

Contemporary Problems with the GATS and Internet Gambling

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'Fairness and equality tend to be in the eye of the beholder, especially when commercial interests are at stake'

This article focuses on the issue of enforcement of the WTO rules on international cross-border trade in services. It is argued that the examination of the GATS jurisprudence and state practice reveal that the GATS does not address the needs of the developing countries in general and the prospects of internet gambling services in the Caribbean Community in particular. First, the article discusses the extent of service-producing activities within the GATS provisions and outlines the main principles of WTO. It stresses that 'services' include gambling and games provided online. It also asserts that cross-border trade in services via Information and Communication Technologies presents several challenges for policy makers including enforcement, control and accountability. Second, the article critically analyses the United States (US) domestic legal instruments, which led to the complaint by Antigua and Barbuda. Subsequently, the focus is shifted to the critique of the judgments by WTO dispute settlement bodies. Third, the article evaluates the effectiveness of the DSU from a legal redress and compliance point of view, particularly in instances where weaker economies as complainants challenge leading economies of the world.

1 INTRODUCTION

The growth of the service sector within the last two decades resulted in increased economic activity across borders with concomitant regulation being sought in international trade.

The notion of trade in services was a novelty for the negotiators in the Uruguay Round, hence the use of GATT principles in the development of the core principles for a trade in services agreement (GATS). However, the liberalization of trade in services is significantly different from that of goods due to the intrinsic nature of services and as such, the application of border controls

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cannot be physically implemented, thus the regulatory provisions of the services agreement.

The shadow of GATT is therefore ubiquitous in the GATS and is most visible in the non-discrimination provisions, market access, domestic regulation, most favoured nation treatment and national treatment, conversely the distinction has addressed various legislative issues.

The World Trade Organization¹ (WTO) adjudicates trade disputes pursuant to the Dispute Settlement Understanding (DSU).² Antigua and Barbuda³ became the smallest developing country member⁴ to challenge the United States of America (US)⁵ in the regulation of remote supply of cross-border gambling and betting services⁶ in the first and most prominent internet gambling case⁷ with a degree of success.

Whilst the WTO is based on equal treatment and non-discrimination⁸ principles and provides a 'rules based' dispute settlement mechanism,⁹ there are still shortcomings in securing justice, remedies and compliance. With more potential cases involving fair competition for small economies on the horizon,¹⁰ this article critically analyses the inherent and current problems facing vulnerable economies in the context of the GATS. It is argued that GATS has not been as effective as it had been envisaged twenty years ago owing to problems such as

¹ The World Trade Organization, Marrakesh Agreement establishing the World Trade Organization. 15 Apr. 1994, 1867 U.N.T.S 154, 33 I.L.M.1144 (1994).

² Understanding the Rules and Procedures Governing Settlement of Disputes, 15 Apr. 1994, Marrakesh Agreement establishing the World Trade Organization, Annex 2, Legal Instrument.

³ Antigua and Barbuda has been a WTO member since 1 Jan. 1995. Antigua and Barbuda is a small, twin island nation on the eastern edge of the Caribbean Sea. Being small and suffering the consequences of hundreds of years of colonialism, deforestation by the former colonial power and the inability to compete in the global agricultural markets, it had to turn to alternative ways of developing the economy and providing livelihoods for its people: Alongside tourism, internet gambling has been one of the blood line of its economy in the last decade.

⁴ WTO classification, 'small vulnerable economy (SVEs) NAMA'.

⁵ Unites States – Measures affecting the Cross Border supply of Gambling and Betting services WT/DS285/AB/R (8 Oct. 2003).

⁶ World Trade Organization, Report of the Panel: United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, DS285 (10 Nov. 2004).

⁷ U.S. General Accounting Office, Internet Gambling: an overview of the issue, Publication No. GAO 03-89 (2002).

⁸ GATS, Art. XVII.

⁹ Understanding on Rules and Procedures Governing Settlement of Disputes, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, WTO Charter – Annex 2, Art. 1[hereinafter DSU].

¹⁰ For example, internet-based services (sales, financial products, etc.) are increasingly provided from small jurisdictions. In the early 90s, when WTO Members were finalizing their Schedules of Commitments, Internet was viewed as just another services sector rather than a mode of supply in itself through which virtually all services can be supplied. Delimatsis P., *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US – Gambling and China – Publications and Audiovisual Products*, 14 J Intl. Econ. L. 257 (2011).

uncertain definitions and scope of sectors within the schedule of commitments of Member States.

1.1 BACKGROUND

The Uruguay Round¹¹ of negotiations resulted in the establishment of the General Agreement on Trade in Services (GATS)¹² to enhance the regulation of trade in services.¹³

The GATS is a complex agreement comprising of general obligations with narrow exceptions applicable to specific commitments in the respective service sectors of the Member countries. The general obligations are applicable and binding on all Members, whereas specific commitments relate to the individual Member States.

The GATS provides four 'modes'¹⁴ of supply of services:

- cross-border supply;¹⁵
- consumption abroad;¹⁶
- commercial presence;¹⁷ and
- the presence of natural persons.¹⁸

The discussion here revolves around the provisions of the first modality of cross-border supply which 'covers service flows from the territory of one Member into the territory of another Member'.¹⁹ The significance of this mode is analysed with reference to the *US-Gambling* dispute²⁰ whereby the DSB confirmed the application of GATS rules to e-commerce and electronically supplied services and reviewed the public morals exception under Article XIV(a) GATS.

In order to fulfil the mandate of these modalities, Members either make horizontal or specific commitments or no commitment to a sector. Horizontal and specific commitments are subject to various conditions and limitations on market access and qualifications on national treatment. Being reciprocal to the specific

¹¹ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Marrakesh, 1994.

¹² General Agreement on Trade in Services, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS].

¹³ Bigos BJ, *Contemplating GATS Art. XVIII on Additional Commitments*, 42 J. World Trade, 723 (2008).
GATS Art. I.2.

¹⁴ GATS Art. I.2 (a).

¹⁵ GATS Art. I.2 (b).

¹⁶ GATS Art. I.2 (c).

¹⁷ GATS Art. I.2 (d).

¹⁸ GATS Art. I.2.

¹⁹ United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/R, 10 Nov. 2004.

sector, the Members agree not to impede market access by the imposition of any quotas or prohibitions and non-discrimination against foreign providers.²¹ These commitments are based on an independent classification of activities developed on the United Nations (UN) Central Product Classification (CPC).²² The barriers to trade in services are regulatory²³ and are intra-territorial, thus the liberalization of services entails restriction of domestic regulation.

Resulting from this and identified in the Framework Agreement of Protocols and Members Schedules of Specific Commitments in Services ('Schedule'),²⁴ are the general obligations and specific commitments. General obligations require Members to: 'accord immediately and unconditionally to services and service suppliers of any Member treatment no less favourable than that it accords to like services and services suppliers of any other country'.²⁵

On the other hand, specific obligations only apply to the extent that a Member has a specific undertaking in accordance with the Schedule.²⁶ While the GATS aims to enhance international trade liberalization,²⁷ it recognizes the rights of Member to regulate services to meet national policy objectives.²⁸

There have only been four cases involving the GATS²⁹ and as such, there was not a dearth of case law that neither the panel nor Appellate Body (AB) could have referred to in the *US-Gambling* case.³⁰ Previously, Part III of the GATS was not challenged. Accordingly, discussion here focus on the regulatory framework relating to the market access (e.g., Article XVI of the GATS), national treatment

²¹ Mattoo A & Wunsch S, *Preempting Protectionism in Services: The GATS and Outsourcing* (2004).

²² WTO, Uruguay Round, Group of Negotiations on Services, Services Sectoral Classification List. MTN.GNS/W/120, 10 Jul. 1991 and United Nations, Services Sectoral Classification List Central Product Classification (CPC) MTN.GNS/W/120 (10 Jul. 1991).

http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc. Lester S, Mercurio B & Davies A, *World Trade Law: Texts, Materials and Commentary* (2d ed., Oxford & Portland Oregon 2012) defines CPC as a detailed multi-level classification of goods and services which is exhaustive and its categories are mutually exclusive.

²³ Pauwelyn J, *Remedies in the WTO: First Set the Goal, Then Fix the Instruments to Get There*, in *WTO Law and Process* (Mads Andenas & Federico Ortino eds, Brit. Inst. Intl. & Comp. L. 2005).

²⁴ WTO, Uruguay Round, Group of Negotiations on Services, Services Sectoral Classification List, MTN.GNS/W/120/ 10 Jul. 1991 and United Nations, Services Sectoral Classification List Central Product Classification (CPC) MTN.GNS/W/120 (10 Jul. 1991).

GATS Art. II.1.

²⁶ Bigos BJ, *Contemplating GATS Article XVIII on Additional Commitments*, 42 J. World Trade (2008).

²⁷ Murin N, *The GATS: a Legal Perspective on Crossroads of Conflicting Interest*, 10 World Trade Rev. (2011).

GATS Art. XIV.

²⁹ Canada – Certain Measures Concerning Periodicals, 14 Mar. 1997, WT/DS31/R; European Communities – Regime for the Importation, Sale and Distribution of Bananas WT/DS27, Canada – Certain Measures Affecting the Automotive Industry, (AB-2000-2) Report of the Appellate Body, 31 May 2000; United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (WTO Doc WT/DS285/AB/R of 7 Apr. 2005).

³⁰ World Trade Organization, Report of the Panel: United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, DS285.

obligations (Article XVII of the GATS), certain provisions of domestic regulations detailing the procedural and substantive obligations (Article VI of the GATS) and the additional commitments (Article XVIII of the GATS).

Contentious interpretative issues pertaining to the balance between trade constraints and the autonomy of Member service regulators are also analysed.³¹ Furthermore, inter-linkages between market access and national treatment obligations³² and those of domestic regulations which have not been clearly established by the provisions of GATS³³ are addressed.

Article XVI GATS stipulates six prohibited market access restrictions for services. Conversely, domestic regulations affecting the supply of services are permitted if they are non-discriminatory.³⁴ The complaint based on Article XVI GATS relates to whether or not the US had undertaken market access commitment in the GATS Schedule with regard to gambling and betting services.³⁵

Owing to the intrinsic nature and the variety of methods which can be employed to conduct services,³⁶ the GATS obligations to grant market access and national treatment only apply with respect to those service sectors and modes of supply which a particular WTO Member chooses to bind in its schedules of specific commitments on liberalization on trade in services.³⁷

The *US-Gambling* dispute relates to the national treatment principle. The *EC-Bananas III*³⁸ case developed a four-pronged test to establish inconsistency of a particular measure with Article XVII GATS by examining the elements must be presented cumulatively.³⁹ Article XVII.2 GATS states that not only de jure but also de facto discrimination is covered by national treatment obligation.

To ensure effective dispute resolution under the GATS Agreement, Articles XXII and XXIII GATS provide the framework for consultations and dispute settlement. Whilst there are no strict *stare decisis* mandates in the WTO,⁴⁰ reliance is placed upon previously decided cases and the interpretative rules of international

³¹ Leroux EH, *Eleven Years of GATS Case Law: What have we Learned?* 10 J. Intl. Econ. L. 749 (2007).

³² GATS Arts XVI and XVII.

³³ GATS Arts XXI, XVII, XVI.4 and XVI.5.

³⁴ GATS Art. XVII and Pauwelyn J, *Enforcement and Countermeasures in the WTO: Rules Are Rules – towards a More Collective Approach*, 94 Am. J. Intl. L. 335 (2000).

³⁵ Ortino F, *Treaty Interpretation and the WTO Appellate Body report in US-Gambling: A Critique*, 9 J. Intl. Econ. L. 117 (2006).

³⁶ Marchetti JA & Mavroids PC, *What Are the Main Challenges for the GATS Framework? Don't Talk about Revolution*, 5 European Bus. Org. L. Rev. 548 (2008).

³⁷ Zdouc W, *WTO Dispute Settlement Practice Relating to GATS*, 2 J. Intl Econ. L. 295 (1999).

³⁸ EC-Regime for the Importation, Sale and Distribution of Bananas, WTO Docs WT/DS27/R. 7 WT/DS27/AB/R of 25 Sep. 1997 (*EC-Bananas III*).

³⁹ Matsushita M, Schoenbaum TJ & Mavroids PC, *The World Trade Organization: Law, Practice, and Policy* 662 (Oxford U. Press 2006).

