

**WTO CASE STUDY: UNITED STATES—MEASURES
AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING
AND BETTING SERVICES**

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INTRODUCTION: THE EVOLUTION OF ONLINE GAMBLING¹

THE WORD “GAMBLING” readily brings a variety of images to mind. Glamorous images include the neon lights of the Las Vegas strip, the historic casinos of Monte Carlo, high-rollers throwing dice at the craps tables, and high-stakes poker games behind closed doors. Less glamorous images, such as seedy racetracks and smoke-filled bingo halls, also come to mind. Yet regardless of the size of the player’s bankroll, the common thread among all traditional forms of gambling was once a concrete physical environment. However, since the first online gambling site was launched in 1995, a new breed of gamblers has

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¹ Since this article was originally written, there have been some important developments on this topic which are beyond the scope of this paper. On 4 May 2007, the U.S. made the unprecedented move of withdrawing its commitments in the gambling and betting services sector from its GATS schedule. Since that time, Antigua has filed a claim for \$3.44 billion, which it will seek primarily through the suspension of global copyright and intellectual property rights agreements. These sanctions, if approved, could be implemented immediately and could have serious implications for American companies such as Microsoft and Disney, which would face billions of dollars in lost revenue if Antigua was allowed to suspend all intellectual property obligations to the United States. The U.S. also faces claims from other WTO members, including the European Union, China, Chinese Taipei, India, Japan, Brazil, Costa Rica, and Mexico for compensation under the WTO rules pertaining to withdrawn commitments.

In addition, political support towards the prohibition of online gambling within the U.S. has cooled recently. Republican Barney Frank’s Bill, the *Internet Gambling Regulation and Enforcement Act of 2007* (U.S., Bill H.R. 2046, *Internet Gambling Regulation and Enforcement Act of 2007*, 110th Cong., 2007), which would legalize, regulate, license, and tax online gambling, has received increasing support from U.S. Congressmen. This comes at a time of mounting support to repeal the *Unlawful Internet Gambling Enforcement Act of 2006* (U.S., Bill H.R. 4411, *Unlawful Internet Gambling Enforcement Act of 2006*, 109th Cong., 2006). Observers of this topic will be watching for further developments with interest.

emerged.² At present, the American Gaming Association estimates that “there are well over 2,000 Internet gambling Web sites offering various wagering options, including sports betting, casino games, lotteries and bingo.”³ Many of the perks customarily associated with casinos, such as complimentary drinks and hotel rooms, are still offered; however, the quintessential bricks and mortar casino is no longer the only game in town. The new arena where fortunes are won and lost is cyberspace. Players around the world no longer need to leave their homes to gamble, and with a few clicks of a mouse, players can compete online against other players from all over the world in the comfort and convenience of their own homes.

Poker has commonly been identified as the catalyst which brought online gambling to the mainstream. Ironically, the low profitability of poker which made it an unattractive offering at casinos is what spurred the game’s growth on the Internet.⁴ As casinos continued to replace poker tables with more profitable slot machines, the game flourished on the Internet, where much lower overhead costs made offering poker significantly more profitable. Poker is well-suited to the Internet because poker sites are able to match players seeking a game at any time. Since poker is a game of skill, rather than dependent on the random generation of numbers, many players are attracted to the game for the opportunity to win money at the expense of weaker players. In recent years, the popularity of online poker has soared with televised events and celebrity tournaments. Successful online players such as 2003 World Series of Poker winner Chris Moneymaker and 2004 World Series of Poker winner Greg Raymer have become some of the industry’s biggest marketers and celebrities in their own right.⁵ However, even though the poker craze continued to fuel the growth of the worldwide online gambling industry, there was one big obstacle standing in the way—the United States. The U.S. contains the majority of the world’s online gamblers, yet the nation’s laws have hampered the efforts of

² American Gaming Association, Industry Information, Fact Sheets: Industry Issues, “Internet Gambling”, online: American Gaming Association <http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17>.

³ *Ibid.*

⁴ The opportunity costs of offering poker at casinos are very high, since more profitable slot machines could be placed in the same location and generate higher revenue. “Online/Internet Gambling”, online: SportsPool.com <<http://www.sportspool.com/gambling/>>.

⁵ Chris Moneymaker has been credited with revolutionizing the game after being the first Internet qualifier to win the World Series of Poker. Moneymaker took home the top prize of \$2.5 million in the 2003 event after qualifying online at PokerStars.com. Associated Press, “Mr. Moneymaker nets \$2.5M poker prize” *Offbeat News* (24 May 2003), online: CNN.com/US <<http://www.cnn.com/2003/US/West/05/24/offbeat.poker.win.ap/>>.

online gaming operators in Antigua from legally serving this lucrative market. The WTO dispute between these two nations will be chronicled in this paper.

THE WTO DISPUTE SETTLEMENT SYSTEM

PROponents of the World Trade Organization's ("WTO") role in globalization eagerly contend that the WTO trading system allows for the fair adjudication of trade disputes between member nations. The result, supporters argue, is that all member nations are placed on an even playing field regardless of size or economic resources. The rationale is that "[t]he WTO trading system can be characterized as a 'rule-oriented international trade order' as opposed to a 'power-oriented international trade order.'"⁶ Under a power-oriented system, the party with stronger economic, political, and even military power has greater leverage, while the weaker state with less economic resources and political influence must suffer a disadvantage. In this type of trading system, the weaker party is often pressed to make concessions against its will. Under the rule-oriented WTO dispute settlement system, however, Panels and the Appellate Body do not take into account factors such as economic or political power when resolving disputes.⁷ The only relevant factor is the legitimacy of the legal claims of the parties under the WTO rules. It is argued that this system provides more stability, fairness, and predictability in international trade relationships than does a power-oriented model, and it is especially beneficial to developing country members. A developing country can bring a case against a more powerful developed country member to the WTO and prevail under the dispute settlement system, as long as the developing country makes persuasive legal arguments.

An obvious example of a developing country benefiting from the rule-oriented dispute system, which also represented the WTO Dispute Settlement Body's first direct engagement with the Internet,⁸ is the

⁶ Mitsuo Matsushita, "Accomplishment of the WTO Dispute Settlement system—A Review of Some WTO Jurisprudence" (Keynote Speech at the Intensive Course on WTO Dispute Settlement Mechanisms, delivered at the Thailand Resident Mission, Bangkok, Thailand, 20 June 2006) at 4, online: Asian Development Bank

<<http://www.asiandevbank.org/Documents/Events/2006/WTO-Dispute-Settlement-Mechanisms/paper-matsushitsa.pdf>>.

