THE WTO APPELLATE BODY GAMBLES ON THE FUTURE OF THE GATS:

ANALYZING THE INTERNET GAMBLING DISPUTE BETEEN ANTIGUA AND THE UNITED STATES BEFORE THE WORLD TRADE ORGANIZATION

KELLY ANN TRAN

INTRODUCTION

The World Trade Organization's ("WTO") recent Appellate Body decision in the *Antigua—United States* dispute involved a claim by Antigua and Barbuda ("Antigua") that U.S. federal and state anti-gambling regulations violated U.S. obligations under the General Agreement on Trade in Services ("GATS").[1] The U.S. federal laws in question, the Wire Act, the Travel Act, and the Illegal Gambling Business Act ("IGBA"),[2] allegedly make it

1. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 374, WT/DS285/AB/R (Apr. 7, 2005) (requesting that the United States bring its measures, found in this Report and in the Panel Report to be inconsistent with the GATS, into conformity with its obligations under GATS); *see* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1168 (1994) [hereinafter GATS].

2. Wire Act, 18 U.S.C. § 1084 (2000) (penalizing "betting or wagering" businesses that facilitate "bets or wagers on sporting events or contests" over the Internet); Travel Act, 18 U.S.C. § 1952 (2000) (defining "unlawful activity" as including any business enterprise involving gambling in violation of the laws of the United States or the particular state in which they are committed); Illegal Gambling Business Act, 18 U.S.C. § 1955 (2000) (defining "illegal gambling

unlawful for suppliers located outside the United States to "remotely" supply gambling and betting services to consumers within the United States.[3] Regulating Internet gambling[4] within Antigua is particularly important to the United States because a substantial portion of offshore Internet gambling sites in the nearby Caribbean and Central America are located in Antigua.[5] By 1999, there were over

---

business" as a business that violates "the law of a State or political subdivision, . . . involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and 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").

3. *See generally* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3.227, WT/DS285/R (Nov. 10, 2004) (defining remote supply of gambling and betting services as including situations in which the gambling service supplier, whether foreign or domestic, and the service consumer are not physically in one place).

4. Internet gambling is defined as "any activity that takes place via the Internet and that includes placing a bet or wager." U.S. GEN. ACCOUNTING OFFICE, PUBL'N NO. GAO-03-89, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUE 1 n.1 (2002). Wagers and bets, under the typical definition put forward by courts, include "a prize, consideration, and chance." *Id.*

5. *See* Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 128 (2000); *see also* John D. Andrle, Note, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT'L L. 1389, 1409 (2004) (explaining that the 1994 Antigua and Barbuda Free Trade and Processing Zone Area Act established a commission to create a tax-free zone for a number of industries, including gambling, which caused gambling to become a major industry in the area).

one hundred licensed Internet gambling operators in Antigua.[6]

In November 2004, the WTO Panel ruled in favor of Antigua.[7] This decision would have required the United States to allow offshore casinos to accept U.S. wagers over the Internet. However, on April 7, 2005, the WTO Appellate Body partially reversed the Panel's decision.[8] Both the Panel and the Appellate Body found the U.S. ban to be a restriction on trade in services under GATS;[9] but unlike the Panel, the Appellate Body found that, with the exception of the potentially discriminating Interstate Horseracing Act ("IHA"),[10] the ban was "necessary to protect public morals or maintain public order."[11]

---

6. *See* First Written Submission of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 7, WT/DS285 (Oct. 8, 2003), *available at* http://www.antigua-barbuda.com/business_politics/pdf/Antigua_FirstSubmission_ExecutiveSummary.pdf (adding that the revenue generated from these activities in 1999 accounted for over ten percent of the nation's gross domestic product that year); *see also* Jeffrey Sparshott, *WTO Lets U.S. Limit Internet Gambling*, WASH. TIMES, Apr. 8, 2005, at C8 (noting the importance of internet gambling revenue as a supplement to Antigua's tourist business).