⁴⁰ Bissett C, *All Bets Are Off(Line): Antigua's Trouble in a Virtual Paradise*, 35 U. Miami Inter-Am. L. Rev. 367 (2004).

law with the primary goal of bringing about compliance⁴¹ within a reasonable period of time.⁴²

The recommendations of the DSB are declaratory and aggrieved party may resort to compensation so as to mitigate the loss suffered or retaliate in order to persuade the respondent party comply with the ruling.⁴³ The DSB authorized retaliatory measures, which proved to be ineffective⁴⁴ in cases such as the *EC-Bananas*⁴⁵ and the *EC-Hormones*.⁴⁶ In the *US-Gambling* case,⁴⁷ Antigua requested authorization to suspend concessions or other obligations under the GATS and TRIPS⁴⁸ Agreements which was granted on 28 January 2013.⁴⁹ It was argued that retaliation would have a disproportionate adverse impact and would be vastly inadequate to recoup the losses incurred.⁵⁰ The differential in this case *vis-à-vis* the two previous cases is the economic disparity between the US and Antigua. Despite not being a condition for cross-retaliation, the arbitrator reasonably determined that the circumstances were serious enough⁵¹ to warrant such concessions. A similar approach was taken in *US – Upland Cotton*.⁵² In both instances the countries followed the hierarchy of procedures and remedies to establish the effectiveness of the sector and agreement for the suspension of concessions.

Whilst it purports to provide equality and a level playing field in an impartial forum; the DSU does not provide a structured way to achieve negotiated settlements.⁵³ This notion has been tested by the *US-Gambling* case.

Despite the legal framework of the DSU rules and procedures for the immediate settlement of disputes, small economies experience difficulties in the enforcement of the decisions of the WTO DSB. Therefore, the lack of clarity⁵⁴ arising from the GATS is one of most profound areas of dissatisfaction.

⁴¹ *Supra* note 34, Pauwelyn, 335.

⁴² DSU Art. 22(2).

⁴³ DSU Art. 2(1), (2) and (3).

⁴⁴ Darling JB, *Gambling with Our Future: A Call for Needed WTO Dispute Resolution Reform as Illustrated by the US- Antigua Conflict Over Online Gambling* 42 *George Wash. Intl. L. Rev.* 381 (2010).

⁴⁵ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 Sep. 1997) [hereinafter *EC-Bananas*].

⁴⁶ Appellate Body Report, *European Communities – Measures concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (16 Jan. 1998) [hereinafter *EC-Hormones*].

⁴⁷ Recourse to Art. 22.6 DSU.

⁴⁸ TRIPS.

⁴⁹ Recourse by Antigua and Barbuda to Art. 22.2 of the DSU, WT/DS/285/22, dated 22 Jun. 2007.

⁵⁰ Van den Bossche quoting a passage from Bridges, *Weekly Trade News Digest*, 4 Jul. 2007.

⁵¹ DSU – Art. 22.3(c).

⁵² United States – Subsidies on Upland Cotton, WT/DS267/EB/R.

⁵³ Mitchell KMW, *Developing Country Success in the WTO Disputes*, 47 *J. World Trade*, 77 (2013).

⁵⁴ Qureshi AH, *Interpreting WTO Agreements: Problems and Perspectives*, (Cambridge U. Press 2006).

1.2 US-GAMBLING DISPUTE

The economic crisis of the 1990s forced many developing countries to restructure their economies in order to sustain growth. Countries, such as Antigua and Barbuda traditionally reliant on tourism sought to diversify its service industry with gambling and offshore banking as key variables.⁵⁵ This in itself has brought considerable economic change and controversy.⁵⁶

The highly penetrable and lucrative online gambling industry⁵⁷ led to the licensing and taxing of this industry, which had been growing exponentially particularly in Antigua.⁵⁸ By the end of 1999, Antigua was hosting operations for 119 licensed internet gambling (IG) sites and provided the government with more than USD 7.4 million in revenue which accounted for more than 10% of its GDP.⁵⁹ Prior to the introduction of the US Unlawful Internet Gambling Enforcement Act 2006 (UIGEA),⁶⁰ the internet gambling industry was estimated to be worth some USD 12 billion.⁶¹ Antigua was at the apex of the global IG industry. Despite its growth, IG had not been widely accepted as a legitimate form of entertainment by the U.S.⁶²

Online gambling falls within the ambit of the GATS in accordance with the CPC classification which lists ‘gambling and betting services’ under the sub-category of ‘other recreational services’⁶³ which WTO members use for the interpretation of commitment categories.

In accordance with the preamble of the GATS, Members have the right to regulate and to introduce new regulations on the supply of services in order to meet national policy objectives. Nevertheless, this must not be done in an ad-hoc, discriminatory or unilateral basis.

⁵⁵ ‘Identity construction’ is an essential marketing device for business development. Las Vegas is, perhaps, the best known example of this type of marketing strategy; thus Caribbean has reconstructed itself not only as a tropical paradise but also centre for gambling, offshore banking, etc.

⁵⁶ Lapid K, *Outsourcing and Offshoring Under the General Agreement on Trade in Services*, 40 J. World Trade 341 (2006).

⁵⁷ Ross C., *David Gambles to Slay the Goliath and Barely Lives to Tell the Tale: Antigua v. United States*, 11 Gaming L. Rev. 674, 691 (2007).

⁵⁸ Antigua Economic & Gambling Data, *The Antigua-US WTO Dispute Over Internet Gambling*, <http://www.antiguawto.com/WTOEconomicgamblingdata.html> (citing Global Betting & Gaming Consultants, Quarterly eGambling Statistics Report: May 2007 (accessed 19 Sep. 2014)).

⁵⁹ *Ibid.*

⁶⁰ The Unlawful Internet Gambling Enforcement Act 2006, Pub. L. No. 109-347, 120 Stat. 1952 (codified at 31 U.S.C. §§5361–5367 (2006)).

⁶¹ Casinocity, <http://www.online.casinocity.com/jurisdictions> (accessed 19 Sep. 2013).

⁶² Kilby M, *The Mouse That Roared: Implications of the WTO Ruling in the US – Gambling*, (2008) 44 Texas Intl. L.J., 236 (2008).

⁶³ Matsushita M, Schoenbaum TJ & Mavroidis PC, *The World Trade Organization: Law, Practice and Policy* 652 (Oxford University Press, 2d ed., 2006).

In 2002, the US successfully brought a case against Jay Cohen,⁶⁴ a US Citizen residing in Antigua and operating an internet gambling business targeting US citizens. The case⁶⁵ resulted in the imprisonment of Cohen for taking bets transmitted over wire in violation of the 1961 Wire Wager Act.⁶⁶ Subsequently, Antigua in an unprecedented manner challenged the US Federal and State laws, which regulated the remote supply of cross-border gambling and betting services.

Antigua, without previous DSU experience was not daunted by the procedural aspects in navigating the WTO dispute settlement system (DSS), whose actions went against the grain of research findings put forward by commentators⁶⁷ (which are predicated in light of disputes mainly pertaining to GATT) to prove that developing countries:

- did not lack the required legal and technical expertise;
- there was no lack of domestic and especially financial resources for the DSS; and
- there was no fear of political retaliation of an adverse ruling as in essence.⁶⁸

Previously, developing countries did not utilize the full economic benefits which were available to them in the DSS as they were primarily underrepresented and unable to compete at the same level as the developed countries owing to the reasons above.⁶⁹

Antigua requested consultation⁷⁰ in March 2003. When the negotiations produced no feasible solution⁷¹ Antigua invoked the DSU via the establishment of

⁶⁴ *United States v. Cohen*, 260 F.3d 68, 70–71 (2d Cir. 2001) Cert. denied 122 S. Ct 2587 2002.

⁶⁵ U.S. General Accounting Office, *Internet Gambling: an overview of the issue*, Publication No. GAO 03-89 (2002).

⁶⁶ Wire Wager Act 18 U. S.C. §1084(a) (2000).

⁶⁷ Brown CP & Hoekman BM, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. Intl. Econ. L. 861 (2005); Brown CP, *Participation in WTO Dispute Settlement Complaints, Interested Parties and Free Riders*, 19 World Bank Econ. Rev. 287 (2005); Horn H, Mavroidis PC, & Nordström, *Is the Use of the WTO Dispute Settlement System Biased? in The WTO and International Trade Law Dispute Settlement* (Petros C. Mavroidis & Alan Sykes eds Edward Elgar 2005); Bush ML, & Reinhardt E, *Developing Countries and GATT/WTO Dispute Settlement*, 4 J. World Trade, 719 (2003); Davis CL & Bermeo, *Who Flies? Developing Country Participation, Adjudication*, Princeton U. ms. (2006); Shaffer G, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 World Trade Rev. 217 (2006); Staiger RW, *What can developing countries achieve in the WTO?* Book review of Jawara Fatoumata and Aileen Kwa *Behind the Scenes at the WTO: the Real World of International Trade Negotiations* 44 J. Econ. Literature 428 (2006).

⁶⁸ For the strategies employed in this dispute see, Jackson S., *Small States and Compliance Bargaining in the WTO: An Analysis of the Antigua-US Gambling Services Case*, 25 Cambridge Rev. Intl. Aff. 367–385 (2012).

⁶⁹ Brown CP & Hoekman BM, *Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough*, 42 J. World Trade, 177 (2008).

⁷⁰ Article IX:2 of the GATS.

⁷¹ Darling JB, *Gambling with Our Future: a Call for Needed WTO Dispute Resolution Reform as Illustrated by the US-Antigua Conflict Over Online Gambling*, 42 George Wash. Intl. L. Rev. 381 (2010).

a panel alleging that several US legal instruments namely, the Wire Act 1961,⁷² The Travel Act 2006⁷³ and the Illegal Gambling Business Act (IGBA) 2006⁷⁴ amounted to a total prohibition on the cross-border supply of gambling and betting services and were therefore in violation of the US commitments under the GATS.⁷⁵ Additionally, these measures were inconsistent with the US obligations under Articles II, VI, XVIII, XI, XVI and XVII and the annexed US Schedule of specific commitments.

1.2[a] *Summary of the Panel/AB Findings*

Based on modified reasoning, the AB upheld the panel's findings⁷⁶ that the US GATS Schedule included specific commitments on gambling and betting services via its inclusion under the W/120 classification of the 1993 Scheduling Guidelines as interpreted under the Vienna Convention on the Law of Treaties (VCLT).⁷⁷ The AB interpreted and concluded that this entry was within the scope of 'gambling and betting services'.

Additionally, the panel's decision was upheld that the US acted inconsistently with Articles XVI:I and 2, as the US federal laws prohibited the cross-border supply of gambling and betting services where they had undertaken specific commitments which amounted to a zero quota which fell within the scope and prohibited by Article XVI:2(a) and (c). However, similar findings of Panel relating to the state laws were reversed as Antigua did not make out a *prima facie* case⁷⁸ in respect to the state laws.

Regarding the third issue of general exceptions of GATS Article XIV(a), the AB upheld the findings of the Panel that the US measures were designed 'to protect public morals or to maintain public order' within the meaning of this Article, but reversed the assertion that the US had not shown that its measures were 'necessary' to do so because the Panel had erred in considering consultations with Antigua to constitute a 'reasonable available' alternative measure. The AB found the measures were necessary as the US had made a *prima facie* case showing the 'necessity' whilst Antigua failed to identify any other measure that may have

⁷² The Wire Act 18 U.S.C. §1084 (2000).

⁷³ The Travel Act 18 U.S.C. §1952 (a)-(b) (2000).

⁷⁴ The Illegal Gambling Business Act 18 U.S.C. §1955 (2000).

⁷⁵ Request for the establishment of a panel by Antigua and Barbuda, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services D-2, WT/DS285/R (13 Jun. 2008).

⁷⁶ Appellate Body Report, United States– Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R – 7 Apr. 2005.

⁷⁷ VCLT Art. 32.

