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Internet gambling

Internet gambling and betting services: When the GATS' rules are not applied due to the public morals/public order exception. What lessons can be learnt?

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ABSTRACT

This paper explores the issues arising from a complaint made by Antigua and Barbuda (Antigua) to a World Trade Organization (WTO) Dispute Resolution Panel. This concerned US State and Federal law regulation that allegedly made it unlawful for suppliers, located outside the United States (US), to supply Internet gambling and betting services to consumers in the United States. As such, this called into question the application of the General Agreement on Trade in Services (GATS). This is the first reported instance of the WTO procedure in the digital environment.

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1. Introduction

Internet gambling (remote supply of) is an on-going flourishing business. Whoever surfs on the Internet, unless he/she uses filters or a browser that restricts pop-up windows and banners,

may have seen numerous invitations to take part in these kinds of activities. The revenues generated by this market are colossal² (with taxes applicable to luxury products in some jurisdictions).³ However, in principle, governments tend to be restrictive in their approach to gambling, especially to

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² "In a recent report, gaming analysts estimate that in 2003 revenues from Internet gambling industry-wide will be \$5.0 billion, or approximately 4.3 percent of the total \$116 billion in business-to-consumer global e-commerce. In the view of gaming analysts, the international markets (non-US customers) represent the future of the industry's growth", United States General Accounting Office, Report to Congressional Requesters, *Internet Gambling. An Overview of the Issues*, December 2002, p.6, available at: www.gao.gov/new.items/d0389.pdf, last visited 27-04-2005.

³ "(...) Great Britain taxes legal betting operations very heavily. Some of the best known operators are moving to other parts of the British Commonwealth. Ladbrokes, for example, calls itself the world's biggest bookmaker. Its website is licensed by the government of Gibraltar. Ladbrokes.com, launched in February 2000, highlights repeatedly that bettors pay no tax. The loss of not just future tax revenue from online wagers but existing tax revenue from wagers placed by telephone and in person is forcing the government to reexamine its present position of simply ignoring Internet gambling", Nelson Rose, "Gambling and the Law: The Future Legal Landscape for Internet Gambling", available at: www.gamblingandthelaw.com/antigua.html, last visited 27-04-2005.

cross-border gambling. They try to maintain certain monopolies⁴ and they see cross-border gambling as a facilitator of crime or harmful conduct that challenges society's public morals.⁵

The European Court of Justice (ECJ) has intervened in a number of cases in this regard, even before the explosion of the industry on the Internet. Most of the cases concerned obstacles existing in Member States to the freedom to provide such services. However, the ECJ, in the *Schindler* case, deemed that "[t]he Treaty provisions relating to freedom to provide services do not preclude [national] legislation (...), in view of the concerns of social policy and of the prevention of fraud which justify it".⁶ The *Läärä* case was decided on similar terms.⁷ In later cases, such as *Zenatti*⁸ and *Gambelli*,⁹ the ECJ discussed the need for proportionality in the restrictions imposed, in the light of the aims which might justify their adoption.

Recently, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) has been requested to solve

a case concerning objections to the limitation upon cross-border provision of Internet gambling and betting services.¹⁰ For the very first time, the WTO Appellate Body was called upon to address the general exception provision of the General Agreement on Trade in Services (GATS), contained in Article XIV. Moreover, it is the first time that a "public morals" exception has been considered at WTO level (e.g. GATT).¹¹ Article XIV GATS foresees the possibility for a Member State not to apply the GATS rules if certain conditions are given, provided that public policy objectives are at stake.

This paper will evaluate, firstly, the methodology followed by the WTO Appellate Body for the decision-making in the present case through the application of Article XIV GATS. The terms of reasoning followed by the Appellate Body are of high importance for Member States in conducting risk-assessment procedures when adopting measures that would otherwise constitute a barrier to trade, but respond to a relevant public policy objective. Companies willing to provide e-services¹² that may be blocked due to this kind of barrier may also assess the right of the country in question to impose such obstacles, in the light of the requisites described in the methodology. Up to now, exceptions had been invoked in cases where scientific evidence could be considered, such as health or environmental cases. However, societies may make political choices that are based on ethics, history, and fundamental rights, etc. It has to be noted that the increase in e-services, that are trans-national in nature, will concomitantly augment the need to proceed with such an assessment, particularly in those areas where commitments have been made under the GATS framework.

