*. (emphasis added; footnote omitted)

203. The Scheduling Guidelines thus underline the importance of using a common format and terminology in scheduling, and express a clear preference for parties to use W/120 and the CPC classifications in their Schedules. At the same time, the Guidelines make clear that parties wanting to use their own subsectoral classification or definitions—that is, to disaggregate in a way that diverges from W/120 and/or the CPC—were to do so in a "sufficiently detailed" way "to avoid any ambiguity as to the scope of the commitment." The example given in the Scheduling Guidelines illustrates how to make a positive commitment with respect to a discrete service that is more disaggregated than a service subsector identified in W/120. It is reasonable to assume that the parties to the negotiations expected the same technique to be applied to *exclude* a discrete service from the scope of a commitment, when the commitment is made in a subsector identified in W/120 and the excluded service is more disaggregated than that subsector.

204. In our view, the requisite clarity as to the scope of a commitment could not have been achieved through mere omission of CPC codes, particularly where a specific sector of a Member's Schedule, such as sector 10 of the United States' Schedule, follows the structure of W/120 in all other respects, and adopts *precisely* the same terminology as used in W/120. As discussed above, W/120 and the 1993 Scheduling Guidelines were prepared and circulated at the request of parties to the Uruguay Round negotiations for the express purpose of assisting those parties in the preparation of their offers. These documents undoubtedly served, too, to assist parties in reviewing and evaluating the offers made by others. They provided a common language and structure which, although not obligatory, was widely used and relied upon. In such circumstances, and in the light of the specific guidance provided in the 1993 Scheduling Guidelines, it is reasonable to assume that parties to the negotiations examining a sector of a Schedule that tracked so closely the language of the same sector in W/120 would—absent a clear indication to the contrary—have expected the sector to have the same coverage as the corresponding W/120 sector. This is another way of stating that, as the Panel observed, "unless otherwise indicated in the Schedule, Members were assumed to have relied on W/120 and the corresponding CPC references."[136]

205. Accordingly, the above excerpt from the 1993 Scheduling Guidelines, together with the linguistic similarities between the two subsectors, provide strong support for interpreting subsector 10.D of the United States' Schedule as corresponding to subsector 10.D of W/120, notwithstanding the absence of CPC codes in the United States' Schedule. Subsector 10.D of W/120, in turn, corresponds to Class 964 of CPC, along with its sub-categories.

[136]Panel Report, para. 6.106.

206. We observe that another element of the preparatory work of the GATS suggests that the United States itself understood the Scheduling Guidelines in this way and sought to comply with them in the drafting of its GATS Schedule. Several drafts of the United States' Schedule included the following cover note:

> [E]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991).[137]

207. These explanatory notes confirm that the United States used W/120 and sought to follow the 1993 Scheduling Guidelines. Although the United States emphasizes that this note did not form part of the final version of the United States' GATS Schedule, the reasons why the note was omitted are unclear[138] and, in any event, the commitment made by the United States in subsector 10.D remained the same in the drafts that had this cover note and in the final version of the Schedule. In other words, the other parties to the negotiations could not have been expected to understand that the mere omission of the cover note from the final version of the United States' Schedule somehow modified the scope of the commitment undertaken in Sector 10.

208. In our view, therefore, the relevant entry in the United States' Schedule, "Other recreational services (except sporting)", must be interpreted as *excluding* from the scope of its specific commitment services corresponding to CPC class 9641, "Sporting services". For the same reasons, the entry must be read as *including* within the scope of its commitment services corresponding to CPC 9649, "Other recreational services", including Sub-class 96492, "Gambling and betting services".

(…)

C. *Summary*

213. Based on our reasoning above, we reject the United States' argument that, by excluding "sporting" services from the scope of its commitment in subsector 10.D, the United States excluded gambling and betting services from the scope of that commitment. Accordingly, we *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.2(a) of the Panel Report, that:

> ... the United States' Schedule under the GATS includes specific commitments on gambling and betting services under subsector 10.D.

VI. Article XVI of the GATS: Market Access

214. Article XVI of the GATS sets out specific obligations for Members that apply insofar as a Member has undertaken "specific market access commitments" in its Schedule. The first paragraph of Article XVI obliges Members to accord services and service suppliers of other Members "no less favourable treatment than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." The second paragraph of Article XVI defines, in six sub-paragraphs, measures

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[137]Communication from the United States of America – Draft Final Schedule of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.3, 7 December 1993. See also MTN.GNS/W/112/Rev.2, 1 October 1993.

[138]Before the Panel, and at the oral hearing in this appeal, the European Communities explained that such notes were removed as part of the process of "technical verification" of schedules and that the United States could not have unilaterally amended the scope of its commitments after 15 December 1993. See the parties' responses to Question 3 posed by the Panel, Panel Report, pp. C-22ff.

that a Member, having undertaken a specific commitment, is not to adopt or maintain, "unless otherwise specified in its Schedule". The first four sub-paragraphs concern quantitative limitations on market access; the fifth sub-paragraph covers measures that restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and the sixth sub-paragraph identifies limitations on the participation of foreign capital.

215. The Panel found that the United States' Schedule includes specific commitments on gambling and betting services, and we have upheld this finding. The Panel then considered the consistency of the measures at issue with the United States' obligations under Article XVI of the GATS. The scope of those obligations depends on the scope of the specific commitment made in the United States' Schedule. In this case, the relevant entry for mode 1 supply in the market access column of subsector 10.D of the United States' Schedule reads "None".[139] In other words, the United States has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of its subsector 10.D commitment. In so doing, it has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI:2.

216. Before the Panel, Antigua claimed that, in maintaining measures that prohibit the cross-border supply of gambling and betting services, the United States is maintaining quantitative limitations that fall within the scope of sub-paragraphs (a) and (c) of Article XVI and that are, therefore, inconsistent with the market access commitment undertaken in subsector 10.D of the United States' Schedule. The Panel took the view that a prohibition on the supply of certain services effectively "limits to zero" the number of service suppliers and number of service operations relating to that service. The Panel reasoned that such a prohibition results in a "zero quota" and, therefore, constitutes a "'limitation on the number of service suppliers in the form of numerical quotas' within the meaning of Article XVI:2(a)" and "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)".[140]

217. In consequence, the Panel found that, by maintaining the following measures, the United States acts inconsistently with its obligations under Article XVI of the GATS:

Federal laws

(1) the Wire Act;

(2) the Travel Act (when read together with the relevant state laws); and

(3) the Illegal Gambling Business Act (when read together with the relevant state laws).

State laws:

(1) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);

(2) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;

(3) South Dakota: Section 22-25A-8 of the South Dakota Codified Laws; and

[139]This notation is the opposite of the notation "Unbound", which means that a Member undertakes *no* specific commitment.

[140]Panel Report, paras. 6.338 and 6.355.

(4) Utah: Section 76-10-1102(b) of the Utah Code (Annotated).[141]

A. *Preliminary Matters*

218. The United States appeals both the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI, as well as its application of those provisions to the measures at issue. We have already determined that the Panel should not have made findings under Article XVI with respect to certain state laws because Antigua had not made out a *prima facie* case in respect of these measures. Having already reversed the Panel's findings regarding these state laws[142], we need not consider them further in our assessment of this part of the United States' appeal. Accordingly, our analysis below is limited to a review of the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, as well as to its application of that interpretation to the three *federal* statutes at issue in this case.

219. We also note that the Notice of Appeal filed by the United States appears to indicate a separate, independent challenge to:

> The Panel's finding that a WTO Member does not respect its GATS market access obligations under Article XVI:2 if it limits market access to any part of a scheduled sector or subsector, or if it restricts any means of delivery under mode 1 with respect to a committed sector.[143]

220. The United States did not, however, adduce any arguments in support of such a challenge in its appellant's submission. Nor did the United States expressly refer to, or request us to reverse, any paragraph of the Panel Report in which the "finding" referred to in the above excerpt is found. Accordingly, we understand that the United States does *not* challenge separately the Panel's findings as regards restrictions on the supply of *part of a sector*, or as regards restrictions on *part of a mode of supply* (that is, on one or more means of supplying a given service).[144] In response to questioning at the oral hearing, the United States confirmed that its appeal focuses on the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2[145], and we shall limit our examination accordingly.

B. *The Meaning of Sub-paragraphs (a) and (c) of Article XVI*

221. The chapeau to Article XVI:2, and sub-paragraphs (a) and (c), provide:

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

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[141]See Panel Report, paras. 6.421 and 7.2(b). The Panel's findings that specific measures afforded treatment less favourable than that provided for in the United States' schedule are found in paragraphs 6.365, 6.373, 6.380, 6.389, 6.395, and 6.412.

[142]*Supra*, paras. 0 and .

[143]United States' Notice of Appeal, para. 3(c), *supra*, footnote **Error! Bookmark not defined.**.

[144]We understand the relevant findings to be those in paragraphs 6.287 and 6.290 of the Panel Report. The Panel found that: (i) as regards a particular service, a Member that has made an unlimited market access commitment under mode 1 commits itself not to maintain measures that prohibit the use of one, several or all means of delivery of that service; and (ii) a Member that has made a market access commitment in a sector or subsector has committed itself in respect of *all* services that fall within the relevant sector or subsector.

[145]In response to a question on this issue at the oral hearing, the United States stated that its arguments on these points are in the nature of "subsidiary" or "supporting" arguments. According to the United States, these arguments illustrate why the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI was "unreasonable".

> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; ...
>
> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; [9]

[9] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

222. In its appeal, the United States emphasizes 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 sub-paragraph (a) or (c) of Article XVI:2. The United States contends that the Panel erred in its interpretation of sub-paragraphs (a) and (c) of 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". According to the United States, the Panel appears to have been influenced by a "misguided"[146] concern that prohibitions on foreign service suppliers should not escape the application of Article XVI simply because they are not expressed in numerical terms. The United States asserts that the Panel ignored the fact that such prohibitions remain subject to other provisions of the Agreement, including Articles XVII and VI, and contends that, in its approach, the Panel improperly expanded the obligations in Article XVI. For the United States, Members that have made a specific commitment under Article XVI have committed themselves not to maintain the precisely defined limitations set out in Article XVI:2; Members have *not* committed themselves to eliminate all other limitations or restrictions that may impede the supply of the relevant services.

1. Sub-paragraph (a) of Article XVI:2

223. In interpreting sub-paragraph (a) of Article XVI:2, the Panel determined 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.[147]

224. The United States submits that this interpretation ignores the text of sub-paragraph (a), in particular the meaning of "form" and "numerical quotas", and erroneously includes within the scope of Article XVI:2(a) measures that have the *effect* of limiting the number of service suppliers or output to zero. Although the Panel opined that any other result would be "absurd", the United States stresses the opposite—that a contrary result would be consistent with the balance between liberalization and the right to regulate that is reflected in the GATS.

225. Article XVI:2(a) prohibits "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test." In interpreting this provision we observe, first, that it refers to restrictions "on the *number* of service suppliers", as well as to "*numerical* quotas". These words reflect that the focus of Article XVI:2(a) is on limitations relating to numbers or, put differently, to *quantitative* limitations.

[146] United States' appellant's submission, para. 98.

[147] Panel Report, para. 6.338.

226. The United States urges us to give proper effect to the terms "in the form of" in sub-paragraph (a) and, to that end, refers to dictionary definitions to establish the meaning of "form" in Article XIV:2(a). Yet even these definitions suggest a degree of ambiguity as to the scope of the word "form". For example, "form" covers both the mode in which a thing "exists", as well as the mode in which it "manifests itself". This suggests a broad meaning for the term "form".[148]

227. The words "in the form of" in sub-paragraph (a) relate to all four of the limitations identified in that provision. It follows, in our view, that the four types of limitations, themselves, impart meaning to "in the form of". Looking at these four types of limitations in Article XVI:2(a), we begin with "numerical quotas". These words are not defined in the GATS. According to the dictionary definitions provided by the United States, the meaning of the word "numerical" includes "characteristic of a number or numbers".[149] The word "quota" means, *inter alia*, "the maximum number or quantity belonging, due, given, or permitted to an individual or group"; and "numerical limitations on imports or exports".[150] Thus, a "numerical quota" within Article XVI:2(a) appears to mean a quantitative limit on the number of service suppliers. The fact that the word "numerical" encompasses things which "have the characteristics of a number" suggests that limitations "in the form of a numerical quota" would encompass limitations which, even if not in themselves a number, have the characteristics of a number. Because zero is *quantitative* in nature, it can, in our view, be deemed to have the "characteristics of" a number—that is, to be "numerical".

228. The second type of limitation mentioned in sub-paragraph (a) is "limitations on the number of service suppliers... in the form of ... monopolies". Although the word "monopolies", as such, is not defined, Article XXVIII(h) of the GATS defines a "monopoly supplier of a service" as:

> ... any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally *or in effect* by that Member as the sole supplier of that service. (emphasis added)

229. The term "exclusive service suppliers", which is used to identify the third limitation in Article XVI:2(a) ("limitations on the number of service suppliers...in the form of exclusive service suppliers"), is defined in Article VIII:5 of the GATS, as:

> ... where a Member, formally *or in effect*, (*a*) authorizes or establishes a small number of service suppliers and (*b*) substantially prevents competition among those suppliers in its territory. (emphasis added)

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

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[148]In footnote 166 to paragraph 105 of its appellant's submission, the United States refers to "*The New Shorter Oxford English Dictionary,* p. 1006, which defines 'form' *inter alia* as 'shape, arrangement of parts,' or '[t]he particular mode in which a thing exists or manifests itself,' or, in linguistics, 'the external characteristics of a word or other unit as distinct from its meaning".

[149]The United States, at footnote 167 to paragraph 105 of its appellant's submission, observes that the "*New Shorter Oxford English Dictionary,* at p. 1955, defines 'numerical' as '[o]f, pertaining to, or characteristic of a number or numbers; (of a figure, symbol, etc.) expressing a number.'"

[150]The United States' appellant's submission, footnote 167 to para. 105 (referring to the *New Shorter Oxford English Dictionary,* p. 2454).

231. We further observe that it is not clear that "limitations on the number of service suppliers ... in the form of ... the requirements of an economic needs test" must take a particular "form."[151] Thus, this fourth type of limitation, too, suggests that the words "in the form of" must not be interpreted as prescribing a rigid mechanical formula.

232. This is not to say that the words "in the form of" should be ignored or replaced by the words "that have the effect of". Yet, at the same time, they cannot be read in isolation. Rather, when viewed as a whole, the text of sub-paragraph (a) supports the view that the words "in the form of" must be read in conjunction with the words that precede them—"limitations on the *number* of service suppliers"—as well as the words that follow them, including the words "*numerical* quotas". (emphasis added) Read in this way, it is clear that the thrust of sub-paragraph (a) is not on the *form* of limitations, but on their *numerical*, or *quantitative*, nature.

233. Looking to the context of sub-paragraph (a), we observe that the chapeau to Article XVI:2, refers to the purpose of the sub-paragraphs that follow, namely, to define the measures which a Member shall not maintain or adopt for sectors *where market access commitments are made*. The chapeau thus contemplates circumstances in which a Member's Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member's Schedule. Plainly, the drafters of sub-paragraph (a) had in mind limitations that would impose a maximum limit of *above* zero. Similarly, Article II:1(b) of the GATT 1994 prohibits Members from imposing duties "in excess of" the bound duty rate. Such bound duty rate will usually be *above* zero. Yet this does not mean that Article II:1(b) does not also refer to bound rates set at zero.

234. It follows from the above that we find the following reasoning of the Panel to be persuasive:

> [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. Paragraph (a) does not foresee a "zero quota" because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or subsector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.[152]

235. As for the first paragraph of Article XVI, we note that it does not refer expressly to any requirements as to form, but simply links a Member's market access obligations in respect of scheduled services to "the terms, limitations and conditions agreed and specified in its Schedule". Neither this provision, nor the object and purpose of the GATS as stated in its preamble[153], readily assists us in answering the question whether the reference in Article XVI:2(a) to "limitations on the number of service suppliers ... in the form of numerical quotas" encompasses the type of measure at issue here, namely, a prohibition on the supply of a service in respect of which a specific commitment has been made.

236. In our view, the above examination of the words of Article XVI:2(a) read in their context and in the light of the object and purpose of the GATS suggests that the words "in the form of" do not impose

[151]See the WTO Secretariat Note on "Economic Needs Tests", S/CSS/W/118, 30 November 2001, para. 4.

[152]Panel Report, para. 6.331.

[153]We recall that the Panel identified, as forming part of the object and purpose of the GATS: transparency, the progressive liberalization of trade in services, and Members' right to regulate trade in services provided that they respect the rights of other Members under the GATS. (Panel Report, paras. 6.107-6.109, and 6.314-6.317)

the type of precisely defined constraint that the United States suggests. Yet certain ambiguities about the meaning of the provision remain. The Panel, at this stage of its analysis, observed that any suggestion that the "form" requirement must be strictly interpreted to refer *only* to limitations "explicitly couched in numerical terms" leads to "absurdity".[154] In either circumstance, this is an appropriate case in which to have recourse to supplementary means of interpretation, such as preparatory work.

237. We have already determined that the 1993 Scheduling Guidelines constitute relevant preparatory work.[155] As the Panel observed, those Guidelines set out an example of the type of limitation that falls within the scope of sub-paragraph (a) of Article XVI:2, that is, of the type of measures that will be inconsistent with Article XVI if a relevant commitment has been made and unless the Member in question has listed it as a condition or limitation in its Schedule. That example is: "nationality requirements for suppliers of services (equivalent to zero quota)".[156] This example confirms the view that measures equivalent to a zero quota fall within the scope of Article XVI:2(a).

238. For the above reasons, we are of the view that limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a).

239. As we have not been asked to revisit the other elements of the Panel's reasoning on this issue—in particular its findings regarding limitations on market access in respect of part of a committed sector[157], and limitations on one or more means of cross-border delivery for a committed service[158]—we therefore, *uphold* 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.[159]

2. Sub-paragraph (c) of Article XVI:2

240. In interpreting sub-paragraph (c) of Article XVI:2, the Panel observed that the wording of the provision "might perhaps be taken to imply that any quota has to be expressed in terms of designated numerical units".[160] However, after further analysis and, in particular, after comparing the English version of the provision with its French and Spanish counterparts, the Panel found that sub-paragraph (c) does *not* mean that any quota must be expressed in terms of designated numerical units if it is to fall within the scope of that provision. Instead, according to the Panel, the "correct reading of Article XVI:2(c)" is that limitations referred to under that provision may be: (i) in the form of designated

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[154]In paragraph 6.332 of the Panel Report, the Panel reasoned that:

> To hold that only restrictions explicitly couched in numerical terms fall within Article XVI:2(a) would produce absurd results. It would, for example, allow a law that explicitly provides that "all foreign services are prohibited" to escape the application of Article XVI, because it is not expressed in numerical terms.

[155]*Supra,* para. 0.

[156]See 1993 Scheduling Guidelines, para. 6.

[157]Panel Report, para. 6.335.

[158]*Ibid*., para. 6.338.

[159]*Ibid*.

[160]*Ibid*., para. 6.343.

numerical units; (ii) in the form of quotas; *or* (iii) in the form of the requirement of an economic needs test.[161]

241. The Panel then found that, where a specific commitment has been undertaken in respect of a service, a measure prohibiting one or more means of delivery of that service is:

> ... 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) because it ... results in a "zero quota" on one or more or all means of delivery include[d] in mode 1.[162]

242. The United States asserts that, in so finding, the Panel used an incorrect reading of the French and Spanish texts to arrive at an interpretation that is inconsistent with the ordinary meaning of the English text. Specifically, the Panel relied upon the presence of commas in the French and Spanish versions of the text—but not in the English version—in order to find that sub-paragraph (c) identifies *three* types of limitations. The United States argues that, when properly interpreted, sub-paragraph (c) identifies only *two* types of limitations. The United States adds that the measures at issue in this case cannot in any way be construed as falling within the scope of either of the *two* limitations defined in sub-paragraph (c).

243. Sub-paragraph (c) refers to the following measures:

> limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

244. The Panel essentially determined that, *notwithstanding* the absence of a comma between "terms of designated numerical units" and "in the form of quotas" in the *English* version, the phrase should, in order to be read in a manner consistent with the French and Spanish versions, be read *as if* such a comma existed—that is, as if expressed in "terms of designated numerical units" and "in the form of quotas" were disjunctive phrases, each of which modifies the word "limitations" at the beginning of the provision. The Panel relied on the fact that such a comma *does* exist in both the French and Spanish versions of the provision.[163] The United States argues, however, based on a detailed analysis of French grammar, that the existence of the comma in the French version is, in fact, consistent with the absence of a comma in the English version, and that both versions mean that Article XVI:2(c) identifies only *two* limitations.[164]

245. Ultimately, we are not persuaded that the key to the interpretation of this particular provision is to be found in a careful dissection of the use of commas within its grammatical structure. Regardless of which language version is analyzed, and of the implications of comma placement (or lack thereof), *all* three language versions are grammatically ambiguous. All three can arguably be read as identifying two

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[161] *Ibid*., para. 6.344.

[162] *Ibid*., para. 6.355.

[163] The French version reads "limitations concernant le nombre total d'opérations de services ou la quantité totale de services produits, exprimées en unités numériques déterminées, sous forme de contingents ou de l'exigence d'un examen des besoins économiques"; and the Spanish version reads "limitaciones al número total de operaciones de servicios o a la cuantía total de la producción de servicios, expresadas en unidades numéricas designadas, en forma de contingentes o mediante la exigencia de una prueba de necesidades económicas".

[164] United States' appellant's submission, paras. 114-120.

limitations on the total number of service operations or on the total quantity of service output.[165] All three can also arguably be read as identifying *three* limitations on the total number of service operations or on the total quantity of service output.[166] The mere presence or absence of a comma in Article XVI:2(c) is not determinative of the issue before us.

246. We find it more useful, and appropriate, to look to the language of the provision itself for its meaning. Looking at the provision generally, we see that the first clause of sub-paragraph (c) deals with the *target* of the limitations covered by that provision. There are two such types of limitations: on the number of service operations; and on the quantity of service output. Both are *quantitative* in nature. The second part of the provision provides more detail as to the *type* of limitations—relating to those service operations or output—that fall within sub-paragraph (c). These are: "designated numerical units in the form of quotas or the requirement of an economic needs test". The second part of the provision clearly modifies the first part of the provision (service operations, service output). Yet certain elements of the second part apply differently to the two elements of the first part. For example, in its ordinary sense, the term "numerical units" is more naturally used to refer to "output" than to "operations".

247. In our view, by combining, in sub-paragraph (c), the elements of the first clause of Article XVI:2(c) and the elements in the second part of the provision, the parties to the negotiations sought to ensure that their provision covered certain types of limitations, but did not feel the need to clearly demarcate the scope of each such element. On the contrary, there is scope for overlap between such elements: between limitations on the number of service operations and limitations on the quantity of service output, for example, or between limitations in the form of quotas and limitations in the form of an economic needs test. That sub-paragraph (c) applies in respect of all four modes of supply under the GATS also suggests the limitations covered thereunder cannot take a single form, nor be constrained in a formulaic manner. Nonetheless, all types of limitations in sub-paragraph (c) are quantitative in nature, and all restrict market access. For these reasons, we are of the view that, *even if* sub-paragraph (c) is read as referring to only *two* types of limitations, as contended by the United States, it does not follow that sub-paragraph (c) would not catch a measure equivalent to a zero quota.

248. To the extent that the above interpretation leaves a degree of ambiguity as to the proper meaning of Article XVI:2(c), we consider it useful to resort to supplementary means of interpretation. The market access obligations set forth in Article XVI were intended to be obligations in respect of *quantitative* , or "quantitative-type"[167], measures. The difficulties faced by the negotiating parties concerned not *whether* Article XVI covered quantitative measures—for it was clear that it did—but rather how to "know where the line should be drawn between quantitative and qualitative measures".[168]

249. We also consider it appropriate to refer to the 1993 Scheduling Guidelines as preparatory work. These Guidelines set out an example of the type of measure covered by sub-paragraph (c) of Article XVI:2. They refer to "[r]estrictions on broadcasting time available for foreign films"[169], without mentioning numbers or units.

250. The strict interpretation of Article XVI:2(c) advanced by the United States would imply that only limitations that contain an express reference to numbered units could fall within the scope of that provision. Under such an interpretation, sub-paragraph (c) could not cover, for example, a limitation

[165]That is: (i) limitations ... expressed in terms of designated numerical units in the form of quotas; or (ii) limitations ... expressed in terms of the requirement of an economic needs test.

[166]That is: (i) limitations ... expressed in terms of designated numerical units; (ii) limitations ... expressed ... in the form of quotas; or (iii) limitations ... expressed in terms of the requirement of ... an economic needs test.

[167]Statement by the Co-Chairman at the meeting of 17-27 September 1991, MTN.GNS/45, para. 16.

[168]*Ibid.*

[169]1993 Scheduling Guidelines, p. 3.

expressed as a percentage or described using words such as "a majority". It is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures, and we do not do so here. Yet we are satisfied that a prohibition on the supply of services in respect of which a full market access commitment has been undertaken is a quantitative limitation on the supply of such services.

251. In this case, the measures at issue, by prohibiting the supply of services in respect of which a market access commitment has been taken, amount to a "zero quota" on service operations or output with respect to such services. As such, they fall within the scope of Article XVI:2(c).

252. For all of these reasons, we *uphold* the Panel's finding, in paragraph 6.355 of the Panel Report, that a measure prohibiting the supply of certain services where specific commitments have been undertaken is a limitation:

> ... within the meaning of Article XVI:2(c) because it totally prevents the services operations and/or service output through one or more or all means of delivery that are included in mode 1. In other words, such a ban results in a "zero quota" on one or more or all means of delivery include in mode 1.

(…)

D. *Application of Article XVI to the Measures at Issue*

257. Having upheld the Panel's interpretation of Article XVI:2(a) and (c), we now consider its application of that interpretation to the measures at issue in this case. In so doing, we consider, for the reasons already explained, only that part of the Panel's analysis relating to the three *federal* laws, and not its analysis relating to state laws.

258. The Panel's explanation of the three federal laws is set out in paragraphs 6.360 to 6.380 of the Panel Report. It is, in our view, useful to set out briefly the relevant part of each statute, as well as the Panel's finding in respect of that statute. The relevant part of the Wire Act states:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers shall be fined under this title or imprisoned not more than two years, or both.[170]

259. With respect to this provision, the Panel found that "the Wire Act prohibits the use of at least one or potentially several means of delivery included in mode 1"[171], and that, accordingly, the statute "constitutes a 'zero quota' for, respectively, one, several or all of those means of delivery."[172] The Panel reasoned that the Wire Act prohibits service suppliers from supplying gambling and betting services using remote means of delivery, as well as service operations and service output through such means.

[170]Section 1084(a) of Title 18 of the United States Code (quoted in Panel Report, para. 6.360).

[171]Panel Report, para. 6.362.

[172]*Ibid*., para. 6.363.

Accordingly, the Panel determined that "the Wire Act contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation 'in the form of a quota' within the meaning of Article XVI:2(c)."[173]

260. As regards the Travel Act, the Panel quoted the following excerpt:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
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> (1) distribute the proceeds of any unlawful activity; or
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> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform --
>
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.
>
> (b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or of the United States.[174]

261. The Panel determined that "the Travel Act prohibits gambling activity that entails the supply of gambling and betting services by 'mail or any facility' to the extent that such supply is undertaken by a 'business enterprise involving gambling' that is prohibited under state law and provided that the other requirements in subparagraph (a) of the Travel Act have been met."[175] The Panel further opined that the Travel Act prohibits service suppliers from supplying gambling and betting services through the mail, (and potentially other means of delivery), as well as services operations and service output through the mail (and potentially other means of delivery), in such a way as to amount to a "zero" quota on one or several means of delivery included in mode 1.[176] For these reasons, the Panel found that "the Travel Act contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation' in the form of a quota' within the meaning of Article XVI:2(c)."[177]

262. The Panel considered the relevant part of the Illegal Gambling Business Act to be the following:

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[173] *Ibid*.

[174] Section 1952(a) and (b) of Title 18 of the United States Code (quoted in Panel Report, para. 6.366).

[175] Panel Report, para. 6.370. See also para. 6.367.

[176] *Ibid*., paras. 6.368-6.370.

[177] *Ibid*., para. 6.371.

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section –
>
> (1) 'illegal gambling business' means a gambling business which –
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
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> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
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> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
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> (2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.[178]

263. The Panel then determined that because the IGBA "prohibits the conduct, finance, management, supervision, direction or ownership of all or part of a 'gambling business' that violates state law, it effectively prohibits the supply of gambling and betting services through at least one and potentially all means of delivery included in mode 1 by such businesses"; that this prohibition concerned service suppliers, service operations and service output; and that, accordingly, the IGBA "contains a limitation 'in the form of numerical quotas' within the meaning of Article XVI:2(a) and a limitation 'in the form of a quota' within the meaning of Article XVI:2(c)."[179]

264. The United States' appeal of the Panel's findings with respect to the consistency of its measures with sub-paragraphs (a) and (c) of Article XVI:2 rests on two pillars: (i) that the Panel erred in interpreting those provisions; and (ii) that the measures at issue do not contain any limitations that explicitly take the form of numerical quotas or designated numerical units. The United States does *not* appeal the Panel's findings as to the various activities that are prohibited under these statutes. We have upheld the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2 and, in particular, its determination that these provisions encompass measures equivalent to a zero quota. In these circumstances, the fact that the Wire Act, the Travel Act and the IGBA do not explicitly use numbers, or the word "quota", in imposing their respective prohibitions, does not mean, as the United States contends, that the measures are beyond the reach of Article XVI:2(a) and (c). As a result, there is no ground for disturbing the above findings made by the Panel.

265. We have upheld the Panel's finding that the United States' Schedule to the GATS includes a specific commitment in respect of gambling and betting services.[180] In that Schedule, the United States has inscribed "None" in the first row of the market access column for subsector 10.D. In these circumstances, and for the reasons given in this section of our Report, we also *uphold* the Panel's

[178]Section 1955(a) and (b) of Title 18 of the United States Code (quoted in Panel Report, para. 6.374).

[179]Panel Report, paras. 6.376-6.378.

[180]*Supra*, para. 0.

ultimate finding, in paragraph 7.2(b)(i) of the Panel Report, 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.

VII. Article XIV of the GATS: General Exceptions

266. Finally, we turn to the Panel's analysis of the United States' defence under Article XIV of the GATS. We found above that Antigua failed to make a *prima facie* case of inconsistency with Article XVI in relation to the eight state laws examined by the Panel.[181] The Panel found that no other state laws had been sufficiently identified by Antigua as part of its claims in this dispute.[182] We therefore limit our discussion to the Panel's treatment of the defence asserted by the United States with respect to the three federal laws—the Wire Act, the Travel Act, and the Illegal Gambling Business Act ("IGBA")—under Article XIV.

The United States and Antigua each raises multiple allegations of error with respect to the Panel's analysis under Article XIV. We begin with Antigua's claim that the Panel erred in examining the merits of the United States' defence, notwithstanding that the United States did not raise it until its second written submission to the Panel. Next, we consider the participants' allegations that the Panel erred by taking it upon itself to construct the defence or rebuttal for the other party. We then turn to the participants' claims of error in relation to the Panel's analysis under paragraphs (a) and (c) of Article XIV, and under the chapeau, or introductory paragraph, of Article XIV.

A. *Did the Panel Err in Considering the United States' Defence Under Article XIV?*

268. Antigua argues that "the Panel erred in its decision to consider the United States' defence in this proceeding at all" and thereby failed to satisfy its obligations under Article 11 of the DSU.[183] Antigua points out that the United States did not raise its defence under Article XIV of the GATS until its second written submission to the Panel, which was filed on the same day as Antigua's second written submission. Antigua submits that this delayed invocation by the United States of its defence was a "simple litigation tactic"[184], and that, because the United States did not invoke the defence at an earlier stage of the panel proceeding, Antigua was "deprived of a full and fair opportunity to respond to the defence."[185]

269. Article 6.2 of the DSU requires that the legal basis for a dispute, that is, the *claims*, be identified in a panel request with specificity sufficient "to present the problem clearly," so that a responding party will be aware, at the time of the establishment of a panel, of the claims raised by the complaining party to which it might seek to respond in the course of the panel proceedings. In contrast, the DSU is silent about a deadline or a method by which a responding party must state the legal basis for its defence.[186] This does not mean that a responding party may put forward its defence whenever and in whatever manner it chooses. Article 3.10 of the DSU provides that "all Members will engage in these procedures in good faith in an effort to resolve the dispute", which implies the identification by each party of relevant legal

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[181] *Supra*, paras. 0-[illegible].

[182] Panel Report, paras. 6.211-6.249.

[183] Antigua's other appellant's submission, para. 72.

[184] *Ibid*.

[185] Antigua's other appellant's submission, para. 73.

[186] The issue before us, therefore, is distinct from that addressed by the Appellate Body in *EC – Bananas III*, where a *responding party* challenged the panel's consideration of *claims* mentioned by certain complaining parties in the panel request, but not supported by any arguments until the second written submission before the panel. (Appellate Body Report, *EC – Bananas III*, paras. 145-147; see also Appellate Body Report, *Chile – Price Band System*, paras. 158-162) Here, we address a complaining party's challenge to a *defence* invoked by the responding party.

and factual issues at the earliest opportunity, so as to provide other parties, including third parties, an opportunity to respond.

270. At the same time, the opportunity afforded to a Member to respond to claims and defences made against it is also a "fundamental tenet of due process".[187] A party must not merely be given *an* opportunity to respond, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately. A party that considers it was not afforded such an opportunity will often raise a due process objection before the panel.[188] The Appellate Body has recognized in numerous cases that a Member's right to raise a claim[189] or objection[190], as well as a panel's exercise of discretion[191], are circumscribed by the due process rights of other parties to a dispute. Those due process rights similarly serve to limit a responding party's right to set out its defence at *any* point during the panel proceedings.

271. Due process may be of particular concern in cases where a party raises *new facts* at a late stage of the panel proceedings. The Appellate Body has observed that, under the standard working procedures of panels[192], complaining parties should put forward their cases—with "a full presentation of the facts on the basis of submission of supporting evidence"—during the *first* stage of panel proceedings.[193] We see no reason why this expectation would not apply equally to responding parties, which, once they have received the first written submission of a complaining party, are likely to be aware of the defences they might invoke and the evidence needed to support them.

272. It follows that the principles of good faith and due process oblige a responding party to articulate its defence promptly and clearly. This will enable the complaining party to understand that a specific defence has been made, "be aware of its dimensions, and have an adequate opportunity to address and respond to it."[194] Whether a defence has been made at a sufficiently early stage of the panel proceedings to provide adequate notice to the opposing party will depend on the particular circumstances of a given dispute.

273. Furthermore, as part of their duties, under Article 11 of the DSU, to "make an objective assessment of the matter" before them, panels must ensure that the due process rights of parties to a

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[187]Appellate Body Report, *Australia – Salmon*, para. 278. See also Appellate Body Report, *Chile – Price Band System*, para. 176.

[188]Appellate Body Report, *US – FSC*, paras. 165-166. See also Appellate Body Report, *Thailand – H-Beams,* para. 95.

[189]See, for example, Appellate Body Report, *EC – Tariff Preferences*, para. 113; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 161; and Appellate Body Report, *Thailand – H-Beams*, para. 88.

[190]Appellate Body Report, *US – Carbon Steel*, para. 123; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *US – 1916 Act*, para. 54.

[191]See, for example, Appellate Body Report, *US – 1916 Act*, para. 150; and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243.

[192]Appendix 3 to the DSU. We note that the Panel in this dispute operated under Working Procedures, drawn up in consultation with the parties, that provided for "all factual evidence [to be submitted] to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions." (Working Procedures of the Panel, Panel Report, p. A-2, para. 12)

[193]Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79. The first stage of panel proceedings continues through the first substantive panel meeting, whereas the second stage continues thereafter through the second substantive panel meeting.

[194]Appellate Body Report, *Chile – Price Band System*, para. 164. See also Appellate Body Report, *EC– Tariff Preferences*, para. 113.

dispute are respected.[195] A panel may act inconsistently with this duty if it addresses a defence that a responding party raised at such a late stage of the panel proceedings that the complaining party had no meaningful opportunity to respond to it. To this end, panels are endowed with "sufficient flexibility" in their working procedures, by virtue of Article 12.2 of the DSU, to regulate panel proceedings and, in particular, to adjust their timetables to allow for additional time to respond or for additional submissions where necessary.[196]

274. In the present case, the United States made no mention of Article XIV of the GATS until its second written submission, filed on 9 January 2004.[197] Antigua did not refer to Article XIV in its second written submission, filed on the same day, although Antigua had, in its first written submission, referred to the possibility that the United States might seek to invoke Article XIV.[198] Both parties discussed issues relating to Article XIV in their opening statements at the second substantive panel meeting on 26 January 2004.[199]

275. At the hearing in this appeal, Antigua acknowledged that it "had the opportunity to respond" to the United States' defence, and had "responded sufficiently", during its opening statement at the second substantive panel meeting.[200] When asked whether it had informed the Panel of any prejudice resulting from the United States' allegedly late invocation of the defence, Antigua answered that it had not so informed the Panel. Nevertheless, Antigua maintained at the hearing that it was prejudiced on the grounds that the late invocation by the United States of its defence hampered the Panel's ability to assess that defence, resulting in the Panel's making the defence for the United States.[201]

276. In these circumstances, we are of the view that, although the United States could have raised its defence earlier, the Panel did not err in deciding to assess whether the United States' measures are justified under Article XIV. From the outset, Antigua was apparently aware that the United States might argue that its measures satisfy the requirements of Article XIV. Antigua admitted that it raised no objection to the timing of the United States' defence before the Panel. Antigua also acknowledged that it did have an opportunity to respond adequately to the United States' defence, albeit at a late stage of the proceeding. For these reasons, we consider that the Panel did not "deprive" Antigua of a "full and fair opportunity to respond to the defence".[202] We *find*, therefore, that the Panel did not fail to satisfy its obligations under Article 11 of the DSU by entering into the merits of the United States' defence under Article XIV.

B. *Did the Panel Err in its Treatment of the Burden of Proof Under Article XIV?*

277. In its analysis of issues arising under Article XIV of the GATS, the Panel drew extensively on arguments made and evidence submitted by the parties in connection with other issues in this case. This

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[195]Appellate Body Report, *Chile – Price Band System*, paras. 174-177.

[196]See Appellate Body Report, *Australia – Salmon*, para. 272.

[197]In paragraph 87 of its second written submission to the Panel, the United States argued that the Wire Act, the Travel Act, and the IGBA "meet the requirements of Article XIV, over and above the fact that they are also consistent with the remainder of the GATS."

[198]Antigua's first written submission to the Panel, para. 202 ("It is possible that the United States may try during the course of this proceeding to invoke one or more of the general exceptions of Article XIV of the GATS.").

[199]Antigua's statement at the second substantive panel meeting, paras. 68-83; United States' statement at the second substantive panel meeting, paras. 74-76.

[200]Antigua's response to questioning at the oral hearing.

[201]*Ibid*.

[202]Antigua's other appellant's submission, para. 73.

approach of the Panel to Article XIV is the subject of appeals by both Antigua and the United States. Each alleges that the Panel erred in its treatment of the burden of proof.

278. Antigua argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU because it "constructed the GATS Article XIV defence on behalf of the United States."[203] First, with respect to Article XIV(a), 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[204], (ii) fraud[205], and (iii) public health.[206] Secondly, Antigua contends that the Panel erred in its analysis of the United States' defence under the chapeau of Article XIV because the United States' arguments assessed by the Panel were not taken from the United States' submissions relating to Article XIV, but rather, from the United States' response to Antigua's national treatment claim under Article XVII of the GATS.

279. In its appeal, the United States submits that it established its case that the Wire Act, the Travel Act, and the IGBA are justified under Article XIV, but that the Panel improperly constructed a rebuttal under the chapeau to that provision when Antigua itself had failed to do so. The United States alleges, in particular, that the Panel did so "by recycling evidence and argumentation that Antigua had used to allege a national treatment violation under Article XVII as if those arguments had been made in the context of the Article XIV chapeau."[207]

280. We begin our analysis by referring to the Appellate Body's view that:

> ... nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties - or to develop its own legal reasoning - to support its own findings and conclusions on the matter under its consideration.[208]

281. However, a panel enjoys such discretion only with respect to specific claims that are properly before it, for otherwise it would be considering a matter not within its jurisdiction. Moreover, when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU.[209]

282. In the context of affirmative defences, then, a responding party must invoke a defence and put forward evidence and arguments in support of its assertion that the challenged measure satisfies the requirements of the defence. When a responding party fulfils this obligation, a panel may rule on whether the challenged measure is justified under the relevant defence, relying on arguments advanced by the parties or developing its own reasoning. The same applies to rebuttals. A panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so.

283. Turning to the issues on appeal, we begin with the three protected interests that the Panel allegedly identified on its own in examining the United States' defence under paragraph (a) of

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[203]Antigua's other appellant's submission, para. 80.

[204]Panel Report, paras. 6.499-6.505.

[205]*Ibid*., paras. 6.506-6.509.

[206]*Ibid*., paras. 6.510-6.514.

[207]United States' appellant's submission, para. 188.

[208]Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Report, *US – Certain EC Products*, para. 123.

[209]Appellate Body Report, *Chile – Price Band System*, para. 173.

Article XIV, namely, health concerns, and combating money laundering and fraud. In both its first and second written submissions to the Panel, the United States, in responding to one of Antigua's claims under the GATS, identified five "concerns associated with the remote supply of gambling [services]."[210] These "concerns" relate to: (1) organized crime[211]; (2) money laundering[212]; (3) fraud[213]; (4) risks to youth, including underage gambling[214]; and (5) public health.[215] When subsequently arguing that the Wire Act, the Travel Act, and the IGBA are justified under Article XIV(a), the United States explicitly referred back to the discussion, earlier in its second written submission to the Panel, of all these interests *except* for that relating to public health.[216]

284. In other words, four of the five interests mentioned by the Panel were plainly discussed or referred to by the United States as part of its defence under Article XIV(a). The fifth interest—relating to public health—was prominently identified by the United States in a previous discussion of the protected interests relating to the remote supply of gambling services and, therefore, was not an invention of the Panel.[217] In our view, the fact that this fifth interest was not *explicitly* raised *again* in the context of the United States' Article XIV arguments should not have precluded the Panel from considering it as part of its analysis under Article XIV(a). We therefore dismiss this ground of Antigua's appeal.

285. We turn now to the participants' arguments relating to the Panel's treatment of the burden of proof in its analysis under the chapeau of Article XIV. Antigua had advanced a claim before the Panel under Article XVII of the GATS, alleging that the United States fails to accord to Antiguan services and service suppliers, treatment no less favourable than that accorded to like domestic services and service suppliers.[218] Throughout the panel proceedings, the United States disputed this assertion, consistently arguing that United States laws on gambling make no distinction between domestic and foreign services,

[210]United States' second written submission to the Panel, para. 45.

[211]United States' first written submission to the Panel, paras. 10-11; United States' second written submission to the Panel, paras. 46-49.

[212]United States' first written submission to the Panel, paras. 12-13; United States' second written submission to the Panel, para. 50.

[213]United States' first written submission to the Panel, paras. 14-15; United States' second written submission to the Panel, para. 51.

[214]United States' first written submission to the Panel, paras. 16-18; United States' second written submission to the Panel, paras. 54-56.

[215]United States' first written submission to the Panel, paras. 19-21; United States' second written submission to the Panel, paras. 52-53.

[216]See the United States' second written submission to the Panel, para. 111 and footnote 139 thereto (referring to the United States' second written submission, paras. 46-51); and para. 114 and footnote 143 thereto (referring to the United States' second written submission, paras. 54-55).

[217]United States' first written submission to the Panel, Section III.A.4 ("Supply of gambling into private homes, workplaces, and other environments creates additional health risks"); United States' second written submission to the Panel, Section III.B.1.b.iv ("Remote gambling poses a greater and broader threat to human health").

[218]Antigua's first written submission to the Panel, paras. 110-111, 117-118, 122-123, 125-128, and 188; Antigua's second written submission to the Panel, para. 39; Antigua's statement at the first substantive panel meeting, paras. 88-96; Antigua's statement at the second substantive panel meeting, paras. 61-67; Antigua's response to Question 19 posed by the Panel, Panel Report, pp. C-45 to C-49.

or between domestic and foreign service suppliers.[219] The Panel exercised judicial economy with respect to Antigua's claim under Article XVII.[220] Nevertheless, in the course of considering whether the Wire Act, the Travel Act, and the IGBA satisfy the conditions of the chapeau of Article XIV, the Panel examined arguments put by the parties in relation to Antigua's Article XVII claim.[221]

286. On appeal, both participants contest the Panel's use of such arguments. Antigua contends that the Panel's reliance on the United States' arguments on Article XVII demonstrates that the Panel constructed a defence for the United States, whereas the United States points to the Panel's reliance on Antigua's arguments on Article XVII as proof that the Panel improperly assumed Antigua's responsibility to rebut the United States' defence.

