Chapter 4

GATS Case Laws: Ambiguities and Interpretations

Section 4.1: Introduction

Design and drafting are the preliminary steps towards the functioning of any treaty or agreement that has to be followed by the signing parties. Whenever such an agreement is put 'in effect', ambiguities surface about the time and manner of application of the rules and principles consisting it. Such ambiguities remain, since the negotiators cannot possibly foresee each and every situation that the signing parties can subsequently find themselves in. A dispute is inevitable whenever at least two signing parties find themselves in situations where one or more of the rules consisting the agreement can be interpreted in several ways. Such an occasion calls for a decision as to which interpretation is to be followed. The dispute is settled when a unique interpretation of the relevant rule is arrived at. A review of the settled disputes involving claims under an agreement would illuminate how some of the existing rules have been interpreted, and how the related ambiguities have been resolved, in relation to the agreement in question.

Ambiguities in the rules and principles of the WTO agreement arise as they do in any other treaty or agreement. We have presented some of the ambiguities in the General Agreement on Trade in Services in the previous chapter. A review of the settled disputes that involve claims brought under the GATS would illuminate how principles and disciplines of GATS have been interpreted and how some of the ambiguities have been resolved.
The purpose of this chapter is to shed light on how ambiguities relating to some of the rules and principles of GATS have been resolved through the settlement of disputes. To that end we present the interpretations of principles and disciplines of the GATS established by the settled disputes. We choose to present 3 disputes: (1) “European Communities – Regimes for

1 The reason for this choice is as follows. Disputes or complaints registered with the WTO with claims of violations of GATS clauses are not many. This is possibly due to the following reasons. (1) Commitments assumed by Members in relation to trade in services are not many and hence the scope of conflict is also limited and (2) Lack of experience may have left governments and industry associations less familiar with the new rules as compared to the long tested GATT provisions, and therefore hesitated to launch a case. 13 complaints have been registered with the WTO with claims of violation of one or more clauses under the General Agreement of Trade in Services. 5 complaints have been addressed and settled and Appellate Body reports have been circulated / adopted. For 1 complaint, involved parties have mutually agreed on a solution. For 7 other complaints consultations are still pending.

The settled disputes with completed Appellate / Panel reports are the following:

2. a) Canada (respondent) – Certain Measures Affecting the Automotive Industry. [WT/DS 139]. Complainant – Japan. b) Canada (respondent) – Certain Measures Affecting the Automotive Industry. [WT/DS 142]. Complainant – EC. Both these complains involved the same measures adopted by Canada and hence were addressed by the Dispute Settlement Body as a single dispute. The Appellate Body Report was adopted on 19 June 2000.

The involved Members mutually agreed upon a solution for the following complaint: Turkey (respondent) – Certain Import Procedures for Fresh Fruit [WT/DS 237]. Complainants: Ecuador. Request for consultation: 31 Aug, 2001. Mutually agreed solution was reached on 29 Nov, 2002. The measures in question were modified by Turkey and Ecuador agreed to withdraw its complaint.

Complaints for which consultations are pending are the following:


.....(continued in next page)
Importation, Sale and Distribution of Bananas, WT/DS27”, (2) “Canada – Certain Measures Affecting Automotive Industry, WT/DS139, and WT/DS142” and (3) “United States - Measures Affecting Cross Border Supply of Gambling and Betting Services WT/DS285”.

Interestingly, as the titles of the two disputes (1) and (2), discussed in Section 4.2, suggest, they involve trade in bananas and automobiles respectively, both of which are goods and not services. Both these disputes involve claims under various Agreements under the WTO, including those under GATS. The services in question in both these disputes are the ‘distribution services’ associated with the goods in question. As a study of these disputes suggests - the primary question / ambiguity in relation to distribution services, is whether a measure affecting ‘distribution’ of a good, is a subject matter of GATT or is it a subject matter of GATS. Resolving this issue is a step towards defining the Scope of GATS. Another important issue addressed in these two disputes is that of discriminatory treatment between domestic and foreign suppliers as well as between suppliers of different foreign countries. The primary ambiguity regarding clauses that prohibit discriminatory treatment under the GATS is whether they only prohibit measures that are designed to discriminate or do they also prohibit measures that have discriminatory effect without being designed to do so; and in case the latter is also prohibited, the issue that needs to be clarified is that of the way in which to determine whether a particular measure has a discriminatory effect or not. Another ambiguity surfaced in particular reference to the case “Canada – Certain Measures Affecting Automotive Industry, WT/DS139, and WT/DS142” is in

For the purpose of analyzing how GATS clauses have been interpreted in general, only the disputes, which, relate to general GATS clauses and with completed Appellate Body/ Panel Reports have been analyzed. These are -(1) European Communities - Regime for the Importation, Sale and Distribution of Bananas, [WT/DS27];(2) Canada – Certain Measures Affecting the Automotive Industry, [WT/DS139] and [WT/DS 142] and (3) United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services [WT/DS 285]. The Dispute Settlement Case “Mexico – Measures Affecting Telecommunications Services, [WT/DS204]” has not been consulted in view of the fact that the complaints and arguments in this case relate specifically to (1) a Reference Paper, which, is a part of Mexico’s additional commitments and to Section 5 of the Annex on Telecommunications of the GATS – none of which interpret or explain the GATS rules and obligations in general.

Completed Panel and Appellate Body Reports::


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relation to Article V. 1 (Economic Integration) of GATS. The issue in this particular instance was whether a Member country could claim an exemption from its MFN obligation by invoking Article V. 1(b) while the exemption is accorded to some and not all suppliers of another member of an integration agreement.

A number of issues have been clarified in the third dispute, that is, (3) "United States - Measures Affecting Cross Border Supply of Gambling and Betting Services WT/DS285" discussed in Section 4.3. Services of Gambling and betting quite predictably bring about the concerns for maintenance of public moral and public order. Whether and under what conditions a prohibition in the supply and consumption of gambling and betting services can be maintained as a general exception to the obligations of GATS – is one significant issue addressed in this dispute. This dispute also clarified whether a 'prohibition' of an activity can at all be considered as a 'measure' in the GATS sense and whether it consequently entails an import quota.

Section 4.2: Interpretation of GATS Clauses: A study of the Disputes ‘EC-Bananas, WT/DS 27’ and ‘Canada-Autos, WT/DS 139, WT/DS 142’

In order to present the interpretation of GATS established in the cases EC-Bananas, WT/DS 27 and Canada-Autos, WT/DS 139 and 142 will be useful to briefly discuss the subject matter of the cases, namely the measures of Member countries at issue and the claims arising under GATS. These are presented in Box 1 and 2.

BOX 1

European Communities – Regimes for Importation, Sale and Distribution of Bananas, WT/DS27
[Information Extracted from Panel Report of WT/DS27, paragraph 3.1 to 3.36]

EC is one of the largest importers of bananas in the world. For example, in 1994 EC was the world's second largest importer of bananas after US. Latin American countries and African-Caribbean-and Asian (ACP) countries are the major banana exporters to EC. Costa Rica, Ecuador, Colombia, Panama and Honduras are the leading Latin American banana exporters and Cameron, Cote d'Ivoire; St. Lucia, The Dominican Republic, Jamaica, Belize and Dominica are the leading ACP exporters to the

2 This particular ambiguity was addressed by the Panel established for the case, but subsequently remained unaddressed by the Appellate Body.
A large part of bananas consumed in EC is produced domestically in Canary islands, Martinique, Guadeloupe, Madeira, the Azores and, the Algarve and Crete and Laconia.

Ecuador, Guatemala, Honduras, Mexico and the United States brought complaint against European Communities concerning its regime of importation, sale and distribution of bananas established by Council Regulation (EEC) No. 404/93 of 13th February 1993, on the common organisation of the market for bananas (Regulation 404/93) and subsequent EC legislation, regulations and administrative measures including the provisions of the Framework Agreement on Bananas, which implement, supplement and amend that regime. The complainants claimed that the EC's regime of importation, sale and distribution of bananas is inconsistent with several agreements of GATT 1994 as well as Article II (Most Favoured Nation Treatment) and Article XVII (National Treatment) of GATS.

We present a brief summary of the Council Regulation and subsequent Framework Agreement of Bananas of the EC below. The other regulations and administrative measures related to the EC's importation of bananas are given in the Panel Report of WT/DS27, Paragraph 3.29 to 3.36.

**Council Regulation 404/93**

The EC established a Common Market Organisation for bananas by Council Regulation (EEC) 404/93 in February 1993. Prior to this each country in the EC implemented national import regimes for bananas. Some countries had de facto prohibition against banana imports; some gave preferential access to bananas from one or the other ACP states. Bananas from ACP countries were permitted duty free into all EC member countries.