Secondly, the paper reflects on the relevance of this case in relation to the role of the WTO as far as Internet regulation is concerned. The likelihood of deeper political integration within the framework of WTO seems remote, so discussion will focus on "Internet regulation" in general. Thus, the use of an "exceptions mechanism" in those areas excluded from its current application would be the preferable methodology if further rules are to be adopted to deal with e-commerce issues, such as those related to trade in goods, services, and intellectual property.

⁴ For instance, Denmark has adopted the Danish Act on Certain Games, Lotteries and Bets. It renders illegal for any service provider, operating under a gambling licence of another Member State than Denmark, to advertise, facilitate participation in or supply gaming services. See: European Commission Press Releases, "Free movement of services: Commission inquires into Danish restrictions on sports betting", available at: www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/401&format=HTML&aged=1&language=EN&guiLanguage=en, last visited 27-04-2005.

⁵ "Representatives of law enforcement agencies, regulatory bodies, and the credit card and gaming industries expressed mixed views regarding the vulnerability of Internet gambling to money laundering. Law enforcement officials said they believed that Internet gambling could potentially be a powerful vehicle for laundering criminal proceeds at the relatively obscure "layering" stage of money laundering. They cited several characteristics of Internet gambling that they believed made it vulnerable to money laundering, including the volume, speed, and international reach of Internet transactions and the offshore locations of Internet gambling sites. In their view, these characteristics promoted a high level of anonymity and gave rise to complex jurisdictional issues. Law enforcement officials acknowledged the lack of adjudicated cases involving money laundering through Internet gambling sites but cited what they believed to be contributing factors, including the lack of any industry regulations or oversight. Banking and gaming regulatory officials did not view Internet gambling as being particularly susceptible to money laundering, especially when credit cards, which create a transaction record and are subject to relatively low transaction limits, are used for payment. Likewise, credit card and gaming industry officials did not believe Internet gambling posed any particular risks in terms of money laundering. Gaming industry officials did not believe that Internet gambling was any more or less susceptible to money laundering than other types of electronic commerce and pointed out that, in their view, the financial industry, which is responsible for the payments system, is better suited to monitoring for suspicious activity in the area than the gaming industry itself", United States General Accounting Office, *Internet Gambling. An Overview of the Issues*, December 2002, p. 5.

⁶ ECJ, Case C-275/92.

⁷ ECJ, Case C-124/97.

⁸ ECJ, Case C-67/98.

⁹ ECJ, Case C-243/01.

¹⁰ WTO, Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, available at: www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf, last visited 02-05-2005. See also: WTO, Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, available at: www.wto.org/english/tratop_e/dispu_e/285r_e.pdf, last visited 02-05-2005.

¹¹ For a comprehensive study about the moral exception in Article XX GATT, see: Steve Charnovitz, "The Moral Exception in Trade Policy", *Virginia Journal of International Law*, Summer 1998, available at: www.worldtradelaw.net/articles/charnovitzmoral.pdf.

¹² Since private parties have no possibility to claim at WTO level, the e-services sector has to be quite significant for a country to bring the case to the DSB.

2. The case

Antigua and Barbuda (Antigua) submitted a complaint to a WTO Panel concerning measures of state¹³ and federal law that allegedly made it unlawful for suppliers, located

¹³ The consideration of state laws has been rejected by the DSB.

¹⁴ The relevant part of the Wire Act (18 U.S.C § 1084) 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." In relation to the Travel Act (18 U.S.C § 1952), the following part was quoted:

- "(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
- (1) distribute the proceeds of any unlawful activity; or
 - (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."¹⁴

The relevant part of the Illegal Gambling Business Act (18 U.S.C § 1955) has been pointed out to be the following:

- "(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;
 - (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
 - (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.
- (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."

outside the United States (US), to supply gambling and betting services to consumers in the United States. Antigua claimed that the restrictions imposed by the US, through federal and state laws, resulted in a "total prohibition" on the cross-border supply of the said services, contrary to US obligations under the GATS. Antigua asserted that the GATS Schedule, in respect of the US, included specific commitments on gambling and betting services. Thus, Antigua argued that, since the US had made full market access and national treatment commitments, in maintaining the measures at issue the US was acting in breach of its obligations under the GATS Schedule, as well as under Articles VI, XI, XVI, and XVII of the GATS.