7. Panel Report, *supra* note 3, ¶¶ 7.2, 7.5.

8. Appellate Body Report, *supra* note 1, ¶ 373.

9. *Id.*; Panel Report, *supra* note 3, ¶ 7.2(b); *see also* Joost Pauwelyn, *WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach Into Sensitive Domestic Regulation*, AM. SOC'Y INT'L L. INSIGHT, Apr. 12, 2005, http://www.asil.org/insights/2005/04/insights050412.html (noting that domestic regulation banning the remote supply of gambling services constitutes a "per se prohibited market access restriction" because it has the effect of keeping out "cross-border supplies of gambling services").

10. 15 U.S.C. §§ 3001-3007 (2000) (stating that an interstate off-track wager cab be accepted by an off-track betting system).

11. Appellate Body Report, *supra* note 1, ¶ 373(D)(vi)(a).

This Comment explores whether the Appellate Body, in finding that the U.S. restrictions on gambling qualified for an exception under Article XIV of the GATS, adequately balanced international free trade rules with the U.S. desire to continue to enforce federal restrictions relating to Internet gambling.[12] Part I explains the relevant provisions of GATS Article XIV, particularly XIV(a) and the chapeau, and the general exceptions to Article XIV. Part I also examines the WTO *Antigua—United States* Panel Report and provides background on previous WTO cases that applied and interpreted Article XX of the 1994 General Agreement on Tariffs and Trade ("GATT"), which is similar in language and applicability to Article XIV of GATS. Part II argues that the Appellate Body erred when it concluded that the U.S. gambling restrictions are necessary to protect public morals or maintain public order. Particularly, Part II argues that the Appellate Body failed to adhere to previous WTO measures dealing with similar jurisprudence and both panels did not

12. *Compare* Chad Hills, Citizen Link, Focus on Social Issues: Gambling in the U.S., The National Gambling Impact Study Commission (NGISC) Report (Nov. 26, 2003), http://www.family.org/cforum/fosi/gambling/gitus/a0028977.cfm (providing support for the U.S. interest in prohibiting gambling by explaining that "the NGISC report clearly states that gambling addiction is increasing in the United States as gambling expands"), *with* James D. Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, DUKE L. & TECH. REV., Nov. 5, 2004, ¶¶ 19-20, http://www.law.duke.edu/journals/dltr/articles/PDF/2004DLTR0013.pdf (arguing that the U.S. moral exception claim is attenuated because of the vast extent of gambling among U.S. citizens and the accepted practice of gambling in various form throughout all fifty states).

adequately explain the significance of footnote 5 in GATS Article XIV. Finally, Part III recommends that the WTO explicitly recognize and more stringently enforce its practice of treating prior Panel and Appellate Body decisions as binding; the parties to GATS clarify the language in Article XIV; and that States parties create their own Internet gambling regulations to account for the unique jurisdictional issues surrounding the Internet.

I. BACKGROUND

The WTO resulted from the Uruguay Round that took place between 1986 and 1994.[13] Principle among the WTO's functions are supervising the administration of multilateral trade agreements, serving as a forum for trade negotiations, cooperating with other international institutions to facilitate cohesive policymaking, and facilitating trade dispute resolution.[14]

13. *See* World Trade Organization, Understanding the WTO: The Basics, What is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited May 3, 2006) [hereinafter Understanding the WTO] (comparing documents negotiated by the WTO to contracts, which bind governments to keep their trade policies within agreed limits); *see also* World Trade Organization, The WTO in Brief: Part 3, The WTO Agreements, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm (last visited May 3, 2006) [hereinafter the WTO Agreements] (stating that from 1947 to 1994, GATT was the forum for negotiating trade agreements and since the establishment of the WTO, GATT has become the WTO's umbrella agreement for trade in goods).

14. Marrakesh Agreement Establishing the World Trade Organization, art. III, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1145 (1994) [hereinafter WTO Agreement]; *see also* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 Harv. L. Rev. 511, 530-31 (2000) (opining that the WTO's dispute resolution system is its most important function).

