

**WORLD TRADE
ORGANIZATION**

WT/DS285/AB/R
7 April 2005

(05-1426)

Original: English

**UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF
GAMBLING AND BETTING SERVICES.**

AB-2005-1

Report of the Appellate Body

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"). 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.

2. Before the Panel, Antigua claimed that certain restrictions imposed by the United States through federal and state laws resulted in a "total prohibition" on the cross-border supply of gambling and betting services from Antigua. Antigua contended that such a "total prohibition" was contrary to obligations of the United States under the *General Agreement on Trade in Services* (the "GATS"). In particular, Antigua asserted that the GATS Schedule of the United States includes specific commitments on gambling and betting services. Antigua argued that, because the United States made full market access and national treatment commitments (that is, inscribed "None" in the relevant

columns of its GATS Schedule), the United States, in maintaining the measures at issue, is acting inconsistently with its obligations under its GATS Schedule, as well as under Articles VI, XI, XVI, and XVII of the GATS.

3. In its oral and written submissions to the Panel, the United States maintained its objections to the Panel's consideration of Antigua's claims on the basis of an alleged "total prohibition", reiterating its argument that Antigua had failed to establish a *prima facie* case. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 10 November 2004, the Panel addressed this argument by "identify[ing] the measures that the Panel [would] consider in determining whether the specific provisions of the GATS that Antigua [had] invoked have been violated." The Panel determined, first, that Antigua was not entitled to rely on the alleged "total prohibition" as a "measure" in and of itself.^y The Panel then determined that the following laws of the United States had been "sufficiently identified [by Antigua] so as to warrant a substantive examination by the Panel":

(A) Federal laws:

- (i) Section 1084 of Title 18 of the United States Code (the "Wire Act");
- (ii) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and
- (iii) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or "IGBA").
- (iv)

(B) State laws:

- (i) Colorado: Section 18-10-103 of the Colorado Revised Statutes;
- (ii) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
- (iii) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
- (iv) Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);
- (v) 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;
- (vi) New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;
- (vii)

- (viii) South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and
- (ix) Utah: Section 76-10-1102 of the Utah Code (Annotated).

4. After evaluating Antigua's claims with respect to these federal and state measures, the Panel concluded that:

- (a) the United States' Schedule under the GATS includes specific commitments on gambling and betting services under sub-sector 10.D;
- (b) by maintaining the following measures, ... the United States fails to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS:
 - (i) Federal laws
 - (1) the Wire Act;
 - (2) the Travel Act (when read together with the relevant state laws);¹⁰⁷² and
 - (3) the Illegal Gambling Business Act (when read together with the relevant state laws).¹⁰⁷³
 - (ii) State laws:
 - (1) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;
 - (2) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;
 - (3) South Dakota: § 22-25A-8 of the S.D. Codified Laws; and
 - (4) Utah: § 76-10-1102(b) of the Utah Code.
- (c) Antigua has failed to demonstrate that the measures at issue are inconsistent with Articles VI:1 and VI:3 of the GATS;
- (d) The United States has not been able to demonstrate 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):
 - (i) are provisionally justified under Articles XIV(a) and XIV(c) of the GATS; and

- (ii) are consistent with the requirements of the chapeau of Article XIV of the GATS.

II. Issues Raised in This Appeal.

5. The following issues are raised in this appeal:

(A) with respect to the measures at issue,

- (i) whether the Panel erred in finding that the "total prohibition on the cross-border supply of gambling and betting services" alleged by Antigua was neither capable of constituting an autonomous measure that can be challenged in and of itself, nor identified as a measure in Antigua's request for the establishment of a panel;
- (ii) whether the Panel erred in examining the consistency of the following measures with the United States' obligations under Article XVI of the GATS:
 - (a) State laws:
 - (1) Colorado: Section 18-10-103 of the Colorado Revised Statutes;
 - (2) Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);
 - (3) Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;
 - (4) Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);
 - (5) 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;
 - (6) New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;
 - (7) South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and
 - (8) Utah: Section 76-10-1102 of the Utah Code (Annotated);

- (iii) whether, by undertaking such an examination of the above measures, the Panel acted inconsistently with its obligations under Article 11 of the DSU;
- (B) with respect to the United States' GATS Schedule,
- (i) whether the Panel erred in finding that subsector 10.D of the United States' GATS Schedule includes specific commitments with respect to gambling and betting services;
- (C) with respect to Article XVI of the GATS,
- (i) whether the Panel erred in its interpretation of sub-paragraphs (a) and (c) of Article XVI:2 of the GATS and, in particular:
 - (a) in finding that a prohibition on the remote supply of gambling and betting services constitutes a "zero quota" on the supply of such services by particular means, and that such a "zero quota" is a limitation that falls within sub-paragraphs (a) and (c) of Article XVI:2;
 - (b) in finding that measures imposing criminal liability on *consumers* of cross-border gambling and betting services are not inconsistent with sub-paragraphs (a) and (c) of Article XVI:2 and, in finding for that reason, that the relevant laws of the states of Colorado, Minnesota, New Jersey, and New York are not inconsistent with those provisions;
 - (ii) if the Appellate Body reverses the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, then whether the Panel erred in finding that the restrictions on market access that are prohibited by Article XVI are limited to those listed in Article XVI:2; and
 - (iii) whether the Panel erred in applying its interpretation of Article XVI to relevant United States federal and state laws so as to find them inconsistent with the United States' 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) whether, in considering the United States' defence under Article XIV, and in its analysis under that provision, the Panel failed to satisfy its obligations under Article 11 of the DSU;
- (ii) whether the Panel improperly allocated the burden of proof under Article XIV;
- (iii) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or to maintain public order within the meaning of Article XIV(a);
- (iv) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to secure compliance with laws or regulations which are not inconsistent with the GATS, within the meaning of Article XIV(c); and
- (v) whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA satisfy the requirements of the chapeau of Article XIV.

.....

(b) **Conclusion under the Chapeau.**

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

... 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.

7. 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. We have reversed this finding. 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.^y We have upheld this finding.

8. 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.

2. **Overall Conclusion on Article XIV**

9. Our findings under Article XIV lead us to modify the overall conclusions of the Panel in paragraph 7.2(d) of the Panel Report. 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.

10. 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" *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.

11. 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.

III. Findings and Conclusions.

12. 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;
 - (iii) *reverses* the Panel's finding, in paragraph 7.2(b)(ii) of the Panel Report, that four state laws, namely, those of Louisiana, Massachusetts, South Dakota and Utah, are inconsistent with the United States' obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2; and
 - (iv) *need not rule* on the Panel's findings that restrictions on service *consumers* as opposed to service *suppliers* are neither limitations on "service suppliers" for the purposes of Article XVI:2(a), nor limitations on "service operations" or "service output" for the purposes of Article XVI:2(c);
- (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;
 - (b) *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;

- (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
 - (d) *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;
- (iv) as regards paragraph (c) of Article XIV,
 - (a) *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 secure compliance with the Racketeer Influenced and Corrupt Organizations statute; and
 - (b) *need not determine* whether the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures justified under paragraph (c) of Article XIV;
- (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
- (E) with respect to the remaining allegations of error,
- (i) *need not*, in the light of the above findings, *rule* on the claim relating to Article 6.2 of the DSU, on the additional claims raised under Article 11 of the DSU, or on Antigua's conditional appeal of the Panel's finding that "the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article".

13. 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.

Signed in the original in Geneva this 23rd day of March 2005 by:

Giorgio Sacerdoti
Presiding Member

Georges Abi-Saab
Member

John Lockhart
Member