The federal statutes under scrutiny were the Wire Act, the Travel Act and the Illegal Gambling Business Act.¹⁴ The US maintained that it excluded "sports" from its commitments, which included "gambling" in its ordinary meaning. It also argued that none of the laws imposed a limitation on the number of service suppliers "in the form of numerical quotas" or limitations on service operations or output "expressed as designated numerical units in the form of quotas". Furthermore, said the US, those laws were justified under paragraphs (a) and (c) of Article XIV of the GATS.

3. Methodology for the application of Article XIV GATS exceptions

In a previous paper,¹⁵ following an assessment of the application made by the DSB of Article XX GATT' exceptions, a four-step methodology has been proposed for handling exceptions to the WTO rules. The steps are the following:

- First step: determine whether the measure under discussion is inconsistent with a GATS' provision;
- Second step: evaluate whether "the laws or regulations with which compliance is being secured are themselves 'not inconsistent' with the General Agreement";
- Third step: evaluate whether the measures are "necessary to secure compliance" with those laws or regulations;

¹⁵ María Verónica Pérez Asinari, "The WTO and the Protection of Personal Data. Do EU Measures Fall within GATS Exception? Which Future for Data Protection within the WTO e-Commerce Context?" BILETA Conference, *Controlling Information in the Online Environment*, Institute of Computer & Communications law, Queen Mary, University of London, London, 14 and 15 April 2003, available at: www.bileta.ac.uk/03papers/perez.html, last visited 20-01-2005. See also: María Verónica Pérez Asinari, "Is there any Room for Privacy and Data Protection within the WTO Rules?", *The Electronic Communications Law Review*, vol. 9, n. 4, 2002, pp. 249-280. The cases analyzed in those papers were: "United States – Section 337 of the Tariff Act of 1930", "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes", - "United States – Standards for Reformulated and Conventional Gasoline", "Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef", - "United States – Import Prohibition of Certain Shrimp and Shrimp Products", etc.

- *Fourth step:* assess whether or not the measures are “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.

However, in the case of the GATS, an enquiry as to whether the country in question has made any specific commitments in the service sector under discussion must precede the application of the four-step methodology.¹⁶ Also, with regard to “Most-Favoured Nation Treatment”, consideration must be given as to whether the member can maintain a measure inconsistent with that status, on the basis that such a measure is listed in, and meets the conditions within the Annex dealing with Article II Exemptions.

This paper will examine the findings of the Appellate Body in the present case to the extent that these are relevant to an evaluation of the methodology that follows on from the application of the exception.

3.1. Findings of the Appellate Body

The Appellate Body began with the arguments of the participants. It then proceeded to analyse the points raised in the Appeal: (a) the measures at issue; (b) the interpretation of the specific commitments made by the US in its GATS Schedule; (c) the Article XVI of the GATS: market access; and (d) the Article XIV of the GATS: general exceptions. Given this scenario, it is possible to assess how the Appellate Body has used the methodology for the application of Article XIV GATS exceptions. In what follows, a summary is made of its findings.

3.1.1. Measures at issue

First of all, the parties disputed the “measure” being challenged. Thus, the Appellate Body reviewed the Panel

finding that a “‘total prohibition’ on the cross-border supply of gambling and betting services” could not constitute an autonomous measure that could be challenged per se. Second, it considered whether a practise could be understood as an autonomous measure if it could be challenged in and of itself. Third, it evaluated the US’ allegation that Antigua failed to make a prima facie case of inconsistency with Article XVI in regard to Federal and State laws and that, therefore, the Panel should not have ruled on these claims.

Finally, the Appellate Body considered whether the Panel had erred or not in examining whether the Wire Act, the Travel Act and the Illegal Gambling Business Act were consistent with the US obligations under Article XVI. It would then be possible to consider whether the relevant measures could eventually affect cross-border supply of gambling and betting services.

3.1.2. Interpretation of the specific commitments made by the US in its GATS Schedule

The US appealed the finding that maintained that its Schedule under the GATS included specific commitments on gambling and betting services under subsection 10.D. The US argued that, by excluding “sporting” services from the scope of subsection 10.D of its GATS Schedule, it excluded gambling and betting services from the scope of the specific commitments that it undertook therein.

The Appellate Body made use of Articles 31 and 32 of the Vienna Convention and concluded that a proper interpretation, according to the principles codified in those legal rules, led to the same result that the Panel had reached. Thus, the US GATS Schedule had to be understood as making a specific commitment with regard to gambling and betting services.

