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"INTERNATIONAL TRADE IN GAMBLING SERVICES"

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International Trade in Gambling Services

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INTRODUCTION

The great object of life is Sensation—to feel that we exist, even though in pain. It is this 'craving void' which drives us to Gaming, to Battle, to Travel, to Intemperate, but keenly felt pursuits of any description, whose principle attraction is the agitation inseparable from their accomplishment".
Lord Byron, 1813

Gambling has always been one of man's follies. Equally proscribed by the Bible[1], the Quran[2], the ancient Vedic texts[3] and the mores of most people[4], it has fluctuated between prohibition and tolerance throughout the centuries, following society's moral, political and financial constraints.

The subject of gambling is fascinating because it is controversial and far-reaching. It combines man's natural play and risk-taking instincts with the desire to transcend his condition and know about his fate and his future[5]. It provides easy entertainment to the public and feeds hope and dreams of betterment for

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[1] In the Biblical view, gambling is based on the evil desire to obtain money or goods that belong to someone else without giving fair value in exchange. The Bible calls this sin "covetousness" and underlines that those who do such things shall not inherit the kingdom of God (Romans 1:28-32). St. Paul the Apostle said in his Second Epistle to the Thessalonians (3:10,11): "3:10 […] if any would not work, neither should he eat", "3:11 For we hear that there are some which walk among you disorderly, working not at all, but are busybodies". Another illustrative depiction is found in Mark 15:21-24: "The soldiers […] brought Jesus to a place called Golgotha […] Then they crucified Him and divided His clothes, throwing dice for them, to decide what each would take"- This scene also appears in Matthew 27:35, Luke 23:34 and John 19:24. In the Jewish texts, the Mishnah (the written form of Jewish oral traditions) disqualifies the gambler from testifying before a court of justice (Sanhedrin 24b).

[2] The first verse regarding gambling is found in Surah Al-Baqarah (The Cow); "They ask you concerning wine and gambling. Say: "In them is great sin, and some profit, for men; but the sin is greater than the profit." [2:219]. Translation by ALI Abdullah Yusuf, "The Holy Qur-an, Text, Translation and Commentary", Lahore, Cairo and Riyadh, 1938. In French, see AWAD ALDEEB ABU-SAHLIEH Sami, "Le Coran. Texte arabe et traduction française par ordre chronologique selon l'Azhar", Ed. de l'Aire, 2008.

[3] "[…] gambling is sinful. There is no Kshatriya prowess in it. There is certainly no morality in it". (Mahabharata, Book 2, Section LVIII, translated by Kisari Mohan Ganguli, 1883). Also, the Hindu Laws of Manu state that "gambling and betting amount to open theft; the king shall always exert himself in suppressing both (of them)". BÜHLER George, "Sacred Books of the East", Volume 25, Oxford University Press, 1886, Chapter IX, para.222.

[4] In a Navajo people myth, there is even a feared gambling-god, called Noqoìlpi, who deprives men of their property, of their women and children, and finally wins some of the men themselves. BOAS Franz, CRANE T. Frederick, DORSEY J. Owen; NEWELL W.W., General Editor, Journal of American Folklore, Vol II, No. V, April-June, 1889.

[5] It is interesting to see that, in several languages including in English, the word "lot" kept a broad meaning, related also to the human destiny.

some people, while nourishing moralistic suspicions and condemnation for others[6]. It is about the desire to win money, but also about profound charitable purposes. In the end, it is a truthful mirror of the human nature, combining rational decision with irrational impulse, greed with altruism, proscription with lenience.

From an economical perspective, it was said that games of chance do not create *per se* new economic value[7], but rather constitute an instrument capable of redirecting large sums of money in a very short timeframe, and citizens accept them much easier than taxes. As Thomas Jefferson described it, a lottery is a "wonderful thing: it lays taxation only on the willing"[8]. This exceptional lucrative characteristic contributed to confine most gambling activities to a solid public grip.

From a legal perspective, more than a few aspects of gambling can be identified.

First, there is the contractual law point of view: gambling is an agreement whose result is driven by chance (an aleatory contract). As it was said, in civil law systems, the gambling contract ("contrat de jeu", "Glückspielvertrag", "contrato de juego y apuesta") is a consensual, bilateral, onerous and aleatory contract, by which a party who loses agrees to pay a consideration to the winning party or parties[9].

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[6] For an overview of a historical discourse on money and gambling, see FRANKLIN Jeffrey J., The Victorian Discourse of Gambling: Speculations on 'Middlemarch' and 'The Duke's Children, Johns Hopkins University Press, 1994.

[7] Nobel Prize laureate Paul A. Samuelson believed that "(Gambling) involves simply sterile transfers of money or goods between individuals, creating no new money or goods. […] When pursued beyond the limits of recreation, where the main purpose after all is to kill time, gambling subtracts from the national income". SAMUELSON Paul A., Economics, 10th ed., 1976, p. 425. Other economists disagree and underline that gambling can provide economic utility to consumers, similarly to some extent to the cinema business. For a view on this subject, see EADINGTON William R., "Economic Perceptions of Gambling Behavior", 3 Journal of Gambling Studies 4, December 1988. In my view, it depends of the form of gambling at issue: lotteries, for instance, usually provide little entertainment to consumers, but collect instead large sums of money for the public benefit.

[8] See BRENNER Reuven, BRENNER Gabrielle A., BROWN Aaron, "A World of Chance. Betting on Religion, Games, Wall Street", Cambridge University Press, 2008.

[9] From a rich literature, we refer the reader to AMONN Kurt, "Spiel und spielartige Verträge", Schweizerisches Privatrecht, vol. VII/2, Basel and Stuttgart 1979; ECHEVARRÍA DE RADA

Then, there is the criminal law standpoint, with its varied aspects – money laundering, organized crime, corruption or other peripherally related offences – and their applicable sanctions. The protection of minors is equally related thereto.

Commercial and fiscal law considerations also enter into play when addressing gambling activities. New communications technologies such as the Internet bring us an additional key view on the subject.

Furthermore, the cross-border aspect of gambling activities has been scrutinized by international private law specialists, with regard, for instance, to conflict of regulations and enforceability of gambling debts from one country to another.

Needless to say that regulatory concerns – legalization, tolerance or prohibition, when, for whom and to what extent – have been a long-term preoccupation for lawmakers.

In this intricate context, our perspective on games of chance is a legal view of international trade in gambling services, more specifically where the provider and the beneficiary of such service are not located in the same jurisdiction and one of them – or the service itself – must cross a border in order for the transaction to take place.

Thus, in this perspective, after having set the framework in the present Introduction, we will analyze in *Part One* gambling services in the legal context of global trade (regulated mainly but not exclusively by the provisions of the General Agreement on Trade in Services - GATS), and in *Part Two* at a regional level. In this second part, we will examine the supra-national regulations governing games of chance in the European Union, but also in the framework of the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (CAFTA), the Mercado Comun del Sur (MERCOSUR) and of

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Teresa, "Los contratos de juego y apuesta" J.M. Bosch Editor, 1996; GHESTIN Jacques (editeur), Traité de droit civil, L.G.D.J., Paris, 1996; DEAK Francisc, Tratat de drept civil. Contracte Speciale, Universul Juridic, Bucharest, 2007; TOADER Camelia, Drept civil. Contracte speciale, CH Beck, Bucharest, 2008; GALGANO Francesco, Il Contratto, CEDAM, Padova, 2007.

the Association of South East Asian Nations Free Trade Area (ASEAN Free Trade Area). A General Conclusion summarizing our main findings completes this study.

I.Succinct Facts and Figures

Statistics show that the gambling industry (encompassing all its sectors) is globally a substantial one.

In the United States, for example, it was estimated in 2003 that the legal gaming industries generated gross gaming revenues (GGR)[10] of US$ 72.8 billion[11]. According to one estimate, over US$ 30 billion worth of gambling is conducted on line. If so, online gambling is the largest single electronic commerce activity today[12].

In Canada, gambling accounted for gross gaming revenues of aproximately CAD 12 billion in the same period[13].

In New Zealand, the approximate figure in 2000 was of NZ$ 1.3 billion[14], while in Australia, gambling revenues were in 1998 of AUD 11 billion[15].

The Asian markets are equally impressive. For example, in 2007 Macao's gaming industry alone exceeded revenues of US$ 10 billion, making it a premier

[10] Operator winnings, less payment of prizes.
[11] SCHETTINI KEARNEY Melissa, "The Economic Winners and Losers of Legalized Gambling", 2005, NBER Working Paper No. W11234, available at SSRN: http://ssrn.com/abstract=693095; also, Christiansen Capital Advisors, “Gross Annual Wager of the United States 2003,” extracted from www.cca-i.com.
[12] OEDC, "The Economic and Social Impact of Electronic Commerce. Preliminary Findings and Research Agenda", 1999, p.39.
[13] CAMPBELL Colin S., HARTNAGEL Timothy F., SMITH Garry J., “The Legalization of Gambling in Canada”, prepared for the Law Commission Canada “What is a Crime?”, 2005, p.20.
[14] New Zealand Department of Internal Affairs statistics, cited by the Australian Institute for Gambling research, "Social And Economic Impacts Of Gambling In New Zealand", Final report, July 2001.
[15] Productivity Commission, Australia’s Gambling Industries, Report No. 10, AusInfo, Canberra, 1999, (hereinafter Australia’s Gambling Industries Report), p.8.

gambling destination[16]. In December 2003 Thai Farmers Bank has estimated that Bangkokers gamble the equivalent of US$ 220.000 each month[17].

In the European Union, gambling services were already by 2003 characterized by revenues in excess of € 50 billion[18], as well as substantial contributions to tax revenues and funding of good causes. According to some studies, the traditional land based offer is expected to grow from € 80 million in 2007 to € 95 billion GGR in 2012[19], while the online market is expected to grow at a minimum rate of 8.4 per cent per annum (in Austria and Hungary) to a maximum of 17.6 per cent (in Italy)[20].

Other European states (not members of the EU) also illustrate notable figures.

In Norway, for instance, the total expenditure on gambling services was estimated to the equivalent of USD 2.5 billion in 1999[21].

In Switzerland, the nineteen casinos reported earnings of CHF 992 millions in 2008[22]. As for lotteries, the Loterie Romande distributed more than CHF 174 millions to the French-speaking cantons and public utility entities in 2007, while more than CHF 320 millions were distributed by the Swisslos to the German-speaking cantons[23].

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[16] According to the statistics released by Macao's Gaming Inspection and Coordination Bureau, www.dicj.gov.mo (last visited: 13/03/09).
[17] See VOI YOU Anabela, "The Legalization of Gambling in Thailand: a Revisited Discourse In Light Of Recent Developments", research article at Lund University, p.13, available at www.essays.se (last visited: 13/03/09).
[18] See the Swiss Institute for Comparative Law, “Study of Gambling Services in the Internal Market of the European Union”, Final Report prepared for the European Commission, 2006 (hereinafter "ISDC Gambling Services Report"), p.35.
[19] According to Global Betting and Gaming Consultants, May 2008, quoted by the European Gambling and Betting Association: http://www.egba.eu/en/press/422.
[20] PRICEWATERHOUSECOOPERS’ Global Entertainment and Media Outlook: 2008-2012, p. 623. Growth is measured as the compound increase in annual gambling revenue.
[21] FEKJÆR Hans Olav, M.D., "Gambling and gambling problems in Norway", Paper presented at the 4th conference of the European Association for the Study of Gambling, Warsaw, Poland, September 23, 2000.
[22] According to figures from the Swiss Federal Gaming Board.
[23] According to figures from the Loterie Romande and Swisslos.

As concerns the *gamblers* themselves, it was estimated in the United States that approximately 80 % of the population gambles sporadically, while 2%-3% of the population has a gambling problem[24].

Similarly, 82 % of Australians are thought to gamble, with 40% doing so regularly and 1-2 % of them having some form of gambling addiction[25] ("problem gamblers"[26]).

In New Zealand, approximately 87 % of the population is thought to gamble at least occasionally[27].

In South Africa, the situation seems comparable, with 1.4 % of problem gamblers and only 20 % of the population refraining from gambling[28].

Also, according to one evaluation, 78 % of the Hong Kong population gambles at least intermittently, and 1.85 % can be described as possibly pathological gamblers[29].

In Switzerland, according to a demographic survey conducted by the Federal Office of Justice in 2002[30], 56 % of the Swiss population aged 18 and over

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[24] According to the National Council on Problem Gambling, www.npgaw.org (last visited: 13/03/09).

[25] Australia's Gambling Industries Report, p.10.

[26] A variety of terms have been used to describe people whose gambling causes problems in their personal and professional lives: "pathological", "compulsive", "disordered", "significant", "intemperate", "problem" or "excessive" gambling, or even "level 0", "level 1" and "level 2" gambling. Some authors have used terms for adolescents that are different from the terms generally used for adults (see VOLBERG, Rachel. A, "Gambling and Problem Gambling Among Adolescents in Washington State". Report to the Washington State Lottery, 1993). "Problem gambling" has been defined as "gambling to a degree that compromises, disrupts or damages family, personal or recreational pursuits (SPROSTON Kerry, ERENS Bob and ORFORD Jim, "Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey", London: National Centre for Social Research, 2000, p.41).

[27] According to the "Social And Economic Impacts Of Gambling In New Zealand" report, supra.

[28] See National Centre for the Study of Gambling at the University of Cape Town on behalf of the National Responsible Gambling Programme, "Gambling and Problem Gambling in South Africa. A National Study", 2003, p.13 and p.18.

[29] Hong Kong Home Affairs Bureau, Centre for Social Policy Studies of The Department of Applied Social Sciences and The General Education Centre of The Hong Kong Polytechnic University, "Report on a Study of Hong Kong People's Participation in Gambling Activities", 2002, available at: http://www.hab.gov.hk/file_manager/en/documents/whats_new/gambling/reporteng.pdf (last visited 13/03/09).

regularly takes part in a Swiss lottery and 43 % have played in a casino at least once. At least 20 % of the Swiss are frequent gamblers, while 0.79 % (from 32,700 to 77,800 adults) could be pathological gamblers[31]. In 2007, it was estimated that 0.9% of the German-speaking and Ticino population could be described as being problematic and pathologic gamblers[32].

II.Definition of Gambling

"When I was young, people called me a gambler. As the scale of my operations increased, I became known as a speculator. Now I am a banker. But I have been doing the same thing all the time."
Sir Earnest Cassel, private banker to King Edward VII

As a preliminary terminological remark, we note the vast assortment of expressions used to describe an activity whereby a person relies at least partially on hazard or luck in order to become richer. The general terms "gambling", "games of chance" or "gaming" are often used in English. The French terminology includes "jeux de hazard" and "jeux d'argent"[33], while in German we refer to "Glückspiel" and in Spanish to "juegos de azar".

Evidently, specific terms exist to describe lotteries, betting and precise casino-type games (table games, electronic games etc.). From an international perspective, we will use hereinafter the terms "gambling" and "games of chance"

[30] Bundesamt für Justiz, "Bevölkerungsbefragung 2002 zur Revision des Lotterie- und Wettrechts des Bundes", unveröffentl. DemoScope-Studie, 2002.
[31] KÜNZ Kilian I, FRITSCHI Tobias, EGGER Theres, “Gambling and Gambling Addiction in Switzerland, Empirical study of gambling practice, development, addiction and consequences”, study for the Swiss Federal Gaming Board and the Federal Office of Justice, Bern, November 2004, citing Christian OSIEK, Guido BONDOLFI und François FERRERO, "Etude de prévalence du jeu pathologique en Suisse", 1999, Clinique de psychiatrie 2, Département de Psychiatrie, Hôpitaux Universitaires de Genève, Lausanne : La romande des jeux SA/Loterie romande.
[32] See BRODBECK Jeannette, DÜRRENBERGER Sara, ZNOJ Hansjörg, Institut für Psychologie, Bern University, "Grundlagenstudie Spielsucht: Prävalenzen, Nutzung der Glücksspielangebote und deren Einfluss auf die Diagnose des Pathologischen Spielens", August 2007, available at http://www.fdkl.ch/images/stories/file/Grundlagenstudie_Spielsucht_def.pdf, p.8.
[33] For an in-depth analysis of the two nuances, see MOUQUIN Gérald, La notion de jeu de hasard en droit public : essai axiomatique "de lege ferenda", PhD thesis at the University of Lausanne, 1980.

in a general sense, encompassing all games of chance and games of skill and chance combined, and we will reserve specific terms when addressing a game or a sector in particular (lottery, sports betting, specific casino-type games).

Large panoply of definitions, both national and international, refers to games of chance. In the WTO jurisprudence, for instance, "gambling and betting services" include any activity involving the placing of a bet or wager, that is, instances where a person risks something of value (generally money) on the outcome of an uncertain event[34]. In this view, a bet or a wager can be made with respect to casino-type games, lotteries and sporting events, irrespective of how these services are supplied.

For the purpose of this study and in order to cover an area as broad as possible, we have retained for our definition a *synthesis of criteria*, used both at a national and international level.

Thus, gambling services should be considered to cover any service which involves wagering a stake with monetary value in uncertain events driven at least partially by chance, including lotteries, casino and betting transactions[35].

We note that in several jurisdictions "games of chance" are opposed to "games of skill", where the player's abilities and skills override the importance of the aleatory element in determining the win or the loss. The legal delimitation between the two categories is not homogeneous in all legislations and it has been subject to considerable discussion[36]. This study takes into consideration all

[34] *US Gambling*, panel report, para.445.
[35] This potentially wide definition lays the basis of another controversy, concerning speculative investment, which some authors consider to be a form of gambling, since rational investment decisions are mixed with an inherent element of chance, outside the investor's control. See, for example, HAZEN Thomas Lee, "Rational Investments, Speculation or Gambling? Derivative Securities and Financial Futures and Their Effect on the Underlying Capital Markets", 86 Nw. U. L. Rev. 987 (1991-1992). We believe that the "will to play", although sometimes difficult to identify, is a criterion allowing the distinction between gambling, which has mainly a playful nature, and speculative investment, in which the economic rationale takes precedence. For a Swiss jurisprudential reference, see Tribunal Fédéral, 133 II 68, judgment of 19 February 2007.
[36] In brief, there are jurisdictions where the player's skills are weighed against the aleatory element in order to determine which one is preponderant (the "predominance test"). See, in this sense, jurisprudence from Austria (Unabhängigen Finanzsenat - UFSW, décision du 05.04.2007,

games which are not entirely dependent on the player's skills, in other words the games of pure chance and the games of chance and skills combined.

The above given definition does not exclude promotional games, in which the winner is designated by any element of chance and the exclusive purpose of which is to encourage the sales of goods or services.

The definition thus covers, without limitation, the following on-line and off-line market sectors, both charitable[37] and commercially-run: lotteries[38]; betting services[39] (including horse and dog racing, event betting and pool competitions); casino games, including table games, slot machines, bingo games[40], etc.; services related to gambling machines that can be placed in locations other than in licensed casinos[41]; media gambling services[42] (i.e. games in the editorial content of the media) and sales promotion services[43].

GZ RV/1666-W/06), France (Cour de Cassation criminelle, judgment of 5 january 1877), Germany (Bundesgerichtshofs in Strafsachen - BGHSt 9, 37 ; BGH, 28.11.2002 - 4 StR 260/02; Bundesverwaltungsgericht – BverwG, GewArch 2002 76 (78) ; Verwaltungsgericht Kassel - VGH Kassel, NVwZ 2005, 99 (101), Italy (Cassazione penale, sez.III, 18.10.2007, no.44284), Luxembourg (Trib. Lux., 13 November 1958, P. 17, 390) and the United States (see recently NC Court of Appeals, *Joker Club v Hardin* (2007) 643 S.E. 2d 626). However, the British and Canadian courts have explicitely deviated from the predominance test and considered that a game can be qualified as "game of chance" if an aleatory element, even if secondary, is present (see for the British courts: Divisional Court, Jenks v Turpin, 1884, 13 QBD 505, and recently Court of Appeal, Regina v Derek Kelly, 2008, EWCA Crim 137; for the Canadian jurisprudence, see Supreme Court of Canada in *Ross, Banks and Dyson v The Queen* (1968) 70 DLR (2d) 606).

[37] "Non-profit game" or charity gambling means a game organized by a non-profit organization, the net proceeds of which are intended for a religious, sports, philanthropic, cultural, educational, social or other civic purposes.

[38] Prize games in which an organiser accepts bets on the chances which several numbers have of being extracted at random from a defined series of numbers or symbols. ISDC Gambling Report, p.vi

[39] Bets can be placed on the outcome of a race, competition or other event or process, on the likelihood of anything occurring or not occurring, or whether anything is or is not true. See ISDC Gambling Services Report, p.viii.

[40] Games of chance, in which the player uses a scorecard or an electronic representation thereof bearing numbers and is played by marking or covering numbers identical to numbers drawn by chance, whether manually or electronically, and won by the player who first marks or covers the "line" which is achieved when, during one game, for the first time all five numbers on one horizontal row on one scorecard are drawn; or the "house" or "bingo" is achieved when, during one game, for the first time all the fifteen numbers on one scorecard are drawn. See ISDC Gambling Services Report, p. viii.

[41] Mechanical, electronic or electric processes that can result in the distribution of prize money or anything else of value, including a right or mechanism permitting free play on the machine.

III.Categories of Gambling

Games of chance range from traditional forms, such as lottery, betting and brick-and-mortar casinos, to gambling activities adapted to modern technology.

III.1.Lottery

"Lottery is a Taxation
Upon all the fools in Creation
And Heaven be praised
It is easily raised".
Henry Fielding, "The Lottery", first acted at Drury Lane Theatre on January 1st, 1732[44].

Lotteries' history is undoubtedly millenary. The use of sortition or drawing of lots dates back longer than written records can give evidence. Biblical sources provide extensive confirmation thereof[45]; Romans also used it as an additional source of fortune telling.

For an organized commercial development of public lotteries, implemented in order to raise money for public works, we turn to records for the years 1443 – 1449 in the Low Countries, where lotteries operation are signaled in Ghent, Utrecht, Oudenarde, Bruges and l'Ecluse[46]. In 1470, in Augsburg, the capital of the German land Swabia, a lottery with 36,000 tickets was organized, each ticket costing 8 pfennig. Almost two centuries later, a lottery was organized for the marriage of Louis XIV of France (1659), while other lotteries prospered since the 1530's in Italian cities such as Florence[47].

Success depends completely or predominantly on the coincidence and cannot be influenced by the player. ISDC Gambling Services Report, p.vii.
[42] In Belgium, Luxembourg and France, media games are said to serve commercial or advertisement purposes. Not every EU Member State has enacted a specific definition of media gambling services. See ISDC Gambling Services Report , p.ix
[43] Consisting of promotional games with a prize or where participation is exclusively linked to purchase.
[44] ASHTON John, "A History of English Lotteries", Leadenhall Ed., 1893, p.4.
[45] For example, in Leviticus xvi 8, Numbers xxvi 55, Joshua vii 6. In the New Testament, see Mark 15:24.
[46] See L'ESTRANGE EWEN Cecil, "Lotteries and Sweepstakes", London, 1932, p.26-27.
[47] Ibidem.

The first State lottery was set up in France in 1539 under the name Blanque, whilst the first English lottery was projected under state auspices in 1566 and drawn in 1569, producing gross receipts of ₤ 200,000.

In the United States, lotteries were organized in Philadelphia in 1720 and in Connecticut in 1750, raising money for public building funds. The Yale and Harvard College edifices have been erected with funds raised by lotteries[48].

In its modern form, a lottery is a system of gambling in which prizes are distributed by chance amongst persons who have given some form of valuable consideration in order to participate in such lottery[49].

This definition covers a large variety of schemes, from the classical lottery (where the promoter invites participants to buy tickets in order to enter, the payments are all pooled and there is a draw to determine the winner) to more modern instant or "scratch card" lotteries (where tickets are sold, a few of which contain winning numbers or symbols covered by a seal).

Lotteries generally have the following characteristics: (i) they are based on a scheme designated to attract a large number of participants, who are willing to obtain participation tickets in exchange of a relatively small consideration and who are competing among them for prizes; (ii) the lottery promoter typically has no competitive interest against the participants (as opposed to other types of games of chance, such as casino gambling); (iii) the payment made by participants is consideration for his/her chance to take part in the scheme (thus not excluding sales promotions schemes); (iv) lotteries involve no skill, as opposed to betting.

Lotteries can also be organized online. It appears that the first Internet lottery is operated since 1995 in Liechtenstein by a state-controlled foundation[50].

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[48] MONKCOM Stephen Philip (General editor), Smith&Monkcom, The Law of Betting, Games and Lotteries, Second Edition, Butterworths, 2001, p.562-563.
[49] Idem, p.561.
[50] The International Lottery in Liechtenstein Foundation.

Most lotteries are state-owned or state-controlled[51], but some countries also allow private lotteries, under certain conditions. Participation in such private lotteries is limited to specified groups of people, such as members of one society, or persons working at the same premises[52].

To date, the world's largest lottery jackpot – of USD 390 millions – was won in the United States in March 2007 by two persons participating in the Mega Millions game[53]. Europe's largest jackpot so far – € 180 millions – was won in 2006 in the EuroMillions lottery.

Lotteries are popular worldwide; in Europe, according to a study of 1996, the largest national lottery is the United Kingdom National Lottery, followed by the lotteries in Spain, France and Italy (see table below).

Rank	Lottery	Country	Population (millions)	Total sales (US$ mill)	Total per capita
1	UK National Lottery	UK	58	7,955.7	$140
2	ONLAE	Spain	39	6,997.8	$180
3	La Francaise des jeux	France	58	6,460.8	$111
4	Lottomatica	Italy	58	4,089.3	$71
5	ONCE	Spain	39	2,963.4	$75

Top five sales in lottery games in European countries in 1996

Extracted from CREIGH-TYTE & FARRELL, "*The Economics of the National Lottery*", 1998 [54]

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[51] State lotteries are now established in all European Union States as well as most other European countries. The UK was the last EU State to (re)launch a national lottery in 1994. For an economic perspective on lotteries as revenue generators for the public purse, see SMITH Sarah, Loteries as A Source of Revenue, in VIREN Matti (editor), Gaming in the New Market Environment, Palgrave MacMillian, 2008, pp.99-125.

[52] Private lotteries are permitted in several countries. In the United Kingdom, they are allowed by the Lottery and Amusement Act of 1976, as amended in 1993 by the National Lottery Act. In Ireland, the 1956 Gaming and Lotteries Act, section 23, also allows private lotteries. Many restrictions apply to this type of lottery, such as the obligation to distribute to participants the whole of the proceeds in the form of prizes (after deducting expenses incurred for its organization), no advertisement may be exhibited and no postal distribution of tickets is permitted etc. Private lotteries are also allowed in Sweden (Act on lotteries of June 9, 1994, 1994:1000). In Switzerland, the Federal Tribunal decided in 2008 that the organization of lotto, even of small importance and with prizes distributed in purchase tickets and not directly in money, should remain an entertainment activity organized solely by associations, and not by private persons (Swiss Federal Tribunal, ATF 6B_690/2008).

[53] http://www.megamillions.com/about/history.asp

[54] CREIGH-TYTE Steven, FARRELL Lisa, "The Economics of the National Lottery", University of Durham, Department of Economics Working Paper, 1998.

III.2.Betting

"A man named Kane-ia-kama joins a betting game and wins. On his way home he gambles again at the famous gambling place on Maunaloa and loses everything he has, except his bones, which he was too afraid to stake".
Legend of Kalaipahoa - Hawaii[55]

Betting was probably known to the primitive man, who was backing competitors in races and fights[56]. Homer describes a horse race bet between Idomeneus and Ajax under the walls of Troy[57], and we can only imagine the intense betting activity that surrounded the first Olympic chariot race in 680 BC, during the XXVth Olympic Games. In Rome, Tarquin the Ancient had the first racecourse constructed already by 600 BC.

America's first race track was apparently built at Long Island in 1665[58]. The English Jockey Club was created in 1750 and the Derby – an idea of the 12th Lord Derby and today's one of the world's most famous races - was first run in 1780 in Epsom, England. In France, the famous Longchamp race track was inaugurated by Emperor Napoleon III in 1857.

Nowadays, bets can be placed legally or illegally on numerous races (greyhound races, motor and car races, cycling, the marathon, yachting races etc.), on fighting sports (engaged into by humans, e.g. wrestling, boxing, taekwondo, muay thai, etc., or animals, such as dog or cockfighting), but also on other sports, such as football, rugby, cricket, basketball, tennis, hockey etc., and even on non-sporting events[59].

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[55] Extracted from BECKWITH Martha, "Hawaiian Mythology", Yale University Press, 1940.
[56] See ARNOLD Peter, “The Encyclopedia of Gambling. The game, the odds, the techniques, the people and places the myths and history”, Collins Publishers Glasgow/London, 1978, p.50.
[57] The Iliad, book 23.
[58] See ARNOLD Peter, The Encyclopedia of Gambling, supra, p.50.
[59] For instance, several large betting companies offer bets on the result of elections or on who will win the Oscars.

Sport betting can be described as gambling on the outcome of sporting events. In general there are two different kinds of sports betting games: the toto style games ("pools") and the oddset style games.

Toto or pools games, particularly popular in Europe, are parimutuel[60] games, mainly on the outcome of a number of matches. Three main kinds of toto are largely available: the "1-X-2"[61], select betting[62] and result betting[63].

Oddset betting, first launched in the Scandinavian countries, is becoming very popular all over Europe. It implies fixed odds, the punters do not compete with each other but directly with the company. If predictions are correct, the odds are first multiplied with each other and then with the amount of the stake[64]. There are different kinds of oddest betting, such as"long list" betting[65], "winner betting"[66] and "result betting"[67].

Through its indissoluble link to sports, betting can imply a higher risk of fraud or corruption for the sporting event on which it takes place. Periodic scandals regarding the manipulation of sports events on behalf of bookmakers or bettors, or for the direct gain of players or officials themselves, have been exposed in

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[60] Parimutuel means that the payout percentage of the game is fix, for example 50 %. Prizes for the winners are not fix, they depend on the whole income of the game, on the payout percentage and on the number of winners in the different prize categories. That means that "the customers are playing against each other", there is no financial risk for the company. For a Swiss reference, see ROUILLER Claude, "Jeux de loteries et paris sportifs professionnels", RDAF 2004 I, p. 429.

[61] The punters have to predict the outcome of a number of football matches. Home win means "1", draw means "X" or "0" and away win means "2". In most European countries there are 12 or 13 matches on the match list.

[62] The object of this game to pick some – for example 6 - matches out of a list of – for example 45 – matches. "Draw betting" means that the punters have to predict the draw matches, "Goal betting" means that the punters have to pick the matches with the highest number of goals.

[63] Here the customers have to predict the exact result of some – for example 4 - football matches.

[64] That means that the customer himself chooses the amount of the stake as well as the possible winning. The odds are calculated by the company and are then reported to the customers by newspaper, leaflets or via Internet.

[65] This means that the customers have to choose 3 or more matches out of a list of - for example 90 - matches. The odds combination for this 3 matches creates the bet. Some companies also offer "doubles" and even "singles".

[66] Here the punters have to predict the winner of a special event, for example the winner of a Formula 1 race or the winner of a tennis tournament.

[67] The customers have to predict the exact result of – for example – a football match. There is one odd for every possible result.

newspapers editorials since 1774 and continued to emerge in the twentieth and twenty-first centuries[68].

The advent of the Internet brought a spectacular increase to the betting sector[69]. One major change was the introduction of betting exchanges, who act as online intermediaries between individual bettors, allowing them to bet against each other[70]. The punters can either take the traditional role of backing the bet offered by somebody else, or they can also act as "bookmakers" themselves and lay bets. Similar person-to-person (p2p) models (e.g., eBay or Napster) already demonstrated the immense impact they can have on an industry.

III.3.Casino gambling

"At that point I ought to have gone away, but a strange sensation rose up in me, a sort of defiance of fate, a desire to challenge it, to put out my tongue at it. I laid down the largest stake allowed - four thousand gulden - and lost it. Then, getting hot, I pulled out all I had left, staked it on the same number, and lost again, after which I walked away from the table as though I were stunned. I could not even grasp what had happened to me."
Fyodor Dostoevsky, The Gambler, 1866

Few concepts create a richer collective imaginary than casinos. From the aristocratic and glamorous Monte Carlo resort to the iconic Las Vegas or the fabulous gambling houses in Macao, casinos represent a world of a very particular nature.

The history of casinos is relatively recent. Some of the first known casinos were established in Venice around 1640. Later, the term "casino" came to include other public buildings where pleasurable activities, including gambling and sports took place.

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[68] For illustrations, see FORREST David, McHALE Ian, McAULEY Kevin, "Risks to the Integrity of Sport from Betting Corruption", a Report for the Central Council for Physical Recreation by the Centre for the Study of Gambling, University of Salford, February 2008.
[69] See also MILLER Lori K., "Online Sports Gambling – Regulation or Prohibition?", 11 J Legal Aspects Sport 99 (2001).
[70] For a detailed study, see MECN's " Betting Exchanges – The eBay of the Betting Industry A new Era of Betting in Europe?" 2004, http://www.mecn.net/Publications/Betting_X/betting_x.html.

Today, casinos can be found in almost every country[71], where they are generally submitted to strict licensing requirements. Casino games include games of pure chance (such as slot machines, pachinko or the roulette, or random numbers such as bingo or keno[72]) or combined with the player's skills (card games such as poker, baccarat, blackjack, and dice games such as craps).

Criminal law issues have preoccupied authorities since the creation of casinos. Through history, gambling houses have been more or less ambiguously associated with the idea of direct or indirect criminal manipulation, ranging from money laundering and white-collar crime to prostitution[73].

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[71] Casino services in some countries (e.g. Cyprus, Ireland and Northern Ireland) are entirely prohibited. In Cyprus legislation could however change to allow casinos.

[72] Keno is a game where a player wagers that chosen numbers will match any of the 20 numbers randomly selected from a group of 80 numbers via a computer system or a ball drawing device. It is an electronic form of bingo, and is typically played in clubs, casinos and hotels.

[73] This is one of the most controversial issues related to gambling. For example, American authors who studied changes in crime in 64 communities in Atlantic City between 1972 and 1984 found that "levels of crime appear to have been higher in the post casino years 1978 to 1984, than in the earlier period of 1972 to 1977". See HAKIM Simon, BUCK Andrew, "Do Casinos Enhance Crime?" 17 Journal of Crim. Just., 1989, pp.409-416, cited in LYNCH Rob, "Crime in Relation to the Sydney Harbour Casino", 10 Current issues Crim. Just., 1998-1999, p. 238. Another analysis found average national crime rates in casino communities to be 84% higher than communities without casinos. See SHAPIRO Joseph P., "America's Gambling Fever," U.S. News & World Report, January 15, 1996, pp. 58-60. Others, however, reached the opposite conclusion, showing that crime rates had decreased after legalization of gambling in the studied areas. See ALBANESE Jay S., "The Effect of Casino Gambling on Crime", 49 Fed. Probation p.39, 1985. This ambiguity is perpetuated in more recent studies. One research of 1991 has come to the conclusion that the legalization of gambling has not resulted in a significant increase in index crimes in Atlantic City. See CURRAN Daniel, Frank SCARPITTI, "Crime in Atlantic City: Do Casinos Make a Difference?", 12 Deviant Behaviour, 1991, pp.429-447. Another study found that it is possible that casino gambling establishments in a city actually lower the total crime rate (see HORN Scott T., *Cas*inos and Crime: Don't Bet On It, *1997,* Salem College Report-no: STH-0797-0001. Available at SSRN: http://ssrn.com/abstract=36120). Some authors concluded that there is little valid evidence to support the notion that the presence of casino gambling in a community has any meaningful impact on crime rates (MARGOLIS Jeremy, Casinos and Crime: An Analysis of the Evidence", prepared for the American Gaming Association, December 1997, available at http://www.americangaming.org/assets/files/studies/Crime.pdf.) Also, gambling was found not to cause white-collar crime (ALBANESE Jay S., Casino Gambling and White-Collar Crime: An Examination of the Empirical Evidence, available at http://www.americangaming.org/assets/files/studies/White_Collar_Crime.pdf and prepared for the American Gaming Association, August 1999,.). The same optimistic view was taken by an Australian scholar who noted that the situation prevalent after two years operation of the temporary Sydney Harbour Casino was one of relative order, without any significant increases in crime in the casino precinct, nor suggestion of criminality in the operation of the casino (LYNCH Rob, Crime and the Sydney Harbour Casino, Current Issues in Criminal Justice: Journal of the Institute of Criminology, Vol 10 (3), 1999, pp. 63–77). In 2000, a report issued in the United States by the Public Sector Gaming Study Commission reached analogous conclusions, finding

III.4.Other forms of land-based gambling

Several other forms of land-based games of chance made their appearance with the advent of technology and as a result of a so-called age of consumption.

For instance, **gaming machines** (sometimes called "fruit machines" or amusement with prizes) placed outside casinos can constitute a distinct form of gambling[74]. Such machines come in a great variety in terms of technology, turnover, prizes, payout rates and accessibility. Outside casinos, fruit machines are generally found in pubs, clubs or take-away food shops. Usually, consideration is paid by the consumer in coins, cash or a bar-coded paper ticket. Most games have a variety of winning combination of symbols, often posted on the face of the machine. Modern slot machines are computerized, therefore the odds are run by software.

A form of gaming machines is the video lottery terminal or VLT, which is connected to a centralized computer system that determines the outcome of each

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"no link between gambling, particularly casino-style gambling, and crime" (Public Sector Gaming Study Commission, "Gambling Policy and the Role of the State", Tallahassee, Fla.: Florida Institute of Government, Florida State University, March 2000, p.37. The Commission was appointed by the National Council of Legislators from Gaming States (NCLGS), which is an organization of state legislators who chair or are active members of the legislative committees responsible for gaming in their respective states). Similarly, the American General Accountability Office in a 2000 report concluded that "[i]n general, existing data were not sufficient to quantify or define the relationship between gambling and crime …although numerous studies have explored the relationship between gambling and crime, the reliability of many of these studies is questionable (United States General Accounting Office, Report to the Hon. Frank R. Wolf, House of Representatives "Impact of Gambling: Economic Effects More Measurable Than Social Effects", 2000, p. 35). Several recent reports, however, contain opposite findings (See, among others, "Gambling: Who's really at risk? The connection between gambling and crime", Constantine & Aborn Advisory Services, NY, 2005, available at http://www.cagnyinf.org/reports.htm, p.9: "It is virtually inescapable that there will be an impact on crime from introducing gambling"; also see REUTER Peter, The impact of casinos on crime and other social problems: An analysis of recent experiences. Report for the Greater Baltimore Committee, College Park, Md.: University of Maryland, January 1997, available at http://www.americangaming.org/assets/files/Peter_Reuter_Crime_Study.pdf; THOMPSON William N. et al., Casinos and Crime in Wisconsin: What's the Connection?, Wisconsin Policy Research Institute Report, Vol. 9, No. 9, November 1996).

[74] In several countries, such as Portugal, gaming machines cannot be placed outside casinos (Maquinas de diversao - Decreto-Lei nº 310/2002).

wager. In this way, VLTs mimic scratch-off lottery tickets in that each machine has an equal chance of winning a series of limited prizes.

In our opinion, **media gambling services** can also amount to a form of games of chance. These are games organised by the owner or operator of a radio or television station, where the participation of players takes place by or as a result of their presence at the transmission or recording of a programme in which such game is organised or by any intervention on their part by any means of distance communication (Internet, handy) during or after the transmission or recording of the programme during which such game is organised[75].

Sales promotion services can also qualify as games of chance, although as in the case of media gambling services, certain national legislations do not treat them as such. In the Netherlands for instance, promotional games of chance (including free promotional games, media services and sweepstake contests) are considered games of chance[76]. In Portugal, sales promotional games are defined by public law as a specific category of games of chance and cannot involve prizes in money[77]. In certain countries, such games are prohibited[78].

III.5.Remote Gambling

With the contemporary communication technologies, people are able to gamble from a distance. If gambling in "cyberspace"[79] is the newest and by far most rapidly increasing sector, some games of chance such as lotteries could be

[75] This is the case, for instance, in Malta and Sweden. In other countries (such as Spain and Portugal), the possibility of winning a prize by calling a television program to answer a question on a "just for fun" basis is not considered as gaming.
[76] Article 1, paragraph 7 of the Code of conduct for promotional games of chance (Gedragscode promotionele kansspelen).
[77] Regulamento Nº 1/2001, Decreto-Lei n.º 330/90, Decreto-Lei 422/89.
[78] In Cyprus for instance, sales promotional prize competitions are expressly declared to be illegal. They are also prohibited by law in Belgium and Portugal, unless participation in the competition is offered free of charge. See the detailed country reports in the ISDC Gabling Services Report.
[79] The term was invented by the science fiction author William GIBSON in his novels Burning Chrome of 1982 and Neuromancer of 1984.

remotely engaged into – legally or illegally – long before the advent of the Internet (by mail for instance).

A particularly graphic image of remote gambling was provided by the science-fiction author John Brunner, in his novel "The Shockwave Rider" (1975). As a contextual side-play in his novel, he depicted ubiquitous display-boards for gambling pools on an enormous range of events of varying degrees of likelihood.

Nowadays, gambling offer is particularly varied: people can gamble by phone, through interactive television, from other mobile platforms acting as slot machines or real-time betting platforms etc.

From a **technical point of view**, the available means to gamble include radio-wave transmission (both terrestrial and satellite antennae, growing out of broadcast TV, possibly coupled with low-bandwidth terrestrial connections from the consumer back to the broadcaster), cable transmission (growing out of cable-TV, where the connection's capacity is typically split between high-bandwidth down-channels and low-bandwidth up-channels), and Internet, with connection to the home and most workplaces via the conventional public switched telephone network (PSTN)[80]**.**

Mobile-phone gambling is still in its infancy as compared to more traditional methods. However, thanks to its convenience and to a receptive young public, this sector is expected to grow.

Interactive television also plays a role in gambling. The PMU for instance - the national French horse race betting agency – has entrusted an interactive television company with the task of creating an iTV version of its national betting service.

[80] See for details CLARKE, Roger A., DEMPSEY, Gillian, OOI, Chuin Nee, 'CONNOR, Robert F., "The Technical Feasibility of Regulating Gambling on the Internet", available at SSRN: http://ssrn.com/abstract=156069.

Gambling through the Internet[81] is, as it was already said, the largest mobile sector in games of chance. Some gambling Internet sites require the downloading of a computer program on the hard disk in order to play. Others use JAVA applets to run through the World Wide Web browser, while others use all HTML and do not require any downloading.

It is estimated that in 2009 over 33% of online gambling concerned Internet casinos, while 25% concerned poker rooms and almost 20% sports betting; approximately 14% of gambling sites offered bingo games, and online lotteries represented only 1.7% of the online game business[82].

As to the **physical locations** of servers used for online gambling, it seems that Gibraltar, the Kahnawake Mohawk Territory in Canada, Malta, the United Kingdom and Alderney represent today the top five jurisdictions for Internet gambling.

Jurisdiction	Volume of Transactions (Rank)	Number of Online Gambling Sites	Since Year
Gibraltar (British overseas territory)	1	192	1998
Kahnawake Mohawk Territory (Quebec)	2	279	1999
Malta	3	299	2000
United Kingdom	4	92	1996
Alderney (British Channel Island)	5	66	2001
Antigua and Barbuda	6	99	1996
Netherland Antilles (Curacao)	7	266	1996
Isle of Man	8	12	2001
Austria	9	10	2000
United States	10	27	
Costa Rica	11	222	1996
Australian Northern Territory	12	14	
Sweden	13	4	1999
Kalmykia Republic (Russian Federation)	14	2	1999

[81] For a detailed legal analysis, see for instance TRATOS Mark G., "Gaming on the Internet", 3 Stan. J.L. Bus. & Fin. 101 (1997); MONTPAS Scott M., "Gambling Online: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling", 22 U. Dayton L. Rev. 168 (1996-1997); HOBBES James R., PERRY Amy, "Internet Gambling: Is It Worth the Risk?", 7 Vill. Sports & Ent. L.J. 1 (2000); Craig LANG, "Internet Gambling: Nevada Logs In", 22 Loy. L.A. Ent. L. Rev. 525 (2001-2002); GOLDSTEIN Harley J., "Online Gambling: Down To the Wire?", 8 Marq. Sports L. J. 1 (1997-1998); SAVILIA John J., "Cyber-Games?: Regulation of Internet Gambling in the United States", 34 Suffolk U. L. Rev. 347 (2000-2001); ROSE Nelson, "Gambling and the Law: The Future of Internet Gambling", 7 Vill. Sports & Ent. L.J. 29 (2000).

[82] See a presentation by WILLIAMS Robert, WOOD Robert, University of Lethbridge, Alberta, at the Alberta Gaming Research Insitute Annual Conference held on 27 March 2009, available at http://gaming.uleth.ca/agri_downloads/4455/Williams_AGRI_Conference_2009.ppt.

Top 14 Online Gambling Jurisdictions in October 2008

Extracted from "Internet Gambling: Prevalence, Patterns, Problems, and Policy Options", 2009 [83]

Anticipating a discussion on Internet gambling that we will develop further on[84], we note that while this form of gambling has obvious advantages over traditional gambling both for players (ubiquity[85], anonymity, popularity among young people, availability in time etc.) and for operators (low entry costs, potential world-wide reach etc.), it also faces several issues such as security or consumer confidence.

Finally, techniques aiming to tame the Internet tangle, such as self regulation[86] or filtering[87] also come into debate as complex and still new issues, which remain relatively foreign to many criminologists, law enforcement officers and gambling researchers.

[83] Robert T. WOOD, Robert J. WILLIAMS, "Internet Gambling: Prevalence, Patterns, Problems, and Policy Options", Final Report prepared for the Ontario Problem Gambling Research Centre; Guelph, Ontario, January 5, 2009, p.17.

[84] In the Chapter related to the US Gambling dispute before the World Trade Organization dispute settlement bodies.

[85] Due to censorship and filtering, Internet is not available everywhere in its entirety. See notably WU Tim, "The World Trade Law of Censorship and Internet Filtering", 2006, available at http://ssrn.com/abstract=882459.

[86] Self-regulation of the Internet is in itself an extremely debated issue. Among the proposed models was the creation of a global private or semiprivate self-regulation structure (a bottom-up approach). For a comment on the advantages and inconveniences of such a model, see CLERC Evelyne, La gestion semi-privée de l'Internet, in C.-A. Morand (Editor), Le droit saisi par la mondialisation, Bruylant/Helbing & Lichtenhahn, Bruxelles, 2001.

[87] Filtering programmes "typically work by comparing a user's request for information against a list of prohibited sites". LEWIS Peter H., "Limiting a Medium Without Boundaries: How Do You Let The Good Fish Through The Net While Blocking The Bad?" New York Times, 15 January 1996.

IV.National Regulation of Cross-Border Gambling Services

Although this research focuses primarily on the international perspective of gambling services, it is not without importance to assess the national legal framework attached in different jurisdictions to cross-border gambling transactions, which are now facilitated by technology. Such understanding becomes particularly important when analyzing why and how problems of cross-border enforcement in the field of gambling arise.

Since, as already pointed out, the overwhelming part of cross-border gambling transactions is conducted online, we will concentrate on presenting several selected national legislations which address the “global” Internet gambling issue.

In doing so, we will overview two main legislative models: that of so-called “restrictive jurisdictions”, where online gambling is whether entirely prohibited or strictly regulated as not to allow foreign operators, and of so-called “permissive jurisdictions”, where online gambling is expressly authorized and no limitation insofar the nationality or location of operators or players.

IV.1.Restrictive jurisdictions

In most jurisdictions, gambling is considered a problematic activity, which bears special societal concerns. Many legislators have thus strived to control and limit the “traditional” games of chance as much as possible, and to prevent them from going online. This is the case in Saudi Arabia, for instance, where the government has chosen to prohibit gambling Internet sites[88] and uses blocking programs to enforce this prohibition. In the United States, too, gambling online is

[88] For an overview of gambling in Islamic jurisdictions, see LEWIS Eric, JARVIS Tyler, “Gambling and Islam: Clashing and Co-existing”, Brigham Young University, web document available at http://www.math.byu.edu/~jarvis/gambling/student-papers/eric-lewis.pdf (12/04/09).

restricted *inter alia* by a federal act of 2006. Such jurisdictions were called "totally prohibitive"[89].

Other jurisdictions ("protectionist-prohibitive") allow gambling on the Internet, but only if the provider is located and licensed domestically.

IV.1.1.Situation in Canada

With a few notable exceptions, such as the Kahnawake tribal territory, Canada does not allow online gambling services and strictly regulates this activity.

Part VII of the Canadian Criminal Code makes all activities related to operating or acting in support of a commercial betting enterprise an offence, unless it is an enterprise licensed by a provincial government (Sections 207(1)(a) and (b) and 207(4) of the Code). The Atlantic Lottery Corporation and the British Columbia Lottery Corporation, for instance, offer online lotteries[90].

A criminal prosecution based on the provisions of Section 202 of the Code was initiated in 2001 against an Antiguan based online operator (Starnet Communications Inc.) that was offering bets to Canadian residents[91].

Specific exemptions for pari-mutuel horse-racing are carved out by section 204 of the Criminal Code, and regulated by the Canadian Pari-Mutuel Agency, under the authority of the federal Ministry of Agriculture.

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[89] See SCHRIEVER Eva, "Conflict and Coordination between Diverse Regulatory Environments" in "Cross-Border Gambling on the Internet. Challenging National and International Law", research conducted by the Swiss Institute of Comparative Law, Schultess, 2004.

[90] For details, see CAMPBELL Colin S., HARTNAGEL Timothy F., SMITH Garry J., "The Legalization of Gambling in Canada Report", prepared for the Law Commission Canada "What Is a Crime?", 2005.

[91] R. v. Starnet Communications International Inc., August 17, 2001, Vancouver 125795-1(B.C.S.C). Even though it involved a guilty plea with little judicial reasoning, this case is helpful in that it sheds some light on how Canadian criminal law may apply to an online gambling operation.

IV.1.2.Situation in the USA

In the United States, gambling activities are subject to highly restrictive regulations, both at federal[92] and state level[93]. As a general rule, authority belongs to the states unless specifically granted to the federal government, with the exception of Native American tribes that are given a form of autonomy by Article I § 8 of the US Constitution. As a result, gambling activities occurring on the territory of a single state are regulated at a local level, whilst games of chance that cross a state line are subject to federal law. Gambling taking place on the lands of the Native American tribes is regulated through agreements called "compacts" promulgated under specific federal legislation[94].

The situation of online gambling, extensively debated in the past[95], was clarified in 2006 when the Unlawful Internet Gambling Enforcement Act was adopted[96].

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[92] At a federal level, the main acts directly regulating gambling are the Unlawful Internet Gambling Enforcement Act, federal anti-lottery laws (Title 18 of the United States Code, Section 1301: Importing or transporting lottery tickets, Section 1302: Mailing lottery tickets or related matter, Section 1303: Postmaster or employee as lottery agent; Title 39 of the United States Code, Section 3005: False representations; lotteries), the Wire Act and the Gambling Ship Act. Other acts are: the Travel Act of 1961; the Interstate Transportation of Wagering Paraphernalia Act of 1961; the Illegal Gambling Business Act of 1970; the Racketeer Influenced and Corrupt Organizations Act of 1970; the Professional and Amateur Sports Protection Act of 1992; the Interstate Wagering Amendment of 1994; Amendment to Interstate Horseracing Act of 2000 and the Illegal Money Transmitting Business Act of 1992.

[93] See regulation in the following states: California: Cal. Penal Code §§ 187-189, 240-241 and 518-527; Connecticut: Connecticut Division of Special Revenue, Administrative Regulations: Operation of Bingo Games, Rules 7-169-8a and 7-169-13a; Illinois: Illinois Riverboat Gaming Act § 230; Illinois Compiled Statutes § 10/7 (e); Indiana: Indiana Code §§ 4-33-1-2, 4-33-9-1, 4-33-9-10; Indiana Administrative Code § 2 1-4 (c) (1); Iowa: Iowa Racing and Gaming Commission Administrative Rules, Rules 491 – 1, 491 – 8.2 (4) (g) and 491 – 11.5 (4) (a) (4);Kansas: Kansas Consumer Protection Act; Kansas Crim. Code Ann. § 21-4302(e); Louisiana: Louisiana Gaming Control Law RS § 27 : 65; Massachusetts: Mass. Gen. Laws Ann. ch. 6, § 48; ch. 10, §§ 22-58;Mississippi: Mississippi Gaming Commission Regulations, Section II (B) (2); Nevada: Nev. Rev. Stat. §§ 463.0129, 463.750, 465.091- 465.094; Regulations of the Nevada Gaming Commission and State Gaming Control Board, Regulations 3.010 (5) and (7); New Jersey: N.J. Stat. §§ 5:5-159, 5:8-1 - 8–118, 5:9–1 et seq; New York: NY Penal Code §§ 120.00-.15 and 155.05 (2) (e); Gen. Mun. Law § 185 et seq; Rac., Pari-Mut Wag. & Breed Law §§ 101 and 1012;Oregon: Oregon Administrative Rules, Rules 462-220-0060;Utah: Ut. Const. Art. VI § 27.

[94] Indian Gaming Regulatory Act, Publ.Law 100-497, codified in 25 USC §§2701-2721.

[95] For discussions, see Part One related to the US Gambling dispute before the World Trade Organization.

[96] The Act is Title VIII of a completely unrelated bill, the Safe Port Act, H.R. 4954, dealing with port security.

While the Act does not expressly prohibit Internet gambling, it focuses on payment methods used to fund Internet gambling to fulfill its goal, since it prohibits the "acceptance of any payment instrument for unlawful internet gambling"[97].

However, the Act carves-out exceptions for securities transactions[98], fantasy sports[99], State lotteries[100], gambling on Tribal lands[101], and horseracing[102].

IV.1.3.Situation in most European Union states

In the European Union, most states have chosen the restrictive approach towards games of chance, be they traditional or online. We will limit hereinafter our overview to some of the most illustrative jurisdictions[103].

In **Austria**, legislation distinguishes between federal and state laws (Bundesgesetze and Landesgesetze). Gambling issues are therefore regulated both on a federal and state level. Land-based and interactive gambling services are a monopoly regulated by the federal Law on Games of Chance (Glücksspielgesetz-GSpG[104]). The only license for lottery games, which is limited to 15 years, has been allocated to the Österreichische Lotterien Gesellschaft mbH until 2012. Such a licensee must be domiciled in Austria.

As for casino games, all licenses are allocated to one Austrian company, Casinos Austria AG. The licensee must be headquartered in Austria and the validity of a license is limited to 15 years. Moreover, the operation and advertisement of gambling without a license, as well as the participation in, and offering and

[97] SAFE Port Act, Pub. L. No. 109-347, Title VIII, 120 Stat. 1884, 801-3 (2006).
[98] § 802, Sub. Ch. IV, § 5362 (1)(E)(i).
[99] § 802, Sub. Ch. IV, § 5362 (1)(E)(ix).
[100] § 802, Sub. Ch. IV, § 5362 (10)(B).
[101] § 802, Sub. Ch. IV, § 5362 (10)(C).
[102] § 802, Sub. Ch. IV, § 5362 (10)(D)(1).
[103] For a complete picture of the legislative framework of the EU-25 states, as it was in force in 2006, see the ISDC Gambling Services Report, supra, Legal Study, Part I.
[104] Federal Law No. 620/1989 of November 28, 1989 on the Organization of Games of Chance, as amended.

advertisement of foreign gambling services in Austria, are prohibited by the Penal Code.

In **Belgium**, the main legislative framework is provided by the Law of 7 May 1999[105], which essentially prohibits games of chance as a protective measure to players. It institutes a general “channeling” approach, whereby games of chance are restricted, in principle, unless expressly and limitedly allowed by the competent authorities.

In **Denmark**, there is a general prohibition of lotteries, which can be found in the Act on Lottery Prohibition[106] and in Sections 203 and 204 of the Penal Code. Exceptionally, an authorization may be given to lottery organizers who promote good causes. The Act on Certain Games, Lotteries and Betting[107] contains a specific exception for a single company, the Dansk Tipstjeneste A/S. However, this situation could change if the government pursues its plan to deregulate the gambling market and allow competition between operators in this field[108].

Today the Danish gambling market is in principal run by two main societies, Dansk Tipstjeneste A/S and Det Danske Klasselotteri A/S (the Danish state lottery). Det Danske Klasselotteri has been set up by the Minister of Taxation, while the state owns 80% of the Dansk Tipstjeneste. The rest is owned by two Danish sports organizations. Currently Dansk Tipstjeneste runs lotteries, betting and has a wholly owned subsidiary that operates gaming machines outside casinos. With the Dansk Tipstjeneste and the Danish state lottery, the Danish state ensures that the profit from the market is channeled to public benefit purposes. In addition, the market includes a number of private gaming providers who, like the state, either donate the profit to public benefit or, in return for their licenses and permits, pay a high duty to the State Treasury.

[105] Moniteur belge du 30.12.1999.
[106] Lov. 06/03/1869 om Forbud mod lotteri m.m.
[107] Lov. 2003-12-11 nr 1077 om visse spil, lotterier og væddemål.
[108] According to a press release available at http://www.cphpost.dk/news/national/88-national/45451-government-to-break-up-state-gaming-monopoly.html.

In **Estonia**, the same prohibition in principle is stated in the law on gambling[109].

In **Finland**, the law provides that authorization to organize games of chance can only be given to non-profit Finnish operators[110]. Three licenses have been given so far[111] to state-controlled operators: to Veikkaus Oy (for betting and lotteries), to Fintoto Oy (for horse betting), and to RAY (for casinos and slot machines)[112].

In **France**, the traditional legal framework generally prohibiting games of chance unless expressly authorized[113] is being currently completed by a draft law aiming to regulate online gambling services.

The draft[114] relates to the opening of online gambling market, based on the recommendations of a report released in 2008[115]. The "controlled opening" will concern three of the major sectors in online gambling: sports bets (live betting, mutual bets and fixed odds bets), horse bets (mutual bets) and poker.

According to the draft bill, bets shall be limited to results of real sports competitions and horse races (excluding virtual events). Sports federation will be consulted to determine the categories and the type of bets which will be legalized.

Various provisions aiming at preventing gambling addiction are included in the draft bill, such as the set up of a cap on the return rate on bets, to be specified by

[109] State Gazette I, 95, 58, 1005.
[110] Article 5 of the Lotterilag 23.11.2001/1047.
[111] According to the Swiss Institute for Comparative Law (ISDC Gambling Services Report of 2006, p.191).
[112] The Åland islands have a special autonomous status within Finland and have developed their own gambling market. Also, we note that on 14 February 1979 Finland and Sweden have entered into an agreement concerning gambling on boats that cruise between the two countries.
[113] Laws of 21 May 1836 (prohibiting lotteries), of 12 July 1983 (prohibiting games of chance and gaming machines) and of 2 June 1891 (prohibiting horse betting).
[114] For an official presentation of the main legislative solutions contained in the draft law, see: http://www.budget.gouv.fr/presse/dossiers_de_presse/090305marche_jeux/presentation_projet_loi.pdf. (13/04/09).
[115] DURIEUX Bruno, Rapport de la mission sur l'ouverture du marché des jeux et de hasard (Rapport Durieux), March 2008, http://www.premierministre.gouv.fr/IMG/pdf/04.23_Rapport_de_Bruno_Durieux.pdf (13/04.09).

a decree, but which should be between 80% and 85%. Moreover, spread betting is excluded from the scope of the opening.

An independent regulation authority will be created, and will be entitled to grant free renewable licenses for five-year periods. The number of licenses to be granted will apparently not be limited. The authority shall also be responsible for the creation of the license specifications, detailing the terms of use of said license.

Operators may run gambling activities from any country, except from a tax heaven. They will also be compelled to appoint moderators and to be affiliated to an accredited entity aiming at preventing gambling addiction. Users will be compelled to have a bank account in France.

In **Germany**, too, the organization and operation of games of chance is prohibited unless the operator is validly licensed. The Criminal Code contains several provisions[116], such as Section 284, which declares illegal the organization or running of a game of chance for the general public. The regulatory power is divided between the federal government that roughly regulates machine gaming outside casinos[117] and betting on horse races[118] and the Länder, which govern the sectors of lotteries, sports bets and casinos.

In December 2006, a new interstate treaty on gambling (Glücksspielstaatsvertrag) was launched. Fifteen of the sixteen federal states agreed on the Treaty on 13 December 2006[119]. After several modifications

[116] For details on the judicial controversy surrounding the interpretation of this Section by the German courts, see Part II.
[117] Trade, Commerce and Industry Law (Gewerbeordnung (GewO) in the amended version, 22. 2.1999 (BGBl I 202).
[118] Race Betting and Lottery Act (Rennwett- und Lotteriegesetz (RennLottG), 8 april 1922, last amendment 24.8.2002 (BGBl. I 3412).
[119] Schleswig-Holstein did not give its consent for reasons of legal uncertainty, in particular regarding the Placanica decision of the European Court of Justice.

imposed by a Constitutional Court ruling[120], the Treaty was finally ratified in December 2007 and entered into force as of 1st January 2008.

The treaty imposes mainly a ban on Internet gambling and on advertising gambling through Internet, television or phone, and equally restricts financial institutions from processing and executing payments relating to unauthorized games of chance. The European Commission announced in January 2008 that it would challenge its provisions before the European Court of Justice[121].

In **Hungary**, the legal framework relating to the organization of gambling[122] was adopted in the interest of defining the responsibilities related to the exercise of the gambling monopoly by the state, meeting the demand for organizing gambling activities, preventing gambling activities pursued without license, and/or those in conflict with good morals, controlling gambling organization activities, as well as using a part of revenues derived from gambling activities for public purposes. Any services involving gambling and betting activities from the Hungarian territory through communication equipment and networks must be conducted under the provisions of the Act.

In **Italy**, gambling is generally a state-reserved activity that can be legally carried out through land-based casinos (allowed under special, stand-alone legislative acts, and understood as an exception to a general prohibition of casino-type games set by the Criminal Code), through various lotteries, bingo and a number of sports betting games that are operated either by the State itself or by a number of public or private entities, as well as through "concessions" or "authorizations"[123].

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[120] BundesVerfassungGericht, 28.03.2006, 1 BvR 1054/01.
[121] Press release IP/08/119.
[122] Act XXXIV of 1991 on the organization of gambling.
[123] See for the general legal framework: Law of 13 December 1989, n. 401 on "Measures in the gaming and gambling sectors and protection of the fair operation of sport events" ("Interventi nel settore del giuoco e delle scommesse clandestini e tutela della correttezza nello svolgimento di manifestazioni sportive"); Law Decree ("Decreto legge") of 28 December 2001, n. 452 coverted into law by Section 1 of Law of 27 February 2002, n. 16 – art. 15ter: "Various provisions concerning games" (disposizioni varie in materia di giochi); Law Decree of 8 July 2002, n. 138,

On 24 February 2006, a decree by the Amministrazione Autonoma dei Monopoli di Stato, a body part of the Italian Ministry of the Economy and Finance, entered into force[124]. This provision implements the Italian Finance Act of 2006 (act of the 23 December 2005) and imposes an obligation on all Italian Internet service providers (ISP) to block access to foreign gambling web sites not authorized by the Italian authorities.

In the **Netherlands**, the Act on Games of Chance of 1964[125] prohibits the organization of games of chance unless the operator is validly licensed by the Dutch authorities. At the end of 2008, the Dutch Council of Ministers announced that a study is to be conducted regarding the possibility of introducing statutory provisions to govern Internet gaming. Notwithstanding the fact that earlier legislative proposals were rejected by the Upper House, it would appear that such statutory regulations are necessary to fight illegal gaming[126].

In **Romania**, the same restrictive approach is taken by the regulations in force[127], which provide a state-controlled monopoly for the lottery activity and a requirement for operators involved in other gambling to be authorized by the Ministry of Finance (Section 5 of Government Decision no.251/1999).

In **Portugal**, too, gambling[128] is governed by the general principal of prohibition. Portuguese legislation confers on the Santa Casa da Misericórdia de Lisboa, a

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converted into law by Section 1 of Law of 8 August 2002, n. 178 – Section 4; Law Decree of 24 December 2002, n. 282, converted into law by Section 1 of Law of 21 February 2003, n. 27 – Section 8; Law on lotteries of 4 August 1955, n. 722; Law on instant lotteries of 26 of March 1990, n. 62.

[124] See Gazzetta Ufficiale no. 36 of 13 February 2006.

[125] Wet van 14 september 1961, houdende regelen inzake de belastingheffing met betrekking tot kansspelen, Official journal no.313 of 1964. A consolidated version is available at http://www.wetten.nl.

[126] See the press release from the Dutch Council of Ministers, available at http://www.regering.nl/Actueel/Persberichten_ministerraad/2008/december/19/Kabinet_onderzoek_hoe_vergunningverlening_landelijke_loterijen_transparanter_kan.

[127] Mainly Government Emergency Ordinance no.159/1999 (Official Gazette no.515 of 25 October 1999) concerning the Romanian Lottery, Government Emergency Ordinance no. 69/1998 on the regime of granting the authorization for the activities in the field of gambling (Official Gazette no.515 of 13 December 1998), implemented by Government Decision No. 251 of 1 April 1999 on the conditions for granting the authorization, the organization and operation of gambling (Official Gazette no. 171 of 22 April 1999).

[128] Decree-Law No. 422/89 of 2nd December 1989.

centuries-old non-profit-making organization whose purpose is to finance causes in the public interest and which has the exclusive right to organize and operate lotteries and off-course betting on the national territory. The Portuguese legislation has extended this exclusive right to all electronic means of communication, in particular the Internet.

The legislation also provides for penalties in the form of administrative fines on those who organize such games in breach of that exclusive right or who advertise such games.

This restraining national legislation was challenged by a private operator of online gambling before the European Court of Justice, as constituting an unlawful restriction to the freedom to provide services enshrined in European law[129].

In **Spain**, a centralized system of gaming had been historically installed. However, the Autonomous Regions (Comunidades Autónomas) have been progressively acquiring competences, legislating and controlling the gaming activities held in their respective territories. This process started in 1982, with the transfer of gambling competences to Catalunia and the Basque regions, followed by the granting of competences to Aldalucía, Galicia, Canarias, Valencia, Navarra, Aragón, La Rioja, Castilla y León, Madrid y Murcia, Baleares, Extremadura, Castilla la Mancha, Asturias, Cantabria, and the cities of Ceuta and Melilla. Today, most Autonomous Regions benefit from exclusive competences with respect to gambling held within their respective territories.

From the standpoint of operators, private entrepreneurs exploit casinos[130], gaming machines and bingos[131], the public sector exploits lotteries[132] (the

[129] For a detailed discussion, see Part II.
[130] Reglamento de Casinos de Juego, Orden del Ministerio Interior of 9 January 1979, Casinos y Círculos de Recreo – Official Journal no.20 of 23 January 1979.
[131] Real Decreto 2110/1998 of 2 October 1998, approving the regulation for gaming machines - Official Journal no.248 of 16 October 1998.
[132] Orden EHA/2566/2005, of 20 of July 2005 - Official Journal no.187 of 6 August 2005.

national lottery and the «primitiva» lottery, the bono-loto) and football betting[133] (quiniela de fútbol), whilst the pro-blind ticket (Cupón pro-ciegos) is exploited exclusively by the National Blind Persons Organization.

In **Sweden**, too, all commercial gambling is forbidden unless dully authorized. Yearly concessions are granted to the two main Swedish gambling companies, the state-owned Svenska Spel and the state-controlled ATG. The Swedish parliament voted in June 2002 to change its existing gambling laws[134] in order to allow lotteries, bingo and casino gaming to be organized online. A new business initiative taken by Svenska Spel was to ask the Swedish government, in January 2005, for permission to set up an Internet poker site.

IV.1.4.Situation in Switzerland

In Switzerland, gambling activities are regulated starting from the constitutional level[135] to federal[136] and cantonal laws[137]. The market is divided into the casino sector on the one hand and the lottery and betting sector on the other.

[133] Law 34/1987 of 26 December 1987 regulating the competence to establish sanctions in the field of gaming - Official Journal no.312 of 30 December 1987.

[134] The main legal framework is provided by the Law on lotteries (Lotterilag 1994:1000) and the Law on casino gambling (Kasinolag 1999:355). The state-controlled lottery, Penninglotteriet, began in 1897 and is still in operation. Horse betting was legalized in 1923 and sports pools in 1934. Lotto was introduced in 1979 and followed by many other forms of lotteries and betting. Today, approximately 50 forms of legal gambling are available to the Swedes. See Per BINDE, "Report from Sweden: The First State-Owned Internet Poker Site" in Gaming Law Review Volume 11, Number 2, 2007.

[135] Article 106 of the Swiss Constitution of 18 April 1999: "1. The Confederation shall be responsible for legislation on games of chance and lotteries.

2. A licence from the Confederation shall be required in order to establish and operate a casino. In granting such a licence, the Confederation shall take account of regional circumstances and the dangers of gambling.

3. The Confederation shall levy a revenue-related tax on casinos; this tax must not exceed 80 per cent of the gross revenues from gambling. It shall be used to fund the federal contribution to the Old-age, Survivors' and Invalidity Insurance.

4. The Cantons shall be responsible for the licensing of gaming machines involving an element of skill that offer prizes".

[136] Federal Law of 8 June 1923 concerning lotteries and betting, implemented by Ordinance of 27 May 1924 and Federal Games of Chance and Casinos Act of 18 June 1998, implemented by Ordinance of 24 September 2004.

[137] For example, in the Wallis canton such a law was adopted on 6 February 2001; in Neuchâtel on 24 October 2000; in Vaud on 30 January 2001; in Fribourg on 19 June 2001.

Primary executive authority in respect of lotteries and betting is vested in the Lotteries and Betting Section of the Federal Office of Justice (the law is enforced chiefly by the cantons), while casinos are overseen by the Swiss Casino Commission. On 7 January 2005, the Conference of Cantonal Lottery Directors approved an Intercantonal Agreement on Supervision and Licensing of, as well as Distribution of Profits from Intercantonal or National Lotteries. This agreement harmonizes the licensing and supervision of the Swiss lottery and betting market.

Two main lotteries operate in Switzerland[138]. The Swisslos offers lotteries in all areas of German and Italian-speaking cantons, while French-speaking cantons are served by the Loterie Romande. Small lotteries (target amounts of below CHF 100,000) have a limited geographical reach and are generally held by small-scale organizers in connection with a wide variety of projects and events as a means of financing.

In the casino sector, nineteen premises are run in Switzerland, the first one opening in June 2002[139]. The law differentiates between two different types of casino, “grand casinos” (licence A) and “spa casinos” (licence B), which differ in terms of the types of gambling that can be offered and the size of both the bets that can be wagered and the winnings[140].

Gaming machines currently in use in Switzerland are located either in licensed casinos or elsewhere, in cantons that allow it. If in 1980, gaming machines were still outlawed in most Swiss cantons, by 1997 only 12 of the cantons maintained such prohibition[141].

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[138] And the Sport-Toto Gesellschaft, which operated sports betting.

[139] These casinos are located in Baden, Basel, Montreux, Lugano, Bern, Luzern, St.Gall (license A), and in Bad Ragaz, Courrendlin, Crans-Montana, Davos, Grange-Paccot, Interlaken, Mendrisio, Meyrin, Locarno, Pfäffikon, Schaffhous and St. Moritz (license B).

[140] For details, see Paysage des casinos en Suisse, Rapport sur la situation et Recommandations pour l'avenir, Swiss Federal Gaming Board, 2005, G174-0252.

[141] See KÜNZI Kilian, FRITSCHI Tobias, EGGER Theres, “Gambling and Gambling Addiction in Switzerland, Empirical study of gambling practice, development, addiction and consequences” on behalf of the Swiss Federal Gaming Board and the Federal Office of Justice, Bern, 2004.

In this context, we also note a long controversy opposing lotteries to casinos in the last years and concerning a game launched in 1999 and called “Tactilo” [142] (or “Touchlot” in the German-speaking cantons). In order to determine the legal qualification of this game (electronic lotteries or gaming machines), experts’ opinions were asked[143] and eventually the case has been presented to the Swiss Federal Court[144].

As to Internet gambling, we note that, pursuant to the people’s vote on March 7, 1993, to accept a modification of the Constitution (now Article 106) in order to legalize gambling in land-based casinos, the subsequent legislation – the Federal Games of Chance and Casinos Act[145] - imposes a strict prohibition on the operation of online games. Moreover, when ratifying the General Agreement on Trade in Services (GATS), which provides for the possibility of liberalizing cross-border services, Switzerland has explicitly excluded all gambling-related services from its GATS commitments[146].

The Swiss gaming sector is further evolving, among others by the launch in 2008 of a popular initiative that would redirect all gambling revenues to the public purse for charitable and community organizations, and to sports clubs[147].

IV.1.5.Situation in New Zealand

Gambling in New Zealand is regulated by the Gambling Act 2003[148], which. replaced the Gaming and Lotteries Act 1977, and the Casino Control Act 1990.

[142] This game can be played by touching a screen whereby the player electronically “scratches” a lottery ticket. Before their prohibition by the Federal Gaming Board in 2007, such machines were available to adults in cafés or restaurants and assorted with prevention courses and training aiming to limit excessive gambling.
[143] A legal opinion of Professor Claude ROUILLER, delivered on 13 June 2000, and a technical one from the Netherland Meetinstitute, delivered on 21 March 2001.
[144] A final decision on the appeal formed by the cantons, the Loterie Romande and Swisslos is still expected.
[145] The Act came into force on 1st April 2000.
[146] See Switzerland’s Schedule of Commitments to the GATS, available at http://www.wto.org.
[147] See *inter alia* http://www.biencommun.ch.
[148] Gambling Act no.51 of 2003.