EC's Council Regulation 404/93 established rules of imports that apply uniformly to all EC members. This regulation consists of five separate titles. Title III of this regulation establishes EC assistance for the domestic banana sector. Under this title, members of recognized EC producer organizations (and individual producers under certain circumstances) are eligible for compensation of any income loss resulting from the implementation of the EC banana regime. Title IV of the Council Regulation lays down the tariff treatment for banana imports. It establishes 3 categories of imports for this purpose.

(i) Traditional imports from twelve ACP countries;
(ii) Non-traditional imports from ACP countries which are quantities in excess of traditional quantities supplied by traditional ACP countries and quantities supplied by ACP countries which are not traditional suppliers of the EC;
(iii) Imports from third (non-ACP) countries.

The EC tariff treatment of banana imports under this regulation was as follows.

- **Traditional ACP bananas** – Duty free up to a total of 857,700 tonnes with country specific quotas for each of the 12 ACP countries.

- **Non-traditional ACP bananas** – Duty free up to a total of 90,000 tonnes, divided into country-specific allocations. A specific tariff of ECU 693 per tonne for out-of-quota shipments in 1996/97.

- **Third-country bananas** – A specific tariff of ECU 75 per tonne up to 2.11 million tonnes. An additional 353,000 tonnes were made available in 1995 and 1996. Country-specific allocations were made for countries party to the Framework Agreement on Bananas (BFA), plus an "others" category. A specific tariff of ECU 793 per tonne for out-of-quota shipments in 1996/97.

For each of the 3 categorise the quantitative restrictions / allocations are presented in the panel report [Paragraph 3.8 to paragraph 3.20]

There are some regulations imposed by EC subsequent to the Council Regulations that implement, supplement and amend the regime. These regulations are briefly presented below.

- **Operator Category Rules** - EC under its Operator Category rules defines 3 ‘Operator Categories’ base on quantity of bananas marketed in the previous years, for the distribution of import licences. The definitions of these categories and their respective entitlements are as follows.  
  *Category A:* operators that have marketed third-country and/or non-traditional ACP bananas.  
  [Allocation - 66.5%]
Category B: operators that have marketed EC and/or traditional ACP bananas. [Allocation - 30%]
Category C: operators who started marketing bananas other than EC and/or traditional ACP bananas, as from 1992 or thereafter ("newcomer category"). [Allocation - 3.5%]

Import quantities of category A and B are determined on the basis of previous 3 years supply and that of category C is determined on the basis of volume of application, due to unavailability of previous years' data for this newcomer category. The operator categories A and B are further subdivided into 3 types of qualifying entities or "activity functions" as set forth below. Economic agents, in order to qualify as category A or B, must have performed at least one of these activities of marketing bananas during the previous three years (reference years).

Activity (a): "primary importer" - "the purchase of green third-country bananas and/or ACP bananas from the producers, or where applicable, the production, and their subsequent consignment to and sale of such products in the Community". [Weight allocation - 57% (of average quantity of import within respective categories)]

Activity (b): "secondary importer or customs clearing" - "as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product shall be equated with the risk taken on by the owner". [Weight allocation - 15%]

Activity (c): "ripened" - "as owners, the ripening of green bananas and their marketing within the Community". [Weight allocation - 28%]

 Hurricane Licenses - In addition to the above mentioned 2.553 million tones tariff quota the EC also issued 281,605 tones of supplemental "Hurricane Licenses" from November 1994 to May 1996. Hurricane licenses may be used to import bananas from any source. These licenses are granted, on an ad hoc basis, to operators who "include or directly represent" a producer adversely affected by a tropical storm and is thus unable to supply the EC market. Bananas imported with hurricane licences may be counted as reference quantities for future eligibility for Category B licences. Hurricane import volumes are subject to the third-country (non-ACP) in-quota tariff (ECU 75 per tone).

Framework Agreement of Bananas (BFA)

In 1994, the EC negotiated the BFA with Colombia, Costa Rica, Venezuela and Nicaragua. The BFA contains provisions concerning the size of the basic tariff quota, the in-quota tariff (ECU 75 per tonne), country-specific allocations and transferability of those allocations, the 90,000 tonne allocation for non-traditional ACP bananas, and export certificates. The BFA was incorporated into the EC's Uruguay Round Schedule in March 1994. It came into force on 1 January 1995 and its functioning is scheduled to be reviewed "before the end of the third year" with full consultations with Member Latin American suppliers. The BFA is applicable until 31 December 2002.

Lomé waiver

The Fourth Lomé Convention, signed on 15 December 1989 between the EC and 70 African, Caribbean and Pacific developing countries, many of which are Members of the WTO, contains a protocol concerning bananas, along with provisions applying to products more generally. On 10 October 1994, the EC requested, together with the ACP contracting parties, a waiver from the EC's obligations under Article 1:1 of GATT 1947. The waiver was granted by the CONTRACTING PARTIES on 9 December 1994 and provides, in paragraph 1 of the waiver decision, as follows:

"[T]he provisions of paragraph 1 of Article 1 of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party."
BOX 2

Canada – Certain Measures Affecting Automotive Industry, WT/DS139, and WT/DS142

European Communities (EC) and Japan, the two complaining parties to this case (WT/DS139, and WT/DS142) filed a complaint with respect to a Canadian measure which provides a duty exemption for the importation of certain automobiles, buses and other specified commercial vehicles ("motor vehicles"). EC and Japan claimed that the measure is inconsistent with Art II (MFN) and Art XVII (National Treatment) of the GATS and some other articles of various other agreements under the WTO. During the proceedings of the case, Article I (scope) of GATS was referred and eventually clarified. The other articles of agreements under the WTO that the Canadian measure was claimed to inconsistent with are Art I:1 (MFN) and Art III:4 (National Treatment) of GATT 1994, Art 2 of Trade Related Investment Measures (TRIMS), Article 3.1(a) of Agreement on Subsidy and Countervailing Measures (SCM).

The Canadian measure at issue in this appeal is duty-free treatment provided to imports of automobiles, buses and specified commercial vehicles ("motor vehicles") by certain manufacturers under the Customs Tariff, the Motor Vehicles Tariff Order, 1998 (the "MVTO 1998") and the Special Remission Orders (the "SROs"). The conditions under which eligibility for the import duty exemption is determined are set out in the MVTO 1998, the SROs and certain Letters of Undertaking (the "Letters").

The Canadian Customs Tariff provides that a motor vehicle can be imported into Canada at a tariff of 6.1% applied uniformly on a Most Favoured Nation basis.

Under the MVTO 1998, the import duty exemption is available to manufacturers of motor vehicles on imports "from any country entitled to the Most-Favoured-Nation Tariff", if the manufacturer meets the following three conditions:

1. The manufacturer must have produced in Canada, during the designated "base year", motor vehicles of the class imported;
2. The ratio of the net sales value of the vehicles produced in Canada to the net sales value of all vehicles of that class sold for consumption in Canada in the period of importation must be "equal to or higher than" the ratio in the "base year", and the ratio shall not in any case be lower than 75:100 (the "ratio requirements"); and
3. The amount of Canadian value added in the manufacturer's local production of motor vehicles must be "equal to or greater than" the amount of Canadian value added in the local production of motor vehicles of that class during the "base year" (the "CVA requirements").

* Through the SROs, Canada has also designated certain other companies, in addition to those qualifying under the MVTO 1998, as eligible to import motor vehicles duty-free. The SROs entitle motor vehicles imported by these companies to receive the import duty exemption as long as they meet certain designated conditions. Specifically, the SROs provide for the remission [reduction] of duties on imports of motor vehicles where conditions relating to certain specified production-to-sales ratio requirements and CVA requirements are fulfilled.

* The Letters were prepared and submitted by the Canadian subsidiaries of four automobile manufacturers to the Canadian Minister of Industry in January 1965 and commit these manufacturers to increase the amount of Canadian value added used by a specified percentage of each manufacturer's market share growth. These four companies were: General Motors of Canada Ltd., Ford Motors Co. of Canada Ltd., Chrysler Canada Ltd., and American Motors (Canada) Ltd. Ibid. paragraphs 10.92-10.95 and 10.128.

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The issues/questions arising in these two cases from claims under GATS are:

1. Whether the measure (or measures) at issue is (are) subject to or within the scope of GATS. Resolving this issue provides an interpretation of Article 1 of GATS.

2. Whether the measure(s) at issue are inconsistent with the defending Member’s obligation under the Most-Favoured-Nation clause (Article II:1) of the GATS.

3. Whether the measure(s) at issue are inconsistent with the defending Member’s obligation under the National Treatment (Article XVII) of the GATS.

4. Whether a Member country could claim an exemption from its MFN obligation by invoking Article V.1(b) (Economic Integration) while the exemption is accorded to some and not all suppliers of another member of an integration agreement.

Answers to question (2), (3) and (4) lead us towards interpretations of Articles II, XVII and V of the GATS respectively.