3.1.3. Article XVI of the GATS: market access

Article XVI GATS reads as follows:

- “1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
 - (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
 - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (c) limitations on the total number of service operations or on the total quantity of service output

¹⁶ “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 (...). 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. (...)”, World Trade Organization, “Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions”, available at: www.wto.int/english/tratop_e/serv_e/guide1_e.htm, last visited 21-04-2005.

The United States of America – schedule of specific commitments Modes of supply: 1) Cross-border supply; 2) Consumption abroad; 3) Commercial presence; 4) Presence of natural persons				
Sector or subsection	Limitations on market access	Limitations on national treatment	Additional commitments	Additional commitments
ii. Sector-specific commitments				
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	1) None 2) None 3) None 4) None		
B. News agency services	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None		
C. Libraries (archives, museums and other cultural services)	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None		
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	1) None 2) None 3) None 4) None		

expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.”¹⁷

This Article enumerates certain obligations of market access that Member States must fulfill when they make specific commitments. Having stated that the US had made such commitments vis-à-vis the gambling and betting sector, the Panel considered the consistency of the measures at issue against the US obligations under Article XVI.

Antigua claimed that the measures at issue prohibited cross-border supply of gambling and betting services, representing a quantitative limitation within the scope of subparagraphs (a) and (c) of Article XVI. The Panel considered that the prohibition resulted in a “zero quota” and, therefore, constituted a limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a). It also represented 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). The US appealed the Panel’s interpretation, emphasizing that none of the measures at issue stated any numerical units or was in the form of quotas.

The Appellate Body concluded that the limitations amounting to a zero quota were quantitative limitations and fell within the scope of Article XVI:2(a) and (c).

¹⁷ General Agreement on Trade in Services, available at: www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#fnt8, last visited 25-04-2005.

Consequently, those rules *were applicable* to the measures at issue.

3.1.4. Article XIV of the GATS: general exceptions

Finally, the Appellate Body analyzed the US defence under Article XIV of the GATS. The Article reads as follows:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.”¹⁸

3.1.4.1. *Justification of the measures under paragraph (a) of Article XIV.* This rule covers “measures ... necessary to protect public morals or to maintain public order”. The Panel found that the Federal Acts were measures of that kind. However, Antigua disagreed, mainly on the grounds that the Panel failed to determine whether the concerns identified by the US (“money laundering, organized crime, fraud, underage gambling and pathological gambling”)¹⁹ satisfied the standard set out in footnote 5 to Article XIV(a) of the GATS: “[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”.

The Appellate Body deemed that the Panel was not required, in addition, to make a separate, explicit determination that the standard of footnote 5 had been met.

In the second part of its analysis, the Panel examined the “necessity” of the Wire Act, the Travel Act and the IGBA Act. It found that the US had not demonstrated the “necessity” of the measures. This finding was based in the following reasoning: (i) the interests and values protected by the mentioned Acts served very important societal interests that could be characterized as “vital and important in the highest degree”; (ii) those Acts “must contribute, at least to some extent”, to addressing the US’ concerns “pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling”; (iii) the measures in question “have a significant restrictive trade impact”; (iv) “[i]n rejecting Antigua’s invitation to engage in bilateral or multilateral consultations and/or negotiations, the US failed to pursue, in good faith, a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative”. Each party appealed different parts of this analysis.

With regard to the determination of “necessity”, the Appellate Body asserted that 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 – was relevant to an objective determination of its necessity. However, a Panel was not bound by these characterizations, and could search for evidence in other elements. The necessity to act implied that there was no “reasonably available” WTO-consistent alternative available to the responding member that could preserve its right to achieve the desired level of protection.

The Appellate Body added:

“311. If, however, the complaining party raises a WTO-consistent alternative measure then, in its view, 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”.

Furthermore, the Appellate Body found that the necessity of the three statutes should not be assessed against the possibility of consultations with Antigua, because such consultations could not qualify as a reasonably available alternative measure with which a challenged measure should be compared.

Following these preliminary considerations, the “necessity” of the statutes “themselves” was studied. Whereas the Panel recognized the “significant trade impact” of the Federal Statutes, it tempered this recognition by enumerating characteristics and concerns derived from the remote supply of gambling and betting services. That is: (i) the volume, speed and international reach of remote gambling transactions; (ii) the virtual anonymity of such transactions; (iii) low barriers to entry in the context of the remote supply of gambling and

¹⁸ General Agreement on Trade in Services.

