A Summary Analysis of the Report of the WTO Appellate Body in the Dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

This article summarises and explains the Report (the "Report") of the Appellate Body (the "Appellate Body") of the World Trade Organisation (the "WTO") in the dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "Dispute").

INTRODUCTION

The Report was issued on 7 April 2005 as a result of the decision of the United States to appeal the report dated 10 November 2004 (the "Panel Report") of the WTO panel that had considered the Dispute initially (the "Panel"). In the Panel Report, the Panel had found that a number of United States federal and state laws violated its commitments to Antigua and Barbuda ("Antigua") under the WTO's General Agreement on Trade in Services (the "GATS"). The Panel recommended that the WTO request the United States to bring the applicable laws into compliance with its obligations under GATS, in basic terms requiring the United States to provide market access to Antiguan gambling and betting service providers in order to offer their services to consumers in the United States.

The decision of the Panel was an unqualified victory for Antigua in the Dispute, and clearly took the United States and most gambling experts and commentators by surprise. It should be noted that most American legal experts, including experts that had performed services in the past for Antigua and well-known authors on gambling law in the United States, had completely discounted the Antiguan case from the beginning.

Unfortunately, the Report by the Appellate Body lacks the clarity of the Panel Report, which has led the United States, certain members of the press and a number of gambling experts and commentators to conclude that either the United States "won" the Dispute on appeal or that the Appellate Body had determined that all the United States had to do was "adjust" or "tweak" one of its laws to bring itself into compliance with the GATS. As will be explained below, the United States, the press and the experts and commentators are wrong. Despite the occasionally ambiguous language contained in the Report, the end result is the same as the result of the Panel Report–the United States was found by the Appellate Body to be in violation of its obligations under the GATS.

GENERAL CONSIDERATIONS

When considering the meaning of WTO report it is important to take into account the following:

> WTO dispute settlement reports are virtually always highly technical and legalistic.

> The Panel and the Appellate Body only have to consider factual elements that have been put before them. Factual elements which are not considered by the Panel or Appellate Body remain open for possible determination at a later time.
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> The section of the Report which has generated the most controversy is the discussion on the "public morals and public order" exemption of Article XIV of the GATS. This is the first Appellate Body ruling to address this exemption. During the proceedings, however, there was very little factual debate on the United States' attempt to invoke this exemption. This was due to the fact that the United States only invoked this exemption at a very late stage of the proceedings before the Panel, after all written submissions had been made.

SUMMARY OF THE REPORT

As noted above, the Report of the Appellate Body upholds the Panel Report, although on slightly different and narrower grounds. In the Report, the Appellate Body made four key rulings:

(1) The United States' Made Commitments for Betting and Gambling Services

Certain key obligations of the GATS only apply to the extent that a WTO Member has made "specific commitments" for the service sector or subsector at issue. The Appellate Body ruled that the United States had made commitments to provide "market access" to other WTO members in gambling and betting services in its schedule of specific commitments to the GATS. The United States had contended that it had not made such a commitment and expressly excluded gambling and betting services by its omission of "sporting services" in its GATS schedule. The Appellate Body disagreed, holding that the commitment was covered by the heading "Other Recreational Services" made in Section 10.D of the United States' GATS schedule.

(2) Antigua Established The Existence of Offending Measures

The Appellate Body ruled that the United States had adopted "measures" that interfered with its obligation to provide market access to Antiguan gambling and betting service operators. Specifically, the Appellate Body ruled that Antigua established the existence of three federal laws which prohibited Antigua's gambling services (i) the Wire Act of 1961, 18 U.S.C. §1084 (the "Wire Act"); (ii) the Travel Act, 18 U.S.C. §1952 (the "Travel Act"); and the Illegal Gambling Business Act, 18 U.S.C. §1955 (the "IGBA"). Antigua had sought to have additional federal and state laws considered "measures" that violate the United States's GATS commitment and had listed a large number of these other federal and state laws that it contended to be measures in the Dispute. Antigua also contended that the United States maintained a "total prohibition" against the supply of gambling services from Antigua, and that this "total prohibition" was itself a measure. The Appellate Body disagreed with these arguments, finding that the other list of federal and state laws were not discussed in sufficient detail by Antigua in its submissions and that a "total prohibition" cannot serve as a measure by itself. Thus, the Appellate Body limited the offending "measures" in this matter to the three federal statutes listed

above. This is *not* because the Appellate Body found that the other federal and state prohibition laws do not violate GATS. Rather, the Appellate Body made no substantive ruling with respect to the other federal and state laws, so Antigua could, if necessary, raise the other laws as offending measures in future WTO proceedings.