The GATT is the WTO's principal authority for trade in goods.[15] Through the GATT, WTO Members operate a non-discriminatory trading system that defines their rights and obligations.[16] The GATS, on the other hand, was created to provide a similar system of international trade rules for the services sector.[17] The GATS distinguishes between four modes of supplying services: consumption abroad, commercial presence, presence of natural persons, and cross-border supply, which is the mode of service relevant in the *United States—Antigua* dispute.[18]

A. THE WORLD TRADE ORGANIZATION—GATS 1995

The Uruguay Round resulted in the creation of the GATS, mainly because services are the largest and most active component of both developed and developing countries.[19] GATS requires each Member to have a schedule of specific commitments that identifies the

15. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 14, Annex 1A [hereinafter GATT].

16. *See* The WTO Agreements, *supra* note 13 (noting that each Member of the WTO receives guarantees that its exports are fairly and consistently treated within other countries' markets).

17. GATS, *supra* note 1, pmbl., art. 1.

18. *See* World Trade Organization, Services: GATS, The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited May 3, 2006) [hereinafter GATS: Objectives, Coverage and Disciplines] (defining cross-border supply "to cover services flows from the territory of one Member into the territory of another Member").

19. *See id.* (stating that services "account for over 60 percent of global production and employment").

services for which the Member guarantees market access, therefore binding the Member to that specified level.[20] The Member undertakes not to impose any new measures that would restrict entry into the market or the operation of a service.[21]

This gambling dispute is the first occasion in which a WTO Member raised an argument under Article XIV, which provides for general exceptions to the GATS.[22] Therefore, the Panel is unable to use prior GATS jurisprudence as a guiding framework.[23] Even if there were previous decisions interpreting Article XIV, stare decisis does not apply to the WTO.[24] However, previous decisions remain persuasive and may have a binding nature.[25]

---

20. *See generally* GATS, *supra* note 1.

21. *See* World Trade Organization, Services: Schedules, Guide to Reading the GATS Schedule of Specific Commitments and the List of Article II (MFN) Exemptions, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited May 3, 2006) (explaining that specific commitments "are a guarantee to economic operators in other countries that the condition of entry and operation in the market will not be changed to their disadvantage").

22. *See* Panel Report, *supra* note 3, ¶ 6.447; *see also* Appellate Body Report, *supra* note 1, ¶ 291 n.351 (noting that the *United States—Antigua* dispute is also the first instance defining public morals and public order). GATS Article XIV lists several general exceptions, preceded by the caveat that all members must agree not to apply an exception in a discriminatory manner, in order to avoid a "disguised restriction on trade in services." GATS, *supra* note 1, art. XIV.

23. *See* Panel Report, *supra* note 3, ¶ 6.447.

24. *See* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 254 (2004).

25. *See id.* (arguing that the Appellate Body does seems to observe de facto stare decisis, but the WTO Agreement expressly places exclusive interpretory powers with the Ministerial Conference and General Council).

Similar to the GATT, the objectives of the GATS are grounded in trade liberalization and the desire to foster a mutually advantageous trading framework among countries.[26] Despite the GATS goal of promoting free trade, Article XIV contains general exceptions to the GATS.[27]

If a measure is found inconsistent with one of a party's substantive obligations under the GATS, the measure is subjected to a two-tiered analysis to determine if it is justifiable under Article XIV.[28] First, the WTO panel must determine whether the measure falls within one of the provisions of Article XIV.[29] The analysis requires "a sufficient nexus between the measure and the interest protected."[30] The required nexus is generally specified within the language of the provision[31] and, in this

26. GATS, *supra* note 1, pmbl. (making specific reference to the need to account for the particular needs of developing countries, including their need to regulate the internal supply of services).

27. *Id.* art. XIV; *see also id.* art. XVbis (providing additional exceptions specifically related to security).

28. *See, e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 118, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body, *United States—Shrimp*] (recounting the two-tier process announced by the appellate body in the *United States—Gasoline* case).

29. *See* Appellate Body Report, *supra* note 1, ¶ 292 (determining that Members can pursue objectives identified in the provisions of Article XIV, even if Members act inconsistently with obligations set out in other provisions of the agreements, provided that the objectives satisfy all necessary conditions of Article XIV).