¹⁹ Panel’s Report, para. 6.486.

betting services; and (iv) the isolated and anonymous environment in which such gambling took place.²⁰

The Appellate Body judged that this analysis showed that the Panel placed more weight upon the circumstances mentioned than upon the restrictive trade impact. Moreover, whilst no reasonable alternative measure had been proposed by Antigua or examined by the Panel, and given that the US had made its *prima facie* case of “necessity”, the Appellate Body concluded that the US had successfully demonstrated that its statutes were “necessary”, and therefore justified, under paragraph (a) of Article XIV of GATs.

3.1.4.2. The guise of Article XIV. Antigua alleged that the Panel had erred by focusing its discussion under the guise of remote supply of gambling services rather than on the entire gambling industry. The Appellate Body deemed that, since it was indeed the *remote* supply of gambling that gave rise to particular concerns, there was no error in maintaining such a distinction for the purpose of analyzing any possible discrimination in the application of the three Federal Statutes.

The Appellate Body then considered two instances which allegedly showed that the measures at issue discriminated between domestic and foreign service suppliers, contrary to the defence asserted by the US under this interpretation. The first instance was based on “inconclusive” evidence of the alleged non-enforcement of the three Federal Statutes. It was considered that the proper significance to be attached to isolated instances of enforcement could not be determinative. The finding was consequently reversed.

The second instance was based on the “ambiguity relating to” the scope of application of the Interstate Horseracing Act (IHA), which could be understood as permitting certain types of remote betting on horseracing within the US. As such, this could result in a difference between the measures applied to foreign and domestic service suppliers of remote betting services for horseracing. The Appellate Body argued that the US could have chosen, but did not, to put forward an additional argument that even if such discrimination existed, it did not rise to the level of “arbitrary” or “unjustifiable” discrimination. For that reason, the Appellate Body found that the US had not shown that these measures satisfied the requirements of the Article XIV interpretation. In consequence, the Appellate Body recommended that the Dispute Settlement Body request the US to bring these measures into conformity with its obligations under the GATS.

3.2. Consistency of the methodology followed in the present case with previous assessments of Article XX exceptions. Reflections for the construction of a (new) pattern for risk assessment

If a comparison is made with the four-step methodology used in cases where Article XX GATT applies, consistency

can be found with the evaluation conducted for the application of Article XIV GATS. In this last case, it is possible to refer to it as a five-step methodology, since the very first issue to check is whether commitments have been made in the specific service sector being assessed.

From now on, with the increase of e-services, exceptions to the application of the WTO rules due to national public policy objectives were likely to be invoked more often. If so then has the Appellate Body’s decision left some new clues for use in evaluating the application of the exceptions’ rule? What follows is a five-step methodology designed to assess the question step-by-step. This is intended to clarify which pattern would likely be followed for the application of an Article XIV GATS exception. As such this constitutes a tool for risk assessment in cases of adoption of measures that might violate WTO rules in the e-services sector.

- *First step:* determine whether specific commitments have been made in the service sector under analysis, or whether the member can maintain a measure inconsistent with the “Most-favoured Nation treatment” principle, provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

The Appellate Body understood the extent of the commitment under scrutiny in a broad way, resulting in the affirmation of the existence of such a commitment.

- *Second step:* determine whether the measure under discussion is inconsistent with a GATS’ provision.

Under this step the Appellate Body has left a clear “clue”: a “total prohibition” is equivalent to a “zero quota” under Article XVI GATS. Here again, as in the first step, the reasoning has been such as to include the measures analyzed within the scope of the GATS.

- *Third step:* evaluate whether “the laws or regulations with which compliance is being secured are themselves ‘not inconsistent’ with the General Agreement”.

The Appellate Body has not considered this step in the present case, which was previously analyzed in cases of Article XX GATT application. It must be noted, indeed, that this step is used when paragraph (c) of Article XIV GATS is being scrutinized.

- *Fourth step:* evaluate whether the measures are “necessary to secure compliance” with those laws or regulations.

Under this step, the Panel evaluated, as a preliminary issue, whether the measures were of the kind to “protect public morals or to maintain public order”. This is a correct approach, which has to be guided by footnote 5, even if, as pointed out by the Appellate Body, this footnote does not

²⁰ Surprisingly enough, those characteristics and concerns are so neutral that could, indeed, be applied to a myriad of international e-services.

create an obligation to make a separate and explicit determination that its standard has been met.²¹

Another important clue is the rejection of the need to engage in bilateral or multilateral consultations as a prerequisite to determine the non-existence of “reasonably available WTO-consistent alternatives”.