As a general rule, games of chance are licensed in New Zealand as a form of community fund-raising only. The only exceptions to this rule are casinos, which operate as profit-making companies.

Remote interactive gambling, which includes gambling conducted on the Internet or by phone or text messaging, is prohibited by Section 9 (2) (b) of the Act, except in strictly defined circumstances (sales promotions and games organized by the Lotteries Commission and the Racing Board). However, the law does not incriminate New Zealand players who gamble online on foreign sites. Nevertheless, advertising for such sites constitutes an offence.

IV.1.6.Situation in several Asian jurisdictions

Internet gambling operators have hoped in the last decade to enter the huge Asian market, which benefits from a long gambling tradition. However, in most jurisdictions, games of chance remain strictly regulated and their online activities are largely prohibited.

In **China**, for instance, gambling is generally prohibited, except for state lotteries and for games organized in the special administrative region of Macao. Article 303 of the Criminal law states that whoever, for the purpose of reaping profits, assembles a crowd to engage in gambling, opens a gambling house or makes an occupation of gambling, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention or control, in addition to a fine.

Concerning more specifically Internet gambling, according to a circular of 2008 issued jointly by the Ministry of Finance, the Ministry of Civil Affairs and the General Administration of Sports, no institutions are allowed to sell lotteries on the Internet[149].

[149] See the official press communiqué at http://english.gov.cn/2008-01/02/content_848995.htm.

Macao, a special administrative region of the People's Republic of China, has a long tradition in gambling, which represents a significant part of the city's economy[150].

Gambling contracts are regulated by Article 1171 of the Civil Code[151]. The opening of the sector of land-based casinos to various operators was done by granting six concessions and sub-concessions, based on Law no. 16/2001 of 24 September (operation of casino games of fortune). Another important regulation was the "credit for gaming" act (Law no. 5/2004 of 14 June[152]). However, online gambling is not allowed by the current Macao legislation.

In **South Korea**, too, gambling activities are generally prohibited. Article 246 of the Criminal Act punishes by a fine whoever gambles or bets for the purpose of gaining property. Article 247 of the same Act prohibits the opening of a gambling place for profit. Violations are punished by imprisonment not exceeding three years or by a fine.

Exceptions to the general prohibition concern lotteries, regulated under the Lottery and Lottery Fund Act[153], horse racing, permitted under the Korean Horse Racing Association Act[154], bull-fighting, allowed by the Act on Traditional Bull Fighting Game[155], cycling and motor boat racing, regulated under the Cycling and Motor-Boat Racing Act[156], and casinos, which are separately regulated for foreigners and Korean citizens.

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[150] See the statistics released by Macao's Gaming Inspection and Coordination Bureau, www.dicj.gov.mo (last visited: 13/04/09).
[151] For a comment, see GODINHO Jorge A., "The Regulation of Gaming and Betting Contracts in the 1999 Macau Civil Code", Gaming Law Review, Volume 11, Number 5, 2007.
[152] For a comment, see GODINHO Jorge A., Credit for gaming in Macau, Gaming Law Review, vol. 10, no. 4, 2006.
[153] Law 7159 of January 29, 2004 enacts the Lottery and Lottery Fund Act.
[154] See Law 6091 of December 31, 1999 which amends the Korea Racing Association Act.
[155] Law 6722 of August 26, 2002 enacts the Act on Traditional Bull Fighting Game.
[156] Law 7133 of January 29, 2004 amends the Bicycle and Motorboat Racing Act.

Similarly, **Japan** bans gambling in general (Articles 185-187 of the Penal Code). Nonetheless, games (especially pachinko) are very popular in this country[157].

Also, in the **Philippines**, the state-owned and controlled Philippines Amusement and Gaming Corporation is the sole authorized gambling operator in the country[158]. However, under its mandate, Internet gaming licenses are available from the Cagayan Special Economic Zone and Free Port[159].

IV.2.Permissive Jurisdictions

In the jurisdictions overviewed hereinafter, online gambling is expressly authorized. However, while in some countries there is no limitation as to the players' nationality or residence or as to the operators' location, in others licensed operators are not allowed to deliver their services in jurisdictions where games of chance or online gambling are not permitted. In other countries, online gambling is allowed from their national territory (operators may establish their business in such countries, and governments collect fiscal revenues), but domestic players are prohibited from gambling.

IV.2.1.Permissive Jurisdictions in North America

In the United States, the state of **Nevada** allegedly allowed e-gambling, notwithstanding the restrictive position of the US federal government. On 14 June 2001, the Nevada Governor signed into law assembly bill 466, now codified

[157] For figures, see SIBBITT Eric C., "Regulating Gambling in the Shadow of the Law: Form and Substance in the Regulation of Japan's Pachinko Industry", Harvard International Law Journal vol.38 p.568.
[158] The Philippine Amusement and Gaming Corporation (PAGCOR) is a government-owned and controlled corporation created in 1977 by virtue of Presidential Decree 1067-A, amended in 1983. PAGCOR was created with a three-pronged mandate: to regulate all games of chance, particularly casino gaming in the country, to raise funds for the governments' socio-civic and national developmental efforts, and to help boost the country's tourism industry.
[159] The Cagayan Economic Zone Authority (CEZA) is a government authority operating under the Republic Act 7922. CEZA has the power to issue Internet gaming licenses independently of any other government agency or authority, including the PAGCOR, for the purpose of targeting international players. See http://www.ceza.gov.ph.

as Nevada Revised Statutes 463.750 – 463.780, which provide for the licensing and control of games of chance, including of those conducted online.

In Canada, based on section 35 of the Kahnawake Gaming Law[160], the **Kahnawake** Gambling Commission enacted Regulations Concerning Interactive Gambling in 1999[161]. To date, 279 gambling sites are registered on this Mohawk land located close to Montreal.

IV.2.2.Permissive Jurisdictions in Europe

As already mentioned, **Liechtenstein** was a pioneer in Internet gambling, launching its online lottery in 1995.

Malta, a Member of the European Union, is today an attractive premise for e-gambling operators. It has opted to embrace the gaming industry and permits a broad range of activities. Important distinctions, however, are made between gaming by Maltese residents and foreigners – the latter being subject to less stringent regulation than the former. The Lotteries and Other Games Act[162], the main legislation in this field, provides for the regulation of all gaming operations other than land-based casinos which remain governed by the Gaming Act 1998. The law established a regulatory body, distinct from the government, the Lotteries and Gaming Authority.

According to statistics of the Maltese Lotteries and Gaming Authority[163], in 2006 the players who gambled on Maltese site came mainly from Sweden, Italy, Austria, Germany and the United Kingdom. Only 14% of them were non-Europeans. The Maltese licensed operators produced gross gaming revenues of US$ 173 millions.

[160] MCR no.26/1996-97.
[161] Available at http://www. kahnawake.com/gamingcommission/.
[162] Act No. XXIV of 2001, as amended by Act III of 2004.
[163] Available at http://www.lga.org.mt/lga/files_folder/iGaming%20-%20Mario.pdf.

The **United Kingdom** also represents an attractive location for online gambling[164]. The Gaming Act adopted in 2005 aims to modernize British gambling laws. Under the Act, British based operators are allowed to offer all types of on-line gambling, whether via the Internet, interactive television or any other media, within a system of licensing and regulation under the control of the Gambling Commission[165].

The 2005 Gaming Act also provides the legal framework for the world's first e-gaming location today, located at the southernmost tip of Europe: **Gibraltar**. Remote gambling licenses, including for telephone and internet betting, are issued by the licensing authority. The Gibraltar Regulatory Authority, in turn, is the gambling commissioner under the provisions of the Act. Around 200 gambling sites were operating from Gibraltar in 2009[166].

Finally, the territories of the **Isle of Man** and **Alderney** actively encourage the development of gambling and e-gaming business[167]. The Isle of Man enacted an Online Gambling Regulation Act in 2001, while Alderney adopted its e-Gambling Regulations in 2006.

IV.2.3. Permissive Jurisdictions in Central America and the Caribbean Area

Antigua and Barbuda's liberal framework of Internet gambling became well-known for international trade lawyers since the *US Gambling* dispute before the World Trade Organization. By the late 1990s, this island nation had enacted an ample regulatory scheme for companies providing remote gambling services from servers located on its territory, the Interactive Gaming and Interactive Wagering Regulations, as amended in 2007. Section 15 of the act requires *inter*

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[164] See KELLY Joseph, TEW Michael, DUBIN Laura, The Global E-Gaming Industry: Why London, Why Now?, the Gaming Law Review, Volume 9, Number 6, 2005.
[165] For details, see the Stationary Office, Report of the Gaming Board for Great Britain 2004-05, HC 227 SE/2005/113.
[166] See http://online.casinocity.com/jurisdictions/jurisdiction.cfm?Id=16.
[167] The British Channel Islands are self governing dependencies of the Crown, but they are not part of the United Kingdom, nor are they part of the European Union.

alia an applicant for license to be committed to maintaining a physical presence on the islands.

In **Belize**, the existing regulatory framework – the Computer Wagering Licensing Act of 1995, revised – provides for a licensing procedure by the Belize Computer Wagering Licensing Board for operators wishing to offer online gambling services from a server located in Belize. The Act does not contain any limitation as to the nationality or residence of players or service providers.

Costa Rica, too, is home to many online gambling companies, even if it does not actually have legislation specifically designed to deal with gambling over the Internet[168]. Pursuant to a decision of the Supreme Court, the Costa Rican authorities are of the opinion that, since online providers block the access of the local population to their sites, the act of gambling does not take place in Costa Rican territory.

In **Curaçao** (the Netherlands Antilles), Internet gambling is subject mainly to the Landsverordening A 1993 no.63. Section 3 of this act prohibits the offering of Internet gambling services to the domestic population.

In **Dominica**, similarly to Costa Rica, Internet gambling operators, registered under the International Business Company Act of 1996, may offer their services worldwide but must not accept wagers from the domestic population.

In December 1999, the government of **St. Kitts and Nevis** enacted legislation allowing Internet gambling providers to establish themselves on the island. The Betting and Gaming Control Act of 1999 contains no specific requirements as to the nationality or residence of players, who must be at least 21 to gamble.

Finally, the **US Virgin Islands** enacted in 2001 the Virgin Islands Internet Gambling and Gaming Act[169] which provides a legal basis for online gambling

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[168] See SCHRIEVER Eva, "Conflict and Coordination between Diverse Regulatory Environments", supra, p.124.
[169] Act no.6419, bill 24-0046.

operators wishing to establish themselves in this territory. The Act states that such operators must not accept wagers from players located in a jurisdiction that prohibits gambling.

IV.2.4.Permissive Jurisdictions in Oceania

Australia seems to be presently the most attractive Internet gambling location in Oceania, with several licensed gambling sites[170]. Because of its specificity – the law allows remote gambling operators to establish themselves in Australia, but does not allow them to offer online gambling services to the domestic customers or to customers in certain designated foreign jurisdictions – Australia's legal framework has been qualified as liberal-prohibitive[171].

The Australian Interactive Gambling Act of 2001[172] makes it an offence to provide an interactive gambling service to a customer physically present in Australia or in designated countries (in order to be placed on the designated countries list, a foreign government must make a request to the Australian authorities, proving *inter alia* that its legislation prohibits online gambling internally[173]). This offence applies to all interactive gambling service providers, whether based in Australia or offshore and whether Australian or foreign owned.

In 2007, **Papua New Guinea**'s parliament has passed legislation regulating land-based and online gambling (the Gaming Control Bill, replacing the Gaming Act and the Gaming Machine Act). The bill allows for each of the country's twenty provinces to grant a casino license for a ten year period and it also allows lotteries, but only for foreign participants.

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[170] For details, see Productivity Commission 1999, Australia's Gambling Industries, Report No. 10, AusInfo, Canberra; Netbets, A review of online gambling in Australia, Report by the Senate Select Committee on Information Technologies, March 2000.
[171] See SCHRIEVER Eva, Conflict and Coordination between Diverse Regulatory Environments, supra, p.122.
[172] Act No. 84 of 2001 as amended.
[173] See Section 15 of the Act.

Also, **Vanuatu** enacted in 2000 its Interactive Gaming Act[174] which provides full liberty for online operators to establish themselves on the island and to offer Internet gambling services worldwide, provided that they hold a valid license from the Vanuatu authorities and that they observe the players' age limit.

IV.2.5.Permissive Jurisdictions in Africa

A few countries in Africa have decided to legalize online gambling and to subsequently allow e-gambling operators on their territories.

Anjouan (the second largest of the Comoros Islands) established in March 1999 a licensing system for online gambling operators, amended in 2005[175].

In **Liberia**, the national lottery was allowed to operate online, but it restricts its offer to jurisdictions where gambling is legal[176].

In the **Seychelles**, an Interactive Gambling Act was enacted in 2003[177].

In **South Africa**, the legal framework consists of a dual system with separate legislation regulating lotteries and sport pools on the one hand[178], and casinos, gambling, and wagering on the other hand[179]. Although this country has not yet

[174] Act no.16 of 2000.
[175] See the Betting and Gaming Act 2005.
[176] According to the 2003 Annual Message to the National Transitional Legislative Assembly of Liberia by His Excellency C. Gyude Bryant, Chairman of the National Transitional Government of Liberia, the Liberian National Lotteries Inc. made in 2003 financial contributions of $L194,000 to the state purse. See http://www.theperspective.org/2004/feb/annualmessage2003.html.
[177] Official Gazette of 4 August 2003.
[178] Lotteries Act 57 of 1997 and the National Gambling Act 7 of 2004. For a detailed overview, see CARNELLEY Marita, "Gambling Law Developments in South Africa: The Summer of 2004/2005", in Gaming Law Review Volume 9, Number 4, 2005.
[179] The national legislation is constituted by the National Gambling Act 7 of 2004, and the provincial legislation the Eastern Cape Gambling and Betting Act 5 of 1997; Free State Gambling and Racing Act 6 of 1996; Gauteng Gambling Act 4 of 1995; KwaZulu-Natal Gambling Act 10 of 1996; Mpumalanga Gaming Act 5 of 1995; Northern Cape Gambling and Racing Act 5 of 1996; Northern Province Casino and Gaming Act 4 of 1996; North West Gambling Act 2 of 2001 and the Western Cape Casino and Racing Law 4 of 1996.

enacted a liberal e-gambling policy, its National Gambling Board commissioned in April 1999 experts to investigate such a possibility in the future[180].

IV.2.6.Permissive Jurisdictions in Asia

A few permissive jurisdictions can also be found in Asia.

The Republic of **Kalmykia,** for instance, a territory in the Southwest of the Russian Federation, has been offering online gambling licenses since 1999[181].

In **Singapore**, laws generally prohibit gambling and the advertising or promotion of gambling venues. The principal legislation is the Betting Act[182] and the Common Gaming Houses Act[183]. However, concerning Internet gaming, it appears that the Media and Broadcasting Authority has discretionary licensing power to permit Singapore-based Internet service providers to host gambling sites, as long as wagers are not accepted from domestic customers[184].

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[180] See the "Internet Gaming and South Africa: Implications, Costs & Opportunities", Interim Report for the National Gambling Board, prepared by the National Centre for Academic Research into Gaming, Cape Town, August 1999.

[181] In Russia, gambling is restricted by Federal Law no.244-FZ, "On State Regulation of Gambling and Introduction of Amendments to Certain Legal Acts of the Russian Federation" adopted by the State Duma on December 20, 2006.

[182] Act 14 of 1999.

[183] Cap 49, 1985.

[184] See SCHRIEVER Eva, "Conflict and Coordination between Diverse Regulatory Environments", supra, p.123.

PART ONE: GLOBAL TRADE IN GAMBLING SERVICES

I.TRADE IN GAMBLING SERVICES IN THE GATS

I.1. Introductory Elements

Although trade in services is an increasingly important part of modern economies, data on their exact importance are notoriously weak[185].

Global trade in services was not regulated in a comprehensive manner until the advent of the GATS. Part of the WTO Agreement, the GATS was adopted on 15 April 1994 as a result of the Uruguay Round negotiations and entered into force on 1 January 1995. It is found in Annex 1B of the WTO Agreement and it binds all WTO Members, which in 2008 comprised 153 countries.

As stated in its Preamble, the GATS is intended to contribute to trade expansion "under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries".

The GATS rules apply to all measures (laws, regulations, procedures, requirements or practices)[186], irrespective of their qualification under national law. They bind all levels of government as well as non-governmental bodies that exercise delegated powers[187], Members being required to take such reasonable measures as may be available to them to secure compliance with GATS rules by sub-central and non-governmental bodies.

The Agreement covers all services with a few exceptions[188]. Services supplied in the exercise of governmental authority are excluded[189], meaning the public services that are supplied by governments on a non-commercial and non-competitive basis[190]. In addition, the provisions of the most favoured nation (MFN) treatment and the specific commitments on market access

[185] See HOEKMAN Bernard, MATTOO Aaditya, Services Trade and Growth, in MARCHETTI Juan. A., ROY Martin (editors), Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press, 2008, pp.21-58.
[186] Article XXVIII(a).
[187] Article I:3(a).
[188] Article I:3(b).
[189] Idem.
[190] Article I:3(c). See also CLERC Evelyne, Le service public en droit de l'OMC et de l'Union européenne: à la limite de l'Etat et du marché, in TANQUEREL T., BELLANGER F (Editors), Le service public, Schulthess, Zürich, 2006, p.47-117.

and national treatment do not apply to government procurement of services unless they are acquired with a view to commercial resale or to use in the supply of services for commercial sale[191].

Besides the general frame for all services, the GATS contains special rules for financial services[192], telecommunications and air and maritime transport services.

Obligations contained in the GATS may be categorized into two broad groups: General obligations, which apply directly and automatically to all Members and services sectors[193], as well as commitments concerning market access and national treatment in specifically designated sectors. Such commitments are laid down in individual country schedules whose scope may vary widely between Members. Any Member is free to expand or upgrade its existing commitments at any time.

The Agreement applies to services supplied by any of the four modes of supply, to the extent that a Member's schedule of commitments does not contain any limitations in that respect[194].

This approach leaves Member States the freedom – apart from some specific binding provisions, and subject to the need to reciprocate concessions from other Members – to identify which sectors and sub-sectors of their economy they wish to liberalize in the field of services. These are then listed in the national schedules of commitments and are covered by the provisions regarding market access and national treatment, albeit subject to any limitations and conditions that the Members wish to retain or introduce[195]. The schedules of commitments containing the listed services are integral part of the GATS and bind the Members[196].

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191 However, government procurement in some service sectors, essentially construction, is covered by Annex 4 of the WTO Agreement. This government procurement agreement is plurilateral and WTO Members are not obliged to participate to it.
192 For a comment, see MARCHETTI Juan A., Financial Services Liberalization in the WTO and PTAs, MARCHETTI Juan A., ROY Martin (editors) Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press, 2008, pp.300-339.
193 The main General obligations are : MFN (Article II of GATS) and transparency.
194 A so-called "bottom-up" approach.
195 Articles XVI:1 and XVII:1.
196 Article XX:3.

For purposes of structuring their commitments, WTO Members have generally used a classification system comprised of 12 core service sectors (according to the Services Sectoral Classification List, document MTN.GNS/W/120 - hereinafter the "W/120 document"[197]):

Business services (including professional services and computer services)

Communication services

Construction and related engineering services

Distribution services

Educational services

Environmental services

Financial services (including insurance and banking)

Health-related and social services

Tourism and travel-related services

Recreational, cultural and sporting services

Transport services

Other services not included elsewhere

The W/120 document – whose legal relevance will be discussed further[198] – indicates that these sectors are further subdivided into a total of some 160 sub-sectors.

Sector 10 is dedicated to Recreational, cultural and sporting services and is further defalcated in sub-sectors ranging from A to E[199]. Gambling activities are suitable for the description

[197] Available at http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.
[198] In the Chapter referring to the *US Gambling* case.
[199] A – entertainment services; B - News agency services; C- Libraries, archives, museums and other cultural services; D - Sporting and other recreational services, and E – Other.

under this sector[200]; therefore, in order to assess a Member's commitment in relation to gambling services, to what extent and for which modes of supply, one needs to check that Member's schedule of commitments under sector 10 and interpret the indications provided therein[201].

Most Member States wishing to make a commitment to or to exclude gambling services from their schedules have inscribed such commitment or limitation under sub-sector 10.D (Sporting and other recreational services). For example, Sweden has inscribed "None" limitations on market access for modes 1, 2 and 3 under section 10.D, but expressly excluded "gambling activities" from the scope of its commitments under this section. However, other Member States have scheduled their commitments on gambling services in sub-sector 10.A (Bulgaria) or 10.E (Senegal).

Concerning monopolies[202], the GATS does not forbid their existence *per se*, or that of exclusive service suppliers[203] but subjects them to the unconditional MFN obligation. Moreover, under Article VIII:2, Members are held to prevent such suppliers, if these are also active in sectors that are beyond the scope of their monopoly rights and covered by specific commitments, from abusing their position and act inconsistently with these commitments.

In addition, Article VIII:4 requires Members to report the formation of new monopolies to the Council for Trade in Services if the relevant sector is subject to specific commitments. The provisions of Article XXI (Modification of Schedules) apply.

I.2. Modes of Supply

Pursuant to Article I:2, the GATS covers services supplied:

(a) from the territory of one Member into the territory of any other Member (Mode 1 - Cross-border trade);

[200] We will discuss in details the qualification of gambling services under this sector when we analyze the US Gambling case.
[201] According to the Guidelines For The Scheduling Of Specific Commitments Under The General Agreement On Trade In Services adopted by the Council for Trade in Services on 23 March 2001, NONE means no limitation in that specific sector or sub-sector, UNBOUND if the Member wishes to remain free in a given sector or mode of supply to introduce or maintain measures inconsistent with market access or national treatment.
[202] We recall that lotteries are usually monopolistic entities. See the Introduction.
[203] Article VIII.

(b) in the territory of one Member to the service consumer of any other Member (Mode 2 – Consumption abroad);

(c) by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3 - Commercial presence); and

(d) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4 - Presence of natural persons).

Commercial linkages may exist among all four modes of supply. For example, a foreign company established under mode 3 in country A may employ nationals from country B (mode 4) to export services cross-border into countries B, C etc. Similarly, business visits into A (mode 4) may prove necessary to complement cross-border supplies into that country (mode 1) or to upgrade the capacity of a locally established office (mode 3).

Insofar as gambling services are concerned, these modes of supply present several particularities that we will explore hereinafter.

I.2.1.Mode 1: Cross-Border Gambling

Mode 1 supposes that a user in a Member State receives services from another Member State through its telecommunications or postal infrastructure.

In the Introduction, we have taken a closer look at the concrete means of supplying transnational gambling services through Mode 1: post, phone, TV services, Internet[204].

I.2.2.Mode 2: Tourist Gamblers

Under this mode of supply, nationals of a Member move into the territory of another Member to consume the respective services. Until the advent of the Internet, this was the most frequently used modality to consume foreign gambling services.

[204] See the Introduction, Chapter III.5.

This mode of supply concerned more casinos than lotteries or other forms of gambling, and the practice of building casinos at the state border is quite old. For example, since 1809 when it opened and until the end of the 1870's, the German Baden-Baden casino was one of the favorite gambling resorts of the French aristocracy and bourgeoisie (in that period, *les maisons de jeu* were prohibited in France[205]).

Consuming gambling services abroad remains a popular practice nowadays. For example, until 2002 when casinos were allowed again to open in Switzerland, Swiss residents had several foreign casinos available within a few kilometers from their borders[206]. Also, in Macao, in just six weeks of operation, the Venetian – the world's largest casino today - had already taken in over 2.5 million visitors, most of whom were from mainland China.

A study of 2002[207] confirmed that border regions are a favorite site for the development of casinos, particularly if gambling is prohibited or highly restricted in territories across the border. For casino operators, this entails a large source of demand stemming from more than one national or state jurisdiction. For the local community, a border casino represents the ultimate in export-based activity; appropriating local taxes from casino operators and the direct, indirect and induced impacts of local casino based expenditures. For national or state government, the border casino means the import of tax income and the re-exportation of all the negative externalities that accompany the gamblers as they return to their homes on the other side of the border: gambling-induced addiction, bankruptcy, reduced productivity and social pathologies[208]. Moreover, in some countries casinos at the border are designed exclusively for tourists, while the local population is prohibited to enter. One example in this sense is the casino open in Jericho, on the Palestinian West Bank.

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[205] A very interesting debate animated the French elites and press during the French-German war (1870-1871). In the economic crisis that followed, many French lawmakers believed that re-legalizing gambling would help rebuild the economy, instead of having important amounts of money flowing into German casinos located at the state border. See HOUSSAYE Arsène, La question des jeux – Opinion des moralistes, des journaux et des hommes politiques, Paris, 1872, FEYDEAU Ernest, « Le rétablissement des jeux publics en France », Paris, 1871, LABLET J., "Les Jeux de Hasard au commencement du XIX siècle", Lyon, 1803, LEROY Xavier, « Le monde des jeux », Paris, 1893, all available at the French National Library.

[206] For example, a casino at Campione di Italia, a village enclave encircled by the Swiss Canton of Ticino, several casinos at Divonne, Evian, and Annecy in France, a German casino in Konstance, or an Austrian one in Bregenz. All these casinos are within a 300 km range from the Swiss capital Bern.

[207] FELSENSTEIN Daniel, FREEMAN Daniel, "Gambling on the Border: Casinos, Tourism Development and the Prisoner's Dilemma", in KRAKOVER S. and GRADUS Y. (editors). Tourism in Frontier Areas, Lexington Books, Maryland, 2002, pp. 95-115.

[208] Idem, p.96.

Apart from casino services, consumption abroad can also concern other forms of gambling, such as the lottery. This mode of supply was the premise of the *Lindman* case presented before the European Court of Justice in 2003. In that case, Mrs. Lindman, a Finnish national, bought a lottery ticket during a stay in Sweden and won the draw organized by the Swedish lottery company[209].

I.2.3.Mode 3: Commercial presence

Under this mode of supply, services are provided within a Member State by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and controlled company. According to one estimate, by 2050 trade in services under Mode 3 alone could overtake world merchandize trade[210]. The OECD anticipated that service providers can achieve a far higher level of market penetration through establishment abroad than through cross-border service exports[211].

For gambling services, this mode of supply supposes that a gambling operator from a Member State opens a commercial presence in another Member State. Such possibility obviously largely depends on the regulatory environment applicable to games of chance in the host country: for instance, if it is feasible to establish a presence in gambling - permissive jurisdictions, such as Malta, Gibraltar or several Caribbean nations, it may be substantially more difficult or impossible to do so in gambling – restrictive jurisdictions[212].

I.2.4.Mode 4: Movement of natural persons

Under mode 4, a foreign national provides a service within a Member State as an independent supplier or employee of a service supplier. This mode of supply has little application insofar as games of chance are concerned.

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[209] As we will see in Part Two, the litigation's main issue was the taxation of that amount, in the framework of Article 49 of the EC Treaty (Finland taxed winnings from its own lottery differently from those of other EU Member States lotteries). The ECJ's answer in this case was that the taxation in a Member State of winnings from lotteries solely where they are organized in other Member States is contrary to Article 49 EC and cannot be justified on grounds of public interest.

[210] See HUFBAUER Gary, STEPHENSON Sherry, "Services Trade: Liberalization and Future Challenges" Journal of International Economic Law 10(3), August 2007, p.609.

[211] OECD, "Trade in Services: Negotiating Issues and Approaches", Paris, 2001.

[212] We refer the reader to our presentation in the Introduction.

I.3.Market Access and National Treatment

Market access and national treatment are separated in the GATS[213].

The *market access* provisions laid down in Article XVI, cover six types of restrictions that must not be maintained in the absence of limitations. The restrictions relate to:

- the number of service suppliers
- the value of service transactions or assets
- the number of operations or quantity of output
- the number of natural persons supplying a service
- the type of legal entity or joint venture
- the participation of foreign capital.

Assuming that a WTO Member agreed to liberalize a particular sector, but wishes to impose any of the six measures here above, such Member must indicate its wish in its schedule of commitments. In the absence of such indication, recourse to these measures is impermissible.

National treatment (Article XVII) implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers. Again, limitations may be listed to provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc. It is for the individual Member to ensure that all potentially relevant measures are listed; Article XVII does not

[213] Art. XVI.1 GATS reads: “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”.

contain a typology comparable to Article XVI (examples of frequently scheduled national treatment restrictions are given in Attachment 1 to document S/L/92[214]).

The national treatment obligation applies regardless of whether or not foreign services and suppliers are treated in a formally identical way to their national counterpart. What matters is that they are granted equal opportunities to compete.

A debated issue at this point regards the relationship between Articles XVI and XVII, i.e. the discriminatory or non-discriminatory nature of these measures. According to the Scheduling Guidelines[215] and to the WTO jurisprudence, these measures, except for (e) - type of legal entity or joint venture – and (f) - the participation of foreign capital - are not necessarily discriminatory, i.e. they may affect *national as well as foreign services* or service suppliers.

In a different view[216], it is alleged that the current understanding is wrong, and that, for policy and legal reasons, the response should be negative: market access restrictions coming under the purview of Art. XVI GATS, to the extent included in a schedule of concessions, should be interpreted as concerning *foreign suppliers only*. This relationship is a central issue of the *US Gambling* case, and will be debated further in the detailed analysis of this ruling[217].

I.4.General Exceptions

Part II of the GATS (General Obligations and Disciplines) contains exception clauses for particular circumstances. Regardless of relevant GATS obligations, Members are allowed in specified circumstances to restrict trade in the event of serious balance-of-payments difficulties[218] or of health and other public policy concerns[219], or to pursue essential security interests[220].

[214] Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92, available at http://www.wto.org/French/tratop_f/serv_f/sl92.doc.
[215] Document S/L/93, http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/S/L/93.doc.
[216] MAVROIDIS Petros C., "Highway XVI Re-Visited: The Road From Non-Discrimination To Market Access In GATS", World Trade Review (2007), 6: 1.
[217] See discussion in next chapter.
[218] Article XII.
[219] Article XIV.
[220] Article XIV *bis.*

Insofar as gambling is concerned, the applicable exception is provided in Article XIV and it was used for the first time in *US Gambling* jurisprudence in order to justify a trade restriction in cross-border gambling services. While the recourse to the exception of "public order" tends to tackle a "genuine and sufficiently serious threat […] posed to one of the fundamental interests of society"[221], the concept of "public morals" is not explained in the GATS.

Before entering into the details of the *US Gambling* case, we note the WTO Secretariat's statement with regard to the protection of public morals and the maintenance of public order under Article XIV, that "[M]easures to curb obscenity or *to prohibit Internet gambling* might well be justified on these grounds"[222] (emphasis added).

The issue of cross-border gambling services in the GATS framework has been broadly captured in one particular case before the WTO adjudicating bodies, whose understanding is essential in order to identify the legal challenges that such an issue represents to lawmakers and judges. The *US Gambling* case, presented in the next Chapter, opposed the country with the biggest gambling market to the tiny Antigua and Barbuda, illustrating perfectly the sensitivity of the gambling topic and the importance, from the international trade perspective, of new communication technologies such as the Internet.

[221] Footnote original 5 to Article XIV.
[222] The Work Programme on Electronic Commerce, Note by the WTO Secretariat, S/C/W/68 (16 November 1998), para. 26.

I.5.The US Gambling Case

The *US Gambling* dispute before the WTO adjudicating bodies, thoroughly commented in the literature, has advanced our understanding in respect to the GATS, especially in the face of electronic service delivery. It also demonstrated in details how the GATS captures gambling services.

After a brief overview of the case and of the main arguments brought by the parties, we will endeavour in this chapter to examine with a critical eye the main findings of the Panel and Appellate Body. Also, unresolved issues will be evoked, followed by an outline of an alternative solution which could have been applied, in our opinion, by the WTO adjudicating bodies.

I.5.1.OVERVIEW OF THE CASE AND MAIN ARGUMENTS OF THE PARTIES

I.5.1.1.Antigua's Claims and the U.S. Responses

Antigua claimed that the United States' prohibition on the cross-border supply of gambling and betting services and its measures restricting international money transfers and payments relating to gambling and betting services are inconsistent with: (i) the United States' Schedule of specific commitments under the GATS, and (ii) Articles XVI:1, XVI:2, XVII:1, XVII:2, XVII:3, VI:1, VI:3 and XI:1 of the GATS.

I.5.1.1.1.The question of the U.S. commitments

Firstly, Antigua submitted that, in its Schedule of commitments under the GATS, the United States has made a full commitment for the cross-border supply of services classified under sub-sector 10.D "Other recreational services (except sporting)." According to Antigua's interpretation, gambling services are definitely covered by the concept of "recreational services", and are not excluded from the U.S. commitments by the words "except sporting".

In response, the U.S. argued that their Schedule does not reference or rely on the CPC, and submitted that a proper interpretation of their Schedule, without recourse to the CPC, would show that the United States made no commitment for measures affecting gambling services. Also, such conclusion would be sustained by the interpretation of the words “recreational” and “sporting”.

I.5.1.1.2.The measure at issue and the “zero quota”

Secondly, concerning the measure at issue, Antigua submitted that large number of U.S. federal and state laws adversely affect the ability of Antiguan service suppliers to provide cross-border gambling and betting services to consumers in the United States. Antigua also referred to a number of illustrative actions by U.S. federal and state authorities that also constitute measures inhibiting the provision of cross-border gambling and betting services into the United States. In order to facilitate the legal discussion, Antigua has made a distinction between two broad types of measures: (i) those which act to prohibit the offering of gambling and betting services *per se* and (ii) those restricting international money transfers and payments relating to gambling and betting services.

The U.S. replied that, rather than providing an analysis of specific U.S. laws as they relate to gambling, Antigua was asking this Panel to accept a mere assertion as to the effect of such laws – that they represent a “total prohibition” on cross-border gambling – as proof that the United States is in violation of its WTO obligations. The U.S. further replied that this approach cannot form the basis for a *prima facie* case in a WTO dispute settlement proceeding; a party cannot advance a *prima facie* case without linking its evidence and argumentation to some specific measure(s), and a mere assertion is not itself a measure.

Then, concerning the zero quota, Antigua submitted that, in view of the decision of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, it is possible to challenge a total prohibition that is comprised of numerous (i) “specific legislative and regulatory provisions;” (ii) “application[s] of such provisions;” and (iii) “practice[s].[223]“ It further argues that, while the Panel needs to establish that this ban exists, it is not necessary for the Panel or

[223] See Panel Report on US Gambling, para. 3.102.

Antigua to establish the definitive list of (and analyzed) every law, regulation, application and practice that is part of the total prohibition. Regarding this point, the defendant itself stated that putting together all the pieces of its "legislative puzzle" in the field of gambling would be an impossible task.

The Unites States reiterated that a complaining party must demonstrate, through evidence and argumentation, the existence and meaning of the measure(s) purportedly at issue. Antigua being the party that makes claims about U.S. domestic law, it therefore "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion"[224]. An examination of relevant "specific provisions" of domestic law is essential to the assessment of such a claim, and Antigua has not provided the evidence and argumentation necessary in order for the Panel to make such an assessment.

I.5.1.1.3.The alleged violation of Article XVI

Antigua submitted that the U.S. have manifestly violated Article XVI:1 of the GATS, because they totally impeded cross-border market access by prohibiting all cross-border supply of gambling and betting services, even though they had made a full commitment to the cross-border supply of gambling and betting services in their national schedules.

Furthermore, Antigua alleged that thousands of service suppliers of U.S. origin have been given an authorization to supply gambling and betting services (often creating monopolies or exclusive service suppliers), while it remains impossible, however, for service suppliers from Antigua to obtain an authorization to supply services on a cross-border basis. Antigua therefore qualified this complete ban on cross-border supply as a "limitation on the number of service suppliers" prohibited by Article XVI:2(a) of the GATS. It submitted that the United States measures violated Article XVI:2(a) not only as establishing a numerical quota (of zero) but also as measures creating monopolies or exclusive service suppliers. Also, the complete ban on cross-border supply would qualify as a "limitation on the total number of service operations" prohibited by Article XVI:2(c) of the GATS.

[224] Appellate Body Report on US – Carbon Steel, para. 157.

The United States replied that Antigua failed to prove the inconsistency of any U.S. measure(s) with Article XVI of the GATS. Article XVI prohibits Members that have inscribed commitments from maintaining or adopting six types of measures referred to in its paragraph 2, sub-paragraphs (a) to (f). For the US, it is a mistaken assumption that the existence of a commitment in the market access column of a Member's schedule implies a generalized commitment not to impede "market access." In fact, Article XVI does not enshrine a general rule prohibiting measures that impede "market access" in whole or part. Instead, it prohibits only those measures falling within the specific categories listed in Article XVI:2. While Article XVI:1 makes clear that it addresses market access, it is the closed list in Article XVI:2 that defines the substance of the obligation that Article XVI imposes. Therefore, the Panel should restrict its Article XVI inquiry in this dispute to an examination of whether Antigua has proven that any specific U.S. measures fall within the particular types of measures listed in Article XVI:2.

I.5.1.1.4.The alleged violation of Article XVII

Concerning the "likeness" of gambling services provided by Antigua with services of U.S. providers, Antigua presented a long argument that services and service suppliers of Antigua are "like" those of the United States. According to Antigua, the types of games offered from Antigua are the same as those offered in the United States and all involve the winning or losing of money; the only differences being the origin of the services and the suppliers and the mode of supply (cross-border as opposed to commercial presence). These differences, however, would not be relevant in the context of a commitment to national treatment of cross-border supply under the GATS[225].

The U.S. rejected Antigua's argument, stating that it ignores the important distinctions between different gambling and betting services. For example, as a general matter, the U.S. quoted the National Research Council, which has found that "[t]he characteristics of game

[225] In *EC–Bananas III (US)* the panel stated that "[i]n order to establish a breach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the (Member) has undertaken a commitment in a relevant sector and mode of supply; (ii) the (Member) has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the measure accords to service suppliers of any other Member treatment less favourable than that it accords to (its) own like service suppliers". Panel Report on EC – Bananas III (US), para. 7.314.

technologies, such as the number of gambles offered per time period, the physical and informational environment of games, game rules, speed of play, probabilistic structure, cost per play, and jackpot size, appear to affect gambling preferences and habits"[226]. Internet virtual casinos are "unlike" real casinos in that the true object of the bet or wager in a virtual casino is the generation by a software algorithm of some random number. They are governed and controlled by a computer rather than by the laws of the physical world. The U.S. further submitted that Antigua also ignored potentially relevant differences in service suppliers.

Concerning the "treatment no less favorable" condition, Antigua argued that the United States' measures at issue disfavor services and service suppliers of other WTO Members compared to services and service suppliers of United States origin, which is in violation of Article XVII.

The U.S. replied that Internet gambling restrictions apply equally within the United States, therefore there is no violation of the national treatment obligation.

I.5.1.1.5.Exemptions under Article XIV

Anticipating a defense argument on Article XIV, Antigua noted that this article had not yet been interpreted by panels or the Appellate Body. However, the interpretation and application of Article XX of the GATT 1994 by the Appellate Body, WTO panels and GATT panels could provide useful and relevant guidance, particularly so because the text of Article XIV of the GATS and Article XX of the GATT 1994 is largely identical.

By analogy, Article XIV of the GATS would require a two-tiered analysis: first, provisional justification of a measure as "necessary" under one of the subparagraphs and, second, further assessment of the measure under the "chapeau"[227]. In *Korea – Various Measures on Beef*, the Appellate Body confirmed the "necessary" test adopted by the Panel in *US – Section 337*, i.e. that a measure is not "necessary" when "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". In *Korea – Various Measures on Beef*,

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[226] Panel Report on US Gambling, para 3.153.
[227] Appellate Body Report on US – Gasoline, p. 22; Appellate Body Report on US – Shrimp, paras. 119-121.

the Appellate Body has also outlined a weighing and balancing process that is comprehended in the "reasonable alternative" test of the GATT Panel report *US – Section 337*.

For the US, remote supply of gambling raised significant concerns relating to the maintenance of public order and the protection of public morals; gambling by remote supply is particularly vulnerable to various forms of criminal activity, especially organized crime. Maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of "public morals" and one of "public order". According to the US, these grave concerns met the high standard for "genuine and sufficiently serious" threats to a fundamental interest of society, as required in the case of "public order" by footnote 5 of Article XIV.

I.5.1.2.DSU Findings and Subsequent Procedures

The report of the Panel was issued on 10 November 2004 followed by the issuance of the report of the Appellate Body on 7 April 2005, and the Dispute Settlement Body (DSB) adopted these reports on 20 April 2005.

In its report, the Panel found that the U.S. had violated Article XVI of the GATS, and that it had failed to demonstrate that the measures were provisionally justified under Articles XIV(a) and (c) nor the "chapeau" of Article XIV. The panel exercised judicial economy with regard to Article XVII and did not examine the consistency of the U.S. measures with this Article.

Both parties appealed certain legal interpretations developed by the panel. In 2006, the Appellate Body reversed some aspects of the Panel's findings, and found that the U.S. had demonstrated provisional justification under Article XIV(a), but had failed to do so for the chapeau. The Appellate Body concluded that the measures at issue were justified by grounds of public morality and public order.

On 19 August 2005, an arbitrator established under Article 21.3(c) of the DSU determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute was 11 months and 2 weeks from the date of adoption of the Panel and Appellate Body Reports by the DSB. The United States was consequently awarded until 3 April 2006 to bring its measures into conformity with its obligations under the GATS.

On 6 July 2006, Antigua requested the establishment of a panel under Article 21.5 of the DSU. At its meeting on 19 July 2006, the DSB referred the matter to the original panel, if possible. The report of the Article 21.5 compliance panel was adopted on 25 May 2007. The compliance panel found that the United States had failed to comply with the recommendations and rulings of the DSB in this dispute.

On 21 June 2007, Antigua requested authorization from the DSB, under Article 22.2 of the DSU, to suspend the application to the United States of concessions and related obligations of Antigua under the GATS and the TRIPs amounting to an annual value of US$3.443 billion. The appointed arbitrator's decision, issued on 21 December 2007, determined that Antigua may request authorization from the DSB to suspend the obligations under the TRIPS Agreement at a level not exceeding US$21 million annually.

As a result of the *US Gambling* dispute, the United States initiated procedures under GATS Article XXI – which allows WTO Members to modify or withdraw GATS commitments[228] – in order to renegotiate its commitment involving "recreational services"[229].

[228] Article XXI provides that countries wishing to modify or withdraw GATS commitments must offer to make a "compensatory adjustment" by including new commitments in their schedules. On May 4, 2007, the United States filed with the WTO a notification to the Council for Trade in Services stating its intention to modify its commitment for ``other recreational services" to explicitly exclude gambling and betting services. In accordance with the procedural schedule set out in the WTO Document S/L/80, "Article XXI Procedures", on June 22 the United States received notice from eight WTO Members (Antigua and Barbuda, Australia, Canada, Costa Rica, the European Communities, India, Japan and Macao) that they consider that their benefits under the GATS may be affected by the proposed modification. Consequently, consistent with Article XXI:2(a) of the GATS, the United States has entered into negotiations with these WTO Members with a view to reaching agreement on any necessary compensatory adjustment. The aim of such negotiations and agreement shall be to maintain a general level of mutually advantageous commitments not less favorable to trade than that provided for in the U.S. schedules of specific commitments prior to such negotiations.

[229] http://www.ustr.gov/Document_Library/Press_Releases/2007/December/Statement_on_Internet_Gambling.html.

I.5.2.ISSUES RESOLVED BY THE DISPUTED SETTELEMENT UNIT

I.5.2.1.The measure at issue and the "zero quota"

The WTO adjudicating bodies tackled the issue of whether a total prohibition on the cross-border supply of a service in respect of which a full market access commitment was undertaken (*in casu*, gambling and betting services) can be deemed a market access limitation falling under Articles XVI:2(a) and XVI:2(c) GATS, even if this prohibition does not contain any express reference to numbered units. This was the first dispute that gave the opportunity to the DSB to define the scope of the market access obligation.

We recall that Antigua's request for the establishment of the Panel listed as challenged "measures" federal and state laws as well as court decisions, state Attorneys' General statements, websites and agreements between U.S. enforcement agencies and credit card companies.[230] In its submissions, Antigua argued that all of these "measures" constitute a "total prohibition" on the cross-border supply of gambling and betting services that is inconsistent with the United States' obligations under the GATS. The United States disagreed with this view, stating that a "total prohibition" is not a "measure" within the meaning of the Dispute Settlement Unit (DSU) and the GATS.

I.5.2.1.1.DSU Findings

The DSU found that the relevant legislation was provided in Article I:3 GATS[231], Article XXVIII(a) and (c) GATS[232], Article XXIII GATS[233], Article 3.3 DSU[234] and Article 6.2 DSU[235].

[230] Request for the Establishment of a Panel by Antigua and Barbuda, WT/DS285/2.
[231] Article I:3 of the GATS reads as follows:
"'[M]easures by Members' means measures taken by:
(i) central, regional or local governments and authorities; and

The U.S. requested for a preliminary ruling on this issue, contending that a "total prohibition" could not be a "measure". The panel found that it was too premature to make a ruling on the matter. The U.S. then argued that Antigua, by making its "total prohibition" claim, had not established a *prima facie* case of violation by the U.S. of Article XVI of the GATS.

In order to define the term "measure", the Panel referred to the interpretation given in *US – Corrosion-Resistant Steel Sunset Review*[236]: "In principle, *any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings*. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch. […] *instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance"* (emphasis added). Therefore, the Panel agreed that the definition of "measures" under the GATS as well as jurisprudence regarding the interpretation of this term in the context of the DSU indicates a broad reading of the term under the GATS.

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.
In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory."

[232] Article XXVIII(a) of the GATS provides that "measure" means:
"[A]ny measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."
In addition, Article XXVIII(c) provides that "measures by Members affecting trade in services" include measures in respect of:
"(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."

[233] Article XXIII of the GATS provides that:
"If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU."

[234] Article 3.3 of the DSU provides that:
"The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

[235] Article 6.2 of the DSU provides that the request for the establishment of a panel:
"[S]hall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

[236] Appellate Body Report, United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R.

However, the Panel decided that:

"[n]otwithstanding the broad concept of "measures" under the GATS and the DSU, […], in the circumstances of this case, the alleged "total prohibition" on the cross-border supply of gambling and betting services describes the alleged effect of an imprecisely defined list of legislative provisions and other instruments and *cannot constitute a single and autonomous "measure" that can be challenged in and of itself, even if it is claimed that, together, these legislative provisions and other instruments result in a total prohibition*" (emphasis added).

Its arguments were the following:

Firstly, Antigua's use of the term "total prohibition" was done by way of description of an alleged effect to which it takes objection, namely the fact that Antigua's suppliers are prohibited from providing gambling and betting services in the United States on a cross-border basis. However, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* made it clear that "instruments of a Member containing rules or norms could constitute a 'measure'" that may be the subject of challenge under the DSU; therefore, a "total prohibition" as explained by Antigua cannot be construed as an "instrument" within the meaning ascribed to that term by the Appellate Body because it is a *description of an effect* rather than an instrument containing rules or norms.

Secondly, Article 6.2 of the DSU requires that measures be "specifically" identified in a panel request, which in the Panel's view was not the case. Antigua had listed more than 90 laws in its Panel request; however, it had not made clear which of these laws and which provisions of these laws should be examined as part of the alleged "total prohibition"[237].

Thirdly, the Panel recalled that the identification of the challenged measures is critical not only in terms of defining the Panel's terms of reference and informing the defending party of

[237] Moreover, Antigua replied to the Panel's clarification request that : "It is important to note ... that Antigua has cited all these laws in its Panel request in order to be as comprehensive as possible, not because it believes that each law is an essential part of a "puzzle" without which there would be no total prohibition. ... most of the laws cited in the Panel request are prohibition laws that could be applied independently of each other to prohibit cross-border supply from Antigua." (emphasis added). In its first oral statement, Antigua underlined the complexity and ambiguity as well as the overlap between federal and state laws made it "very difficult to identify with complete precision all laws and regulations of the United States that could be applied in the prohibition of the cross-border supply of gambling and betting services." Antigua also stated that it finds it "wasteful and unnecessary" to engage in such an identification exercise.

the legal basis of the complaint so that it can defend itself, but also because the challenged measure, if found to be in violation of a WTO agreement, must be brought into conformity with that agreement pursuant to Article 19.1 of the DSU. In this view, the ability of an instrument to be brought into conformity with a WTO Agreement is an important consideration in determining whether or not a measure has been sufficiently identified for the purposes of the DSU and the GATS. Therefore, it would be impossible for the United States to implement a DSB 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 the "total prohibition" that has been identified by Antigua as the challenged measure.[238] Also, monitoring the implementation process pursuant to Article 21.6 of the DSU would be in this case impossible.

Finally, since Members' national laws are always presumed to be compatible with the WTO Agreement[239], the Panel argued that Antigua as the complaining party bears *the burden of properly identifying measures* with some detail and explanation so as to allow the United States to defend itself adequately. The fact that the United States has admitted a total or partial prohibition on the remote supply of certain gambling and betting services under U.S. law does not relieve Antigua of its obligation to specifically identify and demonstrate WTO inconsistencies that result from such a prohibition.

In conclusion, the Panel decided that Antigua is not entitled to rely upon a "total prohibition" on the cross-border supply of gambling and betting services as a "measure" *per se*, but rather must identify which measures could be regarded as violating the obligations under GATS.

This vision was upheld by the Appellate Body, which 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".[240]

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[238] Indeed, it could be said that Antigua itself has acknowledged this. Antigua submits that "Antigua and Barbuda needs to ensure that, at the stage when the United States needs to implement any recommendations and rulings resulting from this proceeding, the United States cannot take the position that it needs to amend only the Wire Act and can continue to apply its other prohibition laws. This is particularly important because, given the huge amount of American legislation on gambling and betting, it cannot be excluded that Antigua and Barbuda has been unable to identify all domestic laws that could possibly be applied against the cross-border supply of gambling services." : Antigua's first oral statement, para. 22.
[239] Appellate Body Report on US – Carbon Steel, para. 115
[240] Appellate Body Report on *US Gambling*, para.126.

The Panel then asked Antigua to make a *prima facie* case identifying the measures at issue. It proceeded to a laborious approach to examine the mix of federal and state laws, court decisions, state Attorneys' General statements, websites and agreements between U.S. enforcement agencies and credit card companies presented by Antigua. After putting aside the "specific applications" and "practices", considered to be only support allegations, the Panel went on to examine the state and federal laws cited by Antigua, and it divided them into those that were consistent and inconsistent with the GATS, recommending that only the latter category of laws be brought into conformity with the GATS. In so doing, the panel found that Antigua had established a *prima facie* case in respect of *three federal laws* and *eight state laws*[241] out of the nine federal laws and 84 state laws listed in Antigua's panel request.

The Appellate Body however disagreed with the Panel's view. It stated that "[i]n none of Antigua's submissions to the Panel was the way in which these measures operate explained in a manner that would have made it apparent to the Panel and to the United States that an inconsistency with Article XVI was being alleged with respect to these measures. Thus, we see no basis on which we can conclude that Antigua sufficiently connected the eight state laws with Article XVI and thereby established a *prima facie* case of inconsistency with that provision".

The "measure at issue" was therefore narrowed to the Wire Act[242], the Illegal Gambling Business Act[243] and the Travel Act[244].

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[241] The federal laws in question were the Transmission of Wagering Information Act, 18 U.S.C. § 1084 (more known as "the Wire Act"), the Interstate or Foreign Travel or Transportation in Aid of Racketeering, Enterprises Act, 18 U.S.C. § 1952, and the Prohibition of Illegal Gambling Business Act, 18 U.S.C. § 1955 (para. 6.223), while the state laws were those of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah.

[242] The Wire Act of 1961 provides the following: "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both". Though the Act was clearly written with the intent of stopping bookmaking through the telephone and as such the scope of an entity like the Internet was not conceived at its conception, it was until 2006 the only federal law which has been employed in the successful conviction of a foreign Internet gambling website proprietor. Therefore, although one may be hesitant to try and transpose the wording of an Act written in 1961 to the "wire" technology available in 2005, as this is the only successful regulation to be used by the U.S. government, its wording does indeed require further examination. The Act specifically makes it a crime for an individual or corporation to be involved in the "transmission…of information assisting in the placing of bets or wagers on any sporting event or contest." When applied to the context of Internet gambling, such wording leaves much room for interpretation. The specific reference in the Act to

I.5.2.1.2.Critique

The WTO adjudicating bodies' approach has been microscopically scrutinized in the aftermath of US – Gambling[245]. With respect to the question of the "zero-quota", while one author conceded that "the Appellate Body correctly interpreted Article XVI GATS by examining the measures at issue under this provision […]"[246] (in this opinion, "it is not the form that this [restrictive] measure takes that will determine the applicability of any of the Article XVI:2 subparagraphs, but rather the quantitative nature of such a measure, irrespective of whether this quantitative nature is expressed in numbers"), the majority of commentators were reserved, to say the least, as to the correctness of the panel's and Appellate Body's argumentation.

(i)Interpretation of subparagraph (a) of GATS Article XVI:2

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sporting events raises the question of whether the Act should be confined in its jurisdiction to just those acts involving sports. As well, the wording in the Act which states, "information assisting in the placing of bets or wagers", leaves open the question of whether Internet sites which link to gambling sites or those which provide the current sporting lines are providing such information and are therefore leaving themselves open to prosecution. Further, as the Act only covers "transmissions of wire communication", this leaves it potentially vulnerable to attack by counsel with respect to the Internet. Not all Internet communications are conducted through wired communication (wireless connections continue to grow) and further, as noted by the GAO itself, the phrase may be "ambiguous as it applies to the Internet." (United States General Accounting Office, "Internet Gambling. An Overview of the Issues" Report, GAO-03-89, December 2002, p.12, available at http://www.gao.gov/new.items/d0389.pdf). For a further analysis, see COHEN Michael G., "Pocket Ace's: A Comprehensive Look At The Legality Of Off-Shore Internet Gambling Within The USA" (2005, May).

[243] As part of its effort to curb organized crime and specifically racketeering, in 1970 as part of the Organized Crime Act, the United States passed the Illegal Gambling Business Act. In order to prove a prima facie case under this statute, the government must establish that there is a gambling operation which (1) is in violation of state or local law where it is conducted, (2) involves five or mores persons (not necessarily the same five people) and (3) remains in substantially continuous operation for more than thirty days or has a gross revenue of $2,000 in any given day. (RODEFER Jefferey, "*Illegal Gambling Business Act of 1970*", Available online at http://www.gambling-law-us.com/Federal-Laws/illegal-gambling.htm).

[244] The Travel Act of 1961 makes it a criminal activity for one to use "interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity." As noted by the United States General Accounting Office, "*Internet Gambling. An Overview of the Issues*" Report, supra, under the Act "unlawful activity includes any business enterprise involving gambling in violation of the laws of the state where the gambling takes place or of the Unities States."

[245] See notably MAVROIDIS Petros C., Highway XVI Re-Visited: The Road From Non-Discrimination To Market Access In GATS, World Trade Review (2007), 6: 1, PAUWELYN Joost, Rien Ne Va Plus: Distinguishing Domestic Regulation from Market Access in GATT and GATS, in 4 World Trade Revew (2005) 131; ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, Journal of International Economic Law 9(1) 117–148, 2006,; KRAJEWSKI Marcus, National Regulation and Trade Liberalization in Services, Kluwer Law International, 2005; and DELIMATSIS Panagiotis, Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US – Gambling Case, Journal of World Trade vol.40 no.6 December 2006.

[246] DELIMATSIS Panagiotis, "Don't Gamble with GATS", supra p.1061.

As we have noted above, for the United States a ban on the remote supply of gambling and betting services does not fall within the list of prohibited measures under Article XVI since it was not expressed in the form of a numerical quota, while for Antigua, the U.S. ban is caught by Article XVI because it has the effect of a zero quota by limiting to zero the number of service suppliers or their output. Both the Panel and Appellate Body agreed with Antigua on the proper scope of Article XVI GATS.

Several authors have criticized the adjudicating bodies' approach[247]. Besides certain weak points in the Appellate Body's textual analysis of Article XVI, commentators have deplored the striking absence of any consideration of the 'context' of the provision at issue and the 'object and purpose' of the GATS.

The Appellate Body starts by referring to the ambiguity of dictionary definitions as to the scope of the word 'form' in Article XVI:2(a), which leads it to conclude that this term has a 'broad meaning' and 'must not be interpreted as prescribing a rigid mechanical formula'[248]. Through dictionary definitions, it also interprets "numerical quota" to be essentially a quantitative restriction (zero being quantitative in nature). Therefore, the ban of remote supply of gambling services amounts to a zero quota. The remaining important question was whether, for purposes of Article XVI:2(a), a numerical quota includes a ban on the remote supply of gambling services, which has an effect equivalent to a zero quota.

According to several commentators, in order to answer holistically this question, the adjudicating bodies should have turned to the "context" and "object and purpose" of the GATS. Or, it was argued that their absence in the argument is "perhaps the weakest (and most disappointing) part of the Appellate Body's interpretative exercise in US – Gambling"[249]. "It seems quite odd that in order to understand the nature and function of Article XVI (for the first time before the Appellate Body), no consideration is given to the Agreement's other general disciplines, in particular Articles VI and XVII"[250]. Also, no mention is made of the Understanding on Commitments in Financial Services which constitutes an alternative

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[247] See especially ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, Journal of International Economic Law 9(1), 117–148, 2006, p.133.
[248] Appellate Body Report US – Gambling, para 226.
[249] See ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.135.
[250] Idem, p.137

approach to that covered by the provisions of Part III of the GATS (namely, Articles XVI, XVII and XVIII) with regard to financial services[251].

The same commentator argues that Article XVI simply prohibits Members from employing certain types of regulatory instruments; in other words, it may be said that in itself the normative content of Article XVI is much stricter and more demanding than the normative content of Articles XVII and VI:5[252]. From this strict content it would seem "clear from the 1993 Scheduling Guidelines that the list of limitations in paragraph 2 of Article XVI is an exhaustive list. Thus, the types of measures listed in the second paragraph would exhaust the types of market access restrictions prohibited by Article XVI, in particular by the first paragraph of Article XVI”[253]. Extending the prohibition of Article XVI to measures that have an effect equivalent to a quota (whether it be a quota equal to, or greater than, zero) would run a serious risk of de facto banning any type of domestic regulation with a restrictive effect on the flow of services, thus tilting the balance in favor of multilateral liberalization to the detriment of domestic regulatory prerogatives[254].

In this view, it would thus be unconceivable that the drafters of the GATS included within the category of ‘incriminated’ measures in Article XVI any domestic regulation which has simply an effect equivalent to a quota (i.e., restricting access to national markets) [255]. Banning (online) gambling, like imposing an entry exam for lawyers or a minimum capital requirement for banks, undeniably pursues legitimate policy objectives. It seems to follow that, even if

[251] Idem, p.140.
[252] Idem, p.138.
[253] Panel Report, US – Gambling, above n 2, paras 6.298–6.299. See RAWORTH Philip, Trade in Services – Global Regulation and the Impact on Key Service Sectors, New York, Oceana Publications, 2005, pp. 36–37
[254] ORTINO Federico, *Treaty Interpretation and the WTO Appellate Body Report in US – Gambling*: *A Critique*, supra, p.141. Also, see PAUWELYN Joost, *Rien Ne Va Plus: Distinguishing Domestic Regulation from Market Access in GATT and GATS*, in 4 World Trade Revew (2005) 131 at 158–59 and 168.
[255] "Without denying the fact that the known aversion toward ‘quantitative restrictions’ in the field of trade in goods undoubtedly influenced the drafting of Article XVI GATS, it seems that, more than their ‘quantitative’ nature, the common feature characterizing the measures falling within Article XVI GATS (and Article XI GATT) appears to lie in the presumed absence of a legitimate public policy justifying such measures. In light of the rigid discipline to which they are subject (per se prohibition), it is indeed plausible that, in the mind of the treaty drafters (and the neo-liberal economists inspiring them in the late 1980s) the underlying rationale of Article XVI is a presumption that the measures listed in subparagraph 2(a)–(f) generally lack any legitimate policy justification (in much the same way as quotas and other restrictions on the importation of goods)”. ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.142.

these types of measures potentially restrict market access, they should not be subjected to the rigid approach (per se prohibition) of Article XVI[256].

(ii)A Non-Discriminatory Zero-Quota Is Not A Quota Under Article XVI

Another critique which was brought to the adjudicating bodies' approach is that it wrongly qualified a total prohibition of a service as a *quantitative* zero-quota, falling under Article XVI[257].

According to this approach, the first question we need to ask when analyzing the compliance of a trade-restrictive measure with the GATS is whether such measure is *quantitative* or *qualitative* in nature[258]. Quantitative limitations are "*limitations relating to numbers*"[259]. With the exception of measures falling under (e), all the other measures listed in Article XVI:2 involve *quantitative* restrictions.

In this author's view, a zero-quota (or total prohibition of a service) is not a quota in the sense of Article XVI, but rather a *qualitative* limitation. "A zero-quota reflects a judgment that the service (perhaps further specified by mode of method) is somehow so objectionable or problematic that it should not be allowed at all. Such a judgment is essentially qualitative"[260].

Therefore, when referring to a quantitative restriction (a quota) we imply, for example, a number of services or service suppliers (e.g. 5 banks allowed to operate in a country). Oppositely, when speaking of zero services or service suppliers, we understand that there is *no market* for that service, which implies a *qualitative* prohibition, and not just a simple *quantitative* restriction.

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256 ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.143.
257 See an excellent analysis by REGAN Donald H., A Gambling paradox: Why an origin-neutral "zero-quota" is not a quota under GATS Article XVI, 41 Journal of World Trade December 2007, p.1297.
258 *Ibidem*.
259 Appellate Body Report on *US Gambling*, para. 225.
260 REGAN Donald H., A Gambling paradox: Why an origin-neutral "zero-quota" is not a quota under GATS Article XVI, supra, p.1307.

A quantitative restriction (or n-quota, as opposed to zero-quota[261]) of foreign supply presumably incarnates protectionist measures, which fall under Article XVI[262] (for example, if a country allows not more that 5 foreign banks to operate on its territory, this would qualify as an origin-specific quota within the meaning of Article XVI).

A qualitative restriction (or zero-quota) can affect both domestic and foreign supply; a country may decide to completely shut down the market in a specific service field (origin-neutral zero-quota), or it can decide to only prohibit foreign supply of that service (origin-specific zero-quota). In this latter case, it is argued that the foreign supply prohibition is objectionable, "but it is the origin-specificity which makes it so. *An origin-specific zero-quota is a core violation of Article XVII, and it should be dealt with under Article XVII*"[263] (emphasis added).

We agree with the analysis that a *zero quota* is primarily a qualitative prohibition, and not a simple limitation in the number of services provided or of service providers. If such a zero quota is origin-neutral, it is equivalent to the absence of a legal market for the specific service in question. Taking this argument and applying it to the *US Gambling* case, it results that the right questions which the WTO adjudicating bodies should have asked in order to determine whether the U.S. measures were or not GATS compliant are the following:

- Does the USA prohibit remote gambling for domestic and foreign suppliers alike? If yes, there is no market for remote gambling in the USA, and thus no market access can be claimed by interested foreign suppliers.

- If, on the contrary, a domestic market exists, then does the USA allow: (i) only a limited number (higher than zero) of foreign gambling providers to enter its market? If the answer is yes (and assuming the U.S. has undertaken market access commitments with respect to this service), than the restrictions imposed on foreign supply are a violation of Article XVI; or (ii) no foreign gambling providers (zero-quota)? If yes, such prohibition is not an issue under Article XVI, but it can be scrutinized under Article XVII; and finally,

261 *Ibidem*.
262 *Idem*, p.1308.
263 *Ibidem*.

- If the U.S. is found to have violated its obligations under Article XVI and/or XVII, are its measures justifiable under Article XIV?

Assuming that the above analysis could have been a judicious alternative for the WTO adjudicating bodies in this case, we will re-examine in Chapter I.6 Antigua's complaint and the U.S. measures in a different light, especially in order to re-position the analysis between Articles XVI and Article XVII.

I.5.2.2.The question of the U.S. commitments

The disputing parties disagreed with the scope of the U.S.'s specific commitment in relation to gambling and betting services.

In the U.S. Schedule, the word "NONE" was inscribed in respect of limitations on market access for mode 1 and mode 2 supplies under the heading *"10. Recreational, cultural and sporting services… D. Other recreational services (except sporting)"*. For Antigua, the United States have made a full market access and a full national treatment commitment for the cross-border supply (mode 1) of "gambling and betting" services. The United States denied the claim altogether, contending that its Schedule makes no such commitment.

I.5.2.2.1.DSU Findings

The Panel's analysis started with the analogical rules of interpretation of GATT as an international treaty. As stated by the Appellate Body in *EC – Computer Equipment*[264], "Tariff concessions provided for in a Member's Schedule […] are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. *As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention"*. (emphasis added).

(i)Interpretation through Article 31 of the Vienna Convention

(a)The Panel's view

[264]Appellate Body Report, European Communities - Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851.

Pursuant to Article 31 of the Vienna Convention[265], the U.S. Schedule must be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the Schedule when read *in their context* and in light of the *object and purpose* of the GATS and the WTO Agreement. Of particular relevance for the Panel was the principle of "effective treaty interpretation"[266], whereby all terms of a treaty should be given a meaning.

The Panel then proceeded to examining the ordinary meaning of the word "*sporting*" to see if it includes "*gambling*" and, thus, confirms that the United States has made no commitments for gambling and betting services in sub-sector 10.D. A wide range of English language dictionaries was used to this purpose and even the significance of French and Spanish words "sportif" and "deportivos" was taken into consideration[267]. The same linguistics analysis was undertaken for the words "recreational" and "entertainment", to examine if their ordinary meaning included gambling.

The Panel noted on this point that the ordinary meaning of the words "Other recreational services (except sporting)" and "entertainment services" leaves a number of questions open and does not allow it to reach a definitive conclusion on whether or not the U.S. Schedule includes specific commitments on "gambling and betting services" in sector 10 (Recreational, cultural and sporting services).

A contextual and teleological analysis followed (in the *context* of W/120 and the 1993 Scheduling Guidelines, and in light of the GATS *object and purpose*), at the end of which the Panel concluded the following:

"6.110 *In its interpretation of the U.S. Schedule in light of Article 31 of the Vienna Convention, the Panel noted that dictionary definitions of key terms in that Schedule ("entertainment", "recreational", and "sporting") do not exclude that gambling and betting services could be covered under sub-sector 10.D of the U.S. Schedule. We also found that these definitions are less than conclusive. The Panel then examined the terms of the U.S. Schedule in the context of W/120 and the 1993 Scheduling Guidelines and found that, where the U.S. Schedule follows W/120 without any clear departure and in the absence of any*

[265] Vienna Convention on the Law of Treaties, 1969, heienafter the "Vienna Convention".
[266] Appellate Body Report on US – Gasoline, p. 23.
[267] Panel Report on US Gambling, paras. 655 to 660.

specific definition, there would be reason enough for Members to believe that the scope of sub-sector 10.D in the U.S. Schedule corresponds to that of W/120 and the corresponding CPC numbers. ***Thus, the Panel believes that the U.S. Schedule, read in the light of paragraph 16 of the Scheduling Guidelines, can be understood to include a specific commitment on gambling and betting services under sub-sector 10.D (Recreational services (except sporting)*** **–** emphasis added).

The Panel then resorted to Article 32 of the Vienna Convention (supplementary means of interpretation), to confirm the meaning imparted to sub-sector 10.D of the U.S. Schedule on the basis of its examination under Article 31.

(b)The Appellate Body's view

The Appellate Body however had some reservations concerning the Panel's argument. It disagreed with the Panel's findings in determining the *ordinary meaning* of the word "sporting"; then, it opposed the Panel's characterization of the W/120 document and 1993 Scheduling Guidelines as "*context*" for the interpretation of the U.S. Schedules.

First, the Panel's reasoning ,which simply equated the "ordinary meaning" with the meaning of words as defined in dictionaries, was considered too mechanical.

Secondly, the Panel failed to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word "sporting".

Thirdly, the Panel failed to explain the basis for its recourse to the meanings of the French and Spanish words "deportivos" and "sportifs" in the light of the fact that the United States' Schedule explicitly states, in a cover note, that it "is authentic in English only". Therefore and overall, the Panel's finding concerning the word "sporting" was premature.

Concerning the second issue, the Appellate Body found two main difficulties with the Panel's characterization of the two documents as *context*. First, it saw no basis for the Panel's finding that they "constitute an agreement made between all the parties or an instrument made between some parties and accepted by the others as such". Both W/120 and the 1993

Scheduling Guidelines were drafted by the GATT Secretariat rather than the parties to the negotiations. Even if, on its own, authorship by a delegated body would not preclude specific documents from falling within the scope of Article 31(2), in this case the Appellate Body could not find W/120 and the 1993 Scheduling Guidelines to be context. It did not accept, as the Panel did, that simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty[268].

Therefore, the Appellate Body set aside this part of the Panel's examination of "context". It did consider, however, additional context referred to by the Panel and the participants, namely: (i) the remainder of the United States' Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of *other* Members[269].

Concluding on this point, the Appellate Body - contrary to the Panel - noted:

"[…] *application of the general rule of interpretation set out in Article 31 of the Vienna Convention leaves the meaning of "other recreational services (except sporting)" ambiguous and does not answer the question whether the commitment made by the United States in subsector 10.D of its Schedule includes a commitment in respect of gambling and betting services. Accordingly, we are required, in this case, to turn to the supplementary means of interpretation provided for in Article 32 of the Vienna Convention*".

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[268] We note that the Appellate Body in EC – Boneless Chicken Cuts accepted that the Harmonized System (International Convention on the Harmonized Description and Coding System, GATT, BISD, 30th Supplement, 17-21, decision of 12 July 1983) fell under Article 31(2)(a) VCLT because a GATT decision was evidence of the consensus among GATT Contracting Parties to use the Harmonized System.

[269] Concerning the first issue – the rest of the U.S. Schedule – the Appellate Body found that this context does not indicate clearly the scope of the commitment under subsector 10.D (the U.S. Schedules does not refer at all to CPC codes and only refers to W/120 document in some entries). Regarding the second issue – the context provided by the GATS itself – the Appellate Body noted that this Agreement covers all services except those supplied in the exercise of governmental authority, therefore a Member may schedule a specific commitment in respect to any service, provided that the same service is not listed under two or more different sectors or subsectors. Concerning the third issue – context provided by other covered agreements – the Appellate Body found that Article 22.3 (f) of the Dispute Settlement Understanding confirms the relevance of W/120 document to the task of identifying service sectors in GATS Schedules, but does not appear to assist in the task of ascertaining within which subsector of a Member's Schedule a specific service falls. Finally, the fourth context indication - Schedules of other Members - an examination of the term "Other recreational services (except sporting)" in its context does not clearly reveal whether, in the United States' Schedule to the GATS, gambling and betting services fall within the category of "other recreational services" or within the category of "sporting services".

(ii)Article 32 of the Vienna Convention – Supplementary means of interpretation

(a)The Panel's view

Under Article 32 of the Vienna Convention, the Panel took into account GATS preparatory work and other supplementary means of interpretation.

Concerning the GATS preparatory work, the Panel referred to the cover-notes U.S. draft Schedules dated 7 December 1993, which read as follows: "[E]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)". In the Panel's view, the fact that this reference to W/120 was made at a crucial stage during the services market access negotiations and was contained in three successive drafts cannot be ignored as it would have led participants to believe in good faith that the "scope" of the U.S. commitments "corresponded" to the "sectoral coverage" of W/120. The cover-notes indicate that the United States used W/120 not only for the "ordering" of its Schedule or for establishing its "structure", but also to determine the *scope* of its commitments, except where specifically noted otherwise, even though it chose not to refer to the CPC, as it was indeed entitled to do under the 1993 Scheduling Guidelines.

For the Panel, the cover-notes indisputably testified that services market access negotiations were held on the basis of W/120 and contribute to determining the common intention of the participants to the Uruguay Round negotiations with regard to the content of the U.S. Schedule, and, thus, the obligations that the United States was willing to undertake. The Panel therefore concluded that the common intention of the Members, at the time the U.S. specific commitments were negotiated, was that where the U.S. Schedule visibly followed W/120 without any clear and explicit departure, the specific commitments at issue were to be interpreted in the light of W/120 and the CPC numbers associated with it.

Regarding the other supplementary means of interpretation, the Panel referred to a document drafted by the United States International Trade Commission in May 1997 called *U.S.*

Schedule of Commitments under the General Agreement on Trade in Services[270]. This document stated that sub-sector 10.D of the U.S. Schedule “corresponds” to CPC 964 - under this sub-sector, the United States’ Schedule explicitly excluded “sporting services” (CPC 9641), but not “gambling and betting services” (CPC 96492). The Panel considered that, because USITC is an agency of the U.S. federal government, created by an Act of Congress, its actions are attributable to the United States and therefore, in this dispute, the USITC document can legitimately be probative of the United States’ interpretation of its own GATS Schedule.

All these arguments led the Panel to conclude that its analysis pursuant to Article 31 of the Vienna Convention was confirmed and that the U.S. Schedule included specific commitments on gambling and betting services.

Finally on this issue, we believe it is interesting to note a statement of May 2007 made by the U.S. Trade Representative regarding the issue of the U.S. commitments. According to this statement, the inscription of the word “None” in subsector 10.D was an “*oversight*” in the drafting of the U.S. Schedules, which went unnoticed until Antigua and Barbuda filed their complaint with the WTO[271].

(b)The Appellate Body’s view

The Appellate Body upheld the Panel's finding that the United States' Schedule under the GATS includes specific commitments on gambling and betting services under subsector 10.D.