30. *Id.*

31. *See* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 16-17, WT/DS2/AB/R (April 29, 1996) [hereinafter Appellate

case, because the United States defended its measure under Article XIV(a), the WTO dispute resolution bodies examined whether the measure is "necessary" to protect public morals or to maintain public order.[32] Additionally, footnote 5 of Article XIV(a) requires that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[33] The term "order," when read together with footnote 5, refers to the preservation of society's fundamental interests, which includes standards of law, security and morality.[34] Under the second tier of the analysis, the measure must meet the requirements of the introductory provisions—chapeau—of Article XIV, where the WTO panel then must determine whether the measures are applied in a manner that constitutes arbitrary or unjust discrimination.[35]

Body, *United States—Gasoline*] (noting that the general rule in treaty interpretation is that terms should be interpreted in accordance with their ordinary meaning, giving consideration to the context of the terms, in light of the purposes and objects of the treaty).

32. *See, e.g.*, Panel Report, *supra* note 3, ¶¶ 6.465-6.487 (noting that the term 'public morals' "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation" and that the legislative history of the U.S. laws in question indicate the protection of fundamental interests, such as minimizing fraud and underage gambling).

33. GATS, *supra* note 1, art. XIV n.5. In *International Legal Materials*, this appears as footnote 12.

34. *See* Panel Report, *supra* note 3, ¶¶ 6.467-6.469 (explaining the intention of the drafters of the GATS, in regards to footnote 5). Although "public order" and "public morals" are two distinct concepts, there is overlap because they protect similar values.

35. *Id.* art. XIV; *see also* Vicente Paolo B. Yu, III, Technical Comments on the WTO's "GATS—Fact and Fiction" Paper, http://www.gatswatch.org/docs/ foei.html (last visited May 3, 2006) (arguing that the language expressed in the introductory clause of Article XIV creates an additional barrier to the adoption and enforcement of measures that violate a country's GATS commitments). If the disputed measures do not meet the requirements of the chapeau, it is considered

B. PREVIOUS WTO DECISIONS ANALYZING ARTICLE XX OF THE GATT

Article XX of the GATT and Article XIV of the GATS are similar in context and purpose.[36] Therefore, the WTO dispute resolution bodies consider prior jurisprudence addressing GATT Article XX as relevant and useful in interpreting GATS Article XIV.[37] The relevant interpretation of "necessary" under previous Article XX decisions entails an evaluation of whether the measure is likely to achieve the stated policy objective of protecting against identified risks and whether there is a strong connection between the interests the measure protects and the necessity of the measure.[38]

---

inconsistent with the GATS. *Id.* A likely result is that the non-complying country must alter its measure or suffer retributions such as paying compensation or suffering retaliatory sanctions. *Id.*

36. *See* Appellate Body Report, *supra* note 1, ¶ 291 (noting that both permit country deviations in the pursuit of specified policy objectives); *see also* World Trade Org., Environment Backgrounder: Relevant GATT/WTO Provisions, GATT 1994—Article XX on General Exceptions, http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c7s3_e.htm (last visited May 3, 2005) (noting that in applying Article XX, the purpose of the WTO-inconsistent measure must aim either to protect human, animal or plant life or health, and additionally, the disputed measure must meet the requirements of the necessity test).

37. *See* Appellate Body Report, *supra* note, ¶ 291 (affirming the Panel's use of GATT jurisprudence).

38. *See generally* Christoph T. Fedderson, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(A) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 95 (1998) (reviewing divergent opinions on whether GATT Article XX deserves a narrow interpretation and noting that "the rule of strict construction is flexible enough to achieve either a

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."[39] To adequately apply Article XIV to the *United State—Antigua* dispute, the Appellate Body had previous WTO interpretations of Article XX of the GATT for guidance, particularly its decisions in *United States—Gasoline*, *United States—Shrimp*, and *Korea—Beef*.

1. United States—Standards for Reformulated and Conventional Gasoline

The United States Congress amended the Clean Air Act in 1990, which, through subsequent regulations, permitted domestic refiners to establish an individual baseline representing the quality of their 1990 gasoline before forcing them to use the EPA's statutory baseline.[40] The disparity in the Clean Air Act

---

narrow or broad interpretation of the Exceptions Clause").

39. *See* Tatjana Eres, Note, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT'L L. 597, 625 (2004) (citing Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 162-66, WT/DS161 (Dec. 11, 2000) (arguing that the validity of the original measure is particularly relevant under the second aspect, which examines whether any alternative measures are "reasonably available").

40. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (stating that the amendments purported to ensure that the level of air pollution caused by gasoline combustion did not exceed 1990 levels, thus reducing the pollutants in major metropolitan areas); *see also* Appellate Body, *United States—Gasoline*, *supra* note 31, at 21 (noting the Panel's finding that imported and domestic gasoline were "like products," but under the baseline

was that foreign refiners were not afforded the same permission in establishing their baselines, which induced complaints from foreign countries, including Venezuela and Brazil.[41]

The Panel found that the United States failed to meet the "necessity test" under Article XX because there was no direct connection between less favorable treatment of imported gasoline and the U.S. objective of improving its air quality.[42] Conversely, the Appellate Body found the Panel erred by ruling that the baseline establishment rules did not constitute a measure "relating to" the conservation of clean air within the meaning of Article XX, and consequently failed in its analysis to further examine the chapeau, or introductory clause, of Article XX.[43]

The Appellate Body determined that the Clean Air Act did not meet the requirements of the chapeau of Article XX.[44] The U.S. failure to

---

establishment rules of the Gasoline Rule, imported gasoline did not benefit from as favorable sales conditions as domestic gasoline).

41. *See* Appellate Body, *United States—Gasoline*, *supra* note 31, at 6.

42. Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996).

43. Appellate Body, *United States—Gasoline*, *supra* note 31, at 28; *see also* Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 758 (2001) (arguing that the Appellate Body formulated a more sophisticated analysis of Article XX and "shifted its attention, for the first time in any such proceeding, to the conditions placed on the use of a measure in the chapeau to Article XX").

44. Appellate Body, *United States—Gasoline*, *supra* note 31, at 27; *see also* Gaines, *supra* note 43, at 759

explore other means, including cooperative arrangements, and its disregard of the costs for foreign refiners from the imposition of baselines, constituted "unjustifiable discrimination" and a "disguised restriction on international trade."[45]

2. United States—Import Prohibition of Certain Shrimp and Shrimp Products

India, Pakistan, Malaysia, and Thailand brought the *United States—Shrimp* case to the WTO, disputing Section 609 of a 1990 appropriations bill amending the U.S. Endangered Species Act.[46] Section 609 states that in order to export shrimp into the United States, countries must obtain certification showing that they equipped their vessels with turtle-excluder devices.[47]

(finding that the Appellate Body did not need to establish an elaborate interpretation of "arbitrary or unjustifiable discrimination" because the U.S. regulations facially discriminated between domestic and foreign refiners).

45. Appellate Body, *United States—Gasoline*, *supra* note 31, at 27.

46. *See* Appellate Body, *United States—Shrimp*, at 1; *see also* International Trade Data System, Import Restrictions Under Environmental Laws, http://www.itds.treas.gov/EnvImp.htm (last visited May 3, 2006) (noting that the Endangered Species Act of 1973 protects animal and plant species currently in danger of extinction and those that may become endangered in the future); Dukgeun Ahn, Note, *Environmental Disputes in the GATT/WTO: Before and After* US—Shrimp *Case*, 20 MICH. J. INT'L L. 819, 836 (1999) (stating that the most significant risk to the species of sea turtles was the incidental capture and drowning of the sea turtles by shrimp trawlers).

47. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 609, Pub. L. No. 101-162, 101 Stat. 988, 1037-38 (1990); *see also* Ahn, *supra* note 46, at 838 (recounting that in 1996, the U.S. embargo on shrimp was being enforced on "shrimp or products from shrimp harvested in the wild by citizens or vessels of nations which have not been certified", even though some of the boats may have been equipped with turtle excluder devices).

The Appellate Body examined the chapeau and considered whether the application of the measure would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade."[48] The Appellate Body found that the Panel did not examine Article XX's ordinary meaning,[49] disregarding that the application of the Article's introductory clauses is essential to the analysis.[50]

The Appellate Body found that Section 609 constituted both unjustifiable and arbitrary discrimination because the United States required all importing countries to adopt a comprehensive regulatory program that was essentially the same as the U.S. program, without inquiring if the program was appropriate for the conditions in the exporting countries.[51] Additionally, the U.S.