⁷ *Ibid.*

⁸ Anupam Chander, "Globalization and Distrust" (Paper presented to *The Yale Law Journal's* Symposium on Democratic Ground: New Perspectives on John Hart Ely: Democracy and Distrust, 12-13 November 2004), (2005) 114 Yale L.J. 1193 at 1211.

dispute which occurred between Antigua and Barbuda (“Antigua”), a tiny twin-island Caribbean nation-state and the smallest WTO member nation, and the U.S. In an April 2005 Appellate Body decision which took the U.S. and most gambling experts and commentators by surprise, Antigua charged the U.S. with violating international trade law in a dispute over its ban on remote Internet gambling and was victorious.

However, while the Appellate Body’s decision appears to be a major victory for Antigua, the decision has not yet proven to be the unqualified success that many WTO advocates claim. Specifically, the Appellate Body’s partial reversal of the Dispute Panel’s finding that, with the exception of the potentially discriminating *Interstate Horseracing Act* (“IHA”), the ban was “necessary to protect public morals or maintain public order,” has led to some confusion about who the real victor was in this dispute.⁹ Until very recently, there were two distinct interpretations of the decision’s practical meaning going forward. On one hand, Antigua had declared that “[d]espite the occasionally ambiguous language contained in the Report, the end result is the same as the result of the Panel Report [...]” and thus, the U.S. was in violation of its obligations under the *General Agreement on Trade in Services* (“GATS”).¹⁰ On the other hand, U.S. trade representatives disagreed with Antigua’s interpretation of the decision, pointing to the exception under the *GATS*, whereby a country can enforce laws intended to protect “public morals.”¹¹ The American interpretation is that the Appellate Body did not find that it failed to meet the standards specified in the chapeau of Article XIV, but that that Appellate Body ruled that so long as the U.S. alters the IHA so that it is not discriminatory against foreign competitors, the U.S. will be in compliance with its obligations under the *GATS*.¹²

This paper will summarize the progression of the WTO dispute, with a focus on recent developments. Special attention will be paid to the shortcomings in the WTO dispute settlement system, which even

⁹ WTO, *Report of the Appellate Body on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services on 7 April 2005*, WTO Doc. WT/DS285/AB/R at para. 373(D)(vi)(a), online: WTO <<http://docsonline.wto.org>>.

¹⁰ Mendell Blumenfeld LLP, “Memorandum Re: Report of the Appellate Body of the World Trade Organisation on the *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*” at 2 (2006), online: The Antigua-US WTO Dispute over Internet Gambling <http://www.antiguawto.com/wto/Summary_WTO_Case_March06.pdf>.

¹¹ Fox Butterfield, “U.S. Limits on Internet Gambling Are Backed” *The New York Times* (8 April 2005) C14, online: *The New York Times* <http://www.antiguawto.com/wto/07_NewsArt_NYTimes_8April05.pdf>.

¹² I. Nelson Rose, “Internet Gaming: U.S. Beats Antigua in WTO” *Casino City Times* (22 May 2005), online: *Casino City Times* <<http://rose.casinocitytimes.com/articles/19020.html>>.

following the recent Article 21.5 Panel Report, have resulted in a lack of certainty for online gambling operators concerning the legality of their operations. The adjudication of the Antigua-U.S. dispute represents the first time the WTO has considered the “public morals” exception under Article XIV.¹³ As such, it is critical that the WTO’s final ruling in this case deliver an unambiguous message regarding the applicability of this Article XIV defence, so that a clear precedent can be set and future trade disputes can avoid the protracted litigation which has characterized this matter. In addition, to add a greater degree of certainty and finality to Appellate Body decisions, the WTO should consider formal recognition of *stare decisis*. Moreover, an international regulatory scheme should be pursued by WTO members as a beneficial and more pragmatic alternative to the present prohibition which still survives in many jurisdictions.

THE RELEVANT LAW UNDER THE GATS

THE GATS GOVERNS TRADE IN SERVICES among WTO members and sets out the general principles that regulate the specific commitments entered into by each member nation. Under the GATS, each member is required to establish its own schedule of commitments. There are two significant principles under the GATS that each member must comply with regarding its individual schedule of commitments: 1) market access and 2) national treatment.

Market access is applicable to all WTO members and denotes that, concerning market access, each member will treat other members no less favourably than what is provided for under its Schedule.¹⁴ Under the market access principle, the GATS stipulates that, according to a country’s specific commitments, a country cannot use specific types of trade restraints, such as quotas.¹⁵

National treatment also applies to all WTO members and requires that each member treat all other members no less favourably than how it treats its own suppliers of like services.¹⁶

However, the GATS does provide for exceptions to the principles of market access and national treatment. Members are allowed to adopt

¹³ *Report of the Appellate Body on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services on 7 April 2005*, *supra* note 9 at para. 291, f.n. 351 (noting that the *United States—Antigua* dispute is also the first instance defining public morals).

¹⁴ *General Agreement on Trade in Services*, art. XVI(1), Annex IB to the *Agreement Establishing the World Trade Organization*, online: World Trade Organization <http://www.wto.org/English/docs_e/legal_e/26-gats.pdf>.

¹⁵ *Ibid.*, art. XVI(2).

¹⁶ *Ibid.*, art. XVII(1).

measures which are necessary to protect public morals, human life, or health, and to prevent fraudulent practices.¹⁷

THE DEVELOPMENT OF THE OFF-SHORE GAMBLING AND BETTING INDUSTRY IN ANTIGUA

THE ECONOMY OF ANTIGUA WAS BASED PRIMARILY on the exportation of sugar cane until the 1960s.¹⁸ A sudden drop in the price of sugar cane led Antigua to shift its focus to tourism later in the twentieth century.¹⁹ However, following a recent decline in the tourism industry, Antigua, with few other natural resources, sought to build up an Internet gambling industry to provide jobs to replace those in its fading tourist industry.²⁰ In the last decade, Antigua has successfully diversified its economy by developing infrastructure which supports gambling and betting services that operate primarily over the Internet. Antigua was one of the first nations to legalize, license, and regulate online wagering. By 1997, the island was recognized as a centre for online gambling companies, with over twenty gambling and Internet betting businesses operating in Antigua. By 1999, following a government-licensing program, employment in Antigua's gambling and betting industry reached 3000.²¹ By this time, there were 119 fully licensed Internet gambling and betting operations in Antigua, with the Antiguan government receiving over \$7.4 million dollars annually in licensing fees, accounting for over ten percent of the tiny nation's gross domestic product.²²

However, the success of the thriving industry attracted unsavory elements in the form of money laundering and organized crime. To placate growing concerns in the U.S. and the U.K.,²³ Antigua increased regulation of its gambling and betting industry.²⁴ However, once the tighter regulations were adopted, the economic boom from Antigua's gambling and betting industry lost much of its momentum. Between

¹⁷ *Ibid.*, art. XIV.

¹⁸ WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services: First Submission of Antigua and Barbuda on 1 October 2003*, WTO Doc. WT/DS285 at para. 8, online: The Antigua-US WTO Dispute over Internet Gambling <http://www.antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf>.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.* at para. 30.