- Fifth step: assess whether the measures are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.

As far as the fifth step is concerned, the “lesson” left by the Appellate Body is that the non-enforcement of national infringements to the law that is being enforced against third countries’ providers must constitute a clear pattern of conduct to be considered as an “arbitrary or unjustifiable discrimination”. On the contrary, when the discrimination emanates from the wording of the Act itself, having being invoked by one party, the defendant has to demonstrate that such discrimination, even if existing, is justified for a given public policy reason, and therefore, it is not “arbitrary or unjustifiable”.

4. The WTO and Internet regulation

When the use of the Internet as a tool to practice commerce commenced, *the doctrine seemed* to be in awe due to the Internet’s absence of borders or “geographic indeterminacy”. In any case, the question arises as to “what should be (if any) the regulatory model for the Internet?” This emblematic question seduced specialists of many different legal branches, and also sociologists, philosophers, economists, political scientists, computer scientists, as well as national governments, and international organizations, etc.²²

²¹ The Panel interpreted the meaning of those terms. “Public morals”, it said, “denotes standards of right and wrong conduct maintained by or on behalf of a community or nation” (para. 6.465 of the Panel’s Report). The term “public order” was analyzed literally, instead of interpreting it as the US has made, that is, as the civil law concept of *ordre public*, which functional counterpart in common law systems is the concept of “public policy”. It further added: “Based on the dictionary definitions referred to above and taking into account the clarification added by the drafters of the GATS in footnote 5, we believe that ‘public morals’ and ‘public order’ are two distinct concepts under Article XIV(a) of the GATS. Nevertheless, to the extent that both concepts seek to protect largely similar values, some overlap exists” (para. 6.468 of the Panel’s Report).

²² See: Jacques Berleur and Yves Poulet, “Quelles R-régulations pour L’Internet?”, in *Gouvernance de la Société de l’Information*, Cahiers du Centre de Recherches Informatique et Droit n. 22, Bruylant, Bruxelles, Presses Universitaires de Namur, Namur, 2002, pp. 133-151. Philippe AMBLARD, *Régulation de l’Internet*, Cahiers du Centre de Recherches Informatique et Droit n. 24, Bruylant, Bruxelles, 2004.

A “declaration of the independence of cyberspace”²³ was issued, as the paradigm of a strong commitment (or desire) to maintain the Internet as an ephemeral place lacking regulation, where the sole premise for interaction was “freedom”. Another sound (and again paradigmatic) answer stressed the concept of...: “code”²⁴ or “lex informatica”.²⁵ Yet another response was “self-regulation”: industry-led regulation was preferred to State regulation. This last approach was mainly supported by the US government,²⁶ multinationals acting on-line (and represented, for instance, by the ICC²⁷); and certain very particular private entities (such as ICANN²⁸ and CBDe²⁹).

However, reality showed that those initiatives alone could not always constitute an adequate answer when important interests of society were being threatened or when certain activities carried out in cyberspace had consequences in a “known place” affecting “known individuals”. In some cases, even the responsibility of the State could be involved, for instance, as the guarantor of fundamental rights that are at stake on the net, as in the case of privacy and personal data protection.

The Libertarian approach seems to be increasingly restricted... The “declaration of the independence of cyberspace” started to water down some years ago. Even if the enforcement of the law in Internet cases was rather difficult, States tend to make no distinction between their jurisdiction within the territory where they have sovereignty, and the

²³ John Perry Barlow, “A Declaration of the Independence of Cyberspace”, 8 February 1996, available at: homes.eff.org/~barlow/Declaration-Final.html, last visited 27-04-2005.

²⁴ Laurence Lessig, *Code and other laws of cyberspace*, Basic Books, New York, 1999. Laurence Lessig, “The Law of the Horse: What Cyberlaw might Teach”, *Harvard Law Review*, vol. 113, 1999, p. 501-546.

²⁵ Joel R. Reidenberg, “Lex Informatica: The Formulation of Information Policy Rules Through Technology”, *Texas Law Review*, vol. 76, n. 3, 1998, p. 553-584.