48. *United States—Shrimp*, *supra* note 28, ¶¶ 98, 113 (presenting the issues of the case and an introduction to Article XX of the GATT).

49. *Id.* ¶ 115 (finding that the Panel did not look into the object and purpose of the chapeau of Article XX).

50. *See* Yasmin Moorman, Note, *Integration of ILO Core Rights Labor Standards into the WTO*, 39 COLUM. J. TRANSNAT'L L. 555, 571 (2001). The standards of the chapeau are both substantive and procedural because a facially neutral measure, applicable in an arbitrary or unjustifiable manner, is considered discriminatory. *Id.*; *see also* Timothy M. Reif & Julie Eckert, *Courage You Can't Understand: How to Achieve the Right Balance Between Shaping and Policing Commerce in Disputes Before the World Trade Organization*, 42 COLUM. J. TRANSNAT'L L. 657, 694 (2004).

51. *United States—Shrimp*, *supra* note 28, ¶¶ 161, 176-77. *But cf.* Chris Wold & Glenn Fullilove, International Environmental Law Project, *Analysis of the WTO Appellate Body's Decision in* Shrimp/Turtle (Feb. 24,

failure to reach an international agreement with the complaining WTO Members was "unjustifiable discrimination" because the United States completed an agreement with Latin American countries.[52]

3. Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef

Australia and the United States brought the *Korea—Beef* case to the WTO, disputing Korean measures that affected the importation of beef products.[53] Specifically, they contested the separate retail distribution channels ("dual retail system") that existed for imported and domestic beef products, which allegedly benefited domestically-supplied beef.[54] Korea raised an argument under Article XX, claiming that even if the Appellate Body disagreed with Korea's claim that the dual retail system was consistent with the GATT, the system was justifiable.[55]

2000), http://www.lclark.edu/org/ielp/turtlebriefing.html (arguing that even though applying the same rules to both foreign and U.S. shrimpers may be inequitable, it is not discriminatory because "discrimination" is treating all products differently).

52. *Cf. id.* (arguing that conditions may differ in some countries, so the Appellate Body should not infer that the successful negotiation of an international treaty with Latin America should result in a successful treaty with the Asian countries).

53. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter Appellate Body, *Korea—Beef*].

54. *Id.* ¶¶ 35-41, 50-60. The dual retail system for beef included "the obligation for department stores and supermarkets authorized to sell imported beef to hold a separate display, and the obligation for foreign beef shops to bear a sign with the words 'Specialized Imported Beef Store.'" *Id.* ¶ 5.

55. *Id.* ¶ 23 (arguing that Korea's regulatory goal of eliminating deceptive retail practices justified the dual retail system). Korea's goal was not merely the "reduction or limitation" of deceptive retail practices, but their "elimination." *Id.*

Applying Article XX, the Appellate Body noted that the reach of the word "necessary" is not limited to that which is "indispensable or an absolute physical necessity," although measures which fall under those categories would certainly fulfill the requirements of Article XX.[56] There are varying degrees of necessity, such as the less stringent standard of "making a contribution to."[57] In *Korea—Beef*, the Appellate Body set a stricter standard of necessity, one that is located closer to the side of "indispensable," not the less stringent "making a contribution to."[58]

The Appellate Body articulated a balancing test for making a determination as to whether a measure is "necessary" under Article XX. That test includes "the contribution made by compliance with the measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[59] The Panel found that Korea did not apply a dual retail system for other products in which fraudulent sales

56. *Id.* ¶ 160 (noting that a standard law dictionary definition of "necessary" highlights its distinctive contextual meanings).

57. *Id. See generally* Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 405 (2003) (arguing that necessity or least restrictive means tests embody the WTO's commitments to lower trade barriers).

58. *See* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 161.

59. Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 164. The Appellate Body noted that a measure is more likely to be considered "necessary" when its impact on imported products is minimal. *Id.* ¶ 163.

previously occurred.[60] This indicated that the dual retail system was not "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" under Article XX.[61]

The Panel stated that Korea's burden was showing that no alternative measures consistent with the WTO agreement were reasonably available or that an alternative measure was technically or financially burdensome.[62] The Appellate Body therefore made clear that a Member must first explore and exhaust all GATT/WTO compatible alternatives before resorting to WTO-inconsistent measures.[63]

C. *UNITED STATES—ANTIGUA* CASE HISTORY

This dispute began in March 2003, when Antigua requested formal consultations with the United States and the WTO concerning the U.S. ban on cross-border gambling and betting

60. *See* Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 660-64, WT/DS161/R (July 31, 2001) [hereinafter Panel Report, *Korea—Beef*; *see also* Appellate Body, *Korea—Beef*, *supra* note 52, ¶ 153 (finding that Korea used "traditional enforcement measures" such as "record-keeping, investigations, policing, and fines," rather than a dual retail system, for related products where fraudulent misrepresentation occurred).

61. Panel Report, *Korea—Beef*, *supra* note 59, ¶ 665; *see also* Appellate Body, *Korea—Beef*, *supra* note 52, ¶ 153 (noting that Korea had the burden of demonstrating to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available).

62. Panel Report, *Korea—Beef*, *supra* note 59, ¶ 665; *cf.* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 153 (noting Korea's contention that ex post facto investigations do not guarantee the level of enforcement that Korea has chosen and with respect to policing, that option is not reasonably available because Korea lacks the resources to police thousands of shops on a round-the-clock basis).

63. Appellate Body, *Korea—Beef*, *supra* note 53, ¶¶ 180-82.

services.[64] Consultations between the parties failed to resolve the dispute, and upon request by Antigua, the WTO Dispute Settlement Body ("DSB") established a panel to resolve the matter.[65]

Antigua claimed that U.S. laws prohibiting the cross-border supply of gambling services are inconsistent with provisions of the GATS.[66] Antigua argued that the United States violated market access provisions, set out in its schedule of commitments, by barring the supply of gambling services on a cross-border basis.[67] Specifically, the U.S. GATS Schedule makes "a full commitment for the cross-border supply of services classified under subsector 10.D 'Other recreational services (except sporting).'"[68]

The United States justified its restrictions on Internet gambling as an exception from its GATS commitments based on Article XIV(a), which states that the GATS agreement shall not

64. Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1 (Mar. 27, 2003).

65. *See* Panel Report, *supra* note 3, ¶ 1.2.

66. *Id.*; *see also* Joost Pauwelyn, *WTO Condemnation of U.S. Ban on Internet Gambling Pits Free Trade Against Moral Values*, AM. SOC'Y INT'L L. INSIGHT, Nov. 2004, http://www.asil.org/insights/2004/11/insight041117.html (stating that Antigua's argument relied on whether in the GATS, the United States made international commitments to gambling services, particularly arguing that the United States agreed to not enact restrictions on "recreational services").

67. *See* Panel Report, *supra* note 3, ¶ 3.30.

68. *Id.* ¶¶ 3.30-3.31 (noting that the United States did not adequately explain why gambling and betting services should be excluded in light of the wording of its schedule of commitments).

prevent governments from adopting or enforcing measures deemed "necessary" to protect public morals or maintain public order.[69] As the party seeking to invoke Article XIV, the United States had the burden of proof in support of its assertion that the challenged measures satisfy the requirements of Article XIV.[70] In defense of perceived GATS violations, the United States argued that its measures are exempt under Articles XIV(a) and XIV(c); the application of these exceptions are consistent with the chapeau of Article XIV.[71]

The United States argued that the remote supply of gambling and betting services raised significant concerns relating to the maintenance of public order and the protection of public morals under Article XIV(a).[72] Specifically, the United States identified two primary issues of concern. Internet gambling provides increased opportunities for minors to gamble; gambling within the United States is not permissible for minors.[73] Age verification

69. *Id.* ¶¶ 6.443-6.446; *see also* Jeremy Hutto, *What Is Everybody Else Doing About It? A Foreign Jurisdictional Analysis of Internet Gaming Regulation*, 9 GAMING L. REV. 26, 33 (2005) (stating that the main U.S. argument for regulating Internet gambling is "to protect children and prevent financial crimes"). Following the Panel Report, the Bush Administration announced that it will adamantly contest the Panel's decision. *Id.*

70. *See* Panel Report, *supra* note 3, ¶ 6.450 (recounting the burden of proof test articulated by the Appellate Body in *Unites States—Wool Shirts and Blouses*).