²² *Ibid.*

²³ In 1999, the U.S. and the U.K. advised investors to be cautious of transactions involving financial institutions in Antigua. *Ibid.* at para. 31.

²⁴ *Ibid.*

1999 and 2002, the Antiguan economy was devastated by the closure of thirty-five licensed banks, a drastic decrease in gambling and betting operations, and the resulting decrease in government licensing fees.²⁵ Antigua had good reason to be alarmed about the sudden downturn in its infant online gambling industry. Estimates place the number of online gamblers at fifteen million, with revenue in excess of six billion dollars annually.²⁶ Four percent of Americans, or about twelve million people, currently engage in online gambling.²⁷ While this figure may seem insignificant given that one in four Americans visits offline casinos each year, it should be noted that the number of Americans gambling online doubled in 2005.²⁸ The typical online bettor can best be described as a marketer's dream. "The typical U.S. Internet gambler is under 40, college-educated, male, and more affluent than his fellow citizens [...]."²⁹ Furthermore, this demographic continues to grow—it is estimated that "a quarter of male college students now play card games online at least once a month."³⁰

In total, Americans make up one-half of online gamblers³¹ and are estimated to be responsible for 65% of Internet gambling revenues worldwide.³²

Background to the Antigua-U.S. WTO dispute

The dispute commenced on 27 March 2003, when the government of Antigua requested formal consultation with the U.S. and the WTO concerning the U.S.'s "total prohibition" on cross-border gambling services offered by Antiguan operators to consumers in the lucrative U.S. market.³³ Antigua asserted that the U.S. had violated its

²⁵ James D. Thayer, "The Trade of Cross-Border Gambling and Betting: The WTO Dispute between Antigua and the United States" [2004] *Duke L. & Tech. Rev.* 0013 at para. 6.

²⁶ John D. Andrie, "A Winning Hand: A Proposal for an International Regulatory Schema With Respect to the Growing Online Gambling Dilemma in the United States" (2004) 37.5 *Vand. J. of Transnat'l L.* 1389 at 1391.

²⁷ "Busted Flush" *The Economist* (5 October 2006), online: Economist.com <http://www.economist.com/business/displaystory.cfm?story_id=7997055>.

²⁸ *Ibid.*

²⁹ Out-law.com, "Illegal internet gambling soars in the US" *The Register* (10 May 2006), online: The Register <http://www.theregister.co.uk/2006/05/10/internet_gambling_soars/>. (Statistics cited from *Reuters*.)

³⁰ "Busted Flush," *supra* note 27.

³¹ Interactive Gaming Council, "Benefits of Joining the IGC" at 2, online: IGC <<http://www.igcouncil.org/join/IGCBenefits.doc>>.

³² Andrie, *supra* note 26 at 1391.

³³ WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Request for Consultations by Antigua and Barbuda on 27*

commitments under the *GATS* to open “other recreational services” to trade by prohibiting the cross-border provision of gambling services via the Internet.

The U.S. responded to the allegations by arguing that it had never committed to opening up competition in gambling services, which should be considered “sporting” services, explicitly separate from the American liberalization commitment. The U.S. contended that in the alternative, even if it had made such a commitment, the preservation of public morals compelled it to prohibit cross-border online gambling.³⁴ Offshore remote gambling, the U.S. argued, might produce money laundering, fraud,³⁵ and contribute to underage gambling³⁶ and gambling addiction among adults.³⁷

After consultations between the parties failed to produce a satisfactory settlement to the dispute, and on Antigua’s request, the WTO Dispute Settlement Body (“DSB”) established a panel to resolve the matter.³⁸

The WTO Dispute Panel Report (10 November 2004)

The Dispute Panel concluded that the U.S.’s schedule under the *GATS* included specific commitments on gambling and betting services under Section 10.D—Other Recreational Services (Excluding Sporting). The Panel found specifically that three U.S. federal laws, the *Wire Act*,³⁹ the *Travel Act*,⁴⁰ and the *Illegal Gambling Business Act*,⁴¹ failed to present services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations, and conditions

March 2003, WTO Doc. WT/DS285/1 at 1, online: WTO <<http://docsonline.wto.org>>.

³⁴ A nation is permitted to maintain a trade-restrictive measure if “necessary to protect public morals or to maintain public order.” *General Agreement on Trade in Services*, *supra* note 14, art. XIV(a).

³⁵ WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services: First Written Submission of the United States on 7 November 2003*, WTO Doc. WT/DS285 at para. 9, online: Office of the United States Trade Representative <http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file732_5581.pdf>.

³⁶ *Ibid.* at para. 16.

³⁷ *Ibid.* at para. 100.

³⁸ WTO, *Report of the Panel on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services on 10 November 2004*, WTO Doc. WT/DS285/R at para. 1.2, online: WTO <<http://docsonline.wto.org>>.

³⁹ 18 U.S.C. § 1084.

⁴⁰ 18 U.S.C. § 1952.

⁴¹ *Ibid.*, § 1955.

agreed and specified in its Schedule, contrary to Article XVI:1 and Article XVI:2 of the *GATS*. The Panel concluded that the U.S. was unable to demonstrate that these laws were provisionally justified under Articles XIV(a) and XIV(c) of the *GATS*. Furthermore, none of the laws at issue were found to be consistent with the requirements of the chapeau of Article XIV of the *GATS*. The Panel recommended that the WTO request the U.S. bring the applicable laws into compliance with its obligations under *GATS*, essentially requiring the U.S. to provide Antiguan gambling and betting service providers with market access to consumers in the U.S.

The Panel's unanimous ruling in favour of Antigua was hailed by Antigua's WTO ambassador as a "great victory" for a "little country."⁴² The Panel held that the U.S. had committed to market access for gambling services and that this commitment extended to all means of delivery, including the Internet.⁴³ Furthermore, the Panel rejected the U.S.'s defence of the protection of public morals, concluding that it had failed to engage in good faith discussions with Antigua with respect to finding a solution that might have met American concerns while allowing Antigua market access.⁴⁴

The WTO Report of the Appellate Body (7 April 2005)

The U.S. appealed the decision of the Panel, and the matter was considered by the WTO Appellate Body. After considering additional arguments filed by Antigua and the U.S., the WTO issued the Report of the Appellate Body, which upheld the Dispute Panel's report, though on slightly different and narrower grounds. In its report, the Appellate Body made four key rulings.⁴⁵

First, the Appellate Body ruled that the U.S. had indeed made a commitment to free trade in gambling and betting services in its schedule

⁴² Daniel Pruzin, "Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions" *International Trade Reporter* 21:13 (25 March 2004) 514, online: BNA <<http://www.bna.com/index.html>>.

⁴³ *Report of the Panel on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services on 10 November 2004*, *supra* note 38 at para. 6.287.

⁴⁴ *Ibid.* at para. 6.534.