⁷⁸ Appellate Body Report, United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R Adopted 7 Apr. 2005 ¶¶153–155, 257–263.

been reasonably available. Regarding the Article XIV(c) defence, the AB reversed the Panel's erroneous 'necessity' analysis but decline to assert its own findings on the matter. The rulings of the Panel and AB were subsequently adopted by the DSB with the preferred remedy of withdrawal of the inconsistent measure.⁷⁹

To substantiate its argument, the US initiated the legal restrictions as well as the 'rigorous regulatory constraints' of gambling activities and domestic locations to protect the public thereby imposing severe restrictions to their operations.⁸⁰ Based on these constraints, Antigua contended that the US regulations damaged its domestic gambling industry, which resulted in a significant reduction of gambling operators.⁸¹

This case generated tremendous interest owing to the implications of its outcome elsewhere. Questions therefore remain as to the ability of WTO Members to regulate internet gambling and whether the results will challenge the economic and political power in the WTO and if current sanctions provide developing countries with sufficient leverage to enforce compliance with treaty obligations.⁸²

The US having indicated its intention to implement DSB recommendations needed 'a reasonable period of time to do so'⁸³ but its failure to do so, resulted in a determination via binding arbitration.⁸⁴ In the interim, the US indicating compliance, sought to withdraw their commitment in that sector;⁸⁵ however, this was rejected by the Compliance Panel.

As the US did not comply within a reasonable time, Antigua requested authorization⁸⁶ to suspend the application of concessions and related obligations under the GATS and TRIPS⁸⁷ Agreement.

Justice was clearly not served in this case, which has been on going since 2004 and at the date of publication has not reached an amicable resolution whereby an authorization to retaliate was granted on 28 January 2013.⁸⁸

⁷⁹ DSU Art. 22.2.

⁸⁰ Panel Report ¶ 3.30.

⁸¹ Casinocity, <http://www.online.casinocity.com/jurisdictions> (accessed 19 Jun. 2013). In 1999, Antigua had 119 Licenced internet gambling sites which has been reduced to forty-five registered internet gambling operators as of 19 Jun. 2013.

⁸² *Supra* note 62, Kilby, 233.

⁸³ DSU Art. 21.3(b).

⁸⁴ DSU Art.e 21.3(c).

⁸⁵ Article XXI GATS permits a Member to permanently withdraw from a specific commitment at any time after three years have passed from the time the agreement was put into place.

⁸⁶ DSU Art. 22.2.

⁸⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 Apr. 1994, Marrakesh Agreement Establishing The World Trade Organization, Annex IC 33 I.L.M. 1197 [hereinafter *TRIPS Agreement*].

⁸⁸ Appellate Body Compliance Panel found that the DSB recommendations were not fully implemented. Case summary, http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285sum_e.pdf.

Being cognizant of the negative implications of trade retaliation, WTO Members are aware that it is not a credible action from an economic perspective. It is merely a persuasive tool. Furthermore, since this is an imperfect non-binding remedy, challenges in the implementation were experienced by Antigua as they do not bound any tariff concessions,⁸⁹ neither do they have any service commitments as in the case of the US.

Adversely, retaliation would produce a negative effect on Antigua owing to its limited productive capacity and dependency on imports primarily from the US. Any tariff increases will cause a trickle-down effect in increased domestic prices with severe negative spill-off effects on the domestic market and consumers. Considering this and the experience of the implementation problems of the suspension of the GATS commitments in the US-Upland Cotton case⁹⁰ and the resultant fallout in foreign direct investment, emphasis was placed on the economic implications as experienced in the *EC-Bananas* case.⁹¹

Additionally, the effective rationale of this decision must follow the rules and procedures.⁹² However, in considering the challenges posed to developing countries,⁹³ the complaining party is entitled to move from the same sector or same agreement when suspension in that particular sector is not practical or effective.

A further examination of the *EC-Bananas* dispute reveals that the retaliation of trade sanctions rotated and affected unrelated industries as sanctions were imposed on paper, bath products, handbags, bed linens and batteries.⁹⁴ As a consequence, legal actions were brought for damages against the European Union (EU) in the EU Courts,⁹⁵ yet were not effective in securing compliance. Ecuador, aware of the economic implications to its citizens, was compelled and opted not to take any retaliatory action.

Despite all the mechanisms, compliance is less likely to be achieved especially in situations where the complaining party is highly dependent on imports from the respondent.⁹⁶ Owing to disparity between economic strength and influence, under the WTO DSS, retaliation is considered as a measure of last and final resort

⁸⁹ GATS Sector 10.D., 'Sporting and Other Recreational Services,' in the Schedule of specific Commitments under the GATS (GATS/SC/2) (the 'Antigua Schedule').

⁹⁰ DS/267 *US-Upland Cotton*.

⁹¹ DS/27 *EC-Bananas*.

⁹² In accordance with the DSU Art. 22.3.

⁹³ DS/267 *US-Upland Cotton*.

⁹⁴ O'Connor B, *Remedies in the World Trade Organization Dispute Settlement System – the Bananas and Hormones Cases*, 38 J. World Trade, 260 (2004).

⁹⁵ *Ibid.*, at 260.

⁹⁶ Recourse to arbitration by the European Communities under Art. 22.6.

in order to restore the commitments⁹⁷ and to induce compliance with DSB rulings.⁹⁸

The security and predictability in this case were being jeopardized by the persistent recalcitrance of the US. The decision by the Arbitrator of January 2013⁹⁹ signalled to the US that even a small-scale denial of Intellectual Property Rights (IPR) can create some degree of political discomfort, which would presumably cause this sector to pressure the US into compliance.

This decision is not subject to appellate review and therefore not mandatory to adhere unconditionally as in previous rulings¹⁰⁰ since these are generally agreed by previous determinations in the interpretation and application.¹⁰¹ Furthermore, the aggrieved Member would not have to produce detailed sector information to prove the practicality and effectiveness.¹⁰²

To ensure consistency, that the violation was 'serious enough'¹⁰³ to warrant cross-sector agreement application, the 'broader economic consequences' and the 'adverse effects' were considered. Despite cross-agreement retaliations being compounded with legal and policy issues, thus far in the WTO DSS, cross-agreement retaliation has been invoked only three times.¹⁰⁴

The volume of Antiguan exports to the US is around USD 4.5 million annually, when contrasted with corresponding imports from the US is approximately USD 180 million. This disproportionate trading relationship would place the citizens of Antigua in difficult position and whilst suspension of trade with the US will be negligible to the US economy, it would have devastating effect on the Antiguan economy.¹⁰⁵

Retaliation is diametrically opposed to Article 3.2 of the DSU, whilst it may justify the security and predictability of the complaining member, it is simultaneously targeting those sectors which will be affected by the retaliatory measure and this is even less understood by those in the cross-agreement segments.¹⁰⁶ The degree of uncertainty of the effects or impact of retaliation thus

⁹⁷ Article 22.4 DSU.

⁹⁸ Article 22.3 DSU.

⁹⁹ Pursuant to DSU Art. 22.7.

¹⁰⁰ Jackson, Sovereignty.

¹⁰¹ Article 22.3 of the DSU.

¹⁰² DS/27 *EC-Bananas III*.

¹⁰³ DSU Art. 22.3.

¹⁰⁴ *EC-Bananas III*, *US-Gambling* and *US-Upland Cotton*.

¹⁰⁵ *US-Gambling* Panel Report, WT/DS285/R, 10 Nov. 2004, ¶3.2.

¹⁰⁶ Quoting from Malacrida n. 27 in relation to retaliation in the *EC-Hormones* Case – Edward Moreland in relation to US Agriculture Repeals Rotating products on Beef Hormone Retaliation list, 16 International Trade Reporter, 16, 662, French Glue reels from US Sanctions, Agence France-Presse, 23 Jul. 1999 and in the *EC-Bananas III* case – Italian Chees gets caught in grinder of Banana Dispute, Wall Street Journal, 1 Mar. 1999.

makes it problematic with negative implications in the multilateral trading system which promotes progressive liberalization.¹⁰⁷

Clearly, there is a significant need for dispute resolution reform. The inherent problem in the WTO system for enforcement procedures are too insignificant to mandate a country like the US to adhere to the WTO when it is facing a weaker economy. According to Darling, 'this therefore has the potential for causing systemic damage to the WTO process'¹⁰⁸ and to the integrity of the WTO.

1.3 INTERNET GAMBLING LAWS IN THE US

The Internet has provided new opportunities for the gambling sector,¹⁰⁹ and as predicted, given the American public a voracious appetite for online gambling.¹¹⁰ The connotation of gambling has been imbued with social, religious and moral implications,¹¹¹ and in the US this is highly regulated pursuant to the individual states' laws.¹¹² As such, internet gambling is illegal in all fifty states¹¹³ with a number of federal measures designed to limit online gambling. The prohibition of online gambling has been taken through a variety of legislative, executive and judicial responses. On the legislative front, the US prohibits online gambling via the Wire Act 1961,¹¹⁴ the Illegal Gambling Business Act 2006¹¹⁵ and the Interstate and Foreign Travel or Transportation in Aid of Racketeering Act ('Travel Act') 1952.¹¹⁶ Despite these legal instruments, the 1990s saw the growth of gambling websites at a meteoric rate.¹¹⁷ With the ease of online gambling, the website operators moved away from the US for tax advantages establishing their operations offshore, targeting primarily American citizens. The US federal

¹⁰⁷ Malacrida R, *Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures*, 42 J. World Trade (2008).

¹⁰⁸ Darling J, *Gambling with Our Future: A Call for Needed WTO Dispute Resolution Reform as Illustrated by the US-Antigua Conflict Over Online Gambling* 42 George Wash. Intl. L. Rev., 381 (2010).

¹⁰⁹ Kailus MP, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, U. Ill. L. Rev. 1045 (1999).

¹¹⁰ Montpas SM, *Gambling on-Line: for a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. Dayton L. Rev. 163 (1996).

¹¹¹ Carbajales NH, *No More Bets: the United States Rolls the Dice One More Time Regarding International Relations and Foreign Internet Gambling Services*, 19 Tul. J. Intl. & Comp. L. 397 (2010–2011).

¹¹² Lessani A, *How much do you want to bet that the Internet Gambling Prohibition Act of 1997 is not the most effective way to tackle the problems of online gambling?* (1998) The UCLA Online Inst. Cyberspace L. & Policy Archive, <http://www.gseis.ucla.edu/iclp/alessani.html>.

¹¹³ Rychiak RJ, *Legal Problems with Online Gambling*, Engage 36 (2005).

¹¹⁴ The Wire Act is codified at 18 U.S.C. §1084 (2006).

¹¹⁵ The Illegal Gambling Business Act is codified at 18 U.S.C. §1955 (2006).

¹¹⁶ The Interstate and Foreign Travel or Transportation in Aid of Racketeering Act [hereinafter *The Travel Act*] is codified at 18 U.S.C. §1952 (2006).

¹¹⁷ *Supra* note 109, Kailus.

government sought to curb this growing trend which came with a depletion of revenue from the US to other jurisdictions.

The *US-Gambling* dispute thus emerged from different regulatory approaches¹¹⁸ to internet gambling from being morally persuasive to the necessity to diversify an economy utilizing legally available trading options of the WTO. The belief was that their cumulative effect was detrimental to the online gambling industry owing to their discriminatory nature: Antigua contending that the US was allowing domestic internet gambling operators.¹¹⁹

To examine whether the past and current US gambling laws have unjustifiably discriminated against gambling service providers, the scope and nature of the US laws are examined:

- 1) The Federal Laws:
 - a) The Wire Wager Act 1961;
 - b) The Travel Act 1952 (when read together with the relevant state laws); and
 - c) The Illegal Gambling Business Act 1970 (when read together with the relevant state laws);
 - d) The Interstate Horseracing Act.
- 2) The State Laws:
 - a) Section 14:90.3 of the Louisiana Annotated Revised Statutes 1950;
 - b) Section 17A of Chapter 271 of the Annotated Laws of Massachusetts;
 - c) Section 22-25A-8 of the South Dakota Codified Laws; and
 - d) Section 76 -10- 1102(b) of the Annotated Utah Code.

Furthermore, during this discourse, other relevant legal instruments which became critical in the Gambling case are reviewed.

1.3[a] *Federal Laws*

1.3[a][i] The Wire Act

The Wire Act of 1961¹²⁰ is the first Federal Act which the Department of Justice (DOJ) have interpreted to prohibit the supply of gambling services through 'wire communication facilities' which criminalizes internet gambling. Of all the federal statutes, the Wire Act is the principal enforcement mechanism over interstate gambling transactions¹²¹ to be applied in the federal prosecution of activity

¹¹⁸ Lester L, *Beating the Odds: Regulation of Online Gambling Stateside and Abroad*, 28 J. Natl. Assn. Admin. L. Jud. 621 (2008).