287. In arguing its Article XIV defence before the Panel, the United States asserted that its measures satisfy the requirements of the chapeau of Article XIV because they do not discriminate *at all*. In particular, the United States contended:

> The restrictions in [the Wire Act, the Travel Act, and the IGBA] meet the requirements of the chapeau. None of these measures introduces any discrimination on the basis of nationality. On the contrary, *as the United States has repeatedly observed*, they apply equally regardless of national origin.[222] (emphasis added)

In our view, this statement by the United States, particularly the adverb "repeatedly", reflects an intention to incorporate into its Article XIV defence its previous arguments relating to non-discrimination in general, which were made in response to Antigua's national treatment claim. We therefore consider that the Panel did not err in referring to these arguments—originally made in the context of Article XVII—in its Article XIV analysis.

288. With respect to Antigua's rebuttal of the arguments, we note that, contrary to the United States' assertions, Antigua did contend that the three federal statutes are applied in a discriminatory manner and therefore fail to meet the requirements of the chapeau of Article XIV. In its opening statement at the second substantive panel meeting, Antigua said:

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[219]See, for example, United States' first written submission to the Panel, para. 102 ("relevant restrictions on remote supply of gambling under U.S. law, whether by Internet or other means, are based on objective criteria that apply regardless of the national origin of the service or service supplier"); United States' second written submission to the Panel, para. 61 ("As the United States has repeatedly pointed out, U.S. restrictions on remote supply of gambling apply regardless of national origin"); United States' statement at the first substantive panel meeting, para. 52 ("The United States again points out, as we have throughout this dispute that U.S. restrictions applicable to Internet gambling and other forms of gambling services that Antiguan firms seek to supply on a cross-border basis apply equally to those remote supply activities within the United States."); United States' statement at the second substantive panel meeting, paras. 61-68; United States' responses to Questions 19 and 21-22 posed by the Panel, Panel Report, pp. C-45 to C-49 and C-50 to C-51.

[220]Panel Report, para. 6.426.

[221]*Ibid*., para. 6.584. See also paras. 6.585-6.603.

[222]United States' second written submission to the Panel, para. 118.

> Even were the United States to make out a provisional defence under Article XIV, it is required to demonstrate that the three federal statutes in question meet the additional requirements of the "chapeau" of Article XIV. This is *clearly* not the case. … First, the United States *discriminates* against Antigua services because they cannot be supplied through distribution methods that are available for the distribution of domestic services. This is an *obvious* "unjustifiable discrimination".[223] (emphasis added; footnote omitted)

We consider that, in making this statement, Antigua effectively formulated an allegation of discrimination, describing it as" clear[]" and "obvious". This must be understood as a reference to the arguments that it had advanced in support of its national treatment claim. Accordingly, the Panel did not err in evaluating, as part of its analysis under the chapeau to Article XIV, the extent to which Antigua's arguments under Article XVII rebutted the defence advanced by the United States.

289. Therefore, we *find* that the Panel did not improperly assume the burden of constructing the defence under Article XIV(a) for the United States. We also *find* that the Panel did not improperly assume the burden of making a rebuttal to the United States' defence on behalf of Antigua.

290. Antigua also claims on appeal that the Panel improperly constructed the defence for the United States under paragraph (c) of Article XIV. Antigua argues that the United States "failed to sufficiently identify"[224] the Racketeer Influenced and Corrupt Organizations statute (the "RICO statute") as a law relevant to the Panel's examination of the challenged United States measures under Article XIV(c). Antigua submits that the Panel should therefore have refused to consider the RICO statute in its assessment of the United States' Article XIV(c) defence. In the light of our analysis in the next sub-section of this Report, it is not necessary for us to determine whether the Wire Act, the Travel Act, and the IGBA might also constitute measures falling under Article XIV(c).[225] In these circumstances, we *need not rule* on Antigua's appeal relating to the Panel's treatment of the burden of proof in its analysis under paragraph (c) of Article XIV.

C. *The Panel's Substantive Analysis Under Article XIV*

291. Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions[226], notably the term "necessary"[227] and the requirements set out in their respective chapeaux.

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[223]Antigua's statement at the second substantive panel meeting, para. 80.

[224]Antigua's other appellant's submission, para. 121.

[225]*Infra*, para. **Error! Reference source not found.**.

[226]Notwithstanding the general similarity in language between the two provisions, we note that Article XIV(a) of the GATS expressly enables Members to adopt measures "necessary to protect public morals *or to maintain public order*", whereas the corresponding exception in the GATT 1994, Article XX(a), speaks of measures "necessary to protect public morals". (emphasis added)

[227]See, for example, paragraphs (a), (b), and (d) of Article XX of the GATT 1994:

> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> …

Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.[228]

292. Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision.[229] A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected. The required nexus—or "degree of connection"—between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as "relating to" and "necessary to".[230] Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV.

I. Justification of the Measures Under Paragraph (a) of Article XIV

293. Paragraph (a) of Article XIV covers:

> ... measures ... necessary to protect public morals or to maintain public order. (footnote omitted)

294. In the first step of its analysis under this provision, the Panel examined whether the measures at issue—the Wire Act, the Travel Act, and the IGBA—are "designed" to protect public morals and to maintain public order.[231] As a second step, the Panel determined whether these measures are "necessary" to protect public morals or to maintain public order, within the meaning of Article XIV(a).[232] The Panel found that:

> ... the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are necessary to protect public morals and/or public order within the meaning of Article XIV(a). We, nonetheless, acknowledge that such laws are designed so as to protect public morals or maintain public order.[233] (footnotes omitted)

295. Our review of this conclusion proceeds in two parts. We address first Antigua's challenge to the Panel's finding that the three federal statutes are "measures that are designed to 'protect public morals'

> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

[228]In this respect, we observe that this case is not only the first where the Appellate Body is called upon to address the general exceptions provision of the GATS, but also the first under any of the covered agreements where the Appellate Body is requested to address exceptions relating to "public morals".

[229]Appellate Body Report, *US – Shrimp*, para. 147. See also Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

[230]Appellate Body Report, *US – Gasoline*, pp. 17-18, DSR 1996:I, 3, at 16.

[231]Panel Report, paras. 6.479-6.487.

[232]*Ibid*., paras. 6.488-6.534.

[233]*Ibid*., para. 6.535.

and/or 'to maintain public order' in the United States within the meaning of Article XIV(a)."[234] We then address the participants' respective challenges to the Panel's finding that the three federal statutes are not "necessary" to protect public morals and to maintain public order.

(a) "Measures … to protect public morals or to maintain public order"

296. In its analysis under Article XIV(a), the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."[235] The Panel further found that the definition of the term "order", read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law."[236] The Panel then referred to Congressional reports and testimony establishing that "the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling."[237] On this basis, the Panel found that the three federal statutes are "measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)."[238]

297. Antigua contests this finding on a rather limited ground, namely that the Panel failed to determine whether the concerns identified by the United States satisfy the standard set out in footnote 5 to Article XIV(a) of the GATS, which reads:

> [t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

298. We see no basis to conclude that the Panel failed to assess whether the standard set out in footnote 5 had been satisfied. As Antigua acknowledges[239], the Panel expressly referred to footnote 5 in a way that demonstrated that it understood the requirement therein to be part of the meaning given to the term "public order".[240] Although "*no further mention*"[241] was made in the Panel Report of footnote 5 or of its text, this alone does not establish that the Panel failed to assess whether the interests served by the three federal statutes satisfy the footnote's criteria. Having defined "public order" to include the standard in footnote 5, and then applied that definition to the facts before it to conclude that the measures "are designed to 'protect public morals' and/or 'to maintain public order'"[242], the Panel was not required, in addition, to make a separate, explicit determination that the standard of footnote 5 had been met.

299. We therefore *uphold* the Panel's finding, in paragraph 6.487 of the Panel Report, that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order' under Article XIV(a)."

(b) The Requirement that a Measure be "Necessary" Under Article XIV(a)

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[234]Panel Report, para. 6.487.

[235]*Ibid*., para. 6.465.

[236]*Ibid*., para. 6.467.

[237]*Ibid*., para. 6.486.

[238]*Ibid*., para. 6.487.

[239]Antigua's other appellant's submission, para. 89.

[240]Panel Report, para. 6.467.

[241]Antigua's other appellant's submission, para. 90. (original emphasis)

[242]Panel Report, para. 6.487.

300. In the second part of its analysis under Article XIV(a), the Panel considered whether the Wire Act, the Travel Act, and the IGBA are "necessary" within the meaning of that provision. The Panel found that the United States had not demonstrated the "necessity" of those measures.[243]

301. This finding rested on the Panel's determinations that: (i) "the interests and values protected by [the Wire Act, the Travel Act, and the IGBA] serve very important societal interests that can be characterized as 'vital and important in the highest degree'"[244]; (ii) the Wire Act, the Travel Act, and the IGBA "must contribute, at least to some extent", to addressing the United States' concerns "pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling"[245]; (iii) the measures in question "have a significant restrictive trade impact"[246]; and (iv) "[i]n rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States 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."[247]

302. Each of the participants appeals different aspects of the analysis undertaken by the Panel in determining whether the "necessity" requirement in Article XIV(a) was satisfied. According to Antigua, the Panel failed to establish a sufficient "nexus" between gambling and the concerns raised by the United States.[248] In addition, Antigua claims that the Panel erroneously limited its discussion of "reasonably available alternatives". In its appeal, the United States argues that the Panel departed from the way in which "reasonably available alternative" measures have been examined in previous disputes and erroneously imposed "a procedural requirement on the United States to consult or negotiate with Antigua before the United States may take measures to protect public morals [or] protect public order".[249]

303. We begin our analysis of this issue by examining the legal standard of "necessity" in Article XIV(a) of the GATS. We then turn to the participants' appeals regarding the Panel's interpretation and application of this requirement.

(i) *Determining "necessity" under Article XIV(a)*

304. We note, at the outset, that the standard of "necessity" provided for in the general exceptions provision is an *objective* standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach—as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials—will be relevant in determining whether the measure is, objectively, "necessary". A panel is not bound by these

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[243] *Ibid*.

[244] *Ibid*., para. 6.492:

> On the basis of the foregoing, it is clear to us that the interests and values protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) serve very important societal interests that can be characterized as "vital and important in the highest degree" in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC – Asbestos*. (quoting Appellate Body Report, *EC – Asbestos*, para. 172)

[245] *Ibid*., para. 6.494.

[246] *Ibid*., para. 6.495.

[247] *Ibid*., para. 6.531.

[248] Antigua's other appellant's submission, para. 97.

[249] United States' appellant's submission, para. 139.

characterizations[250], however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it.

305. In *Korea – Various Measures on Beef*, the Appellate Body stated, in the context of Article XX(d) of the GATT 1994, that whether a measure is "necessary" should be determined through "a process of weighing and balancing a series of factors".[251] The Appellate Body characterized this process as one:

> ... comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".[252]

306. The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure.[253] Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered.[254] One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available".[255]

308. The requirement, under Article XIV(a), that a measure be "necessary"—that is, that there be no "reasonably available", WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be "reasonably available", however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.[256]

309. It is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked

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[250]Appellate Body Report, *India – Patents (US)*, para. 66.

[251]Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

[252]Appellate Body Report, *Korea – Various Measures on Beef*, para. 166.

[253]*Ibid*., para. 162. See also Appellate Body Report, *EC – Asbestos*, para. 172.

[254]Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

[255]*Ibid*., para. 166.

[256]Appellate Body Report, *EC – Asbestos*, paras. 172-174. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 180.

defence.[257] In the context of Article XIV(a), this means that the responding party must show that its measure is "necessary" to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party's burden to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives. In particular, 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. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden.

310. Rather, it is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary". If the panel concludes that the respondent has made a *prima facie* case that the challenged measure is "necessary"—that is, "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"[258]—then a panel should find that challenged measure "necessary" within the terms of Article XIV(a) of the GATS.

311. If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available". If a responding party demonstrates that the alternative is not "reasonably available", in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary" within the terms of Article XIV(a) of the GATS.

(ii) *Did the Panel err in its analysis of the "necessity" of the measures at issue?*

312. In considering whether the United States' measures are "necessary" under Article XIV(a) of the GATS, the Panel began by considering the factors set out by the Appellate Body in *Korea – Various Measures on Beef* as they apply to the Wire Act, the Travel Act, and the IGBA. Antigua claims that the Panel erred in concluding, in the course of its analysis of these factors, that the three federal statutes contribute to protecting the interests raised by the United States.

313. The Panel set out, in some detail, how the United States' evidence established a specific connection between the remote supply of gambling services and each of the interests identified by the United States[259], except for organized crime.[260] In particular, the Panel found such a link in relation to money laundering[261], fraud[262], compulsive gambling[263], and underage gambling.[264] Considering that the

[257]Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at 21; Appellate Body Report, *US – Wool Shirts and Blouses,* pp. 15-16, DSR 1997:I, 323, at 337; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133.

[258]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[259]Panel Report, paras. 6.498-6.520.

[260]The Panel found that the United States had not submitted "concrete evidence" showing the *particular* vulnerability of the remote supply of gambling services to involvement by organized crime. Therefore, the Panel concluded, the United States had not demonstrated why the means used to regulate *non*-remote supply of gambling services could not sufficiently guard against the risk of organized crime. (Panel Report, para. 6.520)

[261]Panel Report, paras. 6.500-6.504.

[262]*Ibid*., paras. 6.507 and 6.508.

[263]*Ibid*., paras. 6.511-6.513.

three federal statutes embody an outright prohibition on the remote supply of gambling services[265], we see no error in the Panel's approach, nor in its finding, in paragraph 6.494 of the Panel Report, that the Wire Act, the Travel Act, and the IGBA "must contribute" to addressing those concerns. [266]

314. In addition, the United States and Antigua each appeals different aspects of the Panel's selection of alternative measures to compare with the Wire Act, the Travel Act, and the IGBA. The United States argues that the Panel erred in examining the one alternative measure that it did consider, and Antigua contends that the Panel erred in failing to consider additional alternative measures.

315. In its "necessity" analysis under Article XIV(a), the Panel appeared to understand that, in order for a measure to be accepted as "necessary" under Article XIV(a), the responding Member must have first "*explored and exhausted*" all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure.[267] This understanding led the Panel to conclude that, in this case, the United States had "an obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services".[268] Because the Panel found that the United States had not engaged in such consultations with Antigua, the Panel also found that the United States had not established that its measures are "necessary" and, therefore, provisionally justified under Article XIV(a).[269]

316. In its appeal of this finding, the United States argues that "[t]he Panel relied on the 'necessity' test in Article XIV as the basis for imposing a procedural requirement on the United States to consult or negotiate with Antigua before the United States may take measures to protect public morals [or] protect public order".[270] The United States submits that the requirement in Article XIV(a) that a measure be "necessary" indicates that "necessity is a property of the measure itself" and, as such, "necessity" cannot be determined by reference to the efforts undertaken by a Member to negotiate an alternative measure.[271] The United States further argues that in previous disputes, the availability of alternative measures that were "merely theoretical" did not preclude the challenged measures from being deemed to be "necessary".[272] Similarly, the United States argues, the fact that measures might theoretically be available after engaging in consultations with Antigua does not preclude the "necessity" of the three federal statutes.

317. In our view, the Panel's "necessity" analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations

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[264]*Ibid*., paras. 6.516-6.518.

[265]*Supra*, paras. 0-0.

[266]The Appellate Body employed similar reasoning with respect to a prohibition on the import of products containing asbestos. See Appellate Body Report, *EC – Asbestos*, para. 168:

> By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection.

[267]Panel Report, para. 6.528. (emphasis added) See also paras. 6.496, 6.522, and 6.534.

[268]*Ibid*., para. 6.531. See also para. 6.534.

[269]Panel Report, paras. 6.533-6.535.

[270]United States' appellant's submission, para. 139.

[271]*Ibid*., para. 142.

[272]*Ibid*., para. 152.

are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.

318. We note, in addition, that the Panel based its requirement of consultations, in part, on "the existence of [a] specific market access commitment [in the United States' GATS Schedule] with respect to cross-border trade of gambling and betting services".[273] We do not see how the existence of a specific commitment in a Member's Schedule affects the "necessity" of a measure in terms of the protection of public morals or the maintenance of public order. For this reason as well, the Panel erred in relying on consultations as an alternative measure reasonably available to the United States.

319. We turn now to Antigua's allegation that the Panel improperly limited its examination of possible alternative measures against which to compare the Wire Act, the Travel Act, and the IGBA. Antigua claims that the Panel "erred in limiting" its search for alternatives to the universe of *existing* United States regulatory measures.[274] Antigua also alleges that the Panel erred by examining only those measures that had been explicitly identified by Antigua even though "Antigua was never given the opportunity to properly rebut the Article XIV defence."[275]

320. We observe, first, that the Panel did not state that it was limiting its search for alternatives in the manner alleged by Antigua. Secondly, although the Panel *began* its analysis of alternative measures by considering whether the United States already employs measures less restrictive than a prohibition to achieve the same objectives as the three federal statutes[276], its inquiry did not end there. The Panel obviously did consider alternatives *not* currently in place in the United States, as evidenced by its (ultimately erroneous) emphasis on the United States' alleged failure to pursue consultations with Antigua.[277] Finally, we do not see why the Panel should have been expected to continue its analysis into additional alternative measures, which Antigua itself failed to identify. As we said above[278], it is not for the responding party to identify the universe of alternative measures against which its own measure should be compared. It is only if such an alternative is raised that this comparison is required.[279] We therefore dismiss this aspect of Antigua's appeal.

321. In our analysis above, we found that the Panel erred in assessing the necessity of the three United States statutes against the possibility of consultations with Antigua because such consultations, in our view, cannot qualify as a reasonably available alternative measure with which a challenged measure

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[273]Panel Report, para. 6.531.

[274]Antigua's other appellant's submission, para. 103.

[275]*Ibid*., para. 104.

[276]See Panel Report, paras. 6.497-6.498. This type of approach was expressly encouraged by the Appellate Body in *Korea – Various Measures on Beef*, para. 172:

> The application by a Member of WTO-*compatible* enforcement measures to the same kind of illegal behaviour – the passing off of one product for another – for like or at least similar products, provides a suggestive indication that an alternative measure which could "reasonably be expected" to be employed may well be available. The application of such measures for the control of the same illegal behaviour for like, or at least similar, products raises doubts with respect to the objective *necessity* of a different, much stricter, and WTO-inconsistent enforcement measure. (original emphasis)

[277]*Supra*, paras. 0-0.

[278]*Supra*, para. 0.

[279]*Supra*, paras. 310-0.

should be compared.[280] For this reason, we *reverse* the Panel's finding, in paragraph 6.535 of the Panel Report, that, because the United States did not enter into consultations with Antigua:

> ... the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are necessary to protect public morals and/or public order within the meaning of Article XIV(a).

322. Having reversed this finding, we must consider whether, as the United States contends[281], the Wire Act, the Travel Act, and the IGBA are properly characterized as "necessary" to achieve the objectives identified by the United States and accepted by the Panel. The Panel's analysis, as well as the factual findings contained therein, are useful for our assessment of whether these measures satisfy the requirements of paragraph (a) of Article XIV.

323. As we stated above, a responding party must make a *prima facie* case that its challenged measure is "necessary". A Panel determines whether this case is made through the identification, and weighing and balancing, of relevant factors, such as those in *Korea – Various Measures on Beef*, with respect to the measure challenged. In this regard, we note that the Panel: (i) found that the three federal statutes protect "very important societal interests"[282]; (ii) observed that "strict controls may be needed to protect [such] interests"[283]; and (iii) found that the three federal statutes contribute to the realization of the ends that they pursue.[284] Although the Panel recognized the "significant restrictive trade impact"[285] of the three federal statutes, it expressly tempered this recognition with a detailed explanation of certain characteristics of, and concerns specific to, the remote supply of gambling and betting services. These included: (i) "the volume, speed and international reach of remote gambling transactions"[286]; (ii) the "virtual anonymity of such transactions"[287]; (iii) "low barriers to entry in the context of the remote supply of gambling and betting services"[288]; and the (iv) "isolated and anonymous environment in which such gambling takes place".[289] Thus, this analysis reveals that the Panel did not place much weight, in the circumstances of this case, on the restrictive trade impact of the three federal statutes. On the contrary, the Panel appears to have accepted virtually all of the elements upon which the United States based its assertion that the three federal statutes are "indispensable".[290]

324. The Panel further, and in our view, tellingly, stated that

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[280] *Supra*, para. 0.

[281] United States' appellant's submission, para. 176.

[282] Panel Report, paras. 6.492 and 6.533.

[283] *Ibid*., para. 6.493.

[284] *Ibid*., para. 6.494.

[285] *Ibid*., para para. 6.495.

[286] *Ibid*., para. 6.505.

[287] *Ibid*.

[288] *Ibid*., para. 6.507.

[289] *Ibid*., para. 6.514.

[290] Panel Report, para. 6.534.

> ... the United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, *which suggests that the measures in question are "necessary" within the meaning of Article XIV(a).* [291] (emphasis added)

325. From all of the above, and in particular from the summary of its analysis made in paragraphs 6.533 and 6.534 of the Panel Report, we understand the Panel to have acknowledged that, *but for* the United States' alleged refusal to accept Antigua's invitation to negotiate, the Panel would have found that the United States had made its *prima facie* case that the Wire Act, the Travel Act, and the IGBA are "necessary", within the meaning of Article XIV(a). We thus agree with the United States that the "sole basis" for the Panel's conclusion to the contrary was its finding relating to the requirement of consultations with Antigua.[292]

326. Turning to the Panel's analysis of alternative measures, we observe that the Panel dismissed, as irrelevant to its analysis, measures that did not take account of the specific concerns associated with *remote* gambling.[293] We found above that the Panel erred in finding that consultations with Antigua constitutes a measure reasonably available to the United States.[294] Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA. In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not "necessary" within the meaning of Article XIV(a). Because the United States made its *prima facie* case of "necessity", and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are "necessary", and therefore justified, under paragraph (a) of Article XIV.

327. For all these reasons, we *find* that the Wire Act, the Travel Act, and the IGBA are "measures ... necessary to protect public morals or to maintain public order", within the meaning of paragraph (a) of Article XIV of the GATS.[295]

(…)

3. The Chapeau of Article XIV

338. Notwithstanding its finding that the measures at issue are *not* provisionally justified, the Panel examined whether those measures satisfy the requirements of the chapeau of Article XIV "so as to assist the parties in resolving the underlying dispute in this case."[296] This examination is the subject of appeals by both participants. Unlike the Panel, we have found the Wire Act, the Travel Act, and the IGBA to fall within the scope of Article XIV(a). Therefore, we must now review the Panel's examination under the chapeau.

339. The chapeau of Article XIV provides:

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[291] *Ibid*., para. 6.533.

[292] United States' appellant's submission, para. 137.

[293] Panel Report, paras. 6.497-6.498.

[294] *Supra*, para. 0.

[295] We address in the next sub-section of this Report the appeals raised by Antigua and the United States under Article 11 of the DSU, with respect to the Panel's analysis under Article XIV(a) of the GATS, and find them to be either without merit or not necessary to rule on in order to resolve this dispute.

[296] Panel Report, para. 6.566.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures [of the type specified in the subsequent paragraphs of Article XIV]....

The focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV.[297] By requiring that the measure be *applied* in a manner that does not to constitute "arbitrary" or "unjustifiable" discrimination, or a "disguised restriction on trade in services", the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS.[298]

340. The Panel found that:

> ... the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.[299]

341. In reviewing the Panel's treatment of the chapeau to Article XIV, we begin with Antigua's allegations of error, and then turn to those raised by the United States, proceeding as follows: (a) first, we examine Antigua's claim that the Panel should not have analyzed the United States' defence under the chapeau; (b) secondly, we analyze Antigua's allegation that the Panel erred by focusing its discussion under the chapeau on the *remote supply* of gambling services rather than on the entire gambling industry; (c) thirdly, we address the United States' argument that the Panel articulated and applied a standard under the chapeau that is inconsistent with its terms; (d) fourthly, we review the Panel's finding on the alleged non-enforcement of certain laws against United States remote suppliers of gambling services; and (e) finally, we examine whether, in its analysis under the chapeau of Article XIV, the Panel fulfilled its obligations under Article 11 of the DSU.

(a) Did the Panel Err in Making Findings Under the Chapeau of Article XIV?

342. In deciding to assess whether the measures satisfied the requirements of the chapeau, the Panel explained that, even though such an examination was "not necessary", it wanted "to assist the parties in resolving the underlying dispute in this case."[300] Antigua alleges that the Panel acted inconsistently with the Appellate Body's decision in *Korea – Various Measures on Beef* in determining whether the Wire Act, the Travel Act, and the IGBA meet the requirements of the chapeau after having found that they are were not provisionally justified.

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[297]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

[298]*Ibid*., p. 22, DSR 1996:I, 3, at 20-21.

[299]Panel Report, para. 6.608.

[300]Panel Report, para. 6.566.

343. In *Korea – Various Measures on Beef*, the Appellate Body stated, with respect to Article XX of the GATT 1994, that:

> Having found that the dual retail system did not fulfil the requirements of paragraph (d), the Panel correctly considered that it did not need to proceed to the second-tier analysis, that is, to examine the application in this case of the requirements of the introductory clause of Article XX.[301]

Contrary to Antigua's submission[302], this statement does not impose a *requirement* on panels to stop evaluating a responding party's defence once they have determined that a challenged measure is not provisionally justified under one of the paragraphs of the general exception provision.

344. Provided that it complies with its duty to assess a matter objectively, a panel enjoys the freedom to decide *which legal issues* it must address in order to resolve a dispute.[303] Moreover, in some instances, a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis[304], as, for example, in this case.

345. Therefore, the Panel did not err in examining whether the Wire Act, the Travel Act, and the IGBA meet the requirements of the chapeau of Article XIV, even though the Panel had found these measures not to fall within the scope of Article XIV(a) or XIV(c).

(b) Did the Panel Improperly "Segment" the Gambling and Betting Industry in its Analysis?

346. In examining whether discrimination exists in the United States' application of the Wire Act, the Travel Act, and the IGBA, the Panel found that "some of the concerns the United States has identified are specific only to the remote supply of gambling and betting services."[305] As a result, the Panel determined that it would have been "inappropriate", in the context of determining whether WTO-consistent alternative measures are reasonably available, to compare the United States' treatment of concerns relating to the *remote* supply of gambling services, with its treatment of concerns relating to the *non*-remote supply of such services. Antigua characterizes this approach as an improper "segment[ation]" of the gambling industry, the result of which was to "exclude[] a substantial portion of gambling and betting services from any analysis at all."[306]

347. We have already observed that the Panel found, on the basis of evidence adduced by the United States, that the *remote* supply of gambling services gives rise to particular concerns.[307] We see no error in the Panel's maintaining such a distinction for purposes of analyzing any discrimination in the application of the three federal statutes. Such an approach merely reflects the view that the distinctive characteristics of the remote supply of gambling services may call for distinctive regulatory methods, and that this could render a comparison between the treatment of remote and non-remote supply of gambling services inappropriate.

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[301] Appellate Body Report, *Korea – Various Measures on Beef*, para. 156.

[302] Antigua's other appellant's submission, para. 141.

[303] Appellate Body Report, *India – Patents* (*US*), para. 87; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340; Appellate Body Report, *Canada – Autos*, para. 114.

[304] Appellate Body Report, *US – Softwood Lumber IV*, para. 118.

[305] Panel Report, para. 6.498.

[306] Antigua's other appellant's submission, para. 142.

[307] *Supra*, para. 0.

(c) Did the Panel Fail to Take Account of the "Arbitrary" or "Unjustifiable" Nature of the Discrimination Referred to in the Chapeau?

348. We consider next whether, contrary to the United States' allegations, the Panel accurately described and applied the correct interpretation of the chapeau of Article XIV. On the basis of the arguments advanced by Antigua, the Panel examined certain instances of alleged discrimination in the application of the Wire Act, the Travel Act, and the IGBA.[308] In the course of this analysis, the Panel found that the United States had not prosecuted certain domestic remote suppliers of gambling services[309], and that a United States statute (the Interstate Horseracing Act) could be understood, on its face, to permit certain types of remote betting on horseracing within the United States.[310] On the basis of these two findings, the Panel concluded that:

> ... the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a *consistent manner* as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.[311] (emphasis added)

349. The United States contends that the Panel's reasoning, in particular its standard of "consistency", reveals that the Panel, in fact, assessed only whether the United States treats domestic service suppliers differently from foreign service suppliers. Such an assessment is inadequate, the United States argues, because the chapeau also requires a determination of whether differential treatment, or discrimination, is "arbitrary" or "unjustifiable".

350. The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting services by *any supplier*, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the Travel Act, and the IGBA on the basis that there is *no discrimination* in the manner in which the three federal statutes are applied to the remote supply of gambling and betting services.[312] The United States could have, but did not, put forward an additional argument that *even if* such discrimination exists, it does not rise to the level of "arbitrary" or "unjustifiable" discrimination.

351. In the light of the arguments before it, we do not read the Panel to have ignored the requirement of "arbitrary" or "unjustifiable" discrimination by articulating the standard under the chapeau of Article

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[308]Panel Report, para. 6.584.

[309]*Ibid*., para. 6.588.

[310]Panel Report, para. 6.599:

> ... the text of the revised statute does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states.

[311]*Ibid*., para. 6.607.

[312]*Supra*, para. 0.

XIV as one of "consistency".[313] Rather, the Panel determined that Antigua had rebutted the United States' claim of no discrimination *at all* by showing that domestic service suppliers are permitted to provide remote gambling services in situations where foreign service suppliers are not so permitted. We see no error in the Panel's approach.

(d) Did the Panel Err in its Examination of the Alleged Non-Enforcement of the Measures at Issue Against Domestic Service Suppliers?

352. In the course of examining whether the Wire Act, the Travel Act, and the IGBA are applied consistently with the chapeau of Article XIV, the Panel considered whether these laws are enforced in a manner that discriminates between domestic and foreign service suppliers. Antigua identified four United States firms that it claimed engage in the remote supply of gambling services but have not been prosecuted under any of the three federal statutes: Youbet.com, TVG, Capital OTB, and Xpressbet.com.[314] Antigua contrasted this lack of enforcement with the case of an Antiguan service supplier that "had modelled [its] business on that of Capital OTB" but was nevertheless prosecuted and convicted under the Wire Act.[315] In support of its argument that it applies these statutes equally to domestic and foreign service suppliers, the United States submitted statistical evidence to show that most cases prosecuted under these statutes involved gambling and betting services solely within the United States.[316]

353. The Panel also "note[d] indications by the United States" that prosecution proceedings were pending against one domestic remote supplier of gambling services (Youbet.com), but stated that it had no evidence as to whether any enforcement action was being taken against the other three domestic remote suppliers of gambling services identified by Antigua.[317] As to foreign service suppliers, the Panel observed that it had evidence of the prosecution of one Antiguan operator for violations of the Wire Act.[318] The Panel found this evidence "inconclusive" and concluded that the United States had not shown that it enforces its prohibition against the remote supply of gambling services on the three domestic service suppliers in a manner consistent with the chapeau of Article XIV.[319]

354. We observe, first, that none of the three federal statutes distinguishes, on its face, between domestic and foreign service suppliers.[320] We agree with the Panel that, in the context of facially neutral measures, there may nevertheless be situations where the selective prosecution of persons rises to the

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[313]See Panel Report, paras. 6.578-6.581, where the Panel discusses Appellate Body decisions relating to the chapeau of Article XX of the GATT 1994. In particular, we note the Panel's quotation of the relevant portion of paragraph 150 of the Appellate Body decision in *US – Shrimp*, which states:

> [under the chapeau, first,] the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. (original emphasis; footnote omitted)

(Panel Report, para. 6.578 (quoting Appellate Body Report, *US – Shrimp*, para. 150))

[314]*Ibid*., para. 6.585.

[315]*Ibid*., para. 6.585.

[316]*Ibid*., para. 6.586.

[317]*Ibid*., para. 6.588.

[318]Panel Report, para. 6.588.

[319]*Ibid*., para. 6.589.

[320]*Supra*, paras. 0-0.

level of discrimination. In our view, however, the evidence before the Panel could not justify finding that, notwithstanding the neutral language of the statute, the facts are "inconclusive" to establish "non-discrimination" in the United States' enforcement of the Wire Act. The Panel's conclusion rests, not only on an inadequate evidentiary foundation, but also on an incorrect understanding of the type of conduct that can, as a matter of law, be characterized as discrimination in the enforcement of measures.

355. In this case, the Panel came to its conclusion—that the United States failed to establish non-discrimination in the enforcement of its laws—on the basis of only five cases: one case of prosecution against a foreign service supplier; one case of "pending" prosecution against a domestic service supplier[321]; and three cases with no evidence of prosecution against domestic service suppliers. From these five cases, the Panel in effect concluded that the United States' defence had been sufficiently rebutted to warrant a finding of "inconclusiveness".

356. In our view, the proper significance to be attached to isolated instances of enforcement, or lack thereof, cannot be determined in the absence of evidence allowing such instances to be placed in their proper context. Such evidence might include evidence on the *overall* number of suppliers, and on *patterns* of enforcement, and on the reasons for particular instances of non-enforcement. Indeed, enforcement agencies may refrain from prosecution in many instances for reasons unrelated to discriminatory intent and without discriminatory effect.

357. Faced with the limited evidence the parties put before it with respect to enforcement, the Panel should rather have focused, as a matter of law, on the wording of the measures at issue. These measures, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services.[322] We therefore *reverse* the Panel's finding, in paragraph 6.589 of the Panel Report, that

> ... the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau.

(e) Did the Panel Fail to Comply with Article 11 of the DSU in its Analysis of Video Lottery Terminals, Nevada Bookmakers, and the Interstate Horseracing Act?

358. The United States and Antigua each alleges that the Panel did not comply with its obligations under Article 11 of the DSU in its analysis under the chapeau of Article XIV. We examine first Antigua's appeal relating to video lottery terminals and Nevada bookmakers, and then consider the United States' appeal concerning the Interstate Horseracing Act.

359. The Panel examined Antigua's allegations that several states in the United States permit video lottery terminals[323], and that Nevada permits bookmakers to offer their services over the internet and telephone.[324] The Panel rejected both of these allegations. Antigua contends that the Panel made these findings notwithstanding that Antigua had submitted evidence and the United States had submitted none, and that, by so finding, the Panel effectively "reversed" the burden of proof.[325]

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[321]Panel Report, para. 6.588.

[322]*Supra*, paras. 0-0.

[323]Panel Report, paras. 6.590-6.594.

[324]*Ibid*., paras. 6.601-6.603.

[325]Antigua's other appellant's submission, paras. 144-145.

360. Antigua is correct that the burden of proof is on the United States, as the responding party invoking the Article XIV defence. Once the United States established its defence with sufficient evidence and arguments, however, it was for Antigua to rebut the United States' defence.[326] In rejecting Antigua's allegations relating to video lottery terminals and Nevada bookmakers, we understand the Panel to have determined that Antigua failed to rebut the United States' asserted defence under the chapeau, namely that its measures do not discriminate at all. Consequently, we do not read the Panel to have reversed the burden of proof in these two instances, and we dismiss this ground of Antigua's appeal.

361. We now turn to the United States' Article 11 claim relating to the chapeau. The Panel examined the scope of application of the Interstate Horseracing Act ("IHA").[327] Before the Panel, Antigua relied on the text of the IHA, which provides that "[a]n interstate off-track wager *may be accepted* by an off-track betting system" where consent is obtained from certain organizations.[328] Antigua referred the Panel in particular to the definition given in the statute of "interstate off-track wager":

> [T]he term ... 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, *placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State*, as well as the combination of any pari-mutuel wagering pools.[329] (emphasis added)

Thus, according to Antigua, the IHA, on its face, authorizes *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races.[330] To this extent, in Antigua's view, the IHA "exempts"[331] domestic service suppliers from the prohibitions of the Wire Act, the Travel Act, and the IGBA.[332]

362. The United States disagreed, claiming that the IHA—a civil statute—cannot "repeal"[333] the Wire Act, the Travel Act, or the IGBA—which are criminal statutes—*by implication*, that is, merely by virtue

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[326]See *supra*, para. 0.

[327]We understand the Panel to have predicated its examination of the IHA on its view that the services under the IHA include services subject to the specific commitment undertaken by the United States in subsector 10.D of its Schedule.

[328]Section 3004 of Title 15 of the United States Code, Exhibit AB-82 submitted by Antigua to the Panel. (emphasis added)

[329]Section 3002 of Title 15 of the United States Code, Exhibit AB-82 submitted by Antigua to the Panel.

[330]Antigua submitted additional evidence in support of its reading of the IHA. See, for example, Panel Report, footnote 1061 to para. 6.599 and footnote 1062 to para. 6.600 (citing, *inter alia*, Congressional Record, House of Representatives Proceedings and Debates of the 106th Congress, Second Session (26 October 2000) 146 Cong. Rec. H 11230, 106th Cong. 2nd Sess. (2000), Exhibit AB-124 submitted by Antigua to the Panel); and United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (December 2002), Appendix II, Exhibit AB-17 submitted by Antigua to the Panel.

[331]Panel Report, para. 6.595 (quoting Antigua's statement at the first substantive panel meeting, para. 92).

[332]The Wire Act, the Travel Act, and the IGBA prohibit a broad range of gambling and betting activities when they involve foreign or interstate commerce. (Panel Report, paras. 6.362, 6.367, and 6.375)

[333]Panel Report, para. 6.597 (quoting United States' response to Question 21 posed by the Panel, Panel Report, p. C-50).

of the IHA's adoption *subsequent* to that of the Wire Act, the Travel Act, and the IGBA.[334] Rather, under principles of statutory interpretation in the United States, such a repeal could be effective only if done *explicitly*, which was not the case with the IHA.[335]

363. Thus, the Panel had before it conflicting evidence as to the relationship between the IHA, on the one hand, and the measures at issue, on the other. We have already referred to the discretion accorded to panels, as fact-finders, in the assessment of the evidence.[336] As the Appellate Body has observed on previous occasions, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts."[337]

364. In our view, this aspect of the United States' appeal essentially challenges the Panel's failure to accord sufficient weight to the evidence submitted by the United States with respect to the relationship under United States law between the IHA and the measures at issue. The Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion. This limitation, however, could not absolve the Panel of its responsibility to arrive at a conclusion as to the relationship between the IHA and the prohibitions in the Wire Act, the Travel Act, and the IGBA. The Panel found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by *domestic* firms continues to be prohibited notwithstanding the plain language of the IHA. In this light, we are not persuaded that the Panel failed to make an objective assessment of the facts.

365. With respect to the Panel's analysis under the chapeau of Article XIV, the United States also contends that the Panel failed to satisfy its obligations under Article 11 of the DSU in finding that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau."[338] Having reversed this finding under the chapeau of Article XIV[339], we *need not rule* on the United States' additional ground of appeal, namely that, in arriving at this finding, the Panel acted inconsistently with its duty under Article 11 of the DSU.

366. In sum, we *find* that none of the challenges under Article 11 of the DSU relating to the chapeau of Article XIV of the GATS has succeeded.

(f) Conclusion under the Chapeau

367. In paragraph 6.607 of the Panel Report, the Panel expressed its overall conclusion under the chapeau of Article XIV as follows:

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[334]Panel Report, para. 6.595 (citing, *inter alia*, United States' first written submission to the Panel, paras. 33-35); United States' second written submission to the Panel, para. 63; and United States' response to Question 21 posed by the Panel, Panel Report, p. C-50. See also Panel Report, para. 6.597 (citing, *inter alia*, United States' response to Question 21 posed by the Panel, Panel Report, p. C-50); and Presidential Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act, 21 December 2000, Exhibit US-17 submitted by the United States to the Panel, pp. 3155-3156.

[335]United States' response to Question 21 posed by the Panel, Panel Report, p. C-50; United States' second written submission to the Panel, paras. 63-64.

[336]*Supra*, para. **Error! Reference source not found.**.

[337]Appellate Body Report, *EC – Hormones*, para. 133. See also Appellate Body Report, *Japan – Apples*, para. 222.

[338]Panel Report, para. 6.589.

[339]*Supra*, para. 0.

> ... the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

368. This conclusion rested on the Panel's findings relating to two instances allegedly revealing that the measures at issue discriminate between domestic and foreign service suppliers, contrary to the defence asserted by the United States under the chapeau. The first instance found by the Panel was based on "inconclusive" evidence of the alleged non-enforcement of the three federal statutes.[340] We have reversed this finding.[341] The second instance found by the Panel was based on "the ambiguity relating to" the scope of application of the IHA and its relationship to the measures at issue. [342] We have upheld this finding.[343]

369. Thus, *our* conclusion—that the Panel did not err in finding that the United States has not shown that its measures satisfy the requirements of the chapeau—relates solely to the possibility that the IHA exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA. In contrast, the *Panel's* overall conclusion under the chapeau was broader in scope. As a result of our reversal of one of the two findings on which the Panel relied for its conclusion in paragraph 6.607 of the Panel Report, we must *modify* that conclusion. We *find*, rather, that the United States has not demonstrated that—in the light of the existence of the IHA—the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau. Put another way, we uphold the Panel, but only in part.

4. Overall Conclusion on Article XIV

370. Our findings under Article XIV lead us to modify the overall conclusions of the Panel in paragraph 7.2(d) of the Panel Report.[344] The Panel found that the United States failed to justify its measures as "necessary" under paragraph (a) of Article XIV, and that it also failed to establish that those measures satisfy the requirements of the chapeau.

371. We have found instead that those measures satisfy the "necessity" requirement. We have also upheld, but only in part, the Panel's finding under the chapeau. We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign *and* domestic suppliers of remote gambling services, notwithstanding the IHA—which, according to the Panel, "does appear, on its face, to permit"[345] *domestic* service suppliers to supply remote betting services for horse racing. In other words, the United States did not establish that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA.

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[340]Panel Report, paras. 6.589 and 6.607.

[341]*Supra*, para. 0.

[342]Panel Report, para. 6.607.

[343]*Supra*, paras. 0 and 0.

[344]See also Panel Report, para. 6.608.

[345]*Ibid*., para. 6.599.

372. Therefore, we *modify* the Panel's conclusion in paragraph 7.2(d) of the Panel Report. We *find*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we *find* that the United States has not established that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.

VIII. Findings and Conclusions

373. For the reasons set out in this Report, the Appellate Body:

(…)

(A) with respect to the measures at issue,

(i) *upholds* the Panel's finding, in paragraph 6.175 of the Panel Report, that "the alleged 'total prohibition' on the cross-border supply of gambling and betting services ... cannot constitute a single and autonomous 'measure' that can be challenged in and of itself";

(ii) *finds* that the Panel *did not err* in examining whether the following three federal laws are consistent with the United States' obligations under Article XVI of the GATS:

(a) Section 1084 of Title 18 of the United States Code (the "Wire Act");

(b) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and

(c) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act");

(iii) *finds* that the Panel *erred* in examining whether eight state laws, namely, those of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah, are consistent with the United States' obligations under Article XVI of the GATS;

(B) with respect to the United States' GATS Schedule,

(i) *upholds*, albeit for different reasons, the Panel's finding that subsector 10.D of the United States' Schedule to the GATS includes specific commitments on gambling and betting services;

(C) with respect to Article XVI of the GATS,

(i) *upholds* the Panel's findings that a prohibition on the remote supply of gambling and betting services is a "limitation on the number of service suppliers" within the meaning of Article XVI:2(a), and that such a prohibition is also a "limitation on the total number of service operations or on the total quantity of service output" within the meaning of Article XVI:2(c);

(ii) *upholds* the Panel's finding, in paragraph 7.2(b)(i) of the Panel Report, 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 sub-paragraphs (a) and (c) of Article XVI:2;

(…)

(D) with respect to Article XIV of the GATS,

(i) *finds* that the Panel *did not fail* to satisfy its obligations under Article 11 of the DSU by deciding to examine the United States' defence under Article XIV;

(ii) as regards the burden of proof,

(a) *finds* that the Panel *did not improperly assume* either the burden of establishing the defence under Article XIV(a) on behalf of the United States or the burden of rebutting the United States' defence on behalf of Antigua;

(iii) as regards paragraph (a) of Article XIV,

(a) *upholds* the Panel's finding, in paragraph 6.487 of the Panel Report, that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order'";

(b) *reverses* the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to protect public morals or to maintain public order;

(c) *finds* that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are "measures ... necessary to protect public morals or to maintain public order"; and

(…)

(v) as regards the chapeau of Article XIV,

(a) *reverses* the Panel's finding, in paragraph 6.589 of the Panel Report, that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau";

(b) *finds* that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU; and

(c) *modifies* the Panel's conclusion in paragraph 6.607 of the Panel Report and *finds*, rather, that the United States has not demonstrated that—in the light of the existence of the Interstate Horseracing Act—the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau;

(vi) as regards Article XIV in its entirety,

(a) *modifies* the Panel's conclusion in paragraph 7.2(d) of the Panel Report and *finds*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures "necessary to protect public morals or maintain public order", in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau; and

(…)

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement.

2-3-B. Meeting of the Dispute Settlement Body on April 20, 2005

Minutes of the Meeting, WT/DSB/M/188

4. United States – Measures affecting the cross-border supply of gambling and betting services

(a) Report of the Appellate Body (WT/DS285/AB/R) and Report of the Panel (WT/DS285/R)

66. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS285/9 transmitting the Appellate Body Report on: "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services", which was circulated on 7 April 2005 in document WT/DS285/AB/R, in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of WTO Documents contained in document WT/L/452, the Appellate Body Report and the Panel Report pertaining to this case had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure was without prejudice to the right of Members to express their views on an Appellate Body report".