It held that a proper interpretation pursuant to the principles codified in Article 31 of the Vienna Convention "does not yield a clear meaning as to the scope of the commitment made by the United States" in the entry "Other recreational services (except sporting)". Accordingly, the Appellate Body considered that it was appropriate for the Panel to have recourse to the supplemental means of interpretation identified in Article 32 of the Vienna

[270] Panel Report, *US – Gambling*, para.59.
[271] “Neither the United States nor other WTO Members noticed this *oversight* in the drafting of U.S. commitments until Antigua and Barbuda initiated a WTO case ten years later” *(emphasis added)*. See http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_of_Deputy_United_States_Trade_Representative_John_K_Veroneau_Regarding_US_Actions_under_GATS_Article_XXI.html

Convention. These means include W/120, the 1993 Scheduling Guidelines, and a cover note attached to drafts of the United States' Schedule.

After examination of these documents, the Appellate Body concluded that the relevant entry in the United States' Schedule, "Other recreational services (except sporting)", must be interpreted as excluding from the scope of its specific commitment services corresponding to CPC class 9641, "Sporting services". This entry was considered to include within the scope of its commitment services corresponding to CPC 9649, "Other recreational services", including Sub-class 96492, "Gambling and betting services".

I.5.2.2.2.Critique

If the trend in WTO jurisprudence to minimize the relevance of dictionary definitions when interpreting Members' commitments is believed to be a welcome development[272] (and this is particularly so when the object of interpretation is a term in an individual schedule of one of the Members), several discussions can however be undertaken with regard to the following aspects of the WTO adjudicating bodies' interpretation of the U.S. schedules: the nature of the Members' schedules of commitments; the debate whether the W/120 document and the 1993 Scheduling Guidelines are to be treated as "context" versus "supplementary means of interpretation"; the question of the prevailing language; and the utility of a comparison between other Members' schedules in interpreting the schedule of a specific Member[273].

(i)The Nature of the Members' Schedules of Commitments

Schedules of concessions are part of the WTO covered agreements, pursuant to GATS Article XX:3, which provides that Members' Schedules are "an integral part" of the GATS; however, their interpretation might require some differentiation in the means of interpretation on which panels and the Appellate Body can and should rely. It is argued that the hybrid feature of the negotiations, drafting and conclusion of schedules may influence the weight given to certain means of interpretation in the Vienna Convention, as well as explain why other rules of international law are particularly instructive in determining the meaning of treaty language in the schedules[274].

Several legal natures were attributed in the juridical literature to the schedules of concessions: one is that the WTO adjudicating bodies have embraced the qualification as *treaty* language;

[272] ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, Journal of International Economic Law 9(1), 117–148, p.124
[273] In certain cases, such as tariff classification, the question was raised whether the panels and Appellate Body alone are best qualified to interpret schedule of commitments, without the enlightened expertise of the ratione materiae competent international organizations (such as the World Customs Organization). See MAVROIDIS Petros C., The General Agreement on Tariffs and Trade, 2005, supra, p.80.
[274] Van DAMME Isabelle, The Interpretation of Schedules of Commitments, Journal of World Trade 41 (1), February 2007, p.52.

in another opinion, the schedules could be qualified as *unilateral* acts or declarations under international law; finally, a hybrid solution is proposed, qualifying the schedules as *multilateral acts of a special character.*

Since the *EC – Computer Equipment* case, panels and the Appellate Body have consistently interpreted schedules on goods and services as *treaty language*[275] in accordance with Articles 31, 32 and 33 of the Vienna Convention[276]. *US Gambling* is among the first cases where the WTO adjudicating bodies interpreted the schedules of commitments with respect to services[277]. The Appellate Body confirmed its approach under *EC – Computer Equipment* that "although each Member's Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a *common* agreement among *all* Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention"[278] (emphasis added).

In a different understanding, schedules could be interpreted as *unilateral* acts or declarations rather than treaties. In this case and following the International Court of Justice (ICJ) jurisprudence[279], the national laws of WTO Members could become relevant in the interpretation of those commitments[280]. However, in *EC – Computer Equipment* the Appellate Body has rejected this interpretation. On the other hand, the fact that schedules of concessions should not be qualified as unilateral acts under general international law does not preclude

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[275] See Appellate Body report, EC – Poultry, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, paras.82-83; Appellate Body report, EC – Boneless Chicken Cuts, supra, paras. 148 and 175; Panel report, Korea – Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541, para.6.16; Appellate Body report, Korea – Beef, Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5, para.96.
[276] For a critique see MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, The World Trade Organization. Law, Practice and Policy, Oxford University Press, 2006, p.647 (reminding that, when exchanging concessions, the WTO members adopt a contractual type of approach).
[277] For the first such interpretation, see Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985 (Canada – Autos).
[278] Appellate Body Report, US Gambling, para.159.
[279] See the ICJ case Anglo-Iranian Oil Co. (United Kingdom v. Iran), ICJ Reports (1952) 93; ICJ Fisheries Jurisdiction Case (Spain v. Canada), 4 December 1998, ICJ Reports (1998) 432.
[280] See Van DAMME Isabelle, The Interpretation of Schedules of Commitments, supra, p.13.

that the practice of other international courts and tribunals in interpreting unilateral acts or declarations be used as a model of comparison and possible guidance[281].

Finally, in another opinion, schedules may be qualified as *multilateral acts of a special character*[282], a category introduced by Judge Alvarez in his dissenting opinion in the ICJ *Anglo-Iranian* case[283]. They are treaty language, but their process of negotiation, drafting and concluding is in various degrees unilateral; therefore, it may be more accurate to describe them as multilateral acts of a special character to denote their distinct characteristics and allow a more contextual and pragmatic interpretation of schedules[284].

(ii)"Context" Versus "Supplementary Means of Interpretation"

The Panel and Appellate Body disagreed on whether the W/120 document and the 1993 Scheduling Guidelines were to be treated as *context* for purposes of Article 31(2)(a) of the Vienna Convention (referring to 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty') or as *supplementary means of interpretation* pursuant to Article 32(a) of the Vienna Convention. The Panel believed they were relevant context, while the Appellate Body, reversing the Panel, concluded that they were in fact supplementary means of interpretation.

In contrast, the Appellate Body in *EC – Boneless Chicken Cuts* accepted that the Harmonized System fell under Article 31(2)(a) of the Vienna Convention because a GATT decision was evidence of the consensus among GATT Contracting Parties to use the Harmonized System[285].

The distinction between the primary criteria for interpreting a treaty identified in Article 31 of the Vienna Convention (in particular, text, context, object and purpose, good faith) and the supplementary means of interpretation pursuant to Article 32 (in particular, preparatory work)

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[281] See Van DAMME Isabelle, Sixth Annual WTO Conference: An Overview, Journal of International Economic Law 9(3), 749–767, p.760.
[282] See Van DAMME Isabelle, The Interpretation of Schedules of Commitments, supra, p.19.
[283] ICJ Anglo-Iranian Oil Co. (United Kingdom v. Iran), Dissenting Opinion Judge Alvarez, ICJ Reports (1952) 93 at 125. See Van DAMME Isabelle, The Interpretation of Schedules of Commitments, supra, p.21
[284] See Van DAMME Isabelle, *The Interpretation of Schedules of Commitments*, supra, p.21
[285] Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, at para. 199.

is not without importance. As explained in the International Law Commission (ILC) Commentary on the draft Vienna Convention, the aim of the distinction was to focus treaty interpretation on 'the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties [...]. The word supplementary emphasizes that article [32] does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31][286].'

The two documents at issue may indeed not have constituted in their entirety an 'agreement between the parties' for purposes of Article 31(2)(a) since, as stated by the Appellate Body, they were drafted by the GATT Secretariat, they were expressly not binding on the negotiating parties and they had not been accepted by the parties as agreements related to the treaty. However, some authors[287] inquired why the Appellate Body did not go beyond the mere formal features of W/120 and the 1993 Scheduling Guidelines and question whether the two documents constitute *evidence* of an underlying, albeit more limited in scope, consensus among parties that had emerged during the negotiations. This is in any event the conclusion at which both adjudicating bodies eventually arrive: despite the fact that W/120 and the 1993 Scheduling Guidelines were not formally binding, the negotiating parties, in order to ensure unambiguous commitments and achieve clarity, agreed to follow those guidelines as much as possible.

Another critique was the Appellate Body's decision to treat the two documents as 'supplementary means' rather than 'context', which shows an unusual disregard for certain policy considerations surrounding the use of supplementary means of interpretation pursuant to Article 32 of the Vienna Convention in cases of 'ambiguous or obscure terms'[288]. In this view, it may prove quite problematic and controversial for the interpreter to attribute meaning to a treaty term via supplementary means on the basis of Article 32 when such treaty term remains 'ambiguous' or 'obscure' after having examined (in good faith) its text, context and object and purpose[289]. According to this critique, in the *Mexico - Telmex* case, for instance, the Panel did not decide whether the 1993 Scheduling Guidelines provide 'context' for

[286] Yearbook of the International Law Commission, 1966, Vol II at 223.
[287] ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.128.
[288] Ibidem.
[289] Idem, p.129.

purposes of Article 31(2) or (3) or ‘supplementary means’ within the meaning of Article 32 of the Vienna Convention[290]. The Panel, however, hinted that it would use the 1993 Guidelines in the latter sense only in order to *confirm* its understanding of the ordinary meaning of ‘cross-border supply of services’[291].

As it was said[292], Article 32 should not be employed as an interpretative mechanism of last resort (i.e. if everything else fails, a meaning shall be found according to the potentially open-ended list of supplementary means).

Also, another critique which could be brought against the Appellate Body’s argument under the Vienna Convention rules of interpretation is that it seems excessively mechanical[293], in particular with regard to evaluating different contextual elements as well as in examining object and purpose[294]. A holistic approach to treaty interpretation would require reaching a conclusion on the ordinary meaning of the term at issue only upon an examination of all the relevant elements, rather then examining each element in turn until the meaning of the term at issue is revealed.

(iii)The Question of the Prevailing Language

The Panel and Appellate Body in *US Gambling* also approached the issue of a linguistic comparison between the meanings of the U.S. Schedules (especially of the term “sporting”) in the three official WTO languages.

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[290] For a view that the Scheduling Guidelines are part of the Travaux Préparatoires, see MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, “The World Trade Organization. Law, Practice and Policy”, Oxford University Press, 2006, pp.664-665. “[…] we find that these documents are, with respect to the GATS Protocol on Telecommunications (to which Mexico's Schedule was attached) an important part of the "circumstances of its conclusion" within the meaning of Article 32 of the Vienna Convention” - Panel Report, Mexico – Measures Affecting Telecommunications Services, WT/DS204/R, adopted on 1 June 2004, para 7.67.
[291] Panel Report Mexico – Measures Affecting Telecommunications Services, para 7.44.
[292] ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.130.
[293] “While recognizing that [each element of] the Vienna Conventions rules do not represent a number of tests that must be ticked or crossed robotically in a particular sequence, they represent, rather, a disciplined and holistic approach to determining the relevance and weight of materials in interpreting a treaty provision, in whatever order the materials are actually considered”. See LENNARD Michael, "Navigating by the Stars: Interpreting the WTO Agreements", 5 Journal of International Economic Law (2002) 17, at 23.
[294] ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.130.

Since the schedules are treaty language, they should be translated and published in English, French, and Spanish. Each of these three official languages is in principle equally authentic in accordance with the closing paragraph of the WTO Agreement, which confirms the general rule in the law of treaties (Article 33(1) of the Vienna Convention[295]). In practice however, almost all schedules are drafted in one language only, and no translation in the other WTO official languages exists[296].

The cover page of the U.S. schedule for instance explicitly mentions that it is "authentic in English language only". The U.S. thus unilaterally contracted out of the application of the general law of treaties, as reflected in the first part of Article 33(1) of the Vienna Convention. In this case also a certain contrast is visible between, on the one hand, the formal treatment of schedules as treaty language, and on the other hand the manner in which schedules are negotiated and drafted[297].

The Appellate Body gave effect to the unilateral declaration of the United States that only the English version of its schedule can be considered as authentic (thereby discarding the meaning of the relevant words in French and Spanish), without discussing the conditions for derogating from the general rule of Article 33(1) of the Vienna Convention. It remains therefore unclear whether other WTO Members and at least the Members involved in the negotiation of the U.S. schedule, agreed with this position[298].

The European Communities asserted this issue before the Appellate Body. Considering that Members' Schedules form an integral part of the WTO Agreement and constitute an agreement of *all* the Members, the EC argued that it is correct to resort to the interpretative rules of the Vienna Convention when evaluating the United States' commitments in its Schedule. In particular, the European Communities argued that the Panel appropriately followed Article 33 of the Vienna Convention in comparing the terms of the U.S. schedule in French and Spanish[299].

[295] "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail".
[296] See Van DAMME Isabelle, The Interpretation of Schedules of Commitments, supra, p.23.
[297] Ibidem.
[298] Idem, p.24.
[299] Appellate Body report US Gambling, para.99.

(iv)The Utility of Comparing the U.S. Schedule with Other Members Schedules

As noted above, the Appellate Body examined other Members' schedules as proper context. While one author[300] considers that this approach sheds light on the common intentions of the Members for purposes of interpreting the meaning of the U.S. schedule, in support of the principle of good faith and the related concept of Members' shared expectations[301], another commentator considers that, in the light of the particularities which characterize the process of negotiation and conclusion of schedules, it is not entirely clear whether Members' schedules can be compared (for the purpose of their interpretation) in a way which is similar to comparing the treaty language in different WTO agreements, other than schedules[302].

The Appellate Body extensively compared the relevant sub-sector of the U.S. schedule with the same sub-sector in other Members' schedules (namely Austria, Bulgaria, Croatia, the European Communities, Finland, Lithuania, Peru, Senegal, Slovenia and Sweden)[303], although it agreed with the Panel that "each Schedule has its own intrinsic logic, which is different from the U.S. Schedule"[304].

It was argued that, in doing this, the Appellate Body has basically compared different *individual* intentions of the Members, with the purpose of determining the intent, and consequently the scope of obligations, of only one of them[305]. In this logic, "deference should be given to the treaty language of the U.S. schedule and not to that of other Members' schedules[306].

[300] See ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.131.
[301] For an analysis of the legitimate expectations principle in WTO jurisprudence, see WOLFRUM Rudiger, STOLL Peter-Tobias, KAISER Karen (editors), "WTO. Institutions and Dispute Settlement", Max Planck Commentaries on World Trade Law, Martinus Nijhoff Publishers, 2006, pp.300-302.
[302] See Van DAMME Isabelle, The Interpretation of Schedules of Commitments, supra, p.32.
[303] "Unlike the United States, several Members specifically used the words "gambling and betting services", or some approximation thereof, in their Schedules". Appellate Body on US Gambling, para.183.
[304] Panel Report on US Gambling, para. 6.98.
[305] Van DAMME Isabelle, The Interpretation of Schedules of Commitments, supra, p.33.
[306] Idem.

However, given the contractual approach in the exchange of concessions[307] and the fact that "schedules … represent a *common* agreement among *all* Members"[308] (at least theoretically, all Members verified the other Members' schedules during the final phase of the negotiations under the Uruguay Round), we tend to believe that the Appellate Body did not err when it examined other Members' schedules as proper context in order to determine the meaning of the U.S. schedule.

[307] See MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, "The World Trade Organization. Law, Practice and Policy", supra, p.647. In EC – Computer Equipment, the Appellate Body explained that "tariff negotiations are a process of reciprocal demands and concessions, of "give and take". EC–Computer Equipment, para.109.
[308] Appellate Body Report on US Gambling, para.159.

I.5.2.3.Article XVI – Market Access

In order to determine if the U.S. has breached its obligations under Article XVI, the Panel examined several issues : whether Article XVI:1 contains obligations that are different from those contained in Article XVI:2; whether Article XVI:2 exhaustively defines the types of restrictions that are prohibited by Article XVI; in the specific circumstances of the dispute, the Panel also ascertained the legal implications of the inscription by a Member of the word "None" in the market access column of its schedule for mode 1 for a specific sector or sub-sector; another point of analysis concerned the interpretation of Article XVI:2(a) and (c); finally, the Panel identified which federal and state laws compose the "measure at issue".

I.5.2.3.1.DSU Findings

(i)The first paragraph of Article XVI

For the Panel, the first paragraph of Article XVI makes clear that Members are bound by the "terms, limitations and conditions" contained in the market access column of their respective schedules. A Member must abide by the "terms, conditions and limitations" contained in its schedule and cannot provide, in respect of services and services suppliers of other Members, treatment less favorable than the minimum treatment it is committed to in its schedule for market access.

The ordinary meaning of the terms used in the first paragraph of Article XVI also indicates that nothing would prevent a Member from providing to services and service suppliers of *all* Members treatment *more favorable* than that provided for in its schedule or that it provides to its own services and service suppliers.

The first paragraph of Article XVI also extends to Members the obligation to provide no less favorable treatment than that provided for in their respective schedules, to *any other Members*, i.e. to *all* WTO Members. In other words, the commitments undertaken pursuant to Article XVI are to be applied on a non-discriminatory basis. Therefore, the first paragraph of

Article XVI contains a specific expression of the most favoured nation (MFN) principle of Article II of the GATS.

(a)"None" inscribed under "Market Access Limitations"

In the absence of any treaty definition of the word "None" when inscribed in a Member's schedule under "Limitations on market access", and pursuant to Article 31 paragraphs 1 and 2 of the Vienna Convention, the Panel resorted to the dictionary definitions of these terms in order to determine their ordinary meaning. After examining several such definitions, the Panel concluded that "Limitations on market access" would appear to include provisions or conditions limiting the ability of services and service suppliers to gain access to the market of that Member; however, it considered such dictionary definitions as not particularly enlightening or informative.

Since the ordinary meaning of the terms was not satisfying, the Panel turned to the legal context of Article XVI to shed light on its interpretation. According to paragraph 24 of the 1993 Scheduling Guidelines, by inscription of the word "None" in the market access column of a Member's schedule, a Member cannot adopt or maintain any measure inconsistent with Article XVI. The word "None" in the market access column means that the Member has undertaken a *full market access commitment*[309].

Thus, when a Member has inscribed "None" in the market access column of its schedule, it must maintain "full market access" within the meaning of the GATS, i.e. it must not maintain any of the six limitations and measures listed in the second paragraph of Article XVI.

(b)Mode 1 and its means of delivery

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[309] "Full market access" is defined in paragraph 4 of the 1993 Scheduling Guidelines as follows: "A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI. The measures listed comprise four types of quantitative restrictions (subparagraphs a-d), as well as limitations on forms of legal entity (subparagraph e) and on foreign equity participation (subparagraph f). The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII). The quantitative restrictions can be expressed numerically, or through the criteria specified in subparagraphs (a) to (d); these criteria do not relate to the quality of the service supplied, or to the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier)."

The Panel then considered the nature of a market access commitment for mode 1. Since this implies the supply of a service "from the territory of one Member into the territory of any other Member", the Panel concluded that that the GATS did not limit the various technologically possible means of delivery under mode 1, which may encompass all possible means of supplying services from the territory of one WTO Member into the territory of another WTO Member (whether by mail, telephone, Internet etc.), unless otherwise specified in a Member's Schedule[310]. For the Panel, this interpretation would be in line with the principle of "technological neutrality", which seems to be largely shared among WTO Members.

(ii)The second paragraph of Article XVI

The next step was to analyze the types of limitations and measures indicated in the second paragraph of Article XVI which shall not be maintained or adopted in scheduled sectors or sub-sectors, unless otherwise indicated in the relevant Member's schedule. Looking at the ordinary meaning of the terms contained in this paragraph, read in their context, the Panel concluded that the list of measures is exhaustive. Thus, the types of measures listed in the second paragraph exhaust the types of market access restrictions prohibited by Article XVI, in particular by the first paragraph of Article XVI.

(a)Subparagraph (a)

The Panel analyzed four elements of Article XVI:2(a). First, the Panel determined whether the challenged measures contain limitations on "service suppliers"; secondly, whether the list of limitations in Article XVI:2(a) is an illustrative or an exhaustive list; thirdly, whether a measure which prohibits one, several or all means of supply is to be considered as a limitation "in the form of [a] numerical quota"; and finally, in this case, whether a limitation on some of the services covered by a committed sector or sub-sector, is to be considered as a limitation "in the form of [a] numerical quota".

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[310] We note that where the online mode of delivery is concerned (i.e. through the Internet), the Panel did not analyse if at the time when the GATS was signed, its authors could not have been aware of the fulgurant development of Internet technology in the future. See Chapter I.5.3.

Concerning the first point, the Panel considered that “service suppliers” covers “any person that supplies a service”. Then, the list of limitations in Article XVI:2(a) is an exhaustive one. Concerning the third point, the Panel notes that the United States, although it has not inscribed any limitation to gambling services in its schedule, nevertheless maintains and enforces laws that prohibit the supply by remote means of gambling and betting services. By so doing, it limited to zero the number of service suppliers in the sector to which the relevant market access commitment had been made – in the words of Article XVI:2(a) of the GATS, it imposed a “limitation on the number of service suppliers in the form of [a] numerical quota”. Regarding the fourth issue, the Panel judged that if one, several or all means of delivery cross-border are prohibited, the opportunities for foreign suppliers using those means of delivery to supply services cross-border to gain access to foreign markets are clearly reduced. The Panel was of the view that such a prohibition 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.

(b)Subparagraph (c)

In order to examine the conformity of the U.S. measures with this subparagraph, the Panel analyzed if the limitations were “expressed […] in the form of a quota”; if such limitations concerned “service operations” or “service output”; if they referred to all or part of the schedules commitment; and if they concerned one, several or all means of delivery under mode 1.

Similarly to the analysis on subparagraph (a) of Article XVI (2), the Panel answered that the maintenance and enforcement of laws that prohibit the supply by remote means of a committed sector or sub-sector limits to zero the number of service operations in the sector or sub-sector for which the Member has made a commitment, imposing a “limitation on the total number of service operations ... expressed ... in the form of quotas” contrary to Article XVI:2(c) of the GATS. To the second question, the Panel answered that “service operations” means activities comprised in the production of a service, and “service output” means the result of the production of the service. Then, it noted that a Member does not respect its GATS market access obligations under Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector or sub-sector. Finally on this point, it considered that if one or several mean(s) of delivery cross-border are prohibited, services operated through one or more of these means of delivery or services that are outputted using one or more of these means of delivery will be limited and such a limitation results in a "zero quota" on one or more or all means of delivery include in mode 1, which is contrary to Article XVI (2) (c).

(iii)Application of the legal standard to the facts of the case – the measure at issue

(a)The Panel's view

As to the concrete measures at issue, the Panel decided to confine its analzsis of GATS violations to three U.S. federal laws (namely the Wire Act, the Travel Act and the Illegal Gambling Business Act) and to the laws of eight U.S. states (namely, Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah).

•*The Wire Act*

As we have previously mentioned, the Wire Act prohibits in its relevant part interstate or foreign trade with gambling services. It concerns suppliers of "betting and wagering" services, therefore "service suppliers" within the meaning of Article XVI:2(a). For the Panel, the Wire Act can also be read to concern the treatment of services operations or service output within the meaning of Article XVI:2(c), since the Act effectively prohibits the supply of betting or wagering services through the use of a wire communication facility.

In the Panel's view, the Wire Act prohibits the use of at least one or potentially several means of delivery included in mode 1 (telephone, Internet[311] etc.) and it contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2 (a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c). Therefore, since the U.S. has made

[311] Although the Act refers originally to "wire" communication, several U.S. courts have interpreted that it applies to Internet communications, too. See for example US v Jay Cohen (260 F.3d 68, 2001) and People ex rel. Vacco v World Interactive Gaming Corp., (714 N.Y.S.2d 844, N.Y. Sup. Ct., 1999.

a commitment in its schedule not to maintain such limitations, this Act was considered inconsistent with Article XVI:1 and Article XVI:2.

•*The Travel Act*

The Travel Act prohibits travel in interstate or foreign commerce or the use of mail or any facility in interstate or foreign commerce, with the intent to: distribute the proceeds of any "unlawful activity"; commit any crime of violence to further any "unlawful activity"; or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any "unlawful activity". "Unlawful activity" is defined, *inter alia*, as any business enterprise involving gambling in violation of the laws of the state in which they are committed or of the United States. It may be the case that some state laws prohibit a "business enterprise involving gambling". In such cases, a "business enterprise involving gambling" in contravention of the relevant state laws would also be contrary to the Travel Act if such a business enterprise entails the supply of gambling and betting services by "mail or any facility" provided that the other requirements in subparagraph (a) of the Travel Act have been met.

For the Panel, the Travel Act refers to service suppliers within the meaning of Article XVI:2(a). It can also be read to concern the treatment of services operations or service output because it effectively prohibits the supply of gambling services through mail or "any facility", that is by telephone and Internet. Therefore, the Panel considered that the Travel Act also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

Under the Travel Act (when read together with the relevant state laws), service suppliers seeking to supply gambling and betting services through the mail and potentially all other means of delivery included in mode 1 are prohibited from doing so. Further, services operations and service output through the mail and perhaps all other means of delivery included in mode 1 are also prohibited under this Act (when read together with the relevant state laws). Accordingly, the Panel considered that the Travel Act contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota " within the meaning of Article XVI:2(c). Therefore, since it was found that the U.S. had made a commitment in its schedule not to maintain such limitations, the Travel Act was considered inconsistent with Article XVI:1 and Article XVI:2.

•*The Illegal Gambling Business Act*

This Illegal Gambling Business Act (IGBA) prohibits the conduct of businesses that fall within the definition of an "illegal gambling business"[312]. A gambling business is defined as "illegal" under the Act if it violates the law of a state (or political subdivision) of the United States. It effectively prohibits the supply of gambling and betting services through at least one and potentially all means of delivery included in mode 1.

This Act refers to service suppliers, in particular those who conduct, finance, manage, and supervise, direct or own all or part of an illegal gambling business. Therefore, the Panel noted that this Act concerns "service suppliers" within the meaning of Article XVI:2(a). The Illegal Gambling Business Act can also be read to concern the treatment of services operations or service output because it effectively prohibits businesses that fall within the definition of an "illegal gambling business". Therefore, the Panel considered that the Illegal Gambling Business Act also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

The Panel considered that, because it amounts to a "zero quota", the Illegal Gambling Business Act contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c). Since the U.S. have scheduled no limitations insofar gambling in concerned, the Panel concluded that the Illegal Gambling Business Act is inconsistent with Article XVI:1 and Article XVI:2.

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[312] "(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
(b) As used in this section –
(1) 'illegal gambling business' means a gambling business which –
(i) is a violation of the law of a State or political subdivision in which it is conducted;
(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."

We note that at the time of the *US Gambling* litigation, the law prohibiting online gambling – the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) – had not yet been passed[313].

•*State Laws*

Out of the eight state laws examined by the Panel, only four were, in its view, inconsistent with the GATS, because they were directed at "service suppliers", "service operations" or "service output", limiting the supply of gambling services through mode 1 to a "zero quota". Those laws are from Louisiana (Section 14:90.3 of the La. Rev. Stat. Ann.[314]), Massachusetts (Section 17A of chapter 271 of Mass. Ann. Laws[315]), South Dakota (§§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws[316]), and Utah (Section 76-10-1102 of the Utah Code Ann.[317]).

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[313] For a comment, see GALE Dana, "The Economic Incentive behind the Unlawful Internet Gambling Enforcement Act", 2006, available at SSRN: http://ssrn.com/abstract=942689.

[314] "E. Whoever designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server providing a Home Page, Web Site, or any other product accessing the Internet, World Wide Web, or any part thereof offering to any client for the primary purpose of the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit shall be fined not more than twenty thousand dollars, or imprisoned with or without hard labor, for not more than five years, or both.
I. ... The provisions of this Subsection shall not exempt from criminal prosecution any telephone company, Internet Service Provider, software developer, licensor, or other such party if its primary purpose in providing such service is to conduct gambling as a business."

[315] "Whoever uses a telephone or, being the occupant in control of premises where a telephone is located or a subscriber for a telephone, knowingly permits another to use a telephone so located or for which he subscribes, as the case may be, for the purpose of accepting wagers or bets, or buying or selling of pools, or for placing all or any portion of a wager with another, upon the result of a trial or contest of skill, speed, or endurance of man, beast, bird, or machine, or upon the result of an athletic game or contest, or upon the lottery called the numbers game, or for the purpose of reporting the same to a headquarters or booking office, or who under a name other than his own or otherwise falsely or fictitiously procures telephone service for himself or another for such purposes, shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year; provided, however, that this section shall not apply to use of telephones or other devices or means to place wagers authorized pursuant to the provisions of section 5C of chapter 128A."

[316] "22-25A-8 Establishment of internet gambling business prohibited.
Except as provided in § 22-25A-15, no person may establish a location or site in this state from which to conduct a gambling business on or over the internet or an interactive computer service.
22-25A-9 Violation if gambling originates or terminates in state -- Each bet a separate violation.
A violation of § 22-25A-7 or § 22-25A-8 occurs if the violation originates or terminates, or both, in this state. Each individual bet or wager offered in violation of § 22-25A-7 or from a location or site that violates § 22-25A-8 constitutes a separate violation. "

[317] "(1) A person is guilty of gambling if he:
(a) participates in gambling;
(b) knowingly permits any gambling to be played, conducted, or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part; or
(c) knowingly allows the use of any video gaming device that is:
(i) in any business establishment or public place; and
(ii) accessible for use by any person within the establishment or public place.

The Panel concluded that the cumulative effect of the Wire Act, the Travel Act (when read together with the relevant state laws), the Illegal Gambling Business Act (when read together with the relevant state laws), was to prohibit all means of delivery included in mode 1 for all gambling and betting services that are sought to be supplied by Antigua.

(b)The Appellate Body's view

The Appellate Body partially reversed the Panel's findings in relation to the U.S. laws constituting the measure at issue. It considered that certain general statements made by Antigua were insufficient to permit the Panel to proceed on the basis that Antigua had established a *prima facie* case regarding the eight state laws identified by the Panel[318].

In its view, Antigua established its *prima facie* case of inconsistency with Article XVI, only with respect to the Wire Act, the Travel Act, and the IGBA. In contrast, with respect to the state laws the Appellate Body considered that Antigua failed to identify how these laws operated and how they were relevant to its claim of inconsistency with Article XVI:2.

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(2) Gambling is a class B misdemeanor, provided, however, that any person who is twice convicted under this section shall be guilty of a class A misdemeanor."

[318] The Appellate Body cited as example Antigua's second written submission, which contains a general discussion of state gambling laws, with footnote citations to, inter alia, a report by the United States General Accounting Office and a law review article (citing United States General Accounting Office, Internet Gambling: An Overview of the Issues (December 2002), and Antonia Z. COWAN, "The Global Gaming Village: Interstate and Transnational Gambling", Gambling Law Review, Vol. 7, pp. 255-257, submitted by Antigua to the Panel). The Appellate Body held that law review article contains a discussion of state regulation of gambling, with reference, primarily in footnotes, to the laws of several states, including California, Hawaii, Illinois, Louisiana, and South Dakota. The Panel merely followed this trail of footnote references, and then compared the statutes cited in the footnotes of that law review article with Antigua's panel request to determine whether Antigua had identified provisions of those statutes and, thereby, to ascertain which state law Antigua intended to include as part of its claim.318 This led the Panel to conclude that certain laws of Louisiana and South Dakota were challenged by Antigua under Article XVI. Then, the Appellate Body considered that the Panel had engaged in a similar multi-step analysis in seeking to discern some connection between the laws of Massachusetts, New Jersey, New York, and Utah, and Antigua's references in its written submissions and various exhibits (Panel Report, paras. 6.228 and 6.244). However, the Appellate Body was "unable to detect any connection, however tenuous, between the relevant laws of Colorado and Minnesota, on the one hand, and the allegation of inconsistency with Article XVI:2, on the other hand. Although Antigua did submit these laws in its exhibits, we see no arguments in any submissions that would have clearly informed the Panel and the United States how those two laws would form part of Antigua's claims under Article XVI:2(a) and XVI:2(c). It follows that, without providing a stronger link between the particular state law being challenged and the obligation alleged to have been infringed, Antigua failed to make a prima facie case with respect to any of these eight state laws" (Appellate Body Report on US Gambling, para. 153).

I.5.2.3.2.Critique

US Gambling was the first dispute in which the WTO adjudicating bodies interpreted the market access obligation laid down under Article XVI GATS. As we have seen, both the Panel and the Appellate Body put forward, although in an indirect way, some elements that could shed light on what one author called “the thorniest systemic issue in the GATS today”[319], i.e. the relationship between its Articles VI, XVI, and XVII.

The correlation between these provisions has been discussed in several studies analyzing the outcome of the *US – Gambling* Reports. While most scholars[320] disapproved with the DSU arguments in this respect, one commentator[321] considered that the Appellate Body correctly - although not laudatory - interpreted Article XVI GATS by examining the measures at issue under this provision rather than Article VI GATS.

(i)Relationship between Article XVI and Article VI: Market Access Restriction or Domestic Regulation?

As it was said, an important difference between Article XVI and Article VI is that the first covers quantitative limitations, whereas the latter deals with domestic regulatory measures having a qualitative character.[322]

In the United States’ view, the measures at issue “represent[ed] domestic regulation limiting the characteristics of supply of gambling services, not the quantity of services or suppliers”, or else, they were designed “to restrict qualities of service activities rather than quantities of suppliers, operations, or output”[323]. According to the United States, notwithstanding measures falling under Articles VI or XVI GATS, the measures at stake fall under the general right of

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[319] DELIMATSIS Panagiotis, "Don’t Gamble with GATS", supra, p.1061
[320] See especially PAUWELYN Joost, *Rien Ne Va Plus: Distinguishing Domestic Regulation from Market Access in GATT and GATS*, supra, pp. 131-170, ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, pp. 117-148. See also KRAJEWSKI Marcus, National Regulation and Trade Liberalization in Services, supra, pp. 417-447.
[321] DELIMATSIS Panagiotis, *Don’t Gamble with GATS,* supra, p.1061.
[322] Appellate Body Report, US – Gambling, para. 250. This distinction appears notably in the S/L/92 document, para. 11. As we have prevosly seen, qualitative limitations can, of course, have a quantitative effect, but this does not automatically make them market access limitations.
[323] Appellate Body Report on US – Gambling, para. 122.

Members to regulate the supply of services within their territories in order to meet national policy objectives.

The Panel examined thus the relationship between Articles XVI and VI which it regarded as context in order to determine the scope of Article XVI obligations. In a finding not reassessed by the Appellate Body, the Panel suggested that "*Articles VI:4 and VI:5 on the one hand and XVI on the other hand are mutually exclusive*".[324]

Several authors[325] notably argued that the Panel was "erroneously led to the conclusion that Articles VI and XVI are mutually exclusive". They noted that several discussions in the Working Party on Domestic Regulation as well as negotiating history in general would not support the Panel's view. "While the desire not to have an overlap of these two provisions is obvious, no Member or WTO body has ever opted for a mutual exclusivity of these provisions. What is rather acknowledged among WTO Members is that Articles VI and XVI are *complementary*, since a measure at stake can raise issues relating to both of these provisions[326]. For instance, in the case of a domestic licensing system, the quantitative restrictions (e.g., number of service suppliers) or its discriminatory effects (e.g., different procedures for foreign service suppliers) will be assessed under Articles XVI and XVII, respectively, assuming commitments have been undertaken, while its regulatory/procedural elements pertaining to transparency, administration, or objectivity will be evaluated under Article VI. Hence, an adjudicating body may be required to evaluate a measure first under

[324] See Panel Report on US – Gambling, para. 6.305.
[325] See DELIMATSIS Panagiotis, MOLINUEVO Martin, Article XVI GATS, in WOLFRUM Rüdiger, STOLL Peter-Tobias, FEINÄUGLE Clemens, WTO – Trade in Services, Martinus Nijhoff Publishers, 2008, p.394; DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1069.
[326] DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.14: "Indeed, the United States was correct to underline in its appeal that "*the text of Article VI does not support the Panel's interpretation of mutual exclusivity. Specifically, it does not state that any measure covered by Articles VI:4 and VI:5 is automatically exempt from any other Article of the GATS*". See United States' appellant's submission in the *US – Gambling* case, paras. 132-133. An interpretation that would opt for the complementarity of these provisions is also confirmed by Article VI:1, which provides that the Members shall ensure that, in sectors where they undertook specific commitments, the administration of *all measures of general application affecting trade in services* is reasonable, objective and impartial; in other words, if a Member decides to liberalise a service sector by making a commitment in the market access column of its Schedule, any measure which falls under Article XVI will be also scrutinised under Article VI with respect to its administration. Or, alternatively, the measure of the Member at hand may comply with its commitments as to Article XVI, but the administration of the same measure may still raise a question of incompatibility with Article VI. One can expect that the Appellate Body will seize the first opportunity that it will appear in order to reverse this erroneous finding".

Article XVI and then under Article VI. It follows that no such thing as mutual exclusivity exists between the two provisions”.

Concerning the qualification of the U.S. measures as “market access restrictions” or as “technical standards”, another commentator[327] noted that the measures at issue should have been qualified as technical standards because they fall under Article VI.

This author’s main assertions were the following: the U.S. laws are domestic regulations that, on their face, apply to both foreign and U.S. providers, and are imposed in relation to the *quality* of the service supplied. They would therefore regulate *how* certain gambling services must be performed, namely by prohibiting their remote supply. Arguably, the aim is to fulfill non-protectionist domestic policy objectives (concerns of money laundering, fraud, organized crime and compulsive and underage gambling). The U.S. laws do not put a *maximum limitation* on gambling services in the United States. Rather, they impose *minimum requirements* as to how those services must be supplied. Therefore, what the U.S. laws essentially do is that “they regulate the *way* in which gambling services must be *performed*”. For this author, a domestic regulation prescribing *how* gambling services must be performed does not become a prohibited market access restriction simply because it has the *effect* of restricting the number of services or service suppliers that can supply the U.S. market.

Concerns related to the confusion between Article XVI and Article VI are shared by another scholar, who argues that “extending the *per se* prohibition of Article XVI to measures that have an *effect* equivalent to a quota (whether it be a quota equal to, or greater than, zero) runs a serious risk of *de facto* banning any type of domestic regulation with a restrictive effect on the flow of services, thus tilting the balance in favour of multilateral liberalization to the detriment of domestic regulatory prerogatives”[328].

[327] See PAUWELYN Joost, Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS, supra, p. 162. “The US gambling laws at issue in the US – Gambling dispute were better defined as technical standards subject to Articles VI:4/5 and XVII. They are not market access restrictions per se prohibited under Article XVI.”
[328] See ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, p.141.

In the opposite sense it was maintained[329] that a total prohibition on the supply of a service can never be deemed a measure falling under Article VI GATS[330]. The arguments for this assertion can be synthesized as follows:

First, none of the U.S. laws at issue define minimum technical requirements that a service supplier should conform to or rules according to which remote gambling must be performed in order for the supplier to be *allowed* to supply gambling and betting services. On the contrary, the United States' federal laws at stake *prohibit* in essence the remote supply of gambling services "A blanket prohibition can never be a standard, as a technical standard usually sets *technical* requirements that *at least one* supplier can potentially meet. However, *no* service supplier can meet a technical standard that provides for an outright prohibition because, by definition, everybody is prohibited from supplying services in a cross-border manner"[331]. It would be inconceivable to qualify as technical standard a measure which does not define or describe the way of supplying a gambling service in a remote manner, but it merely *excludes* this mode of supplying gambling and betting services.

Second, a prohibition that limits the potential service suppliers to *zero* can never be intended to *ensure the quality* of the service. Quality is usually connected with minimum requirements which, if satisfied, ensure the quality of the services at issue and hence allow the interested supplier to provide its services.

Another critique has focused on the relevance of the *objective* of the measure at issue when distinguishing between Articles XVI and VI. In particular, it was stated that a measure which serves a legitimate objective such as the United States' blanket prohibition of remote gambling can never be subject to the rigid approach of Article XVI[332].

This critique was however disavowed by other commentators[333], who noted that nothing prevents a quantitative restriction from equally aiming at serving a legitimate objective[334].

[329] See DELIMATSIS Panagiotis, Don't Gamble with GATS, supra.
[330] See DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1071
[331] Ibidem.
[332] See ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, supra, pp. 135-146.
[333] See notably DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1072.
[334] The example he uses is the case of a limitation of the TV channels to ten due to a lack of frequencies or in order to ensure the quality of the transmission. This example shows that the quantitative characteristic of a

(ii)Relationship Between Article XVI And XVII: Is There A Need To Schedule Non-Discriminatory Market Access Barriers?

The relationship between Article XVI and Article XVII GATS is not explicitly clarified in the GATS[335], but it was addressed in the Scheduling Guidelines[336]. The WTO adjudicating bodies followed in *US – Gambling* the interpretation advanced by the Scheduling Guidelines, adopted by the Council for Trade in Services in 2001. Their approach is however questionable, for the reasons we will examine below.

As we have seen, Article XVI GATS is deemed to encompass market access-restrictive quantitative[337] measures. In its second paragraph, Article XVI enumerates six types of limitations on market access which are outlawed unless Members schedule them. According to the Scheduling Guidelines, the absence of any of the limitations listed in Article XVI:2 would mean granting full market access. However, as one author argues[338], other textual elements lead to the opposite conclusion.

First, according to this commentator, footnote 8 to Article XVI implies, *a contrario*, that there are other measures which can inhibit market access, but which are not necessarily mentioned in Article XVI:2, such as restrictions on capital movements with respect to mode 2 and 4.

Second, in this author's view Article XVIII appears to acknowledge that there are measures other than those subject to scheduling under Article XVI (including, but not limited to, measures relating to qualifications, standards, or licensing) which can still affect market access. Thus, both of these provisions would appear to support the view that the absence of the limitations listed in Article XVI in a Member's Schedule does not *ipso facto* mean that

measure does not necessarily imply that this measure is protectionist. See DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1072.

335 With the exception of an oblique reference in Article XX.2 GATS which reads: "Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well".

336 Paragraph 8 of the Scheduling Guidelines reads: "The list [in Article XVI:2] is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII). In other words, all measures falling under any of the categories listed in Article XVI:2 must be scheduled, whether or not such measures are discriminatory according to the national treatment standard of Article XVII".

337 See Appellate Body Report, US – Gambling, para. 214. As the Appellate Body pointed out in para. 225, "…the focus is on limitations relating to numbers, or, put differently, to quantitative limitations".

338 DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1064.

this Member allows for full market access. This interpretation, the author argues, would also be in line with the principle of progressive liberalisation as well as Members' right to regulate[339], and would also be corroborated by the *US – Gambling* case law[340].

The question whether the trade restrictions prohibited by Article XVI are aimed at *all* services and service suppliers, irrespective of their origin (non-discriminatory quantitative restriction) or if, on the contrary, they target only foreign services and service suppliers (discriminatory quantitative restriction) was also highly debated.

One author[341] noted that Article XVI extends beyond any conventional notion of access for foreign services suppliers (tariff bindings in GATT) to embrace all policies of quantitative nature which restrict access to a market *even in a non-discriminatory manner* (extending the multilateral trade disciplines into the area of domestic regulations, especially competition policy). The provision on national treatment, on the other hand, in lieu of distinguishing between border and domestic constraints and dealing with internal taxation and regulation only (as is the case in the GATT), embraces all policies (both border and non-border) affecting the supply of services which may discriminate – whether *de facto* or *de jure* – against foreign services or foreign service suppliers[342].

Thus for this author, Article XVI GATS is deemed to encompass for the most part *non-discriminatory* quantitative measures[343]. Therefore, it is submitted that the Panel and Appellate Body were right to examine the relevant U.S. laws in the light of Article XVI.

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339 See also Panel Report, US – Gambling, paras. 6.313-6.317.
340 DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1065: "In para. 6.304 of its Report, the Panel implicitly recognised that there are indeed measures not covered by Article XVI GATS that can involve a restriction on market access by stating: "Domestic regulations falling within the scope of Articles VI:4 or VI:5 of the GATS are, nonetheless, likely to *have an effect on market access* to the extent that services and service suppliers from other WTO Members which do not, or cannot, comply with such regulations will not have access to the relevant Member's market." In the US – Gambling dispute, both the Panel and the Appellate Body did not provide with a clear answer as to the question whether a full market access commitment implies an unlimited market access in a given sector. Both adjudicating bodies, however, emphasised that in the case of a full market access commitment, a Member shall refrain from maintaining or adopting any of the measures listed under Article XVI:2 GATS".
341 DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1062.
342 DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1062.
343 According to this author, "That Article XVI covers both discriminatory and non-discriminatory measures is already clarified in the subparagraphs of Article XVI (e.g., subparagraph (a) refers to the number of service suppliers and not only to the number of foreign service suppliers. Cf. with subparagraph (f) that expressly covers only foreign capital), but it is made more explicit in the 2001 Scheduling Guidelines". See DELIMATSIS Panagiotis, Don't Gamble with GATS, supra, p.1063. For the same conclusion, see also MATTOO Aaditya,

This view is not shared by other scholars[344], who argue that the objective function of Article XVI is to cover measures concerning *exclusively foreign* services or service suppliers. "Article XVI GATS covers only foreign suppliers and is nothing but a list of violations of Article XVII GATS. It is probably the case that the measures included therein are the most frequent violations of national treatment. Consequently, the negotiators, by including these measures in Article XVI GATS, wanted to signal their desire to, in principle, abolish them. The suggested approach requires sequencing Article XVI GATS to Article XVII GATS: assuming a WTO Member has not granted national treatment to foreign suppliers, it cannot impose on them any of the measures featured in Article XVI GATS, unless it has indicated so in its schedule of concessions"[345].

The driving force of this approach can be synthesized as follows:

First, there are textual elements[346] embodied in Article XVI:1 which clarify that each Member shall accord services and service suppliers *of any other Member* (as opposed to its own, domestic services or service suppliers). The second textual element is to be found in the phrase "[w]ith respect to market access through the modes of supply *identified in Article I*". The modes of supply identified in Article I:2 of the GATS deal with services supply by *foreign* suppliers only.

Second, to conceive Article XVI GATS as an instrument to regulate market access for domestic services and services suppliers would go against the very nature of the GATS[347], which is the agreement to liberalize trade in services. Through its many provisions, foreign services and services suppliers will be granted market access to markets that they could not, in principle, access before the entry into force of the GATS. Article XVI GATS is one of the provisions regulating *liberalization commitments*. Domestic services and services suppliers will access their national market under the conditions specified in domestic legal instruments,

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MFN and the GATS, in COTTIER Thomas, MAVROIDIS Petros C. (editors), Regulatory Barriers and the Principle of Non-Discrimination, Ann Arbor:University of Michigan Press, 2000, pp. 51–99.
[344] MAVROIDIS Petros C., Highway XVI Re-Visited: The Road From Non-Discrimination To Market Access In GATS, 1–23.; MARCHETTI Juan A., MAVROIDIS Petros C., Walking the Tightrope between Domestic Policy and Globalisation: Market Access, Discrimination and Regulatory Intervention under the GATS, Mimeo, (2006).
[345] MAVROIDIS Petros C., Highway XVI Re-Visited, supra, p.9
[346] MAVROIDIS Petros C., Highway XVI Re-Visited, supra, p.10
[347] Ibidem.

such as, for example, the national constitution, state laws, bar regulations etc. The very title of Part III (covering Articles XVI, XVII, and XVIII GATS) is Specific Commitments. *Commitments are made to foreign nations and not to domestic suppliers*. Thus, it would be "logically unthinkable to talk of trade liberalization – that is, an international transaction par excellence – and, at the same time, understand this term to cover market access for nationals as well"[348].

Third, from a policy-perspective, this author argues that trade liberalization will indeed be served were one to restrict the applicability of Art. XVI GATS to foreign services and services suppliers only: the limitations indicated in a schedule of concessions will apply to foreign services suppliers only[349].

It is therefore submitted that non-discriminatory trade restrictions do not come under the scope of Article XVI and therefore *do not need to be scheduled under this article*. To prevent sceptics from arguing that such absence of scheduling necessarily leads to absence of transparency and, thus, to increased transaction costs, the author points out to Article III GATS, which obliges WTO Members to publish promptly all relevant measures of general application which pertain to or affect the operation of this Agreement[350].

While we find these arguments to be founded (and agree that a "*market access*" commitment in an *international* agreement would more logically concern foreign actors aspiring to enter the domestic market of the State that made the commitment), we refer the reader to Chapter I.6 for an alternative approach to the solving of *US Gambling*.

[348] MAVROIDIS Petros C., Highway XVI Re-Visited, supra, p.11.
[349] MAVROIDIS Petros C., Highway XVI Re-Visited, supra, p.12.
[350] MAVROIDIS Petros C., Highway XVI Re-Visited, supra, p.15.

I.5.2.4.Article XIV – General Exceptions

The U.S. last-resort defense was based on the justifications provided in Article XIV[351]. It is interesting to note that the United States did not develop its defense under Article XIV until it made its second written submission, and it only affirmatively invoked Article XIV during the Panel's second substantive meeting with the parties in response to a question asked by the Panel, in other words when it had become clear that its other defenses could fail and that its measures could be declared inconsistent with its commitments under the GATS[352].

This was the first occasion on which Article XIV of the GATS had been invoked by a Member in a WTO dispute; therefore the Panel was unable to avail itself of prior jurisprudence under the GATS for possible guidance.

Support was however found in *EC – Bananas III*, where the Appellate Body had confirmed that jurisprudence under the GATT 1994 could be relevant for the interpretation of analogous provisions contained in the GATS[353]. Given the textual similarity (but not identitiy) between Article XX of the GATT 1994 and Article XIV of the GATS, and the similar purposes that

[351] The relevant paragraphs of Article XIV read:
"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; 5
(footnote original) 5 The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
[…] (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; [...]"
[352] An interesting discussion, however exceeding largely the scope of this research, is related to the general US policy to leave the broadest possible free flow of content within and across international borders. Rooted in the First Amendment to the US Constitution on free speech, this phylosophy makes the US authorities more reluctant to elaborating and invoking the very complex and structured list of restrictions called "public order" (from "ordre public" in French) or "public policy". See WUNSCH-VINCENT Sacha, "The WTO, the Internet and Trade in Digital Products", Hart Publishing, 2006, p.105
[353] Appellate Body Report on *EC – Bananas III*, para. 231

these Articles are designed to serve, the Panel considered that GATT/WTO jurisprudence in relation to the former may be relevant and useful in the interpretation of the latter.

We underline however that Article XX GATT and Article XIV GATS are not identical in content. Wisely, Article XIV GATS departs from Article XX GATT and uses both the terms of "*public morals*" and "*public order*" [354].

For the US, because the measures challenged by Antigua serve important policy objectives that all within Article XIV of the GATS, they should benefit from the exceptions of Article XIV(a) and Article XIV(c). Moreover, such measures were applied in a way that complies with the requirements of the chapeau of Article XIV of the GATS.

In relation to its defense under Article XIV(a), the United States argued that the Wire Act, the

Travel Act and the Illegal Gambling Business Act were necessary to protect "public morals" and "public order" within the meaning of Article XIV(a) because, *inter alia*, remote gambling is particularly vulnerable to use by minors who are prohibited from gambling or can be used for laundering the proceeds of organized crime. Antigua questioned the United States' argument that its measures prohibiting the remote supply of gambling and betting services are necessary to protect public morals and public order on the basis, *inter alia,* that the United States is a significant consumer of gambling and betting services and that state-sanctioned gambling opportunities are available in 48 states.

With respect to its defense under Article XIV(c), the United States argued that the Wire Act, the Travel Act and the Illegal Gambling Business Act serve as law enforcement tools to secure compliance with other WTO-consistent U.S. laws, in particular, state gambling laws and criminal laws relating to organized crime.

I.5.2.4.1.DSU Findings

In its analysis of GATS Article XVI, the DSU analyzed the following aspects: (i) whether these laws could be provisionally justified under Article XIV(a) and Article XIV(c), the two

[354] See MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, "The World Trade Organization. Law, Practice and Policy", supra, p.638.

provisions specifically invoked by the United States; and, if so, (ii) whether the United States had successfully met the requirements of the chapeau of Article XIV with respect to these measures.

(i)Provisional justification under Article XIV(a)

(a)The Panel's view

Pursuant to the text of Article XIV(a), in determining whether a challenged measure is provisionally justified under this Article, the Member invoking it must demonstrate two elements, namely:

(a) the measure must be one designed to "protect public morals" or to "maintain public order"; and

(b) the measure for which justification is claimed must be "necessary" to protect public morals or to maintain public order.

•Measure … to "protect public morals" or to "maintain public order

The Panel first examined the meaning of the terms "protect public morals" and "maintain public order" in an effort to understand their scope, in accordance with the ordinary meaning of the words when read in their context and in light of the object and purpose of the GATS and the WTO Agreement.

In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Furthermore, as the Appellate Body has stated on several occasions, in applying similar societal concepts, Members have the right to determine the level of protection that they consider appropriate[355]. Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, such statements were considered also valid with respect to the protection of public morals and public order under Article XVI of the GATS.

[355] Appellate Body Reports on Korea – Various Measures on Beef , para. 176 and EC – Asbestos, para. 168

More particularly, it was considered that Members should be given some scope to define and apply for themselves the concepts of “public morals” and “public order” in their respective territories, according to their own systems and scales of values.

However, the principle of effective treaty interpretation required the Panel to give an interpretation of the terms “public morals” and “public order” in the context of Article XIV(a), in order to apply them to the facts of this case.

After examining dictionary definitions, the Panel concluded that the term “public morals” denotes “standards of right and wrong conduct maintained by or on behalf of a community or nation”[356]. Then, the term “public order” was interpreted as referring to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, *inter alia* , to standards of law, security and morality[357].

Based on the dictionary definitions and taking into account the clarification added by the drafters of the GATS in footnote 5, the Panel believed that “public morals” and “public order” are two distinct concepts under Article XIV(a) of the GATS. Nevertheless, to the extent that both concepts seek to protect largely similar values, some overlap may exist.

After using also supplementary means of interpretation (other jurisdictions judgments[358], behavior of other WTO Members[359], and historical examples[360]) and after examining evidence related to the elaboration and scope of the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act[361], the Panel concluded that

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[356] US Gambling, para.6.465
[357] US Gambling, para.6.467
[358] The panel cited ECJ Schindler and Anomar cases, that we will discuss in detail in Part II.
[359] Examples of WTO Members that have relied on "public moral" grounds to justify certain restrictions include Israel and the Philippines. In this regard, the 1999 Trade Policy Review of Israel observed that Israel maintained an import prohibition on "[t]ickets or publicity items for lottery or gambling" and identified the reason for this prohibition as "[p]ublic morals." (See WTO Secretariat, Trade Policy Review – Israel, WT/TPR/S/58, table III.8 (1999). Similarly, the 1999 Trade Policy Review of the Philippines listed limitations on foreign ownership of gambling operations (e.g., racetracks) under a heading that referred, inter alia, to limitations "for reasons of ... risk to health and morals (WTO Secretariat, Trade Policy Review - The Philippines, WT/TPR/S/59, table III.11).
[360] In the context of the Economic Committee of the League of Nations, where a draft convention had been put forward that included an exception for “[p]rohibitions or restrictions imposed for moral or humanitarian reasons” See Economic Committee of the League of Nations, Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement, League of Nations Doc. C.E.1.22. 1927 II.13. pp. 10, 15 (1927).
[361] The Panel examined references made to the threat of money laundering, organized crime, fraud and risks to children (i.e underage gambling) and health (i.e. pathological gambling) that are associated with Internet

measures prohibiting gambling and betting services, including the supply of those services by the Internet, fall within the scope of Article XIV(a) as they are enforced in pursuance of policies, the object and purpose of which is to "protect public morals" or "to maintain public order".

•*Measures "necessary" …*

In *Korea – Various Measures on Beef,* the Appellate Body interpreted the word "necessary" as not being limited to that which is "indispensable" or "of absolute necessity" or "inevitable"[362], but it did not give indications as to what this means exactly.

In order to assess the necessity of the measures at issue, the Panel considered (a) the importance of the interests or values that these Acts are intended to protect; (b) the extent to which these Acts contribute to the realization of the ends respectively pursued by these Acts; and (c) the respective trade impact of these Acts.

Basing its arguments on Congressional statements and Attorney General's testimonies, it appeared clear to the Panel that the interests and values protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) serve very important societal interests that can be characterized as "vital and important in the highest degree"[363].

However, having said that, the Panel reminded that these interests – to protect society against the threat of money laundering, organized crime, fraud and risks to children (i.e underage gambling) and health (i.e. pathological gambling) – also exist in the context of the non-remote supply of gambling and betting services. Yet, in contrast to its treatment of the remote supply

gambling in a 1961 report by the House of Representative on the Wire Act, in statements of the Attorney General with respect to the Travel Act, 2003 hearings before the Subcommittee on Crime, Terrorism and Homeland Security and in Congress statements referring to the Illegal Gambling Business Act. See US Gambling paras.6.482 – 6.485.

[362] "Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is 'necessary' taken to mean as "making a contribution to". We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". Appellate Body Report on Korea – Various Measures on Beef, para. 161.

[363] Similarly to the characterization of the protection against a life-threatening health risk by the Appellate Body in EC – Asbestos (Appellate Body Report on EC – Asbestos, para. 172).

of gambling and betting services, the United States does not prohibit outright the non-remote supply of gambling and betting services[364].

As for the other two conditions (contribution to the ends pursued and trade impact), the Panel found without difficulties that the laws at issue sought to address concerns pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling, and had no doubt that these Acts have a significant restrictive trade impact.

•*Had the U.S. exhausted all GATS compatible alternatives?*

In examining whether a reasonably available WTO-consistent alternative measure existed, the Appellate Body in *Korea – Various Measures Affecting Beef* examined the means that had been used by Korea to address the prevention of fraudulent conduct in relation to the sale of other food products. Recalling this reasoning, the Panel considered that the only other relevant context to which reference has been made in this dispute is gambling and betting services supplied by non-remote means.

Therefore, the Panel compared the treatment of certain specific concerns (such as money laundering, fraud, health issues, underage gambling, and organized crime) with the treatment of similar concerns which arise in the case of non-remote supply of gambling services, and found that most of these concerns are *specific* to the remote supply of gambling and betting services. Therefore, the measures used by the United States to address its concerns with respect to money laundering, fraud, health and underage gambling in the context of the non-remote supply of gambling and betting services cannot be compared and examined as WTO-consistent alternatives that the United States could have used to address the specific concerns it has with regard to the remote supply of gambling and betting services.

A question raised in the literature was weather the United States had an *obligation to consult*[365] with Antigua before and while imposing its prohibition on the cross-border supply

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[364] "We acknowledge that there may be particular aspects associated with remote supply of gambling and betting services that may justify a difference in treatment as compared to the non-remote supply of such services. However, reference must be made to the evidence at hand to determine whether particular aspects associated with the remote supply of gambling and betting services will justify a prohibition, particularly in light of the tolerant attitude displayed in some parts of the United States to the non-remote supply of such services. We consider this issue in further detail below in our discussion of whether or not a WTO-consistent alternative is reasonably available to the United States".

of gambling and betting services. More specifically, because of the existence of a specific market access commitment with respect to cross-border trade of gambling and betting services, it was debated if the United States remained obliged to consider WTO-consistent alternatives, including those that may have been suggested by Antigua and other Members, before and while maintaining its prohibition on the cross-border supply of gambling and betting services.

According to the Panel, which "weighted and balanced" the elements found, "in rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative". As discussed further, this finding was however overturned by the Appellate Body, who ruled that consultations or negotiations were not an appropriate alternative to consider under the necessity test.

In conclusion on this point, the Panel considered that United States had not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) were "necessary" to protect public morals and/or public order within the meaning of Article XIV(a), although there was no doubt that such laws were designed so as to protect public morals or maintain public order.

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[365] Some authors argue that the circumstances in which there is a duty to negotiate in order to justify a measure under the GATS general exceptions remain unclear (See CONDON Bradly J., The Existence of a Duty to Negotiate in the General Exceptions of GATT and GATS, 2005, available at SSRN: http://ssrn.com/abstract=704749). Guidance on the duty to negotiate can be found in the GATT relevant jurisprudence; two Appellate Body decisions have found that failure to engage in inter-governmental consultations or negotiations resulted in measures being applied in manner that constituted arbitrary or unjustifiable discrimination under the GATT Article XX chapeau: US – Reformulated Gasoline and US – Shrimp. In both cases, the challenged measures were provisionally justified under paragraph (g) of GATT Article XX. It was argued that negotiation efforts in the Shrimp case were only relevant to determining whether the United States had discriminated between the countries around the Indian Ocean and the countries in the Americas and noted that negotiation efforts were only one of several factors that determined the outcome of this analysis, rather than a decisive factor (HOWSE Robert, The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, 27 Columbia Journal of Environmental Law 491 (2002). He argued that "there is nothing in the wording of the chapeau (or any other part of Article XX) to suggest that a nation must first secure agreement by WTO Members or any other nation before exercising its rights under Article XX(g)" (HOWSE Robert, The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate, supra, at 507).

(b)The Appellate Body's view

The Panel's findings described above were reversed by the Appellate Body. In doing so with respect to the "necessity" condition, the Appellate Body made two significant contributions to the interpretation of this requirement under Article XIV[366]. First, it clarified the standard of review to be applied by a WTO adjudicating body when confronting this issue (a panel must evaluate the "relative importance" of the interests or values furthered by the challenged measure; the contribution of the means used to the realization of the end sought; and the restrictive impact of the means used on international commerce[367]). Then, it also clarified the allocation of the burden of proof when an Article XIV defense is raised. Overturning the Panel's findings in this respect, the Appellate Body held that the original burden of proof rests with the responding party, which invokes an Article XIV defense. Assuming this one has made a *prima facie* case, the burden of proof shifts to the complaining party who will have to demonstrate that the use of another less restrictive measure could have been privileged. If the existence of such a measure is confirmed, the burden of proof will shift again to the party who invoked the Article XIV defense, who will now have to demonstrate that this measure was not reasonably available to it[368].

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[366] See MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, The World Trade Organization. Law, Practice and Policy, p.636

[367] We quote paras. 306-308 of the Appellate Body's US Gambling: "The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One 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.
A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available". The requirement, under Article XIV(a), that a measure be "necessary"—that is, that there be no "reasonably available", WTO-consistent alternative—reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. An alternative measure may be found not to be "reasonably available", however, 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".

[368] Paras. 309-311 of the Appellate Body Report on US Gambling: "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), this means that

(ii)Provisional justification under Article XIV(c)

(a)The Panel's view

The same reasoning as above was taken by the Panel in examining whether the measures at issue were or not justified under Article XIV (c). The Panel required that three elements be demonstrated by the Member who invokes Article XIV(c)[369], namely:

(a) the measure for which justification is claimed must "secure compliance" with other laws or regulations;

(b) those other "laws or regulations" must not be inconsistent with the WTO Agreement; and

(c) the measure for which justification is claimed must be "necessary" to secure compliance with those other laws or regulations.

Concerning the first point, the Panel noted that the U.S. Congress designed the Wire Act, the Travel Act and the Illegal Gambling Business Act in large part to serve as law enforcement tools to secure compliance with other WTO-consistent U.S. laws, namely, state gambling laws and criminal laws related to organized crime. The United States specifically referred to

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the responding party must show that its measure is "necessary" to achieve objectives relating to public morals or public order. In our view, however, 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. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. The WTO agreements do not contemplate such an impracticable and, indeed, often impossible burden. Rather, it is for a responding party to make a prima facie case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, 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 find that challenged measure "necessary" within the terms of Article XIV(a) of the GATS. 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 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 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."

[369] Based on the Appellate Body requirements in Korea –Various Measures on Beef, which framed the analysis under Article XX(d) of the GATT.

the Racketeer Influenced and Corrupt Organizations statute ("RICO statute"), the Organized Crime Control Act of 1970 findings that contain a definition of "organized crime", and an Attorney General Order, which also contains a definition of organized crime. After examining the Wire Act, the Travel Act and the Illegal Gambling Business Act, the Panel concluded that these three laws assist in enforcing the RICO statutes and securing compliance with its provisions.

Regarding the second point, with respect to the criminal laws relating to organized crime upon which the United States also seeks to rely in making its defense under Article XIV(c), Antigua had not questioned their WTO consistency. Therefore, since Members' laws are presumed to be WTO-consistent, the Panel considered that it is entitled to assume that these laws are WTO-consistent.

Finally, the necessity condition was also examined. The same criteria used in determining the necessity under Article XIV (a) were analyzed: the importance of the interests or values protected by the RICO statute; the extent to which the Wire Act, the Travel Act and the Illegal Gambling Business Act contribute to the realization of the end pursued; and the trade impact of the Wire Act, the Travel Act and the Illegal Gambling Business Act.

For the Panel it was again clear that the interests protected by the RICO statute are very important societal interests that can be characterized as "vital and important in the highest degree". Also, the measures at issue make a significant contribution to ensuring that local law enforcement efforts to enforce criminal laws against organized crime, including the RICO statute, are not undermined. As for the trade impact of those measures, it is uncontested that they are trade restrictive.

After weighting and balancing the arguments found, the Panel again concluded that the United States should have engaged in good faith bilateral or multilateral consultations and/or negotiations with Antigua when invited to do so, with a view to exploring whether there were any ways of meeting its concerns with regard to organized crime in a WTO-consistent manner. Having refused to do so, the United States could not demonstrate, in the Panel's view, that the measures at issue were "necessary" within the meaning of Article XVI (c).

(b)The Appellate Body's view

The U.S. appealed the Panel's finding under Article XVI (c). Since the Appellate Body had found that the Wire Act, the Travel Act, and the IGBA fall under paragraph (a) of Article XIV, it was not necessary for it to determine whether these measures are also justified under paragraph (c).

(iii)The chapeau of Article XIV

(a)The Panel's view

The United States has not been able, in the Panel's view, to provisionally justify the Wire Act, the Travel Act and the Illegal Gambling Business Act under Article XIV(a) nor under Article XIV(c) of the GATS. The Panel could have exercised judicial economy as to the justification under the chapeau of Article XIV. Instead, since important arguments have been made by the parties on certain key issues, the Panel decided to address them so as to assist the parties in resolving the underlying dispute in this case.

The chapeau - textually similar to the chapeau of Article XX of the GATT - requires that the measures in question be not *applied* in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.

The Panel started its analysis by referring to the relevant Appellate Body findings in *US – Gasoline*[370] and *US – Shrimp*[371]. In *US – Gasoline* it stated that the chapeau to Article XX of the GATT has been worded to prevent the abuse of exceptions under that Article[372]. In *US – Shrimp* the Appellate Body elaborated on the notion of preventing abuse or misuse of the exceptions under Article XX of the GATT 1994. It found that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members"[373]. The Appellate Body then

[370] Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
[371] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII,2755.
[372] Appellate Body Report, US – Gasoline, p. 22.
[373] Appellate Body Report US – Shrimp, para. 156.

linked the balance of rights and obligations under the chapeau of Article XX to the general principle of good faith.

According to the Panel, the chapeau of Article XX of the GATT 1994 addresses not so much a challenged measure or its specific content, but rather the manner in which that measure is applied, with a view to ensuring that the exceptions of Article XX are not abused. In order to do so, the chapeau of Article XX identifies three standards which may be invoked in relation to the same facts: arbitrary discrimination, unjustifiable discrimination and disguised restriction on trade. In the Panel's view, these principles would also be applicable in relation to Article XIV of the GATS.

The Panel evaluated all the evidence considered relevant in determining whether the United States has been applying and enforcing domestically its prohibition on the remote supply of gambling and betting services in a consistent manner. In order to do so, it examined the enforcement by the U.S. of restrictive measures on its domestic suppliers[374]; the electronic availability of a number or services, such as video lottery terminals, which are legal in a number of U.S. States[375], and the remote supply of betting services for horse races[376]; and the availability of electronically supplied services offered by certain Nevada bookmakers[377].

The Panel's conclusion after this analysis was that the United States had not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner as between those supplied domestically and those that are supplied from other Members.

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[374] The Panel noted that several US-based companies, namely, Youbet.com, TVG, Capital OTB and Xpressbet.com, had been providing telephone or online gambling and betting services for some time, and found no conclusive evidence that those operators were being prosecuted. In contrast, in the case of United States v. Jay Cohen, an operator of an Internet sportsbook service based in Antigua was prosecuted and ultimately convicted under the Wire Act. The evidence being inconclusive, the Panel considered that the US has failed to demonstrate its point i.e. that the manner in which it enforces its prohibition on the remote supply of gambling services against domestic suppliers is consistent with the requirements of the chapeau.

[375] On this point, the Panel expressed doubts whether video lottery terminals are actually "remote" supplied services, since they are located in shop counters, where the consumers are physically present, can be identified and their age can be verified.

[376] The Panel acknowledged the conflicting interpretations put forward by Antigua and the United States regarding the interpretation of the U.S. Interstate Horseracing Act. Since it was for the United States to demonstrate that it has complied with the requirements of the chapeau of Article XIV, the Panel found the evidence presented to be inconclusive, and noted that the United States has not demonstrated that the IHA, as amended, does not permit interstate pari-mutuel wagering for horse racing over the telephone or using other modes of electronic communication, including the Internet.

[377] As there was no unquestionable evidence that Nevada operators supply their services through the Internet – except for an advertisement from a bookmaker – the Panel concluded that the manner in which the US enforce its restrictive gambling policy in Nevada is consistent with the chapeau of Article XIV.

Accordingly, the Panel believed that the United States had not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

(b)The Appellate Body's view

The Appellate Body reversed this last finding of the Panel and noted rather that, confronted with the limited evidence the parties put before it with respect to enforcement, the Panel should have focused, as a matter of law, on the wording of the measures at issue, which, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services[378]. It considered clear that the complainant, in order to establish discriminatory treatment, must show evidence of *patterns of enforcement* rather than isolated cases or instances of individual treatment.

Concluding with respect to Article XIV, the Appellate Body found that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are "measures ... necessary to protect public morals or to maintain public order" and are therefore justified under GATS Article XIV.

[378] "In our view, the proper significance to be attached to isolated instances of enforcement, or lack thereof, cannot be determined in the absence of evidence allowing such instances to be placed in their proper context. Such evidence might include evidence on the overall number of suppliers, and on patterns of enforcement, and on the reasons for particular instances of non-enforcement. Indeed, enforcement agencies may refrain from prosecution in many instances for reasons unrelated to discriminatory intent and without discriminatory effect." Appellate Body Report, US Gambling, para.356.

I.5.2.4.2.Critique

The relationship between morality and law caused long discussions since the Greek thinkers of the fifth century BC to contemporary times[379]. The enquiry whether the right and just is so by nature or only by convention, and therefore if legal rules sit on immutable moral foundations or not – with concrete legal consequences – still preoccupies thinkers, lawmakers and judges[380].

Assuming that morals are indeed at the foundation of law, a question deriving from this enquiry is whether we accept a universal definition or morals, notably as a result of embracing the theory of natural law – remains to define the contents of such a definition – or if we rather accept a multitude of moralities, according to the spirit of each people.

Several international treaties include the notion of "public morality", thus giving the adjudicating bodies in charge with their enforcement the difficult task of assessing the meaning and scope of this notion. Some authors therefore speak of an "international morality"[381] (or "universal morality", as enshrined in the Declaration at the Congress of

[379] Generally, see PLATO, Protagoras; ARISTOTLE, Nicomachaean Ethics; DEMOSTENES, Against Aristogeiton. Also, see CICERO, De Republica; Tomas Aquinas, Summa Theologiae (arguing that natural law has a theological foundation as « reason of the divine wisdom ») ; GROTIUS Hugo, De jure belli ac pacis; KANT Immanuel, The Metaphysics of Morals; SAVIGNY Friedrich Charles von, System des heutigen römischen Rechts, 1840 (arguing that the law is not binding because of its intrinsic moral authority, but because it derives from the very spirit of the people); HEGEL Georg Wilhelm Friedrich, Les principes de la philosophie du droit, 1821, translated by A. Kaan, Gallimard ed., 1940 (« Le soleil, la lune, les monts et les fleuves, les objets naturels en général qui nous entourent sont. Pour la conscience ils n'ont pas seulement l'autorité qui consiste à être en général, mais aussi l'autorité qui consiste à avoir une nature particulière que la conscience admet, et s'y conformant dans son comportement à leur égard […]. L'autorité des lois éthiques (die Autorität der sittlichen Gesetze) est infiniment plus haute, car les choses de la nature ne présentent la rationalité que d'une manière extérieure et isolée, et la cachent sous la forme de la contingence ») ; JHERING Rudolf von, Geist des römischen Rechts, 1894; VINOGRADOFF Paul, Common sense in law, 1914 (arguing that law is clearly distinguishable from morality) ; DJUVARA Mircea, Le fondement du phénomène juridique, Paris, Sirey, 1913; POUND Roscoe, Law and Morals, Chapel Hill ed., 1924; HART Herbert Lionel Adolphus, Positivism and the Separation of Law and Morals, 1958, Harvard Law Review 71; KELSEN Hans, The Pure Theory of Law, 1934; BENTHAM Jeremy, The principles of Morals and Legislation, republished by Prometheus Books ed., New York, 1988; STUART MILL John, On Liberty, 1869.

[380] For more recent theories, see for example DWORKIN Ronald, Law as Interpretation, 1982, Texas Law Review 60; RAZ Joseph, On the Nature of Law, 1996, Archiv für Rechts- und Sozialphilosophie 82; GREENAWALT Kent, Conflicts of Law and Morality, Oxford Univ. Press, 1987.

[381] For a historical approach to "international ethics", see MORGENTHAU Hans J., The Twilight of International Morality, Ethics 58, 1948.

Vienna of 13 March 1815[382]), corresponding to an "international community"[383], while others underline that such a notion is a concept imposed by countries with market power, which extrapolate their own definition of morality to the world[384].