¹¹⁹ First written submission of Antigua ¶ 118.

¹²⁰ The Wire Act of 1961 codified at 18 U.S.C. §1084.

¹²¹ *Supra* note 62, Kilby, 233 quoting Jenna F Karadbil, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 Ariz. J. Intl. & Comp. L. 413, 426 (2000).

relating to internet gambling of executives from online casino companies.¹²² This Act has been classified as a cumbersome prosecutorial device¹²³ which remains ambiguous.

According to the DOJ, The Wire Act prohibits ‘not only the act of gambling, but also transmissions of any information that make it possible to gamble in the first place’.¹²⁴ Since this Act was enacted in 1961, it could not have been specifically designed to address the legality of internet gambling¹²⁵ but was used to successfully prosecute Cohen and others¹²⁶ who were operating gambling websites. According to several commentators,¹²⁷ the Wire Act has shortcomings as it:

- ‘Applies to transmissions conducted over a wire, as opposed to wireless transmissions thus transactions using a wireless router, are likely outside the scope of the Wire Act’;¹²⁸
- ‘The Act does not apply to individual betters/gamblers only to those ‘engaged in the business of betting’;¹²⁹ and
- ‘The Act has never been updated to address ambiguities in the law created by the Interstate Horseracing Act’.¹³⁰

In this format, the Wire Act prohibits the use of Mode 1 delivery of service in the GATS by constituting a zero quota for one or several of these means of delivery¹³¹ which limits the form of numerical quotas¹³² and a limitation in the form of a quota¹³³ as confirmed by the Appellate Body.¹³⁴ According to the Panel, any limitation on the means of cross-border delivery would reduce or nullify a standing specific GATS Mode 1 commitment.¹³⁵ Under Article XVI: 2,¹³⁶ the

¹²² Nelson B., *Regulation or Prohibition? The Troubled Legal Status of Internet Gambling Casinos in the United States in the Wake of the Unlawful Internet Gambling Enforcement Act of 2006*, 9 Texas Rev. Ent. & Sports L. 39, 46 (2007).

¹²³ Kilby, quoting Murawski MVC, *The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet Gambling Enforcement Act of 2006*, 48 Santa Clara L. Rev. 441 (2008).

¹²⁴ *Supra* note 62, Kilby.

¹²⁵ Keller Bruce P, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 Yale L.J. 1569, 1577–1578 (1999).

¹²⁶ Hartley H., *Major Legislation on All Forms of Gambling Could Be Imminent*, Offshore Gaming Assn., 17 Dec. 2012; <http://www.osga.com/wordpress/gambling-rumors/major-legislation-on-all-forms-of-gambling-could-be-imminent.html>.

¹²⁷ *Supra* note 62, Kilby, 233; *supra* note 123, Murawski, 48 Santa Clara L. Rev. 39 (2008) and *supra* note 122, Nelson, 39.

¹²⁸ *Supra* note 123, Murawski.

¹²⁹ *Supra* note 122, Nelson B, 39.

¹³⁰ *Supra* note 62, Kilby, 233.

¹³¹ US-Gambling Report – Panel Report, paras 6.363, 6.367 and 6.370.

¹³² GATS Art. XVI:2(2).

¹³³ GATS Art. XVI:2(c).

¹³⁴ US- Gambling Appellate Body Report 265.

¹³⁵ US-Gambling Panel report para. 6.286.

¹³⁶ Article XVI:2(a) and (c) of the GATS.

panel found that Members would be able to circumvent their commitments by adopting restrictions to market access greater than those envisaged and thus ruled that the Wire Act fell within the limitations to market access.¹³⁷

The broad scope 'gambling' under the Wire Act conflicts with the permissibility of internet gambling on a purely interstate basis.¹³⁸ According to Roysen,¹³⁹ the main controversy is its failure to explicitly mention wagering on games of chance, in addition to 'sporting events'. The US Government has consistently argued that the Wire Act applies to all types of internet gambling. However, the judiciary has concluded that it does not prohibit non-sport internet gambling.¹⁴⁰ Additionally, the legislative history indicates that Congress only intended to regulate sports gambling. This is further confirmed by the attempts to amend the Act to include other forms of gambling. Therefore, the DOJ's interpretation of the Wire Act creates a greater conflict in terms of the degree of the US violation of its WTO's commitments.¹⁴¹

1.3[a][ii] The Travel Act

The Travel Act of 1952¹⁴² was drafted in an origin-neutral language and prohibits the use of: 'any facility in interstate or foreign commerce, including the mail . . . to promote . . . or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity'.¹⁴³

Whilst it does not specifically refer to wire communications, it has been interpreted to apply to telephone communications.¹⁴⁴ Grunfeld argues that this law makes interstate travel related to gambling illegal. However, it is dependent on gambling being illegal in the state where the activity in question is intended to be committed as the Act applies to both internet and live gambling.¹⁴⁵

¹³⁷ Molfa M, *US Legislation on Cross Border Gambling Violates the GATS: Has a New Era for Internet Gambling Commenced? I Would Not Bet on It!* 11 *Intl. Trade L. Rev.* 205 (2005).

¹³⁸ *Ibid.*

¹³⁹ Roysen Y., *Taking Chances: The United States' Policy on Internet Gambling and Its International Implications*, 26 *Cardozo Arts & Ent. L.J.* 873 (2009).

¹⁴⁰ *Re Mastercard International Inc.*

¹⁴¹ Grunfeld M, *Don't Bet on the United States Internet Gambling Laws: the Tension between Internet Gambling Legislation and the World Trade Organization Commitments*, *Colum. Bus. L. Rev.* 439 (2007).

¹⁴² The Travel Act s. 1952(a) and (b) of Title 18 of the US Code.

¹⁴³ 18 U.S.C. §1952 (a)(3) (2006).

¹⁴⁴ *Supra* note 139, Roysen.

¹⁴⁵ *Supra* note 141, Grunfeld.

1.3[a][iii] The IGBA

The Illegal Gambling Business Act (IGBA)¹⁴⁶ sought to provide the Federal Government with the authority to prosecute large gambling enterprises by prohibiting the operation of illegal gambling businesses to curtail organized crime and racketeering. The Act defined ‘illegal gambling’ as:

- (1) a violation of the law of a state or political sub-division in which it is conducted;
- (2) involving five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and
- (3) has been or remains a substantially continuous operation for a period in excess of thirty days or has a gross revenue of USD 2,000 in any single day.¹⁴⁷

Similarly, this Act does not mention the use of wire facilities in gambling specifically. Nevertheless, it has been extended to encompass internet gambling so long as the online gambling operators come under the definition of an illegal gambling business under the Act.¹⁴⁸

The Travel Act and the IGBA discriminate between domestic and foreign service suppliers to the extent that these two laws make international internet gambling illegal on the federal level because they are illegal under state laws, but do not prohibit the same actions on a purely intrastate basis.¹⁴⁹ Furthermore, the Travel Act does not specifically refer to wire communications, but has been interpreted to apply to telephone communications and is therefore applicable to internet gambling.¹⁵⁰ Additionally, both the Travel Act and the IGBA were drafted in an equally origin-neutral language and were both interpreted by the panel to amount to a ‘zero quota’,¹⁵¹ which is prohibited by Article XVI:2. In contrast, Matsushita et al., argue that this approach is incorrect from a legal and trade liberalization perspective as it would be inconceivable for GATS to regulate market access conditions.¹⁵² Furthermore, it would be regrettable to incite opaque

¹⁴⁶ The Illegal Gambling Business Act s. 1955(a) and 9(b) of Title 18 of the U.S.C. Code.

¹⁴⁷ 18 U.S.C. §1955 (b)(1) (i)–(ii). The IGBA specifies that ‘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.’

¹⁴⁸ *Supra* note 139, Roysen.

¹⁴⁹ *Supra* note 141, Grunfeld.

¹⁵⁰ *Supra* note 139, Roysen. *It is plausible to conclude that the use of the internet ‘to facilitate an illegal gambling enterprise . . . would violate the law’*; Roysen quoting from Anthony N. Cabot, Federal Gambling Law 119 (1999).

¹⁵¹ Irwin D & Weiler J, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 World Trade Rev. 71 (2008).

¹⁵² Matsushita M, Schoenbaum TJ & Mavroids PC, *The World Trade Organization: Law, Practice and Policy*, 652 (Oxford U. Press 2006).

protectionism with restrictions in the number of items under Article XVI of the GATS.¹⁵³

Whilst the Interstate Horseracing Act (IHA) was not a subject of complaint, as a gambling legislation it became pivotal in the decision.

1.3[a][iv] The IHA

The IHA was enacted in 1978 'to regulate interstate commerce with respect to wagering on horse racing'¹⁵⁴ in response to the rising concern that interstate wagering would lead to a loss of revenue for racetracks.¹⁵⁵ It defines interstate off track wagering as:

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 other state.¹⁵⁶

The term 'electronic media' includes internet transactions and exempts domestic interstate providers from the federal statutes. However, it does not provide the same exemptions for offshore providers.

The IHA underscores discrepancies within the US gambling laws thus was found to be discriminatory because it exempts domestic suppliers of remote gambling and betting services, contrary to the Chapeau of Article XIV.

1.3[b] *State Laws*

According to the US laws, a state is constitutionally empowered to legislate gambling, and local gambling operators can take bets online. This has resulted in a conflict between the federal and state governments on the legality of internet gambling in the US.

The state laws¹⁵⁷ challenged (pursuant to Article XVI GATS) in the *US-Gambling Case* were directed at consumers of gambling who make a bet. However, this was rejected by the panel as Article XVI: 2 (a) specifies 'service suppliers' whilst 'service operators' are mentioned in Article XVI: 2(c). As such, the limitations of these measures are not within the ambit of Articles XVI: 2(a) and/or XVI 2 (c) and thus are not inconsistent with the US specific commitments.¹⁵⁸

¹⁵³ *Ibid.*, p. 652.

¹⁵⁴ 15 U.S.C. §3001 (b) (2006).

¹⁵⁵ Roysen quoting Cabot AN, Federal Gambling Law 119 (1999).

¹⁵⁶ 15 U.S.C. §3002 (3).

¹⁵⁷ Colorado, Minnesota, New Jersey and New York.

¹⁵⁸ Wunsch-Vincent S, *The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling* 5 World Trade Rev. 319 (2006).

The AB determined that despite written submissions and exhibits, Antigua had not established a prima facie case in relation to these laws.¹⁵⁹ Since they were not subjected to any further challenge, it is still uncertain whether the state prohibitions on internet gambling violate WTO anti-discrimination provisions.

1.3[b][i] The UIGEA 2006

The AB held that the US shall modify the violations created by the IHA and bring the measures into compliance.¹⁶⁰ However rather than complying, the US government strengthened its legislation¹⁶¹ and further complicated it¹⁶² by the 'UIGEA' in 2006.¹⁶³ This Act relies heavily upon the government's regulatory power over the domestic financial services industry to constrain the flow of funds to internet gambling firms.¹⁶⁴ After unsuccessful attempts to modify the aforementioned federal laws to eliminate online gambling, the next objective was to target the methods of payment. The restriction of transactions¹⁶⁵ was designed to block or limit the flow of funds to internet gambling businesses.¹⁶⁶ This in essence bans financial institutions from transferring funds for bets in which 'opportunity to win is predominately subject to chance'.¹⁶⁷

The UIGEA does not make placing bets on the internet illegal,¹⁶⁸ but it generally prohibits persons who are 'engaged in the business of betting or wagering' from knowingly accepting payments that involve participation of another person engaged in 'unlawful internet gambling'.¹⁶⁹ Accordingly, unlawful internet gambling is defined as being involved in betting, at least partly through the internet, where that bet 'is unlawful under any applicable Federal or State law in the State or tribal lands in which the bet or wager is initiated, received or otherwise made'.¹⁷⁰ It is primarily an enforcement mechanism which does not alter any of the existing laws. On the contrary, the objective provisions and the restrictions of international payments can cause serious impairments of

¹⁵⁹ Panel Report ¶6.357 and AB report ¶149.

¹⁶⁰ US – Gambling, Appellate Body Report ¶374.

¹⁶¹ *Supra* note 139, Roysen.

¹⁶² Carbajales NH, *No More Bets: the United States Rolls the Dice One More Time Regarding International Relations and Foreign Internet Gambling Services*, 19 Tul. J. Intl. & Comp. L. 397 (2010–2011).