67. The representative of Antigua and Barbuda said that his country wished to thank the Panel and the Appellate Body, as well as the WTO Secretariat for their work on this very important and difficult issue. Antigua and Barbuda recognized that this particular dispute was unique in many ways and presented the WTO with particularly difficult issues. While his country had some concerns about some of the statements and conclusions reached by the Appellate Body in its Report, it was generally satisfied with the result. Antigua and Barbuda looked forward to prompt adherence by the United States with the recommendations and would be monitoring the progress very closely.

68. The representative of the United States said that his delegation wished to begin by thanking the members of the Appellate Body, the Panel, and the Secretariat for their hard work throughout the course of this dispute. As discussed in the US submissions to the Appellate Body in this dispute, the Panel Report in this dispute was very flawed. The United States was, therefore, pleased that the Appellate Body had seen fit to reverse or modify key findings of the Panel, and to identify and correct numerous flaws in the Panel's legal reasoning. The United States was pleased with the Appellate Body's finding that the US federal statutes at issue in this dispute were "measures ... necessary to protect public morals or to maintain public order" within the meaning of Article XIV(a) of the GATS. This finding rested on several important subsidiary findings. Significant among them was the Appellate Body's reversal of the Panel's erroneous finding that the United States was required to enter into consultations with Antigua and Barbuda before it could justify these measures as being "necessary".

69. Further, in applying the Article XIV chapeau, the Appellate Body had correctly clarified that it was an error for the Panel to rely on a very small number of unrepresentative cases to make a general finding concerning whether enforcement of US laws was non-discriminatory. The United States noted that the Appellate Body had raised the possibility of discrimination under one US statute that related to horse racing. However, the Appellate Body explicitly had not found that this statute was in fact discriminatory. His authorities were exploring possible avenues for addressing this narrow issue. The Appellate Body had also provided other important clarifications relating to GATS Article XIV. For example, it had clarified that under GATS Article XIV, which was similar to Article XX(d) of the GATT 1994, Members were not required to "identify the universe of less trade-restrictive alternative measures." Rather, the issue was whether the complaining party had identified a reasonably available WTO-consistent alternative. The United States welcomed that clarification.

70. The United States further welcomed the Appellate Body's finding that the Panel had erred in examining whether certain US state laws were consistent with US GATS obligations. This finding was important because it reconfirmed the burden that a complaining party must meet in order to present a prima facie case. The Appellate Body emphasized that "[a] prima facie case must be based on 'evidence and legal argument' put forward by the complaining party in relation to each of the elements of the claim." The United States appreciated the Appellate Body's rigor in analyzing whether Antigua and Barbuda as the complaining party presented sufficient evidence and legal arguments concerning US state laws to sustain its burden of establishing a prima facie case.

71. The United States regretted the Appellate Body's affirmation, on different grounds, of the Panel's findings with respect to sector 10.D of the US Schedule of specific commitments. However, the United States noted that, in contrast to the Panel, the Appellate Body had had recourse to the W/120 document and the UN CPC only as preparatory work, and not as context, in interpreting the US Schedule. The Appellate Body had also corrected some of the more egregious errors in the Panel's analysis of the US Schedule, such as the Panel's reliance on the purported meaning of terms in non-authentic languages. The United States was disappointed by the Appellate Body's analysis of Article XVI, and in particular its failure to give effect to the explicit terms "in the form of", which was repeated in each of the first four sub-paragraphs of Article XVI:2. The Appellate Body's reasoning appeared to rely upon the preparatory work while de-emphasizing the precise terms actually used in the text agreed to by all Members. In the US view, this was not a model of proper textual analysis. Indeed, the Report itself acknowledged some of the many questions left open or even created by the Appellate Body's interpretation. These included the proper legal analysis of "limitations on market access in respect of part of a committed sector" or "limitations on one or more means of cross-border delivery," and the proper meaning of what the Appellate Body called "quantitative measures" – a phrase that appeared in some of the negotiating history, but was ultimately omitted from the text of the GATS.

72. In sum, the United States welcomed the central conclusion of the Appellate Body that the relevant US measures were necessary to protect public morals or maintain public order in relation to gambling. While the United States was disappointed with some aspects of the Report, it appreciated the reversal of various disturbing aspects of the Panel's analysis. The United States thanked the members of the Appellate Body again for their hard work.

(…)

75. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS285/AB/R and the Panel Report contained in WT/DS285/R, as modified by the Appellate Body Report.

2-4. ARBITRATION UNDER ARTICLE 21.3(C) DSU

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS/285/13, 19 August 2005

Arbitrator: Claus-Dieter Ehlermann

I. Introduction

1. On 20 April 2005, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[346] and the Panel Report[347], as modified by the Appellate Body Report, in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.[348] At the DSB meeting of 19 May 2005, the United States indicated its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would require a reasonable period of time in which to do so.[349]

2. On 6 June 2005, Antigua and Barbuda ("Antigua") informed the DSB that consultations with the United States had not resulted in an agreement on the reasonable period of time for implementation. Antigua therefore requested that such period be determined by binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[350]

3. Antigua and the United States were unable to agree on an arbitrator within 10 days of the matter being referred to arbitration. Therefore, by letter dated 17 June 2005[351], Antigua requested that the Director-General appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The Director-General appointed me as arbitrator on 30 June 2005, after consulting the parties.[352] I informed the parties of my acceptance of the appointment by letter dated 30 June 2005.

4. Antigua and the United States have agreed that this award will be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90 day period stipulated in Article 21.3(c).[353]

5. Antigua and the United States provided their written submissions to me on 12 July 2005. On 20 July 2005 I requested the United States, by letter, to provide me with a copy of the 2006 schedules for the House of Representatives and the Senate. An oral hearing was held on 21 July 2005. At the outset of that hearing, the United States informed me that the 2006 schedules for the United States Congress are not yet

[346]Appellate Body Report, WT/DS285/AB/R.

[347]Panel Report, WT/DS285/R.

[348]WT/DS285/10.

[349]WT/DSB/M/189, para. 47.

[350]WT/DS285/11.

[351]Antigua's letter was received on 20 June 2005.

[352]WT/DS285/12.

[353]The 90 day period following adoption of the Panel and Appellate Body Reports expired on 19 July 2005.

available, but that the recess periods in 2006 were likely to be similar to those in the 2005 schedules.[354] On 22 July 2005, in response to a question posed at the oral hearing, the United States informed me by letter that there is currently one bill under consideration by the United States Congress related to the subject of internet gambling.[355]

[…]

III. Reasonable Period of Time

A. *Preliminary Matters*

1. Mandate

27. The Panel and Appellate Body Reports in this dispute were adopted by the DSB on 20 April 2005 and, pursuant to Article 21.3 of the DSU, the United States informed the DSB of its intentions with respect to implementation shortly thereafter.[356] Article 21.3 of the DSU establishes that, when it is "impracticable" for a Member to comply "immediately" with the recommendations and rulings of the DSB, then that Member "shall have a reasonable period of time in which to do so." The United States informed the DSB that it would require such a reasonable period of time in this dispute.

28. My task as arbitrator in this proceeding is to determine such reasonable period of time, taking due account of the relevant provisions of the DSU, and, specifically, of the following directions set forth in Article 21.3:

> ... The reasonable period of time shall be:
>
> ...
>
> (c) a period of time determined through binding arbitration ... In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (footnotes omitted)

2. The Measures to be Brought into Conformity

29. Both the Panel and Appellate Body Reports in this dispute contained findings that the United States had acted inconsistently with its obligations under the covered agreements. More specifically, the Appellate Body upheld the Panel's finding that, by maintaining the following three measures, the United States acts inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 of the GATS:

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[354]The United States included the 2005 schedules of both chambers of Congress as Exhibit US-9 to its submission.

[355]The United States referred to H.R. 1422, the Student Athlete Protection Act. The United States also conveyed its understanding that a Senator is in the process of preparing an internet gambling bill to strengthen penalties for illegal gambling and limit the use of financial instruments in connection with internet gambling.

[356]Minutes of the DSB meeting held on 19 May 2005, WT/DSB/M/189, para. 47.

Section 1084 of Title 18 of the United States Code (the "Wire Act");

Section 1952 of Title 18 of the United States Code (the "Travel Act"); and

Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or the "IGBA").[357]

30. The Appellate Body also upheld, albeit for different reasons, the Panel's finding that the United States had not demonstrated that its measures, found to be inconsistent with Article XVI of the GATS, satisfy the requirements of Article XIV of the GATS.[358] Accordingly, the Appellate Body recommended that the DSB request the United States to bring its inconsistent measures into conformity with its obligations under the GATS.

B. *Factors Affecting the Determination of the Reasonable Period of Time under Article 21.3(c)*

1. Burden of Proof

31. Both of the parties to this dispute agree that the United States, as the implementing Member, bears the burden of establishing that its proposed implementation period is a "reasonable period of time".[359] I do not disagree with the principle that when an implementing Member seeks a reasonable period of time for implementation, then it is appropriate for that Member to carry the burden of demonstrating the reasonableness of its proposal.[360]

2. Choice of Method of Implementation

32. Both the Appellate Body and the Panel found that, due to ambiguity in the relationship between the Wire Act, the Travel Act and the IGBA, on the one hand, and a federal civil statute known as the Interstate Horseracing Act (the "IHA") on the other hand, the United States had not satisfied its burden of justifying the measures at issue under the chapeau to Article XIV of the GATS.[361] Referring to these findings, the United States indicates that it will seek to implement the recommendations and rulings of the DSB by further clarifying the relationship between these statutes. Antigua, on the other hand, believes that broader action is necessary. Antigua submits that the United States can properly implement the recommendations and rulings of the DSB only if, consistently with the requirements of the chapeau to Article XIV of the GATS, it removes any discrimination in the treatment of Antiguan suppliers of "remote" gambling and betting services, on the one hand, and the treatment of domestic suppliers of the same services, on the other.[362] To do so, argues Antigua, the United States will have to either grant

[357]Appellate Body Report, para. 373(C)(ii); Panel Report, para. 7.2(b)(i).

[358]Appellate Body Report, para. 373(D)(vi); Panel Report, para. 7.2(d).

[359]Antigua's submission, para. 30; United States' response to questioning at the oral hearing.

[360]Award of the Arbitrator, *US – 1916 Act*, para. 33. A similar sentiment was also expressed by the Arbitrator in *EC – Tariff Preferences*, at paragraph 27 of his award.

[361]Appellate Body Report, para. 373(D)(v)(c); Panel Report, paras. 6.599-6.600.

[362]In this dispute, the Panel used the term "remote" supply to refer to:

market access to Antiguan service providers or prohibit the supply of all domestic remote gambling services.

33. It is not the role of an arbitrator under Article 21.3(c) to identify a particular method of implementation and to determine the "reasonable period of time" on the basis of that method. Rather, the implementing Member retains the discretion to choose its preferred method of implementation.[363] Nevertheless, it will be necessary for me to consider certain aspects of the means of implementation proposed by each of the parties, as explained in more detail below.

3. Particular Circumstances

34. Article 21.3(c) requires that I determine the "reasonable period of time for implementation", establishes a guideline that this period "should not exceed 15 months", and directs that in fixing the relevant period I should have regard to "the particular circumstances" of this case.

35. It is by now well established that a key determinant of the reasonable period of time for implementation is the nature of the implementing action that is to be taken. Legislative action will, as a general rule, require more time than regulatory rule-making, which in turn will normally need more time than implementation that can be achieved by means of an administrative decision.[364]

36. In this arbitration, Antigua contends that the United States can implement, in part, through executive action, and in part through legislative action. With respect to what Antigua characterizes as the supply of "non-sports related and horseracing" gambling and betting services, Antigua argues that the United States can, and should, implement the recommendations and rulings of the DSB through the issuance of an executive order by the United States President that would clarify that the supply of such services from Antigua is not prohibited under the Wire Act, the Travel Act or the IGBA.[365] As regards

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> "any situation where the supplier, *whether domestic or foreign*, and the consumer of gambling and betting services are not physically together". In other words, in situations of remote supply, the consumer of a service does not have to go to any type of outlet where the supply is supervised, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier offers the service directly to the consumer through some means of distance communication. Hence, cross-border supply is necessarily remote, but remote supply amounts to "cross-border" supply only when the service supplier and the consumer are located in territories of different Members.

(Panel Report, para. 6.32; original emphasis, footnote omitted)

[363]See, for example, Award of the Arbitrator, *EC – Hormones*, para. 38; Award of the Arbitrator, *Australia – Salmon,* para. 35; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *US – Offset Act (Byrd Amendment*), para. 48; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews,* para. 26.

[364]See, for example, Award of the Arbitrator, *Australia – Salmon*, para. 38; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49; Award of the Arbitrator, *Canada – Patent Term*, para. 41; Award of the Arbitrator, *Chile – Price Band System*, para. 38; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 57; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26.

[365]Specifically, Antigua argues that:

the supply of "other sports-related" gambling and betting services, Antigua accepts that legislative change will be necessary in order to clarify whether and how the Wire Act, the Travel Act and the IGBA apply to these activities.

37. The United States maintains that I need not address Antigua's arguments concerning implementation by executive order for at least three reasons. First, and foremost, it is my role under Article 21.3(c) to determine a *single* reasonable period of time for implementation. Since both parties agree that implementation by legislative means is required in this case, Antigua's argument that partial implementation could be achieved in a shorter period of time is irrelevant. For the United States, the only reasonable period of time that I am to determine is the reasonable period of time for *legislative* implementation. The United States points, in this respect, to two previous arbitrations in which a single reasonable period of time for implementation was determined, notwithstanding that the parties agreed that two different methods of implementation were required.[366] Secondly, the United States rejects Antigua's distinction between the supply of "non-sports related and horseracing" gambling and betting services, on the one hand, and the supply of "other sports-related" gambling and betting services, on the other. In the view of the United States, the three federal statutes at issue apply equally to, and prohibit, the supply of all forms of remote gambling and betting services. Thirdly, the United States contends that it is neither appropriate nor possible to achieve implementation in this dispute by means of a presidential executive order. The order that Antigua contends the United States President should issue could not properly form the subject of an executive order. Furthermore, the United States points out that it argued before the Panel that a presidential statement that accompanied the passage of the amendments to the IHA made clear that nothing in that Act, as amended, overrides the previously enacted criminal laws relating to gambling. Nevertheless, neither the Panel nor the Appellate Body considered that this presidential statement was sufficient to resolve the ambiguity in the relationship between the IHA, on the one hand, and the Wire Act, the Travel Act, and the IGBA, on the other. Given that the presidential statement was not considered by the Panel or the Appellate Body to provide sufficient clarity regarding this relationship, the United States submits that an executive order issued by the President would not do so either. For this reason, the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means.

38. As I understand it, although there is no express provision creating the power to issue executive orders, it is commonly accepted that the United States President has the authority to issue such orders, and that such authority derives from the general executive powers vested in the President by Article II of the United States Constitution.[367] In practice, United States presidents do issue executive orders. Nevertheless, the scope of the authority to issue such orders, and the types of matters that may be dealt with by executive order, appear to be matters of some debate. At the oral hearing, both parties agreed that the United States President may not issue an executive order that contradicts an existing statute. The parties disagree, however, on the issue of whether the Wire Act, the Travel Act and the IGBA, as they

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> ... it is well within the power of the president to issue an executive order to the agencies of the United States government to the effect that (i) these services may be lawfully offered by Antiguan operators to consumers in the United States and (ii) all enforcement and related action to the contrary, including (A) asset forfeitures, (B) restrictions on money transfers and use of financial instruments, (C) threats of federal prosecution by the DOJ against service providers to these industries, including advertisers, banks and credit card companies and processors, and (D) current pending prosecutions against persons operating these businesses, should in each instance immediately cease and desist.

(Antigua's submission, para. 22; footnote omitted)

[366]Award of the Arbitrator, *US – Hot-Rolled Steel*; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews.*

[367]Antigua's submission, para. 17.

stand, prohibit the supply of "non-sports related and horseracing" gambling and betting services from Antigua to consumers in the United States.

39. Neither the Panel nor the Appellate Body referred to the distinction that Antigua now draws, namely between the United States' regulation of the supply of "non-sports related and horseracing" gambling and betting services, on the one hand, and its regulation of the supply of "other sports-related" gambling and betting services, on the other. In response to a question at the oral hearing, Antigua acknowledged that neither report distinguishes between types of gambling. Moreover, it seems to me that the findings of both the Panel and the Appellate Body are based on the premise that each of the three statutes in question prohibits a broad category of gambling activities.[368]

40. In asking me to draw this distinction, therefore, Antigua is effectively asking me to make a ruling concerning the meaning and scope of application of United States municipal law. I do not consider that it forms part of my mandate to do so, given that the findings of the Panel and the Appellate Body make no such distinction.

41. Because I do not rule on whether the distinction asserted by Antigua exists, I need not, in this proceeding, resolve the issue of whether it is permissible for an arbitrator under Article 21.3(c) of the DSU to determine more than one reasonable period of time for implementation. I am not persuaded that the mere use of the indefinite article "a" in the phrase "a reasonable period of time" suffices, as the United States suggests, to establish definitively that an arbitrator is authorized only to determine a *single* reasonable period of time for implementation in a dispute. At the same time, conceptually, I have difficulty accepting that it may be possible to determine, as Antigua seems to request me to do, two separate reasonable periods of time in respect of the *same* measure.[369] I would not, however, want to exclude *a priori,* and without having carried out a thorough interpretative analysis of the relevant provisions of the DSU, the possibility that an arbitrator might be able to fix separate reasonable periods of

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[368]The Panel's explanation of the three federal laws is set out in paragraphs 6.360 to 6.380 of the Panel Report, and the Appellate Body's treatment of the three statutes is found in paragraphs 257-265 of the Appellate Body Report. With respect to the Wire Act, the Panel observed that it prohibits "the use of a wire communication facility for, *inter alia*, the transmission in interstate or foreign commerce of bets or wagers". (Panel Report, para. 6.362. See also Appellate Body Report, para. 259) As for the Travel Act, the Panel stated that it prohibits:

> ... gambling activity that entails the supply of gambling and betting services by 'mail or any facility' to the extent that such supply is undertaken by a "business enterprise involving gambling" that is prohibited under state law and provided that the other requirements in subparagraph (a) of the Travel Act have been met.

(Panel Report, para. 6.370. See also Appellate Body Report, para. 261)

Lastly, the Panel explained that the IGBA prohibits:

> ... gambling activity that entails the conduct, finance, management, supervision, direction or ownership of all or part of such a business to the extent that such supply is undertaken by a "gambling business" that is prohibited under state law and provided that the other requirements in sub-paragraph (b)(1) of the Illegal Gambling Business Act have been met.

(Panel Report, para. 6.377. See also Appellate Body Report, para. 263)

[369]Essentially, Antigua is asking me to determine two separate reasonable periods of time for the United States to implement the DSB's recommendations and rulings regarding the Wire Act, two separate reasonable periods of time for the United States to implement the DSB's recommendations and rulings regarding the Travel Act, and two separate reasonable periods of time for the United States to implement the DSB's recommendations and rulings regarding the IGBA.

time for separate measures. It is true that, to date, no arbitrator has done so.[370] Yet it is also true that, to date, no arbitrator has been asked to do so.

42. Having declined to rule on the distinction on which Antigua bases its assertion that the United States could undertake two separate methods of implementation, I need not consider the reasonable period of time that would be necessary for implementation by means of an executive order. I turn, instead, to the question of the reasonable period of time needed for the United States to implement by legislative means.

43. In response to a question at the oral hearing, Antigua suggested that even if I were to consider that the United States enjoys the discretion to decide to implement by legislative means, rather than by means of an executive order, then the United States should be required to "pay the price" for having chosen a "complicated, more lengthy way" of implementing rather than another available method that would be shorter. Thus, submits Antigua, I should reduce the reasonable period of time for legislative implementation. Given that I do not rule on the distinction on which Antigua bases its assertion that two separate means of implementation are possible in this case, I need not decide whether a Member's decision to opt for one means of implementation (legislative) notwithstanding that another, more rapid means of implementation has been demonstrated to be available, could affect the determination of the reasonable period of time for implementation under Article 21.3(c) of the DSU.

44. Antigua and the United States agree that, as previous arbitrators have stated, the "reasonable period of time" under Article 21.3(c) should be "the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB", in the light of the "particular circumstances" of the dispute.[371] Yet, it is useful to recall that the DSU does not refer to the "shortest period possible for implementation within the legal system" of the implementing Member. Rather, this is a convenient phrase that has been used by previous arbitrators to describe their task. I do not, however, view this standard as one that stands in isolation from the text of the DSU. In my view, the determination of the "shortest period possible for implementation" can, and must, also take due account of the two principles that are expressly mentioned in Article 21 of the DSU, namely reasonableness and the need for prompt compliance. Moreover, as differences in previous awards involving legislative implementation by the United States have shown, and as the text of Article 21.3(c) prescribes, each arbitrator must take account of "particular circumstances" relevant to the case at hand. Strict insistence on the "shortest period possible for implementation within the legal system" of the implementing Member would, in my view, tie an arbitrator's hands and prevent him or her from properly identifying and weighing the particular circumstances that are determinative of "reasonableness" in each individual case.[372]

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[370]In Award of the Arbitrator, *US – Hot-Rolled Steel*, the Arbitrator determined a single reasonable period of time of 15 months (para. 40); and in Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews,* the Arbitrator determined a single reasonable period of time for implementation of 12 months (para. 53).

[371]Award of the Arbitrator, *Chile – Price Band System*, para. 34 (quoting Award of the Arbitrator, *US – 1916 Act*, para. 32). See also Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *EC – Tariff Preferences*, para. 26; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25.

[372]With respect to the overriding principle of "reasonableness" I find it useful, like the Arbitrator in *US – Hot-Rolled Steel* (para. 25), to refer to the Appellate Body's elaboration of the meaning of the word "reasonable", albeit in another context. In its Report in *US – Hot-Rolled Steel*, the Appellate Body stated that the word "reasonable":

> … implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time under

45. The United States raises, as a "particular circumstance" relevant to my determination, the complexity of the legislation that will be necessary in order to implement the recommendations and rulings of the DSB in this case. The United States contrasts the complexity of the task of eliminating discrimination in this case with the relative simplicity involved in amending the statutory term of patent protection in *Canada – Patent Term*.[373]

46. I agree with the United States that the legislative task faced by its Congress in this dispute is more complex than the one confronted by the Canadian Parliament in *Canada – Patent Term*. I attach some significance to the fact that, as the United States explained at the oral hearing, the field of internet gambling is one that is highly regulated in the United States. A myriad of interconnected and overlapping laws apply to these activities, including state and federal laws, and criminal and civil statutes. For this reason, a careful examination of how proposed legislation will impact the existing regulatory regime will be a necessary part of the process of adopting implementing legislation in this dispute.

47. I am also conscious of the fact that any legislation adopted by the United States will inevitably, as the Appellate Body Report demonstrates, bear on questions of public morals and public order.[374] It seems to me that, within the field of public morals and public order, only prohibitions are simple. In other words, to the extent that the United States may consider authorizing any form of internet gambling or wagering, this will increase the complexity of any legislative solution. The more such activities are authorized, the greater lengths the legislator will have to go to in order to ensure that sufficient safeguards are in place to make the system consistent with, and acceptable under, prevailing standards of public morals and public order. This is, in my view, separate from the question of contentiousness. However, the United States has not, in this proceeding, explained in any precise manner how it intends to implement the recommendations and rulings of the DSB. The few indications that it has given suggest that it is leaning more in the direction of "confirming" or "clarifying" the prohibitions on the remote supply of gambling and betting services, rather than in the direction of authorizing, even in part, the supply of such services. In the absence of any more specific information from the United States on this issue, I do not consider the fact that the legislative activity called for in this case will inevitably touch on questions of

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> Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.
>
> In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case.

(Appellate Body Report, paras. 84-85)

[373]In paragraph 12 of its submission, the United States quotes the following statement from paragraphs 55 and 56 of my award in *Canada – Patent Term*:

> In prescribing a precise result, that is, the duration of the minimum period of patent protection, Article 33 of the TRIPS Agreement is quite different from provisions which limit only marginally the discretion of the legislator, *such as prohibitions of discrimination between imported and domestic goods or services.* Such discrimination can, of course, be eliminated in several ways, while a violation of Article 33 of the TRIPS Agreement can only be remedied through one action, that is, by providing for the required minimum period of patent protection.
>
> Thus, with respect to the minimum period of patent protection, Article 33 of the TRIPS Agreement *leaves no room for any legislative discretion or legislative choices*. (emphasis added by the United States)

[374]Appellate Body Report, para. 373(D)(iii)(c).

public morals and public order to be a "particular circumstance" affecting my determination of the reasonable period of time.

48. The United States also submits that I should take account of the fact that several previous Congresses have considered bills related to internet gambling, but that none of these bills has passed. The United States did not, however, provide me with any explanation as to the reasons why such bills have not been enacted into law. I am, therefore, unable to determine whether Congress' inability to pass previous bills was related to their complexity—a relevant particular circumstance—or to their contentiousness—something that would not constitute a relevant particular circumstance for purposes of my determination.[375]

49. As regards the specific details of the United States legislative process, the United States and Antigua agree on the basic steps involved.[376] They also agree that the only steps that are required by law are the approval of a bill by both chambers of Congress as well as presidential signature. Furthermore, both parties accept that there is no fixed time frame attached to any one of the steps involved in the United States legislative process. Finally, both parties accept that, as previous arbitrators have observed, there is a considerable degree of flexibility inherent in the United States legislative system.[377]

50. In my view, the need for prompt compliance means that it is incumbent upon the United States to use the flexibility available in its legislative process to ensure rapid implementation. The United States is not, however, obliged to have recourse to extraordinary legislative procedures.[378]

51. The United States suggests that another "particular circumstance" that has a strong influence on the passage of legislation within the United States and that should, therefore, influence my determination in this proceeding, is the Congressional schedule. The United States points out that the vast majority of legislation is passed near the end of a Congress. Each Congress lasts for two years and consists of two sessions, each of which runs over one calendar year. The United States Congress is currently in the first session of the 109th Congress. Although the United States submits that it would be impossible to pass the necessary implementing legislation by the end of the first session of the 109th Congress, currently scheduled to end on 30 September 2005, the United States does not request that I fix the reasonable period of time to coincide with the end of the second session of the 109th Congress, at the end of 2006. Rather, the United States argues that, "much as the end of a Congressional session spurs legislative activity, the opportunity to pass legislation may be greater prior to a Congressional recess."[379] Thus, reasons the United States, it would be appropriate for the reasonable period of time for implementation to expire just before Congress begins its August 2006 recess, as this would provide a concrete impetus for passage of the necessary legislation.

52. I do not take the view that a legislature's schedule is totally irrelevant to the determination of the reasonable period of time for implementation of the recommendations and rulings of the DSB. Rather, it

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[375]Award of the Arbitrator, *Canada – Pharmaceutical Patents,* para. 60; Award of the Arbitrator, ***US – Section 110(5) Copyright Act,*** paras. 41-42; Award of the Arbitrator, ***Canada – Patent Term,*** para. 58; and Award of the Arbitrator, ***US – Offset Act (Byrd Amendment),*** para. 61.

[376]At the oral hearing Antigua indicated that it accepts the description of the process provided by the United States, which is summarized *supra,* para. 13.

[377]Award of the Arbitrator, *US – Section 110(5) Copyright Act,* para. 45; Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, ***US – Offset Act (Byrd Amendment),*** paras. 63-64 and 74.

[378]Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, paras. 32 and 45; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 43; and Award of the Arbitrator, *EC – Tariff Preferences*, para. 42.

[379]United States' submission, para. 35.

seems to me that this is a circumstance that may or may not be relevant depending on the particular case.[380] Thus, for example, in *Canada – Patent Term* I did not consider Canada's parliamentary schedule to be determinative of the reasonable period of time in the circumstances of that case.[381] In this case, I do not attach much weight to this "particular circumstance", for the reasons that follow. The United States has taken the position that it would be appropriate for the reasonable period of time to expire just before Congress begins its August 2006 recess. In response to a written request that I addressed to the United States prior to the oral hearing, the United States informed me that the tentative 2006 Congressional Schedule is not yet available. The United States nonetheless indicated that in all likelihood the recesses taken by Congress in 2006 will closely resemble those in the 2005 Schedule, which the United States has provided.[382] I note, in this respect, that in addition to its August recess (the "Summer District Work Period"), Congress takes a number of recesses of a week or more throughout the year. In 2005, these include: a "Presidents Day District Work Period" in February; a "Spring District Work Period" in March/April around the time of Easter; a "Memorial Day District Work Period" at the end of May/early June; and an "Independence Day District Work Period" around the time of the 4th of July. In my view, the United States' argument that a recess period spurs legislative action must apply in the same way to these recesses as it does to Congress' August recess and to the end of a session of Congress. Thus, Congress has, throughout the year, a number of breaks that could serve to push forward the legislative process.

53. Antigua emphasizes the speed with which the 109th Congress has passed legislation to date, pointing out that this Congress adopted 15 measures through 19 June 2005.[383] In Antigua's view, this illustrates why the United States needs no more than six months in order to achieve legislative implementation in this case. The United States, however, argues that the rapidity with which these measures were passed in the first half of the 109th session of Congress is not at all representative of the ordinary workings of the United States legislative process. According to the United States, these 15 measures represent only a tiny fraction of all the laws that will be passed in the 109th Congress. Moreover, of these 15 measures, four dealt with disaster relief or emergencies, three were legislative packages that had been thoroughly considered in a previous Congress or Congresses, four dealt with the renewal of measures previously enacted but due to expire, and four involved the naming of buildings and museum regents.[384]

54. I find the rebuttal arguments of the United States concerning the work of the 109th Congress to be persuasive. Given that the 109th Congress has only been in session for half a year, it follows that any law that it has adopted during that time must have been adopted in less than half a year. Taken in isolation, however, that fact is not probative of the average length of time that it takes to pass legislation, nor of the relationship between the content of specific legislation and the length of time that is required for it to be passed. In the absence of any additional context that would allow me to evaluate the significance of the time taken to pass the 15 measures cited by Antigua, I do not consider this to be a particular circumstance relevant to my determination.

55. Antigua also points to the fact that the United States Congress took just five months to pass the 2000 amendments to the IHA. I take note of this fact. Given that these amendments relate to the

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[380]Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, paras. 69-70.

[381]Award of the Arbitrator, *Canada – Patent Term*, paras. 65-66.

[382]Exhibit US-9 to the United States' submission.

[383]According to Antigua, of these 15 measures: "two became law within a day of introduction, the longest period from introduction to adoption was 91 days, and the average number of days from introduction to adoption was 43.27 days." (Antigua's submission, para. 54; footnotes omitted)

[384]United States' statement at the oral hearing.

same field as the one in which the United States intends to implement in this case, I consider it relevant that Congress was able to act so expeditiously on a prior occasion.

4. Article 21.2 of the DSU

56. Antigua requests that, in making my determination, I apply Article 21.2 of the DSU and pay particular attention to Antigua's interests as a developing country Member of the WTO. Antigua underlines the importance of the cross-border gambling and betting service industry to the economic health and growth of Antigua, as well as the strain that this dispute has placed on Antigua's limited resources. Antigua suggests that I should rely upon Article 21.2 of the DSU in two ways. First, I should use Article 21.2 to examine the consistency of the United States' proposed means of implementation with the recommendations and rulings of the DSB and with the covered agreements generally. Secondly, Antigua submits that I should rely on Article 21.2 to require the United States to use the considerable flexibility that exists within its legislative system to achieve implementation in a shorter period of time than I might otherwise do.

57. The United States argues that Article 21.2 is not relevant to my determination in this proceeding. For the United States, Article 21.2 can be relevant in an arbitration to determine the reasonable period of time for implementation only when it is the *implementing* Member that is a developing country. This is because the task of an Article 21.3(c) arbitrator is to determine the shortest possible period of time for implementation within the legal system of the implementing Member. The fact that the *complaining* Member may be a developing country cannot, in the view of the United States, have any impact on such a determination.

58. Article 21.2 provides:

> Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

59. On its face, this provision does not contain any limitation of the type suggested by the United States. In other words, the text of Article 21.2 does not expressly limit its scope of application to developing country Members as *implementing,* rather than as complaining, parties to a dispute. Any such limitation, if it exists, must therefore be found in the context and/or object and purpose of this provision.[385]

60. Before considering relevant context for the interpretation of Article 21.2 of the DSU, however, I consider it useful to examine in further detail the words that are used in this provision. The provision requires that "particular attention" be paid to: (i) matters; (ii) affecting the interests of developing country Members; (iii) with respect to the measures at issue. At first blush, it is not clear whether the word "matters" in Article 21.2 has the same meaning as elsewhere in the DSU[386], or whether it refers simply to the subject matter covered by Article 21. In any event, it seems to me that Article 21.2 contemplates a clear nexus between the interests of the developing country invoking the provision and the

[385]I note that the Arbitrator in *EC – Tariff Preferences* identified, but did not decide, the issue of whether Article 21.2 might apply to developing country Members whose interests are affected by measures at issue in the dispute but which are not parties to the arbitration. (Award of the Arbitrator, para. 59) No such issue arises in this arbitration.

[386]The Appellate Body has held, for example, that the "matter" referred to in Article 7 of the DSU "consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)." (Appellate Body Report, *Guatemala – Cement I*, para. 72; original emphasis)

measures at issue in the dispute, as well as a demonstration of the adverse affects of such measures on the interests of the developing country Member(s) concerned.

61. Turning briefly to the context in the light of which Article 21.2 must be interpreted, I note that the provision is located within Article 21, which is entitled "*Surveillance of Implementation of Recommendations and Rulings*". The second paragraph of Article 21, like the first[387], sets out a broad principle that guides and informs the more specific paragraphs that follow, including Article 21.3. Given that Article 21 contains a number of additional paragraphs dealing with different aspects of surveillance and implementation, it seems likely that Article 21.2 informs each of the subsequent paragraphs in a different manner. Arguably, for example, Article 21.2 could constitute a legislative expression of a factor that is to constitute a "particular circumstance" to be taken into account under Article 21.3(c). The last two paragraphs of Article 21 are also, as Antigua pointed out at the oral hearing, of potential use in interpreting the scope and role of Article 21.2. Each of those provisions also deals with developing country Members of the WTO at the stage of surveillance and implementation of DSB recommendations and rulings.[388] Yet, contrary to Article 21.2, both Article 21.7 and Article 21.8 expressly apply to the developing country Members that brought the case, that is, to developing countries as *complaining* parties.

62. The significance to be attached to this context, and the precise nature of the relationship between Article 21.2 and Article 21.3(c), are not issues that need be resolved in this arbitration. This is because, in my view, Antigua has not satisfied the criteria expressly mentioned in Article 21.2. In its submission, Antigua pointed out that its population, as well as its gross domestic product per capita, are tiny fractions of those of the United States. Antigua also asserted that the "continuation and responsible further development of the well-regulated cross-border gambling and betting service industry in Antigua is critical to the economic health and growth of the country"[389], and that the "prosecution of the Dispute has put considerable stress on the very limited resources available to Antigua."[390] In response to questioning at the oral hearing, Antigua explained that, prior to 1998, the cross-border gambling and betting industry employed a significant percentage of the Antiguan work force, but that the number of active firms and employees now involved in the sector has shrunk significantly. Antigua did not, however, provide specific data in support of these arguments. Nor did Antigua seek to demonstrate any clear relationship between the decline of its industry and the measures which were subject to this dispute, that is, the Wire Act, the Travel Act, and the IGBA.

63. In the absence of any more specific evidence or elaboration of the affected interests of Antigua and their relationship with the measures at issue, I am not persuaded that the criteria referred to in Article 21.2 have been satisfied. For this reason, I need not consider further the issue of the precise relationship between paragraphs 2 and 3 of Article 21, nor how I might apply Article 21.2 so as to pay "particular

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[387]Article 21.1 stipulates that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

[388]Paragraphs 7 and 8 of Article 21 provide as follows:

> 7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.
>
> 8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

[389]Antigua's submission, para. 58.

[390]Antigua's submission, para. 59.

attention" to the interests of Antigua in fixing the reasonable period of time for implementation by the United States in this dispute.

5. Summary

64. The United States, as the implementing Member, bears the burden of persuading me that the 15 month period that it proposes would constitute a "reasonable period of time" within the meaning of Article 21.3(c). I accept as relevant "particular circumstances" the following considerations raised by the United States: (i) implementation will occur by legislative means; (ii) the task of implementing by legislation is complicated both by the objective of eliminating, or clarifying the absence of, discrimination in the treatment of Antiguan and domestic service suppliers, and by the highly regulated nature of the field of internet gambling and betting in which this objective must be achieved. I take note of, but attach little significance to, Congress' likely 2006 schedule. Taken together, these factors do not, in my view, suffice to discharge the United States' burden of persuading me that 15 months would be a reasonable period of time for implementation in this dispute, particularly given the acknowledged flexibility in the United States legislative process.

65. I also accept as a relevant "particular circumstance" the fact that, as Antigua points out, the United States Congress passed the 2000 amendments to the IHA in only five months.

66. I am not persuaded that several other factors invoked by the United States (to date, Congress has not been able to pass any of the bills relating to internet gambling that have been proposed) or Antigua (the asserted availability of partial implementation through a presidential executive order, the fact that the 109th Congress has already passed 15 laws in approximately 6 months of work, or Antigua's status as a developing country Member) are properly characterized as particular circumstances relevant to my determination in this case.

67. Lastly, I wish to observe that, in the four previous Arbitrations in which the issue of the reasonable period of time for implementation by *legislative* means within the United States system arose, each arbitrator determined a different reasonable period of time, ranging from 10 to 15 months.[391]

IV. The Award

68. In the light of what has been stated above, I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 11 months and 2 weeks from 20 April 2005, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time will therefore expire on 3 April 2006.

[391]In *US – Section 110(5) Copyright Act,* the Arbitrator determined that 12 months would be a reasonable period of time (para. 47); in *US – 1916 Act*, the Arbitrator determined that 10 months would be a reasonable period of time (para. 45); in *US – Hot-Rolled Steel*, the Arbitrator determined that 15 months would be a reasonable period of time (para. 40); and in *US – Offset Act (Byrd Amendment),* the Arbitrator determined that 11 months would be a reasonable period of time for the United States to implement the recommendations and rulings of the DSB in that dispute (para. 83).

2-5. COMPLIANCE PROCEEDING UNDER ARTICLE 21.5 DSU

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Panel Report, WT/DS285/RW, 30 March 2007

I. PROCEDURAL BACKGOUND

1.1 On 20 April 2005, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report (WT/DS285/AB/R) and the Panel Report (WT/DS285/R) as modified by the Appellate Body Report in the dispute on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.[392] In its recommendations and rulings, the DSB requested the United States to bring its measures, that were found, in the Appellate Body Report and in the Panel Report as modified by that Report, to be inconsistent with its obligations under the General Agreement on Trade in Services (GATS), into conformity with its obligations under that Agreement.

1.2 On 19 May 2005, the United States informed the DSB that it intended to implement the DSB's recommendations and rulings in this dispute in a manner that respected the United States' WTO obligations, and that it had begun to evaluate options for doing so. The United States indicated that it would need a reasonable period of time in which to do this and that it stood ready to discuss this matter with the Government of Antigua and Barbuda ("Antigua"), in accordance with Article 21.3(b) of the DSU.[393]

1.3 On 6 June 2005, Antigua informed the DSB that Antigua and the United States had been unable to agree on a reasonable period of time. Consequently, Antigua requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").[394] On 30 June 2005, the Director-General appointed Dr. Claus-Dieter Ehlermann to act as Arbitrator under Article 21.3(c).[395]

1.4 In the Arbitration Award, which was circulated on 19 August 2005, the Arbitrator determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB was 11 months and 2 weeks from 20 April 2005, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time was therefore to expire on 3 April 2006.[396]

1.5 In a first Status Report dated 6 March 2006, the United States informed the DSB that the "US Administration, in consultation with the US Congress, has been working on appropriate steps to resolve

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[392] *Appellate Body Report and Panel Report – Action by the Dispute Settlement Body*, WT/DS285/10; Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/188, para. 75.

[393] Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/189, para. 47.

[394] *Request from Antigua and Barbuda for Arbitration under Article 21.3(c) of the DSU*, WT/DS285/11, 9 June 2005.

[395] *Appointment of Arbitrator by the Director-General under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Note by the Secretariat, WT/DS285/12, 5 July 2005.

[396] *Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Award of the Arbitrator Claus-Dieter Ehlermann, WT/DS285/13, 19 August 2005; provided to the Chairman of the DSB, WT/DS285/14, 23 August 2005.

this matter".[397] In its second Status Report, dated 10 April 2006, the United States informed the DSB that:

> "On 5 April 2006, the US Department of Justice confirmed the position of the US Government regarding remote gambling on horse racing in testimony before a subcommittee of the US House of Representatives. The Department of Justice stated that:
>
> > The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes.
>
> In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute."[398]

1.6 At the DSB meeting of 21 April 2006, the United States, referring, *inter alia*, to the aforementioned DOJ statement, informed Members that it "was now able to show that relevant US law did not discriminate against foreign suppliers of remote gambling on horse racing" and concluded that it "was in compliance with the recommendations and rulings of the DSB in this dispute".[399] At the same meeting, Antigua disagreed with that interpretation.[400]

1.7 On 24 May 2006, Antigua and the United States notified an Agreement Regarding Procedures under Articles 21 and 22 of the DSU (the "Agreed Procedures") to the DSB.[401] In a communication dated 8 June 2006, Antigua requested consultations with the United States pursuant to paragraph 1 of the Agreed Procedures.[402] Consultations between the parties were held on 26 June 2006 in Washington D.C., but did not result in a settlement of the dispute. In a communication dated 6 July 2006, Antigua requested the DSB to establish a panel pursuant to Article 21.5 of the DSU.[403]

1.8 At its meeting on 19 July 2006, following the request made by Antigua, the DSB agreed to refer to the original Panel, if possible, the matter raised by Antigua in document WT/DS285/18 and decided that the Panel would have standard terms of reference. The terms of reference are, therefore, the following:

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[397] *Status Report by the United States*, WT/D285/15, 7 March 2006.

[398] *Status Report by the United States*, Addendum, WT/D285/15/Add.1, 11 April 2006.

[399] Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/210, 30 May 2006, paras. 33-35.

[400] *Ibid*., paras. 36-39.

[401] *Agreement between Antigua and Barbuda and the United States Regarding Procedures under Articles 21 and 22 of the DSU*, WT/DS285/16, 26 May 2006.

[402] *Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, *Request for Consultations*, WT/DS285/17, 12 June 2006. Paragraph 1 of the Agreed Procedures stipulates: "If Antigua and Barbuda deems it appropriate to invoke Article 21.5 of the DSU, Antigua and Barbuda will request consultations, which the Parties agree to hold within 15 days from the date of circulation of the request".

[403] *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Request for the Establishment of a Panel*, WT/DS285/18, 7 July 2006.

"To examine, in the light of the relevant provisions of the covered agreements cited by Antigua and Barbuda in document WT/DS285/18, the matter referred to the DSB by Antigua and Barbuda in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[404]

1.9 Article 21.5 of the DSU provides that a dispute under that provision shall be decided through recourse to the DSU, including, "wherever possible, resort to the original panel". In this case, the Chairperson of the original panel and one of the panellists were unavailable to serve. The parties agreed on their replacements, and as a result the Panel was composed as follows:

Chairperson: Mr Lars Anell

Members: Mr Mathias Francke
Mr Virachai Plasai[405]

1.10 The representatives of China, the European Communities and Japan reserved their third-party rights to participate in the Panel's proceedings.[406]

1.11 The Panel established its Working Procedures and Timetable on, respectively, 4 and 14 September 2006, and communicated these to the parties and third parties.

1.12 After receiving the parties' written submissions, the Panel noted that there appeared to be disagreement as to what had been submitted to the Arbitrator appointed pursuant to Article 21.3(c) of the DSU, and was hence of the view that the record of the Arbitrator might assist the Panel in carrying out its work. After consulting with the parties, the Panel requested access, in a letter dated 21 November 2006 addressed to the Director of the Appellate Body Secretariat, to the Arbitrator's record in the Article 21.3(c) proceeding. This record was transmitted to the Panel the same day. It contained the parties' respective submissions and oral statements, as well as a transcript of the Arbitrator's oral hearing. The third parties received copies of the parties' submissions and oral statements directly from the parties.

1.13 The Panel met with the parties on 27 and 28 November 2006. It met with the third parties on 28 November 2006.

II. FINDINGS REQUESTED BY THE PARTIES

2.1 **Antigua** requests that the Panel:

find that the United States has not taken measures to comply with the DSB rulings;

find that the Wire Act, the Travel Act and the IGBA remain in violation of the United States' obligations to Antigua under, *inter alia*, Article XVI of the GATS without meeting the requirements of Article XIV of the GATS; and

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[404] *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Constitution of the Panel*, Note by the Secretariat, WT/DS285/19, 16 August 2006; Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/217, 12 September 2006, para. 71.

[405] *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Constitution of the Panel*, Note by the Secretariat, WT/DS285/19, 16 August 2006.