**Interpretation of Article I of GATS:**

From the facts and issues of the two disputes presented above, it appears that the issue regarding the measures under consideration in either case is similar as far as Article I of the GATS is concerned. The issues are (1) whether a measure regulating trade in goods can be subject to GATS, while it is already subject to GATT 1994 and (2) how to determine whether any particular measure that is found to be subject to GATS affects trade in services. Let us consider the issues one by one.

1. *Whether a measure regulating trade in goods can be subject to GATS, while it is already subject to GATT 1994. Connected to this issue is the question of mutual exclusivity of the GATS and GATT 1994:*

Given that the measures referred in both disputes are directly related to regulation of import of ‘goods’, whether they can be subject to the agreement on trade in ‘services’ is not apparent and should depend on how the scope and definition (Article I: 1 and Article II: 2) of the GATS are interpreted. The arguments forwarded for and against the claim that such measures regulating goods trade can be subject to GATS are as follows.

In WT/DS27 (EC – Bananas) EC (the defending Member imposing the measure) argues that GATS does not apply to the EC’s import licensing procedure because they are not measures “affecting trade in services” and rather deal with the importation, sale and distribution of a ‘good’. The EC while arguing on this issue referred to Article I: 1 of GATS. Article I:1 states,
"This Agreement applies to measures by Members affecting trade in services."

EC points out that the meaning of the phrase “measures by Members affecting trade in services” should be interpreted as in Article XXVIII(c) [Definitions] of GATS. Article XXVIII(c) states that for the purpose of this agreement

"measures by Members affecting trade in services” include measures in respect of [emphasis added]
(i) the purchase, payment or use of a service;
(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;”

As such the EC asserts that the measures are subject to GATT 1994 and not to the GATS arguing that the meaning of “affecting trade in services” should be interpreted as “in respect of”. With this interpretation EC argues that the scope of GATS is limited enough not to encompass the measure in question.

The complaining parties to this case (WT/DS27) argue that the scope of GATS is sufficiently broad to encompass the measures in question; as such all measures affecting the competitive relation between domestic and foreign services and service suppliers can be subject to GATS; and this conclusion is not affected by the fact that the same measures are also subject to the scrutiny of the GATT 1994. Thus according to the complaining parties the two agreements are not mutually exclusive and any measure that is subject to GATT 1994 can also be subject to GATS.

The Appellate Body in addressing this issue referred to Article I: 1, Article I:3(b) and Article XXVIII(c). The Appellate Body, following the conclusions of previous panels3 interpreting GATT Article III, interpreted the phrase ‘measures by Members affecting’ as implying a measure that has ‘an effect on’ which indicates a broader scope of application than ‘regulating’ or ‘governing’4. Appellate Body asserts that contrary to EC’s argument, Article XXVIII(c) does not narrow the meaning of the term ‘affecting’. Referring to Article I: 3(b)5 the Appellate Body acknowledges that GATS does not apply to services supplied in the exercise of governmental authority. In the absence of a claim that any service supplied in the exercise of governmental authority is affected by the measures at issue, the Appellate Body concludes that there

3 This interpretation follows the interpretation in the dispute Italian Discrimination Against Imported Agricultural Machinery (“Italian Agricultural Machinery”) Adopted 23 October 1958, BISD 7S/60.
5 Article I:3(b) states that for the purpose of this agreement "services" includes any service in any sector except services supplied in the exercise of governmental authority;
is no legal basis for an a priori exclusion of any measures under consideration from the scope of GATS.

The connected issue is whether the GATS and the GATT 1994 are mutually exclusive agreements; that is, whether a measure can simultaneously be subject to both agreements or not. The European Communities (in the dispute WT/DS27) argue that the two agreements must be mutually exclusive; otherwise two problems might show up. The first problem would occur because within GATS, it is a matter of choice for Members to make commitments of National Treatment, while within GATT 1994, National Treatment is mandatory. While scheduling commitments under GATS, Members were instructed to make provisions for measures that can limit only trade in services. If the two agreements are not mutually exclusive and a measure can be subject to both, the measures inscribed in a Member's Schedule of National Treatment under GATS (such that the measure makes a distinction between foreign services and service suppliers and the domestic ones in favour of the latter) can be subject to GATT 1994 also. In that case, the measures mentioned in the Member's Schedule of National Treatment may have to be withdrawn if it is found to be inconsistent with GATT 1994. Thus, if GATS and GATT 1994 are not mutually exclusive, then the results of the negotiations of such scheduling under the GATS can be upset. Secondly, there does not exist any rule of conflict and hierarchical relationship between the GATS and GATT 1994. EC asserts that this is because any overlap was not seen by the negotiators to exist between the two agreements. The Panel in the same dispute opposes European Community's view and argues that the two agreements are not mutually exclusive and a measure can be subject to both. The reason the Panel provides is that, if the two agreements are exclusive then the possibility of circumvention undermines members' obligation and hence frustrates the object and purpose of the two agreements.

The Appellate Body in WT/DS27 acknowledges that "[t]he GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services." Yet the Appellate Body concludes that "[g]iven the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects
of that measure examined under each agreement could be different. Under the GATT 1994, the
focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the
measure affects the supply of the service or the service suppliers involved. Whether a certain
measure affecting the supply of a service related to a particular good is scrutinized under the GATT
1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.”

This interpretation of Article I of GATS of the Appellate Body for the dispute
WT/DS27 (EC – Bananas) is adopted in the decision to the dispute WT/DS139 (Canada –
Autos). In this regard the Appellate Body for the dispute WT/DS139 further decides that the
determination of whether a measure is in fact covered by the GATS must be made before the
assessment of consistency of that measure with any substantive obligation of the GATS.

(2) How to determine whether a measure, which is subject to GATS, “affect trade in services”?

Given that the Appellate Body, in both the disputes discussed above (WT/DS27 and
WT/DS139), conclude that any measure can be a subject matter of GATS as long as the measure
involves a service relating to any good or a service supplied in conjunction with a particular good,
the relevant question now is whether such a measure “affects trade in services”. The conclusion of
the Appellate Body in this context is based on evidences, rather than arguments. The Appellate
Body prescribes a two step enquiry for this purpose: (1) whether there has been “trade in
services” in the particular instance and (2) whether the measure in issue “affects” such trade in
services within the meaning of Article I: 1 of GATS.

In both of these disputes, in order to find whether there has been “trade in services” the
Appellate Body first identified the service that is being traded. For the purposes of the GATS, "trade
in services" is defined in Article I:2 as the "supply of a service" in any one of four listed modes of
supply, namely, cross border supply (Mode 1), consumption abroad (Mode 2), commercial
presence (Mode 3) and movement of natural persons (Mode 4). In both disputes the trade in
services was identified under "Commercial presence".

6 Article I: 2 of GATS2. For the purposes of this Agreement, trade in services is defined as the supply
of a service: (a) from the territory of one Member into the territory of any other Member;
(b) in the territory of one Member to the service consumer of any other Member;
(c) by a service supplier of one Member, through commercial presence in the territory of any
other Member;
(d) by a service supplier of one Member, through presence of natural persons of a Member
in the territory of any other Member.

7 “Commercial presence” is, in turn, defined in Article XXVIII(d) as "any type of business or
professional establishment, including through (i) the constitution, acquisition or maintenance of a
juridical person...".

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The relevant service was identified as "wholesale trade services" as defined in the Provisional Central Product Classification\(^8\), which the WTO follows with respect to product classification. In the dispute WT/DS27, European Communities questioned the identification of ‘vertically integrated companies’ involved in processing as well as distribution of imported products as ‘service suppliers’ being affected by the measures affecting trade in bananas. In the context of these ‘integrated companies’ the Appellate Body concluded that even if a company is vertically integrated to the goods sector directly affected by the measure, to the extent it is also engaged in providing services and is affected, by a particular measure of a Member, in the capacity of a service supplier, the company is a service supplier within the scope of GATS.

In order to find out whether the measure in issue “affects” such trade in services within the meaning of Article I: 1 of GATS the Appellate Body suggests that along with identification of service suppliers engaged in trade it is also necessary to investigate how such services are supplied and show how the measure under consideration affects such service suppliers in their capacity as service suppliers.

**Interpretation of Article V (Economic Integration) of GATS:**

In relation to Article V (Economic Integration) of GATS an issue surfaced in particular reference to the case “Canada – Certain Measures Affecting Automotive Industry, WT/DS139, and WT/DS142”\(^9\). The issue in this particular instance was whether a Member country could claim an exemption from its MFN obligation by invoking Article V. 1(b) while the exemption is accorded to some and not all suppliers of another member of an integration agreement. This particular ambiguity was addressed by the Panel established for the case, but subsequently remained unaddressed by the Appellate Body.

Article V. 1(b) of GATS states,

> This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage.\(^1\) and

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\(^8\) Cited in WT/DS27/AB/R, "Provisional Central Product Classification, United States Statistical Papers.1991"
(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable timeframe, except for measures permitted under Articles XI, XII, XIV and XIV bis.