¹⁶³ Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, 120 Stat. 1952 (codified at 31 U.S.C. §§5361–5367 (2006)).

¹⁶⁴ 31 U.S.C. §5364 (2006).

¹⁶⁵ 31 U.S.C. 5362 (7).

¹⁶⁶ 31 U.S.C. 5364 (a).

¹⁶⁷ The Economist, *At War with Lick: Is Poker a Game of Chance Or Skill*, 10 Jul. 2010.

¹⁶⁸ Rose NI, *The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, Gambling & the Law (15 Jun. 1999).

¹⁶⁹ 31 U.S.C. §5363 (2006) and §5362 (10)(A).

¹⁷⁰ *Ibid.*

transactions to the scheduled sectors.¹⁷¹ This Act would therefore be in conflict with the GATS as it restricts international transactions. However, additional uncertainty is embedded here, as Article XI¹⁷² does not deprive Members from regulating the usage of financial instruments, provided that they are consistent with GATS.¹⁷³

The UIGEA by its construction seeks to modify already existing gambling laws by prohibiting internet gambling in states where non-internet gambling is already illegal.¹⁷⁴ Hence, if state law prohibits gambling in a physical casino, the UIGEA indicates that internet gambling will be illegal there as well, unless the law specifically allows for it.¹⁷⁵ This exception therefore discriminates against foreign operators as it provides an exception to operators in states with legalized gambling.¹⁷⁶

The UIGEA is construed as an internal regulation that acts primarily as an external trade barrier closing off the US gambling and betting services market from foreign service providers. It identifies public policy morality and money laundering concerns as the legislative basis, and cites public policy (e.g., protection of morality) as the grounds for exemption from its GATS commitments.¹⁷⁷ The panel report indicates that the enactment of the UIGEA contributed to the inconsistency that the IHA created in terms of anti-internet gambling environment.¹⁷⁸ The panel therefore concluded that the US had failed to comply with the AB ruling against it.¹⁷⁹

One of the critical challenges in this case was that the US schedule of concessions did not include a restriction to the cross-border supply of internet gambling. It was therefore determined that gambling services are committed via 'other recreational services'¹⁸⁰ of the CPC classification. Subsequently, they could

¹⁷¹ US-Gambling Panel Report, ¶¶ 6.441–6.442.

¹⁷² Article XI of the GATS 'Except under the circumstances envisaged in Art. XII, a Member shall not apply restrictions on international transfers and payments.'

¹⁷³ Panel Report §6.442.

¹⁷⁴ *Supra* note 139, Roysen.

¹⁷⁵ *Ibid.*

¹⁷⁶ Carbajales NH, *No More Bets: the United States Rolls the Dice One More Time Regarding International Relations and Foreign Internet Gambling Services*, 19 Tulane J. Intl. & Comp. L. 397 (2010–2011).

¹⁷⁷ Bisset C, *All Bets Are Off(Line): Antigua's Trouble in Virtual Paradise* 35 U. Miami Inter-Am. L. Rev., 367 (2004).

¹⁷⁸ Report of the Panel, Unites States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO/DS285/RW ¶6.135 adopted 30 Mar. 2007.

¹⁷⁹ It is worth noting that the US Constitution Art. VI, §2 provides for self-executing treaties to have a direct effect on US law, which require implementing legislation; this creates a problem as WTO agreements are considered non-self executing, and thus not binding upon the US. By virtue of the US Constitution, the decisions of the WTO DSU have no direct effect on US law and therefore only the US Congress and the President can ensure compliance with WTO rulings.

¹⁸⁰ US-Gambling Panel Report ¶6.134.

not restrict internet gambling services originating in the US.¹⁸¹ As argued by Wunsch-Vincent, the Scheduling Guidelines are facilitative and not normative or mandatory.¹⁸² This in itself leads to ambiguity in regards to the specific provisions of US law, which would establish the prohibitions on the remote supply of gambling services.¹⁸³ However, it was held that the Wire Act, the Travel Act, and the IGBA were in violation of the US's commitments under Article XVI of the GATS.

Furthermore, the AB asserted that these legislation limited market access to 'service suppliers', 'service operation' and 'service output' and thus constitute a 'zero quota' for one or more or all of those means of delivery¹⁸⁴ therefore violating Article XVI:1 and XVI:2(a) and (c).¹⁸⁵ However, these laws were provisionally justified by the 'public morals' exception under Article XIV.

Additionally, the AB approached the dispute by 'not looking only at restrictions on internet gambling, but rather at any restrictions on the free trade of gambling services from Antigua'.¹⁸⁶ Since the US had committed to keeping all gambling services unrestricted, the AB deemed it non-compliant with Article XVI of the GATS, even though the restrictions applied solely to internet gambling.¹⁸⁷

The AB report also indicates that while the IHA¹⁸⁸ allowed for internet gambling, the US was in violation of the GATS owing to the fact that the IHA allows certain forms of gambling, while other forms remain restricted.¹⁸⁹

Analysis of the IHA and the UIGEA reveals that the allowance for intrastate gambling is different thus discriminatory because these exemptions authorize only discriminatory state regulations, as opposed to the other federal laws in question which allow a state to enact non-discriminatory measures.¹⁹⁰ Whereas these two federal laws¹⁹¹ make an exception only for domestic, but not foreign, service providers, then the federal law itself discriminates.

The inclusion of electronic media to the IHA further contradicts the UIGEA, as it makes specific mention of the IHA, indicating that coverage of the UIGEA does 'not include any activity that was allowed under the IHA'.¹⁹² This inconsistency is important for the *US-Gambling* dispute as the WTO has held that

¹⁸¹ Matsushita (p. 615).

¹⁸² Wunsch-Vincent S, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US -Gambling* 5 World Trade Rev. 319 (2006).

¹⁸³ US-Gambling panel Report quoting 18 U.S.C. §1081¶6.165.

¹⁸⁴ Panel Report 6.363.

¹⁸⁵ US-Gambling, Appellate Body Report para. 265.

¹⁸⁶ *Supra* note 141, Grunfeld, 439.

¹⁸⁷ *Supra* note 139, Roysen Y, 873.

¹⁸⁸ AB Report, ¶373(d)(v)(c).

¹⁸⁹ *Supra* note 139, Roysen.

¹⁹⁰ *Supra* note 141, Grunfeld.

¹⁹¹ The IHA and the UIGEA.

¹⁹² 31 U.S.C. §5362 (10)(D)(i)(2006).

the existence of the IHA places the US in violation of international law.¹⁹³ The UIGEA was passed by the US Congress after the WTO decision, and rather than bringing it into compliance, it enunciated that current federal laws allow for purely intrastate internet gambling. The UIGEA does subtly acknowledge the WTO dispute in its pronouncement as it does not affect how the IHA interacts with other federal laws, which is the central issue in the WTO dispute.¹⁹⁴

GATS commitments are legally binding, yet States seeking to enforce laws against the prohibition of internet gambling face jurisdictional constraints over their enforcement efforts, along with other challenges which are rooted in laws which have not been updated to deal with the internet as discussed above.

The approach to interpretation becomes critical in this context as the US's approach was significantly different from the WTO. Jackson opines that the interpretation of international courts is based on the ordinary meaning of the text of the agreement, the object and purpose is merely ancillary,¹⁹⁵ whereas, the US, the ordinary meaning of the words is one factor taken into account as the primary objective is to ascertain the meaning intended by the contracting parties. Additionally, the US approach allows for a 'rule of liberal interpretation'. However, the interpretation of agreements by an authorized international body is binding on the US and its courts.¹⁹⁶

In examining the context of Antigua's argument in relation to sub-section 10.D of the GATS Schedule 'Other Recreational Services',¹⁹⁷ it was necessary to interpret this according to customary rules¹⁹⁸ in light of the VCLT 1969 to make a determination on the word 'sporting'. The AB concluded that by expressly excluding sporting from this sub-section but not gambling and betting services, the US failed to exclude gambling and betting services under the GATS as these are covered by the Schedule.¹⁹⁹

From another perspective, a number of commentators²⁰⁰ have expounded and debated this argument from a jurisdictional point of view regarding the borderless, interstate and international nature of internet gambling which has further complicated the dispute. The named activities were carried on from Antigua which

¹⁹³ *Supra* note 139, Roysen.

¹⁹⁴ *Supra* note 141, Grunfeld.

¹⁹⁵ Jackson JH, *The Jurisprudence of GATT & the WTO: Insights on Treaty Laws and Economic Relations* 322 (Cambridge U. Press 2000).

¹⁹⁶ Jackson quoting the Draft Revised Restatement §325, note 5.

¹⁹⁷ US-Gambling Panel Report ¶6.110 and 6.61.

¹⁹⁸ Pauwelyn J, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 *Am. J. Intl. L.* (2001).

¹⁹⁹ Carbajales NH, *No More Bets: the United States Rolls the Dice One More Time Regarding International Relations and Foreign Internet Gambling Services*, 19 *Tul. J. Intl. & Comp. L.* 397 (2010–2011).

²⁰⁰ Kish SA, *Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling*, (1999) 51 *Fed. Commun. L.J.* 449 (1999).

had legalized internet gambling services,²⁰¹ thus the US cannot exercise jurisdictional authority to regulate activities which took place there.²⁰² The supply of electronic data through the internet from abroad cannot be stopped from within the territory or state where the recipient is located. The US prohibitions therefore cannot prevent operators established abroad from supplying cross-border services to US recipients. This lack of jurisdiction, coupled with the Wire Act and other measures do not prevent US residents from gambling online. Consequently, this renders the US measures largely ineffective to protect public morals and/or public order.

With its complex and contradictory nature, the US legislation creates ambiguity as to the application of US federal gambling restrictions to internet gambling.²⁰³ Contrary to US federal regulations, the individual states have the autonomy to regulate gambling, which is evident in the UIGEA.²⁰⁴ This creates the most significant conflict with the WTO rules and reveals the inherent divergence of interest between state and federal concerns and the treaty obligations.²⁰⁵

The possibility that other federal laws conflict with the US free trade commitments further enmesh the tension in the current US law. Antigua's claim that the US legislation is ambiguous, that certain measures and their enforcement discriminate between domestic service providers and foreign electronic gambling suppliers²⁰⁶ is further exemplified by the expansive stance²⁰⁷ on the Wire Act. Contentious provisions of the UIGEA make the stance of the US even less tenable. Thus, the implications of free trade are at a crossroad with the current internet gambling regulatory scheme which allows states to decide for themselves against the US's free trade commitments undertaken on the behalf of the country as a whole.²⁰⁸

The scope of the domestic provisions pursuant to Articles VI, XIV and XVII GATS is examined below. In doing so, the right to regulate domestically based on national policy objectives and the balance of trade liberalization is critiqued.

²⁰¹ Molfa M, *US legislation on cross border gambling violates the GATS: has a new era for internet gambling commenced? I would not bet on it!* 11 Intl. Trade L. Rev. 205 (2005).

²⁰² *Ibid.*

²⁰³ Wunsch-Vincent S, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US-Gambling* 5 World Trade Review 319 (2006).

²⁰⁴ 31 U.S.C. §5362 (10)(B) 2006.

²⁰⁵ *Supra* note 141, Grunfeld.

²⁰⁶ *Ibid.*

²⁰⁷ Wunsch-Vincent S, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US-Gambling* 5 World Trade Rev. 319 (2006).

²⁰⁸ *Ibid.*

1.4 PRINCIPLES OF THE GATS

This part evaluates the interconnectivities of the relevant provisions and the resulting ambiguities by reference to the 1993 Scheduling Guidelines.²⁰⁹ The emphasis is on the scope of the US law specifically in relation to GATS Articles VI, XIV, XVII and XVIII.

The GATS created several deficiencies,²¹⁰ *inter alia*, the interpretation owing to the embedded ambiguities in the interconnectivity of the GATS provisions listed above.²¹¹ The barriers to trade in services are regulatory and reflected in the framework of specific commitments based on the principle that trade in services will be liberalized progressively.²¹² However, ambiguities relating to their substance, scope and interaction²¹³ create inherent complexity and have a unique nature which have affected the overall balance in the disciplining of regulatory measures.²¹⁴

Services sector has expanded significantly in national and international economies, and traditionally been dominated by the developed countries.²¹⁵ This expansion has also witnessed rapid growth in developing countries in terms of output and employment²¹⁶ resulting in significant trade investment flows.