²⁶ The White House, “A Framework for Global Electronic Commerce”, 1 July 1997, available at: www.technology.gov/digeconomy/framework.htm, last visited 27-04-2005. The first principle developed was “[t]he private sector should lead”, and the second one “[g]overnments should avoid undue restrictions on electronic commerce”.

²⁷ International Chamber of Commerce, *A Global Action Plan for Electronic Business*, 3rd Edition, July 2002, available at: www.iccwbo.org/home/e_business/3rd%20Edition%20Global%20Action%20Plan%20no%20annex.pdf, last visited 27-04-2005. Some of the principles enunciated are: “The development of electronic business should be led primarily by the private sector in response to market forces”, “Government intervention, when required, should promote a stable, international legal environment, allow a fair allocation of scarce resources and protect public interest. Such intervention should be no more than is essential and should be clear, transparent, objective, non-discriminatory, proportional, flexible, and technologically neutral”, p. 9.

²⁸ Internet Corporation for Assigned Names and Numbers, see: www.icann.org/.

²⁹ Global Business Dialogue on Electronic Commerce, see: www.gbde.org/.

Internet, for instance, when their citizens are affected, or when their national security is under threat.³⁰

In December 2003, the World Summit on the Information Society took place in Geneva, under the auspices of the United Nations and the International Telecommunication Union. A balanced approach to the regulation of the Internet, and the Information Society in general, was advocated. The promotion of a sustainable development and the respect of human rights and fundamental freedoms in the digital environment were reaffirmed.³¹

Given this scenario, the question arises what would be the role of the WTO in the regulation of the Internet? It is suggested that, for the time being, it is actually not appropriate to speak about "Internet regulation" in the context of the WTO, since it is quite a broad term that involves material aspects that are outside the competence of this organization. Hitherto, the WTO can only play a role in the field of e-commerce, with the same extension and limits as it has in the GATT, GATS and TRIPS.

Whether the existing WTO framework is adequate or not to answer to e-commerce specificities and challenges has been discussed.³² However, to date, the WTO has not given any official answer. In 2001, the Doha Declaration (Fourth Ministerial Conference in Doha, Qatar)³³ included a mandate for negotiation on a series of issues, one of them being e-commerce. Previously, the Geneva Declaration (Second Ministerial Conference in Geneva, Switzerland, 1998)³⁴ had established a work program to examine all trade-related issues arising from global electronic commerce. A report on further progress should have been done in Cancun (Fifth Ministerial Conference, Cancun, Mexico, 2003).³⁵ To date, no concrete results have been achieved, on this issue, from this Conference.

³⁰ Yahoo! case, T.G.I. Paris, Nov. 20, 2000, see: www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf. US Patriot Act, Sec. 217 (see: Sec. 1030: "the term 'protected computer' means a computer - (...) or (B) which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;"), US Can Spam Act, Sec. 12. Restrictions on other transmissions: "Section 227(b)(1) of the Communications Act of 1934 (47 U.S.C. 227(b)(1)) is amended, in the matter preceding subparagraph (A), by inserting ' , or any person outside the United States if the recipient is within the United States' after 'United States'", available at: www.spamlaws.com/federal/108s877.shtml. See also: Joel R. Reidenberg, "Technology and Internet Jurisdiction", 153 Univ. of Penn. L. Rev., 1951 (2005). Joel R. Reidenberg, "States and Internet Enforcement", 1 Univ. Ottawa Tech. L. J. 213 (2004).

³¹ Déclaration de principes, Construire la société de l'information: un défi mondial pour le nouveau millénaire, Document WSIS-03/GENEVA/DOC/4-F, 12 mai 2004, available at: www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!MSW-F.doc, last visited 10-10-2005.

³² Heinz Hauser and Sacha Wunsch-Vincent, "A Call for a WTO E-Commerce Initiative", *International Journal of Communications Law and Policy*, Issue 6, Winter 2000/2001. Sacha Wunsch-Vincent, "Electronic Services: Its Regulatory Barriers and the Role of the WTO", *University of St. Gallen*, July 2001.

³³ The Fourth WTO Ministerial Conference, see: www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm.

³⁴ The Second WTO Ministerial Conference, see: www.wto.org/english/thewto_e/minist_e/min98_e/min98_e.htm.

³⁵ The Fifth WTO Ministerial Conference, see: www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm.

The very spectrum of e-commerce involves issues that are not purely "trade-related". For example, the Geneva Declaration included, as one of the topics to be discussed, "privacy and data protection". Indeed, those topics are considered to be of a human rights nature in some Member States (e.g. Europe and Latin American countries). Thus, what attitude is the WTO likely to assume on such matters?