To give just one example of the difficulty to assess the scope of public morality at international level, we note the statutory embargo on trade between Cuba and the United States imposed by the U.S. Congress in 1996. This embargo is to be terminated only when "a democratically elected government in Cuba is in power"[385]. The act makes a finding that "[t]he United States has shown a deep commitment, and considers it a *moral obligation, to promote and protect human rights*" (emphasis added). However, during his visit to Cuba in 1998, the late pope John Paul II called the U.S. embargo against Cuba "ethically unacceptable."[386]

(i)"Public Morals" Phraseology in International Treaties

The term "public morals" was used as early as 1919 in the Protection of Minorities Treaty[387]. The first consideration of a moral exception to international trade rules occurred in 1922 at the Genoa Conference, which considered a draft agreement calling for a reduction in import and export prohibitions. The agreement stated that certain exceptions must be anticipated, such as measures for "the safeguarding of public health, morals or security."

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[382] Signed by the plenipotentiaries of the high powers who concluded the Treaty of Paris (1814). See BAINES Edward, History of the Wars of the French Revolution, from the breaking out of the wars in 1792 to the restoration of general peace in 1815, volume II, Longman, Rees, Orme and Brown, 1818, p. 433.
[383] For a discussion concerning the international community as a fiction or a reality, see DUPUY Pierre-Marie, L'unité de l'ordre juridique international, Revue de Droit Comparé 297, 2002. The concept of ordre public is identifiable with the concept of jus cogens. See MAGALLONA Merlin M., The Concept of Jus Cogens in the Vienna Convention on the Law of the Treaties, in The Law of Treaties, Ed. By Scott Davidson, 2004, p.521. For a discussion on existence of a unity of international law, see MATZ-LÜCK Nele, Promoting the Unity of International Law : Standard-Setting by International Tribunals, in International Law Today : New Challenges and the Need for Reform ?, ed. by KÖNIG, STOLL, RÖBEN and MATZ-LÜCK, Springer, 2008.
[384] POSTEL-VINAY Karoline, L'Occident et sa bonne parole, Flammarion, 2003.
[385] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104- 114, 102(h), 204(c), 110 Stat. 785, 794, 810 (1996).
[386] News in USA Today, Jan. 26, 1998.
[387] Treaty between the Allied and Associated Powers and Poland (Protection of Minorities), June 28, 1919, art. 2, in CHARNOVITZ Steve, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law (1998) 689.

It is rather unclear whether a moral exception in commercial treaties was a long-established international practice before 1927[388]. There is at least one treaty with such an exception. The treaty of 1881 between Madagascar and the United States declares that commerce between the people of the two countries "shall be perfectly free,"[389] although it permits the Malagasy government to ban imports "tending to the injury of the health or morals of Her Majesty's subjects"[390].

After 1927, the moral and humanitarian exception became an established (but not universal) practice in commercial treaties. Its phraseology in most treaties is: "Prohibitions or restrictions imposed on moral or humanitarian grounds"[391]. Other treaties provided that exceptions may be made "on moral or humanitarian grounds"[392].

One treaty provided an exception for the "maintenance of public morality"[393], another for the "protection of health and public morals"[394]. Other treaties lacked a moral exception, but included an exception "for the putting into force of police or fiscal laws, including laws prohibiting or restricting the import, export or sale of alcohol or alcoholic beverages, of opium, coca leaf and their derivatives and other narcotic substances"[395].

In recent history, we note the Australia-New Zealand trade agreement of 1983 which contains an exception "to protect public morals"[396]. The Agreement for ASEAN Free Trade Area (of 1992) declares that nothing in the agreement shall prevent a Member State from taking action

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[388] See CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra, p.10
[389] Treaty of Peace, Friendship, and Commerce, May 13, 1881, U.S.-Madag., art. IV(1), 22 Stat. 952, 955., quoted in CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra.
[390] Idem, art. IV(9), at 956.
[391] Commercial Convention, July 2, 1928, Czech.-Fr., art. V, 99 L.N.T.S. 107, 111., quoted in CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra.
[392] Agreement Regarding the Commercial Relationship Between Swaziland, Basutoland and the Bechuanaland Protectorate and the Colony of Mozambique, May 11, 1938, Port.-U.K, art. 6, 191 L.N.T.S. 286, 290, quoted in CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra.
[393] Treaty of Amity and Commerce, Feb. 12, 1930, China-Czech., art. XIII, 110 L.N.T.S. 286, 290, quoted in CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra Z.
[394] Provisional Agreement relating to Commerce and Navigation, Feb. 17, 1924, Lith.- Swed., 23 L.N.T.S. 155, 155, quoted in CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra.
[395] Treaty of Friendship and Commerce, Nov. 4, 1937, Siam-Switz., art. III, 190 L.N.T.S. 139, 143, quoted in CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra.
[396] Australia-New Zealand: Closer Economic Relations Trade Agreement, Mar. 28, 1983, Art. 18(b), 22 I.L.M. 945, 970 (1983).

which "it considers necessary" for the protection of public morals[397]. The North American Free Trade Agreement (of 1992) incorporates GATT Article XX(a) by reference[398].

At a European level, the European Convention for the Protection of Human Rights enshrines certain individual rights – such as respect for privacy, freedom of thought, freedom of expression, and freedom of assembly - but also provides that governments may restrict these rights for various reasons including "the protection of health or morals"[399].

Also, in the EU framework, Article 30 of the Treaty of Rome provides an exception for prohibitions or quantitative restrictions "justified on grounds of public morality". The exception notes that such prohibitions or restrictions "shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States".

(ii)What Is "Public Morality" In The WTO System?

Environmental issues, women's rights, child protection and labor rights are all values more and more discussed in relation to international trade[400]. Can they though be included in the scope of "public morality" under the WTO system?[401] Furthermore, is the use of certain medicine a matter of public morals? *Quid* for alcohol or cigarette use? In contrast to the twenty-three members of the original 1947 GATT[402], the modern WTO consists of 153 Member States (in 2008), more than half of which are developing countries, representing a

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397 Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, art. 9, 31 I.L.M. 513, 520 (1992).

398 North American Free Trade Agreement, Dec. 17, 1992, art. 2101(1), 32 I.L.M. 605, 699

399 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 8-11, 213 U.N.T.S. 221, 230-32.

400 See generally HOWSE Robert, Social and Labor Issues and the Agendas of the IMF, World Bank, WTO and OECD, 93 Am. Soc'y Int'l L. Proc. 143, 148 (2000) (remarks as conference panelist discussing inclusion of labor rights through GATT Article XX(a)); HOWSE Robert, The World Trade Organization and the Protection of Workers' Rights, 3 J. Small & Emerging Bus. L. 131 (1999) (arguing for inclusion of international labor standards in WTO through public morals exception); JARVIS Liane M., Note, Women's Rights and the Public Morals Exception of GATT Article 20, 22 Mich. J. Int'l L. 219 (2000) (arguing for use of public morals exception to protect women's rights); LOPEZ- HURTADO Carlos, Note, Social Labelling and WTO Law, 5 J. Int'l Econ. L. 719 (2002) (discussing WTO compatibility of government-sponsored social labeling initiatives).

401 For a study arguing how the WTO could integrate societal values with the objective of progressive trade liberalization, see ROSAS Allan, Non-Commercial Values and the World Trade System: Building on Article XX, in Essays on the Future of the WTO: Finding a New Balance, ed. by Kim Van der BORGHT, Cameron May, 2003.

402 See de BROUWER Anne-Marie, GATT Article XX's Environmental Exceptions Explored: Is There Room for National Policies?, in Concerns Regarding Animals, Anton Vedder ed., 2003, at 9, 23.

variety of religious, cultural, ethnic, and social backgrounds. Expanded membership will bring more countries into contact (and potential conflict), and trading partners with diverse socioeconomic compositions as well as differing cultural and religious views may have more frequent trade-morality conflicts than a more homogenous grouping.

Large panoply of issues is listed by the WTO Members as falling within their national definition of morality protection. Products currently subject to morality-based import restrictions include alcohol[403], pornographic or obscene materials[404], child pornography[405], gambling equipment or games of chance[406], hate propaganda[407], illegal drugs[408], lottery tickets[409], non-kosher meat products[410], posters depicting crime or violence[411], stolen goods[412], treasonous or seditious materials[413], counterfeit money[414], automobile radar detectors[415], and video tapes and laser discs[416].

It appears clearly that, apart from a "core-list" of moral values which seem to be universally protected – such as children' wellbeing – there is no much consensus among WTO Members on the highly sensitive point of moral values. Then the question arises weather, in examining one of the issues listed above in order to determine if they fall or not within the "moral

[403] Indonesia, Addendum to Minutes of Meeting, Indonesia Trade Policy Review, at 3, WT/TPR/M/117/Add.1 (Sept. 11, 2003).
[404] Republic of Korea, Report by the Secretariat, Republic of Korea Trade Policy Review, at 54, WT/TPR/S/137 (Aug. 18, 2004); Honduras, Report by the Secretariat, Honduras Trade Policy Review, at 46, WT/TPR/S/120 (Aug. 29, 2003); Israel, Report by the Secretariat, Israel Trade Policy Review, tbl.III.8, WT/TPR/S/58 (Aug. 13, 1999); Nigeria, Report by the Secretariat, Nigeria Trade Policy Review, at 78, WT/TPR/S/39 (May 27, 1998). The United States prohibits the importation of "obscene" pictures.
[405] Canada, Report by the Secretariat, Canada Trade Policy Review, tbl.III.4, WT/TPR/ S/53 (Nov. 19, 1998).
[406] Turkey, Report by the Secretariat, Turkey Trade Policy Review, tbl.III.7, WT/TPR/S/ 125 (Nov. 19, 2003); Thailand, Report by the Secretariat, Thailand Trade Policy Review, tbl.III.3, WT/TPR/S/123 (Oct. 15, 2003); Indonesia, Report by the Secretariat, Indonesia Trade Policy Review, at 28 & tbl.II.3, WT/TPR/S/117 (May 28, 2003); Israel Trade Policy Review, supra note 83, tbl.III.8; Nigeria Trade Policy Review, supra note 83, tbl.III.9.
[407] Canada Trade Policy Review, supra, tbl.III.4.
[408] Thailand Trade Policy Review, supra note 85, tbl.III.3 (noting restriction on imports of potassium permanganate, known precursor for illegal drugs); India, Report by the Secretariat, India Trade Policy Review, at 38–39, WT/TPR/S/100 (May 22, 2002); Honduras Trade Policy Review, supra note 83, at 46.
[409] Israel Trade Policy Review, supra, tbl.III.8.
[410] Idem at 31.
[411] Canada Trade Policy Review, supra, tbl.III.4.
[412] Suriname, Report by the Secretariat, Suriname Trade Policy Review, tbl.III.2, WT/ TPR/S/135 (June 14, 2004).
[413] Canada Trade Policy Review, supra, tbl.III.4.
[414] Israel Trade Policy Review, supra, tbl.III.8; Canada Trade Policy Review, supra, tbl.III.4.
[415] Israel Trade Policy Review, supra, tbl.III.8.
[416] Singapore, Report by the Secretariat, Singapore Trade Policy Review, at 43, WT/ TPR/S/14 (May 7, 1996).

exception" as included in the GATT or GATS[417], a WTO adjudicating body can narrow its analysis to national elements (therefore relying on the unilateral definition of public morality that a country gives) or does it have to seek a more universal approach[418]?

Another question mark is whose morals can be protected in the WTO system? It seems clear that a government can use a trade measure to protect its own population. But can a trade measure be used to protect morals elsewhere? For example, would an import ban against goods made by indentured children be GATT-legal? For certain authors, the answer must be affirmative and "trade restrictions may be used to promote moral goals"[419]. For others, the negotiating partners of the GATT had in mind a much narrower construction of the term[420].

It can be asserted that the sensitive and variable geometry of public morals could not result from a purely unilateral definition without incurring the danger of disguising a trade restriction motivated by protectionism instead of morality protection. "A single state may adopt what it deems to be effective measures to combat certain evils, only to find that its policies are largely defeated by the failure of neighboring states to adopt similar measures"[421]. As it was said, "allowing each government to restrict imports based on its own definition of morality could disrupt trade and allow imperialism by countries with market power"[422].

Several commentators even question the interruption of trade for moral reasons. They oppose unilateral governmental action to suspend trade access "unless one's choice of ethical

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[417] We recall that public morality issues are covered with a different language by Article XX a) of the GATT (regulating Members' possibility "to protect public morals") and by Article XIV of the GATS (containing Members' possibility to take certain measures "to protect public morals or to maintain public order"). The formulation in the GATS seems to be wiser than that of the GATT, circumscribing the concept of "public morals" to the wider "public order". See MAVROIDIS Petros C., "Trade in Goods", Oxford University Press, 2007, p.262. As it was argued, "public order can be ragarded as a catch-all term". COTTIER Thomas, DELIMATSIS Panagiotis, DIEBOLD Nicolas, Article XIV GATS, supra, pp.287-328.
[418] For instance, in the Declaration at the Congress of Vienna of 13 March 1815, the parties declared that slave trade "has been considered by just and enlightened men of all ages as repugnant to the principles of humanity and *universal morality*" (emphasis added).
[419] See CHARNOVITZ Steve, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law (1998) 689. It is important to note that in 1977 the European Commission took the view that a member state which bans cruelty in the rearing and slaughtering of poultry may not ban imports from other Member States which apply less stringent rules. The Commission argued that any affront to public morals occurs solely in the country where the cruel treatment takes place. OLIVER Peter, Free Movement of Goods in the E.E.C. Under Articles 30 to 36 of the Rome Treaty, European Law Center, London, 2d ed., 1988.
[420] See FEDDERSEN Christoph T., "Focusing on Substantive Law in International Economics Relations: the Public Morals of GATT's Article XX(a) and "Conventional Rules of Interpretation", 7 (1998) Minnesota Journal of Global Trade, 75.
[421] MOWER Edmund C., International Government, Boston, Heath, 1931.
[422] CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra, p.26

concerns is *adopted by others*"[423] (emphasis added). They cite three main reasons: first, the intransitivity of values would allow each country to sanction the other; second, the asymmetry of market power would give larger countries more coercive power; and third, persuasion and private action should be used to spread values. Another argument against interrupting trade is that commerce itself can raise public morals among participating countries.

On the other hand, if we do not accept unilateral definitions of national standards of morality, what criteria can we use to seek a more universal approach? In the *US Shrimp*[424] case, an "acknowledgement by the international community" of the need to preserve living natural resources was sought. One author suggests that "in the public morals context, evidence of widespread international consensus might be found, for instance, in the aspirational preambulary language of broadly subscribed international agreements or conventions"[425].

This universalistic approach is, however, also problematic. First, it might burden this exception with a *probatio diabolica*, requiring the defending party to seek proof that a specific moral value is also recognized in (a majority of) other countries. Second, from a practical point of view, states would rarely need to restrict trade to protect public morality in areas where there is broad international consensus. Rather, a public morals exception would be needed most when opinions are diverse and a country will need trade-restrictive measures to protect its population against products or services produced by foreigners with different moral standards. A too categorically universalistic approach would provide no protection to countries or groups of countries unable to demonstrate consensus about an issue they believe to constitute a matter of public morality.

A less restrictive alternative would be to require widespread, though not universal, state practice, especially amongst states most likely to be affected[426]. However, such an approach

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[423] BHAGWATI Jagdish & SRINIVASAN T. N., Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?, in Bagwati and Hudec (eds.), Fair Trade and Harmonization: Prerequisites of Free Trade?, Cambridge. M.I.T. Press, 1996, at 180.
[424] Appellate Body Report, US Shrimp, para.131.
[425] MARWELL Jeremy C., Trade and Morality: the WTO Public Morals Exception after Gambling, 81 New York University law Review, 2006, p.820.
[426] See ICJ case North Sea Continental Shelf Case (F.R.G. v. Den.), 1969 (noting that conventional rule may "be considered to have become a general rule of international law . . . [if a] widespread and representative" group adopts that rule).

would still not permit the proper defense of certain values which are singularly protected in a few countries only (for example, kosher products in Israel).

According to one author, a proposed solution to this “national v. universal” interpretation dilemma would be to revert to a unilateral definition of public morals, while in the same time requiring that country to provide sound evidence supporting its claim that a particular issue has moral significance[427]. Such substantial evidence of its internal conditions could be, for instance, historical practice, contemporary public opinion polls, results of political referenda, or statements of accredited religious leaders[428]. In order not to give the states a too large discretion that could turn the moral exception into a highway for protectionism, two more conditions should be added to this approach: that a measure be the least restrictive means of protecting the interest at stake and that it be applied in a nondiscriminatory fashion[429].

In *US Gambling*, the Panel and Appellate Body seem to have taken a rather mixed approach as compared to the options presented here above. Indeed, evidence external to the United States was sought in order to define public morals in this country. The Panel tried to follow the principles of the Vienna Convention, and interpreted the notion of “public morals” using the ordinary meaning of the words, read in their context and in light of the object and purpose of the GATS, and with the help of supplementary means of interpretation (such as judgments of the European Court of Justice, behavior of other WTO Members, and historical international examples), all of which say very little about the “public morality” notion as defined in the USA[430].

Nonetheless, the fact that gambling is a concern which can be easily circumscribed to the concept of public morality (in a widely accepted sense) seems undisputable. In the field of international trade, this was made clear since 1927, when during the multilateral negotiations

[427] See MARWELL Jeremy C., Trade and Morality: the WTO Public Morals Exception after Gambling, supra, p.824
[428] Idem.
[429] See MARWELL Jeremy C., Trade and Morality: the WTO Public Morals Exception after Gambling, p.826, based on Appellate Body Report, Japan—Taxes on Alcoholic Beverages, WT/ DS11/AB/R, adopted on ç October 1996, para. 30 (finding Japanese taxes on alcoholic beverages in violation of WTO obligations because taxes were discriminatory); Shrimp/Turtle, supra, para. 186 (finding U.S. restriction on imported shrimp to be “arbitrary and unjustifiable discrimination”).
[430] Referring to our previous example on kosher products, and applying the Panel’s argumentation in US Gambling to it, we find that, if Israel was compelled to justify why it restricts trade of non-kosher meat, it would have to resort to such external means of prove which are probably impossible to find, given the highly local specificity of this particular societal value.

which led to the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, the Egyptian delegate pointed out that his government prohibited the importation of foreign lottery tickets and asked whether this issue would be covered by the moral exception. The president of the conference answered that it would be covered by the new exception for measures adopted for "moral or humanitarian reasons"[431].

(iii) National "Public Morals" Asserted By an International Tribunal: Challenges and Examples

A series of questions is raised when national standards of public morality (and public order) are to be interpreted by an international tribunal. As we have seen previously, some authors believe that the Appellate Body's reasoning on public morals in *US Gambling* improperly impinges on the autonomy of WTO Member States[432].

As noted above, the issue was publicly addressed during the multilateral negotiations which led to the International Convention for the Abolition of Import and Export Prohibitions and Restrictions. The minutes of the debate show the Canadian government raising a concern that, under the most recent treaty draft, "[d]omestic questions, such as the admission of opium... were to be subjected to external jurisdiction."[433]

Several international legal orders, created by international treaties, entrust the difficult task of assessing the notion of "public morals" to their respective adjudicating bodies, and such international courts have already been confronted in practice with this sensitive issue.

The leading decision by the European Court of Human Rights (ECHR) interpreting the moral exception is *Handyside v. United Kingdom* (1976)[434]. Handyside, a book publisher convicted by a United Kingdom court of an obscenity violation, complained to the ECHR that his conviction violated Article 10 (freedom of expression) of the Convention for the Protection of Human Rights. The United Kingdom and the European Commission on Human Rights

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[431] International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference, at 95, League of Nations Doc. C.21.M.12. 1928 II.7 (1928), at 110.
[432] MARWELL Jeremy C., Trade and Morality: the WTO Public Morals Exception after Gambling, supra, p.802.
[433] International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference, supra.
[434] ECHR case Handyside v. United Kingdom, 1 Eur. H.R. Rep. (ser. A) 737 (1980).

defended the conviction on the grounds that the obscenity law was necessary for the protection of public morality. The ECHR ruled against Handyside. Noting that there was *no uniform European conception of morals* within the contracting states, the ECHR declared that "[t]he view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject[435]." The ECHR held that Article 10 "leaves to the Contracting States a margin of appreciation" because "State authorities are in principle in *a better position than the international judge* to give an opinion on the exact content of these requirements as well as on the "necessity' of a "restriction' or "penalty' intended to meet them" (emphasis added).

The European Court of Justice also ruled on the notion of public morals, the first case being *Dassonville* in 1974[436]. In this case, the ECJ did not decide whether the trade restrictive law in question was justified under Article 36 (now Article 30) of the Treaty of Rome; instead, the ECJ took a "shortcut" by ruling that the Belgian law could not qualify under Article 36 because it was "arbitrary discrimination or a disguised restriction on trade" between members of the European Community.

However, the moral exception in Article 36 is addressed in other decisions of the ECJ, related to the interdiction of pornography. In two cases, the importer claimed that a U.K. law was a violation of Article 30 of the Treaty of Rome. In the 1979 case, *Henn and Darby*[437], the ECJ

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[435] Idem, para 753.

[436] ECJ Case 8/74, Procureur du Roi v. Benoit and Dassonville, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974). Mr. Dassonville was charged by Belgian authorities with importing and attempting to sell Scotch whisky without a document from British customs authorities certifying the right to use this designation in Belgium. The Scotch had been bought in France. Dassonville claimed that the Belgian law violated article 30 of the Treaty of Rome as a measure having equivalent effect of a quantitative restriction. At issue was whether the Belgian law could be justified under article 36, which provides an exception for restrictions on imports for the protection of public health and for the protection of industrial and commercial property. The European Court of Justice ruled that such a restriction could not be justified.

[437] ECJ Case 34/79, Regina v. Henn and Darby, 1979 E.C.R. 3795, 1 C.M.L.R. 246 (1979). Henn and Darby were arrested for importing films and magazines that were "indecent or obscene" in violation of the Customs Consolidation Act of 1876. In their defense, they asserted that the import ban violated article 30 of the Treaty of Rome and was not permitted by the article 36 exception because the United Kingdom did not enforce the same standard of public morality throughout its territory. In many parts of the United Kingdom, only obscene matter was banned and less offensive "indecent" matter was permitted. The ECJ stated that "[i]n principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory." With regard to the circumstances of the case, the ECJ ruled that "[t]he fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports

accepted the argument that a restriction on imports of indecent or obscene films and magazines is justified by grounds of public morality. In the 1986 *Conegate* case[438], the ECJ rejected the same moral exception defense and considered that the import ban on obscene material – rubber dolls – was a form of protectionism, since the manufacture and selling of the same material was not banned in the importing country).

Another relevant case before the ECJ was the 1996 *Hedley Lomas* case[439], which concerned a refusal by the United Kingdom to issue a licence for the export of live sheep for slaughter to Spain[440]. The Court considered that such refusal constitutes a quantitive restriction on exports, contrary to Article 34 of the EC Treaty. Community law precludes a Member State from invoking Article 36 of the EC Treaty[441] to justify a limitation of exports of goods to another Member State on the sole ground that, according to the first State, the second State is not

imposed, on grounds of public morality, on trade with other Member States." The ECJ further explained that a morality-based import ban would not constitute "arbitrary discrimination or a disguised restriction on trade" in the absence of lawful domestic trade in the same goods. Perceiving that the pornography was of a nature that "on a comprehensive view" trade in it would be unlawful throughout the United Kingdom, the ECJ denied Henn and Darby's claim. For a comment, see WALLACE, Rebecca M.M., Public Morality. The Terms of Article 36 of the EEC, The Journal of the Law Society of Scotland 1980 p.234-235; VALLEJO LOBETE, Ernesto, Las restricciones a la libre circulación de mercancías por razones de moralidad pública, Gaceta Jurídica de la CEE - Boletín 1990 nº 84 p.10-16

[438] ECJ Case 121/85, Conegate Ltd. v. Her Majesty's Customs and Excise, 1986 E.C.R. 1007, 1 C.M.L.R. 739 (1986). When Conegate sought to import life-size rubber dolls of women, they were seized by British authorities as being "indecent or obscene" in violation of the 1876 Act. Conegate raised the same defense as Henn and Darby, but the facts were more in his favor. There was generally no ban on the manufacture or sale of such dolls in the United Kingdom (except on the Isle of Man). Instead, there was a ban on mailing them, restrictions on their public display, and restrictions on their sale to minors. Distinguishing this case from Henn and Darby, the ECJ clarified the proper use of article 36. Explaining that it was not necessary that domestic manufacture and marketing (of products whose importation is prohibited) be banned throughout a nation's territory, the ECJ held that "it must as least be possible to conclude from the applicable rules, taken as a whole, that their purpose is, in substance, to prohibit the manufacture and marketing of those products." Laws applying to rubber dolls failed this test. In his opinion, the Advocate General postulated that it was up to each state "to lay down their own standards of public morality" since "attitudes vary from place to place and, indeed, from time to time." For a comment, see MILLETT, Timothy, Free Movement of Goods and Public Morality, New Law Journal 1987 p.39-40.

[439] ECJ, Case C-5/94, The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd., May 23, 1996, 1996 E.C.R. 1-2553.

[440] The Ministry had systematically refused to issue licenses for the export to Spain of live animals for slaughter on the ground that their treatment in Spanish slaughterhouses was contrary to Directive 74/577 of November 18, 1974 on stunning of animals before slaughter. The directive sought, among others, to avoid all forms of cruelty to animals and, as a first step, to avoid all unnecessary suffering on the part of animals when being slaughtered. The Ministry believed that the information in its possession indicated a degree of non-compliance with the directive so as to create a substantial risk that animals exported to Spain for slaughter would suffer treatment contrary to the directive.

[441] This article allows the maintenance of restrictions on the free movement of goods, justified on grounds of the protection of the health and life of animals.

complying with the requirements of a Community harmonizing directive pursuing the objective which Article 36 is intended to protect[442].

In summary, several useful principles can be extracted from the European adjudication and used for our analysis of *US Gambling*.

- *First*, there is the declaration in *Handyside* that moral requirements vary from time to time and from place to place.

- *Second*, there is the ECJ judgment in *Henn and Darby* that in principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory.

- *Third*, there is the ECJ judgment in *Conegate* that Article 36 EC should not extend to a situation where the import ban covered much more than the domestic ban.

An interesting question raised in the literature is how would the WTO adjudicating bodies assess the moral exception if the trade-restrictive measures aimed to protect the morals of (a) a Member's domestic population, or (b), those of a foreign population? Some authors believe that import measures to safeguard the morals of a domestic population would probably receive a light scrutiny[443], while import measures to safeguard the morals of a foreign population would receive a strict scrutiny[444].

(iv) Remaining Question Marks on the Relationship "Gambling – Crime – Public Order"

[442] Recourse to the EC Treaty provisions is no longer possible where Community directives provide for harmonization of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision.
[443] See CHARNOVITZ Steve, The Moral Exception in Trade Policy, supra, p.20. For example, if a strict Muslim country banned liquor imports, this would probably pass the necessity test. Panels would not ask whether particular rules of the Moslem religion are necessary or whether the government should tolerate drinking by non-Moslems. See REGE Vinod, GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries, 28 J. World Trade, June 1994, at 95, 117 n.20 (suggesting that article XX(a) would permit countries to ban imports based on religious considerations).
[444] See CHARNOVITZ Steve, The Moral Exception in Trade Policy,supra, p.21.

The Panel's approach in determining whether a particular issue falls or not under the scope of Article XIV brings about another question as to the link between gambling and crime (under the ambit of public order).

Indeed, the relation between crime and games of chance is one of the most controversial issues related to gambling in general[445]. Radically different opinions have been expressed in a particularly rich literature, both in sense of an evident connection between the two, and in that of the lack of any causality relation at all[446].

Without entering inextricable discussions[447,448], we note that several authors[449] remarked that a tendency to consider gamblers as criminals appears to be stronger in the United States, where the "myth of gamblers being criminals" seems to prevail for several reasons, one of

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[445] Findings differ largely in gambling industry sponsored research and independent academic research. For an analysis of the connection between gambling money and research, see KINDT John Warren, "The Gambling Industry and Academic Research: Have Gambling Money Tainted the Research Environment",13 S. Cal. Interdisc. L.J. 1 (2003-2004).

[446] For a discussion see the Introduction, chapter III.3.

[447] A study of 2006 shows that the effect of a casino on crime will vary with the time from the casino's date of opening. It finds that generally, a reduction in crime is observed shortly before and shortly after a casino's opening date; this trend can be attributed to the casino's effects on the local labor market by providing jobs, especially those targeted to low-skill individuals (Policy Analytics LLC, Report to the Indiana Legislative Council and the Indiana Gaming Commission, "A Benefit-Cost Analysis of Indiana's Riverboat Casinos for FY 2005", 2006, available at www.in.gov/legislative/igareports/agency/reports/IGC02.pdf). However, crime rates will increase after an estimate 1 to 3 and half years, when the effects from pathological and problem gamblers will be felt. Also, a 2004 study estimates that "…roughly 8% of crime in counties containing casinos is attributable to the presence of casinos, costing the average adult $75 per year."(measured in 2003 dollars); according to this study, "casinos increased all crimes except murder, the crime with the least obvious connection to casinos" (GRINOLS Earl L., MUSTARD David B., Casinos, Crime, and Community Costs, 2004, available at http://ideas.repec.org/, p.28). Another academic study looked at casino-related crime using the concept of "hot spots", i.e., the locations of the most calls for police service, to help understand the relationship between criminal activity and the presence of gambling casinos. According to this research, certain unique characteristics of the casino environment help to explain why there are "hot spots" for crime. This seems to happen because: (i) unlike other entertainment-oriented tourist attractions, money is the principal center of attention in casinos; (ii) because casinos may inspire "situational and opportunistic crime by gamblers who have sustained big losses and who are desperate to recoup those losses," especially in the case of compulsive gamblers; and (iii) also because the policy of providing free alcohol to gamblers in many casinos may help facilitate crime both by making potential victims less vigilant and potential offenders less inhibited, just to cite a few (STITT Grant, NICHOLS Mark, GIACOPASSI David, Does the Presence of Casinos Increase Crime? An Examination of Casino and Control Communities, Crime & Delinquency, Vol. 49 No. 2, April 2003, p.256).

[448] Other researches have come to mixed findings (BETSINGER Sara Linn, The Relationship Between Gambling And County-Level Crime, 2005, available at https://drum.umd.edu/dspace/handle/1903/2377thesis submitted to the Faculty of the Graduate School of the University of Maryland, College Park,). The statistical analyses revealed that increases in robbery, vehicle theft, and overall crime rates were not significant. Additionally, assault and burglary rates actually decreased as gambling venues were opened, and these decreases were significant for assault. Most surprising, rape rates decreased significantly and arson rates increased significantly as gambling venues were opened. Only larceny rates exhibited the predicted significant increases.

[449] BRENNER Gabrielle A., BRENNER Reuven, A Profile Of Gamblers, Cahier de recherché 8716, Département de sciences économiques, Université de Montréal, 1987.

which being that when gambling was outlawed, the games were supplied by the underworld, frequently connected to crime.

Even official national reports fail to bring more light on this controversial issue. Australia, Great Britain, the United States and Canada have each completed an extensive national review of their gambling operations, regulations and public policies (the Australian Productivity Commission in 1999[450]; the American National Gambling Impact Study Commission in 1999[451]; the Gambling Review Board for Great Britain in 2001[452], and the Law Commission Canada in 2005[453]).

Included in the mandate of these national gambling studies was an examination of the impact of gambling on crime rates. All studies noted a historical connection between gambling and crime and cited various aspects of commercial gambling that make the industry vulnerable to criminal involvement[454]. There was also recognition of the fact that widespread legal

[450] The Australian Productivity Commission Report concluded that street crime in or surrounding gambling venues was of no greater magnitude than in other public places of amusement and that organized crime had little opportunity to infiltrate Australian casinos. The chief gambling-related crime concerns in Australia were crimes committed by problem gamblers to support their addiction and the potential for loan sharking and money laundering in Australian casinos.

[451] The United States National Gambling Impact Study Commission Report hedged its comments on gambling-related crime. The report claimed that research linking the two activities has been too narrow in scope and unable to differentiate the effects of gambling from the effects of tourism in general. As well, the report concluded that more research was needed because, at the time when it was drafted, there was insufficient data to quantify or define the relationship between gambling and crime.

[452] The Great Britain Gambling Board Review Report noted that "highly questionable and overly corrupt practices" in legal bookmaking operations require tighter regulation, and greater enforcement powers were called for to shut down illegal gambling machines.

[453] The Legalization of Gambling in Canada Report of 2005, prepared for the Law Commission Canada "What is a Crime?" showed there is both direct and indirect gambling-related criminal activity.

[454] For an in-depth analysis of the relationship between (Internet) gambling and money laundering, see Financial Action Task Force -XII Report On Money Laundering Typologies 2000-2001; SCHUDELARO A., Electronic Payment Systems and Money Laundering. Risks And Countermeasures In The Post-Internet Hype Era, Wolf Legal Publishers, 2003; MCMILLEN Jan, WOOLLEY Richard, Money Laundering in Australian Casinos, Australian Institute for Gambling Research – UWS, paper presented at the 3rd National Gambling Regulation Conference, Sydney, 11-12 May 2000; FinCEN, the U.S. Treasury Department, A Survey of Electronic Cash, Electronic Banking and Internet Gaming, 2000, available at http://www.fincen.gov/e-cash.pdf; SCHOPPER Mark D., Internet gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a Monetary Control Scheme, 5 Chap. L. Rev. p.318, (2002); WEIMER Wendy J., Cyberlaundering: An International Cache for Microchip Money, 13 DePaul Bus. L.J. 2000-2001, p.202; MUSSINGTON David, WILSON Peter, MOLANDER Roger, Exploring Money Laundering Vulnerabilities Through Emerging Cyberspace Technologies: A Caribbean Based Exercise. (RAND: Critical Technologies Institute, 1998); FILIPKOWSKI Wojciech, Internet as an Illegal Market Place, paper presented at the 6th Cross-Border Crime Colloquim in Berlin, 2004, available at http://www.cross-border-crime.net/a-pdf/CCC-2004-Filipkowksi.pdf; WELLING Sarah N., RICKMAN Andy G., Cyberlaundering: The Risks, The Responses, 50 Fla. L. Rev. 295, p.322 (1998); HUGEL Paul S., Criminal Law and the Future of Internet Gaming, 2 Gaming L.R. 143 (1998).

gambling opportunities had led to relaxed monitoring of illegal gambling by police officials and lenient treatment by the courts for those charged with illegal gambling offences.

However, with the exception of the Canadian report, despite the mandate of each review to explore the link between gambling and crime, the subject was given short shrift. That is, cursory literature reviews reported equivocal findings and no original research on the topic was commissioned[455].

Another study worth noting was conducted for the French Senate in 2002 and renewed in 2006[456]. Its authors mention casino related delinquency, which they do not consider to be a problem of the present, but rather a reputation inherited from the times when regulation of gambling activities was less strict : "Dans les casinos, il y a eu, par le passé, une grande part de vérité dans cette réputation, tant divers procédés, tels que prête-noms ou racket, ont longtemps permis à des délinquants notoires de maîtriser la trésorerie de certaines maisons et à organiser la délinquance sinon le crime. Des scandales spectaculaires, abondamment médiatisés, des affaires longues, tortueuses et sanglantes, sont là pour confirmer le public dans cette opinion. Ceci est du passé et, même à l'époque, ces cas étaient l'exception"[457]. The report notes, however, a significant increase in delinquency rates due to clandestine slot machines[458].

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455 In New Zealand, the Australian Institute for Gambling Research, Social And Economic Impacts Of Gambling In New Zealand. Final Report, 2001, found that the impacts on crime of the two New Zealand casinos were not as extensive as predicted. While the New Zealand Department of Internal affairs (DIA) have found no significant evidence to directly link crime with gambling, the report noted that precise statistical data has not been available. However, it states that analysts agree that gambling is indeed susceptible to crime, be it major crimes such as fraud and money laundering or less major crimes such as cheating and begging. In South Africa, the National Centre for the Study of Gambling at the University of Cape Town, on behalf of the National Responsible Gambling Programme, prepared in 2003 a national study called "Gambling and problem gambling in South Africa". This report found that in respect of crime, a regulated industry, one that is tightly controlled and administered, is much less vulnerable to criminal activity, to the extent that illegal gambling has been replaced by legal gambling operated by reputable companies who have undergone rigorous probity investigation. The report found no evidence yet available of whether people are committing crimes such as fraud, robbery and theft to fund gambling in a way similar to that in which they commit such crimes to buy drugs. If it turns out that this is happening, then this will be, by definition, a function of problem gambling (National Centre for the Study of Gambling at the University of Cape Town, on behalf of the National Responsible Gambling Programme, Gambling and problem gambling in South Africa. A National Study, 2003, p.38).

456 Senator TRUCY François, Rapport d'information fait au nom de la commission des Finances, du contrôle budgétaire et des comptes économiques de la Nation sur la mission sur les jeux de hasard et d'argent en France 2001-2002, available at http://www.senat.fr/rap/r01-223/r01-2231.pdf. (rapport Trucy).

457 Rapport Trucy, p.103.

458 Rapport Trucy, p.16.

*I.5.3.*UNRESOLVED QUESTIONS AFTER *US GAMBLING*

The Dispute Settlement Body did not address in *US Gambling* several key issues which are, in our view, sufficiently important to make a difference in the final judgment and to potentially affect the solution given to this case.

One is the issue of likeness, in respect to which the Panel exercised judicial economy. As a consequence, *US Gambling* does not analyze the very interesting question of knowing if online games are "like" the traditional ones, that is to say if in the GATS framework a "brick and mortar" casino is "like" an Internet casino.

Another unresolved topic, which if analyzed could have inverted the DSU solution, is the concept of evolutionary treaty interpretation, namely applying a legal text to a situation not envisioned by the drafters and virtually overriding the fundamental intention of the parties.

I.5.3.1. "Technical Neutrality", "Evolutionary Treaty Interpretation" And "Fundamental Intentions of the Parties"

It is doubtful whether in 1994 nations that agreed to liberalize trade in services under the GATS fully envisioned the impact of their decision in the light of Internet development[459]. This question raises a problem of interpretative "technological translation" or "intertemporal interpretation" — the application of legal texts to technologies not envisioned at the time of drafting. Indeed, some countries may have opened broader access to their markets by foreign web sites than anyone could realize at that time[460].

[459] See WU Tim, The World Trade Law of Censorship and Internet Filtering, available at at SSRN: http://ssrn.com/abstract=882459.
[460] See WU Tim, The World Trade Law of Censorship and Internet Filtering, supra.

A key question comes therefore into the discussion: how should a legal provision be interpreted in circumstances unimagined by its drafters[461]? For many years, the rule in this matter was the principle of contemporaneity[462], which requires that a fact be appreciated in the light of understanding and law *contemporary with it*.[463] Following the more modern approaches, the Panel and Appellate Body in *US Gambling* adopted an "evolutionary interpretation" of the GATS, thereby interpreting the GATS in the light of today's circumstances, and extending the provisions of the GATS to services provided through the Internet. Such an interpretation does not come without certain difficulties, which will be examined below.

I.5.3.1.1.“The law stays as it was written; men, on the contrary, never rest”[464]

As we already mentioned, the Internet was a technology not yet fully envisioned at the time of the negotiations of the GATS[465] (for example, the first Internet casino opened only in August 1995, one year after the adoption of the GATS[466]).

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[461] For an exhaustive presentation of methods of interpretation in international law, see BOS Maarten, Theory and Practice of Treaty Interpretation, in DAVIDSON Scott (Editor), The Law of Treaties, Burlington, VT: Ashgate/Dartmouth, 2004, pp.327-398; Lord McNAIR, The Law of Treaties, Clarendon Press, Oxford, 1986, pp.345-489. An interesting discussion on treaty interpretation subject to the specific treaty purpose is developed by SLOTBOOM Marco, A Comparison of WTO and EC Law. Do Different Treaty Purposes Matter for Treaty Interpretation?, Cameron May, 2006.

[462] For example, when the International Court of Justice interpreted the provisions of Article 20 of the treaties between the United States and Morocco of 1787 and 1836 (substantially identical in terms), it stated that "it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded". ICJ Case United States Nationals in Morocco, ICJ Reports 1951, 189.

[463] See PAWELYN Joost, The Nature Of WTO Obligations, Jean Monnet Working Paper 1/02, 2002, p. 32, available at http://www.jeanmonnetprogram.org/papers/02/020101.html. This was first expressed by Judge Huber in the Island of Palmas arbitration (1928, Netherlands v. United States), 2 R. Int'l Arb. Awards 831, 845.

[464] PORTALIS Etienne de, Discours Préliminaire sur le projet de Code civil présenté le 1 Pluviose an IX, in Discours, rapports et travaux inédits sur le Code civil, Paris Joubert 1844, p.8

[465] "The Internet is a vital element of the informative society. It has changed the way we live; communicate with people, or even work. It can be seen as both sociological and economical phenomenon. This technology allows us to cross borders, meet or cooperate with people from other countries and exchange ideas. It has also fuelled the globalization process of world economy […] The Internet has also created new branches and economic sectors (e.g. e-commerce, on-line banking or other financial services), or investment tools (e.g. new payment technologies, electronic funds transfers), which operate at the speed of light". See FILIPKOWSKI Wojciech, Internet as an Illegal Market Place, supra.

[466] LANG Craig, Internet Gambling – Nevada Logs In, 22 Loyola of Los Angeles Entertainment Law Review 525, 2001-2002, p.533.

The situation prevailed that no basic affirmation concerning the applicability of WTO rules to cross-border electronic services and electronic commerce[467], in general, had been forthcoming from WTO members[468]. Moreover, certain GATS members sought further examination of the question of whether the GATS obligations and commitments undertaken in 1994 apply to services transmitted by a technology that was not foreseen at the time of the negotiations[469]. Some WTO members went as far as stating that new specific commitments may be needed for cross-border Internet service transactions[470]. Other members called for a common understanding that Internet-supplied services are within the scope of the GATS[471].

In this context, the United States asked for a positive reaffirmation that electronic transactions are covered by existing GATS commitments[472]; ironically, the confirmation that WTO rules are indeed applicable to electronic commerce and/or to electronically-supplied services came from the panel and Appellate Body in a case against them.

"Extending" the GATS to electronically-supplied services was called by some authors "the greatest progress of *US Gambling*"[473]. The panel and Appellate Body applied without hesitation the GATS framework to the concerned electronic cross-border delivery of services, finding that the specific subsector of the U.S. schedule included commitments on Internet-delivered gambling services[474]. The Panel syllogistically considered that, since the U.S. has

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[467] For a detailed view on electronic commerce and its legal implications, see ITEANU Olivier, Internet et le droit: Aspects juridiques du commerce électronique, Eyrolles, 1996.
[468] See WUNSCH-VINCENT Sacha, The Internet, Cross-Border Trade in Services and the GATS: Lessons from the WTO US–Internet Gambling Case, World Trade Review, November 2006, p.323.
[469] On 13 December 1996, on the occasion of the WTO's first Ministerial Conference, which was held in Singapore, a total of 28 WTO Members and States or separate customs territories in the process of acceding to the WTO signed the Ministerial Declaration on Trade in Information Technology Products. Acknowledging the importance of technology products to the development of information industries and the dynamic expansion of the world economy, the Declaration's intention was to achieve maximum freedom of world trade in information technology products and to encourage continued technological development on a world-wide basis.
[470] See e.g., CTS Committee on Trade in Financial Services, Report of the Meeting Held on May 9, 2001, S/FIN/M/31 (June 1, 2001) for a statement by the Representative of India that the positive list approach to scheduling specific commitments under the GATS requires new commitments for services delivered through new technologies.
[471] See CTS Committee on Trade in Financial Services, Report of the Meeting held on June 28 and July 28, 2004, TN/S/M/11 (September 8, 2004), especially intervention of Chinese Taipei. See WUNSCH-VINCENT Sacha, "The WTO, the Internet and Trade in Digital Products", Hart Publishing, 2006, p. 156.
[472] CTS, Communication from the United States, Clarification of the Relationship between Existing Services Commitments and the Internet, S/C/W/130 (October 14, 1999) and COMTD, Submission by the United States, Work Programme on Electronic Commerce, WT/COMTD/17 (February 12, 1999).
[473] See WUNSCH-VINCENT Sacha, The Internet, Cross-Border Trade in Services and the GATS: Lessons from the WTO US–Internet Gambling Case, supra, p.323.
[474] Panel report in US Gambling, paras 6.362 – 6.363.

made a commitment under Mode 1 (cross-border trade), and since Internet-provided services can be understood as cross-border services, the U.S. has therefore made a commitment with respect to Internet-provided services.

The Panel and Appellate Body equated the cross-border delivery by mail or any other (including electronic) facility, basically establishing the *technological neutrality* of specific GATS commitments in mode 1. In other words, new services or new ways of providing services that arise through the Internet benefit from a liberal trade treatment, if they are adequately captured by existing specific GATS commitments and thus the corresponding classifications[475].

I.5.3.1.2.Evolutionary Interpretation of Treaties by International Tribunals

This brings us to the question of extensive and *evolutionary* treaty interpretation, which has been created and applied by the international courts[476].

The European Court of Human Rights, for instance, found in its *Tyrer* case that “the Convention is a living instrument which … must be interpreted in the light of present-day conditions”[477]. Also, an arbitral tribunal in a dispute between Canada and France found that the aim of a treaty can separate itself from the aims of the original parties and can acquire an objective autonomy[478].

The evolutionary interpretation of treaties is a modern method. In 1971, the International Court of Justice gave the tone when it replaced the traditional interpretation method (reading the text in the light of its time) with a dynamic interpretation: “Tout instrument international

[475] See WUNSCH-VINCENT Sacha, The Internet, Cross-Border Trade in Services and the GATS: Lessons from the WTO US–Internet Gambling Case, supra, p.329.
[476] In domestic law, interpreting texts in light of changing circumstances and technologies is a familiar problem. One classic example is the US constitutional question of whether wiretaps are a “search” under the US Fourth Amendment, given the fact that there were no wires to tap when the Bill of Rights was drafted in the 18th century. See WU Tim, The World Trade Law of Censorship and Internet Filtering, supra, p.12.
[477] ECHR Case of Tyrer v. The United Kingdom, no. 5856/72, §15. See also ECHR Case of Marckx v. Belgium, no. 6833/74, §19 and ECHR Case of Loizidou v. Turkey, no. 15318/89, 1996-VI.
[478] “Dans les traités normatifs ou institutionnels conclus entre un nombre élevé d’Etats et pour une durée indéterminée, le but du traité se détache aisément des finalités poursuivies par chacun des contractants primitifs et acquiert une autonomie objective que l’interprète ne peut méconnaître”. Arbital tribunal, case concerning Fileting within the Gulf of St. Lawrence (Canada/France) of 17 July 1986, R.G.D.I.P. 1986 pp.713-734.

doit être interprété et appliqué dans le cadre de l'ensemble du système juridique en vigueur *au moment où l'interprétation a lieu*" [479] (emphasis added).

This approach was also taken by the Appellate Body in the *US Shrimp* dispute, for example, when it the concluded that the term "exhaustible natural resources" in GATT XX(g) includes sea-turtles, despite drafting history that suggested an original intent to refer to resources in finite supply, like minerals, not animals[480].

The principle of evolutionary interpretation ineluctably relates to the principle of teleological interpretation[481]. In the concrete case of the GATS, it could indeed be argued that the aim of the treaty being the progressive liberalization of services, the advent of the Internet integrates perfectly this trend and it constitutes a powerful instrument in the service of liberalization. However, some reserves could be expressed as to this approach.

I.5.3.1.3.Reservations as to the Evolutionary Approach

The question of contemporaneous versus evolutionary interpretation arises "whenever a rule refers to a concept the scope or significance of which has changed in the course of time".[482]

In our case, this could be applied to Internet technology, the significance of which suffered dramatic and unforeseen changes over the past decade[483]. The WTO negotiators did not

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[479] ICJ Namibia (Legal Consequences) Advisory Opinion, ICJ Reports 1971, 31: "the concepts embodied in Article 22 of the Covenant (…) were not static, but were by definition evolutionary (…) The parties to the Covenant must consequently be deemed to have accepted them as such". See also the ICJ Case concerning the Aegean Sea Continental Shelf (Grece v. Turkey), ICJ Reports 1978, 3; the more recent La Bretagne Arbitration (Canada v. France) 82 ILR (90 RGDIP 716, at para. 49 (1986); ICJ the Maritime Boundary Arbitration (Guinea-Bissau v. Senegal) (Award of 31 July 1989, 83 ILR 1, at para. 85 (1990); and the ICJ Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997. For a full presentation of this Opinion, see YAMBRUSIC Edward Slavko, Treaty Interpretation. Theory and Reality, University Press of America, 1987, pp.130-144

[480] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, paras 127-131. For a critique, see Oppenheim's International Law, first published in 1905, 9th edition by Jennings and Watts, 1992, p.1282.

[481] See SIMON Denys, L'Interpretation Judiciare des Traités des Organisations Internationales, éd. A. Pedone, 1981, p.391.

[482] Institute of International Law Resolution of the of 1 September 1995 on "Problems arising from a succession of codification conventions on a particular subject", Preamble 4, 66 Yearbook Of The Institute Of International Law, Part I, 245-248 (1995), hereafter "IIL Resolution 1995".

[483] Article 31.3(c) of the Vienna Convention, which requires that a treaty interpreter takes into account, together with the context, "any relevant rules of international law applicable in the relations between the parties", leaves this question open. See PAWELYN Joost, The Nature Of WTO Obligations, supra, p. 32.

anticipate the giant leap in communications technologies — most important of all, the universalization of the Internet protocol — that would distinguish the 1990s. As a consequence, almost by accident, many of the world's citizens and legal entities today have become what WTO law refers to as "exporters" and "importers" of information services[484].

Internet has not only engendered new types of services, but it has generally created a new platform on which services can be based. Some WTO Members could reasonably argue (which the U.S. did not[485]) that such a dramatic change of technological circumstances, sometimes called the "Internet revolution", could not come under the normal evolutionary treaty interpretation, because it largely surpassed not only the initial will of the parties[486] (which is the very sense of an evolutionary interpretation), but also any reasonable expectation projected in the future[487], thereby completely shattering the development of international trade as envisaged by the GATS[488].

It is also important to note that the Commission in charge of drafting the Vienna Convention had formulated, in the set of draft articles adopted at first reading, the principles of interpretation as follows:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

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[484] See WU Tim, The World Trade Law of Censorship and Internet Filtering, supra, p.5

[485] Before the US Gambling case, the US had repeatedly considered that the GATS should be flexible and cover the new technology provided by the down of the Internet. See the Communication from the United States, Clarification of the Relationship between Existing Services Commitments and the Internet of 1999, supra, and the Submission by the United States, Work Programme on Electronic Commerce of 1999, supra, in which the US asked for the GATS provisions to be applicable to electronic commerce.

[486] It is interesting to note that in Mexico – Telecoms, the US had argued that "the extent of a Member's commitments cannot depend upon what it alleges to have intended at the time of the negotiations. The ordinary meaning of Mexico's Schedule instead dictates its commitments". Second written submission of the Unites States of America. See Panel Report, Mexico – Measures Affecting Telecommunications Services, WT/DS204/R adopted 1 June 2004, DSR 2004:IV, 1537, para. 20.

[487] In a case of hardship invoked before the international Court of Justice, Hungary had claimed, inter alia, fundamental changes in scientific knowledge as a basis for termination of a treaty with Slovakia. The Court rejected the claim, on the ground that these developments were not completely unforeseen. ICJ Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), supra, para 104.

[488] In US – Corrosion-Resistant Steel Sunset Review, the Panel noted at at paras 7.43–7.44 that "Article 31 of the Vienna Convention requires that the text of the treaty be read in light of the object and purpose of the treaty, not that object and purpose alone override the text". See Panel Report, United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report,WTDS244/AB/R, DSR 2004:I, 85

(a) in the context of the treaty and in the light of its objects and purposes; and (b) in the light of the rules of general international law *in force at the time of its conclusion*"[489].

This text was finally modified in the form that we know today[490], because most members thought that the effect of subsequent changes upon the treaty should not be considered under the chapter referring to interpretation, but rather under the question of modification of the treaty[491]. The Commission thus dropped the phrase "in force at the time of its conclusion" and explained that "*in any event*, the relevance of rules of international law for the interpretation of treaties in any given case was *dependent on the intention of the parties*" (emphasis added). The Commission's argumentation was criticized by many authors[492], using the very words of the International Court of Justice who had "more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain"[493].

In the light of these historical explanations, it could be argued that the evolutionary approach brought by the jurisprudence, although constructive in many cases, could not go against the *fundamental intention* of the parties as perceptible when entering into an agreement[494]. Or, since the ubiquity, instantaneity and multi-purpose of the Internet provide for a much spectacular liberalization than the parties intended and agreed upon when negotiating the GATS, it can be maintained that the extension of the GATS provisions to the new Internet reality disrupts the fundamental intentions that the WTO Members had in mind for a future liberalization of services and amounts to a "revision" of the treaty. Parenthetically, the fact

[489] Yearbook of the International Law Commission (1966-II), 222.

[490] For a rich drafting history of Article 31 of the Vienna Convention, see CORTEN Olivier, KLEIN Pierre (editors), Les conventions de Vienne sur le droit des traités, Bruylant, Bruxelles 2006, vol.II, pp.1289-1338.

[491] See Sir SINCLAIR Ian, The Vienna Convention on the Law of the Treaties, Manchester University Press, 1984, p.248. It is interesting to note, in this connection, that Article 38 of the Draft Convention, which provided for the modification of treaties was deleted at the Vienna Conference; however, the modification of treaties by subsequent practice was reaffirmed by the international tribunals as a general rule of international customary law (see the Arbitral tribunal in Air Transport Services Agreement Arbitration, US v. France, 22 December 1963, 38 ILR, 1969 p.249).

[492] See for instance McDOUGAL Myres S., The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus, in The Law of Treaties, Ed. By Scott Davidson, 2004, p.271; JACOBS Francis G., Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference, in The Law of Treaties, Ed. By Scott Davidson, 2004, p.310.

[493] International Law Commission Report, UN General Assembly 21st Session, Official Records, Supp. No.9, UN Doc. A/6309/re.1, 1966, at 52.

[494] See DUPUY Pierre-Marie, Droit international public, 8e éd., Dalloz, 2006, p.328.

that a treaty could not be interpreted so as to cause a complete alteration of the parties' intentions can also be understood from Article 62 of the Vienna Convention (the emergence of dramatic changes unforeseen by the parties is a reason to invoke hardship in international law)[495].

Therefore, the question remains: is the judge respecting the balance of rights and obligations struck by the GATS drafters, or is he modifying the *total* policy space as originally contracted by the parties? In the latter case, what principle can justify such a "licence to legislate"?[496] The WTO adjudicating bodies will perhaps take more caution and ensure a sounder foundation for their argumentation when approaching this issue in the future.

As one author noted[497], the evolutionary interpretation of treaties was understandably used in particular by human rights tribunals, in their struggle to enforce the rights of individuals against states. However, its application to all treaties remains controversial and is not universally accepted[498].

[495] For a full examination of hardship in international law, see for instance ALMEIDA PRADO Mauricio, Le hardship dans le droit du commerce international, Bruylant Ed., 2003 ; SICO Luigi, Gli effetti del mutamento delle circostanze sui trattati internazionali, CEDAM Ed, Padova, 1983.
[496] For the same critique in the context of an evolutionary interpretation of Article XX GATT (the meaning of "exhaustible natural resources"), see MAVROIDIS Petros C., The General Agreement on Tariffs and Trade, Oxford University Press, 2005, pp.197-199.
[497] ZIEGLER Andreas R., Introduction au droit international public, Stämpfli Ed., Bern, 2006, p.104.
[498] For a discussion, see PALMETER David, MAVROIDIS Petros C., Dispute Settlement in the World Trade Organization. Practice and Procedure, Cambridge University Press, 2004, p.83.

I.5.3.2. Likeness in the GATS: Is a Brick-and-Mortar Casino "like" an Internet Casino?

An important element that the Panel and Appellate Body did not address, although it was largely debated by the parties, is the concept of "like services" and "like service suppliers" under GATS Article XVII[499]. Because the Panel exercised judicial economy with respect to this issue, the matter of "likeness in the GATS" is still much uncharted territory[500]. As one author puts it, there is presently no rigorous methodology for determining "likeness" in WTO law[501].

The text of the GATS and the Scheduling Guidelines do not provide guidance as to which criteria should be taken into account to determine likeness, and most Members left to case-law the task of determining the concept on a case-by-case basis. However, only a few dispute cases involving national treatment and most-favoured-nation treatment claims under the GATS concern the criteria which should be used to establish "likeness". In *EC – Bananas III*, the panel accepted that foreign and domestic services and services suppliers were "like", without justifying its decision in great details. Reference was made to the "nature" and "characteristics" of the services at stake, without explaining what these were[502]. In the *Canada – Autos* dispute, it was added that the findings in *EC – Bananas III* must be applied

[499] Article XVII on National Treatment reads: "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."
[500] COSSY Mireille, Determining "likeness" under the GATS: Squaring the circle?, WTO Staff Working Paper ERSD-2006-08, September 2006, available at http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf. For a critique of this paper, see PAWELYN Joost, The Unbearable Lightness of Likeness, 2006, available at www.law.duke.edu/fac/pawelyn/pdf/unbearable_lightness.pdf.
[501] GOCO Jonell B., Non-discrimination, Likeness and Market Definition in WTO Jurisprudence, 40 Journal of World Trade Law, April 2006.
[502] Panel report in *EC – Bananas III*, para. 7.322: "To the extent that entities provide these like services, they are like service suppliers". Panel Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas, adopted 25 September 1997, WT/DS27.

"for the purpose of the case". Moreover, in this latter dispute, the panel introduced the concept of "likeness across modes"[503].

Some guidance on this important concept[504] can be sought in the GATT related jurisprudence on the matter on "like products"[505]. In the *EC – Asbestos* case[506], the Appellate Body summarized as follows the approach for determining likeness under the GATT:

"This approach has, in the main, consisted of employing four general criteria in analyzing "likeness":

- the properties, nature and quality of the products;
- the end-uses of the products;
- consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and
- the tariff classification of the products. [footnote omitted].

We note that these four criteria comprise four categories of "characteristics" that the products involved might share:

- the physical properties of the products;
- the extent to which the products are capable of serving the same or similar end-uses;
- the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and

503 Panel report in. See Panel Report, Canada – Certain Measures Affecting the Automotive Industry, adopted 19 June 2000, WT/DS139, WT/DS142 (Canada –Autos), para. 10.307.

504 One commentator argues that although "likeness" in indubitably an important aspect, the focus on it as the core element of a national treatment test under GATS is misguided. Instead, the focus of a national treatment analysis ought to be on how to define "less favorable treatment of foreign services or service suppliers", in particular on what qualifies as de facto discrimination. See PAWELYN Joost, The Unbearable Lightness of Likeness, supra, p.3.

505 For an analysis of "like products" from the perspective of ethical values, see SWINBANK Alan, Like Products, Animal Welfare and the World Trade Organization, Journal of World Trade 40(4), 2006.

506 For a comment, see HORN Henrik and WEILER Joseph H.H., "EC-Asbestos European Communities: Measures Affecting Asbestos and Asbestos-Containing Products", World Trade Review (2004), volume 3 , issue 1 , p. 129-151.

- the international classification of the products for tariff purposes."[507]

In *Japan Alcoholic Beverages*[508], the Appellate Body formulated an approach to determine "like" or "directly competitive and substitutable" products that explicitly puts emphasis on the "marketplace". As a tool for dissecting the market, the Appellate Body confirmed the utility of economic analysis[509]. This approach has been followed by the adjudicating body in *Korea Alcoholic Beverages*[510]and *Chile Alcoholic Beverages*[511].

However, in the 1994 *Gas Guzzler* report[512] the WTO adjudicating bodies had taken a markedly different approach. The panel proposed that likeness between two products should be evaluated in light of the aim and effect of the challenged regulatory intervention that gave rise to the dispute in the first place[513]. According to this view, likeness would not be defined by reference to prevailing perceptions about the pair of products in the marketplace, but by reference to the regulatory aims pursued by the intervening government.

It is important to note that, unlike under the GATT, the national treatment obligation under the GATS explicitly applies to both products *and* producers[514]. The practical significance of this doublet[515] is viewed differently among commentators. One author argues that the

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[507] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135, adopted 5 April 2001, para. 101.
[508] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, WT/SD10 and WT/DS11, adopted 1 November 1996.
[509] For a comprehensive study on this matter, see CHOI Won-Mog, Like Products in International Trade Law. Towards a Consistent GATT / WTO Jurisprudence, Oxford Univ. Press, 2003.
[510] Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44.
[511] Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303.
[512] Panel Report, *United States – Taxes On Automobiles*, GATT Doc. DS31/R of 11 October 1994.
[513] For a complete overview of the jurisprudence, see HORN Henrik and MAVROIDIS Petros C., "Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination", European Journal of International Law, Vol. 15, No. 1, pp. 39-69.
[514] In *US – Gambling*, the Panel asked the parties whether there was "always a need to assess likeness for both 'services' and 'service suppliers'". Parties and third parties expressed very different views. Antigua argued, in essence, that a cumulative requirement would have the effect of limiting the scope of Article XVII since "less favourable treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers".Invoking the Canada – Autos panel report, the United States argued that likeness had to be established for both services and service suppliers. The EC considered that establishing a discrimination between services only would be sufficient and Mexico replied that the assessment would "depend on the specific claims of violation in any given dispute and the facts and circumstances of each case".
[515] We note that NAFTA Chapter 12, dealing with cross-border trade in services, refers exclusively to "service providers" and not to services. On the other hand, the national treatment clause in NAFTA Chapter 11 addresses the "investors of another Party" and the "investments of investors of another Party" in two different paragraphs.

reference to services and service providers is insignificant because "any treatment of services is also, in effect, a treatment of the suppliers thereof and vice-versa"; therefore, the reference to services and suppliers does no harm, "except for the confusion it may cause as it implies that the distinction has a practical significance"[516].

Other commentators attach importance to the fact that Article XVII refers both to services and suppliers; these authors argue in favor of a "disjunctive" test, whereby both services and service providers would have to be evaluated, but separately[517].

This "disjunctive test" is supported by another scholar who is concerned that a "cumulative" test would not allow Members to discriminate among like services because a measure "which treats service suppliers – for valid regulatory reasons – differently could be invalidated it if (also) affected the supply of like services"[518]. However, according to other authors, such "disjunctive" test may not be easy to implement in practice[519].

I.5.3.2.1. Hypothesis 1: Assessing Likeness of Remote and Non-Remote Gambling Services Is Crucial In Order To Assess National Treatment

If we assume that likeness of services and service suppliers is crucial in the Article XVII consistency test[520], we would consequently need to find criteria in order to assess their direct competitiveness and substitutability.

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[516] ABU-AKEEL A.K., The MFN as it Applies to Service Trade – New Problems for an Old Concept, in Journal of World Trade 33(4):103-129, 1999, pp. 109-110.

[517] NICOLAÏDIS Kalypso, TRACHTMAN Joel P., From Policed Regulation to Managed Recognition in GATS, in SAUVÉ Pierre., STERN Robert M. (editors), GATS 2000 – New Directions in Services Trade Liberalization, Brookings Institution, Washington DC, 2000. 241-282, p. 254.

[518] KRAJEWSKI Marcus, National Regulation and Trade Liberalization in Services, Kluwer Law International, 2005, pp. 105-107.

[519] COSSY Mireille, Determining "likeness" under the GATS: Squaring the circle?, supra, pp.9-10: paragraph 15 of the Scheduling Guidelines "could be read as mandating a national treatment obligation only for services, as far as modes 1 and 2 are concerned. Consequently, only the service should be considered in the context of modes 1 and 2, while the service and/or the supplier would relevant for modes 3 and 4" ; VERHOOSEL Gaetan, National Treatment and WTO Dispute Settlement – Adjudicating the Boundaries of Regulatory Autonomy, Hart Publishing, 2002, p.62; WEISS Friedl., The General Agreement on Trade in Services 1994, Common Market Law Review, 32:1177-1225, 1995, p. 1206 (suggesting that the comparison of suppliers is relevant only for modes 3 and 4: "National treatment, therefore, means treating all services providers – in a given sector and mode of supply – located within the territory of a Member in non-discriminatory manner, irrespective of nationality or ownership").

[520] COSSY Mireille, Determining "likeness" under the GATS: Squaring the circle?, *supra*.

The first question rising in relation to these criteria is if the GATT "likeness of products" test is suited for services. According to one author[521], while the four criteria used in GATT jurisprudence can offer a useful starting-point for analysis, this starting base in too narrow for determining likeness of services and service suppliers, and may have liberalizing effects exceeding what is necessary to protect conditions of competitions for foreign services and service suppliers. New concepts – in particular the application of the national treatment to service suppliers in addition to services, the existence of four modes of supply – call for different solutions. In this view, the "aim and effect" approach[522] could offer a starting-point for dealing with national treatment claims in services trade. The author admits nevertheless that while the thrust of this approach has merits, its application should be strengthened to permit only good faith measures which do not have disproportionate effects on foreign services and service suppliers[523].

[521] COSSY Mireille, Determining "likeness" under the GATS: Squaring the circle?, *supra*.
[522] According to the "aims-and-effect" test, as reflected in the GATT Panel Report, United States – Taxes on Automobiles, DS31/R, 11 October 1994, the party burdened with the demonstration of likeness must inquire into the motives of the governmental action and its effects. See MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, The World Trade Organization. Law, Practice and Policy, supra, p.663.
[523] The same author suggests the importance of "regulatory distinctions" to differentiate between services. In *US – Gambling*, the United States argued in favor of a distinction based on "regulatory distinctions" to differentiate between internet gambling and gambling by other means. The United States argued, inter alia, "Regulatory distinctions are directly relevant under GATS Article XVII, and should be considered in their own right – not solely through the lens of consumer perceptions. The GATS explicitly recognizes in its preamble the "right of Members to regulate" services. The "like services and suppliers" language of Article XVII must therefore be interpreted in light of that object and purpose of the GATS. Thus, one must consider not only the different competitive characteristics of a services or supplier as such, but also the existence of regulatory distinctions between services in interpreting and applying the likeness analysis under Article XVII. Such issues have been addressed in the goods context under the rubric of consumer perception and their impact on competitive relationship, but they merit independent consideration in the context of the GATS. They assume particular importance in this dispute because gambling is so heavily regulated […] The more relevant likeness factor in this dispute is therefore not differences in regulation per se, but differences in the characteristics of services and suppliers that influence the manner in which they are regulated" (Panel report on US - Gambling, para. 3.188, emphasis added). Japan referred also to "regulatory circumstances" which may be different for services provided cross-border as compared to services supplied via a commercial presence, thus making these services "unlike". An "importing" Member would have to demonstrate that different regulatory requirements are necessary (Panel report in US – Gambling, para. 4.45). The EC stated that "... if differences in the factual circumstances had an impact e.g. on the characteristics of the services themselves, as they are provided in the territory of the WTO Member whose measure is at issue, they could have an impact on the likeness of the domestic and foreign service."(Panel report in *US – Gambling*, paras 4.36 – 4.41).

However, the WTO adjudicating bodies in *Japan – Alcoholic Beverages II* and in *EC – Bananas III* report explicitly rejected the relevance of the aims and effects test in assessing consistency with Art. XVII GATS[524].

Another author proposes, among the relevant factors to be examined when analyzing "likeness" of services, the following criteria: the characteristics of the services or service supplier; the classification and description of the services in the UN CPC system; and consumers' habits and preferences regarding the service or the service supplier[525].

In another opinion, the criteria used in order to determine "likeness" of services and service suppliers can be inspired by the concept of "relevant market" and the methodology for "market definition", which were originally developed in antitrust law. These criteria are actually subjective indicators of cross-price elasticity of demand[526].

Bearing in mind all the above considerations, we will briefly re-examine Antigua's arguments that services and service suppliers of Antigua are "like" those of the United States.

First, it was argued that the types of games offered from Antigua are the same as those offered in the United States and all involve the winning or losing of money; the only differences would be the origin of the services and the suppliers and the mode of supply (cross-border as opposed to commercial presence).

We believe that, if we analyze gambling services in the context of cross-border supply (and assuming that a Member has made a commitment granting national treatment), cross-border gambling supply via remote communication could not automatically be considered "unlike" land-based gambling supply, only because it is provided through Mode 1. Further comparison of the services in question should be undertaken[527].

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[524] Panel report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996; Appellate Body report, EC – Bananas, supra, paras. 240 – 1.
525 See VAN DEN BOSSCHE Peter, The Law and Policy of the WTO. Text, Cases and Materials, Cambridge University Press, 2005, p.368.
[526] See GOCO Jonell B., Non-discrimination, Likeness and Market Definition in WTO Jurisprudence, 40 Journal of World Trade Law, April 2006, p.332
[527] Given that services can be supplied across borders, the advent of the Internet constitutes a severe test of the bounds of likeness. (ARKELL, Julian, The GATS—Its Innovative Approach to Trade Rules in the New Economy, Address to the 12th Annual International Conference of the European Network of Economic and Spatial Service Research, Manchester, England, September 26–27, 2002, p. 5. The question is whether the nature

Therefore, looking at the two services to be compared, we note the following: among the two forms of gambling licensed in Antigua – casino gambling and sports betting – at least with respect to the first, likeness with the U.S. based casino services could be questioned. A difference between Internet virtual casinos and brick-and-mortar is that in a virtual casino, the true outcome of the wager is generated by a software algorithm of a random number. Results are controlled by a computer rather than by the laws of the physical world (having said that, we also note that, in many U.S. land-based gaming facilities, some gambling machines legally available are also electronic and computer-controlled, for instance video lottery terminals and video poker and other card game terminals). Then, there seems to be an important difference in the scope of availability of these services, particularly with regard to their availability to minors and pathological gamblers.

Second, Antigua argued that consumers perceive Internet and land-based gambling services as interchangeable (which lead them to consume gambling services provided from Antigua instead of those from the US). However, studies showed major differences in consumer perceptions between real and virtual casino services. For example, the "noise and visual effects of the casino floor . . . heightens the thrill and pleasant tension"[528] that consumers perceive in a real casino. It indicates that consumer perceptions are influenced by the physical surroundings, layout, amenities, and real-world stimuli of a real casino, which are inexistent with Internet casinos. Having said that, since the Panel avoided the problem of likeness in

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of a service can be changed due to the fact that the supplier is not located in the host country or that the service is supplied via electronic means. Under the WTO Work Programme on E-Commerce, the Council for Trade in Services expressed the need for more discussion on the question of likeness and its relationship to the notion of technological neutrality. Delegations posed the question to what extent electronically-traded services must be considered “like” services delivered via different means. Moreover, the question was whether a service that is delivered electronically from abroad must be treated in the same manner as one that is delivered domestically through non-electronic means (DRAKE William J., NICOLAÏDIS Kalypso, Global electronic Commerce and the GATS: The “Millenium Round” and Beyond, in SAUVÉ Pierre., STERN Robert M. (editors), GATS 2000 – New Directions in Services Trade Liberalization, Brookings Institution, Washington DC, 2000, p. 23). In US Gambling, the panel ruled that, in the presence of full specific GATS commitments for mode 1, services cannot be declared unlike and denied market access on the basis that the service delivery under this particular mode requires specific transmission technologies that are different from domestic service suppliers (See US-Gambling, Panel Report, paragraph 3.161). Likeness depends on the attributes of the products in question, rather than on the technological means of their delivery (C.f. S/L/74 (July 27, 1999), paragraph 8).

[528] FINDLAY John M., People of Chance: Gambling in American Society from Jamestown to Las Vegas, Oxford University Press (1986), p. 157.

services, it was not clarified if, according to *EC – Asbestos*[529], these visual and acoustic characteristics are meaningful or not when determining whether things are "like."

Third, it was argued that both Antiguan and U.S. origin gambling and betting services are offered to the public via communication technology including telephone and electronic communication.

Finally, the international classification of services used in the WTO context, the CPC, provides only one category for gambling and betting services.

Regarding the likeness of service suppliers, to the extent that suppliers from Antigua and suppliers from the United States provide "like" services, they are also "like" service suppliers. However, some potentially relevant differences could also be expressed (for example, U.S. state lotteries are supplied exclusively through state monopolies).

Summing up our brief analysis under this hypothesis and using the scarce indications of the jurisprudence together with the criteria proposed in the literature, we conclude that the issue of "likeness" between remote and non-remote gambling services would be decided mainly through a rigorous economic analysis of elasticity of demand, determining the degree of direct competition between the two types of services, based among others on the services relevant characteristics, the consumers' perception and the international service classification.

I.5.3.2.2. Hypothesis 2: Circumventing the Issue of Likeness and Focusing On Discrimination

According to one scholar[530], instead of focusing on whether products are "like" with reference to allegedly neutral criteria of physical characteristics, end use, consumer tastes and tariff classifications – all of which are portrayed as permissible features on which to base regulatory distinctions – panels should concentrate on the specific law or regulation that is at issue, and ask the following question: does the law or regulation differentiate, *de jure* or *de facto*, based

[529] Appellate Body Report on EC – Asbestos, para. 92.
[530] PAWELYN Joost, The Unbearable Lightness of Likeness, supra, p.5.

on the one and only impermissible criterion, namely: national origin. In this view, "likeness" is only the trigger or threshold, not the substantive test[531].

The Appellate Body clearly reminded that "even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" imported products "less favourable treatment" than it accords to the group of "like" domestic products … a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products"[532].

As an illustration, the Panel report on *EC – Biotech* assumed that biotech products and non-biotech products were like (thereby avoiding the likeness question altogether), but pointed out that the EC treats all biotech products alike irrespective of origin, and also treats all non-biotech products alike irrespective of origin[533].