[406] *Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Constitution of the Panel*, Note by the Secretariat, WT/DS285/19, 16 August 2006; Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/217, 12 September 2006, para. 72.

recommend that the DSB request the United States to bring the Wire Act, the Travel Act and the IGBA into conformity with the obligations of the United States under the GATS.

2.2 The **United States** requests that the Panel reject Antigua's claims in their entirety, and find that the US measures taken to comply are not inconsistent with the GATS.

[…]

V. INTERIM REVIEW

5.1 On 25 January 2007, the Panel submitted its interim report to the parties. On 1 February 2007, the parties submitted written requests for review of precise aspects of the interim report. On 8 February 2007, the parties submitted written comments on each other's requests for interim review. In accordance with Article 15.3 of the DSU, this section of the Panel's report sets out a discussion of the arguments made at the interim review stage.

(i) Public comment on the confidential interim report

5.2 When transmitting the interim report to the parties, the Panel explicitly indicated that the interim report was strictly confidential. The Panel also explicitly emphasized at its meeting with the parties that the Panel's proceedings were confidential, as provided for in Article 18 of the DSU. This was accepted by the parties, as well as reflected in the Panel's Working Procedures and in all relevant correspondence with the parties.

5.3 Therefore, the Panel notes with concern that the confidentiality requirement was breached on the occasion of the transmission of the interim report to the parties. The Panel is all the more concerned given that breaches of confidentiality had occurred in the original proceeding and were deplored by the original Panel.[407]

5.4 Within hours of the transmission of the interim report to the parties, the press reported on the result of the "confidential" interim report.[408] Press reports referred in particular by name to a spokesperson from the USTR "confirm[ing] reports that the ruling went against the United States" and commenting on the content of the interim report.

5.5 On 26 January 2007, Antigua referred the Panel to the press report and noted, in particular, that Antigua had "strictly observed the confidentiality obligation".

5.6 On 29 January 2007, the Panel communicated to the parties as follows:

> "The Panel notes with concern that the confidentiality of the Interim Report has been breached, in spite of the fact that the confidentiality requirement was accepted by the Parties (as reflected in the Working Procedures). The Panel wishes to remind the Parties that the Interim Report is strictly confidential, and that breaches of the confidentiality requirement are unacceptable because they affect the credibility and integrity of the WTO dispute settlement process."

5.7 Antigua, in its comments on interim review, expressed its deep disappointment with the decision of the United States to publicly comment on the interim report despite its express agreement not to do so. Antigua informed the Panel that it had scrupulously maintained the confidentiality of the interim report,

[407] See the original Panel report, paras. 5.3 to 5.13.

[408] See, for instance, *US confirms loss in Internet Gambling trade case*, Reuters, 25 January 2007.

and commented that the statements of the USTR were not only contrary to the agreements and obligations of the United States but materially misleading.

5.8 The United States informed the Panel, when submitting its comments on the interim review, that it shared the Panel's concerns regarding the breach of confidentiality of the interim report and assured the Panel that "the United States was not the source of the leaked results". The United States asserted that it had "received several press inquiries regarding these results that indicated that the source was in Geneva. The U.S. comments came only in response to the reports of the leak."

5.9 First, the Panel notes that the insinuations by the United States are serious since they may imply that the Panel or the WTO Secretariat breached the confidentiality requirement with respect to the interim report. The Panel wishes to assert forcefully that neither the Panel nor the Secretariat has done so. Third parties cannot be blamed since they do not receive a copy of the interim report. Second, with respect to the United States' assertion that its comments came "only in response to the reports of the leak", the Panel notes that, even in such circumstances, the comments would still be inappropriate in light of the confidentiality requirement concerning the interim report.

5.10 The Panel wishes to reiterate its concerns and stress again that disregard for the confidentiality requirement affects the credibility and integrity of the WTO dispute settlement process, of the WTO and of WTO Members and is, therefore, unacceptable.

[…]

(v) Intrastate commerce

[…]

5.23 The United States suggested that the Panel not include the section on intrastate commerce in its final report as this aspect of the interim report was not within the scope of this proceeding. In its view, the DSB recommendation and rulings in this dispute relate only to the issue of discrimination under the GATS Article XIV chapeau with respect to remote gambling on horse racing, due to the Appellate Body's conclusion on the chapeau of Article XIV in its entirety. Given that the measures at issue in this dispute are unchanged, the United States was not obliged by the DSB recommendation and rulings to bring into compliance any aspect of the measure that was not addressed by the DSB recommendation and rulings. In accordance with *EC – Bed Linen (Article 21.5 – India)*, Antigua may not re-argue a failed claim in a compliance proceeding. The United States argues that the discussion of intrastate commerce is *dicta* that does not belong in the final report.

5.24 Antigua disagreed in the strongest possible terms with the United States' request. The scope of review under Article 21.5 is broad in order to assess compliance with DSB recommendations and rulings and in light of the overriding objective of the DSU to achieve the "prompt settlement" of disputes. In the original proceeding, the United States bore the burden of proof of its defence under Article XIV of the GATS. As its defence under the chapeau was constructed around the assertion that it prohibited *all* remote gambling, that assertion should be the benchmark for assessing its compliance. The discussion of intrastate commerce provides important context for the extensive domestic remote gambling industry operating in the United States today.

5.25 The Panel observes that the primary issue in this proceeding is whether any "measures taken to comply" exist. The Panel has found that none exist. Accordingly, the assessment of the conformity of the measures at issue with US obligations under the GATS is included only for the reasons set out in Section VI:C.1 of this report. This applies not only to the assessment of intrastate commerce, but also to the

assessment of the other matters in Section VI:C, which the United States does *not* request the Panel to remove.

VI. FINDINGS

A. ORDER OF ANALYSIS

6.1 The DSB referred to this Panel, pursuant to Article 21.5 of the DSU, the matter raised by Antigua in document WT/DS285/18, with standard terms of reference.[409] Article 21.5 of the DSU applies "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]".

6.2 The matter raised by Antigua in document WT/DS285/18 comprises two disagreements. Firstly, there is a disagreement as to the *existence* of measures taken to comply. Secondly, there is a disagreement as to the *consistency* of the measures at issue with the United States' obligations under the GATS which, depending on the resolution of the first disagreement, may be a disagreement as to the consistency with a covered agreement of "measures taken to comply" with the recommendations and rulings of the DSB. The Panel will consider these two disagreements in the above order.

B. DISAGREEMENT AS TO THE EXISTENCE OF MEASURES TAKEN TO COMPLY

1. Recommendation of the DSB in the original proceeding

(a) Main arguments of the parties

6.3 Antigua submits that the United States has not taken measures to comply with the recommendations and rulings of the DSB in this dispute.[410] Antigua argues that the United States has taken no action towards compliance because the measures at issue in the original proceeding have not been amended, supplemented or otherwise changed.[411]

6.4 The United States submits that the "measures taken to comply" in this dispute are the same measures that were at issue in the original proceeding because those measures are consistent with its WTO obligations, only the United States did not meet its burden of showing that they satisfied the requirements of an affirmative defence in the original proceeding.[412] The United States submits that it has complied with the DSB recommendations and rulings by presenting new evidence and arguments during this compliance proceeding that do meet the burden of showing that the measures at issue satisfy the criteria of the chapeau of Article XIV of the GATS.[413]

[…]

(c) Assessment by the Panel

6.8 The parties agree that the United States has not taken any new measures. Nevertheless, the parties disagree as to the existence of "measures taken to comply" with the recommendations and rulings of the DSB in this dispute. Antigua submits that there are *no* measures taken to comply because the

[409] See para. 0 above.

[410] Request for Establishment of a Panel, WT/DS285/18, page 5.

[411] Antigua first written submission, para. 44; second written submission, para. 17.

[412] United States first written submission, para. 43; second written submission, para. 25.

[413] United States reply to Panel question No. 1.

United States has done nothing. The United States responds that there *are* "measures taken to comply" because the same measures that were at issue in the original proceeding can also be "measures taken to comply".

6.9 The Panel will examine whether the same measures at issue in the original proceeding can be "measures taken to comply" for the purpose of this compliance proceeding under Article 21.5 of the DSU.

6.10 The text of Article 21.5 provides that the "measures taken to comply" within the scope of this compliance Panel's jurisdiction are those taken to comply "with the recommendations and rulings" [of the DSB].[414] The recommendation adopted by the DSB in this dispute was as follows:

> "The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement."[415]

6.11 This recommendation, made in accordance with Article 19.1 of the DSU, applies to the measures at issue in the original proceeding that were "found ... to be inconsistent" with the GATS. It appears to follow that, where those measures are unchanged (and where the United States' obligations under the GATS are unchanged) the measures remain inconsistent with that agreement.

6.12 The operative part of the recommendation is that the United States "bring its measures ... into conformity with its obligations" under the GATS.[416] The ordinary meaning of the word "conformity" may be defined as:

> "1. Correspondence in form or manner *(to, with)*; agreement in character; likeness; congruity. 2. Action in accordance with some standard; compliance (*with, to*); acquiescence; an instance of this."[417]

6.13 On the other hand, at the risk of stating the obvious, the ordinary meaning of "inconsistent" may be defined as "[n]ot in keeping, discordant, at variance. Foll. by *with*."[418] In other words, a measure "inconsistent with" a covered agreement is not in "conformity with" that agreement. The same is true of the terms used in the French and Spanish versions of the DSU, that are equally authentic, and that use the terms "*conforme*" and "*incompatible*", and "*en conformidad*" and "*incompatible*", respectively.

6.14 These two terms, in context, indicate that, in order to bring a measure that has been found "inconsistent" with an agreement into "conformity with" the same agreement, some change must come about.

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[414] See also on the "express link" between the measures taken to comply and the recommendations and rulings of the DSB: Appellate Body reports on *US – FSC (Article 21.5 – EC II)*, at para. 61, and in *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para. 68.

[415] Recommendation as set out in para. 374 of the Appellate Body report on this dispute (WT/DS285/AB/R) adopted by the DSB on 20 April 2005; see note 392 above.

[416] The wording of the recommendation under Article 19.1 of the DSU is cross-referenced in Articles 22.1, 22.2 and 22.8, although it can be noted that the text of Article 22.2 uses the word "compliance" rather than "conformity".

[417] *New Shorter Oxford English Dictionary*, (5th edition, 2002) Oxford University Press.

[418] *Ibid.*

6.15 The original Panel has already made an objective assessment of the matter before it, including the measures at issue and the facts of the case as at the time of the original proceeding. It has also made an assessment of the applicability of the GATS and the conformity of the measures at issue with the United States' obligations under that agreement. The recommendation of the DSB was that the United States bring its *measures* into conformity, not to bring the *assessment* of the conformity of those measures into conformity. Therefore, the recommendation requires a change that eliminates the inconsistency of those *measures* with the covered agreements.

6.16 The context within Article 21 of the DSU confirms this interpretation. As part of Article 21, a proceeding under Article 21.5 is a procedure for surveillance of the implementation of recommendations and rulings.[419] It is not an opportunity to reassess claims and defences that led to those recommendations and rulings. Article 21 as a whole deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute.[420] The Panel considers this is true not just of the timing of the proceeding under Article 21, but also of the matter that an Article 21.5 panel is mandated to assess.

6.17 The wider context in the DSU confirms this interpretation. Article 3.7 of the DSU provides that if measures are found to be inconsistent with the provisions of any of the covered agreements, in the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure "the withdrawal of the measures" concerned. In a similar vein, Article 22.8 of the DSU provides that the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement "has been removed". Both of these provisions contemplate that compliance with the standard recommendation applicable in a so-called "violation" case will require a change regarding the measure found inconsistent with a covered agreement.[421]

6.18 This reading is also consistent with the object and purpose of the DSU insofar as it includes the "prompt settlement" of disputes, as set out in Article 3.3 of the DSU. The DSU expressly provides an opportunity for review of a panel report at the appellate review stage under Article 17, *prior* to the recommendations and rulings of the DSB. Thereafter, Article 21.1 requires prompt compliance with those recommendations or rulings. A reassessment of the same claims or defences with respect to a measure that had already been found inconsistent in the original proceeding, without a change relevant to that measure in the intervening period, would run counter to the prompt settlement of disputes.

6.19 Turning to the *form* of "measures taken to comply", the Panel recalls the view of the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* where it envisaged that "measures taken to comply" would, in principle, be new measures:

> "In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures[34]: the original measure

[419] Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

[420] Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70.

[421] This can be contrasted with a recommendation that the Member concerned make a "mutually satisfactory adjustment", applicable in so-called "non-violation" cases under Article 26.1(b) of the DSU. In such cases, there is no obligation to make any change to bring the measure at issue into conformity with the Member's obligations because the measure is *already* in conformity, or consistent, with those obligations.

> which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings.[422]
>
> "Original footnote: [34] We recognize that, where it is alleged that there exist *no* 'measures taken to comply', a panel may find that there is *no* new measure."

6.20 New measures, including amended measures, are certainly the most common form of measures taken to comply with a recommendation of the DSB. Nevertheless, in accordance with Article 19.1 of the DSU, the recommendation made in this dispute was not to adopt "new" legislation, nor was it to "amend" the existing legislation, although those are both possible means of implementation. Rather, the recommendation was to "bring [the] measures into conformity".

6.21 The possible form of measures taken to comply with a recommendation under Article 19.1 of the DSU will depend on the rulings of the DSB in a particular dispute. For example, if a measure has been found inconsistent with a covered agreement, or unjustified under an otherwise available exception, due to the way in which the measure is *applied*, compliance with the recommendation could presumably be achieved by a change in the application of the measure, without necessarily a change to the text of the measure itself or that of any written implementing measures. The present dispute illustrates this point.

6.22 Moreover, compliance with a recommendation under Article 19.1 of the DSU could conceivably be achieved through changes to the factual or legal background to a measure at issue, without a change to the text of the measure itself. For example, a measure may lapse, or satisfy a requirement in a covered agreement, due to the subsequent occurrence of a relevant circumstance. If changes to the measure's factual or legal background modified the *effects* of that measure sufficiently to bring about a situation in which it complied with the relevant covered agreement, there seems to be no reason why this should not fulfil the aim of the recommendation of the DSB, which is to achieve a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and the covered agreements, as provided in Article 3.4 of the DSU.[423] The essential point is that there needs to be compliance. However, even in these cases, compliance would entail a change relevant to the measure since the original proceeding.[424] This dispute does not present any such changes.

6.23 In view of the circumstances of this case, it is not necessary for this Panel to determine what exactly would constitute the "measures taken to comply" in such a situation and whether they could be the same measures at issue in the original proceeding. The Panel only emphasizes that it does not exclude any potential "measures taken to comply" due to their form.

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[422] Appellate Body report on *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36, cited in *US – Shrimp (Article 21.5 – Malaysia)*, para. 86; and *EC – Bed Linen (Article 21.5 – India)*, para. 81.

[423] The Panel also sees support for this view in the Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*:

> "[The word 'existence'] also suggests that, as part of its assessment of whether a measure taken to comply *exists*, a panel may need to take account of facts and circumstances that impact or affect such existence." (at para. 67. See also para. 69)

[424] The United States provides examples of circumstances where a measure could be brought into compliance with another covered agreement without any change to the measure itself, including a change in the underlying basis for the measure or the adoption of a relevant international standard: see United States reply to Panel question No. 2. The Panel observes that in all these examples, there is a change in the factual or legal context and not simply an improvement in the parties' submissions based on the same available facts.

6.24 Nor does the Panel exclude any potential "measures taken to comply" due to the *purpose* for which they may have been taken. In this regard, the Panel recalls the following view of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*:

> "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance."[425] (emphasis in original)

6.25 Turning to the facts at hand, the United States alleges that the "measures taken to comply" are three US federal criminal statutes, known as the Wire Act, the Travel Act and the Illegal Gambling Business Act.[426] The first two were enacted in 1961 and the third in 1970. All three were measures at issue in the original proceeding and were the subject of the recommendations and rulings of the DSB in this dispute.

6.26 The original Panel found that, by maintaining these three measures, the United States was acting inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 of the GATS. The Appellate Body upheld this finding.[427] Neither the original Panel nor the Appellate Body found that the United States was entitled to maintain these measures under Article XIV of the GATS or any other article in the covered agreements.

6.27 There has been no change to any of these three measures since the original proceeding. There has been no change in the application of these three measures, or even their interpretation, since the original proceeding. There is no evidence of any changes in the factual or legal background bearing on these measures or their effects since the original proceeding that might have brought them into compliance. This indicates that they remain inconsistent with the United States' obligations under the GATS.

6.28 The novel element on which the United States seeks to rely to demonstrate its compliance are its submissions to this compliance Panel. The United States' position depends on the view that all along, both during and since the original proceeding, its measures have been consistent with its obligations under the GATS by virtue of the general exception provision in Article XIV, and that it is entitled to another opportunity to demonstrate before this compliance Panel that the measures in fact *do* meet the requirements of the chapeau of Article XIV.[428] However, there was no finding in the original proceeding that the measures at issue in this dispute were consistent with the United States' obligations under the GATS, notwithstanding an invocation of Article XIV. Instead, there was a finding that maintaining these measures was inconsistent with the United States' obligations, which was the basis for the recommendation of the DSB.

6.29 It is true that the Appellate Body found that the United States had demonstrated that the measures at issue were "justified" under paragraph (a) of Article XIV of the GATS.[429] However, this was *not* a finding on Article XIV in its entirety. The Appellate Body expressly confirmed that Article XIV contemplates a "two-tier analysis" – first, under one of the paragraphs of Article XIV, and then under the chapeau.[430] There was no finding that the measures were consistent with the chapeau or with Article XIV

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[425] Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

[426] United States first written submission, para. 43; second written submission, para. 25.

[427] Original Panel report, paras. 6.421 and 7.2(b)(i); Appellate Body report, para. 373(C)(ii).

[428] United States first written submission, paras. 49-50; second written submission, paras. 25, 40; opening oral statement, paras. 27, 42; replies to Panel questions Nos. 1, 8, 10 and 17.

[429] Appellate Body report, para. 326.

[430] Appellate Body report, paras. 291-292.

in its entirety nor, hence, with the United States' obligations under the GATS, and there is no concept recognized under the DSU of provisional or transitional consistency with a recommendation of the DSB.

6.30 Therefore, the Panel rejects the United States' submission that the same measures at issue in the original proceeding in this dispute constitute "measures taken to comply".

6.31 The United States' position in this compliance proceeding is also at odds with its earlier decision to seek a reasonable period of time in which to comply with the recommendations and rulings of the DSB. Article 21.3 of the DSU provides that a Member shall have a reasonable period of time in which to comply "[i]f it is impracticable to comply immediately with the recommendations and rulings". Had the measures the subject of the recommendations and rulings of the DSB already been in compliance, it would not have been impracticable to comply immediately.[431]

[…]

2. Specific findings and conclusions in the original proceeding

[…]

(c) Assessment by the Panel

6.44 The Panel has examined the specific findings and conclusions in the original Panel Report and Appellate Body Report on this dispute that related to the United States' affirmative defence under Article XIV of the GATS. The Appellate Body found and concluded, as regards the chapeau of Article XIV:

> "that the United States has not demonstrated that—in the light of the existence of the Interstate Horseracing Act—the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau";[432]

and, as regards Article XIV in its entirety:

> "that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures "necessary to protect public morals or maintain public order", in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau"[433]

6.45 The parties disagree on the effect of these findings and conclusions. For Antigua, these findings mean that the measures at issue in the original proceeding are not justified by Article XIV of the GATS. For the United States, these findings simply mean that it has not established its defence under Article XIV of the GATS on the basis of the facts and arguments presented in the original proceeding. Therefore, in

[431] As to statements made during the arbitration pursuant to Article 21.3(c) of the DSU, see further paras. 0 to 0 below.

[432] Appellate Body report, para. 373(D)(v)(c).

[433] Appellate Body report, para. 373(D)(vi).

the United States' view, there is no finding that prevents it from attempting to establish that same defence in the compliance proceeding.

6.46 The Panel recalls that Article 17.14 of the DSU provides as follows:

> "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report." (footnote omitted)

6.47 Neither party disputes that, in accordance with Article 17.14 of the DSU, the Appellate Body report is final and must be unconditionally accepted by them.[434] However, they disagree on what unconditional acceptance entails.

6.48 The text of Article 17.14 uses the words "be ... accepted" which is the passive form of the verb "accept". There are several ordinary meanings of this verb, including the following:

> "1. Take or receive with consenting mind; receive with favour or approval. 2. Receive as adequate or valid; admit; believe; tolerate; submit to."[435]

6.49 Article 17.14 expressly provides that Members retain the right to express their views on an Appellate Body report. "Members" include the parties to the dispute, which indicates that the parties are *not* required to receive an adopted Appellate Body report with favour or approval but may state that they disagree with it. Therefore, the second of these two meanings is apposite (other than the denotation "believe"), rather than the first, indicating that the parties to the dispute receive the adopted Appellate Body report as adequate or valid, and submit to it. This is confirmed by the French and Spanish versions of the DSU, that are equally authentic, and that use the terms "*sera accepté*" and "*serán aceptados*", respectively.

6.50 The verb "accept" is used with the modal verb "shall" which indicates that, in this context, acceptance is an obligation. The phrase "shall accept" is used in the same sense in Article 22.7 of the DSU. The phrase "shall be accepted" is also used in Article XII:5(e) of the GATS, as is "shall accept" in Article XV:2 of GATT 1994, in the same sense, although in a different context. This phrase can be contrasted with the words "mutually acceptable" in Articles 3.7 and 22.2 of the DSU, where parties do *not* have an obligation to accept a particular solution or compensation. This obligation can also be contrasted with the prior GATT practice according to which Members were able to block adoption of panel reports.[436]

6.51 However, unlike all these other provisions, Article 17.14 qualifies the phrase "shall be accepted" with the adverb "unconditionally".[437] This indicates that Members are not simply obliged to receive an

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[434] Antigua first written submission, para. 32; oral statement, para. 11; reply to Panel question No. 6; United States reply to Panel question No. 6; comment on Antigua's reply to Panel question No. 20.

[435] *New Shorter Oxford English Dictionary*, (5th edition, 2002) Oxford University Press.

[436] The previous GATT practice was to adopt panel reports by consensus, without prejudice to the GATT provisions on decision-making: see the Decision of 12 April 1989 on improvements to the GATT dispute settlement rules and procedures, para. G.3 (BISD 36S/61-67). This practice remains applicable to so-called "situation complaints" under Article 26.2 of the DSU.

[437] The word "unconditionally" is only used in the covered agreements in relation to adopted Appellate Body reports (see Article 17.14 of the DSU and Articles 4.9 and 7.7 of the SCM Agreement), and in the MFN obligations (see Article I:1 of GATT 1994, Article II:1 of the GATS and Article 4 of the TRIPS Agreement).

Appellate Body report as adequate or valid and submit to it, but that they must do so "unconditionally". The word "unconditionally" is formed from the adjective "unconditional", the ordinary meaning of which may be defined as "[n]ot limited by or subject to conditions; absolute, complete".[438] This is consistent with the French and Spanish versions, that use the terms "*sans condition*" and "*sin condiciones*" respectively. The phrase "shall be ... unconditionally accepted" includes the notion of finality but it does not simply indicate that a report is final in the sense that there is no opportunity to appeal further, nor that a report is the final step at the appellate review stage of a proceeding. Rather, it indicates that the parties may not place *any* conditions on their acceptance of an adopted Appellate Body report.

6.52 There are specific limits on the scope of this obligation. The text of Article 17.14 specifies that the obligation only applies to the "parties to the dispute". Moreover, the parties only owe the obligation with respect to the *report*, which by its own terms is limited to the measures in dispute and the claims, defences and issues ruled upon therein. The text of Article 17.14 also establishes a procedural limit, in that it makes the parties' unconditional acceptance contingent upon adoption of the Appellate Body report by the DSB and expressly acknowledges that the DSB may decide not to adopt it. Therefore, Appellate Body reports are not final until they are adopted, and an Appellate Body report that the DSB decides by consensus not to adopt is not final, or binding, at all.[439] However, an Appellate Body report that has been adopted by the DSB shall be unconditionally accepted by the parties to the dispute which indicates that, from that point on, the report *is* a final resolution, within the context of that dispute, of the claims, defences and issues ruled upon therein. Whether or not the report resolves matters in dispute between those parties in any other context is an issue on which the Panel need not, and does not, rule. Article 19.2 of the DSU also confirms a substantive limit on the effect of panel and Appellate Body reports, by confirming that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

6.53 This reading of Article 17.14 is consistent with the object and purpose of the DSU insofar as it includes the "prompt settlement" of disputes, as set out in Article 3.3 of the DSU. As the Panel noted at paragraph 0 above, the DSU expressly provides an opportunity for review of a panel report at the appellate review stage under Article 17, *prior* to the recommendations and rulings of the DSB. Thereafter, Article 21.1 requires prompt compliance with those recommendations or rulings. A reassessment in a compliance proceeding of an issue that had already been ruled upon in an original proceeding in an adopted report, even with better arguments by the respondent but without a change relevant to the underlying facts in the intervening period, would run counter to the prompt settlement of disputes.

6.54 This reading is also confirmed by the drafting history of the DSU. During the Uruguay Round, consideration of the concept of appellate review generally proceeded on the understanding that the parties to a dispute would agree in advance that they would accept the results of an appellate review unconditionally.[440] All drafting options for the precursor of Article 17.14 provided that appellate decisions would be "the final disposition of the case" or "final and unconditionally accepted".[441] The Chairman of the Negotiating Group on Dispute Settlement, Ambassador Lacarte-Muró, drafted a single text for the

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[438] *New Shorter Oxford English Dictionary*, (5th edition, 2002) Oxford University Press.

[439] Contrast Article 22.7 of the DSU that *does* use the word "final" where it provides that "[t]he parties shall accept an arbitrator's decision as final and the parties concerned shall not seek a second arbitration". However, Arbitrator's decisions are final immediately, without the possibility of an appeal or the requirement of adoption by the DSB.

[440] See "Profile on the Status of the Work in the Group – Report by the Chairman", dated 18 July 1990, GATT document MTN.GNG/NG13/W/43, para. 5.

[441] See "Draft Text on Dispute Settlement", dated 21 September 1990, GATT document MTN.GNG/NG13/W/45.

precursor of Article 17.14 based on the latter option but replacing the word "final" with the provision that reports shall be "adopted by the Council" and adding the proviso "unless the Council decides not to adopt the appellate report ..."[442] This was negotiated further and circulated in the so-called "Brussels Draft" substantially in the form of Article 17.14 today.[443]

6.55 This reading is further confirmed by the Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia),* followed in *EC – Bed Linen (Article 21.5 – India)*, which stated as follows:

> "Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, '… unconditionally accepted by the parties to the dispute', and, therefore, must be treated by the parties to a particular dispute as *a final resolution to that dispute*. In this regard, we recall, too, that Article 3.3 of the DSU states that the 'prompt settlement' of disputes 'is essential to the effective functioning of the WTO'."[444] (emphasis added)

6.56 The Panel agrees, subject to a suitable definition of "dispute" that is limited to the claims, defences and issues ruled upon in a report.[445] As a "final resolution" of a dispute, the adopted Appellate Body report entails more than a final ruling on the evidence presented. It entails a final decision on the claims and defences ruled upon with respect to the measures at issue as they existed at the time of the original proceeding. A compliance panel does not make a reassessment of that same matter but rather assesses the consistency with a covered agreement of "measures taken to comply" (unless it assesses only the *existence* of "measures taken to comply"). This constitutes a separate enquiry and, accordingly, is consistent with the finality of the Appellate Body report adopted at the conclusion of the original proceeding.

6.57 In the present compliance proceeding, the United States seeks an assessment of the consistency of its measures with its obligations under the GATS in relation to an issue on which the Appellate Body ruled in its report on the same dispute in relation to the same measure in the same factual and legal context. The express purpose of such a reassessment would be to reach a new conclusion – that the United States *has* established that these measures satisfy the requirements of the chapeau of Article XIV of the GATS – without any "measures taken to comply" but only the presentation of new and allegedly better arguments. Such a conclusion would mean that the original conclusion, quoted at paragraph 0 above, was not final. Yet, in the Panel's view, Article 17.14 of the DSU applies to *all* conclusions in an Appellate Body report. The United States' position can be characterized as an acceptance of the original ruling on condition that it retains the right to seek a more favourable conclusion in a further proceeding. That type of acceptance is not unconditional. Therefore, in the circumstances, in accordance with Article 17.14, the Panel cannot accede to the United States' request to reach a conclusion different from that reached by the original Panel as upheld by the Appellate Body and adopted by the DSB, without any change relevant to the measures at issue.

6.58 The United States agrees that a complainant who fails to discharge its burden of proof may not re-argue a claim in a compliance proceeding, but it does not consider that the same applies to a respondent.

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[442] "Chairman's Text on Dispute Settlement", dated 19 October 1990.

[443] "Draft Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations – Revision", dated 3 December 1990, GATT document MTN.TNC/W/35/Rev.1.

[444] Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 97, quoted in *EC – Bed Linen (Article 21.5 – India)*, para. 90.

[445] See further para. 0 below.

It argues that a respondent has a "special status", as complaining and responding parties are in fundamentally different positions under Articles 21 and 22 of the DSU.[446]

6.59 The Panel agrees that the respondent is in a unique position under Article 21 of the DSU because it is the only Member to whom the DSB recommendation is addressed and, as such, it is the only Member that must comply with the recommendation. Nevertheless, the respondent, as a party to the dispute, is obliged by Article 17.14 of the DSU unconditionally to accept an adopted Appellate Body report. For the reasons given above, the Panel considers that that obligation precludes re-argument of the same defence in relation to the same measure without any change relevant to the measure.

6.60 The United States also refers to *Canada – Dairy (Article 21.5 – New Zealand and US II)* as an illustration that a Member can present new evidence when it has previously failed to establish a claim due to a lack of evidence. It asserts that there is no general bar in the DSU that prevents a party from meeting its burden of proof in a second proceeding.[447]

6.61 The Panel notes that the example to which the United States refers consisted of two recourses under Article 21.5 of the DSU, both of which assessed the consistency of measures actually adopted by the respondent to comply with a DSB recommendation, unlike the present dispute. In the first recourse, the Appellate Body concluded that the Panel's findings were vitiated by error of law and did not rule on the relevant claim. There was no finding or conclusion that the complainant failed to make a prima facie case.[448] Accordingly, the second recourse by the complainants under Article 21.5 did not imply a rejection or conditional acceptance of the findings or conclusions in the Appellate Body report adopted in the first recourse under Article 21.5.

6.62 The United States argues that the Panel and Appellate Body reports in the present dispute cannot be said to result in a "final settlement" because, as the Appellate Body noted, it was not able to determine whether or not the measures met the requirements of the Article XIV chapeau.[449] The Appellate Body did not state that the measures at issue were inconsistent with the chapeau of Article XIV of the GATS but rather, variously, that the United States "has not demonstrated", "has not shown" and "has not established", essentially, that the measures satisfy the requirements of the chapeau.

6.63 The Panel recalls that, as the party asserting an affirmative defence under Article XIV of the GATS, the United States bore the initial burden of proof that its measures did satisfy the requirements of Article XIV, including the chapeau. A burden of proof is a responsibility to put forward evidence and arguments that show or demonstrate certain matters of fact and law sufficient to establish a particular claim or defence.[450] The Panel notes that it is standard practice for the Appellate Body and panels to use a phrase such as "has not demonstrated" in order to indicate that a party fails to discharge the burden of proof of an affirmative defence.[451] The Panel also notes that the terms "show", "demonstrate" and

[446] United States second written submission, paras. 28-31.

[447] United States reply to Panel question No. 12; comment on Antigua's reply to Panel question No. 7.

[448] Appellate Body reports on *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 103-104; *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 6.

[449] United States reply to Panel question No. 12.

[450] As explained, for example, in the Appellate Body report on this dispute at para. 282.

[451] See, for example, the Panel reports on *EC – Tariff Preferences*, paras. 7.235, 7.236 and 8.1(d); and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.155; and the Appellate Body reports on *Brazil – Aircraft*, para. 186; *Brazil – Aircraft (Article 21.5 – Canada)* para. 80; and *Turkey – Textiles*, para. 63.

"establish" are used throughout the Appellate Body report in this dispute, including in contexts that explicitly address the burden of proof.[452]

6.64 The Appellate Body's findings in this dispute, which use the terms "show", "demonstrate" and "establish", indicate that the United States failed to discharge its burden of proof. This was a ruling on the defence in relation to the measures at issue. It was not equivalent to a statement that the Appellate Body "does not rule" or an exercise of judicial economy. Instead, it indicates that the United States' affirmative defence failed. The Appellate Body then made the recommendation required under Article 19.1 of the DSU with respect to the measures found inconsistent with the United States' obligations under the GATS.[453]

6.65 For the same reason, the original Panel used the terms "has not demonstrated", "has not been able to demonstrate" or "has failed to demonstrate" in its conclusions, not only with respect to the US affirmative defence under Article XIV[454] but also with respect to Antigua's claims under Article VI of the GATS.[455] In each instance the term simply indicated that a particular defence or claim failed due to failure to discharge the relevant burden of proof. This is abundantly clear in relation to the findings on the Interstate Horseracing Act ("IHA") in particular, as the original Panel expressly used the word "demonstrate[d]" twice in the final sentence of this section to link the allocation of the burden of proof to its conclusion.[456]

6.66 The Panel can detect no suggestion in the Appellate Body's use of these terms that the United States could bring its measures into compliance simply through further submissions or presentation of additional evidence to show or demonstrate what it did not show or demonstrate in the original proceeding.

6.67 The United States also draws attention to the following clarification in the Appellate Body's overall conclusion on Article XIV:

> "In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA."[457]

6.68 The United States interprets this clarification, read in the context of the findings that the United States had "not shown", had "not demonstrated" and "did not establish" certain matters, as amounting to

[452] Appellate Body Report, paras. 4, 9, 10, 35, 44, 55, 57, 103, 104, 114D(iii), 114(D)(iv), 114(D)(v), 116, 133, 139, 151, 153, 183, 226, 253, 254, 279, 298, 300, 302, 309, 311, 313, 315, 326, 329, 336, 351, 352, 353, 355, 365, 360, 369, 371, 372, 373(D)(v)(a) and 373(D)(vi)(a).

[453] Appellate Body report, para. 374.

[454] Original Panel report, paras. 6.600, 6.607, 6.608 and 7.2(d). The original Panel also used the term "has demonstrated" to indicate where the United States did succeed in discharging its burden of proof: see original Panel report, paras. 6.594 and 6.603.

[455] Original Panel report, paras. 6.437 and 7.2(c).

[456] Original Panel report, para. 6.600. The burden of proof was also recalled in para. 6.596.

[457] Appellate Body report, para. 371.

an invitation to the United States to demonstrate to a compliance panel that its measures do in fact meet the requirements of the Article XIV exception of the GATS.[458]

6.69 In the Panel's view, the Appellate Body's clarification was due to the unusual, but not unprecedented, circumstance of the Appellate Body declining to accept a Member's interpretation of its own domestic law.[459] The clarification provided greater certainty that, whilst the original Panel and the Appellate Body had not accepted the US interpretation that the IHA does *not* permit activities prohibited by the measures at issue, this did not mean that the original Panel and the Appellate Body had found that the IHA *did* permit such activities. The Panel notes that it is not uncommon for the Appellate Body to clarify what it has *not* decided in a report.[460] The Panel also notes that none of the third parties in this proceeding, nor Antigua, considered that this clarification was open to the interpretation which the United States places upon it.[461]

6.70 In any case, the Appellate Body did not simply clarify what it had *not* decided, and find that the United States had "not shown", had "not demonstrated" and "did not establish" certain matters. In reaching its conclusions, the Appellate Body reviewed and upheld a specific finding by the original Panel on the interpretation of the US measures. Specifically, the Appellate Body was not persuaded that the original Panel had failed to make an objective assessment of the facts as regards the relationship between the IHA, on the one hand, and the measures at issue, on the other, and upheld the original Panel's finding. It later summarized that finding in the following terms:

> "The second instance found by the Panel was based on "the ambiguity relating to" the scope of application of the IHA and its relationship to the measures at issue. We have upheld this finding." (footnotes omitted)[462]

6.71 Here, the Appellate Body cross-referenced the following finding of the original Panel:

> "In summary, on the basis of evidence provided to the Panel relating to the domestic enforcement of the US prohibition on the remote supply of wagering services for horse racing against TVG, Capital OTB and Xpressbet.com and *in light of the ambiguity relating to the Interstate Horseracing Act, which pertains to wagering services for horse racing*, we believe that the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner as between those supplied domestically and those that are supplied from other Members.

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[458] United States first written submission, para. 44. While the United States originally submitted that it had received an "explicit invitation" to do so from the Appellate Body, it later clarified that it used the term "invitation" as shorthand for the type of reasoning commonly found in Article 21.5 proceedings, that is where the Appellate Body (or a panel) finds a particular aspect of a measure to be inconsistent with a covered agreement, the other side of such a finding may provide specific guidance on how the responding Member may bring its measure into compliance. The United States referred to the Appellate Body report on *US – Shrimp (Article 21.5 – Malaysia)* as an "instructive example", but it appeared to acknowledge that in that dispute compliance depended on some change, at least to the facts, since the original proceeding: see United States reply to Panel question No. 16.

[459] See the Appellate Body report on *India – Patents (US)*, para. 70. See also the Panel reports on *EC – Trademarks and Geographical Indications (US)*, para. 7.96, and *(Australia)*, para. 7.146.

[460] See the Appellate Body reports on *US – Shrimp*, para. 185; *Brazil – Aircraft*, para. 187; *US – FSC*, para. 179; *Canada – Autos*, para. 183; *Canada – Patent Term*, paras. 100-101; *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 103; *US – Section 211 Appropriations Act*, para. 362; and *US – Softwood Lumber V*, para. 181.

[461] China, European Communities and Japan respective replies to Panel third party question No. 10; Antigua second written submission, para. 14; reply to Panel question No. 16.

[462] Appellate Body report, para. 368.

> Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute 'arbitrary and unjustifiable discrimination between countries where like conditions prevail' and/or a 'disguised restriction on trade' in accordance with the requirements of the chapeau of Article XIV."[463] (emphasis added)

6.72 The ambiguity relating to the IHA to which the original Panel referred is discussed in a previous section of the original Panel report.[464] That section includes the following finding:

> "In our view, even if the IHA did not repeal the Wire Act, the Travel Act and the Illegal Gambling Business Act as has been submitted by the United States, *there is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act*. We consider this relationship to be critical in determining whether, in fact, the amendment to the IHA permits wagering on horse racing by means of electronic communication."[465] (emphasis added)

6.73 Clearly, this is a finding on the interpretation of US domestic law. However, it is not a finding on the proper interpretation of US law for US citizens. It is an interpretation solely for the purpose of assessing the United States' compliance with its international obligations under the GATS.[466]

6.74 The finding is that the relationship between the IHA and the measures at issue is ambiguous. This was the key to the conclusion that the United States did not establish that the measures at issue satisfied the requirements of the chapeau of Article XIV of the GATS as set out in the original Panel report, upheld in the Appellate Body report, and adopted by the DSB. Therefore, in accordance with Article 17.14 of the DSU, this finding on the relationship between the IHA and the measures at issue "shall be … unconditionally accepted by the parties to the dispute".

6.75 The United States argues that it did not have the opportunity to present complete evidence on the interaction among these statutes in the original proceeding. It asks this compliance Panel to consider evidence allegedly not presented to the original Panel and to reach the conclusion that the IHA does not provide an exemption from the measures at issue.[467] Antigua replies that the failure of the United States to meet its burden of proof in the original proceeding rests squarely on its own shoulders.[468]

6.76 The Panel recalls the Appellate Body's observation that, on this issue, "[t]he [original] Panel had limited evidence before it, as submitted by the parties, on which to base its conclusion."[469] However, this reference to the limitations of the evidence does not alter the effect of the finding. The Appellate Body did not consider the evidence *inadequate* for the original Panel to reach its finding. On the contrary, the Appellate Body upheld the finding. As the Panel pointed out at paragraph 0 above, the United States' position can be characterized as an acceptance of the original finding on condition that it retains the right to seek a more favourable finding in a further proceeding. That type of acceptance is not unconditional. Therefore, in these circumstances, in accordance with Article 17.14, the Panel cannot accede to the

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[463] Original Panel report, para. 6.607.

[464] Original Panel report, paras. 6.595 to 6.600.

[465] Original Panel report, para. 6.599.

[466] This is consistent with the approach of the Appellate Body report on *India – Patents (US)*, para. 65.

[467] United States first written submission, paras. 3, 52-53.

[468] Antigua second written submission, para. 23.

[469] Appellate Body report, para. 364.

United States' request to make a different finding, that the IHA in no way limits the application of federal criminal statutes[470], without any change relevant to the measures.

6.77 In any event, the record of the original Panel proceeding indicates that the United States indeed had the opportunity to present complete evidence on the interaction among these statutes.[471] Whilst the United States did not raise its affirmative defence under Article XIV of the GATS until its second written submission in the original proceeding, it addressed the effect of the IHA amendment and its relationship with the measures now at issue in its *first* written submission in that proceeding. It provided the view of the Department of Justice on the specific issue, as expressed in a Presidential statement on signing of the IHA amendment, a view which the Department of Justice had "repeatedly affirmed".[472] Antigua also addressed this issue in its submissions to the original Panel.[473] In response to questions from the original Panel after the first substantive meeting, the United States referred again to the Department of Justice view expressed in the Presidential signing statement, as well as information on the US principle of statutory construction that repeals by implication are not favoured, with a citation to a US Supreme Court opinion of 1939.[474] The United States returned to the issue to reiterate its view in its original second written submission[475] and also addressed the prosecution of illegal wagering on horse racing in its opening oral statement at the original Panel's second substantive meeting.[476] The US evidence showed that the Department of Justice was fully aware from the time of the IHA amendment in 2000 of the state of US domestic law on the precise issue under consideration, and a representative of the Department of Justice was part of the US delegation at both of the original Panel's substantive meetings with the parties. In its detailed comments on the original interim review, the United States simply restated the arguments that it had already made.[477]

6.78 The United States argues that a respondent Member should not be precluded from presenting facts in a compliance proceeding in order to show that WTO-consistent measures are, in fact, WTO-consistent. The United States emphasizes that a finding that means that a measure *may or may not* fall within Article XIV of the GATS cannot require a Member to abolish or amend a measure, in view of Article 19.2 of the DSU,[478] which reads as follows:

> "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

6.79 The Panel notes once again that this argument depends on the view that the measures at issue have been consistent with the United States' obligations under the GATS all along, both during and since the original proceeding (see para. 0 above). As a matter of principle, the Panel does not consider that a

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[470] United States first written submission, para. 3.

[471] The Panel does not have access to the record of the appellate review stage of the original proceeding.

[472] United States original first written submission, paras. 34-35 and original Exhibit US-17. and referred to in original Exhibit AB-39, as pointed out in United States original first written submission, para. 35 fn 54. See the summary of arguments of the parties in the original Panel report, paras. 3.22-3.23 and 3.228.

[473] Antigua original first written submission, para. 116; original opening second oral statement, para. 94; original second written submission, para. 21; original replies to Panel questions 19 and 32; original Exhibits AB-17, AB-39, AB-54, AB-81 and AB-122.

[474] United States replies to original Panel questions Nos. 21 and 22.

[475] United States original second written submission, para. 63.

[476] United States original second opening oral statement, paras. 66-67.

[477] United States comments on original interim review, paras. 38-40.

[478] United States second written submission, para. 26; reply to Panel question No. 2(b).

recommendation that a Member bring its measures into conformity with a covered agreement could possibly add to or diminish the rights or obligations of any Member provided in the covered agreements. The recommendation, by its own terms, does not require the Member concerned to take measures to comply with any obligations beyond those set out in the relevant covered agreement.

6.80 The United States' argument also depends on the view that the finding in the original proceeding was due to poor briefing on its own part as if, in allegedly confused circumstances in the original proceeding, it had failed to gather and present otherwise available information that would have been sufficient for the original Panel or the Appellate Body to conclude that the measures at issue were actually consistent with the United States' obligations. However, the Panel notes that the source of the ambiguity between the IHA, on the one hand, and the Wire Act, on the other, lies in "the text of the revised statute ... on its face"[479] or, in other words, "the plain language of the IHA".[480] Aware of the view of the Department of Justice, included in a Presidential signing statement, and aware of the US principle of statutory construction that repeals by implication are not favoured, the original Panel made an objective assessment that, when interpreting US domestic law, it could not ignore the plain language of a statute enacted by the United States Congress.[481]

6.81 Perhaps the original Panel could have reached a different conclusion had the parties submitted a US Supreme Court opinion or other authoritative judicial opinion on the relationship between the amended IHA and the measures at issue. The Department of Justice would not have been unaware of the existence of any such authoritative opinion. Whilst the United States *did* submit examples of reported court cases in which the Department of Justice had used federal gambling laws challenged by Antigua to prosecute illegal wagering on horse racing, all those examples pre-dated the amendment of the IHA and all but one pre-dated the IHA itself.[482]

6.82 The absence of US judicial opinion on point was further exacerbated by a lack of prosecutions under the measures at issue of persons who complied only with the provisions of the IHA but not with the measures at issue; this could have indicated how the civil provisions of the IHA were to be construed in cases of conduct considered criminal under the measures at issue.[483] Instead, the United States was only able to assert that its law enforcement officials did not agree with wagering suppliers in the United States who cited the amendment to the IHA as the statutory basis for Internet gambling on horse racing, notwithstanding the fact that such officials had never prosecuted any of these wagering suppliers.[484] The United States *did* point to a disclosure in the annual report of one supplier that referred to unspecified action by the Department of Justice for unspecified companies that the Department of Justice deemed to be operating without proper licensing and regulatory approval. The United States agreed that this supplier

[479] Original Panel report, para. 6.599.