⁴⁵ Antigua was represented by a team of attorneys in this case from two separate firms, Mark Mendel and Robert Blumenfeld of the law firm of Mendel Blumenfeld, LLP (with offices in both Texas and Ireland), and Craig Pouncey and Lode Van Den Hende from the Brussels office of the London-based firm of Herbert Smith. Mendel's summary of the case thus far is available: Mark E. Mendel, "Antigua-United States WTO Internet Gambling Case", online: The Antigua-US WTO Dispute over Internet Gambling <<http://www.antiguawto.com/WTODispPg.html>>.

of commitments under the *GATS*. The Appellate Body disagreed with the U.S. position that it had never made such a commitment and held that the commitment was made in Section 10.D of the U.S.'s *GATS* Schedule, under the heading "Other Recreational Services (Excluding Sporting)."⁴⁶ This finding was consistent with the preceding Panel Report.

Second, the Appellate Body held that the U.S. did adopt measures that interfered with its obligation under *GATS* to provide free trade in gambling and betting services with Antigua. The Appellate Body upheld the Dispute Panel's report, finding that the three federal laws at issue—the *Wire Act of 1961*, the *Travel Act*, and the *Illegal Gaming Business Act*—did in fact prohibit Antigua's online gambling services.⁴⁷

Antigua had submitted a long list of additional U.S. federal and state laws which it argued were measures that also violated its *GATS* commitment. Antigua also purported that the U.S. maintained a "total prohibition" against Antiguan online gambling service providers, and that this was in itself a violation. The Appellate Body disagreed with these additional submissions, finding that the long list of federal and state laws was not discussed in sufficient detail in Antigua's submission.⁴⁸ The Appellate Body added that a "total prohibition" cannot serve as a measure by itself and limited the offending measures found to include only the three federal laws listed above.⁴⁹

Third, the Appellate Body ruled that the measures established by Antigua—the three federal laws listed above—violated Article XVI of the *GATS*. In particular, the Appellate Body agreed that the U.S. prohibition limits service providers from Antigua in such a way as to violate Article XVI of the *GATS*.⁵⁰

Fourth, the Appellate Body concluded that the U.S. could not rely on a "public morals" defence against its violation of the *GATS* under Article XIV. In order for the U.S. to establish this morals defence, the U.S. was required to meet a two-pronged test: (1) prove that the three federal statutes are necessary⁵¹ to protect public morals or maintain

⁴⁶ *Report of the Appellate Body on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services on 7 April 2005*, *supra* note 9 at para. 213. Also noted at para. 373(B)(i).

⁴⁷ *Ibid.* at para. 373(A)(ii).

⁴⁸ *Ibid.* at para. 150, f.n. 172.

⁴⁹ *Ibid.* at para. 373(A)(i).

⁵⁰ *Ibid.* at para. 373(C)(ii).

⁵¹ The "necessity test" involves balancing three factors: "(1) the degree to which the common interests or values that the measure protects are vital and important, (2) whether alternative measures are 'reasonably available' to accomplish the stated objective, and (3) whether alternative measures are inconsistent with the Member's WTO obligations." See Tatjana Eres, "The Limits of GATT Article XX: A Back Door for Human Rights?" [2004] 35 *Geo. J. Int'l L.* 597 at 624-625.

public order and (2) satisfy a legal balancing test, referred to as the “chapeau,” which requires that measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or serve as a disguised restriction on trade in services.⁵²

With respect to the “Necessity test,” the Appellate Body decided, overruling the Dispute Panel, that the three federal statutes were necessary to protect public morals or maintain public order. The Appellate Body refuted the Dispute Panel’s requirement that the necessity of a measure requires consultation and instead ruled that necessity is based on an objective assessment of reasonable alternatives.⁵³ It then noted that all of the other factors expressed by the Dispute Panel weighed in favor of necessity (“very important societal interests” warranting strict controls) and that the three statutes in question “contribute to the realization of the ends that they pursue”—thus the U.S. measures were found to satisfy the necessity test.⁵⁴

However, with respect to the second prong of the test, the Appellate Body concluded that the U.S. did not establish the chapeau. The Appellate Body disagreed with the Dispute Panel’s finding that the U.S. enforced its gambling laws more strictly against foreigners than against domestic suppliers, but agreed with the Dispute Panel in ruling that the U.S. could not establish the chapeau because the U.S. permitted “remote gambling” in the U.S. in the form of off-track account wagering on horse races.⁵⁵ The Appellate Body noted that there were numerous companies in the U.S. that provided telephone and Internet betting services on horse races and that these companies were fully-sanctioned to provide these services by the IHA. Based on this finding, and not the other Dispute Panel findings, the Appellate Body concluded that the U.S. could not justify why it permitted U.S.-based companies to offer remote gambling while the U.S. prohibited Antiguan companies from offering the same type of gambling services. Consequently, the Appellate Body determined that the U.S. measures were contrary to the principle of national treatment.⁵⁶

What does the WTO Ruling mean?

Regardless of whether the Appellate Body decision is ultimately interpreted as a victory for Antigua or the U.S., the WTO ruling is important in several respects. The decision legitimizes the online

⁵² *Ibid.* at para. 339.

⁵³ *Ibid.* at paras. 316-17.

⁵⁴ *Ibid.* at paras. 322-27.

⁵⁵ *Ibid.* at para. 361.

⁵⁶ Matsushita, *supra* note 6 at 5.

gambling and betting services industry as providing a tradeable service recognized by the WTO.⁵⁷ In addition, the decision has provided an ongoing forum for Antigua-U.S. negotiations regarding the access of Antigua operators in the rapidly-growing U.S. gambling market. Furthermore, and potentially most importantly, the decision places international pressure on the U.S. to comply with the WTO ruling. This idea is based on the theory that if the U.S. refused to stand by its own WTO commitments, it would not only ensure “[...] constant frictions with the rest of the world, but also would diminish that nation’s ability to invoke those international rules that served its own national purposes.”⁵⁸

Following the Appellate Body’s ruling, it was predicted that new financial and media opportunities would open up for Antiguan gaming operators. The ruling was expected to end subpoenas or the threat of prosecution from the federal government to U.S. companies who choose to do business with Antiguan offshore gaming companies.⁵⁹ Following the ruling, Texas-based counsel which had represented Antigua throughout the WTO dispute process predicted,

[...] major internet search engines, including Google and Yahoo, financial institutions and credit card service providers will be required to accept transactions and advertising from Antiguan internet gaming sites as they do currently with U.S. gaming interests, including hundreds of American casinos and state lotteries.⁶⁰

U.S. NONCOMPLIANCE AND RECENT DEVELOPMENTS

a) “Reasonable Time”

Following the formal adoption of the Appellate Body’s report by the DSB, the U.S. expressed its intention to comply with the recommendations and rulings of the report, but failed to expressly indicate its plan to do so. The U.S. and Antigua were unable to agree on a “reasonable period of time” in which the U.S. would comply with the

⁵⁷ Mendel, *supra* note 45.