Following this argumentation, the measures at issue in *US Gambling* would seem to pass the Article XVII consistency test, since they would not discriminate between domestic and foreign services, or between domestic and foreign services suppliers (with the exception of the Interstate Horse Act)[534]. The presence of a non-protectionist purpose (in this case, protection of children, prevention of addictions or anti-money laundering measures etc.), and the absence of discriminatory effect, would come up as evidence so as to contradict Antigua's claim of protectionism.

While taking note of these arguments and of the Appellate Body's new approach in *EC Biotech* to omit the likeness question altogether, we believe that the issue of "likeness" could re-become important in the analysis of U.S. measures under Article XVII GATS as we propose it in the next Chapter.

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[531] Moreover, the search for *de facto* discrimination (as the truly important element to consider in the substantive test) should not be different between GATS and GATT. See PAWELYN Joost, The Unbearable Lightness of Likeness, supra, p.6.
[532] Appellate Body Report, EC – Asbestos, para. 100, emphasis in the original.
[533] Panel Report, EC – Biotech Products, WT/DS291/R, adopted on 21 November 2006, para. 7.2514.
[534] The Appellate Body confirmed a form of discrimination based on an authorization in the Interstate Horseracing Act permitting domestic, but not foreign, service suppliers to offer remote betting services in relation to certain horse races. Appellate Body Report, US – Gambling, para 369.

I.6. ALTERNATIVE APPROACH TO THE US GAMBLING CASE

I.6.1. Brief Summary of Critiques to the *US Gambling* Reports

Recapitulating all the important critiques which were cast on the *US Gambling* reports, we retain the following main points:

1. Concerning the *measure at issue* and the *zero quota*, the main two critiques were that: (a) the WTO adjudicating bodies failed to properly interpret subparagraph (a) of GATS Article XVI:2 (measures having an *effect* equivalent to a quota should not come under Article XVI; also, the GATS context, object and purpose have not been taken into consideration) and; (b) the panel and Appellate Body erred when they considered that a non-discriminatory zero-quota is a quota under Article XVI.

2. Concerning the question of the US *schedule of commitments*, questions were raised as to: (a) the correct qualification as to the nature of the Members' schedules of commitments; (b) the qualification of W/120 document and of the Scheduling Guidelines as "context" rather than "supplementary means of interpretation"; (c) the prevailing language of the schedules, and; (d) the utility of a comparison between other Members schedules.

3. With respect to Art. XVI – *Market access*, the main questions were: (a) what is the relationship between Article XVI and Article VI (concretely, do the U.S. measures qualify as market access restrictions or as domestic regulations?), and; (b) what is the relationship between Articles XVI and XVII (did the U.S. need to schedule non-discriminatory market access barriers under Article XVI?)

4. Concerning the *exemptions under Article XIV*, some questions arise as to: (a) the clarification of the "public morals" notion and the challenges faced when such (domestic) notion is interpreted by international tribunals, and; (b) the controversial relationship "gambling – crime – public order".

On the other hand, several issues were not resolved at all by the WTO adjudicating bodies.

1. The issue of “likeness” in the context of services remains largely unmapped territory.

2. More importantly, the “evolutionary treaty interpretation” that was undertaken by the DSU with respect to the new Internet technology is not without challenges.

I.6.2. Alternative Approaches to the *US Gambling* dispute

Several alternative solutions and arguments were at the reach of the DSU in *US Gambling*.

One apparent option is based on the reservations we expressed in Chapter I.5.3.1 as regards the evolutionary treaty interpretation given by the DSU.

Indeed, extending the GATS to electronically-supplied services, acclaimed by some authors as the greatest progress of *US Gambling*, remains a controversial issue. We remind however that such broadening of the GATS scope had been repetedly demanded by the US at the end of the 90’s and the confirmation came – ironically – in a case against them.

If the panel and Appellate Body had been more hesitating in applying the existing GATS framework – outlined before the explosion of the Internet which was probably inimaniginable to its drafters – to the electronic cross-border delivery of services, the solution to *US Gambling* would have probably been very different.

However, alternative solutions exist even if we assume the evolutionary approach.

Indeed, a judicial (general) analysis of this dispute could be performed by striking a different balance between the interpretation of Articles XVI and XVII GATS.

In summary, if we take service “X” supplied via Internet in Arcadia (and assuming that this country undertook specific commitments to grant market access and national treatment), we would structure our alternative approach by answering the following questions:

Question no. 1: Is there a relevant market for service X in Arcadia?

If the answer is negative and Arcadia allows no providers for service X, whether foreign or domestic, to operate, we can qualify it as a non-discriminatory zero-quota, attached to Arcadia’s regulatory sovereignty.

If the answer is affirmative and Arcadia allows the provision of service X, we can acknowledge that there is a domestic market for such a service. In such a case, we can move on to the following question.

Question no. 2: Does Arcadia allow foreign supply?

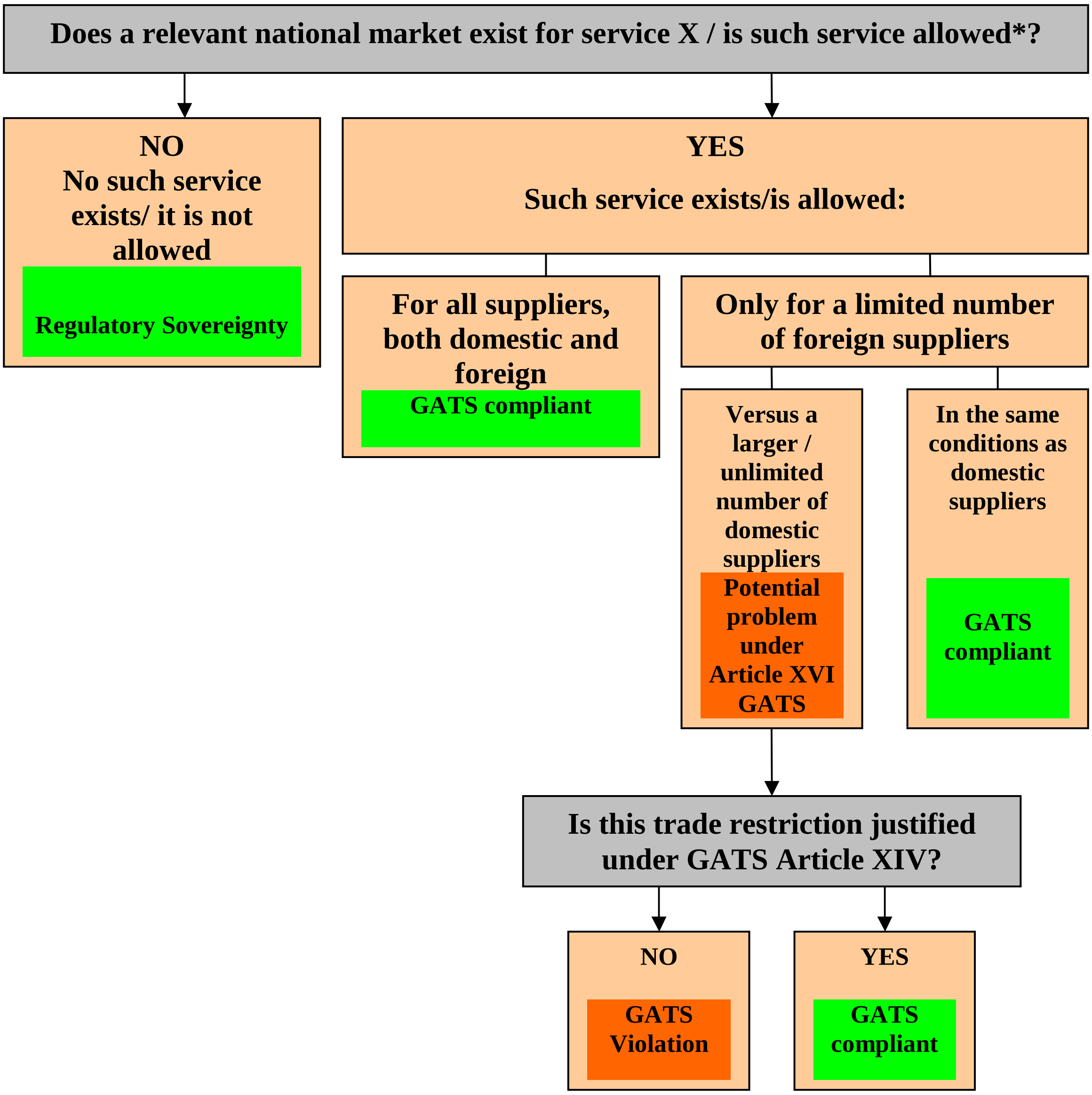
If the answer is negative, we can analyze this restriction in the light of GATS Article XVII as being a discriminatory zero-quota.

If the answer is affirmative, we will question further if *all* foreign suppliers are allowed to operate, or if *only a limited number* of them may do so, as compared to the conditions under which *national* suppliers may offer similar services.[535]

If Arcadia allows only a limited number of foreign suppliers to operate on its market, while such restrictions do not apply to national providers, a potential violation of GATS Article XVI can be analyzed[536]. In order to determine if such restriction is justified, we will then ask the last question, i.e.

Question no. 3: Is the trade restrictive measure justified under Article XIV? (see graphic outline below)

[535] We refer the reader to the critique expressed in Chapter I.5.2.3.2, where it is submitted that national treatment is the best standard that foreign suppliers can obtain in a national market.
[536] We remind that all arguments presented herein rest on the assumption that market access and national treatment commitments have been undertaken by the country in question.



* Assuming that Arcadia has undertaken specific commitments to grant market access and national treatment.

If we now apply this outline to gambling services specifically, we would need to answer the following questions:

Question no. 1: Is there a relevant domestic gaming market in US?

We note that the answer to this question is likely to become the core of the debate, because the others are relatively undisputed.

If the answer is negative (i.e. the U.S. prohibits all gambling activities, whether foreign or domestic), then the U.S. measures establish a non-discriminatory zero-quota and do not violate the U.S. commitments under GATS.

If the answer is affirmative (i.e. there is a relevant gambling market in the U.S.), then the measures which prevent Antiguan providers from penetrating the U.S. market establish a discriminatory zero-quota, violating the U.S. commitments[537] under GATS Article XVII.

In order to answer this question, the analysis developed by international adjudicating bodies in the field of competition law could provide us with a precious guidance.

In European competition law, for instance, the relevant market combines the product market and the geographic market. A relevant product market comprises all products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use – as we can see, the concept of “likeness” of different gambling services will be an important aspect to consider. A relevant geographic market comprises the area in which the entities concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous[538].

Question no. 2: Does the U.S. allow foreign supply?

Since the U.S. allow no foreign gambling providers, this can be analyzed as a potential violation of Article XVII.

Question no. 3: Is the restrictive measure justifiable under Article XIV?

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[537] We recall that in this analysis we assume that the U.S. have made commitments to liberalize gambling services.
[538] Determining the relevant domestic market may be simpler for unitary states as opposed to federal states such as the U.S.

In the light of the already mentioned scientific evidence suggesting that gambling activities can represent a serious threat to public morals and to the public order, the answer to this question is probably affirmative.

Therefore, if we accept that there is a relevant domestic market for gambling in the U.S., we are brought to examine the case mainly under Article XVII, using the criteria established by the jurisprudence and doctrine in the field of competition law. If on the contrary we find that there is no relevant domestic market for gambling in the U.S. (non-discriminatory zero-quota), we are brought to examine the dispute in the light of the states' regulatory sovereignty.

I.6.3.Closing Remarks

Having presented this reasoning, one assertion would still need clarification in order to exhaust the angles of possible analysis for the *US Gambling* ruling.

Certainly, we have asked in Question no.1 above whether Arcadia allows gambling or not and consequently if there is a "market" for this service.

However, one essential difficulty in answering this question is debating if Arcadia *can afford* to entirely prohibit gambling. In other words, from a public policy perspective, can a state not allow at least some form of gambling without incurring the danger of permitting a black market proliferation for such service?

This enquiry takes us back to the definition of games of chance as understood by the relevant adjudicating bodies in order to question – again – if gambling is a "normal" service obeying the economic reason or rather an "inevitable problem" that public authorities strive to channel into controllable and taxable systems[539] inaccessible to (foreign) competition.

[539] See the arguments before the European Court of Justice in the 2007 *Placanica* judgment, discussed in Part Two.

I.7. Possible Future Developments

Gambling disputes may recur before the WTO adjudicating bodies. In March 2008, the European Commission has decided to launch an investigation into United States measures affecting foreign suppliers of Internet gambling services, within the framework of trade barriers regulations. The decision follows a complaint lodged by the Remote Gambling Association (RGA) in December 2007.

The RGA, representing private European operators of games of chance, claimed that the U.S. should not be allowed to enforce its gambling laws selectively against foreign suppliers, with respect to services offered at a time when the U.S. had WTO commitments permitting online gambling.

The challenge made by the RGA concerns the fact that laws and regulations that ban the supply of Internet gambling into the United States market were already in place at a time when the U.S. had WTO commitments allowing such services. It also claims that the U.S. is selectively enforcing these laws against foreign suppliers, for online gambling services which they offered in the past. The RGA therefore argues that the United States measures violate GATS Articles XVI and XVII[540].

Addressing this issue, EU Trade Commissioner Peter Mandelson considered that, while the U.S. has the right to address legitimate public policy concerns relating to internet gambling, "discrimination against EU companies cannot be part of the policy mix"[541].

Following this complaint, the Commission has engaged in a detailed examination of the factual and legal arguments brought by industry and should present its findings in an investigation report which may finally lead to the launch of yet another gambling related dispute before the WTO.

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[540] This complaint does not concern US measures taken after the adoption of the Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006. Since then, EU suppliers of remote gambling services have withdrawn from the US market. The RGA argues that the US should not prosecute foreign nationals or companies for those activities that took place prior to the withdrawal of WTO commitments by the US, following the US Gambling case.

[541] See the press release at http://www.usatoday.com/tech/news/techpolicy/2008-03-10-eu-gambling-laws_N.htm.

II.TRADE IN SERVICES AND THE OECD

II.1. Introductory Elements

The Organisation for Economic Co-operation and Development (OECD) is a forum whose membership is limited by a country's commitment to a market economy and a pluralistic democracy. It is a "rich club", since its 30 members[542] produce almost 60% of the world's goods and services; however, it is not exclusive and non-members are invited to subscribe to OECD agreements and treaties.

The Organisation shares expertise and exchanges views on topics of mutual concern with more than 70 countries worldwide[543]. All OECD Members are also members of the WTO.

The OECD grew out of the Organisation for European Economic Co-operation (OEEC), which was set up in 1948 with support from the United States and Canada to co-ordinate the Marshall Plan for the reconstruction of Europe after World War II[544]. Created as an economic counterpart to NATO, the OECD took over from the OEEC in 1961 and, since then, its mission has been to help governments achieve sustainable economic growth and employment and rising standards of living in member countries while maintaining financial stability. Its founding Convention also calls on the OECD to assist sound economic expansion in member countries and other countries in the process of economic development, and to contribute to growth in world trade on a multilateral, non-discriminatory basis.

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[542] The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996) and Korea (12th December 1996). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).
[543] See www.oecd.org.
[544] See www.oecd.org/history.

II.2.Services Liberalization under the OECD Instruments

The main OECD instruments applying to trade in services on a general basis are the Code of Liberalisation of Current Invisible Operations (the Invisibles Code, 1973), the Capital Movements Code (1982) and the Declaration on International Investment and Multinational Enterprises (1976). The two Codes are binding decisions of the OECD Council[545], while the Declaration is an encouragement to foreign investment. However, the Third Revised OECD Decision on National Treatment of 1991, which supplements the Declaration, is also a binding Council decision.

The OECD instruments are therefore not a treaty or international agreement in the sense of international law, such as the WTO agreements.

The Codes have assisted OECD Member countries in pursuing the aim of removing unnecessary barriers to the free circulation of capital and services.

The Invisibles Code directly liberalizes a number of cross-border services. Such international transactions covered by the Code, set out in Annex A, comprise eleven areas: business and industry, foreign trade, transport, insurance, banking and financial services, income from capital, travel and tourism, films, personal income and expenditure, public income and expenditure and general (including professional) services. In 1992, a new section was introduced to include cross-border banking and financial services operations.

These types of services are not chosen freely by the Members (as in the GATS framework case), but reservations can be made when an item is added to Annex A, when the obligations relating to an item are extended, or when such obligations begin to apply to a Member.

“Invisibles” is the general term applied to all exchanges in which no merchandise is involved.

According to Article 1 a) of the Invisibles Code, Members shall eliminate between one another, in accordance with the provisions of Article 2, restrictions on current invisible

[545] The OECD Council is the supreme organ of the Organisation in which each country has one vote. Its Decisions, which must be taken unanimously, are legally binding on Member Governments.

transactions and transfers. Measures designed for this purpose are hereinafter called "measures of liberalisation".

As one author noted, the importance of the Invisibles Codes has certainly decreased since the advent of the GATS, which to some extent supersedes the Code and also prohibits restrictions on foreign direct investment and on capital transfers related to services[546].

While the GATS and the OECD Codes both promote the same goal, encouraging liberalisation, the GATS approach is however distinct from that of the Codes particularly in two respects: first, it favors a “bottom-up” approach to defining countries’ individual commitments, as opposed to the Codes’ “top-down” approach, and second, it seeks to achieve its goals through rounds of negotiation rather than through unilateral liberalisation and peer persuasion.

II.3. Market Access and National Treatment

The main principles of the Codes are *standstill* (OECD Member countries have accepted under the Codes that they may not introduce new barriers), *rollback* (if and where a Member has decided to maintain restrictions to the free circulation of capital and services, its situation is examined periodically), *unilateral liberalisation* (Members should be ready to abolish restrictions without expecting an immediate concession from other Members – contrary to other international agreements on trade and investment, the Codes’ approach is not one of bargaining and negotiation of mutual concessions under a give-for-take approach), *non-discrimination* (OECD Members are expected to grant the benefit of open markets to residents of all other Member countries alike, without discrimination) and *transparency* (information on the barriers to capital movements and trade in services in OECD countries should be complete, up-to-date, comprehensible and accessible to everyone)[547].

[546] See RAWORTH Philip, Trade in Services – Global Regulation and the Impact on Key Service Sectors, Oceana Publications, New York, 2006, p.75.
[547] See the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations User’s Guide, 2003, p.11.

The Codes do not separate the concepts of *market access* and *national treatment*. Their provisions apply, subject to any reservations, to any measures taken by the authorities that may restrict the conclusion or execution of operations covered by the Codes.

The legal commitments under the Codes only apply to the OECD area. However, Member governments have accepted to use their best endeavors to extend the benefits of liberalisation to all members of the International Monetary Fund. Thus, residents of developing countries and countries in transition can reap the advantages of free market access in OECD countries to the same extent as OECD residents can.[548]

Concerning *national treatment*, the Codes' liberalisation obligations require Member countries to abolish restrictions on operations between residents and non-residents. These terms, which are basic concepts of exchange control and balance of payments, are not related to nationality. Under the OECD Codes, national authorities retain discretion to decide whether, from their point of view, an individual or an institution is resident or non-resident. Non-residents are to be dealt with on an equal footing with their resident counterparts. A measure is a restriction, if it discriminates between residents and non-residents. As a consequence, Member countries are free to prohibit operations between residents, even if one party to an individual operation happens to be a resident foreign-owned or controlled enterprise[549].

The Codes focus on residency, not on nationality. However, nationality requirements have consistently been considered as restrictions incompatible with the liberalisation obligations of the Codes. This is justified by the fact that, in practice, non-residents are almost always non-nationals, and that a nationality requirement thus defeats all possibility for transactions between residents and non-residents, except for nationals of the country who are resident abroad.

As an exception to the Codes' principle of non-discrimination, EU Member States are permitted not to extend liberalization measures to other OECD countries which are not members of the EU. An example is the EU Second Banking Directive[550], which has

[548] Idem, p.14
[549] Idem, p.24
[550] Directive 89/646/EEC of 15/12/1989. Official Journal N.386 of 30/12/1989.

introduced a single "passport" or licence to provide banking services across the EU, an advantage which has not fully been extended to other OECD Members[551].

II.4.General Exceptions

Article 3 of the Invisibles Code (on public order and security) states that the provisions of the Code shall not prevent a Member from taking action which it considers necessary for: i) the maintenance of public order or the protection of public health, morals and safety; ii) the protection of its essential security interests; or iii) the fulfillment of its obligations relating to international peace and security.

In principle, Article 3 allows Members to introduce, reintroduce or maintain restrictions not covered by reservations to the Code, and, at the same time, exempt these restrictions from the principle of progressive liberalization. However, over recent years, Members have been encouraged to lodge reservations when they introduce restrictions for national security concerns, rather than keeping these restrictions outside the disciplines of the Codes. This has not only the advantage of enhancing transparency and information for users of the Codes, it also constitutes a first step towards eventual liberalisation, especially when national security is not the predominant motive for restrictions, i.e. accompanied by economic considerations[552].

II.5.Gambling in the OECD Framework

While gambling is not listed among the invisible transactions covered by the Codes, delegates of the 30 OECD Member countries gathered in April 2002 in Paris to discuss, *inter alia*, the issue of Internet gambling. The meeting was held under the auspices of the OECD Tax Working Group Party on Consumption Taxes. An overwhelming majority of OECD countries supported the view that gambling operators *must not accept bets and wagers from foreign players in the absence of special agreements between the countries in question*[553].

[551] Idem, p.14
[552] Idem, p.34.
[553] See CABOT Anthony, BALESTRA Mark (Editors), Internet Gambling Report, 7th edition, 2004, p.252.

Internet gambling had already attracted the attention of the OECD countries in 2001, when the Financial Action Task Force on Money Laundering (FATF) Typologies Report approached the issue of money laundering[554]. Internet casinos were listed first in the "major money laundering issues". The Report noted that seemingly "Internet gambling might be an ideal web-based "service" to serve as a cover for a money laundering scheme through the net. There is evidence in some FATF jurisdictions that criminals are using the Internet gambling industry to commit crime and to launder the proceeds of crime"[555].

[554] OECD Financial Action Task Force On Money Laundering Report On Money Laundering Typologies for 2000-2001, p.4
[555] Idem, p.6

PART TWO: REGIONAL TRADE IN GAMBLING SERVICES

The number of international agreements intending to liberalize and promote trade in services has increased spectacularly in recent years[556]. While the General Agreement on Trade in Services, negotiated as part of the Uruguay Round in the late 80s and early 90s, has often represented the model in this field[557], many of the recent and current international treaties addressing trade in services (as well as trade in goods and foreign investment) have been signed at the regional and bilateral levels[558].

Preferential trade agreements (PTA) at this level have principally taken two approaches with regard to the scope of application of the services chapter based on the mode of supply.

One approach follows the GATS "trade in services" model and extends the coverage of the services chapter to the four modes of supply defined in Article I GATS (cross-border trade; consumer abroad; commercial presence; movement of natural persons). For example, Article 3.1 of the EFTA-Korea Free Trade Agreement (on the scope and coverage of the chapter on trade in services) states that the chapter "applies to measures affecting trade in services" and Article 3.3 (on definitions) incorporates the definition of 'trade in services' provided for in Article I GATS[559].

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[556] See FINK Carsten, PTAs in Services: Friends or Foes of the Multilateral Trading System, in Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, MARCHETTI Juan. A., ROY Martin (editors), Cambridge University Press, 2008, pp.113-148.
[557] Earlier attempts to provide rules for trade in services are the Codes and Declaration concluded within the Organization for Economic Cooperation and Development (OECD) in the 70s and 80s. See RAWORTH Philip, Trade in Services – Global Regulation and the Impact on Key Service Sectors, supra, Chapter III.
[558] See MARCHETTI Juan A. and ROY Martin, Services Liberalization in the WTO and in PTAs, in Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, MARCHETTI Juan. A., ROY Martin (editors), Cambridge University Press, 2008, pp.61-112; ROY Martin, MARCHETTI Juan A., LIM Hoe, Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?, in Regional Rules in the Global Trading System, ESTEVADEORDAL Antoni, SUOMINEN Kati, THE Robert (editors), Cambridge University Press, 2009; CRAWFORD Jo-Ann, FIORENTINO Roberto, 'The Changing Landscape of Regional Trade Agreements', WTO Discussion Paper No 8 (2005).
[559] Several other examples are presented by ORTINO Federico, Regional Trade Agreements and Trade in Services, in Lester & Mercurio(editors), Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies, Cambridge University Press, 2008, pp.11-12. EFTA-Korea FTA ("Measures affecting trade in services" and GATS definition of 'trade in services'); Mexico-Nicaragua FTA (GATS four modes of supply); EC-Chile FTA (GATS four modes of supply); Thailand-Australia FTA (GATS four modes of supply); EFTA-Chile FTA (GATS four modes of supply); Singapore-Australia FTA (Articles 7.1 and 7.2); EFTA-Singapore FTA (Article 22); Jordan-Singapore FTA (Article 4.1); Japan-Singapore FTA (Articles 57-58); US-Jordan FTA (no chapter on investment); New Zealand-Singapore FTA (Articles 16-17); EFTA-Mexico FTA (no real obligations for investment); MERCOSUR; CARICOM (chapter on establishment and services overlapping).

The second approach follows the NAFTA "cross-border trade in services" model and extends the coverage of the services chapter to measures affecting cross-border trade in services, which includes modes 1, 2 and 4. The service chapter in these PTAs does not cover the provision of a service through foreign direct investment (FDI), which is usually instead covered by a specific chapter on investment. One example is NAFTA Article 1201, which is part of the Chapter 12 on "Cross- Border Trade in Services".

Until the beginning of 2009, over sixty economic integration agreements had been notified to the Council of Trade in Services pursuant to Article V GATS[560].

In this context, the objective of this second Part is to overview several preferential agreements (notably the ones creating the common market of the European Union (EU), the European Free Trade Agreement (EFTA), the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (CAFTA), the Mercado Comun del Sur (MERCOSUR), and the Association of South East Asian Nations Free Trade Area (ASEAN Free Trade Area), in order to analyze their approach and content when addressing the issue of gambling services.

Among these regional approaches, the most elaborate – from the perspective of gambling services – is indubitably the one taken in the European Union, where in the recent years there have been numerous discussions for and against a possible free movement of gambling services between the EU Member States. Such discussions are sustained by a mounting jurisprudence and several concrete initiatives lead by the European Commission and, to a lesser extent, by the European Parliament.

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[560] According to the WTO database, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx. The US is one of the countries with the highest share of services PTAs. See for a comment Federico ORTINO, Regional Trade Agreements and Trade in Services, supra.

I.TRADE IN GAMBLING SERVICES IN THE EUROPEAN UNION

Europeans have been long captivated by the subject of gambling[561], which represents today a considerable industry bringing substantial contributions to tax revenues and good causes[562].

The European gambling market is mainly regulated by specific national legislation which establishes monopolies or licensed operators in the gambling sector[563].

The dynamic growth of cross-border gambling is today an integral part of the European services market. After a brief presentation of services in the EU and analyzing the gambling-related Community legislation, we will take a closer look at the different positions maintained by several European actors, notably the European Court of Justice, national courts across Europe, the European Commission and the European Parliament.

[561] Excessive gamblers are convincingly depicted by DOSTOYEVSKY Fyodor, The Gambler, 1866, or by PUSHKIN Alexander, The Queen of Spades, 1833, and an evocative description of a lottery is found in ORWELL George, Nineteen Eighty-Four, 1948. From scientific surveys to incidental studies, the more recent specialized literature is abundant of gaming related references. See, for a few examples of extensive national surveys, The Social Impact of Gaming in New Zealand, supra; Australian Productivity Commission Report, Australia's Gambling Industries, supra; United States National Gambling Impact Study Commission Report, 1999; Swedish National Institute of Public Health, Gambling and Problem Gambling in Sweden, Report No. 2, 1999; Hans Olav FEKJÆR, M.D. Gambling and Gambling Problems in Norway, supra; Kilian KÜNZI, Tobias FRITSCHI and Theres EGGER, Glücksspiel und Spielsucht in der Schweiz: empirische Untersuchung von Spielpraxis, Entwicklung, Sucht und Konsequenzen, supra; Colin S. CAMPBELL, Timothy F. HARTNAGEL, Garry J. SMITH, "The Legalization of Gambling in Canada Report", supra; Stationary Office, Report of the Gaming Board for Great Britain, supra; TRUCY François, Rapport d'information fait au nom de la commission des Finances, du contrôle budgétaire et des comptes économiques de la Nation sur la mission sur les jeux de hasard et d'argent en France, supra. For a historical perspective on man's preoccupation to gamble, see also BRENNER Reuven and BRENNER Gabrielle, Spéculation et jeux de hasard – Une histoire de l'homme par le jeu, Presses universitaires de France, Paris, 1993.

[562] On average, it is estimated that European state lottery operators allocate 33 % of their gaming turnover to good causes compared to 3 % for private firms. See London Economics, The Case for State Lotteries, a Report for the European Lottery and Toto Association, September 2006, (hereinafter The London Economics Report), p. 23.

[563] See the Introduction.

I.1.INTRODUCTION TO SERVICES IN THE EUROPEAN UNION

I.1.1. The European Union – a unique legal structure

The European Union is a unique international structure[564], regrouping in 2009 twenty-seven Member States and nearly half a billion people[565]. Its Member States have set up common institutions to which they delegate a part of their sovereignty, and which created a legal order separate from the states' domestic orders[566].

The European construction is a dynamic process. The Union developed progressively by relying on partial interdependence that was extended from the economy to political domains. This evolution was achieved through the primary legislation, embodied in the treaties[567], and

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[564] ECJ, case 26/62, Van Gend en Loos v. Nederlanse Administratie der Belastingen, judgment of 5 February 1963.
[565] See http://europa.eu/abc/keyfigures/index_en.htm
[566] A very rich literature covers the unique legal system created within the European Union. See, for recent examples, STEINER Josephine, WOODS Lorna, TWIGG-FLESNER Christian, EU Law, Ninth Ed., Oxford University Press, 2006; ISAAC Guy, BLANQUET Marc, Droit général de l'Union européenne, 9e ed., Sirey, 2006; BIEBER Roland, MAIANI Francisco, Précis de droit européen, Staempfli Ed., Bern, 2004; CARTOU Louis, CLERGERIE Jean-Louis, GRUBER Annie, RAMBAUD Patrick, L'Union européenne, 6e éd., Dalloz, 2006; RIDEAU Joël, Droit institutionnel de l'Union et des Communautés européennes, 4e éd., LGDJ, 2002; SCHWEIZER Michael, HUMMER Waldemar, OBWEXER Walter, Europarecht, Manzsche Verlags- und Universitätbuchhandlung, Vienna, 2007.
[567] The major EU treaties are the following: the European Coal and Steel Community Treaty (ECSC Treaty), signed in Paris in 1951, which bounded the original six Member States (France, Germany, Italy, Belgium, Luxembourg, the Netherlands) for co-operation in a limited number of areas relating to coal and steel production; the European Economic Community Treaty (EEC Treaty or EC Treaty), signed in Rome in 1957, which expanded the areas of co-operation amongst Member States to include agriculture, transport, economics and competition and also established the European Parliament and the Court of Justice; the European Atomic Energy Treaty (Euratom), signed also in 1957, which intended to facilitate the growth of nuclear industries in Member States; the Treaty Establishing a Single Council and a Single Commission of the European Communities, signed in 1965, which merged separate bodies of the ECSC, the EEC and Euratom to form a common Council and a single Commission; the Single European Act (SEA), signed in 1986, which is a comprehensive review of the Treaty of Rome. This treaty launched the Single Market programme and set a date of 31 December 1992 for completion. Amongst other things it also established the Court of First Instance, formally recognised the European Council and increased the legislative powers of the European Parliament; the Treaty on European Union, signed in 1992 in Maastricht, which represented the second major revision of the treaties. It established among others a Common Foreign and Security Policy and set a date for economic and monetary union; the Treaty of Amsterdam, signed in 1997, which amended and simplified the previous treaties. It gave the European Parliament equal legislative powers with the Council; the Treaty of Nice, signed in 2001, which made adaptations to the Community institutions which were necessary for enlargement. The Treaty of Lisbon, signed in 2007, has failed yet to enter in force because of its rejection by the Irish electorate in June 2008. Its main objectives are to make the EU more democratic, meeting the European citizens' expectations for high standards of accountability, openness, transparency and participation; and to make the EU more efficient

secondary legislation in the form of regulations, directives and decisions which are used to implement the policies set out in the treaties.

The European Union law has what is known as a "three pillar structure". The first, oldest and most important pillar deals with law concerning economic and social rights and the organisation of European institutions. This is found in the Treaty of the European Communities, signed in Rome 1957 and subsequently amended by other Treaties concluded between the Member States. The second and third pillars were established under the Treaty of the European Union of 1992. The second pillar concerns the European Union Common Foreign and Security Policy (CFSP), while the third pillar concerns Police and Judicial Co-operation in Criminal Matters (formerly 'Justice and Home Affairs').

Community law has two specific features that distinguish it from international law: direct effect and primacy over domestic legislation.

Direct effect means that certain European legal instruments are directly applicable in all Member States, with two chief consequences: any person can rely directly on a such instruments in support of his/her argument, in the courts as elsewhere; and these instruments apply in the same way throughout the Union, which obviously makes it easier to settle conflicts between residents in different countries[568].

The *primacy of Community law*, emerging from the European Court of Justice in *Costa v. ENEL*[569], means that Community law is part of the Member States' legal systems, and prevails over statutes and other national sources of law. In other words, the courts must disapply a national statute if it is contrary to Community law.

The core of European Union policy can be summed up under the idea of the four freedoms - free movement of goods, workers, capital and the freedom of establishment to provide services. It is under this last freedom that the provision of gambling can be circumscribed.

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and able to tackle today's global challenges such as climate change, energy, security and sustainable development.

[568] Directives, on the other hand, have to be transposed, that is to say the Member States have to incorporate them into their national law. They enjoy a margin of freedom to decide how to achieve the directive’s goals. Because generally they do not themselves directly create rights and obligations for individuals, directives do not have the same direct effect as regulations. However, national legislation will have to be interpreted in the light of the principles of directives, even if it predates them.

[569] ECJ case 6/64 Flaminio Costa v. E.N.E.L, judgment of 15 July 1964.

I.1.2. Services in the European Union

Services account for between 60 and 70% of economic activity in the European Union, and a similar (and rising) proportion of overall employment[570]. The central principles governing the internal market for services, which are set out in the EC Treaty, guarantee to EU companies the fundamental freedom to establish themselves in other Member States, and to provide services in the territory of another EU Member State other than the one in which they are established.

The principles of freedom of establishment and free movement of services have been clarified and developed over the years through the case law of the European Court of Justice (ECJ)[571]. In addition, important developments and progress in the field of services have been brought about through specific legislation in fields such as financial services, telecommunications, broadcasting and the recognition of professional qualifications.

However, despite progress in some specific service sectors, an overall Internal Market for services is at date far from being achieved; most of the benefits of the Internal Market have so far occurred in goods. Consequently, on several occasions, notably during the Lisbon summit of EU leaders in March 2000, a strategy to remove cross-border barriers to services was evoked.

As the reasons why services are not frequently traded between Member States seemed complex and not well documented, the Commission underwent a legal and economic analysis of the issues, including a consultation with the Member States, other European institutions and stakeholders.

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570 For detailed statistics, see European Commission Staff Working Paper Extended Impact Assessment Of Proposal For A Directive On Services In The Internal Market, Com(2004)2 Final; see also Copenhagen Economics, Economic Assessment of the Barriers to the Internal market for Services(2004), report presented to the European Commission in, available at ec.europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf.

571 From the abundant literature concerning the free movement of services in the EU, see, for example, BROBERG Morten, HOLST-CHRISTENSEN Nina, Free Movement in the European Union. Cases, Commentaries and Questions, DJØF Publishing, Copenhagen, 2004; ADENAS Mads, ROTH Wulf-Henning, Services and Free Movement in EU Law, Oxford University Press, 2002; WHITE Robin, Workers, Establishment and Services in the European Union, Oxford University Press, 2004; WOODS Lorna, Free Movement of Goods and Services in the European Community, Ashgate, 2004; BLANPAIN Roger (Editor), Freedom of Services in the European Union. Labour and Social Security Law: The Bolkestein Initiative, Kluwer Law International, 2006.

The results of this analysis were presented in a Report on the State of the Internal Market for Services in July 2002[572]. The report set out in detail the legal, administrative and practical obstacles to the free movement of services across borders in the EU. It concluded that there was still a large gap between the vision of an integrated EU economy and the reality as experienced by European citizens and European service providers.

According to the Commission, these barriers have a serious negative effect on the cost and quality of the final service to users of services whether they are other service providers, manufacturers or consumers. Barriers to trade in services penalise in particular small and medium sized enterprises (SMEs), which are disproportionately affected by complex administrative and legal requirements and therefore more likely than larger firms to turn down cross-border opportunities. Given the predominance of SMEs in service operations, these barriers acted as a considerable hindrance to the development of the Internal Market for Services.

Following the report, the reactions of stakeholders to it and further legal analysis, in January 2004 the Commission made a proposal for a Directive on services in the Internal Market (the Services Directive), aimed at eliminating obstacles to trade in services, thus allowing the development of cross-border operations. The Services Directive was finally adopted by the European Parliament and the Council in December 2006 – explicitly excluding games of chance from its scope of application[573].

I.1.2.1. Legal basis

The main legal basis for the freedom to provide services in the European Union is enshrined in Articles 49 and 43 of the EC Treaty.

Article 49 reads as follows:

"Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States

[572] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0441:FIN:EN:PDF.
[573] See for details Part II, Chapter I.5.2.2.

who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community".

Article 49 EC is applicable to nationals and companies (Articles 55 and 48 EC Treaty) of one Member State providing or receiving a service in another Member State and can be invoked by both the provider and the receiver of services.

The provisions are only applicable in case of cross-border activity. Therefore, either the provider (positive freedom) or the receiver (negative freedom) or the service itself (correspondence services) must cross a border.

Pursuant to Article 50 paragraph 1, 2 EC Treaty, services are those normally provided for remuneration, in so far as not governed by the provisions relating to the freedom of movement for goods, capital and persons. They include activities of an industrial or commercial character, activities of craftsmen and activities of the regulated professions, thus independent activities.

Contrary to Article 43 EC Treaty, which refers to a permanent activity, Article 49 applies when the person or company providing a service temporarily pursues an activity in another State. As a result, the characteristics of a "service" are the temporality of the activity and the fact that it is pursued against remuneration.

Gambling activities, as such, fall within the scope of Article 49 EC Treaty, as stated in the judgments *Schindler*[574], *Zenatti*[575] *and Anomar*[576] and confirmed in the subsequent jurisprudence. According to the ECJ, games of chance must be deemed to be economic activities within the meaning of the EC Treaty (Article 2), since they fulfil the two criteria laid

[574] ECJ case C- 275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, judgment of 24 Mars 1994.
[575] ECJ case C-67/98 Questore di Verona v. Diego Zenatti, judgment of 21 October1999.
[576] ECJ case C-6/01 Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português, judgment of 11 September 2003.

down by the Court in its case-law, *i.e.* the provision of a particular service for remuneration and the intention to make a profit[577].

The provisions concerning the freedom to provide services thus apply to an activity which enables consumers to participate in gambling in return for remuneration consisting of payment of the stake[578], as it was explicitly clarified *e.g.* for the importation of lottery advertisements and tickets for a lottery operated in one Member State into another Member State with a view to the participation by residents of the latter State[579].

Article 49 EC Treaty expressly prohibits any discrimination based upon nationality. Moreover, according to ECJ case law, Article 49 is interpreted as an interdiction of any other restriction upon the free movement of services[580]. In consequence any non-discriminating national measure, applicable without distinction to nationals and aliens, has to be examined as regards its conformity with EU law and to be subject to a proportionality analysis.

Article 43 EC Treaty (Freedom of establishment) reads as follows:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. That prohibition shall also apply to restrictions on the setting-up in the territory of any Member State of agencies, branches or subsidiaries by nationals of any other Member States.

The freedom of establishment shall include the right to take up and pursue activities as a self-employed person and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, subject to the provisions of the chapter relating to capital."

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[577] See Anomar, para. 47, 48. However, as we will see in the next Chapter (I.2), this argument can be disputed.
[578] See Zenatti, para.24.
[579] See Schindler, para. 37.
[580] See ECJ, case 33/74, Van Binsbergen, judgment of 3 December 1974; ECJ case 76/90, Säger/Dennemeyer, judgment of 25 July 1991, para. 12. See also ECJ case C-384/93, Alpine Investments, judgment of 10 May 1995. In Alpine Investments, the Court held that the freedom enshrined in Article 49 applies even when the service does not involve cross-movement, but the provider of the service and the recipient were established in different Member States.

We note that the freedom of establishment is applicable to nationals and companies (Articles 43 and 48 EC Treaty) of a Member State that set up agencies, branches or subsidiaries in other Member States. Within the meaning of the EC Treaty, an "establishment" exists where a person exercises independent activities in another Member State, which are to be considered as economic activities. That presupposes a permanent economic integration within the territory of another Member State**,** usually by setting-up agencies, branches or subsidiaries.

The provision applies in the event that restrictions are imposed on the activities of a company pursuing gaming activities established or wishing to establish in one Member State. Unlike activities described under Article 49 EC Treaty, it refers to a non-temporary activity exercised from within the economic structure of another Member State. This is, for instance, the case for agencies, which establish themselves in other Member States with the aim of collecting bets as intermediaries.

According to Article 43 paragraph 2 EC Treaty, nationals and companies from other Member States can exercise their profession on a permanent basis in another Member State in the same manner as the Member State's own nationals; any discriminating restrictions are forbidden. Moreover, non-discriminating restrictions concerning the access of nationals of a Member State to the market of another Member State are prohibited, including restrictions on the setting-up of agencies, branches or subsidiaries and all restrictions limiting access to certain professions[581].

I.1.2.2. Measures Restricting the Freedom to Provide Services: Justification and Proportionality

Articles 49 and 43 EC Treaty both prohibit discriminatory measures. Furthermore, according to the ECJ jurisprudence, the provisions are to be interpreted as containing prohibitions of any non-discriminatory restriction to the freedom to provide and receive services as well as the freedom of establishment[582]. National measures have to be based on objective justification

[581] See ECJ case 255/97, Pfeiffer/Löwa, judgment of 11 May 1999; ECJ case 19/92, Kraus, judgment of 31 March 1993, para. 32; ECJ case 55/94, Gebhard, judgment of 30 November 1995, para. 37.
[582] See ECJ judgments Van Binsbergen and Säger/Dennemeyer.

grounds, must be suitable to attain the public interest objective alleged and must not go beyond what is necessary to attain it.

Discriminatory measures could only be justified if they fall under one of the exceptions expressly provided for by the EC Treaty for the reasons stipulated in its Articles 46 (public order, security, health) and 55, which are to be applied strictly. On the other hand, non-discriminatory restrictions to the fundamental freedoms provided in Articles 43 and 49 EC and arising from national measures are only permissible if they are justified by overriding reasons relating to the public interest[583].

The Court developed a four-tier test in order to analyze if a restrictive measure which goes against a fundamental freedom is nevertheless compatible with European legislation[584]: firstly, the measure must not be discriminatory; secondly, the measure concerned must meet an appropriate overriding public interest objective; thirdly, the measure must be suitable for securing the achievement of the objectives; and fourthly, the measure must not go beyond what is necessary in order to achieve them[585].

The following requirements were considered by the ECJ as imperative to the public interest: consumer protection, protection of creditors, protection against unfair competition, enforcement of tax laws, protection of health environmental protection, media pluralism, important threat to the financial stability of the social security system, traffic security[586].

Due to the temporality of the cross-border activity under Article 49 EC Treaty, the proportionality analysis must be even more stringent and substantiated[587] than the analysis under Article 43 EC Treaty, and the possibility that the aim of a national measure can be attained by less severe means must be very closely examined.

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[583] See ECJ judgment Van Binsbergen, para.10.
[584] See ECJ Gebhard, para 37.
[585] This four-part test has also been applied in the field of gambling services. See, for example, ECJ Schindler, para. 60.
[586] See ECJ case 288/89, Collectieve Antennevoorziening Gouda, judgment of 25 July 1991, para. 13, 15; ECJ case 110-111/78, Ministère Public v Van Wesemael, judgment of 18 January 1979, para. 28; ECJ case 220/83 Commission v France, judgment of 4 December 1986, para. 20; ECJ case 15/78, Société Générale Alsacienne de Banque v Koestler, judgment of 24 October 1978, para. 5.
[587] See ECJ Säger v. Dennemeyer, para.13: "In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services".

When taking a restrictive measure, national lawmakers often do not refer to precise criteria for the evaluation of the proportionality of the measures taken. In cases in which restrictive national measures are found to be justified, there is a tendency to refer to the notion of "proportionality" in very broad terms[588]. It was reported that parliamentary reports and resolutions in some European countries contain more detailed reasoning and in judgments questioning the justifiability of national barriers, the national courts tend to argue more precisely as regards proportionality, considering whether other measures would have been equally effective, but less restrictive[589].

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[588] For a detailed analysis of European legislation in this respect, see the ISDC Gambling Services Report, p. 984.
[589] Idem.

I.2. GAMBLING AS A SERVICE WITHIN THE EUROPEAN UNION

While in the last decades gambling has been increasingly flourishing in Europe, it was only recently that the European Union bodies started taking interest in this very particular activity, historically governed by national law[590]. This interest could be linked to the significant development of cross-border gambling transactions and especially to the spectacular increase of Internet business, which brought along commercial opportunities that were unimaginable before its advent.

In 1994, in its *Schindler* judgment, the ECJ qualified gambling as a "service" falling in the scope of Article 49 of the EC Treaty. While the Court considers since then that games of chance are deemed to be "economic activities within the meaning of the EC Treaty", we note that a discussion was however undertaken as to the "abnormal" nature of such service[591], which some authors consider to be at the margin of economical reason, and which could therefore escape the economical liberalism logic[592].

I.2.1. Gambling In the EU: Economic Context

As discussed in the Introduction, the European gambling industry is a substantial one[593].

The European gambling market is indubitably dominated by lotteries, which represent almost 45% of the total industry. Casino gaming has a market share of 14.6%, whereas slot machines outside casinos constitute 18.8% and betting some 17.2%[594]. Thus, the main impacts of a potential liberalisation of the gambling market – be they positive or negative – are to be bourn by the lottery industry.

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590 The two European institutions mostly involved in the gambling issue are the European Commission and the Court of Justice, whose positions will be examined in detail further on. However, other European bodies have taken considerable interest in this issue, one of them being the European Parliament.
591 See notably MOUQUIN Gérald, La notion de jeu de hasard en droit public : essai axiomatique "de lege ferenda", supra. An argument brought by this author is that gambling is an activity incapable of producing new economic value and of constructively profiting society, and is deemed mainly to canalize and control man's natural impulse to gamble.
592 See MOUQUIN Gérald, Facteurs économiques et non économiques déterminant les principes régulateurs fondamentaux, 1ère Conférence EASG, Cambridge, August 1995.
593 See the ISDC Gambling Services Report, p.35
594 According to ISDC Gambling Services Report, p.1102.

The largest markets are the United Kingdom, France, Germany, Spain and Italy[595]. The UK gaming market is by far the largest. It was estimated at € 11 billion, which means a yearly spending of € 186 per inhabitant[596]. At the opposite extreme, a Lithuanian citizen would only spend € 12 a year on gambling services[597].

As these diverse figures show, the European gambling market is extremely varied and fragmented by many barriers, most of which are legislative constraints limiting cross-border access to gambling services and strictly regulating their supply within each country.

I.2.2. National Barriers to the Free Movement of Gambling Services

Scrutinizing gambling from a legal point of view, one finds a net division between so-called "liberal approach" countries, such as Great Britain, and so-called "conservative approach" countries, such as France, Italy, Belgium etc[598]. In the latter countries, several legislative barriers stand in the way of the freedom to provide gambling services: some prohibit games of chance in principle[599]; others have put in place strict licensing requirements[600], or have

[595] For more figures, see TRUCY François, Rapport d'information sue les jeux de hasard et d'argent en France fait au nom de la Commission des finances, du contrôle budgétaire et des comptes économique de la Nation du Sénat, 2006.
[596] According to the ISDC Gambling Services Report, p.1398.
[597] According to ISDC Gambling Services Report, p.1272. A different figure (€ 20) is given in London Economics, The Case for State Lotteries, a Report for the European Lottery and Toto Association, supra, pp.9-10.
[598] We refer the reader to the brief presentation in the Introduction.
[599] As noted in the ISDC Gambling Services Report, p.xiv, a number of Member States proscriptively consider that gambling is prohibited on their territories, except in so far as exceptions are provided by law (in Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Luxembourg, the Netherlands and Slovakia). This restrictive policy aims to safeguard the interests of consumers and to prevent fraud, illegal gaming and gambling addiction (Austria, Belgium, Denmark, France, Germany, Greece, Luxembourg, the Netherlands and Slovakia). It also aims at ensuring that the profits derived from the gambling market are devoted to the public's general interests (Belgium, Denmark, France, Greece, Germany). Often, on-line gaming is also prohibited, at least in so far as no national gaming licenses can be issued for on-line gaming (in Cyprus, Greece, Portugal and at present the Netherlands).
[600] Most Member States require every operator of any form of gambling on their territories to obtain a licence within the jurisdiction (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and the United Kingdom). In general, the policy of granting licenses is restrictive and potential licensees have to comply with a series of strict requirements. See ISDC Gambling Services Report, p.xv.

established a *numerus clausus* to limit the gambling business[601]. In some sectors and countries, there is also a State monopoly insofar games of chance are concerned[602].

Defalcated by industry sectors, these legislative barriers are designed as follows: in general, lotteries constitute state (or state-controlled) monopoly[603]. Casino services in some countries (Cyprus, Ireland and Northern Ireland) are entirely prohibited, while in other countries they are submitted to strict licensing requirements; finally, betting services are generally prohibited on non-sports events (Belgium, France, Luxembourg and Portugal). Almost all Member States maintain licensing requirements for betting operators and may thus limit the number of operators[604].

In addition to examining the barriers which directly obstruct free movement of gambling services between Member States, substantially different fiscal treatment of gambling services within each Member State may also have the effect of hindering the free flow of gambling services within the Union[605].

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[601] In most Member States, the number of operators entitled to run a gambling business is limited. There is thus a numerus clausus of casinos and gambling halls in the following Member States: Austria (where there is also a numerus clausus in respect of lottery service providers) Belgium, Germany, Portugal (where there is also a numerus clausus for bingo halls), Spain and Slovenia. The Netherlands, Sweden and the United Kingdom maintain a numerus clausus for casinos, but not for gambling halls. Sometimes, only a single operator is licensed, in particular for casinos (Austria, the Netherlands and Sweden), horse racing (Cyprus, Greece and the Netherlands), and sports betting (France, Greece and the Netherlands), creating in certain cases a monopolistic position from the legal standpoint. See ISDC Gambling Services Report, p.xvi.
[602] Some European jurisdictions have set up a State monopoly for games of chance (Austria, Denmark, Finland, Germany (within the scope of the Länder legislation; some of the Länder have imposed express monopolies, while others attribute de facto monopoly rights to Stateheld entities), Estonia, Greece, Hungary, Slovakia and Sweden). In others, individual operators enjoy a monopolistic position, as is the case in particular of national lottery operators (Belgium, Cyprus, France, Ireland, Luxembourg, Malta, Portugal and the United Kingdom). See ISDC Gambling Services Report, p.xvi.
[603] Some authors note that, with regards to the operation of lotteries in Europe, there are three basic models (DOUGLAS Andrew, British Charitable Gambling 1956-1994: Towards a National Lottery, London: Athlone Press, 1995). The first is the “state administration model” which is found in, for example, Greece, Italy, Belgium, Spain and partly in Germany. This is a system, which emphasizes control and administration rather than the commercial management of the lottery operation. The second is the “public entity model” which operates in Denmark (for their “class” lottery), Luxembourg (for the State lottery), Germany and Italy (for “lotto” and “toto”), and Portugal. The advantage of this structure would be the development of a business culture and the speed and responsiveness of the decision making process. The most modern development is the “private company model” whereby the state grants a licence to a private company to operate the lottery. This has happened in the UK, although other countries are beginning to go down this route (such as the Dutch lottery that has been run by a private organisation since 1992). However, we note that lotteries are not a traditional form of gambling in all European countries. Until 1993, Albania (along with the UK) was the only European country not to have a lottery. Their lottery was introduced as a way of funding the 1992 Olympic team.
[604] See ISDC Gambling Services Report p.xvi-xxiv.
[605] Such an examination was undertaken in the ISDC Gambling Report, which found that the differences between the Member States in their fiscal treatment of gambling services are presently enormous. This study

I.2.3. Justifications for the Restrictions of Cross-Border Gambling Services

According to the test set in the *Gambelli* judgment that we will analyze in the next Chapter, a euro-compatible measure hindering the cross-border provision of gambling services must meet an appropriate overriding public interest objectives, it must be suitable for securing the achievement of such objectives and it must not go beyond what is necessary in order to achieve them[606]. Also, such measure must not be discriminatory. It is for the national judge to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims[607]. Furthermore, in *Placanica*, the Court appears to have delimitated two distinct categories of justifications (objectives which aim to "reduce gambling opportunities" such as protecting consumers, and objectives aimed at "combating criminality by making the operators active in the sector subject to control and channeling the activities of betting and gaming into the systems thus controlled")[608].

In practice, the EU Member States justify barriers to the free provision of gambling services by reasons of public order (*ordre public)*, health and anti-fraud imperatives[609].

National authorities generally put forward four categories of justifications[610]: (i) public order, prevention of money laundering and crime[611]; (ii) consumer protection[612]; (iii) social order, moral and cultural considerations[613]; and (iv) other grounds[614].

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showed that national tax systems employ completely distinct and often incompatible structures, concepts and methods of imposition, which make it extremely difficult to even compare, in rational terms, the burdens which they impose on each sector of the gambling market. See ISDC Gambling Services Report p.xxv. By adopting systematic simplifications and assumptions based on actual market conditions, the ISDC Gambling Report prepared tables ranking the Member States by their comparative-equivalent national tax rates in each of the sectors for which sufficient information is available, namely lotteries, casino gaming, machine gambling outside casinos, betting and bingo. The table concerning lottery services shows that the proportion of Member States which reserve the full proceeds to public or charitable purposes is so large, that there is no sense in making a comparison of tax burdens. In respect of the remaining sectors mentioned, the tables show that the divergences in tax burdens are very large, which might in turn indicate that there is a high risk of market distortion due to national differences in the fiscal treatment of gambling services

[606] See ECJ Gambelli, paras. 64-65.

[607] See ECJ Gambelli, para. 66.

[608] See ECJ Placanica, paras.52 et seq.

[609] See ISDC Gambling Services Report, p.xxvi.

[610] See ISDC Gambling Services Report, pxxix.

I.2.4. Proportionality Requirements

Concerning the proportionality condition, as we will see further[615], it has been analyzed very differently by national courts and the European Court of Justice.

For the ECJ, a measure obstructing the cross-border provision of gambling services must, among others, be suitable for securing the achievement of the objectives (a so-called "hypocrisy test"[616]), and it must not go beyond what is necessary in order to achieve them[617] - such appreciation being incumbent upon the national judge.

In *Placanica*, the Court stressed a few more important elements and gave more explicit guidance on the meaning of "channeling the inevitable desire to gamble into controlled venues"[618].

National courts jurisprudence is quite heterogeneous on the issue of proportionality. Some courts have stated that EC case law allows individual Member States to subject gaming to

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[611] Most of the EU Member States including Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxemburg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom refer in their respective legislations to public order as a kind of "basic justification", mostly combined with a reference to the prevention of crime and the need to combat gambling addiction.

[612] This ground is referred to by several Member States, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[613] This is referred to by several Member States, including Austria, Finland, France, Germany, Italy, Portugal, Spain, Sweden and the United Kingdom.

[614] Other grounds invoked are: economic and tourist development (this is explicitly referred to by Portugal and the United Kingdom); charity and promotion of public interest activities, such as sport (this is expressly referred to in a number of Member States, including Belgium, Denmark, Finland, France, Germany, Greece, Italy, Spain, Sweden and the United Kingdom); media pluralism (only Austria advanced this justification, in a case however concerning a prize game); transitional industry-specific protection (the United Kingdom, for example, refers to the need to protect the revenues of the horse and greyhound racing industries during a transitional period); and fiscal policy considerations (a primary objective in Spain and Portugal, a justification among others in Austria, Greece and Italy).

[615] Chapter I.4 hereinafter.

[616] See CUYVERS Armin, Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) Judgment of the Grand Chamber of 6 March 2007, ECR [2007] I-1891, 45 Common Market Law Review 2008, p. 515-536.

[617] See ECJ Gambelli, paras. 64-65.

[618] According to some authors, this could entail some tolerance as to the increasing of legal gambling attractiveness, leading to an intrinsic tension between channelling and the requirement to reduce gambling opportunities. See See Armin CUYVERS, Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) Judgment of the Grand Chamber of 6 March 2007, ECR [2007] I-1891, supra, p.524. See also ZIMMER Hanne, DEJMEK Paulina, A Wheel of Fortune for the EEA States or Game Over for National Gaming and Betting Monopolies?, in Europe after the judgments in Placanica, Gaming Machines and Ladbrokes, Europarättslig tidskrift. Årg. 10 (2007), nr. 4, p.920.

their own rules, which can be stricter than those of other Member States and may even forbid gaming entirely. Because states have the discretionary power to define the level of protection needed in their territory, it would therefore be perfectly legitimate under EU law to opt for a State monopoly or to adopt an intermediate position and impose a restrictive license requirement[619].

However, other courts in the Member States have taken a different view and have raised the question of whether justifications for national restrict protection and prevention of gambling addiction can be considered valid when public sector gaming operators extensively advertise their services or regularly introduce new games. It has also been doubted, for example by several Dutch and Italian courts, whether justifications referring to public and social order do not actually serve to hide the real aim of protecting public revenues, especially if no verification system has been established to determine the impact on public order and security[620].

I.2.5. Taxation of Gambling Services in the European Union

Within the EU, governments retain sole responsibility for levels of direct taxation – i.e. tax on personal incomes and company profits. Similarly to gambling policy in general, gambling taxation policy is formulated in completely heterogeneous terms in the different Member States[621].

Value-added taxes (VAT) are a partial exception and require a degree of EU-involvement, as they are fundamental to the proper functioning of the single market.

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[619] See Chapter I.4 hereinafter .
[620] Idem.
[621] ISDC Gambling Services Report, p.1057. One example of gambling income tax (presented through the angle of discriminatory taxation) appears in the ECJ Lindman case, C-42/02, judgment of 13 November 2003, which will be analyzed in Chapter I.3 hereinafter. Another case regarding discriminatory taxation of gambling services was referred to the ECJ by the European Commission in 2008. In question is the Spanish legislation according to which lottery winnings from lotteries organized abroad are subject to progressive income tax, whereas an exemption from income tax is applied in case of lotteries organized in Spain by certain institutions (ECJ pending case C-153/08). In his Opinion delivered on 16 July 2009, Advocate General Mengozzi proposed the Court to partially accept the Commission’s claims. Also, in September 2008 the Commission questioned the taxation of lottery winnings in force in Portugal, which it considered discriminatory (only foreign lottery winnings are subject to taxes, as opposed to Portuguese lottery winnings, which are exempted) – EC Press Release IP/08/1355.

Value-added taxation of gambling is addressed at European level notably in Article 13 B (f) of the Sixth VAT Directive (as repeatedly amended)[622]. This Article provides that the operation of all games of chance and gaming machines is in principle to be exempted from value added tax[623], while the Member States retain the power to lay down the conditions and limitations of that exemption.

However, the European Court of Justice stated that, in exercising such power, the Member States must respect the principle of fiscal neutrality that precludes, in particular, treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes[624]. Therefore, those goods or supplies must be subjected to a uniform rate[625].

[622] Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes. "Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse: […](f) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State".

[623] However, commissions paid to a sports betting agent are not exempt from VAT (ECJ Order of 14 May 2008, Joined Cases Tiercé Ladbroke SA (C-231/07) and Derby SA (C-232/07).

[624] ECJ Joined Cases C-453/02 and C-462/02, Finanzamt Gladbeck v Edith Linneweber and Finanzamt Herne-West v. Savvas Akritidis, judgment of 17 February 2005.

[625] See also ECJ Case C-267/99, Adam, judgment of 11 October 2001, para. 36, and ECJ Case C-109/02 Commission v Germany, judgment of 23 October 2003, para. 20. According to ECJ case-law the identity of the manufacturer or the provider of the services and the legal form by means of which they exercise their activities are, as a rule, irrelevant in assessing whether products or services supplied are comparable. See ECJ Case C-216/97, Gregg, judgment of 7 September 1999, paragraph 20.

I.3. POSITION OF THE EUROPEAN COURT OF JUSTICE

The Luxembourg-based European Court of Justice is entrusted with the task of making sure that EU legislation is interpreted and applied in the same way in all EU countries, so that the European law is equal for everyone. The Court has also the power to settle legal disputes between EU Member States, EU institutions, businesses and individuals.

The ECJ was confronted with the issue of cross-border gambling services for only more than a decade[626]. Most of the cases concerning gambling activities were examined under the scope of Articles 43 and 49 EC, but a few cases also were brought forward in relation with the free movement of goods[627].

The first cases gave the Court the opportunity to define gambling as a service within the meaning of the EC Treaty and to qualify restrictive national legislations as a barrier to the free movement of services.

However, it is not until the Gambelli case in 2003, followed by Placanica in 2007 that the Court established more specific criteria for determining in which conditions such particular restrictions are compatible with Articles 43 and 49 EC Treaty[628].

Also, the Court had the occasion to address more specifically the issue of Internet gambling in the recent *Liga Portuguesa* ruling.

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[626] The main judgements in this field are: ECJ case C- 275/92, Schindler, judgment of 24 March 1994, ECJ case C-124/97, Läärä and others, judgment of 21 September 1999, ECJ case C-67/98, Zenatti, judgment of 21 October 1999, ECJ case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português, judgment of 11 September 2003, ECJ case C-42/02, Lindman, judgment of 13 November 2003, ECJ case C-243/01, Gambelli and others, judgment of 6 November 2003, ECJ cases C-338/04, C-359/04 and C-360/04, Placanica and others, judgment of 6 March 2007.

[627] See notably ECJ case C-65/05Commission v. Greece, judgment of 26 October 2006.

[628] The measure must not be discriminatory; it must meet an appropriate overriding public interest objective; it must be suitable for securing the achievement of the objectives; and it must not go beyond what is necessary in order to achieve them.

I.3.1.Pre-*Gambelli* Jurisprudence

I.3.1.1.*Schindler* case, 1994[629]

I.3.1.1.1.Facts:

This case concerned the importation of lottery advertisements/ tickets into the UK with a view to the participation of its residents in a German lottery. The UK gaming provisions wholly precluded operators from other Member States from promoting their lotteries and selling tickets in the market of the United Kingdom.

I.3.1.1.2.Key findings:

The importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State, relates to a "service" within the meaning of Article 50 EC (ex-Article 6017) and accordingly falls within the scope of Article 49 EC (ex-Article 59).

National legislation which prohibits, subject to specified exceptions, the holding of lotteries in a Member State, is an obstacle to the freedom to provide services.

The EC Treaty provisions relating to freedom to provide services do not preclude legislation such as that of the United Kingdom on lotteries, in view of the concerns of social policy and of the prevention of fraud which justify the legislation.

I.3.1.1.3.Analysis:

National legislation, even if non-discriminatory, i.e. applicable irrespective of the nationality of the operator or agent falls within the ambit of Article 49 EC (ex-Article 59) when it is

[629] ECJ case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, judgment of 24 March 1994.

liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides his services. Those obstacles set up by national measures can be justified by overriding public interest considerations if the measures are proportionate to the objectives pursued thereby.

National authorities enjoy a margin of latitude in determining the requirements for permission to offer (here) lottery services, taking into account the social and cultural features of individual Member States and the desire to maintain their social order. Interdictions would thus be justified for the following reasons: protection of moral, religious and cultural standards[630], prevention of private profit from the provision of gambling services[631], social policy and prevention of fraud and other criminal activities, given the size of the amounts that can be staked and the possible winnings[632], and the prevention of encouragement to spend excessive sums on gambling services, given the possible resulting problems for individuals and the social damages[633].

The Court considered the national restriction in question to be a necessary part of the protection the Member State seeks to secure in its territory and thus as not disproportionate.

I.3.1.2.*Läära* case, 1999

I.3.1.2.1.Facts:

In the *Läära* case[634], an unlicensed operator of gaming machines was accused of illegal gaming. According to the Finnish legal provisions, the games of chance in question may be organised, with the authorisation of the administrative bodies, only for the purpose of

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630 See ECJ Schindler, para. 60.
631 See ECJ Schindler, para. 57.
632 See ECJ Schindler, para. 58.
633 See ECJ Schindler, para. 60.
634 ECJ case C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)*, judgment of 21 September 1999. For comments on this judgment, see STRAETMANS Gert, Comment ECJ case C-124/97, Läärä and others, Common Market Law Review, 2000, p.991-1005; ALLEN Barry: Ladies & Gentlemen, No More Bets Please, Legal Issues of Economic Integration, vol.27 (2000), p.201-206; ABBONDANTE Fulvia: Compatibilità fra il diritto comunitario alla libera prestazione dei servizi e monopoli ad Enti pubblici sull'esercizio dei giochi di sorte o d'azzardo finalizzati alla tutela di interessi generali, Diritto pubblico comparato ed europeo, 2000, p.292-297; MYLLY Tuomas, National gaming monopolies and free movement of services, Europarättslig tidskrift, 2000, p.303-309.

collecting funds for charity or for another non-profit-making purpose provided for by the law. Only one licence, valid for a specified period, may be issued to cover such activities. A person organising games of chance without the required license is subject to the imposition of a fine or a term of up to six months' imprisonment.

I.3.1.2.2.Key findings:

The EC Treaty provisions relating to freedom to provide services do not preclude national legislation such as the Finnish legislation which grants exclusive rights to operate slot machines to a single public body, in view of the public interest objectives which justify it.

I.3.1.2.3.Analysis:

The Court considers the following grounds as being a valid justification for national restrictions: public policy, security and health (Article 46, 55 EC Treaty)[635]; limiting the exploitation of the human passion for gambling, protection of the recipients of the services and more generally, of consumers[636]; avoiding the risk of crime and fraud and authorisation of those activities only with a view to the collection of funds for charity or for other benevolent purposes, maintenance of order in society.[637]

Even if measures are based on acknowledged justification grounds they must guarantee the achievement of the intended aims and must not go beyond that which is necessary in order to achieve them[638].

According to the Court, it is for the Member States to assess the level of protection which they intend to provide on their territories[639] and can decide, in the context of the aim pursued, to totally or partially prohibit activities of that kind or to restrict them and to establish control mechanisms, which may be more or less strict. The mere fact that a Member State has opted

[635] ECJ, Läära, para. 31.
[636] ECJ, Läära, para. 32.
[637] ECJ, Läära, para. 32.
[638] ECJ, Läära, para. 31.
[639] ECJ, Schindler, para. 61; ECJ Läära para. 35.

for a system of protection that differs from that adopted by another Member State, cannot affect the need for, and proportionality of, provisions enacted to that end[640].

The fact that games are not totally prohibited does not in itself show that the national legislation is not intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation on an exclusive basis, which has the advantages of confining the desire to gamble and the exploitation of gambling to controlled channels, of preventing the risk of fraud or crime in the context of such exploitation and of using the resulting profits for public interest purposes, falls within the ambit of those objectives[641]. However, according to the Court, the choice of the national measure must not be disproportionate to the aim pursued[642].

Conferring exclusive rights on a single public body or public law association, the activities of which are carried on under the control of the State instead of adopting regulations imposing the necessary code of conduct on private sector operators does not appear to be disproportionate[643]. It is true that sums received by the State for public interest purposes from the sole licensee could equally be obtained by other means, such as taxation of the activities of various operators authorized to pursue them within the framework of rules of a non-exclusive nature; on the other hand, the obligation to pay out all the proceeds which is imposed on the licensed public body, constitutes a measure which, given the risk of crime and fraud, is certainly more effective in ensuring that strict limits are set to the lucrative nature of such activities[644].

I.3.1.3.*Zenatti* case, 1999

I.3.1.3.1.Facts:

[640] ECJ Läära, para. 36.
[641] ECJ Läära, para. 37.
[642] ECJ, Läära, para. 39.
[643] ECJ, Läära, para. 41.
[644] Idem.

In this case[645], an operator had been prohibited to act as an intermediary in Italy for a company established in the United Kingdom specialising in the taking of bets on sporting events. The legislation at issue in this case does not totally prohibit the taking of bets but reserves to certain bodies the right to organise betting in certain circumstances.

I.3.1.3.2.Key findings:

The EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

I.3.1.3.3.Analysis:

The objectives at issue concern the protection of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest[646]. These objectives are the following[647]: prevention of gaming from being a source of private profit; avoidance of risks of crime and fraud; prevention of the damaging individual and social consequences of the incitement to spend and to allow betting only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.

Measures based on above mentioned reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.

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[645] ECJ Zenatti. For several comments, see STRAETMANS Gert in Common Market Law Review 2000 p.991-1005, COCCIA Claudio, Ribadito il divieto delle scommesse, Rivista di diritto sportive, 2000, p.736-746, OHLMANN Wolfgang, Lotterien, Sportwetten, der Lotteriestaatsvertrag und Gambelli, Wettbewerb in Recht und Praxis, 2005, p.48-68.
[646] ECJ Zenatti, para.31.
[647] ECJ Zenatti, para.30.

The scope of the protection which a Member State intends providing (total or partial prohibition, restriction, controlling procedures) falls within the margin of appreciation of the authorities in the context of the aim pursued[648].

The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted[649].

The fact that games are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed[650], which must be considered as a whole[651].

Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public-interest purposes, likewise falls within the ambit of those objectives[652].

However such a limitation is acceptable only if it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted[653].

Even if the fact that lotteries and other games of chance may represent a means of financing charity or other general-interest activities cannot be neglected, such a fact cannot be considered per se as an objective justification for restrictions to freedom to provide services[654].

It is for the national court to verify whether, having regard to the specific rules that govern its application, the national legislation is genuinely directed to realizing the objectives which are

[648] ECJ, Zenatti, para. 33.
[649] ECJ, Zenatti, para. 34.
[650] ECJ Zenatti, para. 35.
[651] ECJ Zenatti, paras. 31 and 35.
[652] ECJ Zenatti, para. 35.
[653] ECJ Zenatti, para. 36.
[654] Idem.

capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives[655].

I.3.1.4.*Anomar* case, 2003[656]

I.3.1.4.1.Facts:

Under the Portuguese law, the operation and playing of games of chance or of combinations thereof outside duly authorised areas is deemed to be an offence punishable by imprisonment. The general principle underpinning the statutory scheme provides that "[t]he right to operate games of chance or gambling is reserved to the State". As the national court states in its order for reference, the Portuguese legislation does not discriminate between nationals of the various Member States. That legislation must therefore be regarded as applying without distinction. The court asked the ECJ if Article 49 EC precludes legislation such as that in issue in the main proceedings which, although it does not discriminate on grounds of nationality, restricts the freedom to provide services.

I.3.1.4.2.Key findings:

Games of chance and gambling constitute economic activities within the meaning of Article 2 EC Treaty.

The activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the EC Treaty and, accordingly, it cannot come within the scope of Articles 28 and 29 EC relating to the free movement of goods.

A monopoly in the operation of games of chance or gambling does not fall within the scope of Article 31 EC Treaty[657].

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[655] ECJ Zenatti, para. 37.
[656] ECJ Anomar. For comments, see STRAETMANS Gert, Comment on ECJ case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português, Common Market Law Review, 2004, p.1409-1428; LUCIANI Fabio, Libera prestazione di servizi fra ordine pubblico nazionale e tutela dei consumatori, Diritto pubblico comparato ed europeo, 2004, p.392-396.

National legislation such as the Portuguese legislation which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC *et seq.* do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

The fact that there might exist, in other Member States, legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation, has no bearing on the compatibility of the latter with Community law.

In the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

I.3.1.4.3.Analysis:

The Court refers to the following: concerns of social policy and the prevention of fraud[658]; protection of consumers[659], who are the recipients of the service, and the maintenance of order in society[660].

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[657] Article 31 EC states: "1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.
The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.
2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.
3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this article to ensure equivalent safeguards for the employment and standard of living of the producers concerned".
[658] ECJ Anomar, para. 62 and 73.
[659] ECJ Anomar, para. 73.

It is common ground that it is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them[661].

The mere fact that the operation and playing of games of chance or gambling are subject, in other Member States, to legislation which is less restrictive, cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure[662].

The choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy[663]. They define the objectives which they intend to protect, determine the means which they consider most suited to achieve them and establish rules for the operation and playing of games, which may be more or less strict and which have been deemed compatible with the EC Treaty[664].