[480] Appellate Body report, para. 364.

[481] Original Panel report, para. 6.599. The original Panel also had a copy of a December 2002 report prepared by the United States General Accounting Office for Congressional requesters titled "Internet Gambling – An Overview of the Issues" which found that "[t]he language of the [IHA] appears to allow the electronic transmission of interstate bets as long as the appropriate consent is obtained", see original Exhibit AB-17, p. 16. The United States considered that characterization as incorrect: original first written submission, para. 33.

[482] United States original second opening oral statement, para. 45.

[483] The Panel here refers to prosecutions to the extent they could shed light on the relationship of the IHA to the measures at issue and not to enforcement of the measures at issue more generally as addressed in the Appellate Body report, paras. 352-357.

[484] United States original second opening oral statement, para. 46.

"face[d] the risk" of criminal proceedings and penalties brought by the government.[485] The United States also provided statistics on caseload data extracted from the United States Attorneys' Case Management System that included data on any and all criminal cases/defendants where the Wire Act or the Travel Act was brought as any charge against a defendant for the fiscal years 1992-2003.[486] Yet there was no clear evidence of a single actual criminal prosecution under the Wire Act or the Travel Act of a person who operated in accordance with the IHA, which would have shown whether the application of those measures was affected by the existence of the IHA.

6.83 In sum, the original Panel had "limited evidence" before it on the relationship between the IHA and the Wire Act because the underlying facts that might otherwise have given risen to more substantial factual submissions were limited. The ambiguity of this relationship was not a matter of poor briefing; rather, it was merely a reflection of the ambiguous state of US domestic law.[487] This ambiguity in US domestic law prevented the United States from demonstrating in the original proceeding that its measures satisfy the requirements of the chapeau of Article XIV of the GATS. Whilst there may be a right and a wrong interpretation of this point in US domestic law, it is currently a matter open to disagreement. As long as this ambiguity remains, the measures at issue are not in compliance with the United States' obligations under the GATS.[488]

6.84 Therefore, the Panel concludes that, both as a matter of principle and also in the specific circumstances of this dispute, its interpretation of the recommendation that the United States bring its measures into conformity with its obligations under the GATS does not diminish the United States' rights or increase its obligations inconsistently with Article 19.2 of the DSU.

6.85 For the reasons set out above, the Panel sees nothing in the specific findings and conclusions in the original proceeding that would disturb its preliminary conclusion at paragraph 6.38. Therefore, the Panel concludes that the United States has not complied with the recommendations and rulings of the DSB.

3. Statements made during the arbitration pursuant to Article 21.3(c) of the DSU

6.86 Both parties and the European Communities referred to statements made by the United States on the means of implementation of the DSB recommendation and rulings during the course of the arbitration to determine a reasonable period of time pursuant to Article 21.3(c) of the DSU in this dispute.[489] Essentially, they disagreed as to whether the United States itself had, during the arbitration, submitted that legislation was the only possible means to bring its measures into compliance with the recommendations and rulings of the DSB.

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[485] United States original second opening oral statement, para. 47, see original Panel report, para. 6.587. Earlier, the United States had provided a careful legal explanation as to why certain services supplied by such suppliers would not be liable to prosecution, if they fell within the "safe harbor" provision of the Wire Act: United States reply to original Panel question No. 22.

[486] United States original second opening oral statement, para. 42-44; original Exhibit US-41, see original Panel report, para. 3.236.

[487] The Panel reiterates that this interpretation of US domestic law is solely for the purpose of assessing the United States' compliance with its international obligations under the GATS.

[488] See the additional clarification with respect to the IGBA, set out at note 505 below. The Panel's findings are without prejudice to any other possible inconsistencies between the measures at issue and the United States' obligations under the GATS.

[489] Antigua first written submission, paras. 17-18; United States first written submission, para. 55; European Communities third party submission, para. 58.

6.87 The Panel considers that parties' statements made in the course of an arbitration pursuant to Article 21.3(c) can be helpful in addressing the existence of measures taken to comply in an Article 21.5 proceeding because, as a practical matter, they will address the specific recommendation and rulings of the DSB in the dispute at hand and also what is required in order for the respondent to comply.[490] In this way, they may confirm a compliance panel's own objective assessment of whether the respondent has complied, based on the specific recommendations and rulings of the DSB in the dispute.

6.88 The Panel notes that the United States, in its written submission and oral statement to the Arbitrator, sought a period of time to adopt legislation *without* stating that legislation was the only option to ensure compliance.[491] Nevertheless, the Panel observes that the Award of the Arbitrator stated that:

> "For this reason, the United States emphasizes that the only means of implementation that will achieve the necessary clarification is legislative means."[492]

6.89 The United States respectfully disagrees with the Arbitrator's characterization of its views, including after its perusal of the unverified transcript of the Arbitrator's oral hearing.[493] Antigua considers the Arbitrator's conclusion to be a correct interpretation of the US argument put before him.[494]

6.90 The Panel can see that the United States submitted to the Arbitrator that it intended to seek legislation and, in this context, stated orally that it needed legislation or that legislation was required. However, the Panel cannot conclude with certainty that the United States *emphasized* that legislation was the *only* means of implementation, especially since a question on that point was never posed to the United States. The Panel, for its part, does not consider that legislation is the only possible means of implementation in this dispute. Even though the key finding on the chapeau of Article XIV of the GATS in the original proceeding concerned the relationship between different statutes, the chapeau relates to the *application* of the measures at issue, which does not simply relate to their wording. The original Panel was not persuaded by the Department of Justice's view of that relationship but that does not exclude other forms of administrative action, or judicial action, to bring the measures into conformity. For this reason, the Panel does *not* consider that the lack of new legislation amending the measures at issue or amending the IHA is determinative of the existence of any "measures taken to comply" in this dispute.

C. DISAGREEMENT AS TO THE CONSISTENCY WITH A COVERED AGREEMENT OF MEASURES TAKEN TO COMPLY

1. Nature of the Panel's assessment

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[490] See also the following statement in the Appellate Body report on *US – Softwood Lumber IV (Article 21.5 – Canada)*:

> "Thus, within Article 21 as a whole, the declarations of the implementing Member form an integral part of the surveillance of implementation, but they do not stand alone. Rather, they are complemented by, and subject to, multilateral review within the World Trade Organization (the 'WTO')." (at para. 70).

[491] See United States written submission to the Arbitrator, paras. 2, 3, 9-12, 17 and 36; and oral statement to the Arbitrator, paras. 3, 4, 13-14 and 18; summarized in the Award of the Arbitrator (WT/DS285/13), at paras. 7-10 and 16.

[492] Award of the Arbitrator (WT/DS285/13), at para. 37.

[493] United States reply to Panel question No. 24. The Panel obtained the Arbitrator's record as described at para. 0 above.

[494] Antigua comment on US reply to Panel question No. 24.

(b) Assessment by the Panel

6.93 The Panel has already concluded at paragraph 0 that the United States has not complied with the recommendations and rulings of the DSB. Having reached that conclusion, the Panel need not continue its assessment of the matter before it. Indeed, the Panel cannot assess a disagreement as to the *consistency* with a covered agreement of "measures taken to comply" with the recommendations and rulings of the DSB because it has found that no such measures exist.

6.94 Nevertheless, it is quite clear what the United States alleged to be the "measures taken to comply". These are the same measures the subject of the recommendations and rulings of the DSB in this dispute, namely, the Wire Act, the Travel Act and the IGBA. As the sole trier of fact in this compliance proceeding, the Panel considers it appropriate to make certain factual findings beyond those that are strictly necessary to resolve the dispute, which may assist the Appellate Body should it later be called upon to complete the analysis. Indeed, the original Panel made such a decision, which was upheld on appeal.[495]

6.95 The United States submits that it can demonstrate in this compliance proceeding what it failed to demonstrate in the original proceeding. This submission depends on the premise that the facts and arguments that it has presented in this compliance proceeding are different from, and more persuasive than, those it submitted in the original proceeding. Therefore, in the circumstances, and in accordance with the function of panels under Article 11 of the DSU, the Panel considers it useful and appropriate to make a factual assessment of that premise. In so doing, the Panel will also make an assessment of facts and arguments presented by Antigua in this compliance proceeding.

6.96 Further, the original Panel's assessment of the matter before it, as reviewed by the Appellate Body, was based on the facts as they existed at the time of the original proceeding. The Panel will also make a factual assessment of certain new developments that have arisen since the time of the original proceeding.

6.97 The Panel sees no reason to limit its factual assessment to the single issue of the legal interpretation of the relationship between the IHA, on the one hand, and the measures at issue, on the other, on which the original Panel ruled, as upheld by the Appellate Body. The language used by the Appellate Body in its report with respect to that issue did not amount to an invitation to the United States to make a demonstration to a compliance panel of this one specific point, for the reasons given at paragraphs 0 to 0 above. Instead, to the extent that the Panel revisits the United States' defence that the measures at issue satisfy the requirements of the chapeau of Article XIV of the GATS, the Panel considers it equally appropriate to assess an issue that was raised in the original proceeding but upon which the original Panel did *not* rule, namely whether the measures at issue are discriminatory "on their face". This was an issue to which *both* parties referred in their submissions to this Panel. The Panel assesses this issue in terms of the treatment of intrastate commerce. However, the Panel emphasizes that it makes this assessment solely for the purposes set out at paragraph 0 above and without prejudice to its finding that the Appellate Body's conclusion regarding the United States' defence under Article XIV of the GATS must be unconditionally accepted by the parties in accordance with Article 17.14 of the DSU.

6.98 The chapeau of Article XIV of the GATS sets out the following requirement:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services".

[495] Appellate Body report, para. 344.

6.99 The Panel recalls the Appellate Body's interpretation of this provision in this dispute:

> "The focus of the chapeau, by its express terms, is on the *application* of a measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the paragraphs of Article XIV. By requiring that the measure be *applied* in a manner that does not to [*sic*] constitute 'arbitrary' or 'unjustifiable' discrimination, or a 'disguised restriction on trade in services', the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS."[496] (footnotes omitted)

2. United States' submissions

(a) Interstate Horseracing Act, as amended

6.100 In this compliance proceeding, as in the original proceeding, the United States asserts that its measures satisfy the requirements of the chapeau of Article XIV because they do not discriminate *at all*. The United States has not put forward an additional argument that *even if* such discrimination exists, it does not rise to the level of "arbitrary" or "unjustifiable" discrimination.

6.101 The United States submits that the prohibition embodied in the three measures at issue is applied consistently with the requirements of the chapeau of Article XIV of the GATS because the measures do not discriminate between countries on their face, and because the IHA does not provide an exemption from those measures. The United States refers to the plain text of the IHA, legislative history and the US principle of statutory construction which disfavours repeals of earlier statutes by implication.[497]

6.102 The Panel observes that there is repetition in key respects between the evidence submitted by the United States in this compliance proceeding with the evidence submitted in the original proceeding, notably with that mentioned at paragraph 0 of this report with regard to:

> the text of the measures at issue;[498]
>
> an assertion that the measures at issue "on their face" meet the requirements of the chapeau of Article XIV of the GATS because their text allegedly does not discriminate between countries;[499]
>
> a description of the "safe harbor" provision in the Wire Act which applies to information assisting in the placing of bets and wagers, but not to bets and wagers themselves;[500]

[496] Appellate Body report, para. 339.

[497] United States first written submission, paras. 10-40.

[498] United States first written submission, paras. 6-8, citing Exhibit AB-1; first written submission, para. 19, citing the Appellate Body report, paras. 260 and 262. The texts of the measures at issue were set out in original Exhibit AB-82 and summarized in United States original second written submission, paras. 78, 80 and 83. See the original Panel report, paras. 3.264-3.267; 6.199, 6.216, 6.221-6.222, 6.360, 6.366 and 6.374; and Appellate Body report, paras. 147, 258, 260 and 262.

[499] United States first written submission, para. 17; reply to Panel question No. 38(c). This was asserted in United States original second written submission, para. 116. See the original Panel report, paras. 3.228 and 3.282. United States original second written submission, para. 118, also referred to non-discrimination in terms of nationality. See the original Panel report, para. 3.283.

the legislative history of the Wire Act;[501]

the text of the IHA and assertions that it does not expressly state that it provides an exemption to the criminal statutes, or is otherwise consistent with those statutes;[502]

the view of the Department of Justice on the relationship between the IHA amendment and the measures at issue;[503] and

statements that, under the US principles of statutory construction, repeals by implication are not favoured.[504]

6.103 It is indisputable that this evidence, presented in the original proceeding (and re-presented in this compliance proceeding), failed to demonstrate that the measures at issue satisfy the requirements of the chapeau of Article XIV of the GATS. The original Panel's finding on this point was upheld in the Appellate Body report, which was adopted by the DSB. Neither party disputes that that finding still stands as regards that evidence.

6.104 Without prejudice to the Panel's findings regarding Article 17.14 of the DSU at paragraphs 0 to 0 above, the Panel will now proceed to make a factual assessment of the other evidence in the United States'

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[500] United States first written submission, paras. 7-8; second written submission, paras. 11 and 19. In response to a question from the Panel, the United States confirmed the apparent relationship between the "safe harbor" provision and the plain language of the IHA amendment, which indicated that the former does not resolve the ambiguity in the relationship between the IHA and the measures at issue: see reply to Panel question No. 27. This provision was explained in United States original second written submission, para. 78. See the original Panel report, paras. 3.140, 3.141 and 3.264.

[501] United States first written submission, para. 9; oral statement, para. 20; and Exhibit US-1. This was discussed extensively in United States original second written submission, paras. 74-79 and included in original Exhibits US-24 and US-30. See the original Panel report, paras. 3.262-3.264, 6.482, 6.486, 6.490 and fn. 321; Appellate Body report, para. 296.

[502] United States first written submission, paras. 12, 22, 25 and 33; second written submission, paras. 11 and 14. The text was set out in original Exhibit AB-82 and discussed in United States original first written submission, paras. 34-35; reply to original Panel question No. 21; original second written submission, para. 63. See the original Panel report, paras. 3.22, 3.23, 3.228, 6.597; Appellate Body report, paras. 38, 361 and 362.

[503] United States first written submission, paras. 49-50; reply to Panel question No. 37. The Department of Justice's view as contained in the December 2000 Presidential signing statement was provided in original Exhibit US-17 and quoted in full in United States original first written submission, para. 35, and again in reply to original Panel question No. 21. See the original Panel report, paras. 3.22-3.23, 3.228, 6.597, and Appellate Body report, para. 362, fn 464. The Panel has noted that the April 2006 DOJ Statement refers expressly to the Wire Act rather than to all existing criminal statutes but this was in the context of Bill H.R. 4777, that would have expressly amended the Wire Act.

[504] United States first written submission, paras. 26 and 37; oral statement, para. 18. This was set out in reply to original Panel question No. 21; comments on original interim review, para. 38; and taken into account in the original Panel report at para. 6.599. The United States' view of repeals by implication was also referred to in the Appellate Body report, para. 362.

submissions, for the reasons set out at paragraphs 0 and 0. The Panel will refer to this other evidence as "supplementary" evidence.[505]

[…]

6.109 The original Panel, which did not have the supplementary evidence before it, made an objective assessment that, when interpreting US domestic law, it could not ignore the plain language of a statute enacted by the US Congress. None of the supplementary evidence alters or addresses the essential point that, on its face, the text of Section 5 of the IHA, read in conjunction with the definition of "interstate off-track wager" as amended in 2000, appears to authorize something that the Wire Act prohibits. The supplementary evidence actually *confirms* that, under US domestic law, whilst repeals by implication are not favoured, they are possible where there is a positive repugnancy between two Acts. Whilst the US court opinions submitted for the first time in this compliance proceeding confirm that two statutes can independently prohibit the same conduct, none of them indicate or even imply that a US court would ignore an authorization in the plain language of a US statute in light of an older statute that addresses the same conduct in less specific terms.[506]

6.110 Therefore, the United States' submissions in this compliance proceeding do not provide any facts and arguments concerning the relationship between the IHA, on the one hand, and the Wire Act, on the other, that would justify a different finding from that made by the original Panel on this issue.

2. Antigua's submissions

(a) Interstate Horseracing Act, as amended

6.111 Antigua argues that the measures at issue in the original proceeding remain out of compliance with Article XIV of the GATS.[507] Although it considers that the issue was resolved in the original proceeding, it submits that the IHA authorizes remote pari-mutuel account wagering in the United States and that this is not prohibited by the Wire Act. It refers *inter alia* to the IHA on its face, US domestic law including principles of statutory construction, State account wagering laws, the activities of suppliers of remote gambling and betting services operating in the United States, and the UIGEA.[508] Much of this

[505] The Panel sought, and obtained, one clarification from the parties that could be useful in the implementation of the recommendations and rulings of the DSB with respect to one of the measures at issue, namely the IGBA. Both parties had initially understood that the focus of Antigua's allegation of discrimination under the IHA was on the Wire Act (United States first written submission, para. 19; confirmed by Antigua in its second written submission, fn. 9). However, in response to a question from the Panel, both parties agreed that offences under the IGBA are not predicated on a violation of federal laws, such as the Wire Act, but on a violation of State laws, whereas the IHA applies to activity that is lawful in each State where it takes place. The United States added that, for this reason, in its view, the original Panel's findings with respect to the Wire Act and the Travel Act, as upheld by the Appellate Body, cannot apply to the IGBA (Antigua reply to Panel question No. 23 and the United States' comment thereon). The Panel notes that this argument, raised very late indeed, appears to be at odds with the United States' position in the original proceeding, as reflected in the view of the Department of Justice expressed in the December 2000 Presidential signing statement. Nevertheless, in view of the wording of the IHA, which is not entirely clear on this point, and of the IGBA, it may be possible for the Department of Justice to clarify the specific issue of the applicability of the IGBA to interstate wagering on horseracing, where legal in the various States involved.

[506] The measures at issue were enacted at an earlier time than the IHA and the United States has not argued that they are more specific than the IHA.

[507] Antigua first written submission, para. 46; second written submission, para. 5.

[508] Antigua first written submission, paras. 46-129; second written submission, paras. 29-60.

evidence was presented for the first time in the compliance proceeding but some of it only provides more detail on information presented in the original proceeding.

6.112 First, Antigua relies on the text of the IHA on its face, which is actually quoted in the original Panel and Appellate Body reports.[509] Antigua does not take a position on whether there is a direct conflict between the IHA and the Wire Act but submits opinions of the US Supreme Court and the US Court of Appeals that were not presented in the original proceeding to explain principles of statutory construction. Like the United States' own evidence, these opinions confirm that, under US domestic law, repeals by implication are not favoured but are possible where there is a positive repugnancy between two Acts.[510] This principle had already been presented in the original proceeding, in less detail, by the United States. One supplementary element provided by Antigua consists of the US court opinions in the *Burrillville* case dating from 1992 and 1993, which is apparently the only reported court case that refers to both the Wire Act and the IHA.[511] However, that case relates to the old version of the IHA before the 2000 amendment and does not discuss the activity engaged in by the defendant in a way that would clearly address the issue that the Panel is assessing. The lack of clarity on this point is highlighted by the fact that both parties to this dispute see in it support for their opposing respective views of the relationship between the two Acts.[512]

6.113 Second, Antigua has submitted laws and regulations of California, Connecticut, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Virginia, Washington and Wyoming that authorize "account wagering". These laws and regulations were not presented in the original proceeding.[513] Most of these State laws refer expressly to the IHA.[514] Almost all these State laws expressly refer to account wagering by telephone, Internet and/or other electronic means[515] (referred to below as "remote account wagering").[516]

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[509] Antigua first written submission, para. 50; second written submission, para. 29. Antigua draws attention to the fact that the definition covers remote wagering on an intra- and interstate basis. Indeed, the definition includes wagers placed or transmitted in one State and accepted by an off-track betting system in the *same or another* State: see original Panel report, para. 6.598; Appellate Body report, para. 361; Exhibit AB-4.

[510] Antigua first written submission, paras. 58-59, second written submission, paras. 36-39, and Exhibits AB-23 to AB-27.

[511] Exhibits AB-30 and AB-117.

[512] Antigua first written submission, para. 61; second written submission, paras. 40-45; United States first written submission, fn. 15; second written submission, paras. 20-23; oral statement, para. 15.

[513] Antigua only mentioned account wagering permitted by States: original first written submission, para. 118.

[514] Antigua first written submission, para. 66, Exhibits AB-34 to AB-51. Oregon law refers to compliance with the IHA, including one provision that licensees may accept bets from persons outside the State provided that they comply with the IHA (Exhibit AB-60). Virginia law expressly refers to pari-mutuel wagering "permissible under the IHA" (Exhibits AB-49 and AB-62). Idaho, Kentucky and Washington laws provide that a hub or advance deposit wagering facility must comply with the IHA (Exhibits AB-55, AB-37, AB-56 and AB-50). Maryland and Missouri laws provide that their intent is similar to the IHA or that the intent of the IHA is instructive (Exhibit AB-58 and AB-54). Louisiana law provides that it is subject to applicable federal law, specifically both the IHA *and* the Wire Act (Exhibits AB-38 and AB-57). However, seven State laws provide that simulcasts (as opposed to wagers) shall comply with the IHA. The United States chose not to address the substance of Antigua's evidence on these matters in its submissions. It considers that there is no basis for allowing Antigua to bring up in a compliance proceeding claims that were not reflected in the DSB's recommendation and rulings: United States second written submission, para. 9.

[515] New Hampshire's law does not (Exhibit AB-42).

[516] The Panel uses the word "remote" as defined by the original Panel at paras. 6.32-6.33 of its report.

Some of these State laws purportedly authorize remote account wagering on an interstate basis.[517] The United States does not contest what the State laws provide on their face but explains that State laws cannot override the Wire Act or other US federal law.[518] The Panel notes that some of the State laws, on their face, regulate the acceptance of legal interstate off-track wagers on horse races in accordance with the IHA. However, some do not refer to the IHA and others do not refer to the IHA in relation to the acceptance of wagers.[519] Further, whilst all the State laws refer to wagering on horse races, some apply to wagering on other sports[520] and four purport to allow wagers placed from foreign jurisdictions[521], which are matters outside the scope of the IHA. All allow remote wagers wholly within the State in question which, to the extent that it does not involve the transmission of bets or wagers in interstate or foreign commerce, is a matter outside the scope of the Wire Act[522] (discussed at paragraphs 0 to 0 below). In any event, even to the extent that these State laws are contemplated by the IHA, they do not remove the ambiguity in the relationship between the IHA itself and the Wire Act.

6.114 Third, Antigua has submitted evidence relating to wagering suppliers operating in the United States, many of whom expressly indicate on their websites that they provide telephone or Internet (i.e. remote) wagering services on horse racing.[523] Less detailed information on four of these operators was submitted in the original proceeding and addressed in the original Panel report in relation to an allegation of non-enforcement of the measures at issue against local suppliers in general.[524] The Panel addresses them now, in this section, in relation to the specific, and distinct, question of what the IHA authorizes.

6.115 The suppliers in relation to which Antigua submits evidence in the compliance proceeding hold licences granted by State governments under the State laws and regulations referred to in paragraph 0 above to conduct remote account wagering, or are public benefit corporations established for this purpose.[525] Some of these licences are expressly limited to remote wagering in the State "that is permissible under the Interstate Horseracing Act".[526] Some of the suppliers and industry associations also

[517] California, Idaho, Kentucky, Louisiana, Maryland (allows telephone betting from account holders with a principal residence outside the State), Nevada, Oregon, Virginia, Washington and Wyoming.

[518] United States reply to Panel question No. 32(c).

[519] See note 514 above.

[520] Connecticut, Massachusetts, New Hampshire, Oregon and Wyoming laws also apply to wagering on greyhound racing, dog racing and/or jai alai.

[521] Idaho, Kentucky, Nevada and Washington. Oregon, Virginia and Wyoming also refer to "other jurisdictions".

[522] United States reply to Panel question No. 32(d).

[523] Antigua first written submission, paras. 71-88, and Exhibits AB-65 to AB-73. The United States chose not to address the substance of Antigua's evidence on these matters in its submissions. It considers that there is no basis for allowing Antigua to bring up in a compliance proceeding claims that were not reflected in the DSB's recommendation and rulings: United States second written submission, para. 9.

[524] Antigua original first written submission, para. 118; original Exhibits AB-42, AB-43 and AB-44; response to original Panel question No. 19. A page from the website of another supplier was also provided in original Exhibit AB-123. See original Panel report, paras. 6.585-6.589, 6.607; Appellate Body report, paras. 352-357 and 373(D)(v)(a).

[525] The evidence relates to nine suppliers who comprise all the advance deposit wagering licensees in California (Exhibit AB-101), Idaho (Exhibit AB-96, except for one), Oregon (Exhibit AB-95, except for one), Virginia (Exhibit AB-98) and possibly Washington (Exhibit AB-99 - it is not clear if the licensee information is exhaustive for that State) as well as two public benefit corporations in New York (Exhibits AB-71 and AB-72). The evidence does not cover licensees in Kentucky (Exhibit AB-97, where only racetracks and Kentucky off-track betting parlors are licensed) or Ohio (Exhibit AB-94, where only racetracks are licensed).

[526] See the licence renewals ordered by the Virginia Racing Commission (Exhibit AB-98).

confirm that they operate under the IHA.[527] Most of these suppliers state that they accept wagers placed in other States.[528] These suppliers are substantial and even prominent businesses with, collectively, thousands of employees and apparently tens of thousands of clients, paying taxes or generating revenue for government owners, having traded openly for up to 30 years and in some cases even operating television channels. Three are publicly listed corporations making filings with the United States Securities and Exchange Commission or subsidiaries of such corporations.

6.116 The evidence regarding these suppliers demonstrates the existence of a flourishing remote account wagering industry on horse racing in the United States operating in ostensible legality. However, it is not clear whether these suppliers actually transmit bets and wagers in interstate or foreign commerce in violation of the Wire Act or only information in relation to the formation of a wagering pool or other information that may fall within the "safe harbor" provision of that Act. Therefore, the Panel is unable to determine to what extent the evidence of these suppliers' operations sheds light on the operation of the IHA in a way that would demonstrate that the IHA authorizes pari-mutuel account wagering that would otherwise violate the Wire Act.

6.117 Therefore, whilst the Panel notes the differences between Antigua's submissions in this compliance proceeding and those it made in the original proceeding, they do not provide any facts and arguments concerning the relationship between the IHA, on the one hand, and the Wire Act, on the other, that would justify a different finding from that made by the original Panel on this issue.

(b) Intrastate commerce

6.118 Antigua's submissions in this compliance proceeding have provided facts and arguments concerning another aspect of the measures at issue on which the original Panel did not rule.

6.119 In the original proceeding, Antigua explained that the measures at issue did not prohibit all remote supply of gambling services within the domestic market of the United States because the measures did not apply to intrastate commerce.[529] The text of the Wire Act and the Travel Act, on their face, showed that their scope was limited to "interstate or foreign" commerce (not "domestic or foreign" commerce) so that they did not include intrastate commerce. Antigua did not clarify to the original Panel how this limitation on scope was discriminatory in practice because, apart from one example[530], Antigua did not provide evidence that remote gambling was permitted in intrastate commerce. Instead, Antigua chose to focus on differential treatment between *non-remote* gambling within the domestic market of the United States and remote gambling from outside the United States rather than on the existence of an

[527] Exhibits AB-65, AB-66, AB-118, AB-119 and AB-120.

[528] One supplier, in New Jersey, states that it does not (Exhibit AB-73).

[529] Antigua original first opening oral statement, para. 92; original second written submission, paras. 33-34; and see original Panel report at paras. 3.105-3.106, 3.110-3.111, 3.135, 3.224, 3.227 and 3.232.

[530] This was a special exemption in Nevada law: Antigua reply to original Panel question No. 19, fn 117; see also the United States' reply to original Panel question No. 36. Antigua also mentioned the existence of State horse racing laws and account wagering, and quoted an IHA definition in a footnote in its original first written submission, paras. 116 and 118, but in its original second written submission, paras. 33-34, it set out the limitation on the scope of federal laws without pursuing the State authorizations that existed beyond that limitation.

authorization to supply remote gambling and wagering services within the United States. Consequently, the original Panel refrained from making a finding on this aspect of the Wire Act and the Travel Act.[531]

6.120 In this compliance proceeding, the United States asserts that the measures at issue "on their face" meet the requirements of the chapeau of Article XIV of the GATS because their text does not discriminate between countries.[532] Antigua disputes this assertion, referring to the operative language of the Wire Act, that prohibits only bets or wagers in "interstate or foreign commerce", but not intrastate commerce.[533] In response to questions from the Panel, the United States indicated that this was a jurisdictional requirement imposed by the United States Constitution. The United States did not dispute that the Wire Act, which is a federal statute, does not prohibit intrastate remote wagering where it has no effect on interstate or foreign commerce but cautioned that this does not indicate that State gambling statutes are discriminatory.[534]

6.121 It is not disputed that the Wire Act prohibits remote wagering from jurisdictions outside the United States, such as Antigua. It is also undisputed that the Wire Act does not prohibit remote wagering within the United States to the extent that it is not in interstate or foreign commerce. Antigua's submissions in this compliance proceeding show that there are at least 18 State laws (laws outside the Panel's terms of reference) that expressly authorize wagering by wire within the United States, including on a wholly intrastate basis. Most of these State laws authorize remote wagering on horse racing, some of them expressly in accordance with the IHA.[535] The simultaneous prohibition of cross-border supply of remote wagering services, on the one hand, and the lack of a prohibition of some domestic supply of remote wagering services, on the other hand, afford different treatment.[536]

6.122 The text of the Wire Act, together with the State laws presented in the compliance proceeding, provide the Panel with a factual record that was not available in the original proceeding concerning the treatment of intrastate commerce, including with respect to remote wagering on horse racing. This factual record would enable the Panel to make findings as to whether the United States has demonstrated that the Wire Act meets the requirements of the chapeau of Article XIV of the GATS on grounds *in addition to* those regarding the ambiguity in the relationship between the IHA and the Wire Act.

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[531] The original Panel expressly noted that both the Wire Act and the Travel Act applied only to "interstate or foreign commerce": see original Panel report, paras. 6.362 and 6.367, cross-referenced in the Appellate Body report, fn 424. The original Panel also discussed the fact that the measures *prohibit* remote gambling and betting services and other activities in the context of the "necessity" test but it did not find that the measures prohibit all remote supply within the United States or that they were non-discriminatory on their face, which was raised extensively in the arguments of the parties section of the report: see note 529 above.

[532] See para. 0(b) above. The United States adds that the limitation to "interstate or foreign commerce" does not discriminate in terms of nationality either: see its reply to Panel question No. 38(c).

[533] Antigua second written submission, para. 9. See also its first written submission, para. 116.

[534] United States replies to Panel questions Nos. 32(c) and 38(c). The United States did not otherwise explain how the discrimination might not be "arbitrary or unjustifiable" or not inconsistent with the requirements of the chapeau of Article XIV of the GATS. The United States considers that there is no basis for allowing Antigua to bring up in a compliance proceeding claims that were not reflected in the DSB's recommendation and rulings: United States second written submission, para. 9.

[535] This includes the State laws and regulations that authorize remote wagering on horseracing and, in some cases, other sports, referred to at para. 0, as well as Nevada laws and regulations that authorize interactive gaming, and lotteries in other States that allow the sale of tickets by telephone: see Antigua first written submission, paras. 116-129; comment on US reply to Panel question No. 38(c).

[536] The Panel notes that this issue is unrelated to the United States' argument that the Wire Act "safe harbor" provision, by virtue of the additional requirements of the IHA, discriminates in favour of suppliers from outside the United States, raised in United States original second written submission, para. 64.

6.123 A finding that the Wire Act "on its face" meets the requirements of the chapeau of Article XIV because its text does not discriminate between countries would overlook the fact that the prohibition in the Wire Act does not apply to remote wagering within the United States to the extent that it is not in interstate or foreign commerce. A finding that the text of the Wire Act does not discriminate between United States and foreign suppliers in terms of nationality would require some explanation of the relevance of nationality to the chapeau of Article XIV.[537] However, in view of the Panel's interpretation of Article 17.14 of the DSU at paragraphs 0 to 0 above, the Panel considers that it is not entitled to make any further findings on this issue as the United States' defence has been finally resolved with respect to the measures at issue in this dispute.

4. Developments since the original proceeding

(a) April 2006 DOJ Statement and prosecutions

6.124 Since the original proceeding, in April 2006, an official of the Department of Justice stated in testimony before a Committee of the US House of Representatives the Department of Justice's view of the relationship between the IHA, on the one hand, and federal criminal statutes, on the other.[538] That view reiterated the view expressed in the Presidential statement on the signing of the amendment of the IHA in 2000, which the United States had presented to the original Panel. It is notable that in that testimony, as in the Presidential signing statement, the Department of Justice lacked an authoritative court opinion to support its view.

6.125 In its statement, the Department of Justice official referred to a "civil investigation" relating to a potential violation of an unspecified law, which the Panel understands is not one of the measures at issue. The United States informed the Panel that that investigation is "still pending" and no further details are publicly available.[539]

6.126 It is striking that the Department of Justice has not, apparently, ever initiated a criminal prosecution under the measures at issue of a pari-mutuel wagering supplier in the United States who transmits bets and wagers in violation of the Wire Act but who, at the same time, has obtained consent from the horse racing associations and shares its revenue with the racetracks in accordance with the IHA.[540] Such a prosecution could lead to a court opinion that would prove – or disprove – the Department of Justice's view, as a court could decide whether the IHA authorized such activity despite the terms of the Wire Act.

6.127 Since the original proceeding, the United States has, under various measures at issue, prosecuted gambling business operators trading as WorldWide Telesports, based in Antigua, and BETONSPORTS PLC, also based outside the United States, and prosecuted US-based operators, named Gianelli, Meyers and others, who employed the services of foreign gambling businesses. During that time the United

[537] The Panel has taken due account of the Appellate Body's findings that "[t]he statutes at issue make no distinction on their face as to gambling services from different origins", that the language of the Wire Act is "neutral" and that "[t]hese measures, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services" (emphasis in original): see Appellate Body report at paras. 332, 354 and 357; as well as the Appellate Body's findings regarding the IHA, an Act that does not discriminate on its face between United States and foreign suppliers in terms of nationality either: see Exhibit AB-4; United States reply to Panel question No. 33; and Antigua's comment on the US reply.

[538] *Status Report by the United States*, Addendum, WT/D285/15/Add.1, 11 April 2006; also set out in Exhibit AB-32, discussed in Antigua first written submission, paras. 34-35; second written submission, para. 67; and United States first written submission, paras. 48-50.

[539] United States reply to Panel question No. 37(b) and (c).

[540] United States replies to Panel questions Nos. 34, 35, 36 and 37(d).

States has also prosecuted US bookmakers who transmitted illegal wagers on horse races interstate without "conforming their conduct to the provisions of the IHA", i.e. without obtaining consent from the horse racing associations and sharing their revenue with the racetracks.[541]

6.128 However, the Department of Justice is not aware of any public pending prosecution of the suppliers in the United States of online pari-mutuel wagering on horse racing who were referred to in the original Panel report[542], including the supplier whom the United States advised the original Panel "face[d] the risk" of criminal proceedings and penalties brought by the government.[543] The evidence referred to at paragraph 0 above shows that these and other suppliers confirm that they operate in accordance with the IHA. Whilst it is not clear whether these suppliers actually violate the Wire Act, it is clear that none of them are being prosecuted.[544]

6.129 The Panel accepts that there are many factors that affect decisions to prosecute, including the availability of resources and prosecutorial priorities.[545] However, the evidence set out above is at least consistent with the view that remote wagering services supplied in accordance with the IHA are tolerated, even if not authorized under federal law. Criminal prosecutions of appropriate cases under the measures at issue could change their application from that which prevailed at the time of the original proceeding and also resolve the ambiguity in the relationship between the IHA, on the one hand, and the Wire Act, on the other, for the purpose of assessing the United States' compliance with its international obligations under the GATS.

(b) Unlawful Internet Gambling Enforcement Act

6.130 Since the original proceeding, in October 2006, during the course of this compliance proceeding, the United States enacted the UIGEA.[546] The Panel agrees with Antigua that the UIGEA is particularly relevant to the question of the relationship between the IHA, on the one hand, and the measures at issue, on the other, because (i) it specifically refers to that issue; and (ii) as a statute enacted by the United States Congress, it is authoritative on matters of US domestic law.

6.131 The UIGEA does not amend or alter any statutes at issue nor affect which activities are unlawful under those statutes.[547] The UIGEA applies to activities falling within its definition of "unlawful Internet

[541] Antigua first written submission, paras. 106-107, Exhibit AB-75 (indictment before the original Panel circulated its report), Exhibits AB-76 and AB-77; United States reply to Panel question No. 36.

[542] Antigua original first written submission, para. 118; United States reply to original Panel question No. 22; United States comments on original interim review, para. 35.

[543] United States reply to Panel question No. 35(e), referring to the mention of action against suppliers set out in para. 0 above.

[544] Antigua first written submission, para. 104; United States replies to Panel questions Nos. 34 and 37(d). See paras. 0 and 0 above.

[545] United States reply to Panel question No. 34; comment on reply to Panel question No. 35(d).

[546] Exhibit AB-113, discussed in Antigua second written submission, paras. 46-60.

[547] 31 U.S.C. §5363 prohibits acceptance of any financial instrument for 'unlawful Internet gambling'; §5364 provides for policies and procedures to identify and prevent restricted transactions; §§5365 and 5366 provide for civil and criminal remedies, respectively; and §5367 prohibits circumvention.

gambling". That definition excludes certain activities, among them certain intrastate transactions[548], certain intratribal transactions[549], and also the following regarding interstate horse racing:

> "The term 'unlawful Internet gambling' shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.)."[550]

6.132 The definition of "unlawful Internet gambling" applies to the UIGEA only. It does not define or alter what type of Internet gambling is unlawful under US domestic law, including under the measures at issue.[551] At the same time, in enacting this exclusion from that definition, the United States Congress appears to have contemplated that some activity may be "allowed" under the IHA that might otherwise be considered "unlawful Internet gambling".[552] However, the Panel does not leap to the conclusion that this provision means that the IHA allows activities prohibited by the Wire Act, in light of another provision in its immediate context within the UIGEA that expresses the sense of Congress as follows:

> *"(iii) Sense of Congress*
>
> "It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this sub-chapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. *This subchapter is not intended to resolve any existing*

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[548] The exclusion of intrastate transactions is subject to conditions, among them that the State laws or regulations include age and location verification requirements reasonably designed to block access to minors and persons located out of a State jurisdiction and appropriate data security standards to prevent unauthorized access. This represents a change since the United States submitted to the original Panel, with respect to identity verification and prevention of online gambling by children, as follows:

> "In fact, such regulation is infeasible. Children have ready access to payment instruments, and no technology has yet been developed to enable constraints on Internet gambling even approaching those that are possible in other settings where gambling can be confined and access to it strictly controlled." (United States original first written submission, para. 39)

See also the original Panel report at paras. 6.515-6.518.

[549] The exclusion for intratribal transactions is subject to conditions that include those set out at note 548 above.

[550] 31 U.S.C. 5362(10)(D)(i).

[551] The definitions in §5362 apply "[i]n this subchapter". See also the rule of construction in §5361 (b).

[552] The Department of Justice expressed a similar view on a provision in Bill H.R. 4777: see Exhibit AB-32, p.4. A statement which forms part of the legislative history of the UIGEA explains that this provision "addresses transactions complying with the IHA which will not be considered unlawful because the IHA only regulates legal transactions that are lawful in each State involved": see Statement of Representative Leach, Congressional Record, pages H8029-H8030 in Exhibit US-15, submitted with United States reply to Panel question No. 31(b). This statement does not indicate whether transactions under the IHA comply with pre-existing federal criminal statutes. The US National Thoroughbred Racing Association considers that "[t]he legislation contained language that recognizes the ability of the horse racing industry to offer account wagering under the Interstate Horseracing Act of 1978 as amended" and "[t]his is a very significant landmark recognition by the U.S. government of our industry's legal right to conduct wagering under the IHA and of our industry's important position as an agribusiness that supports 500,000 jobs": see Exhibit AB-118. The United States does not agree with this view: see United States reply to Panel question No. 31(e).

disagreements over how to interpret the relationship between the IHA and other Federal statutes."[553] (emphasis added)

6.133 The United States confirmed to the Panel that the disagreement referred to concerns whether the IHA repealed by implication pre-existing criminal statutes, thereby allowing the interstate transmission of bets on horse races.[554] This is the precise factual issue that the United States delegation, throughout its submissions, asked the Panel to assess.[555] However, the United States points out that in the "Sense of Congress" provision of the UIGEA "[t]he language simply notes the disagreement [but the language] does not take a position as to how a court would in fact construe the relationship between federal criminal laws and the IHA."[556]

6.134 The Panel agrees. In this way, the United States Congress has provided confirmation that, under US domestic law, the original Panel's finding was correct, that is:

> "[T]here is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act."[557]

6.135 This provision also shows that since the original proceeding the United States had an opportunity to remove the ambiguity and thereby comply with the recommendations and rulings of the DSB.[558] Instead, rather than take that opportunity, the United States enacted legislation that confirmed that the ambiguity at the heart of this dispute remains and, therefore, that the United States has not complied.

VII. CONCLUSION

7.1 For the reasons set out in this Report, the Panel concludes that the United States has failed to comply with the recommendations and rulings of the DSB in this dispute.

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[553] 31 U.S.C. 5362(10)(D)(iii).

[554] United States reply to Panel question No. 31(c).

[555] See, for example, "the IHA in no way limits the application of federal criminal statutes" in the United States first written submission, para. 3.

[556] United States reply to Panel question No. 31(c).

[557] Original Panel report, para. 6.599, dated 10 November 2004, quoted above at para. 0.

[558] Nevertheless, the parties do not dispute that no legislation was ever pending in the United States Congress that would have complied with the recommendations and rulings of the DSB in this dispute.

2-6. ARBITRATION UNDER ARTICLE 22.6 DSU

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Arbitration under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS/285/ARB, 21 December 2007

I. INTRODUCTION

A. INITIAL PROCEEDINGS

1.1 On 20 April 2005, the Dispute Settlement Body (DSB) adopted the report of the Panel in this dispute, as modified by the report of the Appellate Body.[559]

1.2 The Appellate Body *inter alia* upheld the original panel's finding that the United States' Schedule includes a commitment to grant full market access in gambling and betting services and upheld the Panel's finding that the United States acts inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 by maintaining certain limitations on market access not specified in its Schedule. The Appellate Body reversed the Panel's finding that the United States had not shown that the three federal statutes are "necessary to protect public morals or to maintain public order", within the meaning of Article XIV(a). The Appellate Body modified the conclusion of the panel with respect to Article XIV as a whole and found, instead, "that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures 'necessary to protect public morals or maintain public order', in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau".[560]

1.3 On 19 August 2005, an arbitrator established under Article 21.3(c) of the DSU determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute was 11 months and 2 weeks from the date of adoption of the Panel and Appellate Body Reports by the DSB. The United States was consequently awarded until 3 April 2006 to bring its measures into conformity with its obligations under the GATS.[561]

1.4 On 8 June 2006, Antigua and Barbuda (hereafter "Antigua") requested consultations with the United States under Article 21.5 of the DSU.[562] On 6 July 2006, Antigua requested the establishment of a panel under Article 21.5 of the DSU.[563] At its meeting on 19 July 2006, the DSB referred the matter to the original panel, if possible. The report of the Article 21.5 compliance panel was adopted on 25 May 2007. The compliance panel found that the United States had failed to comply with the recommendations and rulings of the DSB in this dispute.

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[559] Report of the Appellate Body on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R), (hereafter the "Appellate Body Report") and Report of the Panel on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/R) (hereafter the "Panel Report").

[560] Report of the Appellate Body, para. 373.

[561] WT/DS285/13.

[562] WT/DS285/17.

[563] WT/DS285/18.

1.5 On 21 June 2007, Antigua requested authorization from the DSB[564], under Article 22.2 of the DSU, to suspend the application to the United States of concessions and related obligations of Antigua under the *General Agreement on Trade in Services* (the "GATS" and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "TRIPS Agreement") amounting to an annual value of US$3.443 billion.

B. REQUEST FOR ARBITRATION AND PROCEEDINGS

1.6 On 23 July 2007, the United States objected to the level of suspension proposed by Antigua and Barbuda pursuant to Article 22.6 of the DSU and claimed that Antigua had not followed the principles and procedures of Article 22.3 of the DSU in its request.[565] At its meeting of 24 July 2007, the DSB agreed that the matter raised by the United States had been referred to arbitration.