Canada, the defendant in this case WT/DS 139 & 142, argued that its measures at issue, were justified under Article V.1 as the import duty exemptions were granted to members of an Economic Integration Agreement (NAFTA) that it had undertaken. But the Panel in this case found that the import duty exemptions were granted by Canada to only a limited number of firms - a small number of manufacturers / wholesalers of the United States to the exclusion of all other manufacturers / wholesalers of the United States and of Mexico. The Panel concluded that Canada could not claim an exemption from its MFN obligation by invoking Article V.1, as the measures at issue did not grant a favourable treatment to all services and service suppliers of the members of NAFTA, while, according to Article V:1(b), an economic integration agreement has to provide for 'the absence or elimination of substantially all discrimination, in the sense of Article XVII', in order to be eligible for the exemption from Article II of the GATS.

Interpretation of Article II (Most-Favoured-Nation Treatment obligation) and XVII (National Treatment Commitment) of GATS:

The Appellate Body clarifies certain critical issues associated with Article II (Most-Favoured-Nation Treatment obligation) and XVII (National Treatment obligation) in the dispute settlement case WT/DS27 (European Communities – Bananas). The Appellate Body in the case WT/DS139 (Canada – Autos) follows the decision of WT/DS27 with respect to the MFN obligation. Since both MFN obligation and National Treatment commitments demand non-discriminatory behaviour from member countries, interpretation of one has implication on the arguments around the interpretation of the other. With respect to the two disputes that we are presently considering, a particular aspect of the MFN Treatment obligation and National Treatment commitment is clarified; that is, whether these Articles apply to de jure, or formal discrimination or to de facto discrimination or to both. In terms of the GATS, a measure is said to discriminate de jure (in law) under the GATS if it is apparent from the text of the law, regulation or policy that it discriminates between service and service suppliers of two Members; a measure is said to de facto discriminate if on review of all relevant facts relating to the application
of the measure, it becomes clear that the measure discriminates between Members in practice. The language of the Article XVII on National Treatment of GATS is more definite than that of the MFN Treatment obligation in elucidating whether it applies to *de jure* and/or *de facto* discrimination. Interpretation of MFN obligation with respect to this issue bears upon interpretation of the National Treatment commitment. All parties to case WT/DS27 interpret this aspect of Article XVII on National Treatment identically.

Let us first see, what Article XVII on National Treatment commitment implies in terms of its application to *de jure* and *de facto* discrimination. Article XVII states,

*National Treatment*

1. *In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*

2. *A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.*

3. *Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.*

It is apparent from the language of the Article XVII that National Treatment is an obligation that a Member has to abide by only for the particular service sector with respect to which the Member has made Specific Commitments of such treatments. These commitments and the limitations there of are set out in the National Treatment column of each Member’s Schedule of commitments. For the sector in which a Member has made commitments the general requirement in this Article is that the Member cannot maintain or impose a measure that discriminates against foreign service or service suppliers as compared to the ‘like’ domestic service and service suppliers. In each sector inscribed in the National Treatment column of the Schedule of commitments each Member is permitted to inscribe particular conditions or qualifications and particular mode of supply and thereby limit the scope of National Treatment obligation to that sector, mode of supply and conditions or qualification. This is clarified in Paragraph 1 of this Article.

Paragraph 2 of Article XVII clarifies the requirements to meet the “no less favourable treatment” standard mentioned in Paragraph 1. In order to meet this standard a Member may provide “either formally identical or formally different treatment to foreign service and service suppliers as compared to the treatment it accords to its own domestic ‘like’ service or service
suppliers. With respect to this Article's application to de facto and de jure discrimination, Paragraph 3 explicitly clarifies whether formally identical or formally different, a treatment will be considered to be less favourable if, “it modifies the conditions of competition in favour of services or service suppliers of the Member compared to ‘like’ services or service suppliers of any other Member”. Members are required, in order to be consistent with this Article, not to maintain or adopt measures (with respect to sectors, modes of supply and conditions or qualification inscribed in the Member’s Schedule of commitments), which modify the conditions of competition in favour of the Member’s own service or service suppliers.

The language of Most-Favoured-Nation Treatment obligation (Article II) is less elucidatory than that of the National Treatment (Article XVII) obligation under the GATS as to whether the obligation applies to de jure and/or de facto discrimination. Article II states,

**Most-Favoured-Nation Treatment**

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

In the case WT/DS27 European Communities argued that interpretation of the term “treatment no less favourable” in Article II (Most Favoured Nation) cannot be the same as its interpretation with respect to Article XVII (National Treatment) and MFN should apply only to de jure discrimination (discrimination by design). The reasons provided are as follows. Firstly, Article II expressly omits the clarification that “no less favourable treatment” meant ‘no modification in competitive conditions’. Secondly, legislators of a country that imposes the measure may be informed about the competitive conditions prevailing between their domestic service suppliers and those of other countries, but they are likely to be less informed about the competitive conditions between service suppliers of foreign countries. Thus, though formal equal treatment towards service suppliers of all foreign countries may be achieved through legislation, yet achievement of equal treatment ‘in practice’ may be practically impossible.

According to the European Communities, whether a measure is discriminatory should be determined on the basis of whether a measure has both the ‘aim and effect’ of discrimination;
demonstration of mere differences in market shares of firms of different countries in not enough to prove discriminatory behaviour on the part of any particular Member country. “The European Communities refers to the panel report in United States - Taxes on Automobiles (DS31/R, 11 October 1994, un-adopted), where the panel looked at the statistical evidence, and beyond the dominant presence of imported goods in the sector of the market affected by the measure, in order to determine whether the measure had the "aim and effect" of affording protection to domestic production.” Correspondingly, EC shows that the aim of its legislators while designing the measures (namely, the Operator Category Rule and the Activity Function Rule) was not discriminatory, though the effects of the legislation may have been to produce differential market shares between service suppliers of different countries. EC asserts that such differential market shares may not have been caused by the measures as such; the actions of the parties, who claim to be affected, may have been responsible for such differential effects. Moreover, the Hurricane Licences have the aim of compensating those who suffer from damages caused by tropical storms. The beneficiaries of Hurricane License must therefore be from particular nationality. This does not mean that such Licences are discriminatory.

The Panel and the Complaining Parties to the case WT/DS27 oppose European Community’s view and argue that Article II of GATS apply to instances of de facto discrimination (discriminatory effect). Their argument is as follows. According to them, the phrase ‘treatment no less favourable’ in Article II is ‘unqualified’ and applies to all less favourable treatments irrespective of whether it is apparently discriminatory from the law or not as in the case of Article XVII (National Treatment). Though paragraph 2 and 3 of Article XVII clarify the use of the phrase ‘treatment no less favourable’, these paragraphs do not impose new obligations on Members in addition to those provided in paragraph 1 of Article XVII. According to this argument, the ‘narrow’ formal interpretation of the MFN standard in Article II: 1 of GATS would be incompatible with the objective and purpose of non-discrimination. The fact that GATS negotiators were aware of the interpretation of the phrase in GA 1T confirms that the ‘treatment no less favourable standard was intended to require ‘effective’ equality of opportunities, as in the case of GATT 1994.

In this connection in opposition to EC’s argument that for a measure to be discriminatory it has to be discriminatory in ‘aim and effect’, the Complaining Parties to WT/DS27 site earlier judgements of the Appellate Body with respect to the National Treatment obligation in GATT 1994. In that instance the Appellate Body asserted that the relevant enquiry is not ‘aim and effect’ but rather an examination of "... the underlying criteria used in a particular ... measure, its structure,

\[9\] Appellate Body Report WT/DS27/AB/R
and its overall application to ascertain whether it is applied in a way that affords protection to domestic products".10

Reflecting on arguments of both sides, the Appellate Body in WT/DS27 (EC – Bananas) concluded that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination. The rationale provided by the Appellate Body is as follows. The ordinary meaning of the Article II (GATS) provision does not exclude de facto discrimination. "[I]f Article II was not applicable to de facto discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article."11 The Appellate body indicates that EC's 'aim and effect' argument in defence of application of Article II to only de jure and not de facto discrimination can not be accepted due this possibility of circumvention.

The Appellate Body in WT/DS27 clarified that the interpretation of MFN clause under GATT 1994 has greater relevance than the interpretation of National Treatment obligation has in the interpretation of the MFN clause under GATS. In this connection the Appellate Body referred to and followed an earlier interpretation by the Appellate Body of the MFN clause under GATT 199412. The Appellate Body in this case asserts that the GATS negotiators chose different language in Article II and Article XVII of GATS in expressing the obligation to provide "no less favourable treatment"; but that does not imply that the intention of the drafters was that only a de jure standard should apply to the Article II of GATS; if that was their intention then it should have been explicitly mentioned in Article II.