(3) Antigua Established That The Measures Violate Article XVI of the GATS

The Appellate Body found that the measures established by Antigua –the three federal statutes–violated Article XVI of the GATS. Article XVI:2(a) and (c) of the GATS concern "market access" for services and prohibit a WTO member country from maintaining "numerical quotas" and other limitations on service suppliers or service operations. The Appellate Body agreed with Antigua that a law prohibiting the supply of a service or prohibiting the use of one or more means of delivery (such as the Internet) violates Article XVI:2(a) and (c). On that basis, the Appellate Body found that the United States' offending measures limited the number of service providers from Antigua in such a way as to violate the "market access" obligations of the United States under Article XVI.

This finding is crucial, as with the finding that a law prohibiting the provision of cross-border gambling and betting services violates Article XVI of the GATS, clearly *all* United States laws that have this effect are in breach of the United States' commitments under the GATS.

(4) The Appellate Body Rejected the United States' Moral Defence Under Article XIV of the GATS

The Appellate Body found that the United States could *not* use a "moral defence" to nullify its violation of the GATS. Article XIV(a) of the GATS provides an exemption allowing a WTO member to maintain measures that otherwise violate the GATS, for reasons related to public morals and public order. In order to establish the exemption, the United States was required to meet both prongs of a two-part test. First, a measure must be "necessary" to protect public morals and public order. Second, a measure must satisfy the requirements of the so-called "chapeau" of Article XIV, that is the measure must not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination."

(a) The first prong: the "necessary" analysis

The "necessary" prong of an Article XIV defence primarily rests on the determination whether there exists a "reasonably available WTO consistent alternative" to the offending measure. The key question on necessity in the Dispute was therefore whether the United States could protect its public morals by regulating remote gambling rather than by simply prohibiting it.

The Report articulates for the very first time precisely how the burden of proof shifts back and forth between the party raising the defence and the party asserting the complaint. Under this "burden-shifting" framework:

(i) the defending party must first establish a prima facie case that its measure is "necessary" to protect public morals and public order;

(ii) the complaining party must then put forward regulatory alternatives; and

(iii) finally, the defending party must then demonstrate that this proposed regulatory alternative is not "reasonably available."

The Appellate Body determined that the three federal statutes were necessary to protect public morals or maintain public order in connection with alleged threats posed to Americans by what the United States called "remote" gambling. In reaching this determination, the Appellate Body concluded that the United States had established a *prima facie* case of necessity, yet Antigua did not provide sufficient rebuttal evidence of regulatory alternatives. Antigua had actually provided a significant amount of evidence and detailed discussion of its successful regulatory measures, but the Appellate Body simply chose to ignore this evidence for reasons that are not explained. It is important to note that the Appellate Body did not find that there are no reasonably available regulatory alternatives to address public morality and public order concerns related to remote gambling. In the Appellate Body's view, there has in fact not been a discussion on regulatory alternatives and that debate remains entirely open. It is now clear, however, that if a WTO Member such as Antigua *does* put forward regulatory alternatives, the United States can continue to invoke Article XIV only if it demonstrates that these regulatory alternatives do not work.

(b) The second prong: the chapeau/discrimination analysis

With respect to the second required element of the United States' Article XIV defence, the Appellate Body ruled that the United States could not establish the chapeau because the United States either sanctioned or permitted "remote" gambling in the United States in the form of off-track account wagering on horse races under the authority of the United States Interstate Horseracing Act ("IHA"). Specifically, the Appellate Body found that the IHA either allows or appears to allow remote betting on horse races across state borders, only for domestic service suppliers and not for foreign service suppliers. This is impermissible discrimination. In view of the existence of remote horse wagering under the IHA, the Appellate Body ruled that the United States did *not* prove that its laws were not non-discriminatory or a disguised restriction on trade. Because the United States had not met its burden under the chapeau–a requirement of establishing a successful Article XIV defence–the United States could not prevail on its morals defense and thus the decisions in favour of Antigua remained intact.

UNDERSTANDING THE APPELLATE BODY DECISION

(1) The Application of the Chapeau

Claims by the United States that it had "won" the Dispute and interpretations by putative gambling law "experts" more or less agreeing with the United States' assessment have led to real confusion as to the consequences of the Report. There is no doubt that for whatever reason, the Appellate Body contributed to this ambiguity by the language used in the Report. Simply stated,

whatever the nature of the discussion used by the Appellate Body, it is clear that it determined that the United States had not met its burden of proof under the "chapeau." Because meeting the chapeau is a requirement of an Article XIV defence, *the defence in its entirety failed*. To properly assess the result of the decision, it is important to note a number of key points.