1.7 The arbitration was undertaken by the original panelists of the Article 21.5 compliance panel as follows:

Chairperson: Mr Lars Anell

Members: Mr Mathias Francke
Mr Virachai Plasai

1.8 An organizational meeting was held on 7 August 2007 to discuss proposed working procedures and the timetable for the proceedings. At that meeting, both parties requested, *inter alia*, additional time for the preparation of their communications to the Arbitrator. The final timetable and working procedures adopted by the Arbitrator were transmitted to the parties on 22 August 2007 (see the text of the Working Procedures in Annex 1).

1.9 In accordance with the timetable adopted by the Arbitrator, Antigua presented a communication concerning the methodology for calculating the proposed level of suspension ("Methodology Paper") on 31 August 2007, and the United States and Antigua submitted written submissions to the Arbitrator on 19 September and 4 October 2007 respectively. The Arbitrator met with the parties on 18 October 2007. After the meeting, the Arbitrator posed questions to the parties, to which the parties provided written responses on 2 November 2007. Both parties were further provided with an opportunity to comment in writing on the responses of the other party to the questions of the Arbitrator. The decision of the Arbitrator was circulated on 21 December 2007.

II. PRELIMINARY ISSUES

A. MANDATE OF THE ARBITRATOR

2.1 Article 22.7 of the DSU provides that:

> "The arbitrator[1] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been

[564] WT/DS285/22.

[565] WT/DS285/23.

followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3."

[1] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

2.2 In this proceeding, the United States challenges two distinct aspects of the request by Antigua for the suspension of certain obligations under the covered agreements. First, it challenges the level of suspension that Antigua seeks an authorization for (i.e. the figure of US$3.443 billion as the level of nullification or impairment of benefits accruing to Antigua). Secondly, the United States also challenges the choice of the sectors and agreement in which Antigua is proposing to carry out the suspension (i.e. certain obligations under the GATS and under the TRIPS Agreement). The Arbitrator therefore has two distinct determinations to make in these proceedings.

1. Mandate in relation to the proposed level of suspension

2.3 Antigua has requested an authorization to suspend the application to the United States of concessions and related obligations of Antigua under the GATS and the TRIPS Agreement, in an amount of an "annual value of US$3.443 billion", which it considers to "match the level of nullification or impairment of benefits accruing to Antigua and Barbuda". The United States, however, has objected to the level of suspension of concessions and other obligations proposed.

2.4 Article 22.4 of the DSU provides that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment". Article 22.6 further provides that "if the Member concerned objects to the level of suspension proposed ..., the matter shall be referred to arbitration".

2.5 As noted above, Article 22.7 provides that "[t]he arbitrator acting pursuant to paragraph 6 (…) shall determine whether the level of such suspension is equivalent to the level of nullification or impairment (..)".[566] The DSU provides no further detail how exactly such equivalence might be established. Some guidance is provided, however, by previous arbitral decisions in which such assessments were carried out further to a recourse to arbitration under Article 22.6 of he DSU.[567]

2.6 As a general matter, as was observed by the arbitrator in *US – 1916 Act (EC)(Article 22.6 – US)*,

> the mandate of the arbitrators is to determine whether the level of suspension of concessions or other obligations sought by the complaining party is equivalent to the

[566] See WT/DS27/ARB, para. 4.1 and WT/DS26/ARB para. 3.

[567] *EC – Bananas III (Ecuador) (Article 22.6 – EC*), *EC – Bananas III (US) (Article 22.6 – EC)* (requests by the US and by Ecuador); *EC – Hormones (Canada) (Article 22.6 – EC) EC – Hormones (US)* (Article 22.6 – *EC)* (requests by Canada and the US); *US – 1916 Act (EC) (Article 22.6 – US)* (request by the EC); *US – Offset Act (Byrd Amendment) (Article 22.6 – US)* (requests by Brazil, Canada, Chile, EC, India, Japan, Korea and Mexico). Also relevant as an example of determination of level of nullification or impairment is an arbitration that took place under Article 25 of the DSU in the *US – Section 110(5) Copyright Act (Article 25)*. We note that there have also been several arbitrations under Article 22.6 of the DSU in cases involving export subsidies, for which the SCM Agreement provides a distinct legal standard for the determination of the level of countermeasures. In those cases, the arbitrators were required to determine, under Article 4.11 of the SCM Agreement, "whether the countermeasures [proposed by the complaining Member] are appropriate". Those cases are therefore not directly relevant for the purposes of determining the Arbitrator's mandate in relation to a determination of "equivalence" under Articles 22.6 and 22.7. Nonetheless, we do not exclude that some aspects of those decisions may be relevant to our determinations.

> level of nullification or impairment sustained by the complaining party as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance.[568]

2.7 In approaching this task, we note, as other arbitrators have, that, while the purpose of suspension of concessions or other obligations under the covered agreements as foreseen in Article 22.1 of the DSU is to "induce compliance" by the Member concerned with its obligations under the covered agreements, this does not mean that such suspension may be authorized beyond what is "equivalent" to the level of nullification of impairment.[569] Rather, in setting out the requirement that suspension be "equivalent" to the level of nullification or impairment, Article 22.4 of the DSU requires a degree of "correspondence or identity"[570] between the level of the suspension to be authorized and the level of the nullification or impairment of benefits.

2.8 This means that it is necessary to determine what this level of nullification or impairment of benefits is, in order to compare it to the requested level of suspension.[571] Further, past arbitrators have also considered that, if they determined that the proposed level is not equivalent to the level of nullification or impairment as required by the DSU, then it was also their duty to estimate the level of suspension that they considered to be equivalent to the impairment suffered, with a view to contributing to the objective of prompt and positive settlement of disputes embodied in the DSU.[572] This is also what the United States is asking the Arbitrator to do in this dispute.

2.9 In light of these elements, we understand our mandate in relation to Antigua's proposed level of suspension to require us to determine whether the annual amount of US$3.443 billion proposed by Antigua is equivalent to the level of nullification or impairment of benefits accruing to Antigua under the GATS as a result of the failure of the United States to bring its GATS-inconsistent measures into conformity with its obligations. If we find that it is not, then we will need to determine what the level of such nullification or impairment is.

2.10 We are also mindful that Article 22.7 of the DSU provides that the Arbitrator "shall not examine the nature of the concessions or other obligations to be suspended". Our analysis will, accordingly, be limited to an examination of the level of the proposed suspension, and will not extend to a consideration of the nature of the concessions or other obligations proposed for suspension.

2.11 We note that the United States has also requested us to require Antigua to indicate how it will ensure that any suspension of concessions does not exceed the level of nullification and impairment found by the Arbitrator. In the view of the United States, without this information it would be impossible for the Arbitrator to determine the equivalence of the level of suspension of concessions with the level of nullification and impairment, as is required by DSU Article 22.7[573] and the Arbitrator should thus not find that Antigua is allowed to suspend TRIPS concessions.[574] In Antigua's view, however, the imposition of a requirement for it to specify how it will ensure that the level of suspension of concessions does not

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[568] *US – 1916 Act (EC) (Article 22.6 – US)*, Decision by the arbitrators, para. 4.5.

[569] Decision by the arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

[570] Decision by the arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.3.

[571] Decision by the arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.2.

[572] Decision by the arbitrators, *EC – Hormones*, para. 12. See also decision by the arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, (request by Ecuador), paras. 171 – 173 and *US – 1916 Act (EC) (Article 22.6 – US)*, paras. 4.6 – 4.8, which cites the relevant passages of earlier decisions.

[573] US response to question 55.

[574] Para. 28 of US comments on Antigua's answers.

exceed the level of nullification determined by the Arbitrators would not be within the terms of reference of the Arbitrators under Article 22.7 of the DSU.

2.12 Without prejudice to our views as to whether our mandate under Article 22.7 of the DSU allows us to impose such a requirement on Antigua, we find it more appropriate to consider this matter once we have made the relevant determinations on the level of suspension and the principles and procedures of Article 22.3 of the DSU, especially in light of the fact that the United States concern appears to relate primarily to the suspension of obligations under the TRIPS Agreement, a matter which will only become pertinent if and when we determine that Antigua may seek suspension of obligations under that Agreement. We therefore leave the discussion of our mandate in relation to this question for a later stage of our award.[575]

2. Mandate in relation to the sector(s) and agreement(s) in which suspension is sought

2.13 Antigua's request for authorization to suspend concessions or other obligations refers to both subparagraph (b) and subparagraph (c) of Article 22.3, and it explains that "[b]ecause the withdrawal of concessions solely under the GATS is at present not practicable or effective, and the circumstances are sufficiently serious to justify Antigua and Barbuda exercising its rights under Article 22, Antigua and Barbuda requests authorization to suspend concessions and other obligations under the TRIPS".[576] The United States, in its request for arbitration under Article 22.6, claimed that Antigua's proposal "does not follow the principles and procedures set forth in paragraph 3 of Article 22 of the DSU".[577]

2.14 Article 22.3 sets out, in subparagraphs (a) to (c), certain principles and procedures to be followed by a complaining party seeking to suspend concessions or other obligations, as to the sector(s) and/or covered agreement in which the suspension can be sought. Subsequent subparagraphs of Article 22.3 further elaborate on the factors that must be taken into account in applying these principles and procedures as well as the definition of "sectors" for the purposes of this provision and the procedural requirements to be followed in requesting authorization to suspend concessions or other obligations in another sector or under another covered agreement.

2.15 Article 22.7, as noted above, provides that "if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim" and that "[i]n the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3".

2.16 There has only been one dispute to date in which claims relating to the observance of the principles and procedures of Article 22.3 of the DSU have been considered (*EC – Bananas III*).[578] In that dispute, in determining the scope of their authority to review the principles and procedures of subparagraphs (b) and/or (c) of Article 22.3, the arbitrators considered that "the fact that the powers of Arbitrators under subparagraphs (b)-(c) are explicitly provided for in Article 22.6 implies *a fortiori* that the authority of Arbitrators includes the power to review whether the principles and procedures set forth in these subparagraphs have been followed by the Member seeking authorization for suspension".[579]

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[575] See below section 0 for a complete analysis of this issue.

[576] Recourse by Antigua and Barbuda to Article 22.2 of the DSU, WT/DS285/22, p. 4.

[577] Recourse to Article 22.6 of the DSU by the United States, WT/DS285/23.

[578] Decision of the Arbitrators *EC – Bananas III (Ecuador) (Article 22.6 – EC), EC – Bananas III (US) (Article 22.6 – EC)*

[579] Decision of the Arbitrator *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 50.

2.17 In this instance, Antigua's request, as noted above, refers both to subparagraph (b) and to subparagraph (c) of Article 22.3. Antigua requested an authorization to suspend obligations both under the GATS and under the TRIPS Agreement. To the extent that it sought to retaliate under the GATS, it sought to do so in a different sector from that in which the violation was found. In addition, Antigua sought an authorization to suspend certain obligations under the TRIPS Agreement. In a subsequent communication, Antigua clarified that it was now seeking an authorization to suspend obligations only under the TRIPS Agreement.[580]

2.18 Our mandate with respect to Antigua's request to suspend concessions or other obligations under the TRIPS Agreement is therefore to review whether the principles and procedures set forth in the various subparagraphs of Article 22.3 of the DSU have been followed by Antigua, as the Member seeking authorization for suspension in this dispute.

3. Order of analysis

2.19 As noted above, the DSU provides for specific mandates in respect of the two aspects of the matter before us. To the extent, however, that our determinations in respect of one aspect may have a bearing in our determinations in respect of the other, we consider it appropriate to examine these two aspects in an order that will allow us to fully take into consideration the relevant elements for each determination, and to then make overall conclusions. Specifically, we consider it appropriate, in the circumstances of this dispute, to examine the issues before us in the following order:

(a) first, the level of nullification or impairment;

(b) second, the principles and procedures of Article 22.3 of the DSU, taking into account to the extent relevant the level of nullification or impairment as previously determined;

(c) third, the US request in relation to equivalence, taking in to account our determination, in the preceding section, as to the sectors and/or covered agreements under which Antigua may seek to suspend obligations;

(d) finally, our conclusions.

B. BURDEN OF PROOF AND PRESENTATION OF EVIDENCE

2.20 Antigua has argued that the burden of proof in Article 22.6 arbitrations is well settled, and that it is not for the complaining party to demonstrate that its request for suspension of concessions or other obligations conforms to the requirements of Article 22, rather that it is for the responding party to establish a prima facie case that the complaining party has not done so. If the responding party is able to establish a prima facie case that the complaining party has not conformed to the requirements of Article 22, then, Antigua argues, the burden shifts to the complaining party to rebut that presumption.[581]

2.21 In response to a question by the Arbitrator, the United States indicated that it agreed that the party referring the matter to arbitration has the initial burden of showing that the proposed level of suspension is not equivalent to the level of nullification or impairment.[582] At the same time, the United States

[580] See Antigua's response to question No. 46 of the Arbitrator.

[581] Written submission of Antigua, paras. 13 and 14.

[582] US response to question No. 1 of the Arbitrator, para. 1.

considers that this burden does not mean that the allegations and factual assertions of Antigua enjoy any presumption of correctness or any special weight simply because Antigua has put them forward.[583]

2.22 We note that, although the DSU provides no specific guidance on the allocation of burden of proof in arbitral proceedings under Article 22.6 (or indeed, in other proceedings), previous arbitrators acting pursuant to Article 22.6 of the DSU have addressed this matter and have consistently determined that, as noted by both parties, the burden of proving that the requirements of the DSU have not been met rests on the party challenging the proposed level of suspension.[584] This was first expressed as follows by the arbitrators in *EC – Hormones*:

> "WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the Canadian proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the Canadian proposal with the said WTO rule. It is thus for the EC to prove that the Canadian proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by Canada is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the Canada to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose."[585]

2.23 This means that it is for the United States, in this dispute, to demonstrate in the first instance that the amount in which Antigua seeks to suspend concessions or other obligations is not equivalent to the level of nullification or impairment of benefits accruing to it.

2.24 At the same time, however, we note that the rules on allocation of burden of proof do not relieve the parties from their duty to provide information to the Arbitrator in these proceedings. It has been generally acknowledged in panel proceedings that it is for each party to bring forward the elements to sustain the factual assertions it makes, and that each party has a duty to collaborate in the establishment of the facts. These principles have been applied *mutatis mutandis* in arbitral proceedings under Article 22.6. In particular, it has been acknowledged that information relating to the calculation of the proposed level of suspension is in the hands of the party that has presented the proposal.[586]

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[583] US response to question No. 1 of the Arbitrator, para. 2.

[584] Decision of the Arbitrators *US – 1916 Act (EC) (Article 22.6 – US)*, decision of the Arbitrators para. 3.3; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 2.5-8; decision of the Arbitrators *US – FSC (Article 22.6 – US)*, paras. 2.8-11; decision of the Arbitrators *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.8; *EC – Bananas III (ECU) (Article 22.6 – EC)*, paras. 37-41; decision of the arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, *EC – Hormones (US) (Article 22.6 – EC)* , para. 9.

[585] *EC – Hormones (Canada) (Article 22.6 – EC), para. 9.*

[586] Decision of the Arbitrators *EC – Hormones (Canada) (Article 22.6 – EC)*, *EC – Hormones (US) (Article 22.6 – EC)*, para. 11:

> "The duty that rests on *all* parties to produce evidence and to collaborate in presenting evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof -- is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, Canada is required to come forward with evidence explaining how it arrived at its proposal and showing why

2.25 We agree with these observations and consider, accordingly, that both parties, including Antigua, have a duty to collaborate in the establishment of the relevant facts. It is in consideration of these elements that we requested Antigua to provide a Methodology Paper explaining how it arrived at its proposed level of suspension at the beginning of these proceedings.

2.26 With respect to the US claims that Antigua has not followed the principles and procedures of Article 22.3 of the DSU, as noted above, only one relevant precedent exists (*EC – Bananas III*). In that dispute, the arbitrator found that the same rules applied for the allocation of burden of proof, namely that it was for the Member challenging the proposal to demonstrate that the principles and procedures of Article 22.3 had not been followed. Specifically, the Arbitrator in that dispute considered that it was "for the European Communities to challenge Ecuador's considerations of the principles and procedures set forth in Articles 22.3 (b)-(d)" and that "[o]nce the European Communities has shown prima facie that these principles and procedures have not been followed, and that the factors listed in subparagraph (d) were not taken into account, however, it [was] for Ecuador to rebut such a presumption".[587]

2.27 We agree with this approach and thus find that it is for the United States to demonstrate in the first instance that Antigua has not followed the principles of Article 22.3 of the DSU and not taken due account of the factors in subparagraph (d). At the same time, here again, by the very nature of the situation, it is likely that some of the key information relating to the factors to be taken into account and how Antigua has considered these factors, is primarily in the hands of Antigua itself. Indeed, as the Member requesting suspension under another sector or agreement than that in which a violation was found, it was for Antigua to "state the reasons therefore" under Article 22.3 subparagraph (e).[588]

2.28 We also note that the Working Procedures adopted by the Arbitrator in these proceedings provide that "each party shall submit all factual evidence to the Arbitrator no later than in its written submission to the Arbitrator, except with respect to evidence necessary for the purposes of rebuttal or for answers to questions".

C. REQUEST BY THE UNITED STATES FOR AN OPEN HEARING

2.29 At the organizational meeting, the United States requested the Arbitrator to open to the public its meeting with the parties. The Arbitrator sought and received the views of Antigua on this request. In a written communication addressed to the parties on 21 August 2007, the Arbitrator addressed this request as follows:

> "The Arbitrator has considered the US request to open its meeting with the parties to the public. The Arbitrator first notes the absence of a specific provision in the DSU addressing this issue in relation to arbitral proceedings under Article 22.6. The Arbitrator

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> its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence - such as data on trade with third countries, export capabilities and affected exporters - may, indeed, be in the sole possession of Canada, being the party that suffered the trade impairment. This explains why we requested Canada to submit a so-called methodology paper." (original footnote omitted).

[587] Decision of the Arbitrators *EC – Bananas III (Ecuador),(Article 22.6 – EC)* para. 59.

[588] The arbitrators in *EC – Bananas III (Ecuador),(Article 22.6 – EC)* also recognized this and considered that Ecuador :

> "[H]ad to come forward and submit information giving reasons and plausible explanations for its initial consideration of the principles and procedures set forth in Article 22.3 that caused it to request authorization under another sector and Agreement than those where violations were found" (decision of the arbitrators, para. 60).

considers that it has a margin of discretion to deal, in accordance with due process, with specific situations, such as this one, that may arise in a particular case and that are not expressly regulated in the DSU. At the same time, it considers that it should, in exercising this discretion, take due account of the views of the parties. In this instance, Antigua opposes the opening of the meeting to the public. In light of this, and bearing in mind the object of the proceedings, the Arbitrator has decided not to allow for the opening of its meeting to the public."

[…]

III. ASSESSMENT OF THE PROPOSED LEVEL OF SUSPENSION

3.1 As noted above in paragraph 0, Antigua has requested an authorization to suspend the application to the United States of "concessions and related obligations" of Antigua under the GATS and the TRIPS Agreement, in an amount of an "annual value of US$3.443 billion", which it considers to "match the level of nullification or impairment of benefits accruing to Antigua and Barbuda". The United States, however, has objected to this proposed level of suspension, pursuant to Article 22.6 of the DSU.

[…]

B. APPROACH OF THE ARBITRATOR

3.10 As noted above, Article 22.7 provides that "[t]he arbitrator acting pursuant to paragraph 6 (…) shall determine whether the level of such suspension is equivalent to the level of nullification or impairment (..)".[589]

3.11 In this instance, we are therefore required to determine whether the amount of US$3.443 billion proposed by Antigua is equivalent to the level of nullification or impairment of benefits accruing to Antigua. As has been noted by previous arbitrators, for that purpose, we must first determine what the level of nullification or impairment of benefits accruing to Antigua is.[590]

3.12 Antigua's proposed level of suspension is based on an assessment of the annual amount of trade that it considers that it has lost, as a result of the maintenance of the inconsistent US measures beyond the end of the reasonable period of time for implementation. To calculate the level of such lost trade, Antigua relies on a counterfactual scenario intended to reflect what the situation would have been, if the United States had complied with the DSB recommemdations and rulings.

3.13 The United States does not disagree with the basic approach adopted by Antigua in determining its level of nullification or impairment of benefits. Specifically, the United States agrees that the level of nullification and impairment may be calculated based on a "counterfactual", under which the Member concerned is assumed to have adopted measures in compliance with the DSB recommendations and rulings".[591]

3.14 We note that this approach has been applied in prior proceedings under Article 22.6 of the DSU.[592] We agree that the use of a counterfactual to assess the level of exports that would have accrued to Antigua, had the United States complied with the rulings, constitutes an appropriate basis for assessing

[589] See WT/DS27/ARB, para. 4.1 and WT/DS26/ARB para. 3.

[590] See for example *EC – Hormones (Canada)*, Decision by the arbitrators, para. 35.

[591] US written submission, para. 14.

[592] See in particular *EC – Hormones (Canada)*, Decision by the Arbitrators, para. 37 and *EC – Bananas III (United States)*, para. 7.1.

the level of nullification or impairment of benefits accruing to Antigua in this dispute and, in light of the parties' common view in this respect, we accept it as the basis for our determination.

3.15 Although the parties are in agreement on the suitability of this general approach, the United States disagrees both with the counterfactual upon which Antigua has based its calculations and with the data used by Antigua to then estimate the level of its lost exports under that counterfactual. The threshold issue of the choice of counterfactual has a crucial bearing on subsequent steps in the determination of the level of nullification or impairment of benefits, as it effectively determines the basis on which subsequent calculations are to be made. We will therefore consider this issue first, before turning to the actual calculation of the level of nullification.

C. CHOICE OF COUNTERFACTUAL

3.16 As described above, Antigua has based its calculation of the level of nullification or impairment it has suffered on a counterfactual under which the United States would open to Antiguan operators the United States market for remote gambling without restriction. Antigua considers that, based on the "full" nature of the commitment made by the United States in its GATS schedule, as well as the findings by the original panel and the Appellate Body that this commitment requires the United States to provide market access to all services within the applicable sector, Antigua has a legitimate right to expect that the United States will comply with that commitment. Antigua further considers that it is completely reasonable for it to assume that the United States will observe its obligations under the "express language of the GATS that requires it to provide Antiguan service providers with full market access to consumers in the United States".[593]

3.17 The United States disagrees with the key assumption underlying Antigua's counterfactual, namely that the United States would be assumed to have complied with its obligations by allowing Antiguan operators to provide unrestricted access to cross-border remote gambling and betting services to United States consumers.[594] The United States considers that this scenario is "extraordinarily unrealistic and thus does not form the basis for a useful counterfactual in this arbitration".[595] The United States considers this assumption to have no factual or legal basis and argues that Antigua's proposed scenario entirely ignores the context of this dispute, including the fact that the United States severely restricts, rather than promotes, internet gambling.[596]

3.18 The United States considers that the single most important consideration in the Arbitrator's determination with respect to the choice of counterfactual must be the factual context of the dispute, as reflected in the prior proceedings and the DSB recommendations and rulings. The United States notes that in this dispute, it has established its strong public policy and morality rationales for restricting remote gambling, and the Appellate Body indeed agreed that the United States had met its burden of showing that the US measures were provisionally justified under GATS Article XIV. The United States considers that in these circumstances, the only reasonable scenarios for compliance are either a complete ban on remote gambling, or the adoption of measures that allow foreign and domestic operators to engage in remote gambling on horseracing.[597] Specifically, the United States considers that the appropriate counterfactual for the Arbitrator's consideration in these proceedings would be to assume a measure that would open, without discrimination, access to remote gambling services in respect of horseracing only.

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[593] Antigua's response to question No. 2 by the Arbitrator.

[594] Antigua's Methodology Paper, para. 3.

[595] US response to questions Nos.3 and 3*bis* of the Arbitrator.

[596] US response to question No. 5 by the Arbitrator, para. 13.

[597] US response to question No. 5 of the Arbitrator, para. 12.

3.19 We therefore now first examine whether, as the United States asserts, the counterfactual upon which Antigua's determination of the level of nullification or impairment of its benefits is based cannot form the basis for such determination. If we find that the counterfactual proposed by Antigua is not appropriate, we will then need to determine what an appropriate alternative counterfactual could be.

1. Assessment of Antigua's proposed counterfactual

3.20 The US challenge to Antigua's counterfactual arises from the fact that it assumes a means of achieving compliance with the DSB rulings that is, in the view of the United States, "extraordinarily unrealistic" in this dispute. In the view of the United States, there is no factual or legal basis for Antigua to assume that the United States would comply with the DSB's recommendations and rulings in this dispute by providing unrestricted access to its remote gambling sector to Antiguan operators.

3.21 Antigua's counterfactual is based on an assumption that the United States, by virtue of its specific commitments under the GATS, is required to provide unrestricted access to its remote gambling market to Antiguan operators. Antigua has explained that it is entitled to assume that the United States would comply with its obligations by allowing such access to the United States remote gambling market for Antiguan operators. Antigua finds support for this assumption in particular in the nature of the rulings (a violation of a market access commitment under Article XVI of GATS), as well as in the terms of Article 3.7 of the DSU, which provide that the first objective of the dispute settlement system is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

3.22 The United States acknowledges that the scenario proposed by Antigua would constitute a means of compliance with the recommendations and rulings of the DSB.[598] However, it argues that this scenario is "extremely unrealistic". The United States considers that only benefits that can reasonably be expected to accrue to the complaining party can form the basis for the calculation of nullification or impairment of benefits. The United States further considers that the Arbitrator's enquiry "is simply what counterfactual – based on the specific facts or circumstances in the dispute and the specific DSB recommendations and rulings – would be the most likely form of compliance".[599]

3.23 In considering this issue, we first recall that the burden rests upon the United States to demonstrate that the level of suspension proposed by Antigua is not equivalent to the level of nullification or impairment of benefits it has suffered as a result of the continued application of the inconsistent US measures. For that purpose, it would not be sufficient, in our view, for the United States to simply identify the existence of alternative possible means of compliance, other than that envisaged by Antigua in its counterfactual. Rather, for the United States to succeed in its challenge, it must persuade us that the particular scenario identified by Antigua as the basis for its counterfactual is not such as to accurately reflect the level of nullification or impairment of benefits accruing to Antigua under the GATS as a result of the continued application by the United States of inconsistent measures.

3.24 We do not disagree with the United States that a WTO Member generally has the discretion to determine the means through which it will comply with adverse DSB rulings, provided that such means are consistent with the WTO covered agreements.[600] However, this does not, in our view, imply that the

[598] US response to questions 3 and 3*bis* of the Arbitrator.

[599] US answer to question 3*quater* of he Arbitrator, para. 10.

[600] This issue has been addressed in arbitrations under Article 21.3(c) for the determination of the RPT. See for example *Australia – Salmon*, Article 21.3(c) arbitration, para. 30. See also *Korea – Alcoholic Beverages*, Recourse to Article 21.3(c), Decision of the arbitrator, para. 45: "Choosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements".

Member concerned has the freedom to decide, for the purposes of a determination under Article 22.7 of the DSU, among a range of potential measures that it might have taken in order to comply with such rulings, which one should form the basis of the arbitrator's assessment. Our mandate under Article 22.7 of the DSU is to determine whether the level of suspension proposed by Antigua is "equivalent" to the level of nullification or impairment of its benefits. Our starting point, in this determination, must be Antigua's proposed level of suspension. In determining whether this proposed level is "equivalent", we must take care to ensure that the level of suspension is neither reduced to a level lower than the level of nullification or impairment of benefits accruing to the complaining party, such as to adversely affect that party's rights, nor exceeds the level of nullification or impairment of benefits, such that it would become punitive. This is the key consideration that must, in our view, guide our assessment of the US challenge to Antigua's choice of counterfactual.

3.25 Specifically, under the methodology proposed here by both parties for the estimation of "lost exports", the counterfactual (and the assumptions that it entails as to what would have constituted compliance) forms the basis for the calculation of the benefits accruing to the complaining party that have been nullified or impaired. It is thus important for the counterfactual to reflect the nature and scope of such benefits accurately, so that the trade flows that will be assumed to occur under the counterfactual can, in turn, provide a reliable basis for an estimation of the level of nullification or impairment of such benefits.

3.26 We do not consider that the proposed counterfactual must necessarily reflect the "most likely" scenario of compliance by the Member concerned. By nature, a counterfactual represents a hypothetical scenario and thus there may be, in any given case, a degree of uncertainty as to what exact form compliance might have taken, had it occurred. The Member concerned may have had a range of WTO-consistent options at its disposal to choose from to ensure compliance. It is not for us to speculate on what might have been the "most likely" such scenario.

3.27 Nonetheless, the counterfactual should, in our view, reflect at least a plausible or "reasonable" compliance scenario. A counterfactual that would assume a compliance scenario that leads to an implausibly high level of nullification or impairment of benefits would lead to a suspension in excess of the level of nullification or impairment actually suffered. Conversely, a counterfactual that would underestimate the level of benefits accruing to the complaining party would risk leading to an unwarranted reduction of the level of suspension below the level that that complaining party is entitled to seek, namely "equivalence".

3.28 We find support for our position in past determinations. We thus note that the arbitrator in *US – Bananas III* case selected what it determined to be a "reasonable counterfactual" for the purposes of its calculation, taking into account the circumstances of the case. We also note that in the *US – Section 110(5) Copyright Act (Article 25)* dispute[601], the arbitrator based its determination of the level of nullification or impairment on historical figures on royalty income prior to the introduction of the TRIPS-incompatible limitation to copyright, rather than on a counterfactual that would have assumed no limitations in respect of the right in question.[602] We further note the finding that "the level of royalty income which the European Communities could reasonably expect EC right holders to receive is, in the

[601] We are aware that the determination of the arbitrator in that case was made pursuant to Article 25 of the DSU, rather than pursuant to Article 22.6 of the DSU. Nonetheless, the nature of the determination entrusted by the parties to the arbitrator in that case was comparable to the determination that we are conducting now, namely a determination of the level of nullification or impairment of benefits accruing to a complaining party as a result of measures that had been found to be inconsistent with a covered agreement (in that case, the TRIPS Agreement).

[602] *US – Section 110(5) Copyright Act (Article 25)*, Award of the Arbitrators (Article 25 arbitration), paras. 4.7-4.14.

view of the Arbitrators, limited to licensing revenue from the numbers of users that *would* be licensed"[603] (rather than the entirety of fees that could by law have been collected). We further note the Arbitrator's observation in that dispute that:

> It should be recalled, in this context, that the inquiry into the level of benefits which the European Communities could expect to accrue to it if Section 110(5)(B) were brought into conformity with the TRIPS Agreement is hypothetical in nature. The Arbitrators consider that, in such a situation, it is necessary to proceed with caution, such that only those benefits which the European Communities could, in good faith and taking into account all relevant circumstances, expect to derive from Articles 11*bis*(1)(iii) and 11(1)(ii) are found to be nullified or impaired".[604]

3.29 In response to a question by the Arbitrator, Antigua commented that, in that case, the parties were not in disagreement over the nature of the benefits that should accrue to the European Communities, but rather over the level of nullification or impairment, and that the "reasonable expectations" at issue did not refer to what was expected of the United States government but to what the European Communities could reasonably expect of non-governmental third-party participants in extracting the full value out of the impaired rights.[605]

3.30 We agree with Antigua that the circumstances of *US - Section 110(5) Copyright Act* and *EC – Bananas III* differ somewhat from those of the present dispute. Nonetheless, we find that the determinations of the arbitrators in those disputes provide useful guidance as to the nature of our task in these proceedings. Specifically, these determinations confirm us in our view that, to the extent that the estimation of the level of nullification or impairment requires certain assumptions to be made as to what benefits would have accrued, in a situation where compliance would have taken place, such assumptions should be reasonable, taking into account the circumstances of the dispute, in order for the proposed level of suspension to accurately reflect the benefits accruing to the complaining party that have actually been nullified or impaired.

3.31 With these considerations in mind, we now turn to an examination of whether the specific counterfactual upon which Antigua bases its calculations accurately reflects the benefits accruing to it in this dispute. As noted above, it is for the United States to demonstrate to us that it does not.

3.32 Antigua considers that the nature of the benefits accruing to Antigua is reflected in Article XVI of the GATS and in the US schedule, and that for the purposes of this arbitration, it means that the United States is under an obligation to provide unrestricted market access for Antiguan providers of all cross-border remote gambling and betting services to consumers in the United States. In Antigua's view, whether it should "reasonably" expect such benefit is not an issue, since it has a legal right to enjoy it.[606] Antigua also considers that it is "entitled to ignore the failed Article XIV defences of the United States in making Antigua's assumptions in this proceeding".[607] The United States, however, notes that, in this dispute, the DSB found that the US measures restricting remote gambling were provisionally justified under the public morals exception set out in Article XIV(a) of the GATS, so that Antigua is wrong in asserting that the United States has an unconditional obligation to allow access to each and every type of

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[603] *US – Section 110(5) Copyright Act (Article 25)*, Award of the Arbitrators (Article 25 arbitration),, para. 3.33.

[604] *US – Section 110(5) Copyright Act (Article 25)*, Award of the Arbitrators, (Article 25 arbitration), para. 3.24, footnote 43.

[605] Antigua's response to question No. 6*bis* of the Arbitrator, p. 12.

[606] Antigua's response to question No. 6 by the Arbitrator, p. 9.

[607] Antigua's response to question No. 2 of the Arbitrator, p. 4.

service covered by the service sectors included in the Member's schedule of GATS commitments.[608] In the US view, the specific problem found with the US measures at issue was with respect to the limited issue of the regulation of remote gambling on horseracing.[609]

3.33 As we understand it, the question before us therefore essentially turns around whether and how we should take into account, in assessing the proposed counterfactual, the fact that the Appellate Body found that the US measures at issue were "necessary to protect public morals or maintain public order" in accordance with paragraph (a) of Article XIV, even though it ultimately found these measures not to be justified under Article XIV.

3.34 Both parties have presented extensive arguments relating to the rulings in the underlying dispute to explain their proposed counterfactuals and justify opposing views on this question. We find it useful, in these circumstances, to consider first the terms of the Appellate Body's rulings in this dispute.

3.35 The Appellate Body made, *inter alia*, the following findings:

- first, with respect to Article XVI of the GATS, the Appellate Body upheld the Panel's 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 sub-paragraphs (a) and (c) of Article XVI:2";[610]

- further, with respect to Article XIV of the GATS, the Appellate Body found that:

> "the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures 'necessary to protect public morals or maintain public order', in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau."[611]

3.36 We note that the findings of the Appellate Body contain an initial finding that the measures at issue (three federal laws) are inconsistent with Article XVI of the GATS, followed by findings that these same measures are "necessary to protect public morals or maintain public order" within the meaning of paragraph (a) of Article XIV, but that the United States ultimately "has not established that these measures satisfy the requirements of the chapeau" of that provision.

3.37 We make no determination in these proceedings as to what exactly the United States might have been required to do to implement these specific rulings. Indeed, it would not be within the terms of our mandate to conduct such an assessment. Rather, we assume that the United States may have had various

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[608] US written submission, para. 20.

[609] US written submission, para. 21.

[610] Appellate Body Report, para. 373(C)(ii).

[611] Appellate Body Report, para.. 373(D)(vi)(a). In its overall conclusion on Article XIV, the Appellate Body, when noting that the United States had not shown that, in the light of the Interstate Horseracing Act, the prohibitions were applied to both foreign and domestic service suppliers of remote betting services for horse racing, emphasized that "[f]or this reason alone" it found that the United States had not established that these measures satisfied the requirements of the chapeau of Article XIV. See Appellate Body Report, para. 372.

WTO-consistent means at its disposal in order to come into compliance with its obligations in this dispute. Indeed, the parties have presented to us a range of scenarios with vastly divergent impacts on the calculation of the level of nullification or impairment of benefits.[612] We limit our consideration of these rulings to the extent relevant to our assessment of whether Antigua's counterfactual accurately reflects the benefits accruing to it in this dispute. In other words, as observed above, we consider this matter only to the extent required in order to determine whether Antigua's assumption that the United States would allow unrestricted access to Antiguan remote gambling and betting operators on the US market was reasonable, in the circumstances of the case.

3.38 The Appellate Body's finding of a violation of Article XVI of the GATS in the underlying proceedings was based on a finding that the United States had a commitment, under sub-sector 10.D of the GATS, to provide unrestricted access to the cross-border supply of remote gambling and betting services. In light of this, we agree that the nature of the benefits accruing to Antigua in this dispute is reflected in Article XVI of the GATS and in the US Schedule, and that these benefits relate to Antigua's access to the supply of cross-border gambling and betting services in the United States.

3.39 The question we must consider, however, is whether Antigua's assumption that such access would come in the form of unrestricted access to the US market with respect to all forms of remote gambling and betting services was reasonable, in the circumstances of this dispute.

3.40 Antigua's proposed counterfactual assumes that, as of 3 April 2006 (the end of the reasonable period of time for implementation), the United States would have granted it unrestricted access to its remote gambling market. As Antigua itself notes, it is based on an assumption, by Antigua, that it was entitled to "ignore" the United States invocation of Article XIV of the GATS in the underlying proceedings. The United States objects that this is an "extraordinarily unrealistic" scenario, in view in particular of the fact that the United States bans remote gambling for strong policy reasons of protecting public morality and public order, and that it is entitled under the GATS to maintain such a ban as long as it is not applied in a manner that arbitrarily or unjustifiably discriminates between operators in different jurisdictions[613]. The United States also argues that the specific problem found with the US measures at issue was the "limited issue of the regulation of remote gambling on horse racing".[614]

3.41 In considering this question, we find it appropriate to take account of the specific circumstances of this case. We note in this respect that the United States has consistently asserted a public morals and public order policy both in the original proceedings and again in the compliance proceedings as a basis for maintaining restrictions on access to the United States remote gambling market. The United States has thus asserted this policy objective before and beyond the end of the reasonable period of time, which is the date at which the counterfactual situation is assumed to start.

3.42 We further note that the Appellate Body found that US measures restricting access to the remote gambling market were "necessary" within the meaning of Article XIV of the GATS for the protection of public morals and public order, and found that the United States had not shown, "in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign

[612] We note, in this respect, that the scenarios identified by the parties in these proceedings as possible means of compliance range from a complete opening to a complete closing of the US remote gambling and betting services market. We also note that, while the parties are in disagreement as to the potential consistency of a scenario of partial opening of the market, they both appear to acknowledge that scenarios involving either a complete opening or a complete closing of the market could constitute a form of compliance with the recommendations and rulings in this case.

[613] US response to question No. 3*bis* by the Arbitrator, para. 5.

[614] US written submission, para. 20.

and domestic service suppliers of remote betting services *for horse racing* and, therefore, had not established that these measures satisfy the requirements of the chapeau".[615]

3.43 In light of these elements, we consider that Antigua's assumption that it could simply "ignore" the failed US defence under Article XIV of the GATS, and that the United States would comply with the rulings by providing unrestricted access to all sectors of its remote gambling market for Antiguan operators, was not reasonable, taking into account the particular circumstances of this dispute.

3.44 In making this determination, we have considered carefully Antigua's arguments that it was entitled by right to expect unrestricted market access, because the United States was obligated to provide such treatment in accordance with Article XVI of the GATS and its specific commitments, and that Antigua was also entitled to expect "withdrawal" of the inconsistent measure (i.e. in this dispute, in Antigua's view, the withdrawal of the US restrictions on access to the remote gambling market), in accordance with Article 3.7 of the DSU.

3.45 We agree with Antigua that the United States has an obligation, under Article XVI of the GATS and the US schedule, to provide market access on the cross-border supply of remote gambling services. At the same time, however, the GATS also recognizes the right of Member to regulate in order to meet their national policy objectives[616] and Article XIV specifically recognizes the possibility of adopting measures necessary to protect public order and public morals. In this dispute, such legitimate policy objectives were consistently invoked by the United States in order to restrict access to its remote gambling market despite the existence of a specific commitment, and the Appellate Body has found that the three federal laws at issue in the proceedings were "measures ... necessary to protect public morals or to maintain public order".[617] In these circumstances, a reasonable counterfactual must take into account these US policy objectives.

3.46 We also note that while Article 3.7 of the DSU does provide that the objective of dispute settlement proceedings is *usually* the withdrawal of the inconsistent measures, we do not read this provision to mean that this is in all cases the only possible outcome in disputes where a violation of one of the covered agreements has been found. The recommendations of the DSB to the United States in this dispute require it to bring its measures into compliance with the GATS. This did not necessarily require it to "withdraw" the measures by removing entirely the restrictions it maintained on remote gambling and betting services. We note in this respect that the "concept of compliance or implementation prescribed in the DSU" has been described by arbitrators mandated under Article 21.3(c) of the DSU to determine the reasonable period of time for implementation as "the withdrawal *or modification* of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement" (emphasis added).[618] Indeed, we note that Antigua itself appears to agree that a total prohibition on remote gambling and betting services (that is, no market access at all) would in fact also constitute a form of compliance by the United States in this dispute.[619]

3.47 In this respect, we note the observations of the compliance panel in this dispute:

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[615] Appellate Body Report, para. 373 (emphasis added).

[616] Preamble of the GATS, fourth paragraph.

[617] Para. 373(D)(iii)(c)

[618] *Argentina – Hides and leather*, Article 21.3(c), Award of the arbitrator, para. 41.

[619] Antigua's response to Question 2*ter* of the Arbitrator, p. 6 ("Although the total prohibition by the United States of all remote gambling and betting services would not be *expressly* compliant with the DSB rulings, Antigua believes that it may well constitute *de facto* compliance, consistent with the approach of the compliance panel in the *US – Shrimp* dispute.")

> "The possible form of measures taken to comply with a recommendation under Article 19.1 of the DSU will depend on the rulings of the DSB in a particular dispute. For example, if a measure has been found inconsistent with a covered agreement, or unjustified under an otherwise available exception, due to the way in which the measure is *applied*, compliance with the recommendation could presumably be achieved by a change in the application of the measure, without necessarily a change to the text of the measure itself or that of any written implementing measures. The present dispute illustrates this point."[620]

3.48 We also note the observation made by the arbitrator appointed under Article 21.3(c) to determine the reasonable period of time for implementation in this dispute that "I am … conscious of the fact that any legislation adopted by the United States will inevitably, as the Appellate Body Report demonstrates, bear on questions of public moral and public order".[621]

3.49 In sum, our conclusion that Antigua's counterfactual is not reasonable, taking into account the circumstances of this dispute, is not modified by our consideration of Antigua's arguments in respect of the nature of its rights under Article XVI of the GATS and of Article 3.7 of the DSU. Rather, our analysis of these elements confirms to us that, as a matter of law, the United States may have had a range of WTO-consistent means at its disposal in order to implement the recommendations and rulings in this dispute, not limited to a complete opening of its remote gambling and betting services market.

2. Alternative counterfactual

3.50 Having determined that the counterfactual used by Antigua to estimate the benefits accruing to it in this dispute did not accurately reflect such benefits, we must now determine what would constitute a reasonable counterfactual, in the circumstances of this dispute.

3.51 We first recall our determination above that a reasonable counterfactual for the purposes of this dispute would have to take into account the US public policy objective of protecting public morals and public order.

3.52 The United States identified, as a potential means of implementation of the DSB's recommendations and rulings in this dispute, a complete prohibition on the provision of remote gambling services in the United States.[622] Antigua appears to agree that this could constitute a form of compliance.[623] However, neither party has suggested that this scenario should form the basis of the calculation of the level of nullification or impairment of Antigua's benefits for the purposes of these proceedings. We therefore do not consider it further.

3.53 The other alternative scenario that has been presented to us is that identified by the United States, which assumes that the United States would provide unrestricted market access for remote gambling and betting services only in respect of horseracing gambling and betting.

3.54 The United States describes this scenario as the "most likely", and explains that the specific problem found with the US measure at issue was with respect to the limited issue of the regulation of remote gambling on horseracing, and in particular on the United States inability to demonstrate an absence of discrimination under the chapeau of GATS Article XIV with respect to remote gambling

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[620] *US – Gambling*, compliance panel report, para. 6.21.

[621] Award of the Arbitrator under Article 21.3(c), paras. 46-47.

[622] US written submission, para. 15.

[623] See footnote 619.

services on horseracing. In the view of the United States, nothing in the DSB recommendations required it to clarify or change its measures with respect to other forms of remote gambling.[624] Moreover, according to the United States, nothing in the DSB recommendations and rulings, nor in the chapeau of GATS Article XIV, would require it to treat all types of remote gambling identically, and a counterfactual that allowed remote gambling on horseracing, but disallowed other types of remote gambling, is entirely plausible.[625]

3.55 Antigua, however, considers that such a scenario would not bring the United States into compliance. Antigua argues in particular that in the underlying proceedings, the United States alleged that it was entitled to maintain the offending measures by application of Article XIV of the GATS and that it prohibited all remote gambling because, by its very nature, remote gambling presented risks and other pernicious features that were not subject to amelioration through regulation or any other means.[626] In Antigua's view, the United States can therefore not now assert that it is "necessary" to prohibit all remote gambling to protect its citizens if it expressly allows remote gambling in *any* context. Antigua also notes that the United States never argued that remote gambling on horseracing was somehow "safer" than other types of remote gambling, or that Antiguan service providers should be allowed to do only what domestic providers can lawfully do.[627] Antigua further considers that it is not for the Arbitrator in this proceeding to assess whether such hypothetical measures can bring the United States in compliance with its obligations under the GATS.