⁵⁸ Harold Hongju Koh, “International Law as Part of Our Law” (2004) 98 Am. J. Int’l L. 43 at 44.

⁵⁹ Previously U.S. companies such as Citibank, Chase Manhattan, Bank of America, Clear Channel Communication, Discovery TV, Yahoo, and MSN were discouraged from conducting financial transactions or broadcasting advertisements involving online gaming products. See Mendel, *supra* note 45.

⁶⁰ *Ibid.*

recommendations of the DSB and thus the determination went to binding arbitration under WTO procedures. The arbitrator gave the U.S. until 3 April 2006 to come into compliance with the rulings and recommendations of the DSB.⁶¹

b) The *Leach Bill* and the *Goodlatte Bill*

Following the introduction into Congress of the *Unlawful Internet Gambling Enforcement Act of 2005*⁶² (“The *Leach Bill*”) on 18 November 2005 and the *Internet Gambling Prohibition Act*⁶³ (“The *Goodlatte Bill*”) in February 2006, the Antiguan Ambassador and WTO representative wrote to the U.S. Trade Representative (“USTR”), complaining that the bills were “non-responsive” and “baldly contrary to the rulings and recommendations of the DSB.”⁶⁴ Antigua noted that the *Goodlatte Bill* was essentially an amendment to the *Wire Act of 1961*, designed to extend the federal criminal statute’s coverage to include most types of gambling services offered over the Internet. The *Leach Bill*, Antigua noted, does not expressly purport to prohibit remote betting *per se*, but rather seeks to criminalize the facilitation of or participation in certain financial transactions associated with what is defined in the legislation as “unlawful Internet gambling.” Antigua noted that both bills contain three significant exceptions from their coverage: 1) transactions made in accordance with the IHA; 2) “intrastate transactions” as defined in the *Leach Bill*, in effect allowing remote gambling that occurs within the borders of a U.S. state; and 3) remote gambling conducted by Native American tribes in accordance with existing federal legislation. Antigua contended that neither of the bills provides Antiguan gambling and betting services with any access to U.S. consumers, nor was either bill responsive to the recommendations and rulings of the DSB. Antigua stated that the three exceptions to the coverage of the bills serve to highlight the chapeau failure and the discriminatory and trade restrictive application of U.S. laws.

⁶¹ In accordance with WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 21.3(c), Annex 2 to the *Agreement Establishing the World Trade Organization*, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> (the “DSU”).

⁶² U.S., Bill H.R. 4411, *Internet Gambling Prohibition and Enforcement Act*, 109th Cong., 2005.

⁶³ U.S., Bill H.R. 4777, *Internet Gambling Prohibition Act*, 109th Cong., 2005.

⁶⁴ Daniel Pruzin, “Antigua Preparing to Impose WTO Sanctions Against U.S. in Internet Gambling Dispute” *International Trade Reporter* 23:8 (23 February 2006) 281, online: BNA <<http://www.bna.com/index.html>> (citing excerpts from 16 February 2006 letter, from Dr. John W. Ashe, Ambassador/Permanent Representative to the WTO to Mr. Rob Portman, USTR).

c) Antigua's Response

Following a meeting of the DSB on 17 March 2006, during which the USTR representative had described the status of its compliance with the rulings and recommendations of the DSB by simply noting that it was “working with Congress” on the matter, the Antiguan Ambassador delivered a scathing address to the assembled delegates, in which he criticized the “complete lack of information from the United States on this most important matter facing the small and delicate economy of Antigua and Barbuda.”⁶⁵ In regards to the new American bills, the ambassador stated that,

[...] each proposal is about as directly contrary to the recommendations and rulings of the DSB as could possibly be imagined. Not only do these bills do nothing to provide Antiguan operators with any access whatsoever to the vast American gambling market, but in fact each would further entrench the anti-GATS nature of United States gambling law by expressly exempting from its application domestic Internet gambling on horse racing, Internet gambling conducted by Native American tribes and [...] Internet gambling that occurs entirely within the border of a particular state.⁶⁶

The ambassador contended that the pending legislation was concrete proof that the American prohibition was really based upon the cross-border nature of the services rather than any of the true “evils” associated with remote gambling as Antigua had argued all along.⁶⁷ He

⁶⁵ H.E. Dr. John W. Ashe, Ambassador of Antigua and Barbuda to the World Trade Organisation, (Statement at the Meeting of the Dispute Resolution Body, 17 March 2006), online: Antigua and Barbuda <http://www.antigua-barbuda.com/business_politics/Dr_Ashe_Speech_WTO.asp>.

⁶⁶ *Ibid.*

⁶⁷ See Gavin Clarkson, “Online Sovereignty: How Tribes Can Use Technology to Offer Internet-Based Gaming” (Working Paper, University of Michigan, 2005) [unpublished] at 3, online: University of Michigan <<http://www.si.umich.edu/~gsmc/pub/InternetGamingWhitePaper.pdf>>. In his article, Professor Gavin Clarkson expressed a similar sentiment noting, “One motivation for Internet gambling legislation, in addition to all the speeches about protecting the morals of the community, is that states stand to lose revenue with online gamblers directing funds out-of-state or out of the country instead of spending this gambling money with state-sponsored lotteries or state-licensed casinos.” (cited with author’s permission)

also emphasized that the proposed legislation had already negatively impacted Antigua's economy, noting that American-based money transfer service Western Union had recently ceased providing money transfer services to and from Antigua, despite the nation's tightly regulated and overseen financial services sector and record of cooperating with other countries around the globe to detect, deter, and prevent financial crimes.⁶⁸ The ambassador noted that Antigua's membership in the WTO was rooted in the desire to compete with larger economies and, in the case of a dispute, to "achieve a fair and balanced hearing which would provide us with a meaningful remedy despite our limited global economic consequence."⁶⁹ The ambassador challenged the U.S. to act as a responsible stakeholder in the WTO and demonstrate that the WTO is not merely a "one-way street" for large economies to further enrich themselves at the expense of lesser ones.⁷⁰

d) Recourse to Article 21.5 of the DSU by Antigua and Barbuda

Consultation between the parties stalled in June 2006 as the parties continued to disagree about the existence and consistency of the measures taken by the U.S. to comply with the recommendations and rulings of the DSB. On 6 July 2006, the delegation from Antigua requested the establishment of an Article 21.5 Panel and in August 2006, the matter was referred back to the Panel.

e) Economic Impact Abroad

While the debate continued at the WTO, the economic fallout had already begun, and Antigua was not the only country where businesses and individuals were being affected.