The interpretation of obligations of non-discriminatory behaviour, in the cases discussed here, pertains specifically to administration of quotas. By this interpretation both de facto and de jure discriminations are not allowed. In the context of quantitative restrictions this interpretation implies that such restrictions, if imposed, have to be administered in a way that competitive conditions between firms and suppliers of different countries are not altered compared to what would have prevailed in the absence of the quota. This implication resembles GATT Article XIII (Non-discriminatory Administration of Quantitative Restrictions). GATT Article XIII: 2 states that "[i]n applying import restrictions to any product, contracting parties shall aim at a distribution of trade


11 Appellate Body Report WT/DS27/AB/R.

12 European Economic Community - Imports of Beef from Canada, Adopted 10 March 1981, BISD 28S/92, paras. 4.2-4.3
in such a product approaching as closely as possible the shares which the various contracting
parties might be expected to obtain in the absence of such restrictions”.

The interpretation of MFN and National Treatment obligation that Members may design
and implement measures that should be both de facto and de jure non-discriminatory is based on
one primary argument. The argument is that in absence of such a rule Members can devise ‘in­
effect’ discriminatory measures aimed at circumventing the basic purpose of the Article. On the
other hand, concerns have been raised about the feasibility of maintaining de facto non­
discriminatory behaviour due to difficulty in obtaining the information (about the conditions of
competition prevailing in the markets of other countries) required to do so. But this concern and
the related argument that de facto non-discriminatory behaviour may not be feasible did not
appear to have affected the Appellate Body’s interpretation of the MFN and the National
Treatment obligation. Argument in favour of non-exclusivity of GATT 1994 and GATS, as
adopted by the Appellate body, is based on a similar argument. The argument is that if the two
agreements are exclusive then the possibility of circumvention undermines Member’s obligations
and hence frustrates the object and purpose of the two agreements. Members forwarded counter­
arguments to this by emphasising that non-exclusivity of the two agreements could undermine
the limitations on specific commitments that Members are allowed to maintain under GATS. But
such counter-arguments failed to affect the Appellate Body’s interpretation with respect to the
non-exclusivity of GATT 1994 and GATS.

From these arguments, it can be noted that upholding the objective and purpose of the
agreements / Articles has been a priority, of the Appellate Body of WTO, over other concerns.
The objective of GATT 1994, as given in its preamble, are raising standards of living and
incomes ensuring full employment, full use of resources of the world and expanding the
production and exchange of goods. The preamble of GATT expresses the desire to contribute to
these objectives through reciprocal and mutually advantageous agreements directed to reduction
of trade barriers and elimination of discriminatory treatment in international commerce.
Promoting the interest of all participants is the aim of GATS, as can be noted in its preamble.
Only to the extent the instruments such as progressive liberalisation and elimination of
discriminatory behaviour can result in the fulfilment of the above stated objectives of the
agreements under WTO, the behaviour prescribed for member countries by these interpretations
can uphold the objectives. The extent to which such instruments are consistent with the
objectives of the agreements under WTO is determined by, among other factors, the nature of
the commodity subject to trade liberalisation policy, structure of its market and related

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circumstances in trading Member countries. In case the commodity is a service, the mode of its supply is also an important factor in determining implications of a liberal trade regime.

Section 4.3: Interpretation of GATS Clauses: A study of the Dispute ‘United States – Measures Affecting Gambling and Betting services, WT/DS 285’

In order to present the interpretations of the GATS Articles from the dispute WT/DS 285, we begin with a brief discussion of the subject matter of the case, particularly the measures at issue and the complaints thereof, presented in Box 3.

BOX 3
United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS 285

Antigua made a complaint against the United States concerning certain measures of the US state and federal authorities that allegedly made it unlawful for suppliers located outside the US to supply of gambling and betting services to consumers within the US. Antigua claimed that these restrictions imposed by the US through its federal and State laws resulted in a “total prohibition” on the cross border supply of gambling and betting services against Antigua. Antigua contended that such “total prohibition” was inconsistent with the obligations of the US under its GATS schedule of commitments as well as Articles VI, XI, XVI and XVII of the GATS. In this connection Antigua points out that US had made Specific Commitments for full market access and national treatment with respect to Cross Border Supply of betting and gambling services.

In response US asserted to the Panel that a “total prohibition” could not constitute a measure and by challenging such an alleged “total prohibition”, rather than the laws and regulations underlying such prohibition, Antigua had failed to satisfy its burden as the complaining party to identify specific measures that are subject to the prima facie case.

The Panel then addressed this argument by “identifying the measures that the Panel would consider in determining whether the specific provisions of the GATS that Antigua had invoked have been violated.” The panel determined first, that Antigua was not entitled to rely on the alleged “total prohibition” as a “measure” in and of itself. The Panel also determined that the following laws of the US warrant a substantive examination by the Panel. These Laws are –

**Federal Laws:**
1. Section 1084 of Title 18 of the US Code (The Wire Act);
2. Section 1952 of Title 18 of the US Code (The Travel Act);
3. Section 1955 of Title 18 of the US Code (The Illegal Gambling Business Act or IGBA).

**State Laws**:13
4. Colorado: Section 18 – 10 – 103 of the Colorado revised Statutes
5. Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated)
6. Massachusetts: Section 17A of the Chapter 271 of the Annotated Laws of Massachusetts
7. Minnesota: Section 609.735(1) and subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated)

13 The panel report provides details on the 8 state laws. Since with respect to the 8 State Laws, Antigua fails to make a prima facie case of inconsistency with Article XVI: 2(a) and (c) (Market Access) the Appellate Body in this case did not consider the 8 State Laws for Arguments. Hence we chose not to present the details of the State laws here.

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The Panel by examining the above measures found that the 3 federal laws and State laws of Louisiana, Massachusetts, South Dakota and Utah are inconsistent with Article XVI: 1 and XVI: 2 (Market Access) of GATS and the state laws of Colorado, Minnesota, New Jersey and New York are not inconsistent with Article XVI of GATS.

Below we provide a brief introduction of the above-mentioned US measures at issue.

The three federal laws:

• The 'Wire Act' (18 U.S.C § 1084), prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires.

• The 'Travel Act' (18 U.S.C § 1952), imposes criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including gambling considered unlawful in the United States.

• The 'Illegal Gambling Business Act' (18 U.S.C § 1955), makes it a federal crime to operate a gambling business that violates the law of the state where the gambling takes place (provided that certain other criteria are fulfilled such as the involvement of at least five people and an operation during more than 30 days).

The issues and questions, with respect to GATS arising in this dispute are the following.

A] With respect to measures at issue:

Whether 'total prohibition' on the cross border supply of gambling and betting services, as alleged by Antigua, constitutes an autonomous measure that can be challenged in and of itself.

B] With respect to Article XVI (Market Access) of GATS:

(i) Whether or not a prohibition on the remote (cross border) supply of (betting and gambling) services constitute a 'zero quota' on the supply of such services by particular means and whether or not such a 'zero quota' is a limitation that falls within the subparagraphs (a) and (c) of Article XVI: 2

14 Article XVI: 2 of GATS (Market Access)

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the
Whether the measures imposing criminal liability on consumers of cross border gambling and betting services is consistent with the subparagraphs (a) and (c) of Article XVI: 2.

C] **With respect to Article XIV**

(i) Whether the Wire Act, the Travel Act and the IGBA are necessary to protect Public morals or to maintain public order within the meaning of Article XIV (a).

(ii) Whether the Wire Act, the Travel Act and the IGBA are necessary to secure compliance with laws or regulations, which are not inconsistent with GATS, within the meaning of Article XIV (c).

**A] Does ‘total prohibition’ constitute a ‘measure’ within GATS?**

From the facts and issues of the dispute, as presented above, it appears that the question, this dispute WT/DS285 attempts to resolve, in relation to the ‘prohibition’ on betting and gambling services is whether a ‘total prohibition’ on the cross border supply of gambling and betting services, as alleged by Antigua, constitutes an autonomous measure that can be challenged in and of itself. The resolution of this question leads one to throw light on the scope of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

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15 **Article XIV** (General Exceptions)

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

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.
of the term 'measure' used in GATS; that is to determine whether 'prohibition' of the supply of a service constitutes a 'measure' in GATS.

Antigua, the party complaining against US 'prohibition' on the cross border supply of gambling and betting services in this dispute, argues in favour of the claim that such prohibition can constitute an autonomous measure. The rationale Antigua provides is that the prohibition is the effect of various US federal and State laws and that all parties to this dispute (including the United States Ambassador) agree that such a prohibition exists on the cross border supply of gambling and betting services. The Panel and United States opposed this view of Antigua. According to the Panel and United States, the 'prohibition' is the cumulative effect of various federal and state laws of the US that together constitute a prohibition on the cross border supply of gambling and betting services; but such prohibition could not constitute a "measure" per se, because of the following three reasons - (1) Total prohibition is not an instrument containing rules or norms; (2) Antigua had not sufficiently identified the total prohibition as a measure at issue, including the precise relevant US laws that give rise to this prohibition; and (3) The Panel failed to see how the United States could be requested to implement a Dispute Settlement Body recommendation to bring a "prohibition" into compliance with the GATS (pursuant to Article 19.1 of the DSU) when an imprecisely defined puzzle of laws forms the basis of 'total prohibition'.