The main principles of GATS encompass non-discrimination, market access for foreign services and service suppliers. However, GATS has some structural weaknesses such as lack of transparency; sector-specificity of the modalities; and scheduling and generic rules.²¹⁷ The problems created by the overlap and inconsistency between national treatment and market access restrictions will infringe national treatment provisions if they apply only to foreign service providers as in the *US-Gambling* dispute. Accordingly, each Member in their initial scheduled commitments can inscribe either (1) 'none'; (2) 'unbound'; or (3) 'to

²⁰⁹ Group of Negotiating on Services, Scheduling of Initial Commitments in Trade in Services: Explanatory Note 3, 3 Sep. 1993, MTN.GNS/W/164 and Scheduling of Initial Commitments in trade in services: Explanatory Note, Addendum, 30 Nov. 1993, MTN.GNS/W/164/Add.1 [hereinafter '1993 Scheduling Guidelines'].

²¹⁰ Delimatsis P, *Don't Gamble with GATS – The Interaction between Arts VI, XVI, XVII and XVIII GATS in Light of the US Gambling Case*, 40 J. World Trade 1059 (2006).

²¹¹ Mavroidis PC, *Highway XVI Re-Visited: the Road from Non-Discrimination to Market Access in GATS*, 6 World Trade Rev. 1 (2007).

²¹² Article XIX GATS.

²¹³ Tans S, *The GATS Approach towards Liberalization: the Interaction between Domestic Regulation, Market Access, National Treatment and Scheduled Commitments in the GATS*, CTEI Working Papers #111 (2009) The Graduate Institute Geneva Centre for Trade and Economic Integration.

²¹⁴ Delimatsis P, *Determining the Necessity of Domestic Regulations in Services: the Best Is Yet to Come*, 19 European J. Intl. L. 365 (2008).

²¹⁵ Chanda Rupa, *GATS and Its Implications for Developing Countries: Key Issues and Concerns*, DESA Discussion Paper No. 25 ST/ESA/2002/DP.

²¹⁶ *Ibid.*

²¹⁷ Hoekman B, *Assessing the General Agreement on Trade in services.*

inscribe the actual limitation'. The schedule of concessions circumscribes the contractual promise given by each WTO Member, yet these terms are not specifically defined in the GATS thereby their interpretation must be made pursuant to the VCLT 1969.²¹⁸

The regulatory discipline of Article VI takes on a generally permissive view of domestic regulation permitting Members to regulate services providing that these regulations are administered in a 'reasonable, objective manner' and are not more burdensome than necessary.²¹⁹

Delimatsis argues that since regulatory intensity and diversity are manifold in the services sectors, border measures are inapplicable. To this end, domestic regulations are unduly burdensome and therefore are the most restrictive potential barriers to trade in services.²²⁰ Mattoo concurs with this proposition and accordingly notes that 'one of the ironies of the GATS is the weak provisions dealing with domestic regulations' which become difficult to develop effective multilateral disciplines without seeming to encroach upon national sovereignty and unduly limiting regulatory freedom.²²¹ Subsequently, domestic regulations can impede international trade even if they do not expressly limit market access or discriminate between foreign and domestic suppliers.²²²

The general exceptions of Article XIV allow for trade restrictions²²³ whereby Members are allowed to impose laws necessary to protect public morals and to maintain public order or to secure compliance with other GATS consistent laws and regulations. These are applicable to both specific commitments and general obligations. Provided that these measures are considered necessary and designed to meet the objectives,²²⁴ they are justified as exceptions to GATS.²²⁵ However, these measures must be in accordance with the conditions of the Chapeau²²⁶ and therefore must not be applied in an arbitrary manner or constitute unjustified discrimination in a disguised manner that would restrict trade.

²¹⁸ Parks M, *Market Access and Exceptions Under the GATS and Online Gambling Services*, 12 South-Western J. Law & Trade Americas, 495 (2006).

²¹⁹ Council for Trade in Services, Note by the Secretariat: Art. VI:4 of the GATS: Disciplines on Domestic Regulations Applicable to All Services S/C/W/96 (1 Mar. 1999).

²²⁰ Delimatsis P, *Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS*, 10 J. Intl. Econ. L. 17 (2007).

²²¹ Mattoo A, *National Treatment in the GATS, Cornerstone Or Pandora's Box?* 31 J. World Trade 109 (1997).

²²² Krajewski M, *National Regulation and Trade Liberalization in Services: the Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer L. Intl. 2003).

²²³ *Supra* note 31, Leroux, 749.

²²⁴ Article XIV – these are not subject to scheduling in a Member's Schedule of Commitments.

²²⁵ Article XIV(a)–(c).

²²⁶ The Footnote to Art. XIV provides that the public order exception may be invoked only where genuine and sufficiently serious threat is posed to one of society's fundamental interest of society.

The application of this article resulted in the interpretation of the object and purpose of the Chapeau based on the relevance of the exceptional provisions of Article XX of the GATT.²²⁷ Hence, the AB relied on the decisions and/or rulings under the GATT to interpret the term ‘necessary’ in accordance with Article XX of GATT, thus determining that the three federal measures²²⁸ at issue were provisionally justified.²²⁹

In the US-Gambling, the issues of public morals and public order under Article XIV(a) were adjudicated.²³⁰ The Panel concluded that as long as they are not discriminatory: ‘Members should be given some scope to define and apply for themselves the concepts of “public morals” and “public order” in their respective territories, according to their own systems of scales of values.’²³¹

Accordingly the burden of proof lies with the Member attempting to justify a measure under exception clauses with positive evidence and not merely a general assertion, that there is a prima facie case that necessitates the measure. Thus the necessity test (established in the AB Report in Korea-Beef case),²³² requires two conditions.²³³ Additionally, the trade impact of the measure and whether or not another WTO consistent measure was reasonably available may be challenged²³⁴ as in the *US-Gambling* case.

Market access rule²³⁵ under Article XVI has been designed to regulate domestic policies that restrict competition for foreign services and service suppliers.²³⁶ These obligations curtail Members’ ability to impose quantitative restrictions; albeit the exception clause enables national interest to override the provisions of GATS.²³⁷

²²⁷ US- Gambling, Panel Report ¶6.448 Art. XX GATT – United States – Standards for Reformulated and Conventional Gasoline WT/DS2 and WT/DS4 (US-Gasoline), Report of the Appellate Body Adopted 20 May 1996 s. IV.

²²⁸ The Illegal Gambling Business Act, The Wire Act and The Travel Act.

²²⁹ Article XIV(a).

²³⁰ US-Gambling, Appellate Body Report, ¶291.

²³¹ US-Gambling Panel Report¶ 6.461.

²³² Korea- Measures affecting Imports of Freshly Chilled and Frozen Beef, ¶166, WT/DS161/AB/R, WT/DS169/AB/R (10 Jan. 2001) [hereinafter *Korea-Beef*].

²³³ The two elements are identified as ‘the contribution of the measure to the realization of the ends pursued by it’; and ‘the restrictive impact of the measure on international commerce’.

²³⁴ ‘Proportionality test’. US-Gambling, Appellate Body Report ¶306.

²³⁵ The nature and scope of the market access obligations are defined in Art. XVI.1 of the GATS which states that: ‘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’.

²³⁶ King N & Kalupahana, *Choosing between Liberalization and Regulator Autonomy Under GATS: Implications for US-Gambling for Trade in Cross-Border E-Services*. 40 Vanderbilt J. Transitional L., 1189 (2007).

²³⁷ GATS Art. XIV; Scheduling Guidelines.

Notably, the US had undertaken full market access under Mode 1, but the measures which were maintained by the US denied any access to its market for that sub-sector and cross-border mode of supply.²³⁸

The US commitment is ambiguous because the GATS schedule does not explicitly mention gambling and certainly not internet gambling.²³⁹ Additionally, Article XVI is unclear in relation to the commitment of full market access of a particular sector and other regulatory measures are not listed in Article XVI: 2.²⁴⁰ The level of uncertainty belies the fact that the list under Article XVI: 2 is exhaustive as it covers all measures which are considered as market access restrictions.

According to Delimatsis,²⁴¹ the complex issues of Article XVI: 2 led the AB to reject the narrow argument by the US on the limitations of this article with reference to the 1993 Scheduling Guidelines²⁴² and in accordance with the interpretation of the VCLT 1969.²⁴³ The AB accepted that a total prohibition or a zero quota is a quantitative measure inconsistent with sub-section (a) of this article.²⁴⁴ Additionally, a similar conclusion was reached in relation to sub-section (c) covering service operations and service output.²⁴⁵ In contrast, some commentators have criticized this approach because it causes confusion and impedes on national regulatory autonomy.²⁴⁶

Importantly, if the measures are not within the six definitions under Article XVI they are not prohibited market access restrictions, even though they restrict market access.²⁴⁷ While the AB recognized the problem of distinguishing between quantitative and qualitative limitations, it declined to draw the line in this case.²⁴⁸ The application of quantitative limitations can constitute a de facto breach of national treatment obligations as such measures could be non-discriminatory and still serve an illegitimate purpose of imposing maximum quantitative limitations which are designed to restrict trade and competition. This can be called the 'effect principle' in determining whether the national measure impeded market access

²³⁸ *Supra* note 31, Leroux, 749.

²³⁹ Irwin DA & Weiler J, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS 285), 7 World Trade Rev. 71 (2008).

²⁴⁰ Council for Trade in Services, Report of the Meeting held on 9 Jul. 2002, S/C/M/54.

²⁴¹ *Supra* note 220, Delimatsis.

²⁴² GATT 1993 Scheduling Guidelines.

²⁴³ VCLT Art. 32.

²⁴⁴ Appellate Body Report US-Gambling ¶¶227–233.

²⁴⁵ *Supra* note 210, Delimatsis, 1059.

²⁴⁶ Pauwelyn Rien Ne Va Plus? *Distinguishing Domestic Regulation from Market Access in GATT and GATTS*, 4 WTR (2005); Krajewski, *Playing by the Rules of the Game? Specific Commitments after US Gambling and Betting and the Current Negotiations*, Leg. Issues Econ. Integration 32 (2005); Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US-Gambling: a Critique* J. Intl. Econ. L. 9 (2006).

²⁴⁷ Furthermore, the extensions of the definitions are also exhaustive. US-Gambling Panel Report ¶¶6.325 and 6.341.

²⁴⁸ Appellate Body Report, US-Gambling ¶248.

and hinders international trade. However, despite specific commitments guaranteeing market access, Members are under obligation to treat all 'like' services and service suppliers equitably.

The national treatment provision of Article XVII is not limited to domestic regulations but for the committed sectors and applies 'in respect of all measures affecting the supply of services' within the scope of GATS. Thus, this provision is necessary to discipline the use of domestic measures regarding the trade in services.²⁴⁹

Furthermore, Article XVII of the GATS explicitly incorporates the de facto doctrine to ensure that Members' measures are accorded the same regulatory treatment with equitable and competitive conditions,²⁵⁰ which prohibits discrimination on a de jure or de facto basis.²⁵¹

The panel in *US-Gambling* applied judicial economy and did not assess the Article XVII claims; therefore, the AB did not interpret this provision²⁵² leaving some of the key elements of the non-discrimination clauses of GATS undecided. This is a result of the fact that the AB only has the power to uphold, modify or reverse the legal findings and conclusions of the panel.²⁵³

Trade liberalization disciplines can be lenient or strict,²⁵⁴ the most important distinction being between government intervention with 'market access restrictions' and 'domestic regulation'. The legal consequence of these two can be identified by the provisions of GATS as both being prohibitive. However, domestic regulations are only prohibited when they are discriminatory or more burdensome than necessary.²⁵⁵ If commitments are made, market access restrictions are, in principle, prohibited unless justified under explicit exceptions. In contrast, domestic regulation is subject to broad regulatory autonomy and, as a rule, violates GATS only when it discriminates against imports.²⁵⁶ Accordingly, the AB ignored the delicate balance between market access and domestic regulation. Nevertheless,

²⁴⁹ Narlikar A, Daunton M & Stern RM, *The Oxford Handbook on the World Trade Organization* 171 (Oxford U. Press 2012).

²⁵⁰ *Supra* note 31, Leroux, 749.

²⁵¹ Article XVII of GATS, paras 2 and 3.

