

US – GAMBLING¹

(DS285)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Antigua and Barbuda</i>	<i>GATS Arts. XIV(a) and XIV(c) and XVI</i>	Establishment of Panel	<i>21 July 2003</i>
			Circulation of Panel Report	<i>10 November 2004</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>7 April 2005</i>
			Adoption	<i>20 April 2005</i>

1. MEASURE AND SERVICE AT ISSUE

- **Measure at issue:** Various US measures relating to gambling and betting services, including federal laws such as the “Wire Act”, the “Travel Act” and the “Illegal Gambling Business Act” (“IGBA”).
- **Service at issue:** Cross-border supply of gambling and betting services.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **Scope of GATS commitments:** The Appellate Body upheld, based on modified reasoning, the Panel's finding that the US GATS Schedule included specific commitments on gambling and betting services. Resorting to “document W/120” and the “1993 Scheduling Guidelines”³ as “supplementary means of interpretation” under Art. 32 of the VCLT, rather than context (Art. 31), the Appellate Body concluded that the entry, “other recreational services (except sporting)”, in the US Schedule must be interpreted as including “gambling and betting services” within its scope.
- **GATS Art. XVI:1 and 2 (market access commitment):** The Appellate Body upheld the Panel's finding that the United States acted inconsistently with Art. XVI:1 and 2, as the US federal laws at issue, by prohibiting the cross-border supply of gambling and betting services where specific commitments had been undertaken, amounted to a “zero quota” that fell within the scope of, and was prohibited by, Art. XVI:2(a) and (c). However, it reversed a similar finding by the Panel on state laws because it considered that Antigua and Barbuda (“Antigua”) had failed to make a prima facie case with respect to these state laws.
- **GATS Art. XIV(a) (general exceptions – necessary to protect public morals):** The Appellate Body upheld the Panel's finding that the US measures were designed “to protect public morals or to maintain public order” within the meaning of Art. XIV(a), but reversed the Panel's finding that the United States had not shown that its measures were “necessary” to do so because the Panel had erred in considering consultations with Antigua to constitute a “reasonably available” alternative measure. The Appellate Body found that the measures were “necessary”: the United States had made a prima facie case showing of “necessity” and Antigua had failed to identify any other alternative measures that might be “reasonably available”. With respect to the Art. XIV(c) defence, the Appellate Body reversed the Panel due to its erroneous “necessity” analysis and declined to make its own findings on the issue.

The Appellate Body modified the Panel's finding with respect to the chapeau of Art. XIV. The Appellate Body reversed the Panel's finding that the measures did not meet the requirements of the chapeau because the United States had discriminated in the enforcement of those measures. However, the Appellate Body upheld the second ground upon which the Panel based its finding, namely that in the light of the Interstate Horseracing Act (which appeared to authorize domestic operators to engage in the remote supply of certain betting services), the United States had not demonstrated that its prohibitions on remote gambling applied to both foreign and domestic service suppliers, i.e. in a manner that did not constitute “arbitrary and unjustifiable discrimination” within the meaning of the chapeau.

¹ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

² Other issues addressed: confidentiality of panel proceedings; terms of reference; the relevance of statements by a party to the DSB; measure at issue (total prohibition); practice as a measure; establishment of a prima facie case; late submission of a defence (DSU Art. 11); burden of proof.

³ “W/120”, entitled “Services Sectoral Classification List”, was circulated by the GATT Secretariat in 1991. It contains a list of relevant service “sectors and subsectors”, along with “corresponding CPC” numbers – from the UN Provisional Product Classification – for each subsector. The “1993 Scheduling Guidelines” were set out in an “Explanatory Note” issued by the Secretariat in 1993.

US – GAMBLING (ARTICLE 21.5 – ANTIGUA AND BARBUDA)¹ (DS285)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Antigua and Barbuda</i>	<i>GATS Art.XIV chapeau</i> <i>DSU Arts. 17.14 and 21.5</i>	Referred to the Original Panel	<i>19 July 2006</i>
			Circulation of Panel Report	<i>30 March 2007</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>22 May 2007</i>

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The Wire Act, the Travel Act and the Illegal Gambling Business Act relating to cross-border supply of gambling and betting services.

2. SUMMARY OF KEY PANEL FINDINGS

- **DSU Art. 21.5 (measures taken to comply):** No “measures taken to comply” existed within the meaning of Art. 21.5 because, since the original proceeding, there had been no change to the measures found WTO-inconsistent, nor to their application, their interpretation, or the factual or legal background bearing on them or their effects.
- **DSU Art. 17.14 (adoption of Appellate Body reports):** In accordance with Art. 17.14, an Appellate Body Report is a final decision on the claims and defences ruled upon in that Report with respect to the measures at issues as they existed at the time of the original panel proceeding. An Appellate Body Report is not simply a final decision on the evidence presented in the original proceeding. A compliance panel may not make a different finding on a claim or a defence already ruled upon without any change relevant to the measures at issue.

3. OTHER ISSUES²

- **Chapeau (GATS Art. XIV):** This relates to the application of measures and not simply their wording. Hence, a change in the administrative or judicial enforcement of the same measures at issue might be sufficient to comply with the DSB recommendation based on an inconsistency with the chapeau of GATS Art. XIV.
- Even if the compliance panel were entitled to re-open a defence ruled upon, the United States presented no evidence in the compliance proceeding regarding the GATS-consistency of the measures at issue that would justify a different finding from that reached in the original proceeding.
- Antigua presented additional evidence in the compliance proceeding regarding intrastate commerce that could have been the basis for additional findings on the consistency of the measures at issue with the chapeau of GATS Art. XIV, but in view of DSU Art. 17.14 the compliance panel was not entitled to make any further findings on this issue.

¹ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

² Other issues addressed: measures adopted after establishment of a panel serving as evidence of facts; DSU Art. 19.1, 19.2 (effect of a DSB recommendation); DSU Art. 21.3 (relevance in a compliance proceeding of a prior request for a reasonable period of time to comply, and of statements made to an Art. 21.3 arbitrator).