In order to resolve this issue, the Appellate Body referred to (1) the Dispute Settlement Understanding (DSU), (2) the GATS text and (3) Consultations at the outset of this dispute. According to the DSU, a 'measure' that can be subject to dispute settlement has to satisfy two criteria. First, a 'nexus' must exist between the responding Member and the 'measure' such that the 'measure' – an act or omission – must be attributable to the Member. Secondly, the 'measure' must be the source of the alleged impairment, which, in turn, is the effect resulting from the existence or operation of the 'measure'. Referring to the Consultations at the outset of a dispute, the Appellate Body found that those Consultations are based on "measures affecting the operation of any covered agreement taken within the territory of the responding Member". Finally referring to the GATS the Appellate Body found that according to the GATS agreement, measures that are within the scope of GATS are "measures by Members affecting trade in services". The Appellate Body's findings from these references is that 'to the extent that a Member's complaint centre's on the effects of an action by another member, that complaint must nevertheless be brought as a challenge to the measure that is the source of the alleged effects. In this sense the Appellate Body concludes that "total prohibition" does not constitute a "measure" that can be challenged 'in and of itself'. It is the collective effect of operation of several imprecisely defined lists of State and Federal laws that constitute the alleged impairment of
Antigua's benefits under the GATS. The Appellate body justifies its claim by pointing out that if the total prohibition were a measure, then the complaining party could identify the specific measure at issue merely by explicitly mentioning the prohibition; it had the obligation to do that under Article 6.2 of DSU. Yet, without knowing the precise source of the "prohibition", a responding party would not be in a position to prepare adequately its defence, particularly where, as here, numerous federal and state laws underlie the "total prohibition". Therefore, the Appellate Body concluded that, without demonstrating the source of the prohibition, a complaining party may not challenge a "total prohibition" as a "measure", per se, in dispute settlement proceedings under the GATS.

B) Interpretation of the Article XVI: 2 of the GATS: (Market Access)

To begin this discussion, let us reproduce Article XVI of the GATS. This Article of the GATS states,

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

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

Article XVI: 1 obliges Members to accord services and service suppliers of other Members "treatment no less favourable than that provided for under the terms, limitations and
conditions agreed and specified in its Schedule." The chapeau of the Article XVI: 2 states that the obligations specified for Members in this Article apply insofar as a Member has undertaken "specific market access commitments" in its Schedule. Thus the scope of Article XVI is confined to the sectors where Members have made Market Access commitments. Hence a prior determination is required as to whether the concerned Member has made Market Access commitments for the service sector under consideration. In this particular dispute (WT/DS 285) it was determined that the United States has undertaken commitments to provide full market access, within the meaning of Article XVI, in respect of the cross border supply of betting and gambling services. In so doing, US had committed not to maintain any of the types of measures listed in the six sub-paragraphs (a) through (f) of Article XVI: 2.

Given that US had made full Market Access commitments for cross border supply of betting and gambling services, it was then required to determine whether or not US had respected its obligations under Article XVI of GATS by maintaining the "prohibition". The Panel and Antigua claimed that the US was not respecting its obligation under Article XVI of GATS and hence was acting inconsistently to its Market Access commitments. According to Antigua, the United States was maintaining quantitative limitations in maintaining measures that prohibit the cross-border supply of gambling and betting services. The Panel opined that a prohibition on the supply of certain services effectively limits the number of foreign service suppliers and number of foreign service operations relating to that service to zero and that such a prohibition results in a 'zero quota'. For this reason the Panel concluded that the US 'prohibition' constitutes a "limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI: 2(a)" and "a limitation on the total number of service operations or on the total quantity of service output ... in the form of quotas within the meaning of Article XVI: 2(c)". The United States, opposing the view of the Panel and also that of Antigua, emphasized that none of the measures at issue states any numerical units or is in the form of quotas and that none of those measures therefore fall within the scope of sub-paragraph (a) or (c) of Article XVI:2. For the United States, Members that had made a specific commitment under Article XVI had committed themselves not to maintain the precisely defined limitations set out in Article XVI:2; but Members had not committed themselves to eliminate all other limitations or restrictions that may impede the supply of the relevant services.

From the discussion above, two connected issues with respect to Article XVI: 2(a) appear to be ambiguous and need to be interpreted. (1) Is 'total prohibition' a form of numerical quota? and (2) Is a prohibition or any other measure, which has the effect of a quota, inconsistent with XVI: 2(a)? Or should it have the 'form' of a quota?
Article XVI: 2(a) obliges Members not to maintain “limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test” in sectors where market-access commitments are undertaken. While addressing the first among the above issues, the Panel appointed for this dispute argues that a prohibition on one, several or all means of cross-border delivery is a "limitation on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) because it totally prevents the use of one, several or all means of delivery included in mode 1 by service suppliers. The defendant United States argues that the Panel's interpretation ignores the text of sub-paragraph (a), in particular the meaning of "form" and "numerical quotas", and erroneously includes within the scope of Article XVI:2(a) measures that have the effect of limiting the number of service suppliers or output to zero. The United States further stresses that the 'prohibition' is consistent with the balance between the obligations of liberalization and the right to regulate that is reflected in the GATS. The Appellate Body clarifies the first issue (that is whether prohibition is a form of a numerical quota). Nevertheless, the Appellate Body agrees with the Panel that a prohibition signifies a limitation on the number of service suppliers.

In interpreting both the above mentioned issues with respect to Article XVI: 2(a) the Appellate Body refers to two phrases in Article XVI: 2(a) - (1) restrictions "on the number of service suppliers", as well as to (2) "numerical quotas". According to the Appellate Body, these words in the Article XVI: 2 (a) reflect that the focus of Article XVI:2(a) is on limitations relating to numbers or, put differently, to quantitative limitations. In order to determine whether a measure, to be inconsistent with Article XVI: 2(a), needs to have the form of a quota, the Appellate Body further focuses on the phrase “in the form of” in Article XVI:2(a). the Appellate Body suggests that the meaning of this phrase is rather broad and it should be interpreted in connection to four types of limitations to market access mentioned in Article XVI: 2(a). These limitations are (i) numerical quotas, (ii) monopolies, (iii) exclusive service suppliers and (iv) the requirements of an economic needs test. Let us see, how the Appellate Body found these four types of limitations to impart meaning to the phrase “in the form of”.

(i) Limitations in the form of Numerical quotas – GATS does not provide a definition of numerical quotas and hence its definition was sought in the dictionary. According to the dictionary definitions provided by the United States, the meaning of the word "numerical" includes "characteristic of a number or numbers". The word "quota" means "the maximum number or quantity belonging, due, given, or permitted to an individual or group"; and "numerical limitations on imports or exports". Thus, as the Appellate Body concludes, a "numerical quota" within Article XVI:2(a) appears to mean a quantitative limit on the number of service suppliers.
(Note that Article XVI: 2(a) refers only to service suppliers) The fact that the word "numerical" encompasses things, which "have the characteristics of a number", suggests that limitations "in the form of a numerical quota" would encompass limitations which, even if not in themselves a number, have the characteristics of a number. Since zero is quantitative in nature, it can, according to the Appellate body, be deemed to have the "characteristics of" a number—that is, to be "numerical".

(ii) Limitations... in the form of... monopolies – Article XXVIII(h) of the GATS defines a "monopoly supplier of a service" as any person, public or private, which in the relevant market in the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service.

(ii) Limitations... in the form of... exclusive service suppliers – The term "exclusive service suppliers" is defined in Article VIII:5 of the GATS, as... where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers, and (b) substantially prevents competition among those suppliers in its territory.

It should be noted that both monopolies and exclusive service suppliers are defined in terms of form as well as in terms of effect. This suggests that, as the Appellate Body points out, the reference, in Article XVI:2(a), to limitations on the number of service suppliers "in the form of monopolies and exclusive service suppliers" should be read to include limitations that are in form or in effect, monopolies or exclusive service suppliers.

(iv) Limitations... in the form of... requirement of an economic needs test – with respect to this fourth type of limitation, it is not clear whether or not "limitations on the number of service suppliers... in the form of... requirements of an economic needs test" must take a particular "form." According to the Appellate Body, this fourth type of limitation (in absence of this clarity), too, suggests that the words "in the form of" must not be interpreted as prescribing a rigid mechanical formula.