A wide doctrinal discussion on international trade and human rights has taken place during the last years.³⁶ Such discussion has had widespread consequences for what has been called the "legitimacy crisis of the WTO".³⁷ Notwithstanding, it seems that in the near future at least, it is improbable that the WTO would assume any active role in Internet regulation or in non-trade related aspects of e-commerce. The case, analyzed here, has shown how those issues can be addressed via the use of existing regulatory tools. If specific regulation was adopted for e-commerce, which is a pending matter of discussion and agreement on a clear position, the exception system, as found in Article XIV GATS, should be maintained for those non-trade related aspects. Any other approach would require deeper political integration, which would be quite difficult to achieve. For instance, the existing exception system allows the EU to adopt certain restrictive measures to guarantee the protection of the fundamental right to personal data. Any regulation at WTO level would risk softening the protection provided currently by EU legislation. That would happen, for instance, if "privacy and personal data" were considered as a "consumer right" in the e-commerce arena.

³⁶ Mireille Delmas-Marty, "Commerce mondial et protection des droits de l'homme", in *World Trade and the Protection of Human Rights*, Institut René Cassin de Strasbourg, Bruylant, Bruxelles, 2001, pp. 1-19. Mireille Delmas-Marty, "Commerce mondial et protection des droits de l'homme", in *World Trade and the Protection of Human Rights*, Institut René Cassin de Strasbourg, Bruylant, Bruxelles, 2001, pp. 1-19. Thiébaud Flory and Nicolas Ligneul, "Commerce international, droits de l'homme, mondialisation: les droits de l'homme et l'Organisation mondiale du Commerce", in *World Trade and the Protection of Human Rights*, Institut René Cassin de Strasbourg, Bruylant, Bruxelles, 2001, pp. 179-192. Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", *European Journal of International Law*, vol. 13, n. 4, (2002), pp. 815-844. Robert Howse, "Human Rights in the WTO: Whose Rights, What Humanity. Comment on Petersmann", *European Journal of International Law*, vol. 13, n. 3 (2002), pp. 651-660. Ernst-Ulrich Petersmann, "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston", *European Journal of International Law*, vol. 13, n. 4 (2002), pp. 845-852. Ernst-Ulrich Petersmann, "The 'Human Rights Approach to International Trade' Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?", in *Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System*, Conference Report, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 2004.

³⁷ Robert Howse, "How to Begin to Think About the 'Democratic Deficit' at the WTO", available at: faculty.law.umich.edu/rhowse/Drafts_and_Publications/house7.pdf. Robert Howse and Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?", in Marco Verweij and Tim Josling (eds), *Deliberately Democratizing Multilateral Organization*, special issue of *Governance*, vol. 16, Issue 1, pp. 73-94.

5. Concluding remarks

The case analyzed in this paper is the first example of the application of the Article XIV GATS exception, and furthermore, is the first concrete example of WTO dispute resolution in the digital environment. This paper has not discussed the appropriateness or otherwise of the legislation in question, but rather, has tried to learn the lessons of the WTO approach towards non-trade related matters that are implicit within the development of e-services. Indeed, the way WTO rules are applied in the online sphere is not dramatically different than the one applied in the offline world. A consistent approach has been observed between previous applications of Article XX GATT and the current application of Article XIV GATS. This case has also illustrated the point that countries are not obliged to abandon all their public policy measures and that they can enforce these in the context of the Internet. Guidance as to the limits of this “right to regulate” can be found in the integral analysis of the use made of Article XX GATT and Article XIV GATS (in the present case). This could eventually allow the construction of a basic pattern for risk-assessment

procedures. This could then be used as a “prior-checking” form of guidance for countries planning to adopt legislation that might have a barrier effect for e-commerce, while nevertheless responding to a public policy need.

The role of the WTO in what concerns Internet regulation is limited to its present competence. Even before any wide discussion and clear positioning of the WTO on this issue has taken place, a case has been submitted and resolved. This may serve as a sign that no extravagant new rules need to be adopted. However, that is not to deny the fact that certain specifics of e-commerce may need adaptation. Yet, any initiative will have to ensure that it does not include matters that have, up to now, been successfully dealt with through exceptions, i.e. “not regulated” unless and until the level of political integration and compromise produces proposals equivalent to the current arrangements.

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