I.3.1.5.*Lindman* case, 2003[665]

I.3.1.5.1.Facts:

According to Finnish tax law, winnings from games of chance are exempt from income tax. The winnings of a Finnish national and resident, originating from a Swedish lottery draw, were however considered to be earned income subject to Finnish income tax, based on the

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660 ECJ Anomar, para. 62 and 73.
661 ECJ Anomar, para. 79. The Court refers here to Läära, para. 35, and Zenatti, para. 33.
662 ECJ Anomar, para. 80. The Court refers here to Läära, para. 36, and Zenatti, para. 34.
663 ECJ Anomar, para. 88.
664 ECJ Anomar, para. 87. The Court refers here to Schindler, para. 61, Läärä, para. 35, and Zenatti, para. 33
665 ECJ Lindman. For comments, see BRUNO Ferdinando, Dei limiti alla tassazione di vincite di lotteria organizzate in uno Stato membro diverso da quello di residenza, Diritto pubblico comparato ed europeo, 2004, p.378-383; IDOT Laurence, Jeux et loteries, Europe, Janvier 2004, p.18-19; STRAETMANS, Gert, comment on ECJ case C-42/02, Lindman, Common Market Law Review, 2004, p.1409-1428.

argument that, interpreted otherwise, the Swedish operator and the Finnish national would both not be taxed in Finland. The case raised not only the question of a justification of barriers to Articles 49 and 50 EC; it also concerned a manifest discrimination.

I.3.1.5.2.Key findings:

Article 49 EC prohibits a Member State's legislation under which winnings from games of chance organised in other Member States are treated as income of the winner subject to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable.

I.3.1.5.3.Analysis:

The court pointed out that it is not sufficient if a Member State invokes a public interest objective to justify its national restrictive measures, but that Member States have to prove by the means of a concrete analysis, that the allegation of the objective is well founded[666].

The analysis of the appropriateness and proportionality of a restrictive measure adopted by a Member State requires that the reasoning of the provisions in question disclose statistical or other evidence allowing a conclusion to be drawn as to the gravity of the risks connected to playing games of chance or the existence of a particular causal relationship between such risks and the participation by nationals of the Member State concerned in games organised in other Member States[667].

I.3.2.The Gambelli Case-Law and Subsequent Jurisprudence

As a brief reminder, in the *Gambelli* judgment the ECJ has comprehensively set a test (including the so-called "hypocrisy test"), in order to determine if a Member State's measure hindering the cross-border provision of gambling services is compatible with Community law.

[666] ECJ Lindman, para. 25.
[667] ECJ Lindman, paras. 25, 26.

This landmark decision was followed by other similar judgments. In *Placanica* notably, the Court stressed a few important elements.

Firstly, basic public procurement principles apply to tenders involving public money, including those for gambling licenses[668].

Secondly, the Court delimitated two distinct categories of justifications (objectives which aim to “reduce gambling opportunities” such as protecting consumers, and objectives aimed at “combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled”). Finally, this jurisprudence also gave more explicit guidance on the meaning of "channelling the inevitable desire to gamble into controlled venues".

As we will analyze further, it was rather demanding for national courts throughout Europe to assimilate these instructions. In this perspective, it is not anodyne to observe that in the recent *Liga Portuguesa* ruling the Court chose not to leave to the national judge the ultimate decision on the compatibility of a national legislation with Article 49 EC, preferring instead to cut the Gordian knot itself.

[668] For a comment, see HATZOPOULOS Vassilis, Public Procurement and State Aid in National Healthcare Systems, in Mossialos, E., Permanand, G., Baeten, R. and Hervey, T. (Editors.), Health Systems Governance in Europe: the role of EU law and policy, Cambridge University Press, 2009.

I.3.2.1.*Gambelli* case, 2003[669]

I.3.2.1.1.Facts:

In this case, an organisation of Italian agencies was accused of having illegally collaborated with a foreign bookmaker in the activity of collecting bets which was normally reserved by law to the State and thus considered incompatible with the national monopoly on sporting bets.

I.3.2.1.2.Key findings:

National legislation which prohibits, on pain of criminal penalties, the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned, constitutes a restriction on the freedom of establishment and on the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the

[669] ECJ Gambelli. For several comments on this judgment, see: BUSCHLE Dirk, "Der Spieler" - Schreckgespenst des Gemeinschaftsrechts, European Law Reporter, 2003, p.470-472; CINGOLO Antonio, La raccolta di scommesse su eventi sportivi: usi e abusi, Rassegna dell'avvocatura dello Stato, 2003, IV Sez.II p.53-54 ; MIGNONE Claudia Ilaria, La Corte di giustizia si pronuncia sul gioco d'azzardo nell'era di Internet, Diritto pubblico comparato ed europeo, 2004, p.397-402; WALZ Simone, Gambling um Gambelli? - Rechtsfolgen der Entscheidung Gambelli für das staatliche Sportwettenmonopol, Europäische Zeitschrift für Wirtschaftsrecht, 2004, p.523-526; STRAETMANS, Gert, comment on ECJ case C-243/01, Gambelli and others, Common Market Law Review, 2004, p.1409-1428, CAMPEGIANI Claudia, PAPI Cinzia, Il sistema di monopolio statale delle scommesse e la sua compatibilità con la normativa comunitaria in materia di libertà di stabilimento e di libera prestazione di servizi (art. 43 e 49 CE), Giustizia civile, 2004, I p.2529-2533; VERBIEST Thibault, REYNAUD Pascal, Incompatibilité de la législation italienne des jeux et paris avec les articles 43 et 49 du Traité CE, La Semaine juridique - édition générale, 2004 II, 10172; ZAGATO Lauso, Caso Gambelli: la Corte di Giustizia riformula il proprio giudizio sulla normativa italiana in materia di scommesse, Europa e diritto private, 2005, p.205-220, COSTAȘ Cosmin Flavius, Libertatea de stabilire. Libera circulație a serviciilor. Colectarea de pariuri pentru evenimente sportive într-un stat membru și transmiterea lor prin Internet unui alt stat membru. Prohibiție instituită sub sancțiuni penale. Legislația unui stat membru care rezervă dreptul de a colecta pariuri anumitor entități, Revista romana de drept al afacerilor, 5/2006, p.160-164.

aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives[670].

I.3.2.1.3.Analysis:

The Court points out that the national measure has to be non-discriminatory. It further points out that it is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licenses to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. It makes clear that if this is so, those conditions do not satisfy the requirement of non-discrimination[671]. Non-discriminatory restrictions must be either acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC or justified for reasons of overriding general interest.

A diminution or reduction of tax revenue does not constitute a matter of overriding general interest which may be relied on to justify a restriction[672].

The financing of social activities through a levy on the proceeds of authorised games must be nothing more than a mere incidental beneficial consequence and not the real justification[673].

Moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society which are associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require[674].

Restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming. However, restrictions based on such grounds and on the need to preserve

670 For a commentary on this judgment, see VERBIEST Thibault, KEULEERS Ewout, Gambelli Case Makes It Harder For Nations To Restrict Gaming, 8 Gaming Law Review 1, 2004.
671 ECJ Gambelli, para. 71.
672 ECJ Gambelli, para. 61.
673 ECJ Gambelli, para. 62.
674 ECJ Gambelli, para. 63.

public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner[675].

The restrictions must reflect a concern to bring about a genuine diminution of gambling opportunities. In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting[676].

In the Court's analysis, the restrictions imposed must not go beyond what is necessary to achieve the goals envisaged. Proportionality must be particularly assessed where involvement in betting is encouraged in the context of games organised by licensed national bodies[677].

It has to be determined whether the imposition of restrictions, accompanied by criminal penalties, goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where those intermediaries considered that they were permitted to transmit bets on foreign sporting events[678].

It has further to be determined whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it[679].

With respect to freedom of establishment, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud[680].

[675] ECJ Gambelli, para. 67.
[676] ECJ Gambelli, para. 69.
[677] ECJ Gambelli, para. 72.
[678] ECJ Gambelli, para. 73.
[679] ECJ Gambelli, para. 75.
[680] ECJ Gambelli, para. 74.

I.3.2.2.Placanica case, 2007[681]

I.3.2.2.1.Facts:

This case relates to three persons who were being prosecuted through criminal proceedings before Italian courts for operating data transmission centers through which punters were able to place bets with Stanleybet International, based in the United Kingdom[682]. The latter provider claimed that its UK license should have been recognized by all EU countries, including Italy[683]. The Italian court decided to refer the question to the European Court of

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[681] ECJ Placanica. An identical case was ECJ case C-191/06, Aniello Gallo and Gianluca Damonte, Ordinance of 6 March 2007. For several comments on this judgment, see: DESTOURS Stéphane, Monopole des jeux de hasard en ligne: rien ne va plus, Revue Lamy de la Concurrence : droit, économie, régulation 2006 nº 8 p.67-69, GRYNBAUM Luc, Lutte contre la délinquance et réglementation des jeux et paris à la lumière de la jurisprudence de la CJCE (Loi du 5 mars 2007 relative à la prévention de la délinquance et arrêt CJCE du 6 mars 2007 Placanica et autres), Droit de l'immatériel : informatique, médias, communication 2007 nº 26 p.26-28, SIMON Denys, Faites vos jeux, rien ne va plus ..., Europe, 2007 Mai Comm. nº 141 p.17-18, AM ENDE Moritz, Staatliche Wettmonopole: Neues Spiel, neues Glück?, European Law Reporter, 2007, p.86-88; VERBIEST Thibault ; HEFFERMEHL Evelyn, Jeux d'argent en ligne: l'impact de l'arrêt Placanica, Droit de l'immatériel : informatique, médias, communication, 2007, nº 27, p.69-71; KARL Kai-Uwe, Playing the game, Competition Law Insight, 2007, Vol.6 Issue 5 p.3-5; CONTI Roberto, FOGLIA, Raffaele, Raccolta di scommesse su eventi sportivi, Il Corriere giuridico, 2007, p.566-569, BROUSSY Emmanuelle, DONNAT Francis, LAMBERT Christian, Actualité du droit communautaire. Liberté d'établissement - Libre prestation de service - Jeux de hasard, L'actualité juridique de droit administratif, 2007, p.1122-1124; CLERGERIE Jean-Louis, La compatibilité des réglementations nationales des jeux de hasard avec le droit communautaire, Recueil Le Dalloz, 2007, p.1314-1316, DESTOURS Stéphane, Les jeux (de hasard) sont faits, Revue Lamy de la Concurrence, droit, économie, régulation 2007 nº 12, p.65-67; SCHIANO Roberto, La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt "Placanica et a.", Revue du droit de l'Union européenne, 2007, nº 2 p.461-465; GNES Matteo, Diritto comunitario e disciplina nazionale delle scommesse, Giornale di diritto amministrativo, 2007, p.831-837; VAN DER BEEK J.C.M, ADOBATI Enrica, Viola il trattato CE una sanzione penale applicata per il mancato adempimento di una formalità amministrativa la cui osservanza è resa impossibile dalla normativa nazionale contrastante con il diritto comunitario, Diritto comunitario e degli scambi internazionali, 2007, p.333-334, RUOTOLO Gianpaolo Maria, Il regime italiano del gambling all'esame della Corte di giustizia: rien ne va plus?, Diritto pubblico comparato ed europeo, 2007, p.1397-1405, HOEKX Nele: Kansspelen in Europa: Placanica, Droit de la consummation, 2007, p.227-242; CASHIN RITAINE Eleanor, LEIN, Eva, La notion de proportionnalité appliquée au droit des jeux de hasard - Les cas Placanica et Autorité de surveillance de l'AELE/Royaume de Norvège, Schweizerisches Jahrbuch für Europarecht = Annuaire suisse de droit européen, 2006/2007, p.355-371.

[682] For a presentation of the Italian anti-gambling laws, see SBORDONI Stefano, CELESTI Stefano Maria, DIONISI Francesca, Sanctions for infringements of gambling laws in Italy, ERA-Forum. Vol. 8 (2007), no. 3, p. 405-416.

[683] Stanley operates in Italy through more than 200 agencies, commonly called data transmission centers (DTCs). The DTCs supply their services in premises open to the public in which a data transmission link is placed at the disposal of bettors so that they can access the server of Stanley's host computer in the United Kingdom. In that way, bettors are able electronically to forward sports bets proposals to Stanley (chosen from lists of events, and the odds on them, supplied by Stanley), to receive notice that their proposals have been accepted, to pay their stakes, and, where appropriate, to receive their winnings. The DTCs are run by independent operators who have contractual links to Stanley. Massimiliano Placanica, Christian Palazzese, and Angelo Sorricchio, the defendants in the main proceedings, are all DTC operators linked to Stanley.

Justice for a preliminary ruling, asking mainly if the Italian law was compatible with the principles enshrined in Article 43 et seq. and 49 EC, having regard to the difference between the interpretation emerging from the decisions of the Court (in particular in *Gambelli and Others*) and the decision of the Italian Supreme Court of Cassation, in Case No 23271/04 (the *Bruno Corsi* case[684]).

I.3.2.2.2.Key findings:

The ECJ confirmed the principles already pointed out in the *Gambelli* case and concluded that national legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or a police authorization issued by the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively[685].

Articles 43 EC and 49 EC must be interpreted as precluding national legislation, which imposes a criminal penalty on persons for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where those persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorizations to such persons. Also, Articles 43 EC and 49 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes – and, moreover, continues to exclude – from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

I.3.2.2.3.Analysis:

Concerning the eventual justification of such a restriction, the Court ruled that moral, religious or cultural factors, as well as the morally and financially harmful consequences for

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[684] See next chapter.
[685] For a commentary of this judgment, see DEL NINNO Alessandro, The Placanica Decision: The EU Court of Justice Again Censures Italy's Restrictions on the Gambling Market, Gaming Law Review Volume 11, Number 3, 2007.

the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order[686].

As regards the objectives capable of justifying those obstacles, the Court indicated that a distinction must be drawn in this context between, on the one hand, the objective of reducing gambling opportunities and, on the other hand, the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled.

With regard to the first type of objective, it is clear from the case-law that although restrictions on the number of operators are in principle capable of being justified, those restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and systematic manner[687], which seems not to be the case in Italy (the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector, with the aim of increasing tax revenue). Therefore, it is the second type of objective, that of preventing the use of betting and gaming activities for criminal or fraudulent purposes by channeling them into controllable systems, that is identified, both by the Corte Suprema di Cassazione and by the Italian Government in its observations before the Court, as the true goal of the Italian legislation at issue in the main proceedings.

Viewed from that perspective, the Court recognized that it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated. It is for the national courts to determine whether, in so far as national legislation limits the number of operators active in the betting and gaming sector, it genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes.

The Court confirmed that although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection

[686] ECJ Gambelli, para. 63.
[687] ECJ Zenatti, paras 35 and 36, ECJ Gambelli, paras 62 and 67.

sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality. The restrictive measures imposed by the national legislation should therefore be examined in turn in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives. In any case, those restrictions must be applied without discrimination.

Concretely, the Court concluded that it would be for the national courts to ascertain whether national restrictions to foreign gambling services satisfy the conditions laid down by the case-law of the Court as regards their proportionality.

I.3.2.3.Unibet case, 2007[688]

I.3.2.3.1.Facts:

In this case, the Court did not directly deal with the free movement of goods or services, but rather resolved the issue from the perspective of the principle of effective judicial protection of an individual's rights under Community law. The question was raised in national proceedings concerning the application of the Swedish Law on Lotteries and games of chance.

Following the *Placanica* judgment, the private gambling operator Unibet brought an action to court (with the aim to gain access to the Swedish market), on the grounds that the Swedish gambling monopoly breaches Community law. Since a free-standing action in this sense does

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[688] ECJ case C-432/05, Unibet v. Justitiekanslern, judgment of 13 March 2007. For comments, see SCHMIED Frédéric: L'accès des particuliers au juge de la légalité - L'apport de l'arrêt Unibet, Journal des tribunaux / droit européen, 2007, p.166-170, GROUSSOT Xavier, WENANDER Henrik, Self-standing Actions for Judicial Review and the Swedish Factortame: Case C-432/05, Unibet, Civil Justice Quarterly, 2007, p.376-388; BLUMANN Claude, Le juge national, gardien menotté de la protection juridictionnelle effective en droit communautaire, La Semaine Juridique - édition générale, 2007, I 175 p.13-19; ANAGNOSTARAS Georgios, The quest for an effective remedy and the measure of judicial protection afforded to putative Community law rights, European Law Review, 2007, p.727-739, VAN WAEYENBERGE Arnaud, PECHO Peter, L'arrêt Unibet et le traité de Lisbonne - un pari sur l'avenir de la protection juridictionnelle effective, Cahiers de droit européen, 2008, p.123-156, BO Giovanni, La pronuncia della Corte di giustizia nella causa Unibet tra principio di autonomia processuale e principio di non discriminazione, Rivista trimestrale di diritto e procedura civile, 2008, p.1065-1078.

not exist under Swedish law, Unibet complained to the ECJ invoking the principle of effective judicial protection of an individual's rights under Community law.

The main question addressed by the Swedish court to the ECJ was whether the principle of effective judicial protection of an individual's rights under Community law requires the national legal system to provide for a free-standing action for an examination as to whether national provisions are compatible with Community law, if other legal remedies allow the question of compatibility to be raised as a preliminary issue.

I.3.2.3.2.Findings and analysis:

The Court responded in favor of preserving the national procedural autonomy, and concluded that the principle of effective judicial protection of individual's rights under EC law does not require the national legal order to provide for a free-standing action for an examination of the compatibility of national provisions with EC law, the possibility of an indirect challenge suffices[689].

I.3.2.4.*Commission v. Italy* case, 2007[690]

I.3.2.4.1.Facts:

In this 2007 case, at issue was the behavior of the Italian state, which renewed 329 concessions for horse-race betting, without organizing a bid and without ensuring, for the

[689] ECJ Unibet, para.61.
[690] ECJ case C-260/04, Commission of the European Communities v. Italian Republic, judgment of 13 September 2007. For comments, see GASSO Luca, Libertà di stabilimento e concessioni per l'esercizio di scommesse, Giurisprudenza italiana, 2007, p.2138, PALMIERI Alessandro, Comment on ECJ case C-260/04, Commission of the European Communities v. Italian Republic, Il Foro italiano, IV 2007, Col.525-527, MEISSE Eric, Comment on ECJ case C-260/04, Commission of the European Communities v. Italian Republic, Concession de service public, Europe, Novembre 2007, Comm. nº 299 p.23, BROWN Adrian, The Obligation to Advertise Betting Shop Licences Under the EC Principle of Transparency: Case C-260/04, Commission v Italy, Public Procurement Law Review, 2008, p.NA1-NA7, DE FALCO Vincenzo, Riserve statali nei servizi di gestione e raccolta di scommesse ippiche e fattori di convergenza con l'ordinamento comunitario, Diritto pubblico comparato ed europeo, 2008, p.427-431, CARANTA Roberto, Il principio di diritto comunitario della trasparenza/concorrenza e l'affidamento o rinnovo di concessioni di servizi pubblici (ancora in margine al caso Enalotto), Giurisprudenza italiana, 2008, p.474-478.

benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition.

I.3.2.4.2.Key findings:

Following a complaint lodged by a private operator in the horse-race betting sector, the Court ruled that by renewing these concessions for horse-race betting operations without inviting any competing bids, Italy had failed to fulfill its obligations under Articles 43 and 49 of EC and, in particular, had infringed the general *principle of transparency*[691] and the obligation to ensure a sufficient degree of advertising.

I.3.2.4.3.Analysis:

The Court considered that the renewal of these « old » licenses by the Italian state without any open competition could not be justified by the necessity to dissuade clandestine activities for collecting and allocating bets. The Italian Government had not explained in its defense the basis on which it was necessary not to invite competing bids and has not submitted arguments to dispute the infringement alleged by the Commission. In particular, the Italian Government has not explained how the renewal of the existing licenses without inviting any competing bids could prevent the development of clandestine activities in the horse-race betting sector.

Regarding proportionality, the Court concluded that the renewal of old licenses without putting them out to tender was not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities. In addition, as regards the grounds of an economic nature put forward by the Italian Government, such as the need to ensure continuity, financial stability and a proper return on past investments for license holders, suffice it to point out that those cannot be accepted as overriding reasons in

[691] Transparency is a recurrent theme in the European Union. "Compliance with the highest standards of transparency is an essential condition for the legitimacy of any modern administration." See the European Transparency Initiative launched by the European Commission in 2005, Green Paper available at http://ec.europa.eu/transparency/eti/docs/gp_en.pdf.

the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty[692].

I.3.2.5. The *Liga Portuguesa* case, 2009

A much awaited ruling was issued in this preliminary question asked at the beginning of 2007 by the Tribunal de Pequena Instância Criminal do Porto[693].

The Court's arguments, which seem to adjust the *Gambelli* and *Placanica* jurisprudence, appear rather to follow the approach taken in the 90's in the *Läärä* case.

Understandably, this ruling was applauded by the European state lotteries and criticized by the private gambling operators[694]. It concludes that Article 49 EC does not preclude legislation of a Member State which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.

I.3.2.5.1. Facts

Bwin, an on-line gambling undertaking which has its registered office in Gibraltar and no establishment in Portugal, offered Portuguese consumers a wide range of on-line games of chance covering sports betting, casino games, such as roulette and poker, and games based on drawing numbers by lot which are similar to the Totoloto operated by Portuguese gambling monopoly, the Santa Casa da Misericórdia de Lisboa (the Santa Casa). It also sponsored the national professional football league, the Liga Portuguesa de Futebol Profissional (the Liga).

In exercising the powers conferred on them by the Portuguese law, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines of €75 000 and €74 500

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[692] ECJ Commission v. Italy, paras 34-35.
[693] ECJ case C-42/07 *Liga Portuguesa de Futebol Profissional (CA/LPFP) and Baw International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, judgment of 8 september 2009.
[694] See the European Lotteries press release at https://www.european-lotteries.org/data/info_1832/communiqu__de_presse_EL_FR.pdf, and the one of the European Gaming and Betting Association at http://www.eu-ba.org/fr/press/488.

respectively on the Liga and Bwin in respect of the administrative offences referred to in Article 11(1)(a) and (b) of Decree-Law No 282/2003[695].

The Liga and Bwin brought actions before a national court for annulment of those decisions, invoking, inter alia, the relevant Community rules and case-law. This court has referred a sports betting case to the ECJ, enquiring if the monopoly granted to the national lottery operator, Santa Casa, constitutes an impediment to the free provision of services against a provider of services established in another Member State in which it lawfully provides similar services and which has no physical establishment in Portugal.

Moreover, the court asked if a monopoly in favor of a single body for the operation of lotteries and mutual betting, extended to the entire national territory, including the Internet, is contrary to Community law[696].

I.3.2.5.2. Findings and Analysis

In his non-binding Opinion of 14 October 2008 on this case, the Advocate General Bot proposed to the Court to answer in the sense that the Portuguese legislation conferring on Santa Casa a monopoly for mutual betting on the Internet may comply with Community law if certain conditions are met (if it is justified by an overriding reason relating to the public interest, if it is appropriate for ensuring the attainment of such aim, if it does not exceed what is necessary for attaining it and if it is not applied in a discriminatory way). It would be for the national court to verify that these conditions are met.

However, Advocate General Bot also considered that the extension of the Portuguese legislation to lotteries and betting by electronic means of communication (Internet mainly)

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[695] Under Article 11(1) of Decree-Law No 282/2003 the following are classed as administrative offences: (a) the promotion, organisation or operation by electronic means of games [the operation of which has been entrusted to Santa Casa], in contravention of the exclusive rights granted by Article 2 [of the present Decree-Law], and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not; (b) the promotion, organisation or operation by electronic means of lotteries or other draws similar to those of the Lotaria Nacional or the Lotaria Instantânea, in contravention of the exclusive rights granted by Article 2, and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not".

[696] Another question initially referred to the ECJ concerned a similar issue regarding the monopoly granted to the Belgian national lottery. However, due to a procedural incident in front of the Belgian courts, this question led only to an order from the ECJ rejecting it on procedural grounds. ECJ, case C-525/06, Nationale Loterij, order of 24 March 2009.

falls within the directive laying down a procedure for the provision of information in the field of technical standards and regulations[697] and therefore it should have been notified to the Commission.

The Court first decided that the question referred by the Portuguese court must be answered in the light of Article 49 EC alone. Then it acknowledged without difficulties that, as indeed the Portuguese Government expressly conceded, the legislation at issue in the main proceedings gave rise to a restriction of the freedom to provide services enshrined in this Article.

The justification of the restriction of the freedom to provide gambling services through the Internet was the core of discussion.

The Court underlined that the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected. The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality.

In this context, the Court noted that the fight against crime may constitute an *overriding reason in the public interest* that is capable of justifying restrictions in respect of operators authorised to offer services in the games-of-chance sector. Games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers.

For the Court, allowing only limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime. In this context, the Santa Casa pursues objectives in the

[697] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards (OJ L 204, 21.7.1998, p. 37–48). According to this Directive, every Member State must notify the Commission of its draft technical rules or amendment of technical regulations, the grounds for them and, where necessary, the main basic legislative and regulatory provisions of the draft regulation.

public interest. The grant of exclusive rights to operate games of chance via the internet to this single operator, which is subject to strict control by the public authorities, may confine the operation of gambling within controlled channels and my thus be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

As to whether the system in dispute in the main proceedings is *necessary*, the Portuguese Government submitted the affirmative, alledging that, in relation to foreign operators which use the Internet to offer their services, the authorities of a Member State do not have the same means of control at their disposal as those they have in relation to a national operator. The Court agreed that, since online games of chance have not been the subject of Community harmonization, a Member State is entitled not to apply the country of origin principle, which in this sector does not give sufficient assurance that national consumers will be protected against the risks of fraud and crime.

Concerning Internet gambling specifically, the Court expressly stated that, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.

It then went further and shed a light of doubt on gambling sponsors of sport by pointing out a potential conflict of interest when an operator of sports betting sponsors some of the sporting competitions on which it accepts bets, because such operator may be in a position to influence their outcome directly or indirectly and thus increase its profits.

The remark that in the light of the specific features associated with the provision of Internet gambling, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime closed the Court's argument.

The issue of proportionality, which in the previous case-law had been left for the national judge to decide upon, was thus settled by the Court itself[698]. In doing so, the Court added a

[698] As analyzed in the next Chapter (I.4), several ECJ Advocates General and scholars had questioned if the Court should continue to leave the ultimate decisions to the national judge, or if it should provide them with a complete answer (see for instance Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16 May 2006 in *Placanica*, point 141). Advocate General Alber in his Opinion delivered on 13 March 2003 in *Gambelli* also

new milestone to its dialogue with the national judges in the preliminary ruling procedures concerning gambling services.

I.3.3.Pending Cases before the ECJ

In a time when important changes are foreseen in the legislative environment relating to games of chance in several Member States[699], the Court will have the opportunity to rule again on this issue, as several cases concerning the regulation of gambling sectors are at present pending before it. They concern lottery legislation from Sweden, sports betting restrictions in France, Germany, the Netherlands and Portugal, and casino legislation from Austria. Their future solutions will perhaps bring more elements defining the Court's position on the thorny question of cross-border gambling regulations.

I.3.3.1.Cases concerning Austria

In this casino-related case, the Landesgericht Linz has sent the ECJ a reference for a preliminary ruling[700] whereby it enquired on the euro-compatibility of the Austrian casino policy and the State's control over providers of casino games[701].

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believed that where gambling is concerned, the national courts find it difficult to carry out the task entrusted to them (point 116).

[699] It is for instance the case of France, where lawmakers prepare a new regulation on online gambling.

[700] ECJ case C-64/08, Staatsanwaltschaft Linz v. Ernst Engelmann, ECJ case C-235/08, Roland Langer v. Staatsanwaltschaft Ried im Innkreis.

[701] The court's three questions to the ECJ are the following: 1. Is Article 43 EC […] to be interpreted as precluding a provision which provides that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?; 2. Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as national licensed organisers encourage participation in gaming — such as public sports betting and lotteries — and advertise such gaming (on television goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made (‘TOI TOI TOI — Believe in luck!’)?; 3. Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all licences granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?.

I.3.3.2.Cases concerning France

At the heart of this reference for a preliminary ruling from the French Conseil d'État[702] is the thorny question of "channelling" gambling into controlled systems, which requires legal operators to limit gambling opportunities, while still trying to propose an attractive offer in order to efficiently compete with illegal providers[703].

I.3.3.3.Cases concerning Germany

At present, several German sports betting cases are pending before the ECJ (from courts of Cologne, Schleswig, Stuttgart and Gießen).

The questions[704] referred for a preliminary ruling by the Cologne court [705] (Verwaltungsgericht Köln) concern more the issue of a gambling-restrictive provision being able to ultra-activate in spite of the fact that it was found to be in violation of the EC Treaty[706].

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[702] ECJ case C-212/08, Zeturf.

[703] The questions referred to the ECJ are the following: 1. Are Articles 49 and 50 [EC] to be interpreted as precluding national legislation which has established a system whereby *off-course horserace betting is managed exclusively by a single, non-profit-making operator* where, although that system appears to *fit the purpose of combating criminality* and thus of protecting public order more effectively than would less restrictive measures, it is accompanied by a *dynamic commercial policy* on the part of the operator, *in order to neutralise the risk of unauthorised gambling networks emerging and to channel bettors towards the lawful offer, that does not, in consequence, fully achieve the objective of reducing gambling opportunities*? [emphasis added]; 2. Is it appropriate, in order to determine whether national legislation such as that in force in France, which has established a system whereby off-course horserace betting is managed exclusively by a single, non-profit-making operator, is contrary to Articles 49 and 50 of the Treaty establishing the European Community, to assess the impairment of freedom to provide services solely from the point of view of the restrictions placed on offering *on-line* horserace betting, or is it appropriate to take into consideration the *entire horserace betting sector* in whatever form it is offered and is accessible to bettors? [emphasis added].

[704] The questions are formulated as follows: 1. Are Article 43 EC and Article 49 EC to be interpreted as meaning that national rules governing a State monopoly on sports betting, which contain impermissible restrictions on the freedom of establishment and the freedom to provide services enshrined in Article 43 EC and Article 49 EC, inasmuch as they do not serve to limit betting activities in a consistent and systematic manner within the terms of the Court's case-law (judgment in Case C-243/01 *Gambelli and Others* [2003] ECR-13031), may still *continue to apply for a transitional period on an exceptional basis, notwithstanding the primacy of directly applicable Community law*?; 2. If Question 1 is to be answered in the affirmative: what conditions need to be met for the purpose of derogating from that primacy and how is the transitional period to be determined?

[705] ECJ case C-409/06, Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim.

[706] This court is not the only one in Germany enquiring if a national law considered in breach of Community law could exceptionally be maintained during a transition period, despite the primacy of Community law principle. See also Oberverwaltungsgericht Nordrhein-Westfalen, judgment of 28 June 2006, no. 4 B 961/06, Europäische Zeitschrift für Wirtschaftsrecht, 2006, 603, in Chapter I.4 hereinafter.

In another reference for a preliminary ruling[707], the Schleswig-Holsteinisches Verwaltungsgericht has raised doubts on the justification of the new Interstate Treaty on Gambling. In the main proceedings a remote gaming operator, licensed in Gibraltar, had challenged the state monopoly on sports betting. The court inquired among others whether the prevention of compulsive gambling and the protection of minors, which were put forward as a justification of the Interstate Treaty, really justify the exclusion of private operators.

Also, the Verwaltungsgericht Stuttgart has referred three cases to the ECJ[708], asking mainly if a national monopoly on certain gaming, such as sports betting and lotteries, can be justified in the light of Community law, if there is no consistent and systematic policy to limit gaming in the Member State concerned as a whole, and if other games with the same or even higher potential danger of addiction – such as betting on certain sporting events (horse racing), slot machines and casino games – may be provided by private service providers.

The court also sought clarification on whether authorisations to operate sports betting issued by competent State bodies of a Member State and which are not restricted to the particular national territory are also valid as such in other Member States, by virtue of Articles 43 and 49 EC.

Finally, the Verwaltungsgericht Gießen has referred to the ECJ three sports betting cases[709] seeking clarification on the same questions as the ones referred by the Verwaltungsgericht Stuttgart.

I.3.3.4.Cases concerning the Netherlands

The Dutch Supreme Court and the State Council have both referred questions to the ECJ concerning the euro-compatibility of Dutch gambling-related regulations.

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[707] ECJ case C-46/08, Carmen Media Group v. Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein.
[708] ECJ case C-358/07, Kulpa Automatenservice Asperg GmbH v Land Baden-Württemberg, ECJ case C-359/07, SOBO Sport & Entertainment GmbH v Land Baden-Württemberg, and ECJ case C-360/07, Andreas Kunert v Land Baden-Württemberg.
[709] ECJ case C-316/07, Markus Stoß v. Wetteraukreis, ECJ case C-409/07, Avalon Service-Online-Dienste GmbH v. Wetteraukreis, and ECJ case C-410/07, Olaf Amadeus Wilhelm Happel v. Wetteraukreis.

The Supreme Court (Hoge Raad der Nederlanden) asked the ECJ[710] for clarification regarding the issue of "channeling" stated in *Placanica* and the possibility for monopolistic operators to increase their offer attractiveness[711].

The State Council (Raad van State), confronted with a case similar to the ones that gave rise to the *Placanica* case in Italy, has referred several questions to the ECJ[712], seeking clarification on the compatibility of a closed licensing system with the principle of transparency and competition rules[713].

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[710] ECJ case C-258/08, Ladbrokes Betting & Gaming et Ladbrokes International.

[711] The questions are the following: 1. Does a restrictive national gaming policy which is aimed at channelling the propensity to gamble and which in fact contributes to the achievement of the objectives pursued by the national legislation in question satisfy the condition set out in the case-law of the Court of Justice of the European Communities, particularly in the judgment in Case C-243/01 Gambelli and Others […], that such restrictions must limit betting activities in a consistent and systematic manner, even where the licence holder/s is/ are permitted to make the games of chance which it/they offer/s attractive by introducing new games, to bring the games which it/they offer/s to the notice of a wide public by means of advertising and thereby to keep (potential) gamblers away from the unlawful offer of games of chance (see […] Placanica and Others [2007] ECR I-1891, paragraph 55, in fine)?; 2a. Assuming that national legislation governing gaming policy is compatible with Article 49 EC, is it for the national courts to determine, on every occasion on which they apply that legislation in practice in an actual case, whether the measure to be imposed, such as an order that a particular website be made inaccessible to residents of the Member State concerned by means of software designed for that purpose, in order to prevent them from participating in the games of chance offered thereon, in itself and as such satisfies the condition, in the specific circumstances of the case, that it should actually serve the objectives which might justify the national legislation in question, and whether the restriction resulting from that legislation and its application on the freedom to provide services is not disproportionate in the light of those objectives? [emphasis added]; 2b. In answering Question 2a, does it make any difference if the measure to be implemented is not ordered and imposed in the context of the application of the national legislation by the authorities, but in the context of a civil action in which an organiser of games of chance operating with the required licence requests imposition of the measure on the ground that an unlawful act has been committed in its regard under civil law, inasmuch as the opposing party contravened the national legislation in question, thereby gaining an unfair advantage over the party operating with the required licence? [emphasis added]; 3. Should Article 49 EC be interpreted in such a way that the application of that article results in the competent authority of a Member State being unable, on the basis of the closed licensing system that exists in that State for the provision of gaming services, to prohibit a service provider which has already been granted a licence in another Member State for the online provision of such services from also offering those services online in the first Member State?"

[712] ECJ case C-203/08, Sporting Exchange.

[713] The questions are formulated as follows: "1. Should Article 49 EC be interpreted as meaning that, where a *closed licensing system* is applied in a Member State to the provision of services relating to games of chance, the application of that article precludes the competent authority of that Member State from prohibiting a service provider to whom a licence has already been granted in another Member State to provide those services via the internet from also offering those services via the internet in the first Member State? [emphasis added]; 2. Is the interpretation which the Court of Justice has given to Article 49 EC, and in particular to the *principle of equality and the duty of transparency* arising therefrom, in a number of individual cases concerning concessions *applicable to the procedure for the granting of a licence to offer services relating to games of chance* under a statutorily established single-licence system? [emphasis added]; 3. (a). Under a statutorily established *single-licence system*, can the extension of the licence of the existing licenceholder, *without potential applicants being given an opportunity to compete for that licence*, be a suitable and proportionate means of meeting the imperative requirements in the general interest which the Court of Justice has recognised as justifying restriction of the freedom to provide services in respect of games of chance? If so, under what conditions? [emphasis

I.3.3.5.Cases concerning Portugal

A Portuguese court (the Tribunal Judicial da Comarca do Porto) asked the ECJ for clarification[714] on a question related to the monopoly detained by the state over the gambling sector in general and to the advertising for such activities[715].

I.3.3.6.Cases concerning Sweden

The Svea hovrätt (Court of Appeal) sought clarification from the ECJ in two gambling-related preliminary questions[716], related to the possible justification of discriminatory rules applied on grounds of nationality, to the financing of social activities as marketing objectives ad to advertising activities[717].

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added]; (b). Does it make a difference to the answer to Question 3(a) whether Question 2 is answered in the affirmative or the negative?"

[714] C-55/08, Santa Casa da Misericórdia de Lisboa / Liga Portuguesa de Futebol Profissional.

[715] The questions are formulated as follows: "1. Is the fact that the State reserves to itself the 'right to run games of luck or chance' […] and the right to 'organise pool betting systems' […] compatible with the rules of Community law laying down the principles of the freedom to provide services, free competition and prohibition of State monopolies?; 2. What criteria should guide interpretation of national legislation restricting those principles, for the purposes of determining whether such restriction is admissible in light of the rules of Community law…?; 3. Is the prohibition of advertising games of luck and chance when forming the substantive content of the message, having regard to the exception relating to the advertising of games organised by the Santa Casa da Misericórdia de Lisboa, compatible with the rules of Community law … laying down the principles of the freedom to provide services, free competition and prohibition of State monopolies?"

[716] ECJ case C-447/08, Otto Sjöberg v. Åklagaren; C-448/08, Anders Gerdin v. Åklagaren.

[717] The questions are formulated as follows: "1. May *discrimination on grounds of nationality* be accepted, under some circumstances, on national gaming and lottery markets on the basis of overriding reasons in the general interest? [emphasis added]; 2. If there are a number of objectives pursued by the restrictive policy adopted on a national gaming and lottery market and one of them is the financing of social activities, can the latter then be said to be an incidental beneficial consequence of the restrictive policy? If this question is answered in the negative, can the restrictive policy pursued still be acceptable if the objective of financing social activities cannot be said to be the principal objective of the restrictive policy?; 3. Can the State rely on overriding reasons in the general interest as justification for a restrictive gaming policy *if State controlled companies market gaming and lotteries*, the revenue from which accrues to the State, and one of several objectives of that marketing is the financing of social activities? If this question is answered in the negative, can the restrictive policy pursued still be acceptable *if the financing of social activities is not found to be the principal objective of the marketing*? [emphasis added]; 4. Can a *total prohibition on the marketing of gaming and lotteries organised in another Member State* by a gaming company established there and supervised by that Member State's authorities be *proportionate* to the objective of controlling and supervising gaming activity, *when at the same time there are no restrictions on the marketing of gaming and lotteries organised by gaming companies established in the Member State which pursues the restrictive policy*? What is the answer to the question *if the objective of such an arrangement is to limit gaming*? [emphasis added]; 5. Is a gaming operator who has been granted a licence to operate certain gaming activities in a State and is supervised by the competent authority in that State entitled to market its gaming products in other Member States through, for example, *advertisements in newspapers*, without first applying for a licence from those States' competent authorities? If this question is answered in the affirmative, does this mean that a Member State's rules which are based on the imposition of criminal penalties

on the promotion of participation in lotteries organised abroad constitute an obstacle to the freedom of establishment and the freedom to provide services which can never be accepted on the basis of overriding reasons in the general interest? Is it of any significance for the answer to the first question whether the Member State where the gaming operator is established invokes the same overriding reasons in the general interest as the State where the operator wishes to market its gaming activities? [emphasis added].

I.3.4.Gambling and the Free Movement of Goods in the ECJ Jurisprudence

The free movement of goods – one of the fundamental freedoms within the European Union – is guaranteed by Articles 28 EC to 30 EC Treaty[718]. “Goods” are defined as products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions[719].

A national rule which hinders the free movement of goods is not necessarily contrary to Community law if it can be justified by one of the public interest grounds set out in Article 30 EC or by one of the overriding requirements laid down by the Court’s case-law[720] and if it respects the conditions laid down in the ECJ jurisprudence, especially with regards to the proportionality requirement.

An interesting case involving the free movement of goods – although referring, in the Court’s opinion, only to gaming machines (for amusement and recreational purposes) and not to games of chance – was solved by the ECJ in 2006.

I.3.4.1.European Commission v. Greece case, 2006[721]

I.3.4.1.1.Facts:

In 2002, Greece passed legislation prohibiting electrical, electromechanical or electronic games, including computers, on public premises in general, such as hotels, cafés and meeting

[718] From a rich literature on this subject, we refer the reader to OLIVER Peter (assisted by Malcolm Jarvis), Free movement of goods in the European Community : under articles 28 to 30 of the EC Treaty, 4th ed., Sweet and Maxwell, 2003, and WOODS Lorna, Free movement of goods and services within the European Community, supra.
[719] ECJ Case 7/68, Commission v Italy and C-97/98, Jägerskiöld, judgment of 21 October 1999, para. 30.
[720] See ECJ case C-366/04, Schwarz, judgment of 24 November 2005, para. 30.
[721] ECJ case C-65/05, Commission v. Hellenic Republic, judgment of 26 October 2006. For a comment, see SIMON Denys, Commercialisation des jeux électriques, électromécaniques et électroniques, Europe 2006 Décembre Comm. nº 361 p.17. In 2008, the European Commission introduced an action based on Article 228 EC against Greece for not having taken all the necessary measures to enforce this judgment. ECJ case C-109/08, Commission v. Greece.

rooms recognised as being for any kind of public use or on any other public or private premises. The installation of those games was also prohibited.

The action brought to the ECJ by the Commission under Article 226 EC (for failure to fulfil obligations) had three heads of claim. First, it claimed that the general prohibition on electrical, electromechanical and electronic games inserted by the Greek law is contrary to the provisions of Articles 28 EC and 30 EC (free movement of goods). Secondly, it alleged that this law is incompatible with the Hellenic Republic's obligations under Articles 43 EC and 49 EC (free movement of services). Thirdly, the Commission alleged that that Member State did not observe the procedure for the provision of information provided for in the first subparagraph of Article 8(1) of Directive 98/34[722].

I.3.4.1.2.Key findings:

Concerning the first head of claim, the Court observed that electrical, electromechanical and electronic games, including computer games, in so far as they have a commercial value and can form the subject of commercial transactions, be imported or exported and made available to the consumer in consideration of payment, satisfy those criteria and constitute goods for the purpose of the EC Treaty. Bearing in mind that the free movement of goods is one of the fundamental principles of the Treaty, national legislation must be held to constitute a measure having equivalent effect to a quantitative restriction within the meaning of Article 28 EC, and this is true even if that law does not prohibit the importation of the products concerned or their placing on the market.

The Court considered that the games prohibited by the Greek law are not by nature games of chance, because they are not played for the prospect of winning a sum of money[723].

I.3.4.1.3.Analysis:

The Hellenic Republic submitted that the general prohibition on the installation of all electric, electromechanical and electronic games, including all computer games, was necessary for the

[722] Directive 98/34/EC, supra.
[723] ECJ Commission v. Greece, para.36.

purpose of protecting public morality, policy and security. The Court however pointed out that – since the prohibited games are not games of chance – the justifications accepted in the *Schindler* and *Läärä* judgments (moral, religious and cultural considerations) cannot be automatically accepted.

According to the Court, the Hellenic Republic has not established that it implemented all the technical and organizational measures likely to have achieved the objective pursued by that Member State using measures which were less restrictive of intra-Community trade. For the Court, the Greek authorities not only could have had recourse to other measures which were more appropriate and less restrictive of the free movement of goods, as the Commission suggested during the pre-litigation procedure, but also could have ensured that they were correctly and effectively applied and/or executed in order to achieve the objective pursued[724].

[724] Idem, paras. 39-40.

I.4. THE APPROACHES TAKEN BY NATIONAL COURTS

Courts throughout Europe have been confronted with the question of cross-border gambling praying on national monopolies, and the solutions they gave were varied. While several have restricted their analysis to national law only, others have ruled on the compatibility of their respective national legislations with Articles 43 and 49 EC.

In answering this intricate question, the central issue concerning the interpretation and application of the criteria set by the ECJ in the *Gambelli and Placanica* case law gave rise to visibly divergent approaches – thus entailing a debate on the efficiency of the judicial dialogue between the ECJ and national courts in this field[725].

I.4.1.A PURELY NATIONAL APPROACH: CROSS-BORDER GAMBLING VIOLATES NATIONAL LAW

Several national courts have scrutinized the issue of cross-border provision of gambling services within the EU, and have based their argumentation solely on provisions of national law, without inquiring weather national restrictions could be in violation of Community law[726]. A number of them continued to do so even after the *Gambelli* judgment.

I.4.1.1.Germany

In several judgments of 2002[727] and 2004[728], the Hanseatisches Oberlandesgericht dealt with the question of advertisements on the website of a German company for games of chance

[725] As it was said, the preliminary rulings requested by virtue of Article 234 EC are not only binding on the national judge making the request, but they also function as *canons of interpretation* for all courts and authorities of all the Member States, in the context of the principle of primacy of EU law. ROSAS Allan, The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue, European Journal of Legal Studies, 2007, vol.1, No.2.

[726] Some courts have justly put aside recourse to European law, for geographical jurisdiction reasons. For example, a court from Kassel ruled exclusively in the light of national law, since in this specific case Community law was not applicable (the bookmaker's establishment was on the Isle of Man, and therefore outside the European Economic Area). This court held that the state licensing provisions on gambling were unconstitutional, and the State's exclusive right to operate sports betting was incompatible with German constitutional law, specifically Art. 12 I of the German Constitution concerning the freedom to choose one's profession (Verwaltungsgerichtshof Kassel, case-no. 2 G 701/04, decision of 24 June 2004)

[727] Hanseatisches Oberlandesgericht case 5 U 74/01, judgment of 5 June 2002.

offered by a British company, which were not authorized in Germany. The court decided that this violated simultaneously the German Criminal Code and the Unfair Competition Act. A British bookmaker's permit was not considered sufficient if bets were exchanged on German territory.

In another judgment of 2005[729], the Landgericht Hamburg found that the Post was responsible under unfair trade law in the case of direct mail advertising for foreign games of chance.

Also, in March 2006, in a commented ruling[730], the Bundesverfassungsgericht decided that the German sports betting monopoly is in breach of the German Constitution, but can be retained during an interim phase until a new regulation comes into force.

I.4.1.2.Italy

In Italy, the Corte di Cassazione - Sezione III penale held in a judgment of 16 May 1997 that the collecting of bets in the Italian territory concerning foreign sporting events by a bookmaker, through an Italian intermediary, falls under Law no.401/1989[731]. This law enshrines the concept of “the analogous manifestations of chance”, which requires that such bookmaker obtain an authorization from the Administration of Monopolies.

I.4.1.3.Portugal

In Portugal we note the Legal opinion by the Consultant Council of the General Prosecutor of the Republic[732], which examined a promotional advertising game called «Game of History», promoting the British National Lottery in Portugal. This advertising contest installed a system forecasting the results of number draws with the aim of gaining prices in money. The General Prosecutor therefore considered that such game constitutes a mutual contest essentially

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[728] Hanseatisches Oberlandesgericht case 5 U 131/03, judgment of 12 August 2004.
[729] Landgericht Hamburg case 315 O 950/04, judgment of 17 March 2005.
[730] Bundesverfassungsgericht case no. 1 BvR 1054/01, decision of March 28, 2006. For a comment, see HAMBACH Wulf, SCHÖTTLE Hendrik, The German Sports-Betting Market: Uncertainty and Chaos for Private Providers Like Bwin, Gaming Law Review, Volume 10, Number 6, 2006, pp.521-523.
[731] Published in the Italian Official Gazette no. 294 of 18 December 1989.
[732] Nº Convencional: PGRP00001036 Parecer: P000111998 Nº do Documento: PPA199907081100, 1999 «The game of history» , Jornal Oficial of 03-01-2000.

identical to the local game Totoloto, and therefore constitutes a violation of the state monopoly on lotteries.

I.4.2.DISSONANT INTERPRETATION OF ARTICLES 43 AND 49 EC TREATY BEFORE THE *GAMBELLI* JUDGMENT

Previous to the *Gambelli* judgment, most national courts (especially last instance courts) confronted with the question of interpreting Articles 43 and 49 EC in relation to cross-border gambling services did not question the substantial discretionary powers recognized to national authorities in the *Schindler*, *Läärä* and *Zenatti* cases; nevertheless, this approach was not unanimous.

I.4.2.1.Denmark

In September 2000 a Danish high court[733] examined the prohibition against advertising and selling foreign lotteries and its justifiability with regard to European law. Following the *Schindler*, *Läärä* and *Zenatti* case law, which allow Member States to exercise considerable discretionary powers if the restrictions are justified, the court ruled in favour of the Danish government and found that the respective restrictions were based on solid reasons of public interest (protection of players, prevention of crime, public order and the non-stimulation of gambling demand).

I.4.2.2.France

Similarly, the Cour de Cassation held in a 1997 judgment[734] that the restrictions imposed to the cross-border activities of a foreign bookmaker were justified in the light of Community law. It upheld a disputed judgment of the Cour d'Appel de Paris and ruled against a Brussels resident who had offered bets on the results of the Tour de France 1989 to French clients,

[733] Østre Landsret case Gerhard & Jörg Schindler v. the Danish Ministry of Justice and Ministry of Taxation, judgment of 14 September 2000. In this case the Süddeutsche Klassenlotterie wanted to sell and advertise lots to lotteries in Denmark. The Ministry of Justice refused to grant a license with reference to the law on prohibition of lotteries.
[734] Cour de Cassation - Chambre Criminelle, case no. 94-85.933, Dellner, judgment of 22 May 1997.

through his betting agencies in Guernsey and London. Both the Cour d'Appel and the Cour de Cassation examined the argument that the monopoly on betting activities could be in breach of the EC Treaty. The Cour de Cassation found that such monopoly is justified by reasons relating to the protection of social order.

I.4.2.3.Germany

In 2003 the Landesgericht München held[735] that it is not illegal within the meaning of the German Criminal Code if a company residing in Austria offers bets on the Internet which are accessible from Germany, if such company holds a national license required in Austria for such activity. Pursuant to Article 49 EC, the Austrian license was considered valid in the whole EU territory.

I.4.2.4.Italy

In Italy, most national courts were favorable to maintaining the restrictive approach of the Italian gambling policy, based on public interest considerations. For instance, the Corte di Cassazione[736] decided that the ECJ case law leaves no doubt whatsoever with respect to the legitimacy of a national legislation that poses restrictions to the free provision of services in order to protect major social interests[737].

However, this trend was not followed by all courts and several judges have chosen to play on a dissonant note. In a case of 2000[738], a court of Santa Maria Capua Vetere – anticipating to some extent the so-called "hypocrisy test" established in the Gambelli judgment – found that, in the light of the recent increase of gambling opportunities for the Italian players, the restrictive Italian legislation was difficult to conciliate with the freedom of establishment for

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[735] Landesgericht München I, 5 Qs 41/2003, judgment of 27 October 2003, *Bet at home*, Sec. 284 StGB. The court ruled that a different judgment would be possible only if a Member State forbade gambling in general; however in Germany this is not the case.
[736] Corte di Cassazione - Sezione III penale, judgment no. 124 of 27 March 2000. Generally, we can say that a very interesting dialogue on gambling-related topics has been engaged between the ECJ and Italian courts since the 1999 Zenatti ruling.
[737] For a comment, see SCOPINARO Lucia, Rilevanza penale della raccolta in Italia di scommesse su competizioni sportive estere, nota a Cass. Pen., sez. III, 27 marzo 2000, in Diritto penale e processo, 2001, pp. 1383-1392.
[738] Tribunale di Santa Maria Capua Vetere, judgment of 14 July 2000.

foreign bookmakers. The court considered that a legislative policy pursuing a reduction of gambling opportunities in the Italian territory would have been more appropriate.

In another judgment of 2003[739], a court of Viterbo verified whether the Italian legislation is in effect designed to protect public order and if the proportionality requirement is maintained. According to this court, the restrictions posed by the Italian legislation do not seem to find any justification with regard to the imperative needs of public order and they were designed exclusively to attract money to the public purse[740].

I.4.2.5.The Netherlands

In the Netherlands, courts have repeatedly examined the issue of cross-border gambling services in the light of European law[741]. The majority of judges considered that the restrictive Dutch policy, although it constitutes an infringement of Article 49 EC, is justified since it is intended to safeguard consumer interests, to prevent fraud and illegal gambling, to counter the problem of gaming addiction and to restrict the number of providers, thereby limiting the offer of games of chance in the Netherlands.

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[739] Tribunale di Viterbo, judgment of 5 June 2003.

[740] The court interpreted the legislator's intention and found that, far from pursuing ends of protection of the social and economic security of the families, those restrictions are exclusively designed to ensure considerable gains to the state. The court observes that the granting of licenses is not subject to investigations, no anti-mafia certificates are requested, or other certifications. Consequently, there is no verification designed to guarantee the public order or the public security.

[741] See for instance several judgments of 2003 opposing the national Dutch lottery to an online gaming provider (Ladbrokes) licensed in the United Kingdom but not in the Netherlands before the Arnhem District Court (27.1.2003, N° 93896 / KG ZA 02-798, De Lotto/Ladbrokes and the Arnhem Court of Appeal (2.9.2003, N° KG 2003/319 and 03/325, De Lotto/Ladbrokes; 2.9.2003, N° KG 2003/216, Ladbrokes/De Lotto. The courts considered the restrictive gaming regulations in the Netherlands to be an adequate means to safeguard these objectives of general interest. The license scheme of the Dutch act on games of chance limits the number of providers of games of chance in order to restrain gambling in the country. Advertising for games of chance or a widening of the offer of games of chance does not necessarily contradict this restrictive gaming policy; games organized abroad but available in the Netherlands are considered to be domestic games of chance, especially when Dutch residents are targeted. In addition, it was considered that Ladbrokes failed to prove that English legislation provides restrictive gaming requirements equal to those of the Dutch gaming regulations. The courts concluded that the De Lotto suffered an unlawful disadvantage as the requirements of the Dutch legislation are far more restrictive than those applicable in England (for example and most importantly, foreign gaming providers are not bound to donate their proceeds to charities). See, in the same sense, Utrecht District Court, 31.7.2003, Case N° 156428/KG ZA 03-46/WV, Holland Casino/Peak Entertainment and others; Utrecht District Court (summary proceedings) 18.09.2003, N° 165432/KGZA 03-742, Stichting Exploitatie Nederlandse Staatsloterij/Stargames.

I.4.3.DISCORD CONTINUES AFTER *GAMBELLI*

Several national courts have been entrusted after 2003 with the difficult task of applying the *Gambelli* test to cross-border disputes within their jurisdiction. Given the sensitive nature of these issues, it is not surprising to see that dissensions continued to reign internally in the national jurisprudence[742].

I.4.3.1.Belgium

In a 2004 judgment[743] the Cour d'Arbitrage ruled that the exclusive right granted by law to the Belgian National Lottery to operate online games of chance, lotteries and betting operations did not infringe the EC Treaty. The court considered that the aim of the law was to optimize the government's policy of "channelling" gaming activities, and not to enable the National Lottery to incite consumers or enlarge the overall gaming market. The euro-compatibility of this law came also from the fact that it obliges the National Lottery to prevent gambling addiction by pursuing a responsible gaming policy, and it helps to ensure that illegal games of chance are restricted in a coherent and consistent manner.

I.4.3.2.Finland

In a case of 2005 before the Finnish Supreme Court[744], a gambling operator which had obtained its licence from the autonomous Swedish-speaking province of Åland had engaged in a vast campaign to promote its games in the rest of Finland, and notably it had translated its website into Finnish. The Supreme Court referred to the ECJ *Läära* case to state that the Finnish lottery legislation is compatible with Community law and noted that the exclusive right to provide games of chance, granted by law to the national lottery, did not pursue the aim of filling the public purse, but rather of preventing the commercial exploitation of the people's desire to gamble, and of preventing social troubles and the proliferation of

[742] In the similar framework of the European Economic Area, courts in Norway seem to have been going through the same dissensions. While an Oslo court ruled in favour of private operators, the higher court (Bogarting lagmannsrett) agreed in appeal with the Norwegian government that the State monopoly was justified. See ZIMMER Hanne, DEJMEK Paulina, A Wheel of Fortune for the EEA States or Game Over for National Gaming and Betting Monopolies?, supra, p.909.
[743] Cour d'Arbitrage de Belgique, Spielothek, judgment of 10 March 2004.
[744] Högsta Domstolen– KKO:2005:27, judgment of 24 February 2005.

criminality. Such genuinely pursued objectives justify a restriction to the freedom to provide services enshrined in the EC Treaty.

I.4.3.3.Germany

In the same logic, the Bundesgerichtshof referring to the *Gambelli* case held in a case of 2004, *Schöner Wetten*[745], that provisions restricting access to gambling services (Section 284 of the German Criminal Code) can go against the principle of freedom to provide services; however, such a restriction is justified by imperative reasons of public interest[746].

In 2005, a similar approach was taken by the Verwaltungsgericht of Münster[747]. This court considered that the Gambelli jurisprudence does not raise doubts regarding the Länder license requirements, which are aiming to reduce gaming opportunities and to control the course of gaming[748.]

However, not all German courts have followed this jurisprudential movement. When analyzing their national law concerning cross-border gambling services in the light of the freedom to provide services, several of them have found that such law is incompatible with the EC Treaty.

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[745] Bundesgerichtshof case I ZR 317/01, judgment of 1 April 2004 (Kammergericht), Schöner Wetten.
[746] In this specific case, the defendant was however not held responsible because it was not possible for him to realize without a detailed legal analysis, that a foreign operator holding a foreign license is responsible for illicit gaming in Germany.
[747] Verwaltungsgericht Münster, case no.1 L 118/04, judgment of 11 March 2005.
[748] In 2006, another gambling-related German judgment caused a debate as it questioned the primacy of Community law over national regulations. While it admitted that the legal framework concerning gambling monopoly in Nordrhein-Westfalen infringes the free movement of services and the freedom of establishment in the European Union, the court considered however that the primacy of European law is not always absolute; referring to the principle of legal certainty, the court held that the unacceptable risk of creating a legislative gap in this very sensitive field could constitute a justification for allowing an exception to the application of the primacy of Community law principle (Oberverwaltungsgericht Nordrhein-Westfalen, judgment of 28 June 2006, no. 4 B 961/06, EuZW, 2006, 603). This controversial judgement caused another German court to refer a preliminary question to the ECJ (pending case C-409/06, supra), one of its points being if a national law considered in breach of Community law could exceptionally be maintained during a transition period, despite the primacy of Community law principle. Also, a disputed case in front of German courts currently opposes an online gambling provider (Bwin) and the Westdeutsche Lotterie. The latter had challenged Bwin before the Cologne courts and won both in the first instance and in the appeal procedures. Bwin then filed a motion to the Bundesgerichtshof requesting the court to suspend enforcement proceedings until the court has passed a final ruling on the merits. In a decision of 14 March 2008, the Bundesgerichtshof rejected the motion on procedural grounds. A final ruling by this court on the merits is expected in 2009.

For instance, in a case of 2004[749], the Landesgericht Hamburg ruled that the offering of sports bets in Germany is not punishable according to the German Criminal Code, if the enterprise holds a license of another EU-Member State. This argumentation was then quoted and followed by other courts (for instance by a Bremen court in a 2004 judgment[750]). Also, in a decision of 2006, the Oberlandesgericht München[751] stated that the transmission of sporting bets was not prosecutable under the current legal situation.

The same logic was applied by the Amtsgericht Baden-Baden[752], which held that the offering of bets in Germany on the basis of an English license is not punishable; another interpretation of the German Criminal Code would violate the freedom to provide and receive services in the European Community. This line of reasoning was maintained in a decision of 2006 by the Landgericht Nürnberg-Fürth[753], which upheld an earlier judgment by the Oberlandesgericht München.

I.4.3.4.Italy

In Italy, too, after the *Gambelli* judgment legal restrictions to cross-border gambling have been scrutinized several times by national courts, which raised questions as to their compatibility with the freedoms of establishment and to provide services enshrined in the EC Treaty.

In the majority of cases, national courts were favourable to maintaining the restrictive approach of the Italian gambling policy, based on public interest considerations.

For instance, the Consiglio di Stato[754] decided in 2006 that the ECJ case law leaves no doubt whatsoever with respect to the legitimacy of a national legislation that poses restrictions to the freedom of providing services in order to protect order or major social interests[755].

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[749] Landesgericht Hamburg, 629 Qs 56/04, judgment of 12 November 2004 (Hamburg, Sec. 284 StGB.
[750] Amtsgericht Bremen, 74 Ds 601 Js, 7083/03, judgment of 10 March 2004.
[751] Oberlandesgericht München, judgment of 26 September 2006, case-no. 5 St RR 115/05.
[752] Amtsgericht Baden-Baden, Az.: 5 Cs 305 Js 2486/04 AK 288/04, judgment of 21 October 2004.
[753] Landgericht Nürnberg-Fürth, 14 Ns 372 Js 11605/2005, judgment of 14 December 2006.
[754] See, for example, Consiglio di Stato, decision no.5644 of 27 September 2006, Ministro dell'Interno / Giuseppina Avenia.

The Corte di Cassazione had previously reached the same conclusion that it maintained after the *Gambelli* judgment. While it acknowledged that, for several years, the Italian authorities had been pursuing a policy of expansion in the betting and games sector with the aim of increasing tax revenue, and that such policy could therefore not be justified by reference to the aim of protecting consumers or of limiting their propensity to gamble, the Court stated that the true purpose of the Italian legislation was to channel betting and gaming activities into systems that are controllable, with the objective of preventing their exploitation for criminal purposes. In this view, such objective is sufficient to justify the restrictions on the freedom of establishment and the freedom to provide services[756].

However, several lower courts in Italy have carried out a legal analysis which led them to the contrary solution.

For instance, a Ragusa court held following *Gambelli* that the need to maintain the restrictive Italian legislation based on the dangers of criminal infiltrations, expressly mentioned in the Corte di Cassazione's *Bruno Corsi* judgement, appeared to be too generic and hardly appropriate[757]. In the light of the recent proliferation of news forms of lotteries or betting contests, this court concluded that there is incompatibility between the Community law and the national criminal law which regulate the matter.

More doubts as to the euro-compatibility of the Italian gambling policy were cast by the Larino and Terami courts of first instance, which decided to ask the ECJ for the preliminary rulings leading to the *Placanica* judgment[758].

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[755] For a comment, see SCOPINARO Lucia, Rilevanza penale della raccolta in Italia di scommesse su competizioni sportive estere, nota a Cass. Pen., sez. III, 27 marzo 2000, in Diritto penale e processo, 2001, pp. 1383-1392.

[756] See the Bruno Corsi and Gesualdi cases. Corte di Cassazione – Sezione Unite, judgment of 26 April 2004, cases no. 23271/04 and no. 23273/04. For a comment, see GUASTELLA Sergio, "Giuoco e scommesse on line: la normativa italiana contrasta con i principi europei…Ma non troppo!", available at http://www.diritto.it/archivio/1/20094.pdf (last consulted on 10 November 2008); DEL NINNO Alessandro, The Placanica Decision: The EU Court of Justice Again Censures Italy's Restrictions on the Gambling Market, Gaming Law Review Volume 11 (2007), no.3.

[757] Tribunale di Ragusa, case no.46/2003, judgement of 25 January 2006.

[758] See Placanica, paras.27 and 30.

I.4.3.5.The Netherlands

In the Netherlands, too, it appears that most jurisdictions, including the Supreme Court[759], considered in application of the *Gambelli* test that the restrictive Dutch policy, although it constitutes a restriction to trade under Article 49 EC, is justified since it is intended to safeguard consumer interests, to prevent fraud and illegal gambling, to counter the problem of gaming addiction and to restrict the number of providers, thereby limiting the offer of games of chance in the Netherlands. Furthermore, because gaming licenses can be issued to both foreign and domestic providers, this policy is thus not discriminatory[760].

However, several courts in the Netherlands disagreed.

In a judgment of 2004[761], for instance, the Arnhem District Court ruled that the Dutch gaming regulations which exclude foreign providers from providing their services in the Netherlands, as they are conceived in practice, cannot be justified on the basis of Article 49 EC. According to this court, the criteria that are proposed to justify a limitation of foreign providers' rights to offer their services on the Dutch market are in contradiction with Dutch gaming practices[762].

In another judgment of 2005[763] involving a French provider who had been denied the licence to operate a casino in the Dutch municipality of Bergen op Zoom[764] (judgment which was

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[759] In a 2005 judgment, the Dutch Supreme Court (Hoge Raad) rejected the appeal and confirmed that the restrictive gaming policies of the Dutch authorities are consistent with European law and Article 49 EC (Hoge Raad 18.02.2005 N° C03/306 HR, Ladbrokes/De Lotto).

[760] Zutphen District Court, 9.2.2004 , N° 57370/ KG ZA 03-277, De Lotto/Betfair. The same argumentation was used by other courts (the Arnhem Court of Appeal, 21.11.2004 N° AR 7476, 2004/287 KG, 2004/288 KG and 2004/ 289 KG, Interwetten Cyprus and others / Nationale Sporttotalisator and others; the s-Hertogenbosch District Court 1.06.2004, N° 10.9742/ KG ZA 04-281, Incoll/Fortis; the 's-Hertogenbosch Court of Appeal, 2.3.2004, N° 20.003207), which held that Act on Games of Chance complies with the requirements set out by the ECJ in its Gambelli decision and constitute a justified infringement of EU law.

[761] Arnhem District Court, 2.06.2004, N° 98631/ HA ZA 03-606, Stichting De Nationale Sporttotalisator/Ladbrokes.

[762] The court observes that Dutch consumers have been confronted with a proliferation of marketing campaigns by Dutch licensees promoting their games of chance on national televisions and the radio. Furthermore, the annual report of De Lotto reveals that the prime objective De Lotto pursues is an increase of its annual turnover by attracting new players and exploring new markets. The court requested that the Minister of Justice who supervises the gaming market and is responsible for the issuing of the gaming licenses provide clarification and proof of a consistent gaming policy.

[763] Administrative Court of Breda 02.12.2005, N° 03/1868 WET, Compagnie Financière Régionale B.V. / Netherlands Justice Department.

[764] Only Holland Casino, the current exclusive casino gaming licensee (a 100% State-owned foundation), is entitled to organise casino gaming in the Netherlands (article 27h, paragraph 1 of the Dutch Act on Games of Chance).

overturned by the High Court in 2007), the Administrative Court of Breda had also examined the Dutch policy on casino gaming in order to establish whether it meets the requirements set in the *Gambelli* jurisprudence. This court had concluded that the Dutch government failed to establish that its restrictive casino gaming policy satisfies the suitability criterion – in particular the coherence criterion and the need for a systematic structure – in order to attain objectives such as consumer protection and the prevention of fraud and of gambling addiction[765].

I.4.3.6.Sweden

In Sweden, the supreme administrative court (Sveriges Domstolar) ruled on several occasions on compatibility of the Swedish gambling policy with European law. In a case of 2004 concerning a British gambling provider (Overseas Betting Limited SSP)[766], the court had to examine weather the prohibition to promote participation in foreign lotteries and the exclusion of foreign providers from the operation of gambling and lottery, stated in the Swedish Lottery Act, was compatible with the EC Treaty[767]. The Court's answer was that the main aim of the Swedish legislation is to protect the individual and society, and to direct money surplus to activities that benefit the public. For the court, the stated aims of the Swedish gaming regulations were entirely consistent with the test set in the *Gambelli* jurisprudence[768].

[765] First, the Court found that the number of casinos operating in the Netherlands had grown from 10 to 12 and that the casino gaming market had gone through a considerable expansion over the last 10 years. Moreover, the Court found that the net proceeds from casino gaming accrued for the benefit of the Dutch State and that Holland Casino spent substantial sums on advertising campaigns. Therefore, the growth of casino gaming in the Netherlands and the increase in casino visitors seemed to contradict the objectives of the Dutch casino gaming policy, namely to regulate and restrict games of chance, in order to protect the interests of consumers and to prevent fraud and gaming addiction.

[766] Sveriges Domstolar case n°5819-01, judgment of 26 October 2004.

[767] For a comment of this judgment, see MITROVIC Bobi, The Swedish Gambling Monopoly in Perspective of EC law, 2005, Master Thesis at Gothenburg University, available at http://www.handels.gu.se/epc/archive/00004826/01/20062.pdf.

[768] In this sense, a central question acknowledged by the Court was whether these objectives were genuinely pursued. Overseas Betting Limited SSP had particularly adduced the extensive marketing campaign of the Swedish national lottery, its continuous introduction of new products and the fact that gambling in Sweden was increasing constantly. According to the Court, it would be naive to think that the economical contribution plays a minor importance; however, it could not be taken for granted that it was the only or completely dominating objective pursued by the national lottery. While gaming legislation and the manner in which it is applied raise questions on certain points concerning compatibility with the conditions imposed by the EC Court in the context, the Swedish system as a whole must nevertheless be considered as fulfilling the requirements. On the point of an alleged discrimination between national and foreign providers, the Court found that no discrimination was

In another case of 2004[769], the same court examined a case where another British operator (Ladbrokes) had been refused an application, by the Swedish government, to organize gambling. The Court stated that, according to the *Gambelli* jurisprudence, money-raising for good causes cannot in itself justify a restrictive policy, and it acknowledged the unfortunate wording of the refusal. However, its outcome was not found to be contrary to the Lottery Act or to EC law according to the hitherto case law and thus, the government's decision was upheld.

I.4.4.AN IMPROVED COORDINATION AFTER 2007?

After the 2007 *Placanica* judgment, several courts which had previously raised no question as to the euro-compatibility of their respective national gambling policy decided to revisit the manner in which they had so far applied the *Gambelli* test.

I.4.4.1.France

In France, the Cour de Cassation revisited its 1997 arguments[770] after *Gambelli* and *Placanica*.

Indeed, in a judgement of 10 July 2007[771], it overturned the decision of the Cour d'Appel de Paris[772] mainly because this court had not examined if the French authorities policy fulfilled the moderation criterion established in the *Gambelli* jurisprudence. It considered that where French gaming laws restrict free movement of services, the judge should verify whether these restrictions comply with the requirements set by Article 49 EC, or if the true aim of monopolistic gambling providers is to increase public revenues. The Court also required from

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intended, since the measures are applicable to both Swedish and foreign lotteries for which a permit had not been obtained.

769 Sveriges Domstolar, Case 3841- 04.

770 Cour de Cassation, judgment of 22 May 1997, Dellner, supra.

771 Cour de Cassation, case n° 06-13.986, judgment of 10 March 2007 no.1023. The dispute opposed ZEturf, a Maltese company organizing and offering online horse races betting taking place in France, to the French monopoly PMU (Pari Mutual Urbain).

772 Cour d'Appel de Paris, 14e Chambre – Section A, judgment of 4 January 2006, Société ZETURF Ltd, SA ETURF c/ GIE Pari Mutuel Urbain (PMU

lower courts to ensure whether general interest is guaranteed in the Member State where private operators are established[773].

I.4.4.2.Germany

In Germany, the Oberverwaltungsgericht Saarland issued in April 2007[774] decisions in eight preliminary proceedings, overturning a prohibition order that had been filed to stop sports betting agents from collecting bets for Austrian and Maltese bookmakers. Quoting the ECJ *Placanica*, *Lindmann*, and *Gambelli* rulings, this court decided that a ban on the activities of sports betting agents in the area was incompatible with EU law.

Also, in a decision of March 2008, the Oberlandesgericht Düsseldorf[775] raised significant doubts as to the legality of a state monopoly[776] and called for a tender of the license so far granted to a regional lottery (Lotto Rheinland-Pfalz GmbH, the only lottery company in Germany not owned or controlled by the state[777]).

I.4.4.3.Italy

We recall that in Italy, before the issuing of the Corte di Cassazione's directives of 2004 (in the *Bruno Corsi* case) in the sense that the Italian gambling policy is compatible with European law, several lower courts had undertaken a legal analysis which led them to the contrary solution. Even after 2004, some lower courts continued to qualify the restrictive

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[773] We note that in January 2008 the Cour d'Appel de Versailles called into question the compatibility of French gaming legislation with EU law and asked for supplementary information aiming to justify that the French regulatory framework is consistent, proportionate and justified. *Le Nouvel Observateur*, http://tempsreel.nouvelobs.com/depeches/societe/20080118.FAP1077/unibet_la_justice_demande_un_supplement_dinformation.html.
[774] OberVerwaltungsgericht des Saarlandes, judgment of 4 April 2007, case 3 V 18/06.
[775] Oberlandesgericht Düsseldorf, VII-Kart 19/07 (V), judgment of 3 March 2008.
[776] Basically, the Court held that fighting gaming- and betting addiction as well as effective consumer protection can be achieved by setting respective legal requirements and standards for the gambling business, and by adapted requirements for license holders as well as by a consequent supervision of the gambling operations. For the Court, it was not necessary, that, additionally, the State of Rhineland-Palatinate have a majority interest in the operations entrusted with the lottery business and to exert dominant influence on the operation by means of its position as a shareholder.
[777] The shareholders of this GmbH were the three sports federations of Rhineland-Palatinate (Sportbund Pfalz e.V., Sportbund Rheinhessen e.V. and Sportbund Rheinland e.V.). However, they were willing to cede a majority interest in return for an adequate guarantee by the state, but the Federal Cartel Office voiced considerable anti-trust related doubts regarding this nationalisation.

Italian legislation as being contrary to the Community law. Following the *Placanica* ruling, the Corte di Cassazione had to ultimately reconsider its directives given in the *Bruno Corsi* case, and to rule in judgments of 2007[778] and 2008[779] that the Italian restrictive licensing regime is discriminatory towards operators licensed in other EU member states.