The Appellate Body prescribes that the Article XVI: 2(a) should be read in the light of the meaning of the limitations as given above. If read in this way, according to the Appellate Body, the thrust of Article XVI: 2(a) should appear to be on the numerical, or quantitative, nature of the limitations and not on the form of limitations. The Appellate Body agrees with the Panel that a prohibition would imply a "zero quota" as it signifies a limitation on the number of service suppliers. It points out that Article XVI does not explicitly include the word "prohibition" as a limitation on the number of service suppliers, but this does not mean that a prohibition is consistent under Article XVI. To explain why the word "prohibition" has not been included in Article XVI, the Appellate Body reasons that the drafters of GATS might have assumed a zero
quota, which is equivalent to *full limitations on market access*, to be irrelevant when a member is making a Market Access commitment.

Absence of the word "prohibition" in Article XVI, as indicated above, does not imply that "prohibition" is consistent with this Article. However, it is not clear, either from Article XVI or from any other part of GATS, whether "limitations on the number of service suppliers ... in the form of numerical quotas" encompasses a "prohibition" on the supply of a service in respect of which a specific commitment has been made. Referring to the relevant preparatory work of GATS (1993 Scheduling Guideline), the Appellate Body finds an example of the type of measures that will be inconsistent with Article XVI. The example is: "nationality requirements for suppliers of services (equivalent to zero quota)". This example, being in the nature of and equivalent to and not in the form of a numerical quota, confirms the view that measures equivalent to a zero quota fall within the scope of Article XVI:2(a); the measure does not have to be expressed in numerical terms.

With respect to the ambiguities raised on Article XI:2(a), the Appellate Body thus concludes - (1) a prohibition on one, several or all means of cross-border delivery is a "limitation on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1; and (2) the thrust of Article XVI:2(a) should be on the quantitative 'nature' of the limitations and not necessarily on their quantitative 'form', and hence a measure or prohibition which has the effect of a quota is inconsistent with Article XVI:2(a).

Now let us turn to the ambiguity in relation to Article XVI:2(c) and see how it was interpreted. Article XVI:2(c) prohibits Members to impose measures that are "limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test" in sectors where the Member has made Market Access commitments, unless specified in its Schedule of Commitments. The ambiguity addressed in the dispute WT/DS 285 in relation to Article XVI:2(c) is - whether or not a quota that is not designated in numerical units is prohibited under Article XVI:2(c).

The Panel in this dispute (WT/DS 285) is of the view that Article XVI:2(c) does not mean that any quota must be expressed in terms of designated numerical units if it is to fall within the scope of that provision. According to the Panel, the "correct reading of Article XVI:2(c)" is that limitations referred to under that provision may be: (i) in the form of designated numerical units; (ii) in the form of quotas; or (iii) in the form of the requirement of an economic needs test. That is to say that measures that are designated in numerical units are only a subset of
the measures that are prohibited under Article XVI: 2(c). Thus, the Panel concluded that a "prohibition" on the means of delivery of a service (cross border supply of gambling and betting services in this dispute WT/DS 285) can be subject to the Article XVI: 2(c), even though it is not designated in numerical units. The Panel reasons that such a "prohibition" results in a "zero quota" and therefore is a limitation "on the total number of service operations or on the total quantity of service output ... in the form of quotas" within the meaning of Article XVI: 2(c); hence such a "prohibition" should be subject to Article XVI: 2(c).

The defendant United States argues that, when properly interpreted, sub-paragraph (c) identifies only two types of limitations on market access – expressed (i) in terms of designated numerical units in the form of quotas and (ii) in the form of the requirement of an economic needs test, as opposed to three types of limitations read by the Panel, namely, in terms of designated numerical units, (ii) in the form of quotas, (iii) in the form of requirement of an economic needs test. Hence, US argues, a measure that is identified as a quota has to be designated in numerical units in order to be subject to Article XVI: 2(c).

The Appellate Body observed that The Panel interpreted Article XVI: 2(c) as if the two phrases "terms of designated numerical units" and "in the form of quotas" were separated by a comma, whereas the US's interpretation rested on the absence of the comma. But the Appellate Body is ultimately not persuaded that "the key to the interpretation of this particular provision is to be found in a careful dissection of the use of commas within its grammatical structure". Regardless of the position of the comma Article XVI: 2(c) can arguably be read as identifying two limitations on the total number of service operations or on the total quantity of service output; it can be read as identifying three limitations also. The mere presence of the comma is not determinative of the issue.

The Appellate Body found it more useful to interpret the provision in terms of the provision's own language. The language of the provision suggests that the first part deals with two types of quantitative limitations: on the number of service operations and on the quantity of service output. The second part of the provision elaborates and modifies the type of limitations. Here the Appellate Body states that "by combining, ... the elements of the first clause of Article XVI:2(c) and the elements in the second part of the provision, the parties to the negotiations sought to ensure that their provision covered certain types of limitations, but did not feel the need to clearly demarcate the scope of each such element. On the contrary, there is scope for overlap between such elements: between limitations on the number of service operations and limitations on the quantity of service output, for example, or between limitations in the form of quotas and limitations in the form of an economic needs test." Nonetheless, all types of limitations given in Article XVI: 2(c) are quantitative in nature, and all restrict market access and
hence it does not follow that a measure equivalent to a zero quota is not subject to the provisions of this article.

This interpretation still left it ambiguous as to whether or not a measure needs to be expressed in numerical units in order to be subject to Article XVI: 2(c). For clarification, the Appellate Body referred to the 1993 Scheduling Guidelines, which set out an example of the type of measure covered under Article XVI: 2(c). The Guideline refers to "[r]estrictions on broadcasting time available for foreign films", without mentioning numbers or units. This example shows that limitations need not be with prompt reference to numbered units.

The Appellate Body's conclusion with respect to USA's Wire Act, Travel Act and the Illegal Gambling Act are that these provisions encompass measures equivalent to zero quota. The fact that these Acts do not explicitly use numbers or the word 'quota' in imposing their respective prohibitions, do not mean that the measures are beyond the reach of Article XVI: 2(a) and (c).

C) Interpretation of Article XIV (a) and (c) (General Exceptions)

Article XIV of GATS sets out the general exceptions from obligations under GATS. The Provisions of the Article XIV (a) and (c) are given below.

Article XIV
General Exceptions

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

..............

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety;

The provisions of this Article are very similar to that of Article XX of GATT 1994 (General Exceptions). Both of these provisions affirm Members the right to pursue objectives (protection of Public Moral, Safety etc.) identified in the paragraphs of these provisions, even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out herein are satisfied. In case a Member seeks to justify a measure under the provisions of this Article, the following steps are to
be taken. First, it has to be determined whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. Second, wherever, the challenged measure has been found to fall within one of the paragraphs of Article XIV, it has to be considered whether that measure satisfies the requirements of the chapeau of Article XIV. Determination in the first step, that is, whether the challenged measure falls within the scope of one of the paragraphs of Article XIV requires that (1) the challenged measure addresses the particular interest specified in that paragraph and (2) that there be a sufficient nexus between the measure and the interest protected. The language of the paragraphs (a) and (c) of Article XIV of GATS specifies this "nexus" through the use of the term "necessary to". In the dispute we are discussing, that is, WT/DS 285 the issue of 'determination of whether such a nexus exists' appeared to be significant. How to determine that a measure is 'necessary' to protect the society's interests mentioned in paragraph (a) and (c) – was the question in relation to Article XIV (a) and (c) that this dispute attempted to answer.

The Panel in WT/DS 285 first examined whether or not the measures at issue [the Wire Act, the Travel Act, and the IGBA of US] are "designed" to protect public morals and to maintain public order [requirement of Article XIV (a)] or to secure compliance with laws or regulations that are not inconsistent with the provisions of GATS [requirement of Article XIV (c)]. This determination was based on the Congressional reports and testimony establishing that "the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling."16

The Panel then determined whether these measures were "necessary" to protect public morals or to maintain public order, within the meaning of Article XIV (a) and to secure compliance with laws or regulations that are not inconsistent with the provisions of GATS within the meaning of Article XIV (c). The Panel found that the United States had not demonstrated the "necessity" of those measures. A measure is considered 'necessary' for any particular objective if it is not possible to meet that objective with any reasonably available alternative. This determination of the Panel was based on its observation that the United States rejected "Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations" ... "that could have been used by it [US] to explore the possibility of finding a reasonably available WTO-consistent alternative." Even though the Panel found that the measures served to protect vital and important social interests and "must contribute, at least to some extent", to address the United States' concerns "pertaining to money laundering, organized

16 Appellate Body Report WT/DS 285/AB/R.
crime, fraud, underage gambling and pathological gambling", the requirement of a consultation by the United States with Antigua seemed essential to prove the necessity of the measures for the society's interests mentioned in Article XIV (a) and (c).