Since most U.S. banks prohibit the use of their debit cards for the purpose of Internet gambling, and as most U.S. residents are unable to use credit cards at Internet gambling sites, a number of e-money services, including NeTeller, Firepay, and Moneybookers have sprung up to service this niche by providing online accounts for the purposes of funding online gambling.⁷¹

NeTeller has been one of the high-profile companies negatively affected by the *Unlawful Internet Gambling Enforcement Act*, which was

⁶⁸ Ashe, *supra* note 65.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ U.S., United States General Accounting Office, *Report to Congressional Requestors: Internet Gambling—An Overview of the Issues* (2002) at 27 & 53, online: GAO <<http://www.gao.gov/new.items/d0389.pdf>>.

passed by U.S. Congress in October of 2006. The company, which is publicly listed on the London Stock Exchange and has its corporate headquarters on the Isle of Man, was founded by two former Canadian lawyers in 1999.⁷² The online payment processor, which allows customers to use their NeTeller accounts to transfer funds online and deposit into or withdraw from banks around the world, was relatively small until PayPal discontinued accepting gambling-related transactions in 2002.⁷³ In 2006, the company processed an estimated seven billion dollars (U.S.) in online payments.⁷⁴ However, the passage of the *Unlawful Internet Gambling Enforcement Act* resulted in the company's stock falling by 60% in October of 2006.⁷⁵ Since the Act prohibits "financial transaction providers" from transferring funds to online gambling sites, legal commentators noted that NeTeller could be prohibited from allowing customers to send money from their online NeTeller accounts to gambling sites as a result of this new legislation.⁷⁶

f) January 2007 Developments

On 15 January 2007, in a move which captured the full attention of the online gambling world, the two NeTeller founders were arrested separately in the U.S. and charged with conspiring to distribute funds "with the intent to promote illegal gambling."⁷⁷ These arrests are particularly noteworthy, as both men are former directors of the company with no present connection to the corporation besides owning shares. Regardless, the two Canadians are only the latest to be arrested in the U.S. crackdown on Internet gambling.⁷⁸ Following the arrests, the

⁷² "Their Gambling Divide" *The Globe and Mail* (19 January 2007) A.12.

⁷³ Joanna Glasner, "EBay Says No to PayPal Gambling" *Wired* (9 July 2002), online: *Wired* <<http://www.wired.com/news/business/0,1367,53703,00.html>>.

⁷⁴ "The Gambling Divide," *supra* note 72.

⁷⁵ "US Stocks Crushed by Online Gaming Act" *SEC Investor* (2 October 2006), online: *SEC Investor* <<http://www.secinvestor.com/default,month,2006-10.aspx>>.

⁷⁶ I. Nelson Rose, "Gambling and the Law—The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed" (2006), online: *Gambling and the Law* <http://www.gamblingandthelaw.com/columns/2006_act.htm>.

⁷⁷ "The Gambling Divide," *supra* note 72.

⁷⁸ In July 2006, U.S. authorities arrested BetonSports CEO, David Carruthers, in Texas as he was changing planes while traveling from London to Costa Rica. He had previously been charged in a sealed indictment of violating nine federal U.S. statutes, including the *Wire Act*. See Harry Wallop, "US attack on online gaming" *The Daily Telegraph* (19 July 2006), online: *Telegraph Newspaper Online* <<http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2006/07/18/cnf.bi18.xml>>. In September 2006, U.S. authorities detained the chairman of SportingBet PLC, a publicly-traded British online gaming company, based on a Louisiana warrant while he was traveling in New York. Louisiana is one of the few

company temporarily suspended share trading and subsequently announced it would discontinue offering its services to U.S. customers.⁷⁹ Following its exit from the U.S. market, the company announced 220 layoffs at its Calgary offices and additional layoffs in the U.K. were also confirmed.⁸⁰ The company currently retains 425 staff members worldwide, a decrease from 1000 in mid-2006.⁸¹

On 25 January 2007, USTR officials confirmed that the preliminary confidential report issued to the parties indicated that the WTO Article 21.5 Panel was not persuaded that the U.S. had taken the necessary steps to comply with the Appellate Body's report.⁸² However, following its receipt of the preliminary report, the U.S. submitted further comments to the Panel to be considered before the Panel issued its final report.

g) The Article 21.5 Panel Report and the Future

On 30 March 2007, the Article 21.5 Panel Report was formally issued to the parties. The report contained three important findings with respect to U.S. compliance. Firstly, the Panel held that the U.S. had taken no action towards compliance with the DSB's recommendations and thus was out of compliance.⁸³ Secondly, the Panel noted that the U.S. was not entitled in the compliance proceedings to reargue the case

U.S. States which has a specific law prohibiting online gambling. At the end of the month, New York dismissed the Louisiana warrant, but by that time the chairman had already resigned from his position at the company. See Julie Kollwe, "Former gambling chief Dicks is freed in US" *The Independent* (30 September 2006), online: [The Independent <http://news.independent.co.uk/business/news/article1772362.ece>](http://news.independent.co.uk/business/news/article1772362.ece).

Note: both of these arrests took place prior to the passage of the *Unlawful Internet Gambling Enforcement Act*, under which the founders of NeTeller were charged.

⁷⁹ "Neteller cuts 220 Calgary jobs as U.S. business falls" *The Globe and Mail* (17 February 2007) B7.

⁸⁰ *Ibid.*

⁸¹ The Neteller Group, Press Release, "NETELLER Group Rationalisation Programme Substantially Complete" (16 February 2007), online: [The Neteller Group <http://www.neteller-group.com/press/en/125.htm>](http://www.neteller-group.com/press/en/125.htm).

⁸² Doug Palmer, "U.S. confirms loss in Internet gambling trade case" *SignOnSanDiego.com* (25 January 2007), online: [The Antigua-US WTO Dispute over Internet Gambling <http://www.antiguawto.com/wto/Reuters_USconfirms_loss_in_tradecase_25jan07.pdf>](http://www.antiguawto.com/wto/Reuters_USconfirms_loss_in_tradecase_25jan07.pdf).

⁸³ WTO, *Report of the Panel on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda on 30 March 2007*, WTO Doc. WT/DS285/RW at para. 6.38, online: [WTO <http://docsonline.wto.org>](http://docsonline.wto.org).

that had failed before the Dispute Panel and the Appellate Body.⁸⁴ Thirdly, the Panel added that even assuming the U.S. had been entitled to present new or additional arguments on its failed case, based upon the materials before the Panel in this proceeding, the U.S. case would still fail.⁸⁵

The Panel also held that the U.S. was *not entitled* to maintain its offending measures—the *Wire Act*, the *Travel Act*, and the *Illegal Gambling Business Act*—under the “public morals” exception.⁸⁶ Furthermore, the Panel provided clarification on the divide between the Dispute Panel Report and the report of the Appellate Body, holding that because the U.S. measures were inconsistent with the GATS and the U.S. did not satisfy both parts of the “public morals” exception, it lost the case.