I.4.4.4.The Netherlands

In a decision of 18 July 2007[780] opposing a private operator (Schindler) and the Dutch Ministry of Justice, the Raad van State was critical of the Dutch gambling licensing policy, on the basis of the *Placanica* and *Gambelli* jurisprudence. It argued that this restrictive policy, infringing the free movement of services and the freedom of establishment, was not proved to be suitable for achieving the objectives invoked and was found to go beyond what is necessary in order to achieve such objectives. Also, the court argued that, if there is to be a limited amount of gambling licenses available, there has to be a more transparent mechanism to determine how those licenses are issued or renewed[781].

I.4.5.INTERMEDIARY CONCLUSION

One can hardly find a more sensitive topic than gambling, drugs or alcohol to test the degree of coordination between judges at different levels and in different states[782]. And when national courts give different answers to (almost) identical questions asked in the light of

[778] Corte di Cassazione - Sezione III penale, case no.16928/2007, judgment of 28 March 2007.
[779] Corte di Cassazione - Sezione III penale, case no. 29378/2008, judgment of 19 February 2008.
[780] Afdeling bestuursrechtspraak Raad van State, judgment of 18.07.07, 200607881/1, Schindler/Minister van Justitie, www.rechtspraak.nl, LJN: BA9831
[781] However, we note that only a few days after the issuing of the Placanica judgment, the Raad van State had overturned a 2005 court decision which ruled that a French casino group's exclusion from Holland contravened European law. Afdeling bestuursrechtspraak van de Raad van State, 14 March 2007, decision in Case LJN BA0670. In doing this, this court has definitively rejected an application from a French casino group (CFR – a subsidiary of the Tranchant group) for a casino licence in Holland. The justification was that the Netherlands has deliberately opted for a single licence holder in its desire to protect the consumer, combat illegality and criminality, and reduce gambling, and according to European directives established in both the Gambelli and Placanica judgments, it is acceptable for a Member State to adopt restrictive gambling policies in order to meet such ends.
[782] As it was said, vice proved to be a prime inspiration for the acquis. See CUYVERS Armin, Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) Judgment of the Grand Chamber of 6 March 2007, supra.

Community law, the risk of divergent interpretations engendered by the decentralized application of Community law turns into certitude.

The difficulties encountered by national courts in following the directions given by the ECJ in its landmark rulings related to gambling services have caused several scholars and ECJ Advocates General to question if this Court should continue to leave the ultimate decisions in these cases to the national judge, or if it should provide more specific guidance[783].

In spite of these reservations, the ECJ insisted until the ruling in *Liga Portuguesa* to keep its position and provided "the national court with all the guidance as to the interpretation of Community law necessary”[784]. However, in the well-specified conditions of this latter case, which concerned the particular issue of Internet gambling, the Court has preferred to give the national judge a complete answer, and to achieve its analysis on proportionality.

In view of the extremely divergent national jurisprudence presented here above – which seems to illustrate, however, that last instance national courts have ultimately shown a significantly wider inclination to follow the milestones affixed by the ECJ in the gambling sector – this approach may have proved to be the judicious one.

[783] See Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 16 May 2006 in *Placanica*, point 141. The Advocate General Alber in his Opinion delivered on 13 March 2003 in Gambelli also believed that where gambling is concerned, the national courts find it difficult to carry out the task entrusted to them (point 116). On this point see also Gert STRAETMANS, "Case C124/97, Läärä, judgment of the Court of 21 September 1999 and Case C67/98, Zenatti, Judgment of the Court of 21 October 1999", 37 Common Market Law Review 991–1005, 2000, who advocates that in Läärä and Zenatti the Court clearly departed from its well established “majoritarianism” and was no longer willing to substitute its own view for that of the Member States, except if they exceed the limits of their discretion. Contrariwise, the Advocate General Bot in his Opinion in the delivered on 14 October 2008 in Case C-42/07, Liga Portuguesa de Futebol Profissional (CA/LPFP) Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, considered that it is up to the national courts to ultimately verify in concreto the euro-conformity of the restrictive national measures.

[784] ECJ Placanica, para. 36, citing ECJ Gebhard and ECJ Case C-506/04,Wilson, judgment of 19 September 2006.

I.5.POSITION OF THE EUROPEAN COMMISSION

The European Commission (former Commission of the European Communities) is the executive branch of the European Union. This body is responsible for proposing legislation, implementing decisions, upholding Community law and the general day-to-day running of the Union[785]. The Commission is independent of national governments. Its duty is to represent and uphold the interests of the EU as a whole.

Insofar gambling is concerned, the Commission's actions were mainly taken in the frame of its duty to enforce Community law (sending inquiries to Member States concerning their restrictions of gaming, as part of the infringement procedure under Article 226 EC) and to propose legislation (notably through a proposition of directive to create an internal market for services).

Also, we note the Commission's White Paper on Sport[786] referring to the financing of sporting activities, which addressed the issue indirectly.

I.5.1.Enforcing European Law With Regard To Gambling Services

With regard to gambling services, the Commission's first relevant steps in the infringement procedures began in the 90's.

In 1994, for instance, the Commission took action against Ireland on the grounds that certain sections of the Gaming and Lotteries Act 1956 were incompatible with the principles of the EC Treaty[787]. In 1997, it decided to send a reasoned opinion to Ireland, arguing that its law, which prohibited participation (through the purchase of tickets or the sending of money) in other Member States' lotteries and which recognized the legality of a lottery in Ireland only if

[785] See http://europa.eu/institutions/inst/comm/index_en.htm
[786] European Commission, White Paper on Sport, COM(2007) 391 final, 11 July 2007.
[787] Infringement procedure no.1994/4719.

it was promoted and organized purely within the country and if it had been licensed, is contrary to the principle of freedom to provide services[788].

In 2004[789], the Commission sent Denmark and Greece the first warnings related to their gambling related legislation, followed by other inquiries concerning restrictions of games sent to other Member States in the framework of the infringement procedure under Article 226 EC.

In the case of Denmark, the European Commission has decided in March 2004 to send to this State an official request for information on its legislation, adopted on 26 March 2003, which prohibited the supply or advertisement of, and the facilitation of participation in, gambling services offered by providers licensed in other Member States[790]. Danish law restricted in particular the provision of sports betting services. The Commission intended to verify the compatibility of the ban in question with the provisions of the EC Treaty on the free movement of services and on the freedom of establishment.

The same year, the Commission has decided to refer Greece to the European Court of Justice over its ban on the installation and operation of electrical, electromechanical and electronic games, including computer games, in all public and private places - including premises providing Internet services (cyber cafés). As we have seen in the previous chapter, the ECJ accepted the Commission’s claims in its judgment of October 2006[791].

Equally, in October 2006, the Commission inquired into restrictions on the provision of certain gambling services in Austria[792], France[793] and Italy[794], sending official requests for

[788] A Freedom of Information Act suit was filed to obtain copies of Ireland’s response (Case 000257 - Mr X and the Department of Justice, Equality and Law Reform), which apparently granted the petitioner access to the information requested on public interest grounds. However, copies of either the Commission’s reasoned opinion or the Irish government’s response are not publicly available.
[789] Insofar services in general are concerned, we also note the Report from the Commission to the Council and the European Parliament on the state of the internal market for services, presented under the first stage of the Internal Market Strategy for Services, COM(2002) 441 final, 2002.
[790] Press Release no. IP/04/401.
[791] ECJ case C-65/05, Commission v. Greece, judgment of 26 October 2006.
[792] The Commission has asked questions of the Austrian authorities in relation to national legislation which prohibits the promotion or advertising of casinos licensed and established in other Member States. The Commission also had concerns that the legislation in question provides that casinos must act diligently so as to protect Austrian players from excessive losses, but makes no such provision for foreign players. Such a provision would therefore be liable to be discriminatory as regards the protection of players as recipients of services.
[793] In the case of France the Commission has asked a number of questions in relation to a range of restrictions imposed on remote sports betting operators licensed and established in other Member States. The Commission

information on national legislation restricting the supply of certain gambling services. Similar requests for information had been sent in April 2006 to Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden[795]. In these cases the Commission again wished to verify whether the measures in question are compatible with Article 49 of the EC Treaty, which guarantees the free movement of services. The Commission stressed that it enquires only in relation to the compatibility of the national measures in question with existing EU law and that it does not touch upon the existence of monopolies as such, or on national lotteries, nor does it have any implications for the liberalisation of the market for gambling services generally, or for the entitlement of Member States to seek to protect the general interest, so long as this is done in a manner consistent with EU law (i.e. that any measures are necessary, proportionate and non-discriminatory).

Then, on 31 January 2008 the European Commission has launched infringement proceedings against Germany[796] and Sweden[797]. While the German case relates to key restrictions in the

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had concerns about the proportionality of the French measures where operators licensed and regulated in other Member States are denied access to the French sport and horse race betting market for reasons such as the protection of consumers from gambling addiction, yet it seems that the French sport betting market continues to expand and offer more choice and opportunity for consumers to bet.

[794] This latest inquiry into Italian national restrictions, like in France, focuses on the provision of remote sports gaming services by operators licensed and regulated in other Member States. In particular the Commission had concerns that recent Italian legislation, which has blocked access to the websites of legitimate European operators, is a disproportionate restriction. The Commission has asked the Italian authorities to explain the proportionality of these measures, particularly in the light of the expanding sports betting market which appears reserved to domestic operators.

[795] Press Release no.IP/06/436. Internal Market and Services Commissioner Charlie McCreevy said: "As I said in April the Commission has an obligation under the Treaty to ensure that Member States' legislation is fully compatible with EU law. This is an important responsibility which it takes seriously. It has received a large number of complaints from operators and I have made no secret of the fact that I intend to pursue these inquiries. It has, therefore, decided to seek information on the matter from the Member States concerned. I have already said that I don't underestimate the sensitivities that exist in many Member States on the question of gambling and I know that my services have made this clear to the seven Member States with whom they have already had discussions. But I also have concerns about the legal uncertainty suffered by EU sport betting operators and related stakeholders. I repeat that in sending these latest letters, we are not seeking to liberalise the market in any way. Rather, we are seeking reassurance that whatever measures Member States have in place is fully compatible with existing EU law, or have been brought fully into line". Then, on 28 February 2008, the Commission has taken action in follow-up of the requests sent to Greece in June 2007 and to the Netherlands in April 2006. These formal requests took the form of "reasoned opinions", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty.

[796] Press release IP/08/119 of 31 January 2008. The German Interstate Gambling Treaty seeks to ban all online gaming and betting (except for horse racing) in the country, and came into force on 1 January 2008 despite formal objections raised by the European Commission under its notification procedure (Directive 98/34/EC). The Commission addressed this legislation not only on the basis of the freedom to provide services (Article 49 of the EC Treaty), but also on the basis of the freedom of establishment (Article 43) and the free movement of capital and payment (Article 56). In particular, the Commission challenges "the total prohibition of games of chance on the Internet; notably sports betting; …advertising restrictions on TV, on the Internet or on jerseys or

provision of gambling services enshrined in the new Interstate Gambling Treaty which entered into force on 1st of January 2008 (such as the total prohibition of games of chance on the Internet; advertising restrictions and the prohibition on financial institutions), the Swedish case instead relates to poker games and tournaments which are today offered in Swedish international casinos (Swedish legislation prevents online poker games and tournaments offered by operators licensed and regulated in other EU Member States).

A more generalized approach in dismantling national barriers to a free flow of gambling services was taken by the Commission in 2004, when it decided to include gambling in the scope of application of the Services Directive.

I.5.2.The Proposal of Directive to Create an Internal Market for Services

As mentioned before, the European Commission has been enquiring into the gambling sector since the 90's. If in 1992 it estimated that "cross-frontier activity and the interest in establishment in different Member States remain relatively limited" and that "the sector is essentially incidental to the operation of the rest of the economy"[798], not requiring the launch of any legislative initiatives in this area[799], the Commission revisited this issue a few years later, with a different approach.

Following the Report on the State of the Internal Market for Services in July 2002, the reactions of stakeholders to it and further legal analysis, in January 2004 the Commission

billboards; and the prohibition on financial institutions to process and execute payments relating to unauthorized games of chance. In addition questions are raised regarding the authorization regime to be granted to intermediaries as well as the criminal sanctions or administrative fines provided for in cases of organization, advertising and participation in on-line games of chance."

[797] Press release IP/08/118 of 31 January 2008. The Commission's action against the Swedish poker monopoly operated by 'Svenska Spel' is the first EU infringement action involving online poker. Since March 2006, Sweden has been expanding its monopoly by operating online poker services, while preventing EU-licensed operators from offering their online poker services in the country. This is also the second proceeding opened against Sweden's protectionist gaming legislation. A first procedure focusing on sports betting restrictions had been launched in 2006.

[798] Press Release IP/92/1120 of December 23, 1992.

[799] The European Council in Edinburgh, held on 11-12 December 1992, noted that "following consultations with interested parties, [the Commission] intends to abandon certain initiatives that had been planned. It will not, for instance, be going ahead with proposals on the harmonization of vehicle number plates or the regulation of gambling" – emphasis added (Conclusions of the Presidency, DOC/92/08).

made a proposal for a Directive on Services in the Internal Market (the Services Directive)[800], aiming at allowing services to move across national borders in the EU as easily as within a single Member State[801].

For games of chance, which were expressly included in the scope of application of the said proposal, this dismantlement would have lead to a gradual opening of the European market, the consequences of which remain controversial[802].

I.5.2.1.The Initial Proposal

In order to advocate its proposed directive, the Commission has showed that the services sector provides jobs for more than 70% of the Union's active population, it represents 56% of its gross domestic product, but only regards 20% of interstate trade – in conclusion, the goal to have a genuine internal market was obviously not achieved, since services – a major element of its economic activity – were still excluded from it[803]. Therefore, a wide-ranging set of methods needed to be deployed in order to liberalise the services sector. On the other hand, insofar games of chance are concerned, the Commission acknowledged the serious controversy which exists as to the economical and especially social consequences of a liberalised gambling market.

The Commission's declared objective was to provide a legal framework that would eliminate the obstacles to the freedom of establishment for service providers and the free movement of services between the Member States, giving both the providers and recipients of services the legal certainty they need in order to exercise these two fundamental freedoms enshrined in the Treaty.

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[800] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

[801] All these initiatives were taken in the framework of the guidelines derived from the Lisbon European Council in March 2000, which asked the Commission and Member States to devise a strategy for the removal of barriers to services. See the Presidency conclusions, Lisbon European Council, 24.3.2000, § 17.

[802] For a comment on this part of the proposed directive, see also DIACONU Madalina, The "Bolkestein" Directive and the Attempted Harmonisation of Games of Chance – Stakes and Perspectives, in L'harmonisation internationale du droit, Schulthess, 2007; FILPO Fabio, Il gioco d'azzardo tra la Direttiva servizi e la sentenza Placanica, Contratto e impresa Europa no.2, July - December 2007.

[803] Certain services are subject to specific approaches to liberalization, such as postal services. For an analysis, see GERADIN Damien (Editor), The Liberalization of Postal Services in the European Union, Kluwer Law International, 2002. For a more general overlook of public interest services in the EU, see LOUIS Jean-Victor, RODRIGUES Stéphane, Les services d'intérêt économique general et l'Union européenne, Bruylant, 2006.

In order to eliminate the obstacles to the free movement of services, the proposal provided for the application of the country of origin principle, according to which a service provider is subject only to the law of the country in which he is established, and Member States may not restrict services from a provider established in another Member State[804]. This principle was accompanied by derogations either general or temporary or which may be applied on a case-by-case basis[805].

Concerning the regulatory technique, the proposal for a directive was based on a combination of techniques for regulating service activities, including in particular: the country of origin principle, derogations from this principle, especially in Article 17[806], the establishment of obligations of mutual assistance between national authorities[807], targeted harmonization to ensure protection of the general interest in certain essential fields where too wide a divergence exists in the level of protection[808], and alternative methods of regulation.

According to the Commission's initial plan, a gradual approach was aimed at achieving a genuine internal market for services by 2010. This included additional harmonization on certain specific questions, including gambling (Article 40(1)b) of the initial proposal), which was to be the subject of temporary derogations from the principle of country of origin (Article 18 of the initial proposal).

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[804] For a comment, see also HATZOPOULOS Vassilis, Legal Aspects of the Internal Market for Services, in PELKMANS Jacques, HANF Dominique, CHANG Michele (Editors) The EU Internal Market in Comparative Perspective, College of Europe Studies no.9, P.I.E. Peter Lang, 2008, pp.139-190.

[805] Since the proposal was for a framework directive, it did not aim to lay down detailed rules or to harmonize all the rules in the Member States applicable to service activities. This would have led to over-regulation and a standardization of the specific features of the national systems for regulating services. Instead, the proposal dealt exclusively with questions that were considered vital for the smooth functioning of the internal market in services by giving priority to targeted harmonization of specific points, to the imposition of obligations to achieve clear results without prejudging the legal techniques by which they will be brought about, and to the clarification of the respective roles of the Member State of origin and the Member State of destination of a service.

[806] Necessary in order to take account of differences in the level of protection of the general interest in certain fields, the extent of Community-level harmonization, the degree of administrative cooperation, or certain Community instruments. Some of these derogations were to be applied for a transitional period up to 2010, and were intended to allow time for additional harmonization on certain specific questions. Finally, derogations on a case-by-case basis were possible, subject to certain substantive conditions and procedures.

[807] This was considered vital for ensuring the high level of mutual trust between Member States on which the country of origin principle is based. In order to ensure that supervision is effective, the proposal provided for a high degree of administrative cooperation between authorities by organizing the allocation of supervisory tasks, exchange of information and mutual assistance.

[808] Notably in the field of consumer protection, this kind of divergences would undermine the mutual trust that is vital to the acceptance of the country of origin principle and could justify, in accordance with the case-law of the Court of Justice, measures restricting freedom of movement. Harmonization was also provided for as far as the simplification of administrative procedures and the elimination of certain types of requirement are concerned.

The definition of "service" provided for in this proposal was based on the case-law of the Court of Justice[809], according to which "services" mean any self-employed economic activity normally performed for remuneration, which need not, however, be paid by those for whom the service is performed. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, irrespective of how this consideration is financed. Consequently, a service is any activity through which a provider participates in the economy, irrespective of his legal status or aims, or the field of action concerned.

Gambling services were dealt with in Articles 16[810], 18[811] and 40[812] of the proposal. They were to derogate temporarily from the country of origin principle – which was not intended to

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[809] ECJ case C-352/85, Bond van Adverteerders, Judgment of 26 April 1988, point 16; ECJ case C-263/86, Humbel, Judgment of 27 September1988, point 17, ECJ cases C-51/96 and C-191/97, Deliège, Judgment of April 2000, point 56, ECJ case C-157/99, Smits and Peerbooms, Judgment of 12 July 2001, point 57.

[810] Article 16: Country of origin principle:

(1) Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.

Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behavior of the provider, the quality or content of the service, advertising, contracts and the provider's liability.

(2) The Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State.

(3) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide services in the case of a provider established in another Member
State, in particular, by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to make a declaration or notification to, or to obtain an authorization from, their competent authorities, including entry in a register or registration with a professional body or association in their territory;

(c) an obligation on the provider to have an address or representative in their territory or to have an address for service at the address of a person authorized in that territory;

(d) a ban on the provider setting up a certain infrastructure in their territory, including an office or chambers, which the provider needs to supply the services in question;

(e) an obligation on the provider to comply with requirements, relating to the exercise of a service activity, applicable in their territory;

(f) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed

(g) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(h) requirements which affect the use of equipment which is an integral part of the service provided;

(i) restrictions on the freedom to provide the services referred to in Article 20, the first subparagraph of Article 23(1) or Article 25(1).

[811] Article 18:Transitional derogations from the country of origin principle:

1. Article 16 shall not apply for a transitional period to the following:

[…] (b) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions;

[…] 3. The derogation referred to in point (b) of paragraph 1 of this Article shall not apply after the date of application of the harmonization instrument referred to in Article 40(1)(b).

[812] Article 40: Additional harmonization:

apply for a transitional period to "gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions"[813]. In the meantime, the Commission was supposed to assess the possibility of presenting proposals for harmonization instruments.

I.5.2.2.Exclusion of Games of Chance during the Legislative Procedure

However, the proposal did not convince the European Parliament. We note also that a part of the concerned industry – especially lottery associations – protested vehemently against it[814], while the private sector, which could have benefited from the market liberalisation, logically sustained it[815].

In February 2004, the proposal for a directive on services in the internal market was transmitted to the Council and European Parliament, according to the co-decision procedure. It received the opinion from the Committee of the Regions[816] and the European Economic and Social Committee[817] and was approved with amendments by the European Parliament in December 2005 (first reading). The Commission then accepted the proposed amendments in

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1. The Commission shall assess, by [one year after the entry into force of this Directive] at the latest, the possibility of presenting proposals for harmonization instruments on the following subjects:
[…] (b) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions, in the light of a report by the Commission and a wide consultation of interested parties.

[813] For a comment on the Commission's actions and motivations, see VAGNHAMMAR Erik Bertil, The Proper Functioning of the Internal Market: Observations from Brussels, in Crime, Addiction and the Regulation of Gambling, Nijhoff Publishers, 2008, pp.55 – 69.

[814] To give just one example, the president of the European Lotteries Association said in a press release of November 2006: "European Lotteries has repeatedly stressed that, throughout the world, gambling is not treated as a normal service which can be provided without specific forms of control and restrictions. Because of its particular health and social dimensions and its sensitivity to criminal risks and problems, gambling requires a completely different approach to the provision of conventional economic services. The objective of regulating the gaming market is not to assure the largest offer at the most incentive level for the customer, but to protect consumers and the society in general by controlling a balanced supply of legal gambling services to meet inevitable demand. This restrictive regulation mainly aims at minimizing the social harm of gambling, the excessive development of which is not desirable; it also prevents the benefit of this specific activity from being captured by private operators." See http://www.lotteryinsider.com/vol37/no7.htm.

[815] For example, the European Betting Association (EBA) and the Remote Gambling Association (RGA) stated in a press release of February 2006 that the European Parliament had "missed an important opportunity to promote the adoption of fair and sustainable rules for the EU gambling market. […] The remote gambling industry will not be idle following this vote and will vigorously support the strict adherence to the provisions of the Treaty in relation to gambling". See www.rga.eu.com (20/11/2006).

[816] OJ C 43, 18.2.2005, p. 18.

[817] OJ C 221, 8.9.2005, p. 113.

April 2006. A common position was adopted by the Council in July 2006, which was taken into consideration in a declaration of the Commission the same month. Finally, the proposal of directive was voted by the European Parliament in a second reading in November 2006.

Among the most important amendments brought by the European Parliament to the Services Directive is the exclusion of games of chance from the scope of the directive. Amendment 17 of the Parliament clearly states: "*Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive, in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public order and consumer protection. The specific nature of these activities is not called into question by Community case law, which simply requires national courts to examine in depth the reasons of public interest which may justify derogations from the freedom to provide services or the freedom of establishment. In addition, given the considerable disparities in the taxation of gambling activities, which are at least partly related to differences in Member States' public order requirements, it would be totally impossible to establish fair cross-border competition between operators in the gaming industry without either first or simultaneously dealing with questions of fiscal cohesion between Member States, which are not addressed by this Directive and which are not part of its scope*."

The justification for this amendment was to ensure that gambling activities are not covered by the directive. As the Parliament put it, "gambling activities are intrinsically linked to public order and consumer protection issues and therefore lie outside the sphere of competence of the Community institutions and must remain a sector which the Member States are free to regulate. Attention should therefore be drawn to the fact that they are a special case."[818]

As a consequence of this exclusion, Amendment 174 deleted the initial Article 18 (which regulated transitional derogations for, among others, gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions). Also, gambling was eliminated from the scope of Article 40 (harmonization).

[818] Report of the European Parliament on the proposal for a directive of the European Parliament and of the Council on services in the internal market, A6-0409/2005, 15 December 2005, p.15

The Services Directive is currently being implemented into national legislation by all Member States who have until December 2009 to transpose the provisions of the Directive into their national legislation.

Although “the internal market comprises an area without internal frontiers in which the free movement of services is ensured”[819], games of chance have been thus excluded from the scope of application of the Services Directive, during the first reading by the European Parliament, in the framework of the co-decision procedure. For certain scholars however, the ECJ's *Placanica* judgment "through its radical content and the timing of its publication, clearly constitutes a judicial revision of the unsatisfactory text of the directive"[820].

[819] Position of the European Parliament, adopted at second reading on 15 November 2006, PE 381.847, p.2
[820] See HATZOPOULOS Vassilis, Legal Aspects of the Internal Market for Services, supra, p.176.

I.6.POSITION OF THE EUROPEAN PARLIAMENT

The European Parliament is the only directly-elected body of the European Union. Although it was initially conceived as a consultative assembly with no true legislative powers, the Parliament is today a European co-legislator – together with the Council of the European Union. It has budgetary powers and exercises controls over all the European institutions[821].

The Parliament has recently taken position on games of chance on at least two occasions: the first is a resolution addressing the relation between sport and gambling as sport revenue generator; the second endeavors to tackle the issues surrounding the integrity of Internet gambling.

I.6.1.The Resolution on the White Paper on Sport

In May 2008, the European Parliament's plenary has adopted a resolution on the European Commission's strategy paper ("White Paper") on Sport, in which it voiced its concern at a possible deregulation of national gambling markets.

The European Parliament stressed that the revenues generated by state-owned or state licensed lotteries are "the most important source of income" and "indispensable" for sports organisations in the EU.

It warned that no sustainable and politically feasible alternative to this funding in the event of a liberalisation has so far been either proposed or seriously discussed, and it called on the European Commission to carry out a study of the effects that a deregulation of gambling and betting would have on society and sport.

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[821] From the very rich literature on the European Parliament, we refer the reader to CRAIG Paul C., The role of the European Parliament under the Lisbon Treaty, Springer Vienna, 2008; DOUGLAS-SCOTT Sionaidh, The law and custom of a new parliament : the European Parliament, in BRADLEY Anthony W, BARANGER Denis, ZIEGLER Katja S.(Editors), Constitutionalism and the Role of Parliaments, Oxford, Hart Publishing, 2007, PASSOS Ricardo, The expanding role of the European Parliament, and TIMMERMANS Christiaan W. A., Expansion of executive, judicial and legislative powers - a contribution to the debate, both in The EU Constitution : the best way forward?, Asser Institute Colloquium on European Law, Cambridge University Press, 2005

The Parliament also observed that “sports betting activities have developed in an uncontrolled manner (particularly cross-border betting on the Internet)” and pointed to a growing number of match-fixing cases. The resolution finally called for measures to protect the integrity of sporting events.

I.6.2.The Integrity of Online Gambling Report

The "Integrity of Online Gambling" Report[822] was adopted as a non-legislative resolution on March 18, 2009.

The resolution reminds that gambling activities, including online gambling, have traditionally been strictly regulated in all Member States on the basis of the principle of subsidiarity, in order to protect consumers against addiction and fraud, to prevent money-laundering and other financial crimes, as well as match-fixing, and to preserve public order. Also, it stresses that the European Court of Justice accepts restrictions of the freedom of establishment and the freedom to provide services in the light of such general interest objectives, if proportionate and non-discriminatory.

It recalls that gambling activities were excluded from the scope of Directives 2006/123/EC (the Services Directive), 2007/65/EC[823] and 2000/31/EC[824], and reiterates the concerns already voiced by the Parliament regarding a possible deregulation of gambling in its resolution on the White Paper on Sport.

Importantly, it highlights that policy objectives such as consumers' protection against addiction, fraud, money-laundering and match-fixing or problem gambling and under-age gambling are more difficult to achieve in the online gambling sector, which has developed rapidly and in an uncontrolled manner (particularly cross-border over the internet).

[822] Submitted to the European Parliament's attention by its Rapporteur Mrs. Christel Schaldemose (PSE, Denmark).
[823] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 032 of 18 December 2007, p.27).
[824] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services (OJ L 178 of 17 July 2000, p.1).

The resolutions calls for a transparent sector that safeguards the public and consumer interests[825], for tackling fraud and other forms of criminal behaviour[826], for the prevention of consumer detriment[827], for the adoption of a Code of conduct as useful supplementary tool for achieving some public (and private) objectives[828], and finally calls on the Member States, the Commission, Europol and national authorities to base their actions in the online gambling sector on a better monitoring and research.

[825] Three interesting paths are mentioned: (i) in accordance with the principle of subsidiarity and the case law of the European Court of Justice, Member States have an interest and right to regulate and control their gambling markets in accordance with their traditions and cultures in order to protect consumers against addiction, fraud, money-laundering and match-fixing in sports, as well as to protect the culturally-built funding structures which finance sports activities and other social causes in the Member States; on the other hand, all other stakeholders as well have an interest in a well-monitored and regulated gambling market. Online gambling operators must therefore *comply with the legislation of the Member State in which they provide their services and the consumer resides*; (ii) gambling services are to be considered as *an economic activity of a very special nature* due to the social and public order and health care aspects linked to it, where competition will not lead to a better allocation of resources, which is the reason why *gambling requires a multi-pillar approach. A pure Internal Market approach is not appropriate in this highly sensitive area*, and the Commission should pay particular attention to the views of the European Court of Justice regarding this matter; and (iii) regulators and operators should *closely cooperate with other stakeholders* operating in the field of online gambling, e.g. gambling operators, regulators, consumer organisations, sports organisations, industry associations and the media, which share a joint responsibility for the integrity of online gambling and for informing consumers of the possible negative consequences of online gambling.

[826] The Parliament is here of the opinion that the *growth of online gambling provides increased opportunities for corrupt practices* such as fraud, match-fixing, illegal betting cartels and money-laundering, as online games can be set up and dismantled very rapidly and as a result of the proliferation of offshore operators; the protection of the integrity of sports events and competitions requires cooperation between sports rights owners, online betting operators and public authorities at national as well as EU and international level; and arrangements could be put in place to ensure fair financial returns of betting for the benefit of all levels of professional and amateur sport; this could be examined through the possible recognition of an intellectual property right over their competitions.

[827] Mainly in order to prevent addictions and underage gambling. Being aware of the new technologies impact on the young, the Parliament showed itself concerned by the increasing cross-over between interactive television, mobile phones and internet sites in offering remote or online gambling games, particularly those aimed at minors. In particular, the resolution urges Member States to cooperate at EU level to take measures against any aggressive advertising or marketing by any public or private operator of online gambling, including free demonstration games. Also, it suggests examining the possibility of introducing a maximum amount that a person can use for gambling activities per month, or of obliging online gambling operators to make use of prepaid cards for online gambling to be sold in shops.

[828] Such a code ultimately remains an industry-driven, self-regulatory approach and can therefore only serve as an addition to, not a replacement of, legislation.

I.7.IMPLICATIONS OF A SINGLE EUROPEAN GAMBLING MARKET

What would be the direct impact of an increased liberalisation of the gambling sector on State-owned lotteries and totos, on the private operators, on the national budgets and, last but not least, on consumers? Different studies have been conducted on the economical and social aspects of a wider availability of games of chance, in the framework of a hypothetically EU harmonized regulatory environment.

I.7.1.Economic Consequences

Several researches have been launched with the aim to identify the economic consequences of an open gambling market in Europe, but the findings – or, to be more precise, the interpretation of such findings – differ largely from one study to the other.

However, some common conclusions could be drawn: the liberalisation of the gaming sector – and the consequent suppression of national barriers to gambling – would lead to extensive cross-border competition between providers and competition among lotteries regardless of their Member State affiliations; a notable increase in aggregate spending on gambling services in the Member States; relatively unconstrained remote gambling offerings; a considerable redistribution of revenues among gambling sectors; and, theoretically, reduced prices of gambling services to consumers, as a result of increased competition between providers.

I.7.1.1.London Economics Report

The London Economics Report[829], written for the European Lotteries and Toto Association, assumes that the gaming markets in other Member States will become like that of one of the most liberalised markets in the EU, namely the United Kingdom; however, it does not study the impact of liberalising the provision of gaming products across borders. Quoting another

[829] London Economics, The case for State Lotteries. A report for the European Lotteries and Toto Association, supra, available at http://www.londecon.co.uk/.

study of 1997[830], this Report comes to the conclusion that in the recent years some sectors of the economy that supply the gaming industry have expanded while others have contracted. Within suppliers to the gaming industry, approximately 8,500 jobs have been created in the supply of goods and services and 10,200 jobs were created in construction. Most importantly, traditional gambling activities such as racing, bingo, lotteries and lucky envelopes have contracted by $158 million since the introduction of slot machines (EGMs).

According to this study, the liberalisation of the gaming market would shift activity away from non-gaming clubs and hotels and traditional gambling activities towards venues with EGMs which are operated on a for-profit basis by private interests. Further more, insofar the funding of good causes is concerned, this Report finds that losses could be very high in countries where lotteries have currently a very high market share, whereas new Member States with small lotteries would be relatively unaffected by such liberalisation.

In addition, the London Economic Report concludes that such liberalisation would result in a significant decrease in the State lotteries and totos' turnover as players migrate to more attractive games in turns of winnings and, as a result, the funding of good causes by State lotteries and totos will be sharply reduced. Consequently, state lotteries would respond to such a market development by increasing the attractiveness of their offerings[831], but such a course of action would also reduce the funding of good causes.

I.7.1.2.Europe Economics Report

This study written for a private betting provider[832] finds that creating a single market for online gambling has ambiguous implications for the tax revenues individual Member States collect. Other things equal, a monopoly will hold out the prospect of greatest profits. Thus, a government seeking to maximise the tax revenues it receives from gambling might be tempted to create a state monopoly and receive all the monopoly profits that are available. However, in a dynamic setting, allowing competition and taxing the revenues of competing firms may

[830] Arthur Andersen LLP., Economic Impacts of Casino Gaming in the United States-Volume 2: Micro Study, Report to the American Gaming Association, 1997.
[831] Which would breach the condition of a "consistent and systematic protection of consumers", required by the ECJ in the Gambelli case.
[832] Europe Economics, "The Case for a Single European Gambling Market", report for Ladbrokes, 2004, available at www.europe-economics.com (20/11/2006).

yield greater tax revenues than a state monopoly can generate in profits. As this report shows, the demand for gambling products may be greater in markets such as the United Kingdom where providers compete to offer betting products that appeal to consumers.

Europe Economics also notes that perversely, the dangers of consumers not being protected may increase in countries that heavily regulate their gambling industry. In the absence of competition, prices are likely to be higher and choice lower. In these conditions, consumers may be tempted to bet with foreign bookmakers, perhaps based in jurisdictions that impose very few controls, or to bet with unlicensed bookmakers who by definition avoid regulations. Consequently, a single market may reduce the risk of consumer exploitation.

Finally, aside from increased consumer welfare, and possible increases in tax receipts, this study finds that there are other benefits that can accrue from the higher levels of demand that a more liberal approach to gambling regulation might bring (for instance, larger employment opportunities).

I.7.1.3.ISDC Gambling Services Report

The ISDC Gambling Services Report, written for the European Commission, establishes several scenarios for the future evolution of European gambling market[833]. The “baseline scenario” assumes that not much will change in the near future regarding the legal status, ownership structure and general competitive nature of the gambling services sectors in the Member States of the EU.

Two alternative scenarios have been developed, in order to provide some flavour of how contingencies that might emerge in the EU would affect the size, market shares, profitability, and economic rent generating capabilities of Member States.

The first alternative scenario is considered the more moderate of the two, involving changes that would emphasize the principles of “free and fair trade” and “proportionality” in allowing enterprises the opportunity to gain access to EU member state gambling services sectors, but without relaxing restrictions and constraints on those sectors that are presently in place.

[833] ISDC Gambling Services Report, p.1480 et seq.

The second alternative scenario[834] is more extreme and assumes that a combination of legal, technological, competitive, and policy decisions will substantially open up the gambling services sectors to intra-EU competition. Extracting the main findings from this second alternative scenario, we note that, in general, if this were to transpire, it would lead to a substantial reduction in economic rents, an even more substantial increase in consumer surplus and a notable increase in aggregate spending on gambling services in the Member States of the EU. Based on the experience in other countries, such as the United States, Canada, New Zealand, and Australia, the ratio of gross gambling revenues (GGR)/gross domestic product (GDP) could be expected to increase dramatically, perhaps ultimately to double[835].

This second alternative scenario produces an estimated 53% increase in total GGRs in 2010 over GGRs in 2003. Also, it finds a considerable redistribution of GGRs among the five main gambling services sectors, with the greatest growth occurring in the casino, gambling machine, and betting service sectors, more moderate growth in the lottery sector, and a moderate decline in the Bingo sector.

However, this Study also noted that there may be an increase in various unintended adverse consequences associated with gambling. As the review of the scientific literature reveals, there are several studies which show no statistically significant linkage between expanded gambling offerings and bankruptcies, while several others show a statistically significant but relatively small linkage between expanded gambling offerings and bankruptcies. Also, results of the peer reviewed research on the relationship of expanded gambling to crime have produced mixed results, with instances of increases, no change, and decreases relative to the availability of casino gaming.

I.7.2.Social Consequences

If the experts agree more or less on the economic impact of an open gambling market in Europe, identifying the social consequences of gambling – and furthermore, of a future liberalisation of gambling services – still entails considerable controversy.

[834] ISDC Gambling Services Report, p.1502 et seq.
[835] Idem.

While there are many studies focusing on gambling problems for particular segments of the population or for specific gaming activities[836], there is very little empirical evidence on the overall social cost of gaming. Most studies undertaken so far address the narrower subject of pathological gamblers and try to establish its global consequences on society[837], but the examination of the health and social impacts of a possible expansion of gambling is still in its infancy.

At the European Union level there is yet no exhaustive study on the matter[838], however such research has been undertaken in some Member States[839]. Evidence equally comes from studies conducted in Canada[840], Australia[841], the United States[842] or New Zealand[843].

Generally, the consequence most often invoked is the risk to increase the number of pathological gamblers, which could be caused by a wider availability of such games. According to several studies, the average number of problem gamblers amounts to 1-5 % of the total population involved in playing games of chance[844]. “Problem gambling” has been

836 See for example MEYER Gerhard, HAYER Tobias, GRIFFITHS Mark, Problem Gambling in Europe. Challenges, Prevention, and Interventions, Springer, 2009.
837 See, for example, LADOUCEUR Robert, BOISVERT Jean -Marie, PÉPIN Michel, LORANGER Michel and SYLVAIN Caroline, “Social cost of pathological gambling”, 4 Journal of Gambling Studies vol.10, December 1994.
838 We note however a first study prepared for the European Lotteries by GRIFFITHS Mark D. and WOOD Richard T.A., “Lottery gambling and addiction: An overview of European research”, 1998 (available at https://www.european-lotteries.org/data/info_130/Wood.pdf), which concludes that slot machines are a “hard” form of gambling and that they are potentially addictive to a small minority based on the research evidence, unlike lotteries, which appear to be less addictive.
839 See, for example, Gambling And Problem Gambling In Sweden, supra, ABBOTT Max W., VOLBERG Rachel A., RONNBERG Sten, Comparing the New Zealand and Swedish national surveys of gambling and problem gambling, supra; FEKJÆR Hans Olav, M.D. Gambling and gambling problems in Norway, supra. Similarly, for a study concerning Switzerland, see KÜNZI Kilian, FRITSCHI Tobias and EGGER Theres, Gambling and Gambling Addiction in Switzerland, Empirical study of gambling practice, development, addiction and consequences, supra.
840 KORN David A., Expansion of gambling in Canada: implications for health and social policy, CMAJ • July 11, 2000; 163 (1); Problem Gambling Survey, Final Report submitted to British Columbia Lottery Corporation, Ed. Angus Reid Group, July 1996; BRENNER Gabrielle and BRENNER Reuven, A Profile Of Gamblers, supra, ; CAMPBELL Colin S., HARTNAGEL Timothy F., SMITH Garry J., The Legalization of Gambling in Canada Report, supra.
841 Productivity Commission, Australia’s Gambling Industries Report, supra.
842 See, for example, Committee on the Social and Economic Impact of Pathological Gambling [and] Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council, Pathological Gambling. A Critical Review, National Academy Press, Washington D.C., 2003.
843 The Social Impact Of Gaming In New Zealand, supra; DYALL Lorna, Gambling: A Social Hazard, Social Policy Journal of New Zealand, March 2004.
844 See MCCOWN William G., CHAMBERLAIN Linda L. Best Possible Odds: Contemporary Treatment Strategies for Gambling Disorders, New York: John Wiley & Sons, Inc., 2000. Another study of 2008 shows for the first time a very limited impact on addiction among online gamblers. It followed a sample of more than

defined as "gambling to a degree that compromises, disrupts or damages family, personal or recreational pursuits"[845].

To mention just a few examples of research, a British study of 2004[846] concludes that the existing small evidence suggests that liberalisation of gambling laws increases the prevalence of gambling problems. This has been found in studies in the United Kingdom and various jurisdictions in North America. An interesting observation from the North American studies is that in some cases, there was a decrease in the prevalence of problem gambling following an increase in availability. Typically, this study states, this is associated with strong systems in place to provide services to problem gamblers.

Similarly, the London Economics Report draws the conclusion that participation in increasingly available gaming activities would become more and more attractive and addictive. Social problems resulting from this stimulating gaming offer would increase considerably parallel to rising stakes. However, this study notes that there is yet no comprehensive data on the full economic and social costs of gaming addiction, and it is therefore difficult to quantify such costs at the present time.

Therefore, it must be concluded that in the absence of more detailed information on the extent of the gambling problem in the various Member States, it is not reasonable to estimate with any degree of precision the likely increase in costs that would result from the liberalisation of the European gambling market.

40.000 individual online gamblers over a period of 8 months and concluded that many different elements contribute to the fact that only a very small proportion of people experience gambling addiction, whether online or with traditional forms of gambling. Moreover, the most striking result of this research shows that the assumption of a typical gambler being somebody out of control could be fundamentally wrong. This data shows that a typical online gambler risks 148€ and has a loss of about 33€ during a period of 8 months". See LABRIE R.A., KAPLAN, S.A., LAPLANTE, D.A., NELSON, S.E., and SHAFFER, H.J. (In Press) Inside The Virtual Casino: A Prospective Longitudinal Study Of Actual Internet Casino Gambling, European Journal of Public Health, 2008, http://www.divisiononaddictions.org/html/library.htm.

[845] See SPROSTON Kerry, ERENS Bob, ORFORD Jim, Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey, supra, p.41.

[846] WARD Philip, The Gambling Bill – Bill 163 of 2003-04, House of Commons Library Research Paper, 04/79, October 2004, quoted in London Economics Report, p. 56

I.8.INTERMEDIARY CONCLUSION

Gambling is generally available in some form in every Member State of the European Union, where most of its sub-sectors are state-owned or state-controlled. Like other sensitive services, it bears special concerns of public order, which are generally expressed through regulatory constraints, creating solid restrictions to a free flow of gambling services in the European territory.

In the framework of its goal to achieve a genuine internal market and to harmonize the gambling sector, the European Commission initiated during the last years concerted actions against these barriers. They took the form of a case-by-case approach – many of the Member States being summoned to provide justifications for their regulatory policy in this field – and of a more general approach, occasioned by the passing of the Services Directive.

While this latter initiative proved to be unsuccessful insofar as games of chance are concerned, the case-by-case approach continues to be used by the Commission in order to accomplish, under the scrutiny of the European Court of Justice, a certain relaxation of the regulatory restrictions to cross-border gambling across all Member States.

II.TRADE IN GAMBLING SERVICES UNDER EFTA

II.1.Introductory Elements

The European Free Trade Association (EFTA) is an intergovernmental organization set up for the promotion of free trade and economic integration to the benefit of its four Member States: Iceland, Liechtenstein, Norway and Switzerland.

EFTA was founded in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland, an associate member since 1961, joined EFTA in 1986 while Iceland and Liechtenstein joined in 1970 and 1991, respectively. Its initial objective of this was a free trade arrangement as an alternative to the customs union of the European Economic Community (EEC) set up in 1957. However, closer relations have progressively developed with the EEC, bilateral free trade agreements were concluded in 1972 leading to the elimination of tariffs in the trade of industrial goods. In 1994, several EFTA countries became party to the European Economic Area (EEA). Over the years, a number of countries have left EFTA to join the EU - Denmark and the United Kingdom in 1972, Portugal in 1985 and Austria, Finland and Sweden in 1995.

EFTA's main instruments are the EFTA Convention, which forms the legal basis of the organization and governs free trade relations between the EFTA States; a worldwide network of free trade and partnership agreements; and the European Economic Area Agreement (1994), which enables EFTA Member States (except for Switzerland[847]) to participate in the EU's Internal Market.

II.2.Gambling Services under EFTA

The EFTA Member States commitments under the Convention do not include the gambling subsector.

[847] Switzerland remains outside the EEA, following a referendum that rejected membership in December 1992.

In the EEA Agreement, the legal basis for trade in services is represented by Article 31 (freedom of establishment)[848] and Article 36 (freedom to provide services)[849].

The EEA Agreement includes the implementation of EC internal market legislation covering the four freedoms (the free movement of goods, services, capital and persons). Therefore, all the characteristics of the freedom to provide services in European Union law are applicable here; insofar as gambling services are concerned, we refer the reader to our precedent chapter analyzing gambling services under EU law.

II.3.The EFTA Court Jurisprudence Concerning Gambling

The Court of the European Free Trade Area (EFTA Court), based in Luxembourg, corresponds to the Court of Justice of the European Communities in matters relating to the EEA EFTA States[850].

Two landmark judgments by the EFTA Court provided further guidance as to the cross-border trade in gambling services and the circumstances in which states can justify maintaining national monopolies.

II.3.1.EFTA Surveillance Authority v. Norway, 2007

In *EFTA Surveillance Authority v. Norway*[851], the EFTA Surveillance Authority had contested Norway's legislation which introduces a monopoly for the State-owned undertaking Norsk

[848] Article 31(1) EEA reads: "Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4."

[849] Article 36(1) EEA reads: "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended".

[850] The Court deals with infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of an EEA rule. The Court also handles the settlement of disputes between two or more EFTA States. It also hears appeals against decisions taken by the EFTA Surveillance Authority and gives advisory opinions to courts in the EFTA States on the interpretation of EEA rules.

Tipping AS to operate gaming machines in Norway, thus infringing Articles 31 and 36 of the EEA Agreement.

In its judgment, the EFTA Court upheld the *Placanica* judgment in requiring any unlawful restrictions to be justified, non-discriminatory and proportionate to the objectives in this case, consumer protection and the maintenance of public order. Contributions to the financing of benevolent or public interest activities cannot of itself amount to an objective justification for the restrictions. The Court explicitly stated that a limitation on gambling authorization is only acceptable if, *"from the outset, it reflects a concern to bring about a genuine diminution of thin gambling opportunities and if the financing of social activities constitutes only an incidental beneficial consequence and not the real justification"*.

On the facts of the case ("gaming machines are more dangerous in terms of leading to gambling addiction than other games" and the total number of gaming machines was reduced from 16,600 to 10,000) the Court held that the restrictions were justified and dismissed the complaint.

II.3.2.Ladbrokes Limited v. Norway, 2007

In the *Ladbrokes Limited v. Norway*[852] case, the EFTA court gave further guidance as to what constitutes justified restrictions.

The Court repeated that national restrictions must pursue legitimate aims such as fighting gambling addiction and maintaining public order. These aims must be pursued in a suitable, consistent and proportionate manner. The financing of humanitarian and socially beneficial purposes cannot constitute a sole justification, but can only be "a beneficial consequence which is incidental. Although the Court did say that preventing private profit "may… in principle justify such legislation" the national gaming policy "must then reflect the moral concerns underlying this aim".

[851] EFTA Court Case E-1/06, EFTA Surveillance Authority v. Norway, judgment of 14 March 2007. For a comment see Paulina DEJMEK, A Wheel of Fortune for the EEA States or Game Over for National Gaming and Betting Monopolies?, supra.
[852] EFTA Court Case E-3/06, Ladbrokes Limited v. Norway, judgment of 30 May 2007. For a comment see Paulina DEJMEK, A Wheel of Fortune for the EEA States or Game Over for National Gaming and Betting Monopolies?, supra.

The Court repeated that if a national court decides that such legislation is justified, national authorities could ban cross-border provision of gaming services. If bans are not justified, a licence may still be required “in view of possible differences in the level of protection throughout the EEA. However, national measures cannot be excessive in relation to the aims pursued, must be non-discriminatory and must take into account the requirements already fulfilled by the service provider in its home state”[853].

[853] Idem, para.86

III.TRADE IN GAMBLING SERVICES UNDER NAFTA

III.1.Introductory Elements

The North American Free Trade Agreement (NAFTA) – having two supplements, the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC) – was signed in December 1992 and came into effect on 1 January 1994. Its members are Canada, Mexico, and the United States. Separate trade agreements were signed by Canada and Mexico with Chile, which entered into force on 5 July 1997 and 1 August 1999 respectively. The United States followed and a Chile-U.S. agreement came into force on 1 January 2004[854].

These last agreements, taken together with NAFTA, do not have the effect of incorporating Chile completely into the NAFTA system, as the four agreements are asymmetrical[855].

III.2.Services under NAFTA

NAFTA applies to measures relating to the provision of cross-border services or services supplied from an establishment in a Party[856]. This includes any law, regulation, procedure,

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[854] For a detailed analysis of NAFTA, see JOHNSON Jon R., The North American Free Trade Agreement. A Comprehensive Guide, Canada Law Book Inc., 1994, GLICK Leslie Alan, Understanding the North American Free Trade Agreement, Kluwer Law, 1994, FOLSOM Ralph H., NAFTA in a Nutshell, West Group, 1999, FOLSOM Ralph H., NAFTA and Free Trade in the Americas, West Group, 2004; ABBOTT Frederick M., The North American Integration Regime and Its Implications for the World Trading System, in The EU, the WTO and the NAFTA. Towards a Common Law of International Trade? ed. by J.H.H. WEILER, Oxford University Press, 2000.

[855] The Canada – Chile and Mexico – Chile agreements do not include financial services or government procurement, whereas NAFTA and the U.S. – Chile agreement do. Neither the Canada nor the U.S. agreements deal with standards with respect to services, whereas NAFTA and the Mexico agreement do so, in an albeit very limited way. Unlike the other three agreements, the U.S.- Chile agreement separates out the concepts of market access and national treatment. Despite this, the bilateral agreements largely follow the wording of NAFTA. (see RAWORTH Philip, Trade in Services – Global Regulation and the Impact on Key Service Sectors, p.88). Thus, the discussions hereinafter, although limited to NAFTA, apply mutatis mutandis to the other agreements, unless states otherwise.

[856] Articles 1101:1 and 1201:1 NAFTA. For an analysis see TREBILCOCK Michael J., Robert HOWSE, The Regulation of International Trade, 2nd ed., Routledge, 1999, pp.270-307.

requirement or practice[857]. Except otherwise provided, its provisions bind all levels of government[858]. Reference to a state or province includes local governments of that state or province[859] and, in the case of cross-border trade in services (Modes 1, 2 and 4), any non-governmental body in the exercise of any regulatory, administrative or other governmental authority delegated to it[860].

NAFTA extends to the metropolitan territories of the Parties as well as Puerto Rico in the case of the United States and the islands of Guadalupe and Revillagigedo in the case of Mexico[861].

It applies in principle to all services except cross-border air services, which means domestic and international air transportation, weather scheduled or non-scheduled, and related support services[862]. Special rules apply to financial services[863] and the government procurement services[864], while the telecommunications sector is subject both to the general rules on services and its own sectoral rules[865]. Public services such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, health and child care may be reserved to the state, as long as this is done in a non-discriminatory basis[866]. This corresponds to the exception in GATS for services supplied in the exercise of governmental authority[867]. Culture is excluded in the case of Canada for all modes of supply[868].

The liberalization approach is the following: the Agreement establishes the scope of liberalization, and all services are covered unless specifically excluded by NAFTA. It is a so-called “top-down” approach, as opposed to the “bottom-up” approach used by GATS. However, as within the OECD Codes, which take the same approach, the Parties are allowed

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857 Article 210:1.
858 Article 105.
859 Article 201:2.
860 Article 1213:1.
861 Annex 202.1.
862 Article 1201:2 (b).
863 Articles 1101:3 and 1201:2 (a). For a detailed analysis, see NORTON J.J.(Editor), International Trade in Financial Services: The NAFTA Provisions, Kluwer Law, 1999.
864 Articles 1108:7 (a) and 1201:2 (c)
865 Chapter 13 NAFTA.
866 Articles 1101:4 and 1201:3 (b).
867 GATS Article I:3.(b)
868 Annex 2106.

a range of reservations, which are set out in a number of Annexes in each Party's schedule attached to the Agreement.

Firstly, the Parties may choose to maintain certain existing non-conforming measures at all level of government[869]. These obligations relate to their obligations under NAFTA with respect to national and MFN treatment, as well as to performance requirements and nationality or residency requirements for senior management and boards of directors in the case of commercial presence and to the need for a local presence in the case of cross-border services. They are set out in Annex I. The Parties may renew or amend the non-conforming measures (amendments must not decrease the conformity of the measure).

Secondly, reservations may be made by the Parties with respect to specific sectors, subsectors or activities, for which they may not only maintain existing restrictive measures, but also adopt new ones, that do not conform to the obligations under NAFTA[870]. They are set out in Annex II.

Finally, a Party may reserve certain economic activities to itself and refuse to permit services related to them to be provided through commercial presence by a provider of another Party[871]. These reservations are listed in Annex III[872].

Once the Party has finalized its reservations, no further reservation may be added. Obligations under NAFTA are only subject to modification or withdrawal by means of an exception to the rules or as a retaliatory act permitted under the Agreement.

Insofar as gambling related services are concerned, none of the Parties has either scheduled exceptions or reserved these activities (Annexes I to VII).

[869] Articles 1108:1 and 1206:1.
[870] Articles 1108:3 and 1206:3.
[871] Article 1101:2.
[872] Only Mexico has listed such reservations, which apply inter alia to the petroleum sector, electricity, satellite communication, telegraph and radio-telegraph services, postal services and the railways.

III.3.Modes of Supply

NAFTA specifically regulates cross-border services, which mean the provision of a service: (a) from the territory of a Party into the territory of another Party (Mode 1), (b) in the territory of a Party by a person of that Party to a person of another Party (Mode 2), or (c) by a national of a Party in the territory of another Party (Mode 4), but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment Definitions), in that territory[873]. The provision of services through Mode 3 is covered only incidentally by Chapter 11 on investment and some general provisions of the agreement.

The situation where a person of one Party receives services in the territory of another Party from a person of a third Party is not covered.

A person of a Party means a national or an enterprise[874]. Nationals include citizens and permanent residents and any other natural person referred to in Annex 201.1.

With respect to the provision of services through Mode 4 (presence of natural persons), NAFTA states that the services must be provided in the territory of one Party by a national of another Party, but there are no requirements with respect to the legal person on behalf of whom the service may be performed, as in GATS[875].

Where services are supplied through Mode 3, the commercial presence must be owned or controlled directly or indirectly by an investor of Party, who may be a national or an enterprise. There are no definitions in NAFTA for the terms “owned” or “controlled”, but the jurisprudence contoured these concepts[876]. It is interesting to see that where a service is provided through Mode 1 (cross-border supply), there is no requirement that either the provider or the consumer be of a Party – however, all these rules are subject to the provisions on the denial of benefits.

[873] Article 1213:2.
[874]According to Article 201:1, “enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;”, “enterprise of a Party means an enterprise constituted or organized under the law of a Party”.
[875] GATS Article XXVIII (g), (j) and (m)(i).
[876] For a case where minority shareholding that held de facto control over a Mexican entity was considered as sufficient to accomplish the “control” condition, see, for example, the next chapter on the Thunderbird Gaming Award.

III.4.Market Access and National Treatment

NAFTA does not distinguish between market access and national treatment, except in the provisions on financial services. It uses instead the national treatment principle as the main way to achieve market access as well as for securing equal treatment in a host NAFTA state for providers from other Parties. The shortfalls of this approach seem to have been ascertained by the United States, since their separate agreement with Chile distinguishes between national treatment and market access, reproducing the market access provisions of the GATS[877] and does not permit deviations from it.

Market access for providers using Modes 1, 2 and 4 is handled on a general basis in NAFTA through the application of national treatment. The national treatment required is quite broad: the Parties must, of course, treat service providers from the other two Parties no less favorably than their own nationals, but there are two additional rules. Firstly, national treatment under NAFTA means treatment no less favorable than that accorded by a state or province of a Party to service providers from other states or provinces in that same Party. Secondly, if a Party accord service providers from third countries treatment which is more favorable than its national treatment, it must extend this better treatment to its partners in NAFTA[878].

National treatment remains nevertheless limited to the prohibition of discrimination in law and it only removes market access barriers based on nationality. The residency requirements and operational barriers are not covered under national treatment, as they are almost invariably imposed on a non-discriminatory basis. The Agreement deals specifically with these residency requirements in Article1205, which prohibits the condition of a permanent residence or presence in the host NAFTA state as a condition for the cross-border provision of services. Specific provisions dealing with the operational barriers to market entry are found in Chapter 3.

The NAFTA approach differs in this respect from the GATS. NAFTA does not establish an exhaustive list of market access barriers, like GATS, but obliges the Parties to remove all

[877] With the exception of the prohibition on limitations with respect to foreign capital investment.
[878] See Article 1204. This provision is quite unusual, since it is rare that a country give third party nationals better treatment than it accords to its own nationals. In any case, the Parties to NAFTA would be entitled to this more favorable treatment by virtue of the MFN principle enshrined in Articles 1103 and 1203.

discrimination in law against service providers from other Parties, albeit subject to reservations that they are allowed to make.

Monopolies are permitted under NAFTA, but a Party must ensure that they act in a manner which is consistent with the Party's obligations under NAFTA[879]. The same is valid for state enterprises[880].

III.5.General Exceptions

NAFTA allows the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of the Agreement and which are not applied in a manner that arbitrarily or unjustifiably infringes the MFN principle or constitutes a disguised restriction on trade in services[881].

The exact scope of this exception is not defined; although it refers specifically to health and safety and consumer protection, it makes no mention of public order or morals. This ambiguity is avoided in the US – Chile and Mexico – Chile agreements, which incorporate Article XIV GATS.

It is important to note that in none of the agreements does this exception apply to services provided from a commercial presence.

NAFTA also permits certain exception to the totality of its rules in the case of measures taken for reasons of national security[882]. This provision is similar to the one in GATS and excepts the following with respect to services: information the disclosure of which it determines to be contrary to its essential security interests; traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment ; measures taken in time of war or other emergency in international relations; measures relating to the implementation of national policies or international agreements

[879] Article 1502.
[880] Article 1503.
[881] Article 2101:2.
[882] Article 2102.

respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; and actions taken in pursuance of a Party's obligations under the UN Charter.

Finally, a Party may deny the benefits of Chapters 11 and 12 to a provider of cross-border services or to a provider of services from a commercial presence, when the enterprise involved in providing such services is owned or controlled, respectively, by nationals or investors of a non-Party, if: the denying Party does not maintain diplomatic relations with the non-Party; or the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if benefits were accorded to the enterprise; also, a Party may deny the benefits under these chapters, subject to prior notification and consultation, to an enterprise of another Party which has no substantial business activities in the territory of the Party under whose law it is constituted or organized, or in the case of cross-border services, in the territory of any Party[883].

In view of all the above and as far as gambling services are concerned, we note that among the three jurisdictions concerned, gambling providers licensed in Canada are more likely to benefit of the services liberalization set out in NAFTA, since in the other two countries, national legislation is more restrictive insofar (online) games of chance are concerned[884].

III.6.Case-law: the Thunderbird Gaming Award

The NAFTA provisions were invoked in 2002 in a case concerning a Canadian gambling company which supplied gaming services from a commercial presence in Mexico[885]. The arbitral award has resulted in a dismissal of all allegations against the respondent government and was appealed by the gambling company in 2006 before a US district court, which rendered its judgment in February 2007.

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[883] See Articles1113 and 1211.
[884] See Chapter IV.1 of the Introduction.
[885] Arbitral Award in the matter of a NAFTA arbitration under the UNCITRAL Arbitration Rules between International Thunderbird Gaming Corporation, Claimant, and The United Mexican States, Respondent, before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement, Washington D.C., January 26, 2006 (hereinafter the Thunderbird Gaming Award). For a comment, see SAUVANT Karl P., Appeals Mechanism in International Investment Disputes, Oxford Univeristy Press, 2008, p.257 et.seq.

III.6.1.Facts of the case

Thunderbird was a publicly held Canadian corporation, with its principal offices in San Diego, California, engaged in the business of operating gaming facilities. In the period late 1999 to early 2000, Thunderbird initiated investigations concerning potential "skill machine" opportunities in Mexico.

The Mexican Federal Law of Games and Sweepstakes[886] prohibited gambling and luck related games within the Mexican territory.

In July 2000, Thunderbird decided to request an official opinion concerning the legality of its proposed gaming operations and if the response were favourable, Thunderbird would proceed with the opening and operation of its "skill machine" facilities in Mexico[887]. By letter dated 15 August 2000, the Director General de Gobierno de la Secretaria de Gobernación (SEGOB) replied that it is "not able to prohibit" the use of recreational skill gaming machines[888].

However, in 2001 the Mexican authorities issued an administrative resolution, declaring that such machines were prohibited gambling equipment under the law and ordering the official closure of these facilities.

Several lawsuits were pursued in front of Mexican courts, and in 2002 Thunderbird initiated NAFTA arbitration proceedings under the UNCITRAL Arbitration Rules. The award was issued in January 2006.

III.6.2.Main issues and argumentation

One essential issue in this matter was whether an investment in certain gaming operations based on assurances given by Mexican authorities could give rise to a NAFTA claim when the

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[886] Ley Federal de Juegos y Sorteos, Diario Oficial de la Federación of 31 December 1947.
[887] "The nature of video game machines for games of skills and ability is not games of chance or games with bets, wagers or drawings, since, in the operation of these machines, the player seeks entertainment and is playing with our machines assuming an active position where his intelligence, his willpower, his experience and his skills to optimally answer to specific stimulus with the object of finding a combination, effect or boast on the machine, intervene; which can only be possible with ability, experience and control over the machine, and all of this is for the purpose of entertainment and enjoyment, and at the time, the player can receive points that he can trade for a prize as a reward for the skills achieved and in no way as the result of chance" –Thunderbird Gaming Award, p.13.
[888] Thunderbird Gaming Award, p.16.

government subsequently refused to permit such operations; the elucidation of national treatment in this case is also important.

But first, a jurisdictional question arose over whether Thunderbird, a Canadian company with principal offices in California, could bring the claim based on its minority shareholding of various Mexican entities that operated the gaming facilities. If Thunderbird as a foreign investor did not control these Mexican entities, then the NAFTA panel lacked the authority to resolve these claims against Mexico. The panel ruled that minority shareholders that held *de facto* control over Mexican entities was sufficient[889].

Second, on the doctrine of "legitimate expectations", the panel summarized the requirements under international law and concluded that Thunderbird could not successfully invoke this doctrine[890]. In this point, it is worth mentioning a dissenting opinion of the arbitrator appointed by Thunderbird, who undertook a fuller discussion of the legitimate expectations doctrine under international law[891].

Governments' wide scope of regulation insofar the gambling industry is concerned was reaffirmed, since this regulation reflects national views on public morals: "*The role of Chapter Eleven in this case is therefore to measure the conduct of Mexico towards Thunderbird against the international law standards set up by Chapter Eleven of the NAFTA. Mexico has in this context a wide regulatory "space" for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion*

[889] "The question arises whether 'control' must be established in the legal sense, or whether de facto control can suffice.... The term 'control' is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or 'de facto' control is ... sufficient for the purposes of Article 1117 of NAFTA." (Thunderbird Gaming Award, paras. 105-06).

[890] "Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party of honour those expectations could cause the investor (or investment) to suffer damages. The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA and the circumstances of the case. Whatever standard is applied in the present case however--be it the broadest or the narrowest--the Tribunal does not find that the Oficio generated a legitimate expectation upon which EDM could reasonably rely in operating its machines in Mexico" (Thunderbird Gaming Award, paras. 147-48).

[891] Thunderbird Gaming Award, Dissenting opinion by arbitrator Thomas Wälde, available at http://www.naftaclaims.com/disputes_mexico_itgc.htm.

with respect to how it carries out such policies by regulation and administrative conduct. The international law disciplines of Articles 1102, 1105 and 1110 in particular only assess whether Mexican regulatory and administrative conduct breach these specific disciplines. The perspective is of an international law obligation examining national conduct as a "fact."[892]

The Tribunal further found no violation of national treatment because the Mexican government actively pursued both non-Mexican and Mexican companies for violation of the gambling laws[893]. We note however the doubts expressed in the dissenting opinion pointing out that Thunderbird's main competitor on the Mexican market continued to operate successfully with procedural appeals ("*amparos*") before Mexican courts, and appears to have been able to resist better to the government's attempts in enforcing its measures against it, as compared to the more effective enforcement against Thunderbird.

The Tribunal also determined that there was no violation of minimum standards of treatment under NAFTA[894]. As a result of these findings, Thunderbird was not entitled to damages and costs were awarded to Mexico.

III.6.3.The Appeal against the Thunderbird Gaming Award

The variety of mechanisms for dispute resolution embodied within NAFTA constitutes a unique "package" approach to the need for sound dispute settlement mechanisms in matters involving regional commerce and investment. NAFTA and its two "parallel" agreements on labor and on the environment incorporate a broad and sometimes confusing variety of

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[892] Thunderbird Gaming Award, para 127.

[893] "In the Tribunal's view, Thunderbird has not sufficiently established – not even on a prima facie basis – that the EDM investments were treated, in like circumstances, worse than those of Mexican nationals (or any other nationals for that matter)". […] It thus appears from the facts of the case that SEGOB's policy and actions in enforcing the Ley Federal de Juegos y Sorteos were directed at both Mexican and non-Mexican gambling operations and that they were overall consistent. Accordingly, the Tribunal finds that Thunderbird has not established a breach the "National Treatment" standard under Article 1102 of the NAFTA". – Thunderbird Gaming Award, paras 178 and 182.

[894] "[…] the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards". For the Tribunal, the standards of due process were respected (particularly the opportunity to be heard and to present evidence at the administrative hearings), the manner in which SEGOB proceeded for the official closure of gaming premises was not arbitrary, and the SEGOB proceedings were subject to judicial review before the Mexican courts – Thunderbird Gaming Award, paras 195 – 201.

mechanisms for resolving the disputes that relate to the interpretation and application of certain NAFTA provisions in specific situations[895].

In this complex procedural context, the *Thunderbird Gaming Award* was appealed before a district court in the United States.

On a concrete level, this judgment in appeal does not bring supplementary arguments to our discussion on the liberalization of gambling services under NAFTA — judicial review of an arbitration award being extremely limited; however, we will mention it because, on a loftier level, it is a procedurally rare decision — in which a domestic court entertained a motion to review, and possibly vacate, an international arbitral tribunal's investment treaty award[896].

Thunderbird's primary argument was that the NAFTA panel acted in "manifest disregard of the law" by announcing a particular standard for burdens of proof and then failing to apply that standard. Secondly, Thunderbird alleged that the tribunal exceeded its authority by determining that Thunderbird's machines were illegal under Mexican law (however, the tribunal made no such determination; indeed, it was careful to make this point clear[897]). Finally, Thunderbird challenged the award of costs and fees.

The court concluded that the tribunal's award was not rendered in manifest disregard of the law. Thunderbird's petition was therefore denied.

[895] See GANTZ David A., The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance, 2006, available at http://ssrn.com/abstract=918542.
[896] This demonstrates how extraordinarily important it is to select the right seat, or locale, for an arbitration. For a discussion on this topic, see SCHNABL Marco E., NELSON Timothy G., Nothing Left To Chance: Thunderbird v. Mexico And The Power Of A Domestic U.S. Court To Review A NAFTA Investment Arbitration Award, 2007, in MEALEY'S International Arbitration Report, Vol.22, March 2007.
[897] See para. 125-127 of the Thunderbird Gaming Award.

IV.TRADE IN GAMBLING SERVICES UNDER DR - CAFTA

IV.1.Introductory elements

The United States-Dominican Republic-Central America Free Trade Agreement (DR - CAFTA) is a recent agreement in a series of FTAs that the United States has entered into with its neighbors in the western hemisphere. Originally, the agreement encompassed the United States and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, and was called CAFTA. In 2004, the Dominican Republic joined the negotiations, and the agreement was renamed DR - CAFTA.

The goal of the agreement is the creation of a free trade area, similar to the North American Free Trade Agreement (NAFTA). Like with the NAFTA, the DR - CAFTA approach is “top down”. i.e. all services are covered by its rules unless a country takes action affirmatively to exclude specific services.

DR-CAFTA includes commitments which apply to a long list of service sectors (exceptions are included in country-specific negative lists), including financial services, telecommunications, professional services, distribution, tourism, express delivery, computer and related services, audiovisual and entertainment, energy, transport, construction and engineering, advertising and environmental services.

It should be noted that DR - CAFTA has incorporated an important sectoral “inclusion”: that of electronic commerce. This is an important development since the treatment of electronic commerce has not been yet resolved at the multilateral level or other regional levels[898].

As one author noted[899], the DR-CAFTA is controversial. Supporters see it as part of a policy foundation supportive of both improved interregional trade, as well as long-term social,

[898] For a discussion on e-commerce services (especially in the WTO framework), see WUNSCH-VINCENT Sacha, The WTO, the Internet and Trade in Digital Products, Hart Publishing, 2006.
[899] See HORNBECK J. F., The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), CRS Report for Congress, 2005, available at http://fpc.state.gov/documents/organization/40852.pdf

political, and economic development[900]. Concerns remain in all participating countries[901], however, over the negative effects on certain import-competing sectors and their workers. Labor rights issues in some DR-CAFTA countries have caused organized labor to come out against the agreement, despite arguments that trade contributes to long-term economic growth, poverty reduction, and development. All these economic issues, however, are necessarily balanced against the politics of trade, which makes the outcome of the DR-CAFTA uncertain.

IV.2.Modes of Supply

In DR-CAFTA, the chapter on Cross Border Trade in Services covers Modes 1 and 2 of services trade, namely cross-border services transactions and consumption abroad (when the service consumer travels to another country to purchase the service). The supply of services through investment (which includes Mode 3, or commercial presence), is covered in Chapter Ten on Investment[902], while Mode 4, or the Temporary Entry for Business Persons, is covered in Chapter Fourteen.

IV.3.Market Access and National Treatment

Concerning *market access,* Article11.4 sets out four types of quantitative measures which Parties are not allowed to maintain against service suppliers from other Parties, as well as a specific type of legal measure which Parties are not allowed to use to restrict service suppliers from other Parties. These five measures are the same as those found in Article XVI of the WTO GATS.

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[900] See the series of studies published in GONZALES Anabel (Editor), Estudios Jurídicos Sobre el TLC entre la republica Dominicana, Centroamérica y Estados Unidos, Litografía e Imprenta Lil, San José, 2005.
[901] For a discussion on the disequilibrium of CAFTA costs and benefits for Central American countries, see for example VARGAS Oscar-René, Qué es el CAFTA? Un tratado entre desiguales, 2nd ed., CEREN, 2004, TREJOS PARIS María Eugenia, FERNANDEZ-ARIAS Mario (Editors), Tratado de Libre Comercio Estados Unidos-Centroamérica-Republica Dominicana. Estrategia de Tierra Arrasada, EUNED, 2006.
[902] DR-CAFTA grants reciprocal non-discriminatory rights to investors from signatory parties to establish, acquire and operate investments on an equal footing with local investors, unless specifically stated otherwise. See World Bank, Central America Department and Office of the Chief Economist Latin America and Caribbean Region, DR-CAFTA: Challenges and Opportunities for Central America, available at www.worldbank.org.

Insofar as *national treatment* is concerned, Article11.2 sets out the requirement to accord service suppliers of the other Party treatment "no less favorable than it accords, in like circumstances, to its own service suppliers". This covers treatment of service suppliers both at the time that they enter the market as well as after they have entered within a national territory. Unlike the WTO General Agreement on Trade in Services (GATS) this obligation is of generalized application and unconditional.

IV.4.General Exceptions

Paragraph 2 of Article 21.1 incorporates *mutatis mutandi* GATS Article XIV, including its footnotes, for purposes of the respective chapters related to trade in services, telecommunications and electronic commerce. This means that 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 the above-mentioned chapters related to services shall be construed to prevent a Party from adopting or enforcing the kinds of measures enumerated in GATS Article XIV.

IV.5.Gambling Services in the DR - CAFTA Framework

Because of the "top-down" approach undertaken by DR – CAFTA, all services are covered by its rules unless a country affirmatively takes action to exclude specific services.

Such explicit action[903] was taken by the US and Costa Rica in a Side Letter to DR - CAFTA, which specifically excluded gambling services from the scope of Chapters 10 and 11: "*Nothing in Chapter Ten (Investment) or Eleven (Cross-Border Trade in Services) prevents the United States or Costa Rica from adopting, maintaining, or enforcing any measure*

[903] For a discussion on the legal qualification of such side letter (as a part of CAFTA, as context of CAFTA in the sense of the Vienna Convention, as a sole executive agreement or as a bilateral agreement), see ROMERO-PEREZ Jorge Enrique, Tratado de Libre Comercio. Estados Unidos-Centroamérica-Republica Dominicana, 2nd ed., Instituto de Investigaciones Juridicas, Universidad de Costa Rica, 2006, pp.291-297.

consistent with the Agreement relating to sportsbooks or other gambling activities within their respective national territories"[904].