First, the Appellate Body observed with respect to the chapeau in paragraph 350 of the Report that:

> The United States based its defence under the chapeau of Article XIV on the assertion that the measures at issue prohibit the remote supply of gambling and betting services by *any supplier*, whether domestic or foreign. In other words, the United States sought to justify the Wire Act, the Travel Act, and the IGBA on the basis that there is *no discrimination* in the manner in which the three federal statutes are applied to the remote supply of gambling and betting services.

The Appellate Body further pointed out in paragraph 351 of the Report that:

> The Panel determined that Antigua had rebutted the United States' claim of no discrimination *at all* by showing that domestic service suppliers are permitted to provide remote gambling services in situations where foreign service suppliers are not so permitted. We see no error in the Panel's approach.

In other words, the United States attempted to establish its compliance with the chapeau by asserting that it did not discriminate against foreign suppliers with respect to "remote" gambling–that is, the United States claimed that *all remote gambling is illegal in the United States*. Antigua submitted evidence of a large variety of "remote" gambling in the United States to rebut this assertion. The Panel literally ignored most of this evidence in its chapeau assessment, finding only that the United States could not establish the chapeau for two reasons–the tolerance and non-prosecution of certain domestic remote gambling service providers such as www.Youbet.com and www.CapitalOTB.com and the existence of the IHA.

In reviewing what the Panel had decided in its discussion under the chapeau, the Appellate Body disagreed with the finding of the Panel in respect of Antigua's claim that the United States permitted a number of domestic "remote" gambling services but it agreed with the Panel on the subject of the IHA. Accordingly, even though the Appellate Body repeatedly stated that its decision was based *solely* upon the evidence before it of the IHA, the Appellate Body made it clear that the United States had failed to establish compliance with the chapeau:

> . . . *our* conclusion–that the Panel did not err in finding that the United States has not shown that its measures satisfy the requirements of the chapeau . . . We *find*, rather, that the United States has not demonstrated that . . . the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau. (paragraph 369).

> . . . we *find* that the United States has not established that these measures satisfy the requirements of the chapeau. (paragraph 372).
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> . . . the United States has not demonstrated that . . . the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements of the chapeau . . . (paragraph 373(D)(v)(c)).
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> . . . the United States has not . . . established that these measures satisfy the requirements of the chapeau . . . (paragraph 373(D)(vi)(a)).

In the last paragraph of the Report, the Appellate Body made its final recommendation:

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

It is important to realise that the "measures . . . inconsistent" with the GATS are the three federal laws at issue–the Wire Act, the Travel Act and the IGBA. The measures do *not* include the IHA, which was before the Panel and the Appellate Body only as evidence of United States discrimination over foreign service suppliers. The Appellate Body did not ask the United States to "tweak" the IHA. The Appellate Body did not find that the only discrimination in the United States against foreign "remote" service providers was under the IHA. It simply found that, based upon the IHA itself, the United States had not proved that the three federal measures were not applied by it in a discriminatory fashion. So the Antiguan win holds, despite the finding in favour of the United States on the first prong of the Article XIV defence.

(2) Important Rules of Law

A very important point that most commentators have missed is that the Appellate Body Report expressed certain principles and rules of law that have important applications for the future. Like appellate courts in most legal systems, the Appellate Body considers each dispute with a certain set of facts and either makes or interprets rules of law that apply to those facts. Those rules of law that are established or interpreted then influence conduct, fact patterns and resolution of disputes going forward. For example, if the United States Supreme Court rules in a case that discrimination in the workplace based upon gender violates the American Constitution, then that rule of law applies in the future to all effected workplaces without the need for each possible employee bringing a case to the courts to establish its own entitlement to rely on the rules established in the decision.

In the Dispute, the Appellate Body established three crucial rules of law that are of great importance going forward:

> The United States made full and unrestricted commitments to the cross-border provision of gambling and betting services in its GATS schedule

> A United States law that has the effect of prohibiting the cross-border of gambling and betting services violates Article XVI of the GATS
>
> The United States may not discriminate against foreign service providers in the provision of remote gambling services

If the United States wants to follow the rules laid out by the decision, it will have to do one of two things–grant Antiguan service providers market access or prohibit all remote gambling within the United States in addition to remote gambling provided from other countries.

CONCLUSION

Although it is unfortunate that the Report of the Appellate Body has given rise to misinterpretations, the legal team of Antigua and Barbuda–the United States firm of Mendel Blumenfeld, LLP and the United Kingdom firm of Herbert Smith are pleased with and agree with the foregoing interpretation of the results of the Dispute.