²⁵² The application of judicial economy was articulated in *US – Shirts and Blouses* (Appellate Body Report, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India (*US – Shirts and Blouses*) pp. 17–18) and qualified in *Australia – Salmon* (Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* (*Australia – Salmon*) ¶223) in which the AB considered that a panel only needs to address the claims which must be considered to resolve the matter of the dispute.

²⁵³ *Supra* note 31, Leroux.

²⁵⁴ *Supra* note 246, Pauwelyn, 131.

²⁵⁵ *Ibid.*

²⁵⁶ *Supra* note, Pauwelyn.

Antigua did not appeal the AB's reversal of the panel's findings on the state and federal laws which were contrary to Article XVI:2 of the GATS.²⁵⁷

While GATS does not explicitly regulate the provisions of market access and domestic regulation, an examination of Article XVI and Article VI implies a certain degree of overlap as Articles VI:1 and XVI both have 'general application' in relation to trade in services and market access restrictions.²⁵⁸ Thus both provisions would seem to cover certain market access restrictions, or decisions pursuant thereto, that are already covered by Article XVI of GATS.²⁵⁹

At the centre of the Gambling dispute is the relationship between Article XVI and paragraph 5 of Article VI which are 'mutually exclusive' as these provisions were deemed to be consistent.²⁶⁰ Fundamentally, by undertaking full market access or full national treatment commitment, Members shall not apply measures that would be inconsistent with the provisions of these articles²⁶¹ albeit they maintain the right to regulate within the parameters of Article VI of the GATS.²⁶²

Nevertheless, the Panel in the *US-Gambling* case distinguished these two articles as:

Measures that constitute market access limitations within the meaning of Article XVI and which, unless scheduled must be eliminated, are to be distinguished from measures that impose qualification requirements and procedures, ..., which can be maintained so long as they do not constitute 'unnecessary barriers to trade in services' pursuant to the criteria contained in Article VI:5.²⁶³

Arguably, the demarcation between Articles VI and XVI remains opaque in the WTO jurisprudence.²⁶⁴ The AB did not specify the relationship between these two provisions: 'it is neither necessary nor appropriate for us to draw, in the abstract, the line between quantitative and qualitative measures'.²⁶⁵ However, these can be distinguished as Article XVI covers quantitative limitations and maximum ceilings whereas; Article VI deals with regulatory measures of a qualitative character and minimum requirements.²⁶⁶ According to Wunsch-Vincent, this

²⁵⁷ Appellate Body Report – US–Gambling ¶ 256.

²⁵⁸ GATS Art. VI:1–3.

²⁵⁹ *Supra* note, Pauwelyn.

²⁶⁰ Panel Report ¶6.28.

²⁶¹ Panel Report ¶6.311.

²⁶² Panel Report ¶6.316.

²⁶³ Panel Report ¶6.303.

²⁶⁴ *Supra* note 245, 1059.

²⁶⁵ Appellate Body report, US–Gambling ¶250.

²⁶⁶ *Supra* notes, Pauwelyn and Delimatsis.

confusion amounted to a zero quota and not a qualitative regulation.²⁶⁷ This ambiguity was also articulated by the EU and Japan.²⁶⁸

The US measures were imposed on consumers rather than service suppliers or operators.²⁶⁹ The 'impact' of such measures or prohibition is as important as on whom they are imposed. While the measures may be imposed on the consumers, the effect of the measure is directly related to the market access for service providers. Since such measures have the effect of distorting market access and competition, they are discriminatory.

The combination of Articles XVI and XVII establishes the primary objective of the GATS.²⁷⁰ However, there is a complete overlap in the scope of application of Article XVI (market access) and Article XVII (national treatment), which are not mutually exclusive.²⁷¹ Concomitantly, GATS restricts the right of a Member to impose either trade distorting quantitative limits on service suppliers or qualitative regulations that cause discrimination against foreign services or suppliers on the basis of the origin of the service or the nationality of the service supplier.

This division was clearly evident as the US gambling laws could in theory be both market access restrictions and simultaneously discriminate against foreign suppliers of gambling services as compared with 'like' US suppliers of gambling services. The Panel examined the US gambling laws solely based on discrimination, not pursuant to Article XVII, but pursuant to the *Chapeau* of the Article XIV exception. On the contrary, even if the US gambling laws were found to be non-discriminatory pursuant to Article XVII, this would not preclude them as a violation of Article XVI. Hence, even if a measure is justified as non-discriminatory, it can still violate Article XVI as some measures may conform to Article XVII but still violate Article XVI.²⁷² This is manifestly dichotomous.

The relationship between Article XVI and Article XVII is not explicit except for an oblique reference in Article XX.2:

Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

²⁶⁷ Wunsch-Vincent S, *The Internet, Cross Border Trade in Services, and the GATS: Lessons from US Gambling*, 5 World Trade Rev. (2006).

²⁶⁸ The European Communities and Japan were third parties in this dispute during the appellate decision.

²⁶⁹ Appellate Body report, US-Gambling ¶107.

²⁷⁰ For example, the progressive liberalization of trade in services by eliminating or restricting domestic regulations that impede market access and/or competition.

²⁷¹ *Supra* note, Pauwelyn. Art. XX:2 of GATS provides that 'measures inconsistent with both Arts XVI and XVII shall be inscribed in the column relating to Art. XVI'. In this case, the inscription will be considered to provide a condition or qualification to Art. XVII as well.

²⁷² *Ibid.*

Article XX:2 protects Members from unintentional commitments on national treatment in the absence of any inscriptions to the contrary in Members' schedules.²⁷³ The Scheduling Guidelines also present a degree of difficulty in establishing what exactly has been committed.²⁷⁴ The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard. Accordingly, measures which violate national treatment obligations and require scheduling under Article XVII, would also need to be scheduled under Article XVI if the market access obligation extends beyond the obligation not to maintain or adopt the measures in the list of paragraph two.²⁷⁵ Thus, all measures falling under any of the categories listed in Article XVI:2 must be scheduled, whether or not such measures are discriminatory according to the national treatment standard of Article XVII. Leroux concludes that market access and national treatment disciplines complement each other in ensuring real and effective access of a Member to a committed service sector.²⁷⁶

Thus while Article XVI requires discrimination to be considered on a case-by-case basis whether *de jure* or *de facto*, Article XVII only focus on the establishment of a formal criterion.²⁷⁷

The notable differences between Articles VI, XVI and XVII therein relate to the positive function for national treatment and domestic regulation versus the negative function of the market access provisions. Accordingly, the characteristic of GATS is considered to be hybrid as some obligations apply to measures that affect trade in services, whilst the application of others is subjected to specific commitments.²⁷⁸

Arguably, these articles remain to be 'the thorniest systemic issue in the GATS today',²⁷⁹ considering that market access and national treatment are the trade restrictions targeted by liberalization negotiations and commitments, while domestic regulation encompasses all others that are neither market access limitation nor a *de jure* or *de facto* national treatment violation.²⁸⁰

The analysis of Articles VI, XIV, XVII and XVIII reveals the sensitive nature and complexity of scheduling specific commitments and the ambiguities they

²⁷³ *Supra* note, Delimatsis.

²⁷⁴ Mavroidis PC, *Highway XVI Re-Visited: the Road from Non-Discrimination to Market Access in GATS* 6 World Trade Rev. 1 (2007).

²⁷⁵ Mattoo, *National Treatment in the GATS, Cornerstone Or Pandora 'S Box?* 31 J. World Trade 109 (1997).

²⁷⁶ *Supra* note 31, Leroux.

²⁷⁷ Regan DH, *A Gambling Paradox: Why An Origin-Neutral 'Zero-Quota' Is Not a Quota Under GATS Art. XVI* 41 J. World Trade 1311 (2007).

²⁷⁸ *Supra* note 31, Leroux.

²⁷⁹ *Supra* note 210, Delimatsis, 1059.

²⁸⁰ Marchetti JA & Mavroidis PC, *What Are the Main Challenges for the GATS Framework? Don't Talk about Revolution*, 5 European Bus. Org. L. Rev. 548 (2004).

entail.²⁸¹ On a fundamental level, there is uncertainty regarding the exact scope and contours of central provisions of GATS and their relationship with each other.²⁸²

The hybrid character of the GATS revolves not only around non-discrimination and reduction of trade barriers but also the right to conduct – via market access and disciplines – national policies. Because of this, the objects and purposes are supported by different interpretative results.²⁸³ In accordance with the commitments under the provisions of GATS, any measure which affects the supply of services must be non-discriminatory²⁸⁴ and any measure meeting one of the six specific definitions of market access restrictions²⁸⁵ is prohibited unless they are justified under Article XIV.²⁸⁶

1.5 DISPUTE SETTLEMENT AND SANCTIONS

The analysis of the *US-Gambling* dispute necessitates a brief discussion regarding the roadblocks, which hinder remedies and their enforcement. Although the WTO self-describes its decisions as binding upon all Members, these are merely declaratory.²⁸⁷ So far, available remedies²⁸⁸ have often proven to be ineffective²⁸⁹ as also evidenced in the *US-Gambling* case.²⁹⁰ The DSB therefore may construct remedies that are highly persuasive, yet difficult to enforce because it has no means of forcing countries to adhere to its recommendations.²⁹¹

The WTO has had quite an impressive record of settling disputes, with currently 492 disputes in its books.²⁹² Approximately 4.5% reached the pinnacle of authorization of trade retaliation,²⁹³ remarkably, twenty-four of these requests for consultation were under the GATS with four cases²⁹⁴ reaching the apex of the

²⁸¹ *Supra* note 222, Krajewski.

²⁸² Adlung R, *Services Negotiations in the DOHA Round: Lost in Flexibility?* 9 J. Intl. Econ. L. 865 (2006).

²⁸³ *Supra* note 222, Krajewski, 59.

²⁸⁴ Article XVII of GATS.

²⁸⁵ Article XVI of GATS.

²⁸⁶ *Supra* note 246, Pauwelyn, 169.

²⁸⁷ Legal Affairs Div. & the Appellate Body World Trade Organization. A Handbook on the WTO Dispute Settlement System (2004) 2 88 CUP Cambridge.

²⁸⁸ As discussed previously, these are limited to settlement, withdrawal of the measure, compensation and retaliation.

²⁸⁹ Legal Effect of Panel and Appellate Body Reports and Dispute Settlement Body Recommendation and Rulings §7.1.

²⁹⁰ *Supra* note 34, Pauwelyn, 336.

²⁹¹ Codd KB, *Betting on the Wrong Horse: the Detrimental Effect of Noncompliance in the Internet Gambling Dispute on the General Agreement on Trade in Services (GATS)*, 49 William & Mary L. Rev. 941 (2007).

²⁹² WTO disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (accessed 27 Apr Sep. 2015).

²⁹³ *Ibid.*

²⁹⁴ *EC-Bananas, EC-Hormones, US-Upland Cotton and US-Gambling.*

DSS. Remarkably, retaliation proved ineffective in two of these cases²⁹⁵ as the prospect of smaller Members to enforce their rights on dominant Members with stronger economies was unrealistic and counterproductive.²⁹⁶

The constitution of the WTO limits the jurisdiction of the DSB: defending party can only invoke those rules by which both parties are bound; and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided for in the covered agreements. In order to enforce other rules or proposed recommendations, a WTO panel would require expanded jurisdiction.²⁹⁷ The limited jurisdiction of the panels has thus led to unjustified restrictions as the strict requirements imposed for amendments to the treaty have been wrongly invoked as an obstacle to allowing *inter se* modifications to the treaty. This constitutional blockage leaves most WTO Members without recourse to enforceable legal redress and justice.²⁹⁸

To date several proposals for the reform of the WTO dispute settlement have been put forward. It is imperative to evaluate the feasibility of some of them with a view of improving the remedy regime for smaller economies.²⁹⁹

Currently, the DSU allows for compensation³⁰⁰ as an alternative to retaliatory measures.³⁰¹ In order to eliminate the ineffective remedies of optional compensation and sanctions a more favourable remedy would be a mandatory compensation.³⁰² The existing DSM compensation procedures only permit reparations for prospective relief as determined by the panel. This measure allows the Member to maintain the inconsistent protection for their domestic industry during the panel and appellate stages of the dispute. A limited relief therefore would be an interim measure or preventative measure³⁰³ to avoid the irreparable damage to the injured Member during the judicial phase and exercised according

²⁹⁵ *EC-Bananas and EC-Hormones*.