With respect to this specific bilateral exclusion of games of chance from the scope of Chapters 10 and 11, several explanations may be envisaged. First, in relation to Mode 3, we note that in 2003, some 43% of the US foreign direct investment in DR-CAFTA countries went to Costa Rica[905]. Second, in relation to Mode 1, we note that Costa Rica is a highly used venue for Internet gambling – it was sometimes called the "new capital for Internet gambling"[906]. Before 2003, when a law regulating Internet gambling was passed, Costa Rica's Supreme Court had ruled that gambling does not take place in Costa Rica if no bets are accepted from locals and if the company's merchant account is in another country. Therefore, as long as Costa Ricans could not connect to gamble (this could be accomplished by firewalls/technical filters), there was no gambling presence or gambling activity, and on-line casinos were registered as technology corporations, and not as on-line casinos[907].

No other explicit exclusion of gambling services was listed in DR - CAFTA in respect to the other Caribbean countries; therefore, subject to the national regulation and situation of gambling services in those countries, a dispute related to cross-border gambling – Mode 1, or to direct investment – Mode 3 (similar to the *Thunderbird Gaming* case under NAFTA) could rise under the provisions of DR - CAFTA and could be judged following a procedure similar to that provided in NAFTA[908].

[904] US – Costa Rica Side Letter to the CAFTA-DR of 28 May 2004.
[905] See HORNBECK J. F., The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), supra, p.22.
[906] See Costa Rica: The Internet's Las Vegas news at the CNBC Evening News, 7 April 2006, available at http://www.cbsnews.com/stories/2006/04/07/eveningnews/main1481934.shtml.
[907] See Internet Gambling report VII, p.580.
[908] See Part One, Chapter I.5.

V.TRADE IN GAMBLING SERVICES UNDER MERCOSUR

V.1.Introductory Elements

The Mercado Común del Sur (MERCOSUR) was founded in 1991 by Brazil, Argentina, Uruguay and Paraguay, by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto[909]. Its purpose is to promote free trade and the fluid movement of goods, people, and currency[910].

In December 2004, MERCOSUR signed a cooperation agreement with the Andean Community trade bloc (CAN) and they published a joint letter of intention for future negotiations towards integrating all of South America[911]. The prospect of increased political integration within the organization is still uncertain[912].

According to the World Bank, the bloc comprises a population of more than 263 million people, and the combined Gross Domestic Product of the member nations is in excess of 2.42 trillion dollars a year, making MERCOSUR the fourth largest economy in the world after the EU, NAFTA and Japan.

MERCOSUR established a program of gradual, automatic and across-the-board elimination of import duties between June 1991 and December 1994. Most tariffs were dismantled according to a set timetable, and since 1995 most intra-regional trade faced zero duties. A common

[909] For a history of MERCOSUR, see LIMA NEVES Alessandra de, Le Marché commun du Cône Sud, 2003, available at http://www.unites.uqam.ca/gric/pdf/03-MERCOSUR.pdf.
[910] For an analysis of the outcomes, see OLIVEIRA Júnior Márcio de, Uma Análise Da Liberalização Do Comércio Internacional De Serviços No MERCOSUL, IPEA 2000, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=234631.
[911] For a review of MERCOSUR agreements with third countries, see UNCTAD secretariat note, Regionalism and South-South cooperation: The case of MERCOSUR and India, TD(XI)/BP/11, 2004.
[912] For a detailed analysis of the relations between MERCOSUR and the European Union, see ed. by DIAZ LABRANO Roberto Ruiz, MERCOSUR – Union Europea, Intercontinental Editora, Asuncion, 2001, GUILLERMO ARNAUD Vincente, MERCOSUR, Union Europea, NAFTA y Los Procesos de Integracion Regional, 2nd ed., Abeledo-Perrot, Buenos Aires,1999.

external tariff (CET) structure was established in January 1995, and it applies to 85 percent of total trade[913].

V.2.Services in the MERCOSUR Framework

The Treaty of Asunción provides for the free movement of services[914] but contains no operative provisions. These are found in the Montevideo protocol, which was signed on 15 December 1997[915].

This Protocol follows a GATS-Plus approach. The Members' intend is to liberalise services trade towards achieving commitments beyond their commitments under GATS. Beyond this, GATS rules are largely reproduced by the Protocol.

The Protocol incorporates the four modes of supply laid down in Article I of the GATS. The Members specify in a list specific commitments sectors, sub-sectors, and activities in regard to which it will assume commitments and, for each mode of corresponding provision, indicate terms, limits, and conditions for market access and national treatment[916].

The Protocol rules apply to all measures, which include any law, regulation, procedure, requirement or practice[917], and they cover all services with a few exceptions (such as services provided in the exercise of governmental authority[918]). There are special rules applying to certain sectors of the economy, such as financial services and land, water and air transport services.

[913] BAER Werner, CAVALCANTI Tiago, SILVA Peri, Economic Integration without Policy Coordination: The Case of MERCOSUR, 2001, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283461.
[914] Article I provides: "Este Mercado Común implica: La libre circulación de bienes, servicios y factores productivos entre los países […]".
[915] For a detailed analysis of the free movement of services in MERCOSUR, see ESTOUP Luis Alejandro, FERNANDEZ REYES Jorge (Editors), Derecho Vigente del MERCOSUR, La Ley, Tucuman, 2001.
[916] Article VII:1.
[917] Article II:1 and XVIII:1(a).
[918] Article II:3 (b).

V.3.Market Access and National Treatment

Under the Protocol, foreign services and service suppliers are to be treated in accordance with the Members' specific commitments. Like in the case of the GATS requirements under *market access*, Members must not maintain or adopt measures in regard to quantitative restrictions, prohibitions or restrictions on foreign capital investment, including mandatory local equity, or the requirement of a particular corporate form; nationality requirements are also covered[919].

Concerning *national treatment*, each Member State shall grant to the services and service providers of any other Member State with regard to all measures that affect the provision of services, a treatment no less favorable than that granted to its own similar services or similar service providers[920].

V.4.General Exceptions

Article XIII of the Protocol follows the GATS Article XIV, providing that, with the reservation that measures listed below not be applied in a way constituting a form of arbitrary or unjustifiable discrimination when similar conditions prevail between countries, or a hidden restriction to trade in services, no term of the present Protocol shall be interpreted as impeding a Member State from adopting or applying measures necessary, *inter alia*, to protect morals or to maintain public order, to protect the lives and health of people and fauna or to preserve flora, or to assure the observance of the law and of regulations that are not incompatible with the terms of the Protocol. Also, the security exception provided in Article XIV of the Protocol is identical to that stated in GATS Article XIV *bis*.

V.5.Gambling in the MERCOSUR Framework

Several Members have mentioned gambling services in their schedules of commitments under the Protocol, and made clear that such services are to be excluded from the scope of liberalization.

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[919] For a detailed presentation, see RAWORTH Philip, Trade in Services, supra, pp.146-162.
[920] Article V.

For instance, Argentina has undoubtedly stated that games of chance provided under Modes 1, 2 and 3 are reserved to the State and to the provinces. Also, Paraguay and Brazil have made commitments under "Sporting services", but excluded CPC 9649 (other recreational services, which includes 96492 - games of chance) from their concessions[921].

To date, the other Members did not specifically exclude such services from their commitments. Therefore, if a dispute arises concerning a Member's commitments with respect to "sporting services" or "other entertainment services", the MERCOSUR adjudicating bodies would be confronted to a challenge similar to that of their WTO counterparts in the *US Gambling* case, especially with respect to the interpretation of a Member's schedule, the qualification of the trade-restrictive measure and its relevance vis-à-vis market access and national treatment obligations, and the potential exemption of such restrictive measures for public order or public morals imperatives[922].

[921] See Argentina, Paraguay and Brazil schedules of specific commitments revised in the 6th round of concessions negotiations in 2006, available at www.mercosur.int.
[922] We refer the reader to our analysis of the WTO *US Gambling* case in Part One.

VI.TRADE OF GAMBLING SERVICES UNDER ASEAN FTA

VI.1.Introductory elements

The Association of Southeast Asian Nations or ASEAN was established on 8 August 1967 in Bangkok by the five original Member Countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand[923]. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999.

The ASEAN region has a population of about 500 million, a total area of 4.5 million square kilometers, a combined gross domestic product of almost US$ 700 billion, and a total trade of about US$ 850 billion[924].

The services sector make up a significant proportion of the economies of the ASEAN Members. In 1998 already it was more than 60% of Singapore's economy; close to half for the Philippines and Thailand; and a little more than 40% for most other ASEAN countries[925].

At the Fourth ASEAN Summit in Singapore in January 1992, Members initiated the ASEAN Free Trade Area, which laid out a comprehensive program of regional tariff reduction, to be carried out in phases. ASEAN later signed framework agreements for the intra-regional liberalization of trade in services, and for regional intellectual property rights cooperation. At the Fifth ASEAN Summit in Bangkok, Thailand on 15 December 1995, the ASEAN Leaders agreed that ASEAN should initiate new areas of cooperation in services. As a result, the ASEAN Framework Agreement on Services (AFAS) was signed on 15 December 1995 by the Economic Ministers.

[923] For a detailed analysis of ASEAN aspects before the establishment of the ASEAN Free Trade Area, see PFENNING Werner, SUH Mark M.B. (Editors), Aspects of ASEAN, Weltforum Verlag, 1984.
[924] According to www.aseansec.org.
[925] ASEAN Secretariat, AFTA Reader Volume V, The Sixth ASEAN Summit and the Acceleration of AFTA, 1998, p. 73

VI.2.Services in the ASEAN Framework

Under the agreement, ASEAN countries will negotiate intra-regional services liberalization in a number of sectors, including telecommunications, tourism, financial services, construction, and maritime transport[926].

The objective of this Agreement is to liberalize services trade towards achieving commitments beyond Member Countries' commitments under GATS (the *GATS-Plus* approach)[927]. Therefore, ASEAN Member Countries shall schedule more advantageous commitments under AFAS than their GATS commitments, or offer new services sectors/sub-sectors that have not been scheduled under GATS[928].

ASEAN integration in services is generally carried out through liberalisation processes negotiated under the Coordinating Committee on Services[929]. There are currently six sectoral working groups under the CCS: business services, construction, healthcare, maritime transport, telecommunication and IT services, and tourism sectoral working groups. There is also one committee on education services. Despite the grouping, ASEAN Member Countries could also schedule liberalisation commitments in other services sectors.

The universally recognised and adopted classification of services sectors and sub-sectors is the one based on WTO Secretariat's Services Sectoral Classification List. Each sector contained in this list is identified by a corresponding Central Product Classification (CPC) number.

The ASEAN Framework Agreement on Services incorporates the four modes of supply laid down in Article I of the GATS.

[926] See ASEAN Integration in Services, Jakarta, ASEAN Secretariat, April 2007.
[927] Article IV:1.
[928] For an analysis of the current trade in services achievements under AFAS, see THANH Vo Tri, BARTLETT Paul, Ten Years of ASEAN Framework Agreement on Services (AFAS): An Assessment, REPSF Project No. 05/004, 2006, available at www.aseansec.org.
[929] See KARTADJOEMENA H. S., Reforming Trade in Services Negotiations under AFAS, REPSF Project 02/003, available at www.aseansec.org.

VI.3.Market Access and National Treatment

The Agreement provides the broad guidelines for ASEAN Member Countries to progressively improve market access and ensure equal national treatment for services suppliers among ASEAN countries.

In terms of *access to the market* of a Member, the Agreement follows the essence of Article XVI GATS; services and services suppliers of any other Member must be accorded the same treatment specified in its schedule of commitments.

Regarding *national treatment*, the Agreements incorporates the approach of Article XVII GATS; services and services suppliers of a Member must be permitted access to the market of another Member on the same terms as those accorded to domestic services or services providers.

VI.4.General Exceptions

By way of Article XIV, the Agreement incorporates the GATS approach as to general exceptions to its rules: “The terms and definitions and other provisions of the GATS shall be referred to and applied to matters arising under this Framework Agreement for which no specific provision has been made under it”. Therefore, the approach discussed under Article XIV GATS is fully applicable here.

VI.5.Gambling Services under the ASEAN Framework

Gambling services do not appear identified as such in the ASEAN Members’ schedules of commitments under the Agreement. However, several Members have undertaken commitments under the “Recreational, cultural and sporting services” sub-sector, which could raise a few questions as to the inclusion of concessions relating to games of chance services in their commitments (similarly to those which were brought up in the WTO *US Gambling* case).

For instance, Vietnam has made a commitment for “electronic games businesses”, where, in its market access column, it inscribed “unbound” as to Mode 1, “none” as to Mode 2, and “only through business cooperation contract or joint venture with Vietnamese partners who are specifically authorized to provide these services” under Mode 3.

As no specific dispute settlement mechanism has been established for the purposes of this Agreement, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism applies to possible disputes arising under the Agreement (following the GATS model of a panel – Appellate Body approach).

Therefore, in case a dispute arises concerning a Member’s commitments with respect to “sporting services” or “other entertainment services”, the ASEAN adjudicating bodies would be confronted to a similar type of challenge as the WTO adjudicating bodies in the *US Gambling* case, especially with respect to the interpretation of a Member’s schedule, the qualification of the trade-restrictive measure and its relevance vis-à-vis market access and national treatment obligations, and the potential exemption of such restrictive measures for public order or public morals imperatives[930].

[930] We refer the reader to our analysis of the WTO US Gambling case in Part I.

CONCLUSION AND CLOSING REMARKS

The purpose of this research is to assess the current regulation of international trade in gambling services.

Departing from different national definitions, “gambling” represents, in this study, all services which involve wagering a stake with monetary value in uncertain events driven (at least partially) by chance, including lotteries, casino and betting transactions.

“International trade” of such services implies that the provider, the beneficiary or the service itself must cross a national border. Therefore, notwithstanding a brief evocation of selected national legal frameworks on five continents, this research has striven to focus on international regulations governing – principally or incidentally – provision of such services. In this context, Internet-provided gambling services were granted special attention.

To this purpose, this study has been constructed in an Introduction and two main parts.

The *Introduction* lays the basic frame by exposing the historical, economic and legal background surrounding games of chance in numerous countries on the five continents, which are essentially divided into “gambling – restrictive” or “gambling – liberal” jurisdictions. It also gives a definition of “gambling” services in this study, and it endeavours to classify such services in different categories (lotteries, betting, casino-type gambling, other types including media gambling and sales promotion services, examined from a “land-based” or “remote” perspective).

The first part (*Global Trade in Gambling Services*) is dedicated to international instruments regulating trade in services with a global reach.

It is further divided in two main subparts, as unequal in importance as the instruments they analyze. The first relates to the prominent General Agreement on Trade in Services (GATS), signed by 153 countries under the auspices of the World Trade Organization. The second, more modest, examines the services liberalization framework established by the Organization for Economic Co-operation and Development (OECD) for its 30 member countries.

The second part (*Regional Trade in Gambling Services*) scrutinizes gambling trade with a regional vocation. To this purpose, it analyzes the framework of the most successful preferential trade agreements to date, which have created a closer cooperation with respect to services between regional partners.

This part is thus further divided in subparts dedicated to the following integrated trade areas: the European Union (EU), the European Free Trade Agreement (EFTA), the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (DR-CAFTA), the Mercado Comun del Sur (MERCOSUR), and the Association of South East Asian Nations Free Trade Area (ASEAN).

The driving concept of the entire analysis, whether global or regional, was to examine these international trade regulations in services in the light of the very special nature of gambling. To this purpose, special attention was given to the regulations, policies, initiatives, practices and jurisprudence of each studied area.

The conclusions drawn from these analyses – presented when needed as intermediary conclusions at the end of relevant chapters – can be synthesized as follows:

Firstly, all the national and international legislation considered in this study acknowledges the *special nature* of gambling activities.

In most countries and religions, gambling bears particular moral and societal concerns, which generally place it at the margin of regulatory preoccupations and economic reason. The heavy taxation of gambling services also suggests that, even if games of chance have gradually slid from vice to leisure in contemporary perception, a residual mark of immorality still burdens such activities.

Regulating gambling is not thus similar to regulating the transport or telecommunication sectors. As a consequence, gambling services are not only ignored by the international efforts tending to regulate certain services sectors by special agreements (such as postal services, telecommunication etc.) but they are often completely neglected even in general trade agreements.

Secondly, the special nature of these activities leads the overwhelming majority of states on the five continents to seek to *retain public control* over gambling services. In the lottery sector, for instance, most operators are state-owned or state-controlled. Also, even in the more "liberal" casino sector, public authorities preserve a strong grip or control over the running of the operations. Nevertheless, a few states are, for different reasons, more tolerant to liberalized gambling and seek less public hold over such activities.

Thirdly, all classical trade liberalization instruments allow the states to maintain a *statu quo* on gambling services and to oppose any liberalization of their gambling market, if they wish. Oversights, such as the one in the dispute opposing Antigua and Barbuda to the United States before the WTO adjudicating bodies, may always be corrected through adjustments in the reciprocal concessions granted during negotiations.

Fourthly, it is apparent that the only dynamic which can surpass this quasi-consensus of states with respect to gambling services is the one permitted by the *unique nature of the European Union* edifice. *Evolving* in essence by the will of its founders, the European Union construction is, in addition, vested with *autonomous authority* and is less tributary to the command of its Member States. In the perspective of the ongoing initiatives in this field – one led by the European Commission in the sense of liberalization, the other adopted essentially by the European Parliament in the opposite sense, and in the light of the European Court of Justice jurisprudence – it is very probable that the current regulation of cross-border gambling services in this particular region will continue to develop, although singularly for the moment, in the general landscape of international trade regulations in services.

LIST OF CASES

Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985 85

Appellate Body report, EC – Poultry, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031 85

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Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005 87

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Appellate Body report, Korea – Beef, Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5 85

Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII,2755 119

Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3 119

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ICJ Case United States Nationals in Morocco, ICJ Reports 1951, 189. 142
ICJ Fisheries Jurisdiction Case (Spain v. Canada), 4 December 1998, ICJ Reports (1998) 432.................. 86
ICJ Namibia (Legal Consequences) Advisory Opinion, ICJ Reports 1971, 31... 146
Panel Report, Canada – Certain Measures Affecting the Automotive Industry, adopted 19 June 2000, WT/DS139, WT/DS142 152
Panel Report, Chile – Taxes on Alcoholic Beverages, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303 153
Panel Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas, adopted 25 September 1997, WT/DS27 152
Panel report, Korea – Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541.. 85
Panel Report, Korea – Taxes on Alcoholic Beverages, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44 153
Panel Report, Mexico – Measures Affecting Telecommunications Services, WT/DS204/R, adopted on 1 June 2004.. 88
Panel Report, United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report,WTDS244/AB/R, DSR 2004:I, 85.. 147

GENERAL BIBLIOGRAPHY

ABBOTT Frederick M., The North American Integration Regime and Its Implications for the World Trading System, in The EU, the WTO and the NAFTA. Towards a Common Law of International Trade? ed. by J.H.H. WEILER, Oxford University Press, 2000... 245

Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement drawn up by the Economic Committee of the League of Nations to serve as a Basis for an International Diplomatic Conference, League of Nations Doc. C.E.1.22. 1927 II.13. pp. 10, 15 (1927)... 106

ABU-AKEEL A.K., The MFN as it Applies to Service Trade – New Problems for an Old Concept, in Journal of World Trade 33(4):103-129, 1999 141

ADENAS Mads, ROTH Wulf-Henning, Services and Free Movement in EU Law, Oxford University Press, 2002 165

ALI Abdullah Yusuf, “The Holy Qur-an, Text, Translation and Commentary”, Lahore, Cairo and Riyadh, 1938 1

ALMEIDA PRADO Mauricio, Le hardship dans le droit du commerce international, Bruylant Ed., 2003138

ARISTOTLE, Nicomachaean Ethics... 116

ARKELL, Julian, The GATS—Its Innovative Approach to Trade Rules in the New Economy, Address to the 12th Annual International Conference of the European Network of Economic and Spatial Service Research, Manchester, England, September 26–27, 2002 144

ASEAN Secretariat, AFTA Reader Volume V, The Sixth ASEAN Summit and the Acceleration of AFTA, 1998 264

AWAD ALDEEB ABU-SAHLIEH Sami, "Le Coran. Texte arabe et traduction française par ordre chronologique selon l'Azhar", Ed. de l'Aire, 2008... 1

BAER Werner, CAVALCANTI Tiago, SILVA Peri, Economic Integration without Policy Coordination: The Case of MERCOSUR, 2001, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283461 261

BAINES Edward, History of the Wars of the French Revolution, from the breaking out of the wars in 1792 to the restoration of general peace in 1815, volume II, Longman, Rees, Orme and Brown, 1818 117

BECKWITH Martha, "Hawaiian Mythology", Yale University Press, 1940.. 13

BENTHAM Jeremy, The principles of Morals and Legislation, republished by Prometheus Books ed., New York, 1988 116

BHAGWATI Jagdish & SRINIVASAN T. N., Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?, in Bagwati and Hudec (eds.), Fair Trade and Harmonization: Prerequisites of Free Trade?, Cambridge. M.I.T. Press, 1996 121

BIEBER Roland, MAIANI Francisco, Précis de droit européen, Staempfli Ed., Bern, 2004 163
BLANPAIN Roger (Editor), Freedom of Services in the European Union. Labour and Social Security Law: The Bolkestein Initiative, Kluwer Law International, 2006 165
BOAS Franz, CRANE T. Frederick, DORSEY J. Owen; NEWELL W.W., General Editor, Journal of American Folklore, Vol II, No. V, April-June, 1889 1
BOS Maarten, Theory and Practice of Treaty Interpretation, in DAVIDSON Scott (Editor), The Law of Treaties, Burlington, VT: Ashgate/Dartmouth, 2004... 132
BROBERG Morten, HOLST-CHRISTENSEN Nina, Free Movement in the European Union. Cases, Commentaries and Questions, DJØF Publishing, Copenhagen, 2004 165
BÜHLER George, "Sacred Books of the East", Volume 25, Oxford University Press, 1886 1
CARTOU Louis, CLERGERIE Jean-Louis, GRUBER Annie, RAMBAUD Patrick, L’Union européenne, 6e éd., Dalloz, 2006 163
CHARNOVITZ Steve, The Moral Exception in Trade Policy, 38 Virginia Journal of International Law (1998) 689... 121
CHOI Won-Mog, Like Products in International Trade Law. Towards a Consistent GATT / WTO Jurisprudence, Oxford Univ. Press, 2003 141
CLERC Evelyne, La gestion semi-privée de l'Internet, in C.-A. Morand (Editor), Le droit saisi par la mondialisation, Bruylant/Helbing & Lichtenhahn, Bruxelles, 2001... 21
CLERC Evelyne, Le service public en droit de l’OMC et de l’Union européenne: à la limite de l’Etat et du marché, in TANQUEREL T., BELLANGER F (Editors), Le service public, Schulthess, Zürich, 2006 45
COHEN Michael G., "Pocket Ace's: A Comprehensive Look At The Legality Of Off-Shore Internet Gambling Within The USA" (2005, May)... 65
CONDON Bradly J., The Existence of a Duty to Negotiate in the General Exceptions of GATT and GATS, 2005, available at SSRN: http://ssrn.com/abstract=704749.. 108
Copenhagen Economics, Economic Assessment of the Barriers to the Internal market for Services(2004), report presented to the European Commission in, available at ec.europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf 165
CORTEN Olivier, KLEIN Pierre (editors), Les conventions de Vienne sur le droit des traités, Bruylant, Bruxelles 2006 137
COSSY Mireille, Determining "likeness" under the GATS: Squaring the circle?, WTO Staff Working Paper ERSD-2006-08, September 2006, available at http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf... 139
CRAWFORD Jo-Ann, FIORENTINO Roberto, ‘The Changing Landscape of Regional Trade Agreements’, WTO Discussion Paper No 8 (2005) 160

de BROUWER Anne-Marie, GATT Article XX's Environmental Exceptions Explored: Is There Room for National Policies?, in Concerns Regarding Animals, Anton Vedder ed., 2003 119

DEAK Francisc, Tratat de drept civil. Contracte Speciale, Universul Juridic, Bucharest, 2007 3

DELIMATSIS Panagiotis, MOLINUEVO Martin, Article XVI GATS, in WOLFRUM Rüdiger, STOLL Peter-Tobias, FEINÄUGLE Clemens, WTO – Trade in Services, Martinus Nijhoff Publishers, 2008 .. 96

DEMOSTENES, Against Aristogeiton 116

DIAZ LABRANO Roberto Ruiz, MERCOSUR – Union Europea, Intercontinental Editora, Asuncion, 2001 260

DJUVARA Mircea, Le fondement du phénomène juridique, Paris, Sirey, 1913 116

DOSTOYEVSKY Fyodor, The Gambler, 1866 162

DRAKE William J., NICOLAÏDIS Kalypso, Global electronic Commerce and the GATS: The "Millenium Round" and Beyond, in SAUVÉ Pierre., STERN Robert M. (editors), GATS 2000 – New Directions in Services Trade Liberalization, Brookings Institution, Washington DC, 2000 144

DUPUY Pierre-Marie, Droit international public, 8e éd., Dalloz, 2006 138

DUPUY Pierre-Marie, L'unité de l'ordre juridique international, Revue de Droit Comparé 297, 2002.... 117

DWORKIN Ronald, Law as Interpretation, 1982, Texas Law Review 60 116

ESTOUP Luis Alejandro, FERNANDEZ REYES Jorge (Editors), Derecho Vigente del MERCOSUR, La Ley, Tucuman, 2001 261

FEDDERSEN Christoph T., "Focusing on Substantive Law in International Economics Relations: the Public Morals of GATT's Article XX(a) and "Conventional Rules of Interpretation", 7 (1998) Minnesota Journal of Global Trade, 75 121

FINK Carsten, PTAs in Services: Friends or Foes of the Multilateral Trading System, in Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, MARCHETTI Juan. A., ROY Martin (editors), Cambridge University Press, 2008 160

FOLSOM Ralph H., NAFTA and Free Trade in the Americas, West Group, 2004 245

FOLSOM Ralph H., NAFTA in a Nutshell, West Group, 1999 245

FRANKLIN Jeffrey J., The Victorian Discourse of Gambling: Speculations on 'Middlemarch' and 'The Duke's Children, Johns Hopkins University Press, 1994 2

GALGANO Francesco, Il Contratto, CEDAM, Padova, 2007 3

GANTZ David A., The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance, 2006, available at http://ssrn.com/abstract=918542 254

GHESTIN Jacques (editeur), Traité de droit civil, L.G.D.J., Paris, 1996 3

GLICK Leslie Alan, Understanding the North American Free Trade Agreement, Kluwer Law, 1994 245

GOCO Jonell B., Non-discrimination, Likeness and Market Definition in WTO Jurisprudence, 40 Journal of World Trade Law, April 2006 ....139, 143

GONZALES Anabel (Editor), Estudios Jurídicos Sobre el TLC entre la republica Dominicana, Centroamérica y Estados Unidos, Litografía e Imprenta Lil, San José, 2005....................................... 257

GREENAWALT Kent, Conflicts of Law and Morality, Oxford Univ. Press, 1987 116

GROTIUS Hugo, De jure belli ac pacis 116

GUILLERMO ARNAUD Vincente, MERCOSUR, Union Europea, NAFTA y Los Procesos de Integracion Regional, 2nd ed., Abeledo-Perrot, Buenos Aires,1999 260

HART Herbert Lionel Adolphus, Positivism and the Separation of Law and Morals, 1958, Harvard Law Review 71 116

HATZOPOULOS Vassilis, Legal Aspects of the Internal Market for Services, in PELKMANS Jacques, HANF Dominique, CHANG Michele (Editors) The EU Internal Market in Comparative Perspective, College of Europe Studies no.9, P.I.E. Peter Lang, 2008 226

HATZOPOULOS Vassilis, Public Procurement and State Aid in National Healthcare Systems, in Mossialos, E., Permanand, G., Baeten, R. and Hervey, T. (Editors.), Health Systems Governance in Europe: the role of EU law and policy, Cambridge University Press, 2009... 189

HEGEL Georg Wilhelm Friedrich, Les principes de la philosophie du droit, 1821, translated by A. Kaan, Gallimard ed., 1940 116

HOEKMAN Bernard, MATTOO Aaditya, Services Trade and Growth, in MARCHETTI Juan. A., ROY Martin (editors), Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press, 2008 44

HORNBECK J. F., The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA), CRS Report for Congress, 2005, available at http://fpc.state.gov/documents/organization/40852.pdf.. 256

HOUSSAYE Arsène, La question des jeux – Opinion des moralistes, des journaux et des hommes politiques, Paris, 1872... 49

HOWSE Robert, "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate", 27 Columbia Journal of Environmental Law 491 (2002)................. 108

HOWSE Robert, Social and Labor Issues and the Agendas of the IMF, World Bank, WTO and OECD, 93 Am. Soc'y Int'l L. Proc. 143, 148 (2000)... 119

HOWSE Robert, The World Trade Organization and the Protection of Workers' Rights, 3 J. Small & Emerging Bus. L. 131 (1999) 119

ISAAC Guy, BLANQUET Marc, Droit général de l'Union européenne, 9e ed., Sirey, 2006 163

JACOBS Francis G., Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference, in The Law of Treaties, Ed. By Scott Davidson, 2004.. 137

JARVIS Liane M., Note, Women's Rights and the Public Morals Exception of GATT Article 20, 22 Mich. J. Int'l L. 219 (2000).......... 119

JHERING Rudolf von, Geist des römischen Rechts, 1894 116

JOHNSON Jon R., The North American Free Trade Agreement. A Comprehensive Guide, Canada Law Book Inc., 1994 245

KARTADJOEMENA H. S., Reforming Trade in Services Negotiations under AFAS, REPSF Project 02/003, available at www.aseansec.org 265

KELSEN Hans, The Pure Theory of Law, 1934 116

LENNARD Michael, "Navigating by the Stars: Interpreting the WTO Agreements", 5 Journal of International Economic Law (2002) 82

LIMA NEVES Alessandra de, Le Marché commun du Cône Sud, 2003, available at http://www.unites.uqam.ca/gric/pdf/03-MERCOSUR.pdf 260

LOPEZ- HURTADO Carlos, Note, Social Labelling and WTO Law, 5 J. Int'l Econ. L. 719 (2002) 119

Lord McNAIR, The Law of Treaties, Clarendon Press, Oxford, 1986.......... 132

MAGALLONA Merlin M., The Concept of Jus Cogens in the Vienna Convention on the Law of the Treaties, in The Law of Treaties, Ed. By Scott Davidson, 2004.......... 117

MARCHETTI Juan A. and ROY Martin, Services Liberalization in the WTO and in PTAs, in Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, MARCHETTI Juan. A., ROY Martin (editors), Cambridge University Press, 2008.......... 160

MARCHETTI Juan A., Financial Services Liberalization in the WTO and PTAs, MARCHETTI Juan A., ROY Martin (editors) Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press, 2008 45

MARCHETTI Juan A., MAVROIDIS Petros C., Walking the Tightrope between Domestic Policy and Globalisation: Market Access, Discrimination and Regulatory Intervention under the GATS, Mimeo, (2006) 100

MARWELL Jeremy C., Trade and Morality: the WTO Public Morals Exception after Gambling, 81 New York University law Review, 2006 122

MATSUSHITA Mitsuo, SCHOENBAUM Thomas, MAVROIDIS Petros, "The World Trade Organization. Law, Practice and Policy", Oxford University Press, 2006 79

MATTOO Aaditya, MFN and the GATS, in COTTIER Thomas, MAVROIDIS Petros C. (editors), Regulatory Barriers and the Principle of Non-Discrimination, Ann Arbor:University of Michigan Press, 2000 100

MATZ-LÜCK Nele, Promoting the Unity of International Law : Standard-Setting by International Tribunals, in International Law Today : New Challenges and the Need for Reform ?, ed. by KÖNIG, STOLL, RÖBEN and MATZ-LÜCK, Springer, 2008.......... 117

MAVROIDIS Petros C., "Trade in Goods", Oxford University Press, 2007 121
MAVROIDIS Petros C., “Highway XVI Re-Visited: The Road From Non-Discrimination To Market Access In GATS”, World Trade Review (2007) 52
MAVROIDIS Petros C., The General Agreement on Tariffs and Trade, Oxford University Press, 2005 . 138
McDOUGAL Myres S., The International Law Commission’s Draft Articles Upon Interpretation: Textuality Redivivus, in The Law of Treaties, Ed. By Scott Davidson, 2004 137
MILLETT, Timothy, Free Movement of Goods and Public Morality, New Law Journal 1987 126
MORGENTHAU Hans J., The Twilight of International Morality, Ethics 116
MOWER Edmund C., International Government, Boston, Heath, 1931 121
MUSSINGTON David, WILSON Peter, MOLANDER Roger, Exploring Money Laundering Vulnerabilities Through Emerging Cyberspace Technologies: A Caribbean Based Exercise. (RAND: Critical Technologies Institute, 1998) 130
NICOLAÏDIS Kalypso, TRACHTMAN Joel P., From Policed Regulation to Managed Recognition in GATS, in SAUVÉ Pierre., STERN Robert M. (editors), GATS 2000 – New Directions in Services Trade Liberalization, Brookings Institution, Washington DC, 2000 141
NORTON J.J.(Editor), International Trade in Financial Services: The NAFTA Provisions, Kluwer Law, 1999 246
OECD, “Trade in Services: Negotiating Issues and Approaches”, Paris, 2001 50
OLIVEIRA Júnior Márcio de, Uma Análise Da Liberalização Do Comércio Internacional De Serviços No MERCOSUL, IPEA 2000, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=234631 .. 260
OLIVER Peter (assisted by Malcolm Jarvis), Free movement of goods in the European Community : under articles 28 to 30 of the EC Treaty, 4th ed., Sweet and Maxwell, 2003 205
OLIVER Peter, Free Movement of Goods in the E.E.C. Under Articles 30 to 36 of the Rome Treaty, European Law Center, London, 2d ed., 1988 121
ORTINO Federico, Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique, Journal of International Economic Law 9(1) 117–148, 2006 66
ORWELL George, Nineteen Eighty-Four, 1948 162
PALMETER David, MAVROIDIS Petros C., Dispute Settlement in the World Trade Organization. Practice and Procedure, Cambridge University Press, 2004 138
PASSOS Ricardo, The expanding role of the European Parliament in The EU Constitution : the best way forward?, Asser Institute Colloquium on European Law, Cambridge University Press, 2005 231
PAWELYN Joost, The Nature Of WTO Obligations, Jean Monnet Working Paper 1/02, 2002 132
PAWELYN Joost, The Unbearable Lightness of Likeness, 2006, available at www.law.duke.edu/fac/pawelyn/pdf/unbearable_lightness.pdf 139
PFENNING Werner, SUH Mark M.B. (Editors), Aspects of ASEAN, Weltforum Verlag, 1984 264

PLATO, Protagoras 116

PORTALIS Etienne de, Discours Préliminaire sur le projet de Code civil présenté le 1 Pluviose an IX, in Discours, rapports et travaux inédits sur le Code civil, Paris Joubert 1844 133

POSTEL-VINAY Karoline, L'Occident et sa bonne parole, Flammarion, 2003 117

PRICEWATERHOUSECOOPERS' Global Entertainment and Media Outlook: 2008-2012........ 6

PUSHKIN Alexander, The Queen of Spades, 1833 162

RAWORTH Philip, Trade in Services – Global Regulation and the Impact on Key Service Sectors, Oceana Publications, New York, 2006 156

RAZ Joseph, On the Nature of Law, 1996, Archiv für Rechts- und Sozialphilosophie 82 116

REGE Vinod, GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries, 28 J. World Trade, June 1994 127

RIDEAU Joël, Droit institutionnel de l'Union et des Communautés européennes, 4e éd., LGDJ, 2002 ... 163

ROMERO-PEREZ Jorge Enrique, Tratado de Libre Comercio. Estados Unidos-Centroamérica-Republica Dominicana, 2nd ed., Instituto de Investigaciones Juridicas, Universidad de Costa Rica, 2006 258

ROSAS Allan, Non-Commercial Values and the World Trade System: Building on Article XX, in Essays on the Future of the WTO: Finding a New Balance, ed. by Kim Van der BORGHT, Cameron May, 2003 119

ROSAS Allan, The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue, European Journal of Legal Studies, 2007 208

ROY Martin, MARCHETTI Juan A., LIM Hoe, Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?, in Regional Rules in the Global Trading System, ESTEVADEORDAL Antoni, SUOMINEN Kati, THE Robert (editors), Cambridge University Press, 2009 160

SAMUELSON Paul A., Economics, 10th ed., 1976 2

SAUVANT Karl P., Appeals Mechanism in International Investment Disputes, Oxford Univeristy Press, 2008 251

SAVIGNY Friedrich Charles von, System des heutigen römischen Rechts, 1840 116

SCHUDELARO A., Electronic Payment Systems and Money Laundering. Risks And Countermeasures In The Post-Internet Hype Era, Wolf Legal Publishers, 2003 129

SCHWEIZER Michael, HUMMER Waldemar, OBWEXER Walter, Europarecht, Manzsche Verlags- und Universitätbuchhandlung, Vienna, 2007 163

SICO Luigi, Gli effetti del mutamento delle circostanze sui trattati internazionali, CEDAM Ed, Padova, 1983 138

SIMON Denys, L'Interpretation Judiciare des Traités des Organisations Internationales, éd. A. Pedone, 1981 135

SINCLAIR Ian, The Vienna Convention on the Law of the Treaties, Manchester University Press, 1984 137

SLOTBOOM Marco, A Comparison of WTO and EC Law. Do Different Treaty Purposes Matter for Treaty Interpretation?, Cameron May, 2006 132

STEINER Josephine, WOODS Lorna, TWIGG-FLESNER Christian, EU Law, Ninth Ed., Oxford University Press, 2006 163

STUART MILL John, On Liberty, 1869 116

SWINBANK Alan, Like Products, Animal Welfare and the World Trade Organization, Journal of World Trade 40(4), 2006 140

THANH Vo Tri, BARTLETT Paul, Ten Years of ASEAN Framework Agreement on Services (AFAS): An Assessment, REPSF Project No. 05/004, 2006, available at www.aseansec.org 265

TIMMERMANS Christiaan W. A., Expansion of executive, judicial and legislative powers - a contribution to the debate, both in The EU Constitution : the best way forward?, Asser Institute Colloquium on European Law, Cambridge University Press, 2005 231

TOADER Camelia, Drept civil. Contracte speciale, CH Beck, Bucharest, 2008 3

TREBILCOCK Michael J., Robert HOWSE, The Regulation of International Trade, 2nd ed., Routledge, 1999 245

TREJOS PARIS María Eugenia, FERNANDEZ-ARIAS Mario (Editors), Tratado de Libre Comercio Estados Unidos-Centroamérica-Republica Dominicana. Estrategia de Tierra Arrasada, EUNED, 2006 257

UNCTAD secretariat note, Regionalism and South-South cooperation: The case of MERCOSUR and India, TD(XI)/BP/11, 2004 260

VAGNHAMMAR Erik Bertil, The Proper Functioning of the Internal Market: Observations from Brussels, in Crime, Addiction and the Regulation of Gambling, Nijhoff Publishers, 2008 228

VALLEJO LOBETE, Ernesto, Las restricciones a la libre circulación de mercancías por razones de moralidad pública, Gaceta Jurídica de la CEE - Boletín 1990 nº 84 125

Van DAMME Isabelle, Sixth Annual WTO Conference: An Overview, Journal of International Economic Law 9(3), 749–767 79

Van DAMME Isabelle, The Interpretation of Schedules of Commitments, Journal of World Trade 41 (1), February 2007 78

VAN DEN BOSSCHE Peter, The Law and Policy of the WTO. Text, Cases and Materials, Cambridge University Press, 2005 143

VARGAS Oscar-René, Qué es el CAFTA? Un tratado entre desiguales, 2nd ed., CEREN, 2004 257

VERHOOSEL Gaetan, National Treatment and WTO Dispute Settlement – Adjudicating the Boundaries of Regulatory Autonomy, Hart Publishing, 2002 142

WALLACE, Rebecca M.M., Public Morality. The Terms of Article 36 of the EEC, The Journal of the Law Society of Scotland 1980 125

WEISS Friedl., The General Agreement on Trade in Services 1994, Common Market Law Review, 32:1177-1225, 1995.. 142

WELLING Sarah N., RICKMAN Andy G., Cyberlaundering: The Risks, The Responses, 50 Fla. L. Rev. 295, p.322 (1998).. 130

WHITE Robin, Workers, Establishment and Services in the European Union, Oxford University Press, 2004 165

WOLFRUM Rudiger, STOLL Peter-Tobias, KAISER Karen (editors), "WTO. Institutions and Dispute Settlement", Max Planck Commentaries on World Trade Law, Martinus Nijhoff Publishers, 2006 84

WOODS Lorna, Free Movement of Goods and Services in the European Community, Ashgate, 2004.... 165

World Bank, Central America Department and Office of the Chief Economist Latin America and Caribbean Region, DR-CAFTA: Challenges and Opportunities for Central America, available at www.worldbank.org 257

WTO Secretariat, Trade Policy Review – Israel, WT/TPR/S/58, table III.8 (1999) 106

WTO Secretariat, Trade Policy Review - The Philippines, WT/TPR/S/59 106

WU Tim, "The World Trade Law of Censorship and Internet Filtering", 2006, available at http://ssrn.com/abstract=882459... 20

WU Tim, The World Trade Law of Censorship and Internet Filtering, available at at SSRN: http://ssrn.com/abstract=882459... 132

WUNSCH-VINCENT Sacha, “The WTO, the Internet and Trade in Digital Products”, Hart Publishing, 2006 ....103, 133

WUNSCH-VINCENT Sacha, The WTO, the Internet and Trade in Digital Products, Hart Publishing, 2006 256

ZIEGLER Andreas R., Introduction au droit international public, Stämpfli Ed., Bern, 2006.................... 138

GAMBLING-RELATED BIBLIOGRAPHY

ABBONDANTE Fulvia: Compatibilità fra il diritto comunitario alla libera prestazione dei servizi e monopoli ad Enti pubblici sull'esercizio dei giochi di sorte o d'azzardo finalizzati alla tutela di interessi generali, Diritto pubblico comparato ed europeo, 2000 181

ALBANESE Jay S., “The Effect of Casino Gambling on Crime”, 49 Fed. Probation p.39, 1985 128

ALBANESE Jay S., Casino Gambling and White-Collar Crime: An Examination of the Empirical Evidence, available at http://www.americangaming.org/assets/files/studies/White_Collar_Crime.pdf 128

ALLEN Barry: Ladies & Gentlemen, No More Bets Please, Legal Issues of Economic Integration, vol.27 (2000) 181

AM ENDE Moritz, Staatliche Wettmonopole: Neues Spiel, neues Glück?, European Law Reporter, 2007 192

AMONN Kurt, "Spiel und spielartige Verträge", Schweizerisches Privatrecht, vol. VII/2, Basel and Stuttgart 1979 3

ANAGNOSTARAS Georgios, The quest for an effective remedy and the measure of judicial protection afforded to putative Community law rights, European Law Review, 2007 195

ARNOLD Peter, “The Encyclopedia of Gambling. The game, the odds, the techniques, the people and places the myths and history”, Collins Publishers Glasgow/London, 1978.. 13

Arthur Andersen LLP., Economic Impacts of Casino Gaming in the United States-Volume 2: Micro Study, Report to the American Gaming Association, 1997 234

ASHTON John, "A History of English Lotteries", Leadenhall Ed., 1893.. 10

Australian Institute for Gambling research, "Social And Economic Impacts Of Gambling In New Zealand", Final report, July 2001 .... 5, 7

BETSINGER Sara Linn, The Relationship Between Gambling And County-Level Crime, 2005, available at https://drum.umd.edu/dspace/handle/1903/2377thesis 129

BLUMANN Claude, Le juge national, gardien menotté de la protection juridictionnelle effective en droit communautaire, La Semaine Juridique - édition générale, 2007 195

BO Giovanni, La pronuncia della Corte di giustizia nella causa Unibet tra principio di autonomia processuale e principio di non discriminazione, Rivista trimestrale di diritto e procedura civile, 2008 195

BRENNER Gabrielle A., BRENNER Reuven, A Profile Of Gamblers, Cahier de recherché 8716, Département de sciences économiques, Université de Montréal, 1987.. 129

BRENNER Reuven and BRENNER Gabrielle, Spéculation et jeux de hasard – Une histoire de l’homme par le jeu, Presses universitaires de France, Paris, 1993... 162

BRENNER Reuven, BRENNER Gabrielle A., BROWN Aaron, "A World of Chance. Betting on Religion, Games, Wall Street", Cambridge University Press, 2008 2

BRODBECK Jeannette, DÜRRENBERGER Sara, ZNOJ Hansjörg, Institut für Psychologie, Bern University, "Grundlagenstudie Spielsucht: Prävalenzen, Nutzung der Glücksspielangebote und deren Einfluss auf die Diagnose des Pathologischen Spielens", August 2007, available at http://www.fdkl.ch/images/stories/file/Grundlagenstudie_Spielsucht_def.pdf 8

BROUSSY Emmanuelle, DONNAT Francis, LAMBERT Christian, Actualité du droit communautaire. Liberté d'établissement - Libre prestation de service - Jeux de hasard, L'actualité juridique de droit administratif, 2007, p.1122-1124 192

BROWN Adrian, The Obligation to Advertise Betting Shop Licences Under the EC Principle of Transparency: Case C-260/04, Commission v Italy, Public Procurement Law Review, 2008 196

BRUNO Ferdinando, Dei limiti alla tassazione di vincite di lotteria organizzate in uno Stato membro diverso da quello di residenza, Diritto pubblico comparato ed europeo, 2004 188

Bundesamt für Justiz, "Bevölkerungsbefragung 2002 zur Revision des Lotterie- und Wettrechts des Bundes", unveröffentl. DemoScope-Studie, 2002 8

BUSCHLE Dirk, “Der Spieler" - Schreckgespenst des Gemeinschaftsrechts, European Law Reporter, 2003 189

CABOT Anthony, BALESTRA Mark (Editors), Internet Gambling Report, 7th edition, 2004 158

CAMPBELL Colin S., HARTNAGEL Timothy F., SMITH Garry J., “The Legalization of Gambling in Canada Report”, prepared for the Law Commission Canada “What Is a Crime?”, 2005 23

CAMPBELL Colin S., HARTNAGEL Timothy F., SMITH Garry J., “The Legalization of Gambling in Canada”, prepared for the Law Commission Canada “What is a Crime?”, 2005 5

CAMPEGIANI Claudia, PAPI Cinzia, Il sistema di monopolio statale delle scommesse e la sua compatibilità con la normativa comunitaria in materia di libertà di stabilimento e di libera prestazione di servizi (art. 43 e 49 CE), Giustizia civile, 2004 189

CARANTA Roberto, Il principio di diritto comunitario della trasparenza/concorrenza e l'affidamento o rinnovo di concessioni di servizi pubblici (ancora in margine al caso Enalotto), Giurisprudenza italiana, 2008 196

CARNELLEY Marita, “Gambling Law Developments in South Africa: The Summer of 2004/2005”, in Gaming Law Review Volume 9, Number 4, 2005 42

CASHIN RITAINE Eleanor, LEIN, Eva, La notion de proportionnalité appliquée au droit des jeux de hasard - Les cas Placanica et Autorité de surveillance de l'AELE/Royaume de Norvège, Schweizerisches Jahrbuch für Europarecht = Annuaire suisse de droit européen, 2006/2007 192

Christiansen Capital Advisors, “Gross Annual Wager of the United States 2003,” extracted from www.cca-i.com 5

CINGOLO Antonio, La raccolta di scommesse su eventi sportivi: usi e abusi, Rassegna dell'avvocatura dello Stato, 2003 189

CLARKE, Roger A., DEMPSEY, Gillian, OOI, Chuin Nee, 'CONNOR, Robert F., "The Technical Feasibility of Regulating Gambling on the Internet", available at SSRN: http://ssrn.com/abstract=156069 19

CLERGERIE Jean-Louis, La compatibilité des réglementations nationales des jeux de hasard avec le droit communautaire, Recueil Le Dalloz, 2007.. 192

COCCIA Claudio, Ribadito il divieto delle scommesse, Rivista di diritto sportive, 2000 183

Committee on the Social and Economic Impact of Pathological Gambling [and] Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council, \Pathological Gambling. A Critical Review, National Academy Press, Washington D.C., 2003.......... 238

CONTI Roberto, FOGLIA, Raffaele, Raccolta di scommesse su eventi sportivi, Il Corriere giuridico, 2007 192

COSTAŞ Cosmin Flavius, Libertatea de stabilire. Libera circulație a serviciilor. Colectarea de pariuri pentru evenimente sportive într-un stat membru și transmiterea lor prin Internet unui alt stat membru. Prohibiție instituită sub sancțiuni penale. Legislația unui stat membru care rezervă dreptul de a colecta pariuri anumitor entități, Revista romana de drept al afacerilor, 5/2006 190

CREIGH-TYTE Steven, FARRELL Lisa, "The Economics of the National Lottery", University of Durham, Department of Economics Working Paper 13

CURRAN Daniel, Frank SCARPITTI, “Crime in Atlantic City: Do Casinos Make a Difference?”, 12 Deviant Behaviour, 1991 128

CUYVERS Armin, Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica) Judgment of the Grand Chamber of 6 March 2007, ECR [2007] I-1891, 45 Common Market Law Review 2008.. 176

DE FALCO Vincenzo, Riserve statali nei servizi di gestione e raccolta di scommesse ippiche e fattori di convergenza con l'ordinamento comunitario, Diritto pubblico comparato ed europeo, 2008................ 196

DEL NINNO Alessandro, The Placanica Decision: The EU Court of Justice Again Censures Italy’s Restrictions on the Gambling Market, Gaming Law Review Volume 11, Number 3, 2007 193

DELIMATSIS Panagiotis, Don’t Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US – Gambling Case, Journal of World Trade vol.40 no.6 December 2006.. 66

DESTOURS Stéphane, Les jeux (de hasard) sont faits, Revue Lamy de la Concurrence, droit, économie, régulation 2007 nº 12.. 192

DESTOURS Stéphane, Monopole des jeux de hasard en ligne: rien ne va plus, Revue Lamy de la Concurrence : droit, économie, régulation 2006 nº 8.. 192

DIACONU Madalina, The “Bolkestein” Directive and the Attempted Harmonisation of Games of Chance – Stakes and Perspectives, in L’harmonisation internationale du droit, Schulthess, 2007........................ 226

DOUGLAS Andrew, British Charitable Gambling 1956-1994: Towards a National Lottery, London: Athlone Press, 1995.. 174

DURIEUX Bruno, Rapport de la mission sur l’ouverture du marché des jeux et de hasard (Rapport Durieux), March 2008 27

DYALL Lorna, “Gambling: A Social Hazard”, Social Policy Journal of New Zealand, March 2004....... 238

EADINGTON William R., “Economic Perceptions of Gambling Behavior”, 3 Journal of Gambling Studies 4, December 1988.. 2

ECHEVARRÍA DE RADA Teresa, "Los contratos de juego y apuesta" J.M. Bosch Editor, 1996 3

Europe Economics, “The Case for a Single European Gambling Market”, report for Ladbrokes, 2004, available at www.europe-economics.com (20/11/2006)... 235

European Commission, White Paper on Sport, COM(2007) 391 final, 11 July 2007 222

FEKJÆR Hans Olav, M.D., "Gambling and gambling problems in Norway", Paper presented at the 4th conference of the European Association for the Study of Gambling, Warsaw, Poland, September 23, 2000 6

FELSENSTEIN Daniel, FREEMAN Daniel, “Gambling on the Border: Casinos, Tourism Development and the Prisoner's Dilemma”, in KRAKOVER S. and GRADUS Y. (editors). Tourism in Frontier Areas, Lexington Books, Maryland, 2002 49

FEYDEAU Ernest, « Le rétablissement des jeux publics en France », Paris, 1871 49

FILIPKOWSKI Wojciech, Internet as an Illegal Market Place, paper presented at the 6th Cross-Border Crime Colloquim in Berlin, 2004, available at http://www.cross-border-crime.net/a-pdf/CCC-2004-Filipkowksi.pdf.. 130

FILPO Fabio, Il gioco d'azzardo tra la Direttiva servizi e la sentenza Placanica, Contratto e impresa Europa no.2, July - December 2007... 226

FinCEN, the U.S. Treasury Department, A Survey of Electronic Cash, Electronic Banking and Internet Gaming, 2000, available at http://www.fincen.gov/e-cash.pdf.. 130

FINDLAY John M., People of Chance: Gambling in American Society from Jamestown to Las Vegas, Oxford University Press (1986)... 145

FORREST David, McHALE Ian, McAULEY Kevin, "Risks to the Integrity of Sport from Betting Corruption", a Report for the Central Council for Physical Recreation by the Centre for the Study of Gambling, University of Salford, February 2008 15

GALE Dana, "The Economic Incentive behind the Unlawful Internet Gambling Enforcement Act", 2006, available at SSRN: http://ssrn.com/abstract=942689... 92

GASSO Luca, Libertà di stabilimento e concessioni per l'esercizio di scommesse, Giurisprudenza italiana, 2007 196
GNES Matteo, Diritto comunitario e disciplina nazionale delle scommesse, Giornale di diritto amministrativo, 2007 192
GODINHO Jorge A., “The Regulation of Gaming and Betting Contracts in the 1999 Macau Civil Code”, Gaming Law Review, Volume 11, Number 5, 2007 36
GODINHO Jorge A., Credit for gaming in Macau, Gaming Law Review, vol. 10, no. 4, 2006 36
GOLDSTEIN Harley J., "Online Gambling: Down To the Wire?", 8 Marq. Sports L. J. 1 (1997-1998) 19
GRIFFITHS Mark D. and WOOD Richard T.A., “Lottery gambling and addiction: An overview of European research”, 1998 (available at https://www.european-lotteries.org/data/info_130/Wood.pdf. 238
GRINOLS Earl L., MUSTARD David B., Casinos, Crime, and Community Costs, 2004, available at http://ideas.repec.org/ 128
GROUSSOT Xavier, WENANDER Henrik, Self-standing Actions for Judicial Review and the Swedish Factortame: Case C-432/05, Unibet, Civil Justice Quarterly, 2007 195
GRYNBAUM Luc, Lutte contre la délinquance et réglementation des jeux et paris à la lumière de la jurisprudence de la CJCE (Loi du 5 mars 2007 relative à la prévention de la délinquance et arrêt CJCE du 6 mars 2007 Placanica et autres), Droit de l'immatériel : informatique, médias, communication 2007 nº 26 192
GUASTELLA Sergio, "Giuoco e scommesse on line: la normativa italiana contrasta con i principi europei…Ma non troppo!", available at http://www.diritto.it/archivio/1/20094.pdf 216
HAKIM Simon, BUCK Andrew, “Do Casinos Enhance Crime?” 17 Journal of Crim. Just., 1989 127
HAMBACH Wulf, SCHÖTTLE Hendrik, The German Sports-Betting Market: Uncertainty and Chaos for Private Providers Like Bwin, Gaming Law Review, Volume 10, Number 6, 2006, pp.521-523 209
HAZEN Thomas Lee, “Rational Investments, Speculation or Gambling? Derivative Securities and Financial Futures and Their Effect on the Underlying Capital Markets”, 86 Nw. U. L. Rev. 987 (1991-1992) 9
HOBBES James R., PERRY Amy, "Internet Gambling: Is It Worth the Risk?", 7 Vill. Sports & Ent. L.J. 1 (2000) 19
HOEKX Nele: Kansspelen in Europa: Placanica, Droit de la consummation, 2007 192
Hong Kong Home Affairs Bureau, Centre for Social Policy Studies of The Department of Applied Social Sciences and The General Education Centre of The Hong Kong Polytechnic University, "Report on a Study of Hong Kong People’s Participation in Gambling Activities", 2002, available at: http://www.hab.gov.hk/file_manager/en/documents/whats_new/gambling/reporteng.pdf 7
HORN Scott T., Cas*inos and Crime: Don't Bet On It*, 1997, Salem College Report-no: STH-0797-0001 128

HUFBAUER Gary, STEPHENSON Sherry, "Services Trade: Liberalization and Future Challenges" Journal of International Economic Law 10(3), August 2007,.. 50

HUGEL Paul S., Criminal Law and the Future of Internet Gaming, 2 Gaming L.R. 143 (1998) 130

IDOT Laurence, Jeux et loteries, Europe, Janvier 2004.. 188

ITEANU Olivier, Internet et le droit: Aspects juridiques du commerce électronique, Eyrolles, 1996....... 133

KARL Kai-Uwe, Playing the game, Competition Law Insight, 2007, Vol.6 Issue 5................................ 192

KELLY Joseph, TEW Michael, DUBIN Laura, The Global E-Gaming Industry: Why London, Why Now?, the Gaming Law Review, Volume 9, Number 6, 2005.. 38

KINDT John Warren, “The Gambling Industry and Academic Research: Have Gambling Money Tainted the Research Environment”,13 S. Cal. Interdisc. L.J. 1 (2003-2004)... 127

KORN David A., Expansion of gambling in Canada: implications for health and social policy, CMAJ • July 11, 2000; 163 (1); \Problem Gambling Survey, Final Report submitted to British Columbia Lottery Corporation, Ed. Angus Reid Group, July 1996.. 238

KRAJEWSKI Marcus, National Regulation and Trade Liberalization in Services, Kluwer Law International, 2005..66, 142

KÜNZ Kilian I, FRITSCHI Tobias, EGGER Theres, “Gambling and Gambling Addiction in Switzerland, Empirical study of gambling practice, development, addiction and consequences”, study for the Swiss Federal Gaming Board and the Federal Office of Justice, Bern, November 2004.................................... 8

LABLET J., “Les Jeux de Hasard au commencement du XIX siècle”, Lyon, 1803 49

LABRIE R.A., KAPLAN, S.A., LAPLANTE, D.A., NELSON, S.E., and SHAFFER, H.J. (In Press) Inside The Virtual Casino: A Prospective Longitudinal Study Of Actual Internet Casino Gambling, European Journal of Public Health, 2008, http://www.divisiononaddictions.org/html/library.htm....................... 238

LADOUCEUR Robert, BOISVERT Jean -Marie, PÉPIN Michel, LORANGER Michel and SYLVAIN Caroline, “Social cost of pathological gambling”, 4 Journal of Gambling Studies vol.10, December 1994 238

LANG Craig, Internet Gambling – Nevada Logs In, 22 Loyola of Los Angeles Entertainment Law Review 525, 2001-2002... 133

LEROY Xavier, « Le monde des jeux », Paris, 1893... 49

L'ESTRANGE EWEN Cecil, "Lotteries and Sweepstakes", London, 1932.. 11

LEWIS Eric, JARVIS Tyler, “Gambling and Islam: Clashing and Co-existing”, Brigham Young University, web document available at http://www.math.byu.edu/~jarvis/gambling/student-papers/eric-lewis.pdf 22

LEWIS Peter H., "Limiting a Medium Without Boundaries: How Do You Let The Good Fish Through The Net While Blocking The Bad?" New York Times, 15 January 1996 21

London Economics, The Case for State Lotteries, a Report for the European Lottery and Toto Association, September 2006 162

LOUIS Jean-Victor, RODRIGUES Stéphane, Les services d'intérêt économique general et l'Union européenne, Bruylant, 2006 226

LUCIANI Fabio, Libera prestazione di servizi fra ordine pubblico nazionale e tutela dei consumatori, Diritto pubblico comparato ed europeo, 2004 185

LYNCH Rob, Crime and the Sydney Harbour Casino, Current Issues in Criminal Justice: Journal of the Institute of Criminology, Vol 10 (3), 1999 128

MARGOLIS Jeremy, Casinos and Crime: An Analysis of the Evidence", prepared for the American Gaming Association, December 1997, available at http://www.americangaming.org/assets/files/studies/Crime.pdf 128

MCCOWN William G., CHAMBERLAIN Linda L. Best Possible Odds: Contemporary Treatment Strategies for Gambling Disorders, New York: John Wiley & Sons, Inc., 2000 238

MCMILLEN Jan, WOOLLEY Richard, Money Laundering in Australian Casinos, Australian Institute for Gambling Research – UWS, paper presented at the 3rd National Gambling Regulation Conference, Sydney, 11-12 May 2000 130

MEISSE Eric, Comment on ECJ case C-260/04, Commission of the European Communities v. Italian Republic, Concession de service public, Europe, Novembre 2007 196

MEYER Gerhard, HAYER Tobias, GRIFFITHS Mark, Problem Gambling in Europe. Challenges, Prevention, and Interventions, Springer, 2009 237

MIGNONE Claudia Ilaria, La Corte di giustizia si pronuncia sul gioco d'azzardo nell'era di Internet, Diritto pubblico comparato ed europeo, 2004 189

MILLER Lori K., "Online Sports Gambling – Regulation or Prohibition?", 11 J Legal Aspects Sport 99 (2001) 15

MITROVIC Bobi, The Swedish Gambling Monopoly in Perspective of EC law, 2005, Master Thesis at Gothenburg University, available at http://www.handels.gu.se/epc/archive/00004826/01/20062.pdf. . 218

MONKCOM Stephen Philip (General editor), Smith&Monkcom, The Law of Betting, Games and Lotteries, Second Edition, Butterworths, 2001 11

MONTPAS Scott M., "Gambling Online: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling", 22 U. Dayton L. Rev. 168 (1996-1997) 19

MOUQUIN Gérald, "La notion de jeu de hasard en droit public : essai axiomatique "de lege ferenda", PhD thesis at the University of Lausanne, 1980 8

MOUQUIN Gérald, Facteurs économiques et non économiques déterminant les principes régulateurs fondamentaux, 1ère Conférence EASG, Cambridge, August 1995 172

MYLLY Tuomas, National gaming monopolies and free movement of services, Europarättslig tidskrift, 2000 181

National Centre for the Study of Gambling at the University of Cape Town on behalf of the National Responsible Gambling Programme, "Gambling and Problem Gambling in South Africa. A National Study", 2003 7

OEDC, "The Economic and Social Impact of Electronic Commerce. Preliminary Findings and Research Agenda", 1999 5

OHLMANN Wolfgang, Lotterien, Sportwetten, der Lotteriestaatsvertrag und Gambelli, Wettbewerb in Recht und Praxis, 2005 183

PALMIERI Alessandro, Comment on ECJ case C-260/04, Commission of the European Communities v. Italian Republic, Il Foro italiano, IV 2007 196

PAUWELYN Joost, Rien Ne Va Plus: Distinguishing Domestic Regulation from Market Access in GATT and GATS, in 4 World Trade Revew (2005) 66

Policy Analytics LLC, Report to the Indiana Legislative Council and the Indiana Gaming Commission, “A Benefit-Cost Analysis of Indiana’s Riverboat Casinos for FY 2005”, 2006, available at www.in.gov/legislative/igareports/agency/reports/IGC02.pdf 128

Productivity Commission, Australia’s Gambling Industries, Report No. 10, AusInfo, Canberra, ... 5

Public Sector Gaming Study Commission, “Gambling Policy and the Role of the State”, Tallahassee, Fla.: Florida Institute of Government, Florida State University, March 2000 128

RAWORTH Philip, Trade in Services – Global Regulation and the Impact on Key Service Sectors, New York, Oceana Publications, 2005 68

REGAN Donald H., A Gambling paradox: Why an origin-neutral “zero-quota” is not a quota under GATS Article XVI, 41 Journal of World Trade December 2007 68

REUTER Peter, The impact of casinos on crime and other social problems: An analysis of recent experiences. Report for the Greater Baltimore Committee, College Park, Md.: University of Maryland, January 1997, available at http://www.americangaming.org/assets/files/Peter_Reuter_Crime_Study.pdf 128

ROSE Nelson, "Gambling and the Law: The Future of Internet Gambling", 7 Vill. Sports & Ent. L.J. 29 (2000) 19

ROUILLER Claude, “Jeux de loteries et paris sportifs professionnels”, RDAF 2004 14

RUOTOLO Gianpaolo Maria, Il regime italiano del gambling all'esame della Corte di giustizia: rien ne va plus?, Diritto pubblico comparato ed europeo, 2007 192

SAVILIA John J., "Cyber-Games?: Regulation of Internet Gambling in the United States", 34 Suffolk U. L. Rev. 347 (2000-2001) 19

SBORDONI Stefano, CELESTI Stefano Maria, DIONISI Francesca, Sanctions for infringements of gambling laws in Italy, ERA-Forum. Vol. 8 (2007), no. 3 193

SCHETTINI KEARNEY Melissa, "The Economic Winners and Losers of Legalized Gambling", 2005, NBER Working Paper No. W11234, available at SSRN: http://ssrn.com/abstract=693095 5

SCHIANO Roberto, La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt "Placanica et a.", Revue du droit de l'Union européenne, 2007, nº 2 192

SCHMIED Frédéric: L'accès des particuliers au juge de la légalité - L'apport de l'arrêt Unibet, Journal des tribunaux / droit européen, 2007 195

SCHNABL Marco E., NELSON Timothy G., Nothing Left To Chance: Thunderbird v. Mexico And The Power Of A Domestic U.S. Court To Review A NAFTA Investment Arbitration Award, 2007, in MEALEY'S International Arbitration Report, Vol.22, March 2007 255

SCHOPPER Mark D., Internet gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a Monetary Control Scheme, 5 Chap. L. Rev. p.318, (2002).................................... 130

SCHRIEVER Eva, "Conflict and Coordination between Diverse Regulatory Environments" in "Cross-Border Gambling on the Internet. Challenging National and International Law", research conducted by the Swiss Institute of Comparative Law, Schultess, 2004 ....23, 40, 41, 43

SCOPINARO Lucia, Rilevanza penale della raccolta in Italia di scommesse su competizioni sportive estere, nota a Cass. Pen., sez. III, 27 marzo 2000, in Diritto penale e processo, 2001, pp. 1383-1392 . 211

SHAPIRO Joseph P., "America's Gambling Fever," U.S. News & World Report, January 15, 1996....... 127

SIBBITT Eric C., "Regulating Gambling in the Shadow of the Law: Form and Substance in the Regulation of Japan's Pachinko Industry", Harvard International Law Journal vol.38 36

SIMON Denys, Commercialisation des jeux électriques, électromécaniques et électroniques, Europe 2006 Décembre Comm. nº 361.. 205

SIMON Denys, Faites vos jeux, rien ne va plus ..., Europe, 2007 Mai Comm. nº 141 192

SMITH Sarah, Loteries as A Source of Revenue, in VIREN Matti (editor), Gaming in the New Market Environment, Palgrave MacMillian, 2008, pp.99-125.. 12

SPROSTON Kerry, ERENS Bob and ORFORD Jim, "Gambling Behaviour in Britain: Results from the British Gambling Prevalence Survey", London: National Centre for Social Research, 2000 7

Stationary Office, Report of the Gaming Board for Great Britain 2004-05, HC 227 SE/2005/113 39

STITT Grant, NICHOLS Mark, GIACOPASSI David, Does the Presence of Casinos Increase Crime? An Examination of Casino and Control Communities, Crime & Delinquency, Vol. 49 No. 2, April 2003 129

STRAETMANS Gert, Comment ECJ case C-124/97, Läärä and others, Common Market Law Review, 2000 181

STRAETMANS Gert, Comment on ECJ case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português, Common Market Law Review, 2004............. 185

STRAETMANS, Gert, comment on ECJ case C-243/01, Gambelli and others, Common Market Law Review, 2004 ... 189

STRAETMANS, Gert, comment on ECJ case C-42/02, Lindman, Common Market Law Review, 2004. 188

Swedish National Institute of Public Health, Gambling and Problem Gambling in Sweden, Report No. 2, 1999 ... 162

Swiss Institute for Comparative Law, "Study of Gambling Services in the Internal Market of the European Union", Final Report ... 6, 9, 10, 25, 27, 170, 172, 173, 174, 175, 177, 236

THOMPSON William N. et al., Casinos and Crime in Wisconsin: What's the Connection?, Wisconsin Policy Research Institute Report, Vol. 9, No. 9, November 1996 ... 128

TRATOS Mark G., "Gaming on the Internet", 3 Stan. J.L. Bus. & Fin. 101 (1997) ... 19

TRUCY François, Rapport d'information fait au nom de la commission des Finances, du contrôle budgétaire et des comptes économiques de la Nation sur la mission sur les jeux de hasard et d'argent en France 2001-2002, available at http://www.senat.fr/rap/r01-223/r01-2231.pdf ... 130

United States General Accounting Office, Report to the Hon. Frank R. Wolf, House of Representatives "Impact of Gambling: Economic Effects More Measurable Than Social Effects", 2000 ... 128

United States National Gambling Impact Study Commission Report, 1999 ... 162

VAN DER BEEK J.C.M, ADOBATI Enrica, Viola il trattato CE una sanzione penale applicata per il mancato adempimento di una formalità amministrativa la cui osservanza è resa impossibile dalla normativa nazionale contrastante con il diritto comunitario, Diritto comunitario e degli scambi internazionali, 2007 ... 192

VAN WAEYENBERGE Arnaud, PECHO Peter, L'arrêt Unibet et le traité de Lisbonne - un pari sur l'avenir de la protection juridictionnelle effective, Cahiers de droit européen, 2008 ... 195

VERBIEST Thibault ; HEFFERMEHL Evelyn, Jeux d'argent en ligne: l'impact de l'arrêt Placanica, Droit de l'immatériel : informatique, médias, communication, 2007, nº 27 ... 192

VERBIEST Thibault, KEULEERS Ewout, Gambelli Case Makes It Harder For Nations To Restrict Gaming, 8 Gaming Law Review 1, 2004 ... 190

VERBIEST Thibault, REYNAUD Pascal, Incompatibilité de la législation italienne des jeux et paris avec les articles 43 et 49 du Traité CE, La Semaine juridique - édition générale, 2004 ... 189

VOI YOU Anabela, "The Legalization of Gambling in Thailand: a Revisited Discourse In Light Of Recent Developments", research article at Lund University, available at www.essays.se ... 6

VOLBERG, Rachel. A, "Gambling and Problem Gambling Among Adolescents in Washington State". Report to the Washington State Lottery, 1993 ... 7

WALZ Simone, Gambling um Gambelli? - Rechtsfolgen der Entscheidung Gambelli für das staatliche Sportwettenmonopol, Europäische Zeitschrift für Wirtschaftsrecht, 2004 ... 189

WARD Philip, The Gambling Bill – Bill 163 of 2003-04, House of Commons Library Research Paper, 04/79, October 2004 239

WEIMER Wendy J., Cyberlaundering: An International Cache for Microchip Money, 13 DePaul Bus. L.J. 2000-2001 130

WILLIAMS Robert, WOOD Robert, University of Lethbridge, Alberta, at the Alberta Gaming Research Insitute Annual Conference held on 27 March 2009, available at http://gaming.uleth.ca/agri_downloads/4455/Williams_AGRI_Conference_2009.ppt 20

WUNSCH-VINCENT Sacha, The Internet, Cross-Border Trade in Services and the GATS: Lessons from the WTO US–Internet Gambling Case, World Trade Review, November 2006 133

ZAGATO Lauso, Caso Gambelli: la Corte di Giustizia riformula il proprio giudizio sulla normativa italiana in materia di scommesse, Europa e diritto private, 2005 189

ZIMMER Hanne, DEJMEK Paulina, A Wheel of Fortune for the EEA States or Game Over for National Gaming and Betting Monopolies?, in Europe after the judgments in Placanica, Gaming Machines and Ladbrokes, Europarättslig tidskrift. Årg. 10 (2007), nr. 4 176

OTHER DOCUMENTS

CTS Committee on Trade in Financial Services, Report of the Meeting held on June 28 and July 28, 2004, TN/S/M/11 (September 8, 2004) 133

CTS Committee on Trade in Financial Services, Report of the Meeting Held on May 9, 2001, S/FIN/M/31 (June 1, 2001) 133

Economic Committee of the League of Nations, Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement, League of Nations Doc. C.E.1.22. 1927 II.13........ 106

European Commission Staff Working Paper Extended Impact Assessment Of Proposal For A Directive On Services In The Internal Market, Com(2004)2 Final 165

Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92 51

Institute of International Law Resolution of the of 1 September 1995 on "Problems arising from a succession of codification conventions on a particular subject", Preamble 4, 66 Yearbook Of The Institute Of International Law, Part I, 245-248 (1995) 136

International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference, at 95, League of Nations Doc. C.21.M.12. 1928 II.7 (1928), at 110 123

International Law Commission Report, UN General Assembly 21st Session, Official Records, Supp. No.9, UN Doc. A/6309/re.1, 1966........ 137

OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations User's Guide, 2003 156

OECD Financial Action Task Force On Money Laundering Report On Money Laundering Typologies for 2000-2001........ 158

Report by the Secretariat, Canada Trade Policy Review, tbl.III.4, WT/TPR/ S/53 (Nov. 19, 1998).......... 120

Report by the Secretariat, Honduras Trade Policy Review, at 46, WT/TPR/S/120 (Aug. 29, 2003) 120

Report by the Secretariat, Indonesia Trade Policy Review, at 28 & tbl.II.3, WT/TPR/S/117 (May 28, 2003) 120

Report by the Secretariat, Israel Trade Policy Review, tbl.III.8, WT/TPR/S/58 (Aug. 13, 1999).............. 120

Report by the Secretariat, Nigeria Trade Policy Review, at 78, WT/TPR/S/39 (May 27, 1998) 120

Report by the Secretariat, Republic of Korea Trade Policy Review, at 54, WT/TPR/S/137 (Aug. 18, 2004) 120

Report by the Secretariat, Singapore Trade Policy Review, at 43, WT/ TPR/S/14 (May 7, 1996) 120

Report by the Secretariat, Suriname Trade Policy Review, tbl.III.2, WT/ TPR/S/135 (June 14, 2004)..... 120

Report by the Secretariat, Thailand Trade Policy Review, tbl.III.3, WT/TPR/S/123 (Oct. 15, 2003) 120
Report by the Secretariat, Turkey Trade Policy Review, tbl.III.7, WT/TPR/S/ 125 (Nov. 19, 2003)........ 120
Yearbook of the International Law Commission, 1966, Vol II 81

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