3.56 In approaching this part of our determination, we are mindful that our mandate in these proceedings is not to determine the consistency with the WTO covered agreements of hypothetical compliance measures. We also note that, as we have stated above, whether the scenario at issue is the "most likely", as described by the united States, is not pertinent as such in our determination. Rather, as determined above, we must assess whether the proposed scenario could constitute a "plausible" or "reasonable" compliance scenario, in the circumstances of the dispute, for the purposes of calculating the level of nullification or impairment of benefits accruing to Antigua in the dispute.

3.57 We first observe, in this respect, that, as the United States noted, the specific aspect of the United States' measures that was found to lead to an arbitrary discrimination within the meaning of the chapeau of Article XIV of the GATS was the treatment of remote gambling and betting in respect of horseracing. This was the sole basis upon which the Appellate Body determined that the US measures were not justified under Article XIV of the GATS. Specifically, the Appellate Body found that:

> "We *find*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we *find* that the United States has not established that these measures satisfy the requirements of the chapeau."[628] (underlined emphasis added)

3.58 In these circumstances, in particular in light of the nature of the findings in the underlying proceedings, we do not find it unreasonable to assume that compliance might have been achieved through the removal of this specific source of discrimination identified by the Appellate Body, that ultimately led

[624] US written submission, para. 21.

[625] US written submission, para. 23.

[626] Antigua's response to question No. 2ter of the Arbitrator, p. 6.

[627] Antigua's response to question No. 2ter of the Arbitrator, p. 6.

[628] Report of the Appellate Body, para. 372.

the measures to be found not to be justified under Article XIV of the GATS. We also do not find it unreasonable to assume, in the circumstances of the dispute, that it may have been possible for the United States to remove such discrimination by opening access to remote gambling on horseracing for foreign providers. We also note that this is the only segment of the market that is currently already open to domestic providers, so that an extension of this access to foreign providers would seem to require only limited adjustments to the current situation.

3.59 In making this determination, we do not make any specific finding or determination as to the exact circumstances under which such opening might take place and what specific conditions might be required for the United States to justify, under the terms of Article XIV of the GATS, such a distinction between the treatment of remote gambling on horseracing and other forms of remote gambling. Rather, we are assuming that a range of implementation options might exist for the United States, not necessarily limited to total prohibition or total opening of its market to remote gambling services.

3.60 We also note that the arbitrator appointed under Article 21.3(c) to determine the reasonable period of time for implementation in this dispute made comparable assumptions:

> "I am … conscious of the fact that *any legislation adopted by the United States will inevitably, as the Appellate Body Report demonstrates, bear on questions of public moral and public order*. It seems to me that, within the field of public morals and public order, only prohibitions are simple. In other words, *to the extent that the United States may consider authorizing any form of internet gambling or wagering, this will increase the complexity of any legislative solution. The more such activities are authorized, the greater lengths the legislator will have to go to in order to ensure that sufficient safeguards are in place to make the system consistent with, and acceptable under, prevailing standards of public morals and public order*. (…) However, the United States has not, in this proceeding, explained in any precise manner how it intends to implement the recommendations and rulings of the DSB. The few indications that it has given suggest that it is leaning more in the direction of 'confirming' or 'clarifying' the prohibitions on the remote supply of gambling and betting services, rather than in the direction of authorizing, even in part, the supply of such services."(emphases added) [629]

3.61 Having determined that the alternative counterfactual proposed by the United States reflects a reasonable assumption as to a situation in which the United States would have complied with the recommendations and rulings of the DSB in the circumstances of this dispute, and thus can be considered to accurately reflect the benefits accruing to Antigua that have been nullified or impaired, we now proceed with the calculation of the level of nullification or impairment of benefits accruing to Antigua under this counterfactual.

3. Separate opinion

3.62 One of the arbitrators is unable to agree with the analysis and conclusions reflected in paragraphs 0 to 0 above. In the view of this arbitrator, it was not unreasonable for Antigua to assume, in the circumstances of this case, a counterfactual scenario under which the United States would provide unrestricted access to its remote gambling and betting market.

3.63 In the view of this arbitrator, it is appropriate to refer, as a starting point, to the findings and conclusions of the panel and the Appellate Body in this case. Specifically, the Appellate Body has determined that, although the three federal laws at issue are measures "necessary to protect public morals

[629] Award of the Arbitrator under Article 21.3(c), paras. 46-47.

or public order", the United States had not demonstrated that they were applied in accordance with the requirements of the chapeau of Article XIV of the GATS.

3.64 The Appellate Body made this determination "in light of" only one specific discrimination that it identified in the application of the measures. However, this does not necessarily imply, as the United States suggests, that the specific problem found with the US measure at issue was restricted to the "limited issue of the regulation of remote gambling on horse racing"[630]. Rather, the overall conclusion of the Appellate Body was that *the measures at issue* (rather than simply the discriminatory treatment provided in respect of horseracing) were, as a result, not justified under Article XIV of the GATS. As the compliance panel in this case noted:

> "It is true that the Appellate Body found that the United States had demonstrated that the measures at issue were 'justified' under paragraph (a) of Article XIV of the GATS. However, this was *not* a finding on Article XIV in its entirety. The Appellate Body expressly confirmed that Article XIV contemplates a 'two-tier analysis' – first, under one of the paragraphs of Article XIV, and then under the chapeau. There was no finding that the measures were consistent with the chapeau or with Article XIV in its entirety nor, hence, with the United States' obligations under the GATS, and there is no concept recognized under the DSU of provisional or transitional consistency with a recommendation of the DSB."[631]

3.65 Article XIV of the GATS allows Members to maintain certain trade-restrictive measures that would otherwise be inconsistent with their obligations under this Agreement, in order to fulfil certain legitimate objectives. However, these measures are required to be applied in such a manner that they do not result in unjustifiable discrimination or disguised restrictions to trade. In other words, the protection afforded by the exceptions under the various paragraphs of Article XIV of GATS is conditional upon an application of the measures at issue that does not turn them into instruments of undue discrimination or protection. In this case, the United States was not able to justify that it applied the measures consistently with these requirements. Furthermore, the compliance panel report also identified further aspects in the application of the measures that could reflect a discriminatory application of the measures at issue, although it made no findings in respect of such aspects.[632]

3.66 This arbitrator agrees with the determination in paragraph 0 above that it is appropriate to take into account the specific circumstances of the case in order to assess whether the counterfactual proposed by Antigua accurately reflects the benefits accruing to Antigua under the GATS that have been nullified or impaired in this case. However, this arbitrator considers that, in the circumstances of this case, it was not unreasonable for Antigua to base its counterfactual on an assumption that the United States would open its market to the cross-border provision of remote gambling services. Such an assumption is fully compatible with the nature of the Appellate Body's findings in this case, as analysed above. In fact, as noted above, the United States itself acknowledges that this scenario would constitute compliance with the DSB recommendations and rulings in this case.

3.67 By contrast, it is not clear that the alternative counterfactual scenario envisaged by the United States, which involves a partial opening of a limited segment of the market, constitutes a more reasonable assumption in the circumstances of the case. In particular, assuming, for the sake of argument, that such a scenario would constitute compliance with the recommendations and rulings of the DSB in this case (something that is not within our mandate to determine), it is not clear how the United States proposes to

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[630] US written submission, para. 20.

[631] *US – Gambling*, compliance panel report, para. 6.29 (original footnotes omitted).

[632] See the developments on intrastate commerce, Compliance Panel Report, at paras. 6.118 to 6.123.

reconcile the protection of public morals or public order with the opening of one segment of the market (horseracing).

3.68 In light of the above, this arbitrator is not persuaded that the United States has demonstrated that Antigua's proposed counterfactual was unreasonable in the circumstances of the case.

3.69 This does not imply, however, that this scenario would constitute the only way in which the United States could have complied with these recommendations and rulings. As noted above, Members are free to choose the WTO-consistent means by which they will comply with DSB rulings, and there may be a number of ways in which the United States could have complied, and still could comply, with the rulings in this case. Nor does this determination imply that US policy objectives should not be taken into account. On the contrary, this arbitrator agrees with the determination of the majority that a reasonable counterfactual must take into account the US policy objectives, as stated in para. 3.45 above. In that sense, nothing would require the US to abandon its objective of protecting public morals or public order, under Article XIV(a) of the GATS, in implementing, in the future, the recommendations and rulings of the DSB. Indeed, it is quite conceivable that the United States could have found ways in which to address these concerns while protecting such interests. Other WTO Members have chosen to open their market to remote gambling, and it would not be reasonable to assume that such Members do not also have similar policy objectives.

3.70 This arbitrator also notes Antigua's argument that the objective of inducing compliance with the rulings of the DSB is to be taken into account in the Arbitrator's assessment of Antigua's counterfactual. In the view of this arbitrator, the objective of inducing compliance cannot lead to suspension being authorized in excess of equivalence with the level of nullification or impairment of benefits, as foreseen in Article 22.6 of the DSU, and this must remain the benchmark against which the proposed level of suspension is assessed. At the same time, however, in a situation where different means of compliance might form the basis of a counterfactual in order to determine the level of nullification or impairment of benefits, the complaining party would not be prevented from selecting a counterfactual that may lead to a higher level of nullification or impairment than others, provided that such counterfactual is reasonable.

3.71 In should be borne in mind, in this respect, that the Member concerned has had the opportunity to comply with the rulings at issue, and that the very reason for the existence of countermeasures under the DSU is to induce compliance with the covered agreement that has not taken place within the period foreseen in the DSU. In these circumstances, the complainant is by necessity obliged to make certain assumptions as to how compliance might have taken place. This has no implications, however, as to the means through which the Member concerned might actually choose to comply in the future, possibly including, in this case, through the adoption of measures that involve a restriction to trade fully consistent with the provisions of Article XIV of GATS.

3.72 Finally, although this arbitrator disagrees with the conclusions reached by the majority of the Arbitrator in respect of the choice of counterfactual, it nonetheless sees no added value in pursuing the calculations on the basis of Antigua's counterfactual, which the majority of the Arbitrator does not consider to be reasonable. Accordingly, the assessments and calculations in the following section reflect the common view of the Arbitrator as to the calculation of the level of nullification or impairment, on the basis of the counterfactual proposed by the United States.

3.73 This arbitrator also wishes to highlight that, even if calculations had been pursued on the basis of Antigua's proposed counterfactual, a number of parameters would have had to be taken into account. In particular, due account would have had to be taken of the fact that, in a scenario under which the United States would open the entirety of its remote gambling market, Antigua would face competition not only from other foreign operators but also from domestic US operators that currently also have no access to the market.

D. CALCULATION OF THE LEVEL OF NULLIFICATION

[…]

3. Approach of the Arbitrator

3.172 At the outset, we note that the approaches by both parties are radically different in terms of both the underlying data and the methodology used to determine Antigua's counterfactual levels of exports of remote gambling services to the United States. Both parties have made a number of valid arguments criticizing key aspects of the approach proposed by the other party. We feel unable to rely on the approach used by Antigua, as laid out in its methodology paper, in calculating the requested amount of countermeasures. At the same time, the approach put forward by the United States does not represent a convincing alternative either.

3.173 We, therefore, have no choice but to adopt our own approach. In so doing, we feel we are on shaky grounds solidly laid by the parties. The data is surrounded by a degree of uncertainty. For most variables, the data consists of proxies for what needs to be measured, and observations are too few to allow for a proper econometric analysis. Certain data that we have requested and that, to some extent, could have remedied this situation has not been provided. On methodological questions, parties, in a number of respects, have retained their extreme positions and have failed to propose alternative solutions that would have taken into account the exchange of arguments.

3.174 Hence, we are left with preciously little information and guidance. Nevertheless, we will attempt to stay as closely to the approaches proposed by parties as possible and to make a maximum use of the limited information base we were given, in particular to carry out some sensitivity analysis in support of our main approach. We will broadly follow the spirit of Antigua's original approach, while making the necessary adjustments in light of our analysis above. We will proceed in four steps. First, we will seek to establish a workable assumption about Antigua's revenues from remote gambling services exports to the United States. Second, we will adjust this time series for the apparent impact of competing suppliers. Third, we will determine a plausible share of betting services on horseracing in Antigua's total revenues from remote gambling. Finally, we will take account of developments in US demand for gambling services on horseracing.

(a) Antigua's exports of remote gambling services to the United States

3.175 In view of the non-reporting of remote gambling services data by Antigua and the consequent non-inclusion of such information in the relevant categories of the services trade statistics compiled by the ECCB/IMF/WTO, we are left with no real alternative to the GBGC [“Global Betting and Gaming Consultants”, a private gambling consultant group that issues the Qarterly eGaming Statistics Report] data for a time series of Antigua's revenues from remote gambling. We have to assume that such revenues indeed constitute exports, i.e. that the domestic market in Antigua is negligible and that the allocation of revenues to various jurisdiction has been done according to the actual location of operations. On the basis of some of the additional information provided, we can check whether the order of magnitude of the GBGC data is not out of line with other statistics. Notably, we will calculate an average of revenues per employee using the public company data provided by Antigua. Another interesting point of comparison would have been an estimation of total revenues on the basis of the 2001 wage bill in Antigua's remote gambling sector, but, unfortunately, we were not provided with any evidence as to the average share of wages in total revenues.

(i) GBGC data

3.176 We note that the GBGC data on Antigua's annual remote gambling revenues for the years 1999-2006 from the October 2007 release of the Quarterly eGaming Statistics Report has been significantly revised downwards, especially for the years before 2002, compared to the data of the May release, which was used by Antigua in its methodology paper.[633] Given GBGC's own corrections, we feel, of course, compelled to use the most recent update of the data. We also recall that these figures constitute Antigua's global revenues and that no information on bilateral exports of gambling services from Antigua to the United States has been provided. However, Antigua provides some anecdotal evidence that the US share in Antigua's total revenues from remote gambling should be around 80 per cent. In the absence of better information and of any indication about how this share has developed over time, we feel that the most we can do is to reduce the GBGC time series of Antiguan remote gambling revenues by 20 per cent to obtain an estimate of its revenues from the United States and to do at least some justice to our impression that the United States indeed represents the dominant market for Antigua.

3.177 Like Antigua (in two of its three models) and the United States, we take the 2001-2002 period as the turning point when the US measures began to affect Antiguan exports of remote gambling services to the United States. Following the basic idea of Antigua's constant revenue methodology, we calculate the difference between Antigua's 2001 revenues and its actual revenues in each year 2002 to 2006. From these numbers, we determine the average annual revenue loss in the US market for Antigua to be about **$304 million**, according to the GBGC data.[634]

3.178 However, only part of this loss is due to the US measures. By the same token, the assumption that Antigua's revenues would have remained constant represents a conservative starting point, since Antigua may well have benefited from an increase in US demand (that may have increased Antigua's revenues or cushioned its loss to competitors compared to the 2001 level). To take account of market developments, Antigua, in its methodology paper, proposes to use either a constant market share or constant growth methodology. We think that the constant market share methodology is not appropriate for a number of reasons. As was said before, Antigua's market share may be influenced by a number of events totally unrelated to the question at hand. Also, it is unlikely that an early mover advantage in a market with seemingly low barriers to entry guarantees a constant market share; to the contrary, as long as "supernormal" profits can be earned in a particular market, one would expect new entry and declining market shares of early entrants, even if revenues continue to grow. Most importantly, the GBGC data itself shows signs of increased competition that do not justify such an assumption. Concerning Antigua's constant growth assumption, we think that its 2001 revenues are the product of extraordinary growth in the early years and, if anything, would grow at a decelerating rather than linear rate, more in line with an S-curve pattern commonly observed in competitive markets. Despite the very limited number of observations, a logistic curve can be fit to the pre-2002 Antiguan revenue data, using the Levenberg-Marquardt algorithm. Its saturation point κ converges to US$1,411 million. Taking this value as a benchmark, the average annual loss would have been US$411 million. Yet, we are not going to pursue this approach further preferring instead to model the impact of competition as well as possible increases in United States demand directly.

(ii) Revenues per employee

3.179 As stated above, we use the information on revenues per employee from public listed companies as well as the data on employment in the remote gambling sector provided by Antigua to conduct a rough test of the order of magnitude of Antigua's remote gambling revenues.[635] The data for seven publicly listed companies (three of which are licensed in Antigua) was taken from annual reports and is available

[633] Antigua responses to questions by the Arbitrator, Exhibits AB-14(1) and AB-14(2).

[634] See Annex E, Annex Table 1.

[635] Antigua response to question No. 21 by the Arbitrator, pages 18-19 and Exhibit AB-17.

for the years 2001 (for some companies 2002, 2003 or 2004) to 2006. Taking the average over those years gives an annual value of about $446,000/employee, and $447,000/employee if extreme values are removed.[636] Multiplying the former value by the difference between the number of employees in 2001 and the number of employees in each year 2002 to 2006 (adjusted for the assumed 80 per cent US market share) and taking the average over those years results in an average annual revenue loss of about **$196 million.**[637]

3.180 In the following, we will make further adjustments to both of these numbers.

(b) Competing suppliers

3.181 Analysing the arguments by parties and the available evidence, we have found that we cannot agree with either extreme position taken by parties that either none or all of Antigua's loss in market share experienced since 2002 is due to its loss of competitiveness vis-à-vis providers from other locations. Using the October release of the GBGC data provided by Antigua, we find it particularly revealing that world revenues increase for both individual countries/territories in the region, namely Costa Rica, Curaçao and the Khanawake Territory, as well as for the South/Central America and Caribbean region as a whole, while the opposite is true for Antigua. As discussed above, it seems reasonable to us to assume that countries in the region compete with Antigua for the US market and *a priori* should be affected similarly by the US measures than Antigua. While these countries also lose global market share between 2002 and 2006, this decline is less pronounced than that for Antigua. In order to operationalize the notion of competition, we interpret the underperformance of Antigua since 2002 in terms of its contribution to the regional share in global remote gambling revenues as a loss in competitiveness by Antigua compared to its main competitors that it would have suffered even in the absence of the US measures. If this is so, only part of the revenue loss calculated in 0 and 0 above should be attributed to the US measures.

3.182 To make the necessary adjustments, we proceed as follows: Assuming that Antigua would have continued to do as well as its Central/South American and Caribbean competitors, its contribution to the region's global market share would have remained constant at the 2001 value. However, its contribution declined each year to reach about half of its 2001 value in 2006.[638] Hence, the revenue loss by Antigua should be corrected for by the decline in its relative contribution to the region's global market share for each year 2002 to 2006. If this is done the average annual revenue loss calculated in 0 and 0 above is reduced to **$164 million** and **$128 million** respectively.[639]

3.183 If, in addition, we include the Khanawake Territory in the group of regional competitors, the average annual revenue loss calculated in 0 and 0 above would only amount to $118 million and $108 million respectively. However, while inclusion of the Khanawake Territory makes sense conceptually, we prefer to avoid the use of country-specific information, besides Antigua, as far as possible, since we have more confidence in GBGC's global and regional estimates. Specifically, for the Khanawake Territory, we note some small inconsistencies in certain years with the North America total of revenues by operator location that, unlike for Antigua, have not been corrected between the May and October 2007 releases of the GBGC database.

(c) Gambling on horseracing

3.184 In light of the chosen counterfactual and our analysis above in III.D.2(b)(ii), we have identified two strategies concerning an approximation of the unknown share of gambling on horseracing in

[636] See Annex E, Annex Table 2.

[637] See Annex E, Annex Table 3.

[638] See Annex E, Annex Table 4.

[639] See Annex E, Annex Table 5.

Antigua's exports of remote gambling services to the US, which seem preferable over the other possible options identified by parties. The first option is to use the GBGC data combining remote and non-remote revenues from gambling on horseracing in various regions of the world. It is not clear whether the regional numbers refer to player or operator location. Since the main markets are separated out, it may refer to the former; however, the figure for sportsbetting in North America is rather small. Hence, it is probably more prudent to take the world total. Globally, the share of horseracing in all gambling activities declines from 13 per cent in 2001 to 9 per cent in 2006, while the total amount stays about constant. Applying the average share of 11 per cent to the figures in boldface calculated in 0 above, one obtains an estimated annual revenue loss by Antigua from gambling on horseracing of about **$18 million** and **$14 million** respectively.

3.185 If the 7 per cent share of gambling on horseracing in the United States non-remote market is used (based on the average for the years 2003 to 2006), the amounts calculated 0 above would be reduced to about $11 million and $9 million respectively.

(d) Growth in US demand

3.186 As we said above in 0, we need to take account of the possible growth in the US remote gambling market, in this case in the horseracing segment of the market, that Antigua may have been able to take advantage of in the absence of the US measures. Parties have provided alternative datasets in that regard. Antigua has provided data showing that revenues from the gambling market on horseracing in North America have practically stagnated between 2001 and 2006. Fitting a linear time trend through the data, the world market has barely done better growing at an average of 0.5 per cent annually. This would only marginally affect the estimated annual revenue losses by Antigua from gambling on horseracing calculated in 0 (in boldface), which remain at about US$18 million and US$14 million.

3.187 However, the remote gambling statistics for the North American market may be biased by the effects of the US measures. This is why we prefer to work with the data provided by the United States on pari-mutuel net receipts in the non-remote gambling market from BEA statistics on consumption expenditures, although these figures may still be influenced by a degree of substitution from remote to non-remote gambling on horseracing due the impact of the US measures on foreign suppliers. The United States provides data for the non-remote gambling market from 1995 to 2006, which includes a breakdown of pari-mutuel net receipts, 90 per cent of which are believed to be accounted for by betting on horseracing. Over the 2001-2006 time period, expenditures in that segment grew by 5 per cent annually on average (the same is true if the whole time period is used to calculate a linear trend). Applying the resulting compound growth rate to the amounts (in boldface) calculated in 0 results in an average annual revenue loss for Antigua of about **$23 million** or **$18 million** respectively.

4. Conclusion

3.188 Taking account of the data uncertainties we have discussed earlier, we have decided to take the average of the two figures we calculated in paragraph 0 above in making our final award. Averaging and rounding to the next full million results in an amount of **US$21 million**.

3.189 We therefore find that the annual level of nullification or impairment of benefits accruing to Antigua is US $21 million.

IV. PRINCIPLES AND PROCEDURES OF ARTICLE 22.3 OF THE DSU

4.1 As noted in Section I.B, Antigua requested to be authorized to suspend concessions and other obligations under the GATS and the TRIPS Agreement, in accordance with the principles and procedures of Article 22.3 of the DSU.

[…]

B. OVERALL APPROACH BY THE ARBITRATOR

4.10 Article 22.3 sets out certain principles and procedures to be followed by a complaining party seeking to suspend concessions, as to the sector(s) and/or covered agreement in which the suspension can take place, which the United States claims that Antigua did not follow in its request.

4.11 Article 22.7 of the DSU provides that "if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim" and that "[i]n the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3". We are therefore required to examine the US claim that Antigua has not followed the principles and procedures of Article 22.3 of the DSU.

4.12 As a general principle, Article 22.3(a) of the DSU provides that suspension of concessions or other obligations should first be sought in the same sector as that in which a violation was found. Article 22.3 provides in relevant part that:

> "In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:
>
> (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment."

4.13 Subparagraphs (b), (c) and (d) of Article 22.3 further specify the principles and procedures to be followed by a complaining party wishing to seek suspension in another sector, or another agreement, than that in which a violation was found:

> "(b) if that party considers that it is not practicable or effective for it to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
>
> (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement."

4.14 In addition, subparagraph (d) provides that:

> "(d) in applying the above principles, that party shall take into account:
>
> (i) the trade in the sector or under the agreement under which the panel or the Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

> (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations."

4.15 In considering our mandate with respect to the principles and procedures set forth in Article 22.3 of the DSU, we find it useful to refer to the analysis of the arbitrators in the *EC – Bananas III (Ecuador)* case. As noted in Section I.A above, in determining the scope of their authority to review the principles and procedures relating to requests for suspension of concessions or other obligations under subparagraphs (b) and/or (c), the arbitrators in that case considered that "the fact that the powers of arbitrators under subparagraphs (b)-(c) are explicitly provided for in Article 22.6 implies *a fortiori* that the authority of Arbitrators includes the power to review whether the principles and procedures set forth in these subparagraphs have been followed by the Member seeking authorization for suspension".[640]

4.16 The arbitrators then considered the terms of Article 22.3, including the fact that a certain margin of appreciation is left to the complaining party in arriving at conclusions in respect of certain factual elements (i.e. "if *that party considers*" in subparagraphs (b) and (c)) as well as the fact that the party concerned is required to apply the principles of Article 22.3 (i.e. "*shall* apply the following principles and procedures" in the introductory clause of Article 22.3). On the basis of that textual analysis, the arbitrators determined that:

> "[T]he margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough."[641]

4.17 The arbitrators in the *EC – Bananas III (Ecuador)* case also considered more broadly the terms of Article 22.3 and noted that "these provisions imply a sequence of steps towards WTO-consistent suspension of concessions or other obligations which respects both a margin of appreciation for the complaining party as well as a margin of review by Arbitrators, if a request for suspension under Article 22.2 is challenged under Article 22.6".[642]

4.18 We agree with these determinations. Specifically, we agree that the principles and procedures set forth in Article 22.3 of the DSU, which require the complaining party to make certain determinations, imply "a margin of appreciation" for the complaining party in making these determinations. At the same time, Article 22.3 sets out specific principles and procedures, that the complaining party must follow, and we understand the role of the arbitrator acting pursuant to Article 22.7 of the DSU to involve a review of whether those principles and procedures have been followed. We agree with the arbitrators in *EC – Bananas III (Ecuador)* that this includes a determination "whether the complaining party in question has considered the necessary facts objectively" and also "whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough".

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[640] Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 50.

[641] Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 52.

[642] Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 55.

4.19 Turning now to the specific principles and procedures set forth in Article 22.3 of the DSU, we first note that, as observed by the arbitrators in *EC – Bananas III (Ecuador)*, "these provisions imply a sequence of steps towards WTO-consistent suspension of concessions or other obligations".[643] In other words, as Antigua has expressed it, Article 22.3 of the DSU provides a "hierarchy" of remedies that a complaining party must follow in determining in which sectors or under which agreements suspension of concessions or other obligations can be sought, namely (1) seek to suspend in the same sector in the same agreement, (2) seek to suspend within the same agreement and (3) seek to suspend under another agreement.[644]

4.20 In this instance, Antigua first indicated in its request that it "may" suspend "horizontal and/or sectoral concessions and obligations for the following sector contained in the Antigua schedule: 2. Communication services", as well as under the TRIPS Agreement. However, it now considers that suspension of concessions or other obligations under the GATS, whether in the sector in which a violation was found or in other sectors, is not practicable or effective, and that the circumstances were serious enough, so that it may seek to suspend concessions or other obligations under the TRIPS Agreement (under which no violation was found).[645]

4.21 Since Antigua seeks to suspend obligations under another covered agreement than that in which a violation was found (i.e. the TRIPS Agreement rather than the GATS), this implies that it made two successive determinations, under the "sequence of steps" foreseen in Article 22.3 of the DSU: first, a determination that it was not practicable or effective to suspend concessions or other obligations in the sector in which a violation was found, in accordance with Article 22.3 (b), and secondly, a determination that it was also not practicable or effective to suspend concessions or other obligations under another sector within the agreement in which a violation was found, and that the circumstances were serious enough, so that it was entitled to seek suspension of concessions or other obligations under another agreement as foreseen in subparagraph (c). We will consider these two aspects in turn.

C. PRELIMINARY OBSERVATIONS

4.22 Before we start our assessment of Antigua's determinations, we find it useful to make some preliminary observations to take into account the fact that we have found, in Section III above, that the annual level of nullification or impairment of benefits accruing to Antigua is in the amount of US$ 21 million, rather than US$3.443 million as estimated by Antigua.

4.23 Antigua's arguments in relation to the availability of suspension of concessions or other obligations under the GATS rely in part on assumptions concerning the amount of suspension that it is entitled to. Specifically, Antigua has explained that the "first and most fundamental reason" for which it is not practicable or effective to suspend concessions or other obligations under the GATS is that the volume of its imports from the United States in services is nowhere near sufficient to absorb the level of suspension of concessions that it is entitled to.[646] The United States, for its part, considers that Antigua's argument is flawed because the amount of the request is out of line with any economic reality. Once the

[643] Decision by the arbitrators, *EC – Bananas III*, (request by Ecuador), para. 55.

[644] Antigua's written submission, paras. 16 to 21.

[645] We take note of the fact that Antigua has modified its assessment of the practicability or effectiveness of suspending concessions or other obligations under the GATS in the course of its proceedings, in that it no longer considers, as it had suggested in its request for authorization to suspend, that it "may" suspend concessions or other obligations in telecommunications services. For the purposes of our assessment, we consider Antigua's determinations as clarified in the course of the proceeding, that is, its determination that it is not practicable or effective to suspend concessions or other obligations in any sector under the GATS.

[646] Antigua's written submission, para. 48.

level is recalculated, the United States argues, it is in line with Antigua's services imports and suspension of services concessions is possible (and required).

4.24 We agree that, to the extent that the annual level of nullification or impairment of benefits accruing to Antigua exceeds the total annual level of imports of services by Antigua from the United States, it would not be possible for Antigua to suspend obligations only in the services sector to cover the entire level of nullification or impairment. However, we have determined in paragraph 0 above that the level of nullification or impairment of benefits accruing to Antigua is significantly lower than Antigua had estimated, at US$21 million. We will therefore take this finding into account, in reviewing Antigua's determinations.

4.25 With these preliminary considerations in mind, we now turn to Antigua's determination that suspension of concessions or other obligations is not practicable or effective, in the same sector as that in which a violation was found, or in any other sector under the GATS.

D. REVIEW OF ANTIGUA'S DETERMINATION IN RESPECT OF "SAME SECTOR" SUSPENSION

4.26 As noted above, it is only if the complaining party considers that it is "not practicable or effective" to suspend obligations with respect to the same sector that it may seek to suspend obligations in other sectors (or, ultimately, under another agreement). In addition, Article 22.3 subparagraph (d) requires the complaining party to take into account two specific aspects in applying the principles of paragraphs (a) to (c).

4.27 We have determined in the previous section that our task is to examine whether, in making a determination in this case, Antigua, as the complaining party, has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension with respect to the same sector within the same agreement.

4.28 In order to conduct this assessment, we must clarify the elements that are relevant to such determination, and specifically the meaning of the terms "not practicable or effective" within the terms of Article 22.3(b), as well as the role of the elements identified in subparagraph (d) in this assessment, before turning to Antigua's determination in this case.

1. The principles and procedures of Article 22.3(b)

4.29 In the *EC – Bananas III (Ecuador)* case, the arbitrators analyzed the meaning of the criteria of "practicability" and "effectiveness" in subparagraphs (b) and (c) of Article 22.3 of the DSU in some detail, as well as the role of the elements referred to in subparagraph (d) of Article 22.3 of the DSU. The arbitrators in that case determined *inter alia* that:

- an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice, as well as suited for being used in a particular case;[647]

- in contrast, the thrust of the "effectiveness" criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to

[647] *EC – Bananas III (Ecuador) (Article 22.6 – EC), para.70.*

induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time;[648]

- a consideration by the complaining party of the practicability and the effectiveness of an alternative suspension within the same sector or under the same agreement does not need to lead to the conclusion that such an alternative suspension is both not practicable and not effective in order to meet the requirements of Article 22.3;[649]

- these criteria have to be read in combination especially with the factors set out in subparagraphs (i) and (ii) of Article 22.3(d) which, as the introductory clause of subparagraph (d) stipulates, the complaining party seeking authorization for suspension shall take into account in applying the above principles, i.e. those provided for in subparagraphs (a)-(c).[650]

4.30 We consider that these interpretations provide a useful starting point for our assessment of Antigua's determination that it was not practicable or effective for it to suspend obligations with respect to the same sector under the GATS.

4.31 With respect to the elements referred to in subparagraph (d) of Article 22.3, which the complaining party is required to "take into account" in making its determination, we also find it useful to refer to the interpretations of the arbitrators in *EC – Bananas III (Ecuador)*.

4.32 With respect to the reference in subparagraph (d)(i) to "the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation" and the "importance of such trade" to the complaining party, that arbitrators did not "exclude the possibility" that trade in the entirety of the relevant sector or agreement may be pertinent, but considered that these criteria related primarily to trade nullified or impaired by the WTO-inconsistent measure at issue.

4.33 In our view, the ordinary meaning of the terms of subparagraph (d)(i) suggests that a consideration of the entirety of "trade in the sector" under which a violation was found is pertinent, rather than, as the *EC – Bananas III (Ecuador)* arbitration suggests, primarily the "trade nullified or impaired by the WTO-inconsistent measure at issue". This appears to us also to be consistent with the context of this provision as well as with its object and purpose.

4.34 First, the term "sector" is also referred to in subparagraph (b), where it defines the scope of the examination to be conducted. The term "sector" is also specifically defined for the purposes of Article 22.3 in subparagraph (f). We therefore find it appropriate to give the term "sector" in subparagraph (d) of Article 22.3 of the DSU the meaning that has been ascribed to it in subparagraph (f) of the same provision, and to assume, reading the terms "trade in the sector" in their context, that there should be parallelism between the sector in which the practicability and effectiveness of suspension is being considered and the trade to be taken into account in making this determination. In other words, in order to determine whether suspension is practicable or effective in a certain sector, it is appropriate to take into account all the trade in that sector and its importance to the complaining party. This also appears to us consistent with the purpose of this provision, which is to provide certain objective parameters to guide the conduct of such determinations.

[648] *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 72.*

[649] *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 74.*

[650] *EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 79.*

4.35 In addition, subparagraph (ii) of Article 22.3(d) requires the complaining party to take into account "the broader economic elements related to the nullification or impairment" as well as "the broader economic consequences" of the suspension of concessions or other obligations. In respect of these factors, the arbitrators in the *EC – Bananas III (Ecuador)* case determined that:

> "The fact that the former criterion relates to 'nullification or impairment' indicates in our view that this factor primarily concerns 'broader economic elements' relating to the Member suffering such nullification or impairment, i.e. in this case Ecuador.
>
> We believe, however, that the fact that the latter criterion relates to the suspension of concessions or other obligations is not necessarily an indication that 'broader economic consequences' relate exclusively to the party which was found not to be in compliance with WTO law, i.e. in this case the European Communities. As noted above, the suspension of concessions may not only affect the party retaliated against, it may also entail, at least to some extent, adverse effects for the complaining party seeking suspension, especially where a great imbalance in terms of trade volumes and economic power exists between the two parties such as in this case where the differences between Ecuador and the European Communities in regard to the size of their economies and the level of socio-economic development are substantial."[651]

4.36 We agree with these determinations.

4.37 In conclusion, we understand subparagraph (d) of Article 22.3 to require a consideration, by the complaining party, of the following elements:

- the trade in the relevant sector (as defined in subparagraph (f)) and the importance of such trade to the complaining party (in this case Antigua), including considerations relating to the relative importance of that trade to the complaining party and to the Member to which the requested suspension would apply (the United States);
- "broader economic elements" relating to the Member suffering the nullification or impairment (in this case Antigua);
- "broader economic consequences" of the suspension of concessions or other obligations, both for the party which was found not to be in compliance with WTO law (the United States) and for the complaining party (Antigua).

4.38 With these general considerations in mind, we now review Antigua's determination that it was not practicable or effective to suspend concessions or other obligations with respect to the same sector as that in which a violation was found under the GATS in this case.

2. Review of Antigua's determination that is not practicable or effective to suspend concessions or other obligations in the "same sector"

4.39 In order to review Antigua's determination, we find it useful to first clarify what the relevant "sector" is, as well as the scope of the "concessions or other obligations" to be considered. We will then turn to Antigua's determination on the practicability and effectiveness of suspension of these obligations, including its consideration of the factors identified in subparagraph (d).

(a) Identification of the relevant sector and scope of obligations to be considered

[651] *EC – Bananas III (Ecuador) (Article 22.6 – EC), paras. 85-86.*

4.40 Subparagraph (a) of Article 22.3 provides that :

> "[T]the general principle is that the complaining party should first seek to suspend *concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation* or other nullification or impairment" (emphasis added).

4.41 Article 22.3 (f) of the DSU further defines the term "sector" for the purposes of Article 22.3. Specifically, it defines the term "sector" as meaning:

> "[W]ith respect to trade in services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors".

4.42 As is clarified in footnote 14 of the DSU, this list is contained in document MTN.GNS/W/120, which identifies 11 principal sectors.

4.43 In this case, a violation was found in sub-sector "10.D" (Sporting and Other recreational services). The "principal sector" in which the violation was found, as defined in Article 22.3(f), is therefore Sector 10 ("Recreational, Cultural and Sporting Services"). Antigua has confirmed, in response to a question from the Arbitrator, that it agrees that the entirety of Sector 10 is relevant for the purposes of this determination.[652]

4.44 Article 22.3 refers to "concessions *or other obligations*" (emphasis added) with respect to the relevant sector. This indicates, in our view, that the entire range of obligations incurred under the relevant agreement with respect to the sector concerned is relevant in considering whether suspension is practicable or effective in that sector. This would include, as expressly noted in the text, scheduled concessions, as well as, as is also expressly stated in the text, any "other obligations" incurred with respect to the sector at issue.

4.45 In this case, this means that the relevant range of obligations that should be considered for the purposes of assessing whether suspension is practicable or effective with respect to the same sector includes not only any specific commitments made by Antigua with respect to Sector 10 (Recreational, Cultural and Sporting Services), but also other obligations under the GATS that apply to this sector, such as the MFN obligation contained in Article II of the GATS.

(b) Antigua's determination that it is "not practicable or effective" to suspend concessions or other obligations with respect to the same sector

[…]

(ii) Assessment by the Arbitrator

4.52 As noted above, Antigua considers that it was only required to take into consideration, for the purposes of determining whether suspension is practicable or effective, trade in sectors where it has made

[652] Antigua's response to question No. 47 of the Arbitrator.

a commitment. [653] It notes that the only trade within Sector 10 under the GATS with respect to which it has made commitments in its GATS Schedule is sub-sector 10.A ("Entertainment services"). It states that it has been unable to "locate any statistical sources" on trade in that sub-sector and believes that such trade is negligible in its overall volume. Antigua further considers that suspension of concessions or other obligations in this sector "would most likely impair the already limited entertainment options available to Antiguan citizens while having virtually no impact on the United States at all"[654].

4.53 The United States also appears to have considered, at least initially, that the only trade that was relevant in this determination was that in respect of which Antigua has made a specific commitment, namely sub-sector 10.A.[655] The United States did not, however, specifically respond to any of the arguments provided by Antigua in its written submission in respect of the volumes of trade concerned and the potential adverse impact of a suspension under this sub-sector.

4.54 As we have explained above, we believe that the range of obligations to be considered for the purposes of a determination of whether suspension is practicable or effective in the same sector is not limited to those sub-sectors in which specific commitments have been made. Nonetheless, we consider first Antigua's determination in respect of sub-sector 10.A ("Entertainment Services"), where it has made such commitments.[656]

4.55 Antigua first notes that it has been unable to locate statistical sources in relation to trade in entertainment services and thus concludes that the volume of such trade must be negligible. We note that the United States does not dispute this assertion. Nor has it suggested, in fact, that there exists any amount of imports from the United States falling under sub-sector 10.A, in respect of which Antigua could suspend concessions or other obligations. We also note that the IMF Balance of Payments Statistics country tables submitted by the United States provide a breakdown of Antigua's services imports by category, including a category for "personal, cultural and recreational services" under which no amount is reported for the years 1998 to 2005.

4.56 In these circumstances, we consider that Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations under the GATS in respect of sub-sector 10.A, under which it has made a specific commitment.

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[653] Antigua draws support for this assumption from the arbitral decision in the *EC – Bananas III (Ecuador)* case, where the arbitrators considered it "obvious" that "suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable *EC – Bananas III (Ecuador),* Decision by the Arbitrators, para. 71". The arbitrator in that case further considered that it was "evident" for it "that Ecuador cannot suspend commitments or other obligations in sub-sectors of the distribution service sector in respect of which it has not entered into specific commitments in the first place *EC – Bananas III* (Ecuador), Decision by the Arbitrators, para. 103 *in fine.* However, as we have observed above, the text of Article 22.3 of the DSU refers to "concessions *and other obligations*" (emphasis added) within the relevant sector, rather than simply "concessions". Therefore, the scope of the relevant obligations is not limited, in our view, to specific commitments bound in Antigua's GATS schedule.

[654] Antigua's written submission, para. 51.

[655] US written submission, para. 59: "the issue is not whether Antigua has made any commitments in sub-sector 10.D, but rather whether Antigua has made any commitments in all of sector 10".

[656] We also note that Antigua's request for authorization to suspend concessions actually referred only to Sector 10.D and appeared to assume that this was the "sector" to be considered. Antigua subsequently acknowledged the relevance of the entirety of Sector 10 (although it then limited its enquiry, within Sector 10, to sub-sector 10.A, where it has made a commitment).

4.57 However, as observed above, we consider that, in addition to market access and national treatment specific commitments, other obligations under the GATS, including general GATS obligations, should also have been taken into account by Antigua in making its determination as to whether suspension was practicable or effective in Sector 10. In this respect, we note that Antigua has only made a very general observation, in response to a question from the arbitrator, that "even if this enquiry were carried out to its farthest extent to where Antigua had no obligations to the United States under the GATS *at all*", "[t]he trade disparity is so great that United States service providers would suffer little harm at all, if any, while Antiguan consumers would be forced to scramble for replacement services at uncertain cost".[657] Antigua also observes that the United States has not argued that Antigua has a practical and effective remedy in respect of "other obligations" under the GATS.[658]

4.58 In considering this matter, we first note that there is only a limited number of such "other obligations" under the GATS, that Antigua would be able to suspend under the whole of Sector 10, i.e. including sub-sector "10.B, News agency services"; "10.C, Libraries, archives, museums and other cultural services"; "10.D, Sporting and other recreational services"; and "10.E, Other". In our view, the main relevant obligation in this respect is the MFN obligation, contained GATS Article II, which obliges Antigua to accord immediately and unconditionally to US services and service suppliers treatment no less favourable than that it accords to like services and service suppliers of any other country.

4.59 We recall our observation above that the IMF Balance of Payments statistics do not reflect any volumes of imports by Antigua in relation to "Personal, Cultural and Recreational Services" between 1998 and 2005. This would tend to suggest that no significant volumes of imports of such services takes place. We also note that the United States has not in fact suggested that any amount of imports takes place with respect to Sector 10 from the United States, that could form the basis for suspension of obligations under the GATS. We also note Antigua's argument that "[t]he trade disparity is so great that United States service providers would suffer little harm at all, if any, while Antiguan consumers would be forced to scramble for replacement services at uncertain cost"[659], and the fact that the United States has not given any specific indication that Antigua's assessment in respect of the practicability or effectiveness of suspension of other obligations under Sector 10 is incorrect.

4.60 In light of these elements, we find that Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations under the GATS in respect of Sector 10.

(c) Whether Antigua has taken into account the factors identified in subparagraph (d) of Article 22.3

4.61 We must now consider whether Antigua has taken due account, in making its determination, of the factors identified in subparagraph (d) of Article 22.3.

4.62 Antigua's arguments to explain that same-sector suspension is not practicable or effective, as examined above, relate to the volume of trade in the relevant sector and to the potential impact of suspending concessions or other obligations in that sector both for Antigua (which it considers would be negative) and for the United States (which it considers would be virtually non-existent).

4.63 These elements fall squarely within the range of factors that are pertinent for the purposes of paragraphs (i) and (ii) of subparagraph (d). Specifically, we find that these considerations relate to "the trade in the sector … under which the panel or the Appellate Body has found a violation" within the

[657] Antigua's response to question No. 48 by the Arbitrator.

[658] Antigua's response to question No. 49 by the Arbitrator.

[659] Antigua's response to question 48 by the Arbitrator.

meaning of subparagraph (d)(i), as well as to the "broader economic elements" and "broader economic consequences" within the meaning of subparagraph (d)(ii).

4.64 We find, therefore, that Antigua has taken into account the relevant elements in subparagraph (d) of Article 22.3, in determining that it was not practicable or effective for it to seek suspension in the GATS sector in which the violation was found in accordance with subparagraph (b) of Article 22.3.

(d) Conclusion

4.65 In light of our determinations in sections (b) and (c) above, we find that Antigua could plausibly arrive at the conclusion that it was not practicable or effective to suspend concessions or other obligations under the GATS in respect of Sector 10, and determine that suspension of concessions or other obligations is not practicable or effective, with respect to the same sector as that in which a violation was found. We also find that the United States has not demonstrated that Antigua had not followed the principles and procedures of Article 22.3(b), in making this determination.

E. REVIEW OF ANTIGUA'S DETERMINATION IN REPECT OF "OTHER SECTORS" UNDER THE GATS

4.66 As noted above, Antigua sought an authorization to retaliate both under the GATS and the TRIPS Agreement, but then indicated in the course of the proceedings that it considered that it had no effective remedy under the GATS and was now seeking to suspend obligations under the TRIPS Agreement only.

4.67 The United States considers that Antigua has not provided an adequate explanation of why it cannot seek to suspend concessions under the GATS, as opposed to under the GATS and the TRIPS Agreement, and that Antigua's trade figures indicate that Antigua would have the option of suspending concessions or other obligations in the services area.