²⁹⁶ Darling JB, *Gambling with Our Future: A Call for Needed WTO Dispute Resolution Reform as Illustrated by the US-Antigua Conflict Over Online Gambling*, 42 *Geo. Wash. Intl. L. Rev.* 381 (2010).

²⁹⁷ WTO Agreement Art. X:1. Any legal reform has to go through the Ministerial Conference. The provisions for amendments are explicitly provided by either consensus or a two-thirds majority of the WTO Members at the Ministerial Conference.

²⁹⁸ Van den Borgh K, *Justice for All in the Dispute Settlement System of the World Trade Organization?* 39 *Georgia J. Intl. & Comp. L.* 787 (2010–2011).

²⁹⁹ Bronckers M & Van den Broek N, *Financial Compensation in the WTO: Improving Remedies in the WTO Dispute Settlement System*, 8 *J. Intl. Econ. L.* 101–126 (2008); *supra* note 298, Van den Borgh; and Proposal by the LDC Group, *Negotiations on the Dispute Settlement Understanding TN/DS/W/49* (9 Oct. 2002); WTO Document, TN/DS/W23 and TN/DS/W/49 submitted by Mexico.

³⁰⁰ Article 22.1 DSU.

³⁰¹ Report of Panel, *EEC – Restrictions on the Imports of Dessert Apples*, BISD 36S/93 (L/6491), adopted 22 Jun. 1989.

³⁰² Darling JB, *Gambling with Our Future: A Call for Needed WTO Dispute Resolution Reform as Illustrated by the U. S. –Antigua Conflict Over Online Gambling*, 42 *George Wash. Intl. L. Rev.* 381 (2010).

³⁰³ Article 21.5 – Panel in *Australia – Subsidies Provided to Procedures and Exporters of Automotive Leather* WT/DS126/RW (21 Jan. 2000).

to the UN model³⁰⁴ especially to cover the period until the withdrawal of the measure in breach of the WTO obligation.

This differs from the current compensation system, which limits recovery to the damage the applicant country has suffered subsequent to the date of expiration of the reasonable time period the panel provides the violating country to come into compliance.³⁰⁵ The proposed remedy would actually help a country recover an amount equal to the harm it has suffered.

The removal of the discretion which countries have over compensation request would be significant in addressing the inequality in the system and providing a true remedy.³⁰⁶ After the AB determined the required amount of compensation, the respondent should be required to reduce its tariffs in accordance with the panel or AB's determination as to the sectors and goods most likely to actually help compensate the aggrieved applicant. Under the proposed structure, the DSB would determine the amount of damage already suffered and the annual potential damage likely to be suffered as a result of the inconsistent measures.

Past disputes³⁰⁷ indicate that compensation often produce compliance and has proven to be more practical in lieu of retaliation after the expiration of the reasonable time period. Previous compensatory arrangements³⁰⁸ have proven to be a viable solution. After all, the concept of financial compensation has been enshrined in public international law and jurisprudence.³⁰⁹

Guidance on reform proposals on non-compliance can be taken from the US domestic laws relating to the application of punitive damages where the courts can award punitive damages where an individual has demonstrated 'reckless indifference to the rights of others and conscious action in a deliberate disregard of

³⁰⁴ Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding TN/DS/W/& (9 Oct. 2002).

³⁰⁵ *Supra* note 34, Pauwelyn, 335.

³⁰⁶ O'Connor B, *Remedies in the World Trade Organization Dispute Settlement System-the Bananas and Hormones Cases* 38 J. World Trade 245 (2004). O'Connor has inferred that any change in the system of sanctions must take the basic principles of fairness and justice into consideration with a radical review of the rules for calculating nullification and impairment of the recognition that some members have no 'leverage' over others in trade terms.

³⁰⁷ Mutually acceptable solution on Modalities for Implementation, Japan Taxes on Alcoholic Beverages, WT/DS8/20, WT/DS10/20 WT/DS11/18 (12 Jan. 1998); Notification of Mutually acceptable Solution, Turkey –Restrictions on Imports of Textile and Clothing Products, WT/DS34/14 (19 Jul. 2001); Agreement Under Art. 21.3(b) of the DSU, United States –Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/18 (31 Jul. 2002); Notification of a Mutually Satisfactory Temporary arrangement, United States –s. 110(5) of the US Copyright Act, WT/DS160/23 (26 Jun. 2003).

³⁰⁸ Grosse R-K. *A Pirate of the Caribbean? the Attractions of Suspending TRIPS Obligations*, 11 J. Intl. Econ. L. 313 (2008) indicating that the US negotiated and concluded compensatory agreements with the EC (EU), Canada, India, Japan and other interested WTO third-party members to this dispute.

³⁰⁹ United States –s. 110(5) of the US Copyright Act, WT/DS160/23 (26 Jun. 2003).

them'.³¹⁰ Furthermore, DSU Article 22.4 requirement that sanctions be equivalent to the 'level of nullification or impairment' need not be an absolute bar to punitive damages.³¹¹ The WTO could impose punitive sanctions in the determination of harm. The DSB would be required to articulate clearly how the degree of sanctions selected served to induce compliance with the breached rule.³¹²

According to Pauwelyn, total compliance is not possible given the current instruments available and thus to achieve this ambitious goal would be meagre.³¹³ Accordingly, the WTO must strengthen its mechanisms by punitive sanctions which would allow the WTO to further exploit and bridge the gap between actual damage incurred and the appropriate remedy that would ensure no repetition of the unwanted behaviour in the future.³¹⁴ Punitive sanctions would force non-complying nations to account for the cost they impose by weakening the integrity of the system as a whole.

Davey's reform proposals particularly in scenarios such as the *US-Gambling* case are also apt.³¹⁵ He suggests substituting fines or damages as a remedy in lieu of suspension of concessions; retroactivity so as to induce compliance within the reasonable period of time and an adjustment to the mechanism to increase the level of sanctions over a period of time.

Evidently, and already in existence are fines and other forms of mandatory compensation in public international law³¹⁶ which have been proposed in the GATT.³¹⁷ This provides direct reparations for economic injury suffered whilst inducing compliance and is more congruent with public international law and introduces a degree of fairness.³¹⁸ To ensure that the Antigua gambling industry benefits from this proposed reform, the cost of non-compliance should be applied directly to the injured industry by means of safeguards and trade remedies to prevent further disruption.

³¹⁰ Restatement (Second) of Torts §908 cmt. B (1977).

³¹¹ Williams MR, *Pirates of the Caribbean (and beyond): Developing a Remedy for WTO Noncompliance*, 41 *George Wash. Intl. L. Rev.* 503 (2009–2010).

³¹² *Ibid.*

³¹³ Pauwelyn J, *Remedies in the WTO: First Set the Goal, Then Fix the Instruments to Get There*, in *WTO Law and Process* (Mads Andenas & Federico Ortino eds, BIICL 2005).

³¹⁴ Mavroidis P, *Remedies in the WTO Legal System: between a Rock and a Hard Place*, 11 *European J. Intl. L.* 763 (2000).

³¹⁵ Davey W, *Compliance Problems in WTO Dispute Settlement*, 42 *Cornell Intl. L.J.* 119 (2009).

³¹⁶ Bronckers M & Van den Broek, quoting from Draft Articles on Responsibility for internationally Wrongfully Acts, adopted by the International Law Commission at its 53rd session (September 2001), Supplement No. 10. (A/56/10) Ch. IV.E.1.

³¹⁷ Bronckers M & Van den Broek, quoting from the report of the Ad Hoc Group on Legal Amendments to the General Agreement, COM.TD/F/4 (4 Mar. 1966).

³¹⁸ Bronckers M & Van den Broek N, *Financial Compensation in the WTO: Improving Remedies in the WTO Dispute Settlement*, in *Reform and Development of the WTO Dispute Settlement System* 8 *J. Intl. Econ. L.* 101 (2005).

Bronckers et al. suggested that developing countries should opt for financial compensation as the preferred improvement to the remedies conundrum rather than continuing to support various options that are unlikely to yield diplomatic consensus.³¹⁹ Additionally, the calculation of the level of nullification or impairment should be from as early as the date of the imposition that the measure was found inconsistent with WTO rules.³²⁰ This would allow for an incentive for compliance and further discourage attempts to prolong the implementation period.

The value, legitimacy and integrity of the WTO are dented if obligations therein cannot be enforced when one of the signatories fail or choose not to comply with them. As such, the US response in the Gambling dispute undermines the WTO regime as well as the rights and obligations of its Members under the GATS.

Sanctioning as a remedy is rife with inequality, as the weaker countries are unable to utilize it effectively. Without an effective implementation and enforcement mechanism, the obligation to comply with the rulings and recommendations of the DSB will be null and void if the voluntary nature of compliance remains.

Currently, since monetary compensation is dependent upon compliance by a non-compliant member, it has the potential to threaten the long-term viability of an effective dispute settlement mechanism. Following the outcome of the *US-Gambling* case, one can assume that prospective remedies discourage immediate or timely compliance. The determination of the retaliatory phase is not definitive as to whether or not the intention is to rebalance concession, coerce compliance or to punish recalcitrant respondents.³²¹

The ineffectiveness of conventional remedies is one of the problems faced by small island states, which affect their performance in the WTO DSS. The suspension of IPR potentially provides them not only with leverage but also with difficulties, as it has proven difficult to convince a major power to comply with WTO decisions.

To handle the legal aspects of the retaliatory suspension of TRIPS obligations and to avoid the domestic legal and technical difficulties which would lead to improved compliance, Antigua established a select committee to oversee the implementation process.³²² The seven-member 'WTO Remedies Implementation

³¹⁹ *Ibid.*

³²⁰ WTO Document, TN/DS/W/23 and TN/DS/W/49, both submitted by Mexico.

³²¹ An analysis of Arts 3.7 and 3.3 of the DSU when read together seeks to 'secure a positive solution to a dispute' between Members as promptly as practicable.

³²² Cana News, 19 Jul. 2013 'Antigua - WTO Government appoints select committee as despite continues with over internet gaming', http://feeds.feedblitz.com/_/26/43753226/prorsscan.

Committee' (RIC) is responsible for directing the government's reciprocal plan to suspend selected US IPR to the tune of USD 21 million per year. However, to date, no progress has been made.

1.6 CONCLUSION

In today's inter-connected WTO trade regime, certain violations may have an impact on the legally protected interest of many or even all WTO Members who are entitled to invoke their rights via the DSU.³²³ An efficient rule-based system needs an adjudication that is independent, efficient, fair, consistent and respected.

However, there exists a degree of imbalance between smaller economies and the major players. This is exemplified by the limited enforcement methods available. To nullify this, mandatory, rather than the existing voluntary compliance would ensure adherence.

The extensive temporal condition of this case and the expectations of a quick and decisive outcome proved illusory and instead of an immediate and comprehensive victory, the case has become a time-consuming battle with Antigua showcasing great resilience and dexterity of a small state under stress.³²⁴ Despite Antigua framing the case as one of fairness in the international system which filtered through all of the legal remedies available via the WTO DSM, the US abrogated on one of the fundamental elements of fairness in the international system under the guise of domestic security and social protectionism.³²⁵

The *US-Gambling* dispute was the first to present these arguments relating to Part III of the GATS to the DSB, thus addressing the scope of the agreement, scheduling of specific commitments, market access, national treatment, most favoured nation treatment and general exceptions. The decisions of the panel and the AB provided guidance on several key elements; whilst some provided a degree of clarification, others created confusion and rejected legal clarity.³²⁶ Thus the intended scope of the regulatory measures remains unclear.

Clearly, whilst the GATS provisions were fairly elaborate, there are lacunas in the agreement as illustrated above. The deference shown towards the regulations and flexibility in the application of the conditions under US laws and GATS Articles should be understood and interpreted in light of the particular facts and in the context of this dispute.

³²³ Gazzini T, *The Legal Nature of WTO Obligations and the Consequences of Their Violation*, 17 *European J. Intl. L.* 723 (2006).

³²⁴ Cooper Andrew, *Internet Gambling Offshore: Caribbean Struggles Over Casino Capitalism*, *International Political Economy Series* (Palgrave Macmillan 2011).

³²⁵ *Ibid.*

³²⁶ Krajewski M, *Services Trade Liberalisation and Regulation: New Developments and Old Problems*, *European Y.B. Intl. Econ. L.* 153 (2010).