Both Antigua and the United States differed from the Panel on this issue of determining whether the "necessity" requirement in Article XIV(a) and (c) was satisfied. Antigua claimed that the Panel erroneously limited its discussion of "reasonably available alternatives" only to the set of existing US regulatory measures. The United States argued that the Panel erroneously imposed a procedural requirement on the United States, to consult or negotiate with Antigua before the United States took measures to protect the interests (mentioned in Article XIV (a) and (c)), in order to find "reasonably available alternative" measures.

Thus, two questions appear important in relation to this issue of determining whether or not a measure is necessary to protect the interests mentioned in Article XIV (a) and (c).

1. Is 'consultation with the complaining Member before imposing the measure at issue' required for 'exploring the possibility of reasonably available alternative' to prove that the measure is 'necessary' to meet social objectives mentioned in Article XIV (a) and (c)?
2. Should the search for alternatives be limited to the set of existing regulatory measures of the responding Member (The United States here)?

Let us first look at the arguments on the first question. The Panel, in its analysis, appeared to understand that, in order for a measure to be accepted as "necessary" under Article XIV (a) and (c), the responding Member must have first "explored and exhausted" all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure. This understanding led the Panel to conclude that, in this case, the United States had an obligation to consult with Antigua before and while imposing the measures at issue. Since the Panel found that the United States had not engaged in such consultations with Antigua, the Panel concluded that the United States had not established that its measures were "necessary" and, hence, provisionally justified under Article XIV (a) and (c).

The United States argued that the requirement in Article XIV (a) and (c) that a measure be "necessary" indicated that "necessity is a property of the measure itself" and, as such, "necessity" could not be determined by reference to the efforts undertaken by a Member to negotiate an alternative measure. The United States referring to earlier disputes also argued that the availability of "merely theoretical" alternative measures did not preclude the challenged measures from being deemed to be "necessary". Hence, as the United States argued, the fact that measures might theoretically be available after engaging in consultations with Antigua did not preclude the "necessity" of the three federal statutes.
The Appellate Body in this case (WT/DS 285) did not agree to the view of the Panel that a prior consultation was required between the United States and Antigua in order to find a reasonably available alternative to the measures at issue. The Appellate Body considered that such a consultation would not be appropriate because consultation by definition is a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case. According to the Appellate Body the Panel should have focussed on an alternative measure that was reasonably available to the US to achieve same objectives regarding the protection of public morals or maintenance of public order or to secure compliance with WTO consistent laws.

Let us now turn to the second question. That is, should the search for alternative measures be limited only to the set of existing regulatory measures of the responding Member (The United States here) or should it go beyond that set of measures?

As we have seen above, Antigua brought this allegation against the Panel that the Panel limited its examination of possible alternative measures only to the set of existing United States regulatory measures. The Appellate Body in this case did not agree to Antigua in this respect and stated that there had been no reason for the Panel to analyse and compare the effects of alternative measures when Antigua itself failed to identify any such measures. That is to say, that only if Antigua had identified such an alternative measure, such a comparison by the Panel would have been required.

So far we have presented the Arguments forwarded in this dispute with respect to the two key questions in determining whether a measure is necessary to protect the interests mentioned in Article XIV (a) and (c). We have presented the Appellate Body's conclusions on both the questions. It would be useful to present the reasoning that the Appellate Body based its conclusions upon. For dealing with this issue, the Appellate Body in this case referred to the case Korea - Various Measures on Beef and the statement of the Appellate Body therein in the context of Article XX (d) of the GATT 1994. In that dispute, the Appellate body stated that the process of identifying whether a measure is 'necessary' as one determining "whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".

The Appellate Body describes the process for identifying whether or not a measure is 'necessary' as follows. To begin with, an assessment of the "relative importance" of the interests or values, which are furthered by the challenged measure, is required. Then, as a second step, two factors that would be relevant in the determination of necessity need to be determined. One such factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce. The third step is to
make a comparison between the challenged measure and possible alternatives in the light of the importance of the interests at issue. On the basis of this comparison of measures a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available". However, "an alternative measure may be found not to be "reasonably available", where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV."\textquoteleft 17

As for bearing the burden of proof of the necessity of the challenged measure the Appellate Body admits that "it is well-established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence." In the context of Article XIV(a) and (c), this means that the responding party must show that its measure is "necessary" to achieve the respective objectives. In this case, to meet this requirement the responding party would have to identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. However, the Appellate Body recognises that such a burden is "impracticable and, indeed, often impossible"; hence, it is not the responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. Rather, the responding party should put forward evidence and arguments to make a prima facie case that its measure is "necessary". If the panel concludes that the respondent has made a prima facie case that the challenged measure is "necessary"-that is, "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'" then a Panel should conclude that challenged measure "necessary" within the terms of Article XIV(a) and (c) of the GATS.

The Appellate Body further specifies that, "if, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that particular alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available". If a responding party demonstrates that the alternative is not "reasonably available", in the light of the interests or values being

\textquoteleft 17 Appellate Body Report, WT/DS 285/AB/R
pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary" within the terms of Article XIV(a) of the GATS.”

The Appellate Body found that (1) the records reveal no reasonably available alternative measure proposed by Antigua, or examined by the Panel that the three Federal Statutes were not 'necessary' within the meaning of Article XIV (a) and (c) of GATS and (2) the United States made its prima facie case of necessity. Hence the Appellate body concluded that the United States demonstrated that its statutes are 'necessary' and therefore justified under Article XIV (a) and (c) of GATS. The three Federal statutes of US are proved to be necessary to protect public moral and maintain public order (as per the requirements of Article XIV (a)) and to secure compliance with WTO consistent laws, namely the RICO Statutes (as per the requirement of GATS Article XIV (c))

Section 4.4 Summary and Conclusion:

The purpose of this chapter has been to review how far and in which way some of the ambiguities present in various clauses of GATS have been interpreted through case laws. We have noted above that the disputes and their resolutions have thrown light on some of the ambiguities present in Article I (Scope and Definition), Article II (Most Favoured Nation), Article V (Economic Integration), Article XIV (General Exceptions), Article XVI (Market Access) and Article XVII (National Treatment) of GATS. The major findings in this regard can be summarised as follows.

• A measure, which is subject to GATT or is applied to trade in goods, can be subject to GATS as well if it affects trade in services. To show that a measure affects trade in services two criteria have to be met – (i) the service being affected has to be identified and (ii) it has to be shown how trade in this service is being affected by the measure in question.

• In order to be consistent with obligations of MFN and National Treatment Commitments under GATS, a measure has to be both de facto (in effect) and de jure (by design) non-discriminatory. Being non-discriminatory only by design is not sufficient, as in that case Members can device measures that are discriminatory in effect and aimed at circumventing the basic purpose of MFN and National Treatment.

• A ‘total prohibition’ on an activity may or may not be a ‘measure’ as such but it is a ‘limitation on the number of service suppliers in the form of numerical quotas’ and hence inconsistent with obligations of Market Access commitments under GATS.
A measure is inconsistent with obligations of Market Access commitments under GATS if it is of the nature of a quota, even though not in the form of a quota.

To be consistent with the General Exceptions rule under GATS, a measure should be demonstrated as being necessary to protect certain social objectives mentioned in the Article on General Exceptions. For this, a comparison has to be made between the measure at issue and other reasonably available alternative measures. The search for these alternatives can be limited to the set of existing regulatory measures of the concerned Member. If the complaining Member identifies any other measure, a comparison of that can be made with the measure in question.

The review of GATS disciplines, ambiguities present therein and their interpretations through settlement of disputes reveal the objectives of liberalisation of services trade has received special emphasis. The principle of non-discrimination also seems compelling. Denial of any system of import quotas, not only in form but also in nature, shows that enhancement of competition is also observed to be an important concern for negotiators and the dispute settlement body. Preamble of the agreement (GATS) includes progressive liberalisation of services trade as one of the desired objectives. It also mentions - facilitating increasing participation of developing countries in trade in services and expansion of their service exports through strengthening of their services capacity, efficiency and competitiveness - as another desired objective of the agreement. The preamble of GATS also recognises the importance of national policy objectives particularly for developing countries, given the asymmetries existing with respect to the degree of development of services regulations in different countries. Preamble of the Agreement establishing WTO, mentions raising income and living standards, ensuring full employment for its Members, increasing production and trade for Member countries and making optimal use of world's resources as its objectives. Economic theory suggests that liberalisation of trade, non-discrimination and competition can be means to raising welfare, employment and achieving other social objectives under certain conditions (those discussed in Chapter 2). From the review of disciplines and case laws of GATS, it appears that given a Member's National Treatment and Market Access commitments, liberalisation of trade, non-discrimination and competition have been treated as ends in themselves. The objective of liberalisation is pursued irrespective of whether this objective is consistent with the other objectives of growth, increasing income and employment and raising living standards of Members.