4.68 The relevant provision, Article 22.3 (c), provides that:

> "[I]f [the complaining] party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another agreement."

4.69 Two cumulative conditions therefore have to be met for a complaining party to be able to seek suspension under another agreement:

> that complaining party considers that it is not practicable or effective for it to suspend concessions or other obligations with respect to other sectors within the same agreement; and
>
> that party considers that the circumstances are "serious enough".

4.70 In addition, subparagraph (d) requires, in the application of the principles of subparagraph (c), that the two factors considered above in the context of paragraph (b) suspension also be taken into account.

4.71 We consider these elements in turn.

1. Whether suspension of concessions or other obligations is practicable or effective in "other sectors" under the GATS

4.72 The first condition under Article 22.3(c) of the DSU for the suspension of concessions to be sought in another agreement than that in which a violation was found, is that the complaining party has determined that it is "not practicable or effective" to suspend concessions or other obligations in other sectors within that agreement.

4.73 In determining whether suspension is practicable or effective, the complaining party is also required to take into account the two factors identified in subparagraph (d), namely, in the case of an application of subparagraph (c):

> the trade under the agreement under which a violation has been found and the importance of such trade to the complaining party (i.e., in this case, trade under the GATS and the importance of such trade to Antigua); and
>
> the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations (which as noted above, could include a consideration of the impact of the retaliation both on the party seeking to retaliate and on the party against whom retaliation is being sought).

4.74 In approaching this part of our determination, we are guided, *mutatis mutandis*, by the interpretations that we have developed in Section IV.C.1 above in relation to the same principles and procedures, as they relate to "same-sector" suspension in the context of Article 22.3(b).

4.75 We must therefore determine whether Antigua has considered the relevant facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension of concessions or other obligations with respect to other sectors under the GATS.

4.76 In this part of our assessment, the relevant sectors to be considered are all principal sectors, within the meaning of MTN.GNS/W/120, other than Sector 10, under the GATS. In respect of such sectors, the relevant "concessions or other obligations" under the GATS include, as determined above in relation to Article 22.3(b), not only any specific commitments made by Antigua with respect to those sectors, but also other obligations under the GATS that apply to this sector, such as the MFN obligation contained in Article II of the GATS.[660]

4.77 We first address Antigua's general argument that its volume of imports is insufficient to support suspension of obligations under the GATS alone at the level it is entitled to, before turning to the detail of Antigua's consideration of the practicability and feasibility of such suspension.

(a) Level of suspension and availability of suspension under the GATS

4.78 As noted above, Antigua has explained that the "first and most fundamental reason" for which it is not practicable or effective to suspend concessions or other obligations under the GATS is that the volume of its imports from the United States in services is nowhere near sufficient to absorb the level of suspension of concessions that it is entitled to.[661] The United States, for its part, considers that Antigua's argument is flawed and that once the level is recalculated, it is in line with Antigua's services imports and suspension of services concessions is possible (and, in the US view, required).[662]

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[660] See above our determinations in paras. 4.41-4.45.

[661] Antigua's written submission, para. 48.

[662] US written submission, para. 61.

4.79 As we noted in our preliminary observations, we will take into account, in assessing Antigua's arguments, our own earlier determination that the annual level of nullification or impairment of benefits accruing to Antigua is in the amount of US$21 million, significantly lower than Antigua's estimation. We will compare this amount to the annual level of Antigua's services imports from the United States in order to determine the extent to which suspension of concessions or other obligations entirely under the GATS is at least conceivable.

4.80 Antigua indicates that its total imports of services amount to US$208.11 million for 2005.[663] In response to a question by the Arbitrator, the United States observes that the figures presented by Antigua on its services imports appear to be consistent with the IMF Balance of Payment statistics that the United States has itself presented to the Arbitrator as evidence.[664] These statistics indicate a total value of US$204.85 for imports of services by Antigua.[665]

4.81 Antigua indicates that it has not been able to allocate these services imports among its trading partners, and cites the US CIA's World Factbook in support of the proposition that the United States accounts for 21.1 per cent of Antigua's services imports. The notes and definitions of this Factbook suggest, however, that these figures relate to merchandise imports, rather than services imports.[666] In its request for authorization to suspend obligations, Antigua indicated that "[o]n an annual basis, approximately 48.9 per cent of these imported goods and services come from single source providers located in the United States".[667] The United States does not dispute this figure and refers to it in order to estimate the total value of Antigua's imports of services for the United States.[668] In the absence of any reliable alternative estimation provided by either party, we rely on Antigua's initial statement that the United States share in Antigua's imports of services is "approximately 48.9 percent".

4.82 Combining the amount of US$204.85 million with this percentage, we arrive at a total annual value of services imports from the United States to Antigua of US$101.77 million. This thus represents the maximum value of services trade in respect of which Antigua could potentially seek to suspend concessions or other obligations. In light of our earlier determination that the annual level of nullification or impairment of benefits accruing to Antigua in this case is in the amount of US$21 million, this means that it would in principle be possible for Antigua to seek suspension of concessions or other obligations entirely within the GATS.

4.83 With this initial determination in mind, we turn to a consideration of whether such suspension is, nonetheless, not practicable or effective within the meaning of Article 22.3(c).

(b) Practicability and effectiveness of suspension in other sectors

4.84 In considering this question, we first recall our determinations in paragraph 0above on the nature of the assessment to be conducted in applying the principles of Article 22.3. Specifically, we recall our determinations that an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case. We also recall our determination that in contrast, the thrust of the "effectiveness" criterion empowers the party seeking suspension to ensure that the impact of that

[663] Antigua's written submission, para. 48.

[664] US response to question 51 of the Arbitrator, para. 67.

[665] See US Exhibit US-2. IMF Balance of Payments country table, Antigua and Barbuda.

[666] See US CIA, The World Factbook 2007, at https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html#2087.

[667] Recourse by Antigua to Article 22.6 of the DSU, WT/DS285/22. No source is cited for this assertion.

[668] See US written submission, para. 60, footnote 39.

suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB recommendations and rulings within a reasonable period of time.

4.85 We also bear in mind our related determination that a consideration of the practicability and the effectiveness of an alternative suspension within the same sector or under the same agreement does not need to lead to the conclusion that such an alternative suspension is both not practicable and not effective in order to meet the requirements of Article 22.3. This implies that it would be sufficient for Antigua to have determined that suspension under the GATS in respect of other sectors is not effective, even if it is practicable.

4.86 Antigua has provided some general arguments relating to the size of its economy and the relative sizes of the economies of the United States and Antigua, as well as some more specific indications why it would not be practicable or effective to suspend concessions in specific services sectors. We consider these in turn.

4.87 Antigua has first stressed the fact that, as a small economy with limited natural resources, it is heavily dependant on imports of goods and services, including from the United States, so that the imposition of additional duties on products imported from the United States or on the provision of services from the United States would have "a disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country".[669] Antigua also notes that with respect to most services other than "Sector 10.D", covered by Antigua's GATS schedule, suspension of concessions in the form of higher duties, tariff, fees or other restrictions would have a disproportionate impact on the economy of Antigua and virtually no impact of the United States.

4.88 As a preliminary matter, we note that Antigua's arguments include references to the potential impact of a suspension in respect of trade in goods. Our assessment is however limited to a consideration of suspension of obligations under the GATS. We therefore make no determination in relation to the potential impact of a possible suspension of obligations in relation to trade in goods.

4.89 To the extent that it relates to the suspension of obligations under the GATS, Antigua's concern that, as a small import-dependent economy, it could suffer an adverse impact from such suspension, is in our view pertinent to an assessment of whether suspension is practicable or effective. Specifically, we consider that these circumstances have the potential to affect significantly the effectiveness of the proposed suspension.

4.90 We note in this respect the determination of the arbitrators in *EC – Bananas III (Ecuador)*, that, in a situation "where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law" "and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party".[670] In the view of that arbitrator, "in these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3".[671]

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[669] Recourse to Article 22.2 by Antigua, WT/DS285/22.

[670] *EC – Bananas III (Ecuador) (Article 22.6 – EC),* para. 73.

[671] *EC – Bananas III (Ecuador) (Article 22.6 – EC),* para. 73.

4.91 At the same time, we agree with the United States that general statements relating to the size of the complaining party's economy or the relative size of the economies of both parties do not justify a departure from the requirements of Article 22.3 of the DSU. Rather, the complaining party is required, in all cases, to follow the specific sequence of steps provided in this provision and to make a determination in respect of each of its elements as relevant. In this context, an explanation of how such circumstances affect the practicability or effectiveness of the proposed suspension would in our view be required, in order for these considerations to validly support a determination that it is not practicable or effective to suspend concessions or other obligations in other sectors under the same agreement within the meaning of Article 22.3.

4.92 In this case, Antigua has not limited itself to general assertions as to the size of its economy, in itself or relative to the US economy. It has also provided arguments to explain how the potential adverse impact of suspension of obligations would manifest itself in various specific sectors under the GATS in respect of which suspension might be considered.

4.93 Antigua thus explained that it initially envisaged the suspension of concessions or other obligations in telecommunication services, but that, upon more detailed review of the import and use of telecommunications services in Antigua, it had determined not only that the volume of the trade was low (US$5.03 million) but that disruptions in changing services and suppliers and increased cost to Antiguan consumers would result in a heavier burden on Antiguan citizens as the result of suspending concessions in this area while having no perceptible impact on the United States.[672]

4.94 Antigua has also explained that the arguments it made in respect of Sector 10 ("Entertainment services") also hold true for other sectors of the GATS in which Antigua has made specific commitments in its Schedule. Antigua explains that, of the total value of services imports to Antigua in 2005, the main services imported were transportation (US$ 70.7 million), travel (US$ 40.1 million) and insurance services (US$35.5 million). Antigua argues that if it were to suspend concessions with respect to these services, given the low level of these imports, it is clear that the suspension would have virtually no impact upon the United States, while having to replace these services from other service providers, if reasonably practicable at all, would most likely prove to be more expensive to Antiguan consumers.[673]

4.95 The United States considers that WTO statistics indicate that Antigua's "other services imports" (services other than travel and transport) are in fact larger than its "other services exports", and thus are "an obvious candidate" for a request for suspension of concessions.[674] It is not clear to us why the United States considers that the fact that Antigua's exports of services other than travel and transport are larger than its imports of services in the same category makes such imports "an obvious candidate" for suspension of concessions. To the extent that the United States assumes that, in these circumstances, the provision of the imported services could be replaced with the provision of the same services by local suppliers, this assumption would seem to be unverifiable, in the absence of any specific indication on the composition and distribution of such imports and exports.

4.96 The United States further notes that Antigua has even higher levels of services imports for travel and transport services. The United States argues that although Antigua's economy does depend to a substantial extent on tourism, it does not necessarily follow that suspension of concessions in the areas of travel and transport would adversely affect Antigua's tourism industry.[675] The United States also notes, however, that, in light of the reliance of the Antiguan economy on tourism, it has not contested Antigua's

[672] Antigua's written submission, para. 53.

[673] Antigua's written submission, para. 52.

[674] US written submission, para. 60.

[675] US written submission, para. 60.

assertion that it would not be practicable or effective for Antigua to suspend concessions in a manner that might discourage US tourists.[676] Thus, the United States notes, it has not argued, for example, that Antigua should suspend concessions with regard to US travel services.[677]

4.97 The United States therefore seems to accept that the suspension of concessions or other obligations in respect of tourism services, or of other services that may have an impact on the tourism industry, may be such as to adversely affect Antigua, and that this may render such suspension not practicable or effective within the meaning of Article 22.3(c). We agree that suspension of obligations in respect of such services would have the potential to adversely affect Antigua's economy, while not necessarily having any perceptible impact on inducing compliance by the United States.

4.98 We also note that, by their very nature, services transactions are closely woven into a country's domestic economic fabric, with many cross-sectoral linkages. This is typically the case for so-called infrastructural services, such as large segments of the transport, telecommunications and financial services sectors. In our view, it is plausible that suspension of obligations against US firms established in Antigua in such sectors could entail a negative impact for the Antiguan local economy. The risk of economic disruption in case of forced divestiture, or similar measures, is not negligible, in particular for small economies. For instance, it is not clear to what extent Antiguan services suppliers would be able or willing to step in for US services suppliers obliged to suspend their operation or even leave the country. Moreover, legislative and other measures protecting foreign investors may make it difficult in practice to take and enforce action against them.

4.99 Overall, in light of all these elements, we consider that Antigua has provided sufficient elements in support of its determination, to satisfy us that it has considered objectively the relevant elements and that it could plausibly, on the basis of these elements, reach the conclusion that it was not practicable or effective to suspend concessions or other obligations with respect to "other sectors" under the GATS. By contrast, the United States has not demonstrated to us that Antigua has not met the requirements of Article 22.3(c) of the DSU. In fact, even if it considers Antigua's explanations to be overall insufficient, the United States apparently recognizes the legitimacy of Antigua's concerns, and their relevance to this determination, with respect to at least some sectors. The United States has not, on the other hand, persuaded us that there are services sectors in which Antigua could suspend concessions or other obligations practicably or effectively.

4.100 In making this determination, we recognize that the elements provided by Antigua in explaining how it arrived at its determination are somewhat limited. Specifically, we have been provided with only limited information on the exact composition of Antigua's services imports, including the share of US imports in various sectors. However, we are not persuaded that it would be reasonable to expect Antigua to be in a position to produce, in the context of these proceedings, such detailed sector-specific statistics and data relating to its bilateral services trade. In this respect, we find it appropriate to take into account, in reviewing Antigua's determination, that it may not maintain such data on a regular basis, in the same way as some developed countries or larger developing countries may do. Indeed, the United States itself has also not provided us with any more detailed information on the volume and distribution of its services trade with Antigua.

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[676] See Antigua's oral statement, para. 37: "the United States apparently suggests that we prohibit American entertainers from offering services to consumers in Antigua, that we ban American tourists from visiting our resorts and that we prohibit American vessels and aircraft from bringing goods and holiday-makers to our tiny island. It should not require any deep economic analysis to see the futility of these suggestions". The Arbitrator notes that "ban[ning] American tourists from visiting [Antigua's] resorts" would not constitute a relevant form of retaliation under the GATS for Antigua.

[677] US response to question 69 of the Arbitrator.

(c) Antigua's consideration of the elements in subparagraph (d)

4.101 We must now consider whether Antigua has taken due account, in making its determination, of the factors identified in subparagraph (d) of Article 22.3.

4.102 As determined in paragraph 0 above, we consider that the relevant trade to be considered for the purposes of subparagraph (d)(i) is the trade under the relevant agreement, namely, in this case, trade in services (with the exception of trade in respect of Sector 10). Antigua's arguments as discussed in the preceding section sufficiently establish, in our view, that Antigua considered the relevant trade, as well as the importance of such trade to Antigua's economy, in making its determination.

4.103 Subparagraph (d)(ii) requires that the "broader economic elements" relating to the Member suffering the nullification or impairment, as well as the "broader economic consequences" of the suspension also be taken into account. As we have determined in paragraph 0 above, we consider that the latter element relates to the consequences both on the complaining party and on the party that was found not to be in compliance with its obligations under the covered agreements. As observed in the preceding section, Antigua's consideration of the effectiveness or practicability of suspension of obligations in "other sectors" under the GATS turned importantly on a consideration of the general economic circumstances of Antigua as a small import-dependent economy, in other words, the "broader economic elements" relating to Antigua. Antigua's determination also importantly involved a consideration of the potential adverse impact of such suspension on Antigua's economy, contrasted with the limited impact that such suspension could be expected to have on the United States, in other words, the "broader economic consequences" of such suspension for both parties.

4.104 We are therefore satisfied that Antigua has taken into account the relevant factors identified in Article 22.3(d) in its determination of whether suspension of concessions or other obligations with respect to "other sectors" under the GATS is practicable or effective.

(d) Conclusion

4.105 In light of our determinations in sections (b) and (c) above, we find that Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations in respect of other sectors under the GATS, and determine that suspension of concessions or other obligations is not practicable or effective, with respect to other sectors than that in which a violation was found, under the same agreement. We also find that the United States has not demonstrated that Antigua has not followed the principles and procedures of Article 22.3(c), in making this determination.

2. Whether the circumstances are serious enough

4.106 Finally, we must review Antigua's determination that the "circumstances are serious enough", so that suspension of obligations can be sought under another agreement, in accordance with Article 22.3(c).

4.107 The text of Article 22.3(c) provides no express guidance how this aspect of the determination is to be understood. Like the arbitrators in the *EC – Bananas III (Ecuador) (Article 22.6 – EC)* case, we note that the factors to be taken into account under subparagraph (d) may provide some contextual guidance. We therefore consider that the trade at issue and its importance to the complaining party, as well as the broader economic elements relating to the Member suffering the nullification or impairment and the broader economic consequences of the proposed suspension on the parties may be relevant in the context of a determination that the circumstances are "serious enough".

4.108 We also consider, more generally, that this aspect of the determination, which relates to "circumstances", is of necessity an assessment to be made on a case-by-case basis, and that the

circumstances that are relevant may vary from case to case. We note however, that these circumstances should be "serious enough", which suggests that it is only when the circumstances reach a certain degree or level of importance, that they can be considered to be "serious enough" within the meaning of Article 22.3(c).

4.109 In order to demonstrate the seriousness of the circumstances in this case, Antigua first presents some basic figures comparing the population, size, GDP, exports and imports of the United States and Antigua, which illustrate a considerable disparity in all of these areas.[678]

4.110 Antigua also highlights that it has extremely limited natural resources and very limited arable land, such that it cannot produce sufficient agricultural products to satisfy domestic needs, let alone for export. Antigua further notes that its economy has become highly dependent on tourism and associated services, including hotels and restaurants, retail trade, construction, real estate and housing and transportation.[679] Antigua also highlights the vulnerability of the tourism sector to external factors (such as weather conditions, security threats or economic downturn in source markets) and the fact that it tends to employ unskilled workers and generate low-paying jobs.

4.111 Third, Antigua highlights the need to diversify its economy, and that in order to do this it has tried to develop trade in services, including trade in remote gambling, with the active involvement of the Antiguan Government. Antigua suggests that prior to 1998, the United States Government even supported Antigua in its efforts to develop and supervise the remote gaming industry.[680]

4.112 The United States disagrees with Antigua's understanding of the US Government support provided to Antigua in developing trade in remote gambling[681], but it does not otherwise dispute Antigua's statements in respect of the elements described above.

4.113 In our view, it was reasonable for Antigua to determine, in light of the elements it highlights, that the circumstances are "serious enough" within the meaning of Article 22.3(c). Specifically, in our view, the various considerations highlighted by Antigua are such as to exacerbate the difficulties in finding a way to suspend concessions or other obligations in a practicable or effective manner under the GATS.

4.114 We note in this respect that the extremely unbalanced nature of the trading relations between the parties makes it all the more difficult for Antigua to find a way of ensuring the effectiveness of a suspension of concessions or other obligations against the United States under the same agreement. We also note that the heavy reliance of Antigua's economy on the very sectors that would be candidates for retaliation under the GATS increases the likelihood that an adverse impact would arise for Antigua itself, including for low-wage workers.

4.115 These circumstances can be directly related to the practicability and effectiveness of suspension under the GATS, i.e. the first condition in order for Antigua to seek suspension outside that agreement.

4.116 In light of these elements, we find that Antigua could plausibly make a determination that "the circumstances are serious enough", within the meaning of Article 22.3(c).

F. OVERALL CONCLUSION

[678] Antigua's written submission, para. 55.

[679] Antigua's written submission, para. 58.

[680] Antigua's written submission, para. 64.

[681] US declaration in response to oral question by the Arbitrator at the meeting with the parties.

4.117 In light of our determinations above, we conclude that Antigua has applied the principles and procedures of Article 22.3 of the DSU consistently with the terms of that provision.

4.118 Specifically, we find that Antigua's determination that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector as that in which a violation was found is consistent with the requirements of Article 22.3.(b), and that its determination that it is also not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement and that the circumstances are serious enough is consistent with the requirements of Article 22.3(c) of the DSU.

4.119 Accordingly, we find that Antigua may seek to suspend obligations under the TRIPS Agreement.

V. EQUIVALENCE AND IMPLEMENTATION OF SUSPENSION OF OBLIGATIONS UNDER THE TRIPS AGREEMENT

5.1 The United states has requested the Arbitrator to require Antigua to specify how it will ensure that any suspension of concessions or other obligations does not exceed the level of nullification and impairment found by the Arbitrator. We now address this matter.

[…]

B. ANALYSIS BY THE ARBITRATOR

5.6 In its request for authorization to suspend concessions or other obligations, Antigua identified certain obligations under the TRIPS Agreement, that it proposed to suspend. Specifically, Antigua indicated that it intends to take countermeasures in the form of suspension of concessions and obligations under the following sections of Part II of the TRIPS:

Section 1:	Copyright and related rights
Section 2:	Trademarks
Section 4:	Industrial designs
Section 5:	Patents
Section 7:	Protection of undisclosed information.

5.7 As we have determined above, Antigua may seek to suspend obligations under the TRIPS Agreement. In order for such suspension to be equivalent to the level of nullification or impairment of benefits accruing to Antigua, it must not exceed US$21 million.

5.8 It is incumbent on Antigua to ensure that, in applying such suspension, it does not exceed this level. Antigua has declined to provide any explanation on how it proposes to apply such suspension and how it will ensure that the level of the proposed suspension does not exceed the level to be authorized by the DSB. We regret that Antigua did not find it useful to provide such explanations.

5.9 We note that our mandate does not allow us, in reviewing the equivalence of the proposed suspension with the level of nullification or impairment, to consider the "nature" of the obligations to be suspended.[682] We understand this to mean that we may not question the complaining party's choice of specific obligations to be suspended (other than in the context of considering a claim that the principles and procedures of Article 22.3 have not been followed) and that we must assess the level of the proposed suspension, rather than its form, against the level of nullification or impairment.

[682] See Article 22.7 of the DSU ("The arbitrator acting pursuant to paragraph 6 shall not review the nature of the concessions or other obligations to be suspended...").

5.10 At the same time, it is important that the form that is chosen in order to enact the suspension is such as to ensure that equivalence can and will be respected in the application of the suspension, once authorized. The form should also be transparent, so as to allow an assessment of whether the level of suspension does not exceed the level of nullification. We also note that the suspension of obligations under the TRIPS Agreement may involve more complex means of implementation than, for example, the imposition of higher import duties on goods, and that the exact assessment of the value of the rights affected by the suspension is also likely to be more complex.[683]

5.11 In the light of these considerations, we note the remarks made by the arbitrators in *EC – Bananas III (Ecuador),* on the suspension of TRIPS obligations in that case.[684] We consider these remarks to also be relevant to this case, in that the same considerations will be pertinent to the manner in which Antigua might implement a suspension of its obligations under the TRIPS Agreement.

5.12 Like the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)*[685], *US – 1916 Act (EC) (Article 22.6 – US)*[686], and *US - Byrd Amendment (Article 22.6 - EC)*[687], we also note that the United States may have recourse to the appropriate dispute settlement procedures in the event that it considers that the level of concessions or other obligations suspended by Antigua exceeds the level of nullification or impairment we have determined for purposes of the award.

5.13 Finally, we note that Article 22.8 of the DSU provides that:

> "The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or ruling provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. ..."

VI. AWARD

5.14 For the reasons set out above, the Arbitrator determines that the annual level of nullification or impairment of benefits accuing to Antigua in this case is US$21 million and that Antigua has followed the principles and procedures of Article 22.3 of the DSU in determining that it is not practicable or effective to suspend concessions or other obligations under the GATS and that the circumstances were serious enough. Accordingly, the Arbitrator determines that Antigua may request authorization from the DSB, to suspend the obligations under the TRIPS Agreement mentioned in paragraph 5.6 above, at a level not exceeding US$21 million annually.

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[683] This is illustrated well by the explanations provided by Ecuador in the *EC – Bananas III (Ecuador) (Article 22.6 – EC)* case as to how it proposed to implement the proposed suspension of TRIPS obligations, including through the setting up of specific government-run schemes.

[684] *EC – Bananas III (Ecuador) (Article 22.6 – EC), section V (paras. 139 to 165).*

[685] *EC – Hormones (US) (Article 22.6 – EC),* para. 82.

[686] *US – 1916 Act (EC) (Article 22.6 – US*), para.9.2.

[687] *US - Byrd Amendment (Article 22.6 – EC),* para. 4.27.

2-7. MODIFICATION AND WITHDRAWAL OF CONCESSIONS – ARTICLE XXI GATS

2-7-A. Procedures for the implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)

Adopted by the Council for Trade in Services on 19 July 1999

Notification of Modification or Withdrawal

1. A Member intending to modify or withdraw a scheduled commitment in accordance with Article XXI (the "modifying Member") shall transmit a notification to that effect, no later than three months before the intended date of implementation of such modification or withdrawal, to the Secretariat which will distribute the notification to all other Members in a secret document. The intention by a Member to modify or withdraw scheduled commitments shall be included in the agenda of the next meeting of the Council for Trade in Services.

2. The notification shall include a list of the commitments which it is intended to modify or withdraw. For each such commitment the notification shall indicate whether the intention is to modify or to withdraw it, in whole or in part; the proposed date for implementing such modification or withdrawal; and the exact nature of any proposed modification.

Negotiations on Compensation

3. Any Member which considers that its interests under the Agreement may be affected by the proposed modification or withdrawal ("affected Member") shall communicate its claim in writing to the modifying Member and at the same time notify it to all other Members through the Secretariat. Such claims of interest must be made no later than 45 days after the date of circulation by the Secretariat of the notification referred to in paragraph 1 above. If by that date no Member has submitted a claim that it is an affected Member, the modifying Member shall be free to implement the proposed modification or withdrawal, after completing the certification procedure under paragraphs 20 to 22 and shall submit a notification of the date of such implementation to the Secretariat, for circulation to the Members of the WTO.

4. The modifying Member and any affected Member which has identified itself under paragraph 3 above shall negotiate with a view to reaching agreement within three months following the last date on which such a claim of interest may be made. This period of negotiation may be extended by mutual agreement and the terms of such an agreement, including the period of extension, shall be notified to all other Members through the Secretariat.

5. Upon completion of each negotiation conducted under paragraph 2(a) of Article XXI, the modifying Member shall send to the Secretariat a joint letter signed by the Members concerned, together with a report concerning the results of the negotiations which shall be initialled by the Members concerned. The Secretariat will distribute the letter and the report to all Members in a secret document.

6. A modifying Member which has reached agreement with all Members that had identified themselves under paragraph 3 above shall, no later than fifteen days after the conclusion of the negotiations, send to the Secretariat a final report on negotiations under Article XXI, which will be distributed to all Members in a secret document. After completing the certification procedure under paragraphs 20 to 22, such a modifying Member will be free to implement the changes agreed upon in the negotiations and specified in the report, and it shall notify the date of implementation to the Secretariat, for circulation to the Members of the WTO. Such changes shall not exceed the modification or

withdrawal initially notified and shall include any compensatory adjustment agreed upon in the negotiations.

Arbitration

7. If the modifying Member and a Member that had identified itself under paragraph 3 above do not reach agreement by the end of the period of negotiations referred to in paragraph 4, such an affected Member may request arbitration. Such a request shall be made in writing to the modifying Member and the Secretariat no later than 45 days after the end of that period.

8. If no Member that had identified itself under paragraph 3 above submits a timely arbitration request under paragraph 7, the modifying Member shall be free to implement the proposed modification or withdrawal, after completing the certification procedure under paragraphs 20 to 22**.** In cases where agreement has been reached with some but not all affected Members and no request for arbitration has been made, the modifying Member shall be free to implement in accordance with the procedures of paragraph 6 above, after completing the certification procedure under paragraphs 20 to 22, the proposed modification or withdrawal with the compensatory adjustments agreed upon in the negotiations, but not exceeding the proposed modification or withdrawal initially notified. The modifying Member shall notify the date of implementation to the Secretariat, for circulation to the Members of the WTO.

9. If an affected Member submits a timely arbitration request under paragraph 7, the modifying Member shall not implement any modification or withdrawal until it has received the arbitration body's findings and is in conformity with those findings.

10. The appointment of the arbitration body shall be subject to mutual agreement of the parties concerned. If the parties to the arbitration cannot agree on the arbitration body within twenty days from the date of request for the arbitration, the arbitration body shall be appointed at the request of any party by the Director-General of the WTO, after consulting the parties, within ten days thereafter. The arbitration body shall consist of three arbitrators, unless the parties agree to a different uneven number. The arbitration body shall be chosen from among persons with relevant legal, economic, financial or technical expertise, including expertise in the agreement, with respect to the matter referred to the arbitration body. Except as the parties otherwise agree, the arbitration body shall not consist of citizens of any of the parties to the arbitration. Where a party to an arbitration is a developing country Member, the arbitration body shall, if the developing country Member so requests, include at least one arbitrator from a developing country Member.

11. The "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes" shall apply. The arbitration body may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. The arbitration body shall inform the parties to the arbitration of any consultations with experts. There shall be no *ex parte* communications with the arbitration body concerning matters under consideration by the arbitration body.

12. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration. However, if an affected Member having reached an agreement with the modifying Member under paragraph 4 above were to decide not to participate in the arbitration, it shall nonetheless be deemed to have participated in the arbitration with respect to the modification or withdrawal in question.

13. The arbitration body shall have the following terms of reference unless the parties to the arbitration agree otherwise within ten days from the request for arbitration:

"To examine the compensatory adjustments offered by (name of modifying Member) or requested by (affected Member requesting the arbitration) and to find a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to the negotiations. In such examination, the Arbitration body shall take into account any agreement reached, in negotiations under paragraph 4. above, between the modifying Member and any affected Member".

14. The arbitration body's findings shall be communicated to the parties to the arbitration through the Secretariat within three months of the appointment of the arbitration body.

15. When an arbitration has been conducted in accordance with paragraphs 7 through 14 above, the modifying Member shall be free to implement a modification or withdrawal which is in conformity with the findings of the arbitration body after completing the certification procedure under paragraphs 20 to 22, and shall notify the date of implementation to the Secretariat for circulation to the Members of the WTO together with the findings of the arbitration.

16. If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

17. The affected Member shall notify the Council for Trade in Services of the measures it intends to take in accordance with paragraph 16, one month before exercising its right to take these measures.

18. Modifications or withdrawals implemented in accordance with paragraph 16 shall be terminated if the modifying Member complies with the findings of the arbitration body under paragraph 14.

19. The modifying Member may withdraw at any time its notification under Article XXI:1 of the Agreement and paragraph 1 above, by notice to the Secretariat. Upon receipt of such a withdrawal, Article XXI and these procedures shall cease to apply and the modifying Member shall be obligated to maintain the commitment in question in conformity with its Schedule and Part III of the Agreement.

Formal aspects of the procedures for modification of schedules of commitments

20. Modifications in the authentic texts of Schedules annexed to the GATS which result from action under Article XXI, shall take effect by means of Certification. The draft schedule clearly indicating the details of the modifications shall be communicated to the Secretariat for circulation to all Members. The modifications shall enter into force upon the conclusion of a period of 45 days from the date of their circulation or on a later date to be specified by the modifying Member, provided no objection has been raised by a Member on the ground that the draft schedule does not correctly reflect the results of the action under Article XXI and/or that the modification or withdrawal contained in the draft schedule exceed those initially notified. A Member making an objection should to the extent possible identify the specific elements of the modifications which gave rise to that objection. At the end of the 45-day period, if no objection has been raised, the Secretariat shall issue a communication to all Members to the effect that the Certification procedure has been concluded, indicating the date of entry into force of the modifications.

21. Any Member wishing to object shall submit a notification to that effect to the Secretariat for circulation to all Members and shall enter into consultations with the modifying Member with a view to reaching a satisfactory resolution of the matter as soon as possible. When an objection has been notified,

the Certification procedure shall be deemed concluded upon the withdrawal of the objection by the objecting Member or the expiry of the period in which objections may be made, whichever comes later. Such a withdrawal shall be communicated to the Secretariat. When more than one objection has been raised, the Certification will be deemed concluded upon the withdrawal of the objections by all objecting Members. The Secretariat shall issue a communication informing all Members of the withdrawal of the objection(s) and the conclusion of the Certification procedure, indicating the date of entry into force of the modifications.

22. If the consultations referred to in paragraph 21 result in any changes to the draft schedule submitted for Certification, the modifying Member shall promptly submit them to the Secretariat for circulation to all Members. This modification shall enter into force provided no objection has been raised by a Member within 15 days from the date of its circulation or on later date to be specified by the modifying Member, on the grounds referred to in paragraph 20. A Member making an objection should to the extent possible identify the specific elements of the modification which gave rise to that objection. If no objection is raised by the end of the 15-day period, the Secretariat shall issue a communication to all Members to the effect that the Certification procedure has been concluded, indicating the date of entry into force of the modifications. If an objection has been raised, the procedure described in paragraph 21 shall apply**.**

General Provisions

23. In the application of these procedures Members shall take full account of the special situations of individual developing countries, in particular the least developed countries.

24. Following the lapse of three years from entry into force of these Procedures, the Council for Trade in Services shall, at the request of any Member, review the operation of these Procedures. In such a review, the Council for Trade in Services may agree to amend any of the provisions of the Procedures, including those relating to arbitration.

2-7-B. Modification of gambling concessions by the United States

Meeting of the Dispute Settlement Body on May 22, 2007

Minutes of the Meeting, WT/DSB/M/232

[…]

4. United States – Measures affecting the cross-border supply of gambling and betting services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda

(a) Report of the Panel (WT/DS285/RW)

41. The Chairman recalled that at its meeting on 19 July 2006, the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Antigua and Barbuda concerning the implementation by the United States of the recommendations and rulings of the DSB pertaining to this dispute. The Report of the Panel contained in document WT/DS285/RW had been circulated on 30 March 2007 as an unrestricted document. The Panel Report was now before the DSB for adoption at the request of Antigua and Barbuda. This adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

[…]

46. As pleased as [the representative of Antigua and Barbuda] was by this Panel Report, it was deeply saddened by the announcement by the United States on 4 May 2007 that it intended to withdraw its commitment for gambling and betting services under Article XXI of the GATS. This astounding and unprecedented action not only ran contrary to the object and purpose of the GATS, the DSU and the other WTO Agreements, but also boded very poorly for the future of dispute resolution by small, developing countries at the WTO. In the first place, it was not a little ironic that in the face of the concept of liberalization written into the GATS and the objectives of the Doha Round, the United States would be taking action at this time directly contrary to those objectives. It was difficult to see how the United States could on the one hand encourage and perhaps insist that other Members expand their commitments in services while simultaneously erecting a new barrier to trade in services from other Members. This was particularly so when one considered that the US component of the remote gambling industry was estimated to be in excess of US$10 billion annually.

47. His delegation also did not believe that this type of action was a suitable tactic in dispute resolution. There was something clearly wrong with the concept that after a long, difficult struggle covering years of dispute resolution at the WTO, an offending Member could ultimately avoid the consequences of its loss by withdrawing the commitment that had given rise to the claim in the first place. And, his delegation intended to actively resist this effort by the United States. As far as Antigua and Barbuda was concerned, this dispute had been resolved and the United States remained obligated to comply. If the United States wanted to try to shut out potential future liability to other Members, it was welcome to try. But this dispute was settled and Antigua and Barbuda was entitled to and would be expecting market access.

48. His delegation noted that in its public statements regarding the proposed withdrawal, the United States was apparently trying to limit the potential impact of its action, by stressing it was "clarifying" its schedule, rectifying a "mistake" that no other Members could have "reasonably expected" to result in a commitment to the cross-border provision of gambling and betting services due to "strong domestic laws against" gambling services. Of course, this assertion was untenable, particularly to the 100 or more of

fellow Members who had been able to exclude gambling from their respective schedules under the GATS. All also understood that WTO Members were entitled to rely on the commitments made in the schedules of other Members without having to evaluate those commitments in light of domestic law. Even if it were, however, a cursory look at United States law and its domestic market would support exactly the contrary conclusion with respect to the voracious US appetite for and interest in remote gambling. The United States was the world's largest consumer and exporter of gambling services. Also, as the Article 21.5 panel in this case recognized, the United States had a large, sanctioned domestic industry. While the withdrawal of a commitment might be at least understandable if the United States had possessed a strongly anti-gambling culture, this was certainly not the case here. The unavoidable conclusion was that the United States sought with this action to erect a trade barrier to foreign competition in order to protect and enhance its own, flourishing domestic industry.

49. His delegation noted as well that if the United States believed it had made the commitment in error, it would have made sense to inform Antigua and Barbuda and other WTO Members much earlier than at the end of this hard-fought dispute. Back in 1997, senior US Administration officials had met with then Director of Offshore Gaming to discuss suggestions as to how to improve our regulatory scheme and offer assistance in Antigua government's efforts to supervise the industry. If a "mistake" had been made, why not tell us then? He believed that all knew the answer to that question. What was particularly disturbing was that the United States was proposing this unprecedented step without having made any attempt whatsoever to compromise this dispute or to enter into any kind of settlement with Antigua and Barbuda. In fact, despite repeated pleas to the United States to do so, it had never engaged with Antigua and Barbuda in any discussions with a view to settlement or compromise. The only solution Antigua and Barbuda had ever been offered by the United States was for Antigua and Barbuda to abandon its claim and go away.

50. In a system that was replete with sincere references to good faith, fair dealing and cooperative resolution of disagreements, it was this failure to engage with Antigua and Barbuda at all that was most troubling. His delegation was unable to understand why there was no effort to find some middle ground. It was and remained ready to find a fair and reasonable solution. But it needed the other side to show up to do so. Antigua and Barbuda had been told simply that the United States "cannot change its laws" and "cannot stop enforcing its laws". One might be excused for expecting the United States to do just that. Indeed, was that not what was required in many if not most circumstances when a Member was asked to bring its measures into compliance with recommendations and rulings of the DSB?

51. This action, particularly in light of the very difficult, expensive and time-consuming process that WTO dispute resolution required, during all of which the United States had been aggressively seeking to destroy his country's industry through prosecution, threat of prosecution and interference with financial instruments and other normal means of commerce, reinforced Antigua's grave concern over whether WTO dispute resolution was actually a viable alternative for small countries. As the United States had apparently decided it would not comply with the DSB's rulings in this case, his country was left in a position of assessing what real recourse was left. Encouraged in large part by the United States itself back in the mid-1990s, his government had invested heavily in the development of this industry over more than a decade. A very sizable portion of its slender resources had been used to develop, regulate, supervise and legitimize this industry. Such an investment did not come lightly, nor was it easily replaced or replicated.

52. Antigua and Barbuda did not think that this assault on the system could be abided. Allowing this tactic to succeed and not only prevent this small country from reaping the benefits it was led to expect from WTO dispute resolution, but also enabling the United States to erect a high and firm barrier to international competition was in no one's best interest. His country was resolved to continue the process as far and for as long as it could be pursued. It intended to put this system to the full and final test. At the same time, his delegation asked other WTO Members to let their views on this be known. For starters, it

strongly encouraged all member States to submit a claim for compensatory adjustment from the United States as a result of the proposed withdrawal of the commitment. Article XXI of the GATS allowed any Member who might be affected by the withdrawal to submit a claim for compensation. As every claim was generally prospective, it should not matter whether a Member had a current industry to sustain a claim. Not only did his country think that Members should press claims for compensatory adjustments as a matter of economic self-interest, but it also believed it important that the process was made as difficult as possible for the United States. His country in fact sincerely hoped that the United States would realize that a withdrawal of the commitment was in no one's long term interest and reversed this ill-advised course of action. His country would also encourage other Members who were opposed to this action to express themselves to the United States delegation and publicly. While this case might involve services that some Members might not choose to offer or consume, at the end of the day the commodity was irrelevant. What was relevant were the systemic issues raised by this dispute. To a large extent his country had been fighting these issues alone over the past few years. His country would hope that others might add their voices to the chorus if the WTO was to reach its potential as a truly fair and balanced international trading system. He than thanked the Chairman and the DSB Members for their attention to this matter of most urgent concern to his country. His country again recommended the adoption of the Panel Report and looked forward to support and encouragement as his country pressed on.

53. The representative of the United States said that his delegation wished to begin by thanking the members of the compliance Panel and the Secretariat for their hard work throughout the course of this dispute. The United States also wished to note that it was pleased that the Panel had recognized that, depending on the nature of the DSB's recommendations and rulings, there may be circumstances in which compliance could be achieved without changing the text of a measure at issue, for example where the factual or legal context for that measure had changed. This dispute involved the regulation of cross-border gambling. In the United States, as well as in many other countries, gambling was viewed as an issue of public morals and public order that included the protection of children and other vulnerable groups. As a result, gambling was highly regulated. The threshold issue in this dispute was whether the United States had any obligation under the GATS with respect to cross-border gambling. In particular, the United States schedule did not even include the word "gambling", and the United States believed that its schedule was sufficiently clear in not covering gambling services. The United States had never intended such a commitment.

54. Indeed, in the course of the dispute, the United States had emphasized that its interpretation of its own schedule was supported, among other things, by the circumstances surrounding the negotiations. In particular, the United States had explained that under federal criminal laws, the international transmission of wagers by means of wire transmission had been unlawful since at least the early 1960s. Accordingly, the United States had explained that no one involved in the Uruguay Round negotiations in the mid-1990s could possibly have thought that the United States would make a market access commitment on cross-border gambling. No Member had suggested otherwise during the Round, nor had any Member raised the possibility that the United States would include a gambling commitment in its schedule. Likewise, most other major WTO economies had not included cross-border gambling in their schedule of services commitments. In sum, cross-border gambling services had not been an issue of negotiation during the Uruguay Round.

55. The first time that any WTO Member had ever raised the possibility that the US GATS schedule covered cross-border gambling was when Antigua and Barbuda had initiated this dispute in 2003 – ten years after the US schedule had been drafted. The original Panel had found that the US schedule had not been drafted with sufficient clarity to ensure that gambling services had been excluded from the broad category of "recreational services". The United States would emphasize, however, that the Panel had also explicitly acknowledged that the US coverage of gambling services appeared to be unintentional. The United States reiterated, because it was an important point, that the Panel had appreciated that the United States did not intend to cover gambling services in its schedule of services commitments.

56. The Appellate Body had upheld the Panel's construction of the US schedule, but on different grounds. Finding that the US schedule was ambiguous on its face, the Appellate Body had looked to a UN system of services classification for an interpretation of the coverage of "recreational services". It was important to note that although many Members had used that system as the basis for constructing their GATS schedules, the United States had not. Despite the unexpected findings that the United States GATS schedule had extended to cross-border gambling, the United States believed that it had other valid defences to the claims raised by Antigua. And in fact, the Appellate Body had agreed with the United States that the US federal statutes at issue in the dispute were "measures ... necessary to protect public morals or to maintain public order" within the meaning of Article XIV(a) of the GATS. However, the Appellate Body had also found that on one narrow issue, the United States could not meet the requirements of the GATS Article XIV chapeau. In particular, the Appellate Body had found that the United States had not shown that US legal prohibitions applied equally to foreign and domestic suppliers of remote betting services for horse racing. Unfortunately, the United States had not been able to persuade the Article 21.5 Panel that – as the US Department of Justice had long maintained – US gambling laws governing horse racing applied equally to foreign and domestic suppliers. Given that this was largely a factual issue, the United States had decided not to appeal the Panel's findings, and instead to accept the result.

57. The United States was thus left with a finding of GATS-inconsistency with respect to an area of services regulation that it had never intended to be included in its GATS schedule, and that was viewed in the United States as an issue of public morality and public order, involving the protection of children and other vulnerable groups, as opposed to an issue of international trade. Accordingly, the United States had decided to invoke the established multilateral procedures addressed to situations in which a Member believed it must modify its GATS schedule of services concessions. In particular, on 4 May 2007, the United States had initiated the procedure provided for under Article XXI of the GATS. In this way, the United States intended to bring its GATS obligations into conformity with a long-standing and well-recognized public policy. As provided under those procedures, this matter would be discussed at the next meeting of the Council for Trade in Services.

58. In sum, the United States accepted the results of the dispute settlement process, which included a finding that the United States had not shown that its gambling laws were consistent with WTO rules. In order to bring the United States into compliance and to resolve this dispute permanently, the United States had decided to invoke the procedures provided for under the GATS to modify the schedule of US commitments. This modification would ensure that the US GATS schedule reflected the original US intent of excluding gambling from the scope of US commitments.

59. The representative of the European Communities said that the GATS allowed WTO Members to regulate or ban internet gambling services for reasons of public policy, including morality and consumer protection. However, this had to be done in a non-discriminatory fashion. This was what the United States had refused to do, as established by the Appellate Body and now confirmed by the compliance Panel to be adopted at the present meeting. The EC regretted this. The EC had hoped for a non-discriminatory solution, with the same rules applying to US and foreign companies. The United States had now notified its intention to modify its commitment on "Other Recreational Services" in its GATS Schedule of Specific Commitments, by removing gambling and betting services from the sub-sectoral coverage. This showed that the United States was not willing to bring the relevant legislation into line with the US current GATS commitments which it, therefore, needed to modify. Article XXI of the GATS was the right procedure in this context. The EC wished to thank the Panel for the useful guidance that it had provided with regard to what was a "measure taken to comply" with the relevant recommendations and rulings. This should help all Members ensure prompt and adequate compliance with the rulings of the DSB with regard to any measures that had been subject to dispute settlement.