It is true that the Appellate Body found that the United States had demonstrated that the measures at issue were justified under paragraph (a) of [the ‘public morals’ defence]. However, this was *not* a finding on [the defence] in its entirety. The Appellate Body expressly confirmed that [the defence] contemplates a ‘two-tier analysis’—first, under one of the paragraphs of Article XIV and then under the chapeau. There was no finding that the measures were consistent with the chapeau or with Article XIV in its entirety nor, hence, with the United States’ obligations under the GATS [...].⁸⁷

The Panel also made several other key findings which will have an impact on the case going forward. The Panel observed that in light of recent prosecutions by the U.S. of foreign operators, combined with a clear lack of prosecutions of domestic operators, remote interstate wagering under the IHA is “tolerated, even if not authorized under federal law.”⁸⁸ The Panel also noted that the *Unlawful Internet Gambling Enforcement Act* appears to have recognized that regulation of remote gambling is feasible, yet nevertheless decided to retain the ambiguity regarding the IHA rather than “clarifying” it in the way the U.S. had argued to the Panel.⁸⁹ The Panel also admonished the U.S. for

⁸⁴ *Ibid.* at paras. 6.57 & 6.85.

⁸⁵ *Ibid.* at para. 6.110.

⁸⁶ *Ibid.* at para. 6.26.

⁸⁷ *Ibid.* at para. 6.29. (emphasis in original)

⁸⁸ *Ibid.* at para. 6.128.

⁸⁹ *Ibid.* at paras. 6.130 & 6.133.

commenting publicly in January on an interim version of its report, which had been circulated under strict rules of confidentiality.

The U.S. has sixty days to announce whether it will appeal to the WTO's Appellate Body, which seems to be the most likely outcome, given the history of the dispute. The appeal, if there is one, would last approximately three months, so a final resolution on the issue can be expected this summer.⁹⁰ In the meantime, the Panel Report's most significant short-term impact may be that it makes it virtually impossible for the U.S. to continue to maintain its position that it somehow "won" the dispute, or that the WTO had ruled that the U.S. was entitled to prohibit the provision of Internet gambling services from Antigua.

Should Antigua ultimately be vindicated in this prolonged trade dispute, it would be the smallest nation ever to win a WTO case.⁹¹ Furthermore, a victory for Antigua would mean that the country would be allowed to take retaliatory trade measures against the U.S., such as tariffs on imports, designed to "encourage" the U.S. to meet its obligations under the GATS. Pragmatically, however, such action is unlikely to influence U.S. lawmakers, given the small size of the Antiguan economy, which is heavily dependent on trade with the U.S.⁹² Imposing additional duties on the few imports from the U.S. would simply make American goods more expensive to Antiguans.

Perhaps somewhat ironically, the biggest threat after the WTO case is decided may not even come from Antigua, but rather from the Internet gambling industry in the European Union, which had previously stated it was an "interested party" in the case.⁹³ Recent prosecutions by U.S. authorities could pave the way for the EU to pursue a fair trade case against the U.S., which the U.S. might have to take more seriously, given the more significant impact that trade sanctions from the EU could have on the U.S.

⁹⁰ Despite the lack of finality in this dispute, shares in London-listed gaming stocks rose after the March 30th announcement. Leisure & Gaming PLC closed up 11 percent, while PartyGaming PLC rose 4.5 percent, after initially surging by 16 percent. 888 Holdings PLC climbed 3 percent. See Bradley S. Klapper, "WTO Rebuffs U.S. on Internet Betting Ban" *Houston Chronicle* (30 March 2007), online: The Antigua-US WTO Dispute over Internet Gambling <http://www.antiguawto.com/wto/HoustonChronBradleyKlapperAP_WTORebuffsUS_30mar07.pdf>. For a brief description of the developments on this topic, see *supra* note 1.

⁹¹ "WTO rules against US in Internet gambling case" *Financial Times* (26 January 2007), online: The Antigua-US WTO Dispute over Internet Gambling <http://www.antiguawto.com/wto/FinancialTimes_WTO_Rules_against_US_26jan07.pdf>.

⁹² *Ibid.*

⁹³ *Ibid.*

While it is possible that the Appellate Body may dilute some of the Panel's findings, as the Appellate Body did with the Dispute Panel Report, it seems unlikely that the key findings of the most recent report will change in any material respect. If the final Appellate Body Report is adverse to the U.S., as most experts predict it will be, it raises an interesting dilemma for a nation which has a relatively good record of compliance with WTO panel decisions. The U.S. clearly realized that its passage of the *Unlawful Internet Gambling Enforcement Act* was not in compliance with the WTO ruling and was merely trying to buy time. However, once the U.S. exhausts its appeals, it will have to make a difficult decision: ban all remote gambling in the U.S., open their doors to Antigua operators, or continue to ignore the WTO ruling and suffer the consequences. Clearly the U.S. will not ban all remote gambling within its borders, given the revenue implications to the horse racing industry, which lobbied vigorously for the provision given under the IHA, and are unlikely to relinquish those rights in an effort to appease the government. It is also highly unlikely that the U.S. will ease access to companies with servers licensed in a nation with only 80,000 people, whose legal efforts were largely bankrolled by British-owned Internet gambling operators, especially given all the rhetoric it spouted in the past about morals.⁹⁴ Thus, it seems that the U.S. will choose to ignore the ruling and allow Antigua to retaliate with trade sanctions. This wouldn't be the first time the U.S. has chosen this route, as it ignored several rulings in favour of Canada relating to the softwood lumber dispute, resulting in Canada eventually offering the U.S. many concessions simply to end the ongoing fight.⁹⁵ Unlike the situation with Canada, however, the U.S. will have a much larger problem if it chooses to ignore the WTO ruling relating to Antigua. Japan, Chinese Taipei, the European Union (representing several European countries), Canada, and Mexico all chose to participate in the most recent panel as interested third parties and their motivation seems obvious. Each of these member countries had disputes with the U.S. in which the WTO ruled in favour of the U.S. Each of these countries consequently abided by the WTO decision and complied with the ruling to their own economic detriment.⁹⁶ The U.S. has clearly been the greatest benefactor of WTO rulings and Antigua will be a test case for the world to see what the U.S. will do if the roles are

⁹⁴ Klapper, *supra* note 90.

⁹⁵ Hartley Henderson, "WTO Ruling: The U.S. Lost Again. Now What ... " *MajorWager* (1 April 2007), online: MajorWager <http://www.antiguawto.com/wto/MajorWager_WTOTheUSLostAgain_1Apr07.pdf>.

⁹⁶ "With Japan, this related to carbon steel and apples; with Chinese Taipei, it related to steel; with Canada, it related to beef; and, very recently, the U.S. won a WTO dispute against Mexico over beverage taxes. And with regards to the EU, the United States won several disputes with European countries." *Ibid.*

reversed. If the U.S. chooses simply to ignore the final WTO ruling favouring Antigua, other countries may decide based on its actions that WTO rulings are not applicable and as a result, they may just decide to stop abiding by previous or future findings themselves. This chain of events would greatly undermine the WTO dispute settlement system, making it appear as a “toothless tiger,” which in the end would hurt U.S. interests the most.⁹⁷

It is uncertain how the U.S. will proceed once its stalling tactics cease to be effective. However, considering the long-term damage that ignoring the ruling would do to the credibility of the U.S. and the WTO dispute settlement system, it seems the U.S. will eventually have no choice but to enter into meaningful negotiations with Antigua to resolve this dispute.

CONCLUSION

ALTHOUGH THE RECENT ARTICLE 21.5 PANEL REPORT unequivocally upholds Antigua’s arguments, over two years have passed since the Appellate Body report was issued and yet the issue still remains largely unresolved. Much of the delay has stemmed from the manner in which the Appellate Body’s report blatantly undermined the findings of the original Dispute Panel. The unfortunate result was a report which had:

[...] certain hallmarks of a political decision [...] the Appellate Body decided that Antigua deserved the win under the law, but wanted to make the win as thin and ambiguous as it could under the circumstances.⁹⁸

This shortcoming in the WTO Dispute Settlement system could best be addressed by adopting formal *stare decisis*, which would result in a significantly greater degree of certainty for member nations. In addition, an international regulatory scheme for Internet gambling should be embraced by WTO members, as a result of the unique global nature of the Internet.

⁹⁷ *Ibid.*

⁹⁸ Mendell Blumenfeld LLP, *supra* note 10.

a) The WTO should set a Clear Precedent re: the Article XIV Defence and Consider Recognizing *de jure Stare Decisis*

The Antigua-U.S. dispute marks the first occasion for the WTO to consider the “public morals” exception under Article XIV. As a result, the Dispute Panel was unable to refer to prior *GATS* jurisprudence as precedent.⁹⁹ Nevertheless, even if previous decisions interpreting Article XIV existed, *stare decisis* does not apply to the WTO.¹⁰⁰ However, previous decisions remain persuasive and may have a binding nature as the WTO currently has a system of *de facto stare decisis*.¹⁰¹ The WTO should formally address the binding nature of previous Dispute Panel and Appellate Body decisions in order to eliminate inconsistent Appellate Body decisions. While the concept of *stare decisis* is already common in Appellate Body reports, the WTO needs to address the precise extent to which past decisions are binding. “If the Appellate Body is explicitly bound by the reasoning used in past decisions, the WTO will benefit from a Dispute Settlement system that is fair, predictable, and credible.”¹⁰² This additional measure of certainty would place first and third world countries on an equal footing by creating legitimacy in Appellate Body decisions.¹⁰³ A further benefit of adopting *stare decisis* would be the reduction of tension between first and third world countries, as first world countries would be unable “to use their political or economic power to influence the outcome of a dispute.”¹⁰⁴

⁹⁹ *Report of the Panel on United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services on 10 November 2004*, *supra* note 38 at para. 6.447.

¹⁰⁰ Richard H. Steinberg, “Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints” (2004) 98 *Am. J. Int’l L.* 247 at 254.

¹⁰¹ Kelly Ann M. Tran, “The WTO Appellate Body Gambles on the Future of the *GATS*: Analyzing the Internet Gambling Dispute between Antigua and the United States before the World Trade Organization” (Working Paper No. 1803, *bePress Legal Series*, 2006) at 145, online: *bePress Legal Repository* <<http://law.bepress.com/cgi/viewcontent.cgi?article=8556&context=expresso>>.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at 145-46.

¹⁰⁴ *Ibid.* at 147 (noting that the consensus requirement assures the automatic adoption of final reports because of the assumption that the winning party will be “unwilling to join any consensus against a ruling in its favor”).

b) WTO Members should adopt an International Regulatory Scheme for Internet Gambling

No business on the Internet generates as much revenue as online gambling.¹⁰⁵ In a report issued by the National Gambling Impact Study Commission describing the potential influence of online gambling on the American population, it stated that “[o]nline wagering promises to revolutionize the way Americans gamble because it opens up the possibility of immediate, individual, 24-hour access to the full range of gambling in every home.”¹⁰⁶ Currently in the U.S., gambling is legal in nearly every state and when considering the ample amount of legal land-based gambling, it tends to erode the rationale for continued prohibition of online gambling.¹⁰⁷

As the Antigua-U.S. WTO dispute over online gambling has demonstrated, controlling online gambling is not an issue confined to any one specific nation. Online gambling is a global issue affecting virtually all countries and consequently, any meaningful analysis of online gambling requires an international perspective. Although substantial revenues are generated from online gambling, there exist a myriad of domestic problems which accompany gambling.¹⁰⁸ In light of these policy concerns and the long global history of gambling, it is imperative that all nations develop an international scheme to deal with the situation. “Several countries have successfully moved toward Internet gambling regulations, such as Britain, Australia, and Belgium, all of which passed new legislation regulating online gambling.”¹⁰⁹

Considering the decision of the Appellate Body in the Antigua-U.S. case and based on the recently issued Article 21.5 Panel Report, it appears that the only truly viable solution involves choosing regulation over prohibition.¹¹⁰ The model solution would consist of an “international regulatory schema that preserves each country’s individual right to

¹⁰⁵ Andrie, *supra* note 26 at 1390.

¹⁰⁶ *Ibid.* at 1391.

¹⁰⁷ See Wesley S. Ashton, “Criminalizing Internet Gambling: Should the Federal Government Keep Bluffing or Fold?” (Working Paper No. 1304, *bePress Legal Series*, 2006) at 21, online: *bePress Legal Repository* <<http://law.bepress.com/expresso/eps/1304/>>. (Noting that 37 states offer lotteries, 11 states permit commercial casino gambling and nearly half of U.S. states host Class III Indian Gaming.)

¹⁰⁸ Common social problems associated with gambling include: “divorce, bankruptcy, crime, domestic violence, child neglect, addictive gambling, and alcohol and drug offences.” Andrie, *supra* note 26 at 1392.

¹⁰⁹ Tran, *supra* note 101 at 149.

¹¹⁰ Unless a nation prohibits all “remote” gambling activities within its own borders.

decide the specifics of its online gambling laws while still creating a legitimate method of enforcement”¹¹¹ which complies with the *GATS*.

The advantages of pursuing an international regulatory scheme are readily apparent. Nations would be empowered to design their own online gambling laws with reference to specific domestic social and moral concerns. International regulation combined with the official adoption of *stare decisis* at the WTO would create increased certainty for online gaming companies, online payment processors, financial institutions, and credit card companies regarding the legality of their operations vis-à-vis online gambling. Perhaps most importantly, the forgotten stakeholder in this entire debate—the 23 million estimated online gamblers globally—would be able to enjoy the entertainment provided by gambling in the comfort of their own homes without the constant fear of prosecution.¹¹²

¹¹¹ Andrie, *supra* note 26 at 1393.

¹¹² American Gaming Association, *supra* note 2.