71. *Id.* ¶ 6.443.

72. *Id.* ¶ 6.444; *cf.* John Warren Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENV. U. L. REV. 111, 111 (2002) (arguing that "social, financial, and political costs," including "the creation of new gambling addicts, bankruptcies, and crime," was directly caused by "the widespread proliferation and accessibility of gambling sites on the Internet").

73. Panel Report, *supra* note 3, ¶ 6.444.

is a specific concern because operators of gambling websites cannot look at their customers to assess their age or request photo identification.[74] Additionally, internet gambling can also be used to "launder the proceeds of organized crime."[75] The remote supply of gambling is more dangerous than the non-remote supply of such services because of the amount of money and manipulability inherent in Internet gambling.[76] Further, the United States argued that it did not apply its laws in a discriminatory manner; domestic suppliers of remote gambling services also fall within the purview of the laws in question and are equally subject to enforcement actions.[77]

---

74. *Cf.* IGamingNews.com, New Research Shows that Minors Have Easy Access to Online Gambling Services (July 27, 2004), http://www.igamingnews.com/index.cfm?page=artlisting&tid=5250 (discussing a study that tested thirty-seven online gambling sites "to see if a minor could set up an account"). The study found that "the minor was able to open up an account and access gambling systems on thirty of the sites." *Id.*

75. Panel Report, *supra* note 3, ¶ 6.444. The United States argued that internet gambling is, in general, more susceptible to criminal endeavors and activities. *Id.* ¶ 6.457. In its submission to the Appellate Body, Antigua argued that the Panel impermissibly advocated several other factors associated with internet gambling that would support the U.S. action under Article XIV, including fraud and public health. Appellate Body Report, *supra* note 1, ¶ 278.

76. *But see* I. Nelson Rose, *The Legalization and Control of Casino Gambling*, 8 FORDHAM URB. L.J. 245, 267-99 (1980) (arguing that one of the factors contributing to the influence of organized crime is the need for investment capital; the migration to online gambling may diminish the importance of organized crime because there is less capital required to build online casinos, compared to conventional casinos).

77. Panel Report, *supra* note 3, ¶ 6.586 (reviewing

Since the United States is a major consumer of (domestic) state sanctioned gambling and betting services, Antigua questioned why a prohibition on the remote supply of gambling is necessary to protect public morals.[78] In regards to the requirements of the chapeau, Antigua argued that the U.S. measures' discriminatory motive is shown by a lack of enforcement against domestic suppliers of remote gambling services.[79]

In its report, the Panel examined whether the purpose of the disputed measures was to protect public morals and to maintain public order. The Panel defined "public morals" as "standards of right and wrong conduct maintained by a community or nation;" "public order" concerns "the preservation of the fundamental interests of a society."[80] The Panel found that in addition to protecting against underage gambling and organized crime, congressional reports related to the Wire Act, Travel Act, and IGBA demonstrated that the laws were also established to minimize fraud, money laundering, and health concerns stemming from pathological gambling.[81] The Panel further determined that footnote 5 of Article XIV was met because the United States presented evidence that organized crime posed specific threats, which was enough to satisfy the

---

statistics provided by the U.S. Department of Justice that point to ninety prosecutions of domestic remote suppliers between 1992 and 2002).

78. Panel Report, *supra* note 3, ¶ 6.444.

79. *Id.* ¶ 6.585 (contrasting the lack of enforcement against U.S. suppliers with a case in which the United States prosecuted and convicted an Antiguan internet sportsbook service).

80. *Id.* ¶¶ 6.465-6.467; *see* Appellate Body Report, *supra* note 1, ¶ 296 (referring to "Congressional reports and testimony" that the adopted measures addressed concerns "pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling").

81. Panel Report, *supra* note 3, ¶ 6.486.

footnote's high standard.[82] Accordingly, these measures fell within the purview of GATS Article XIV(a) in terms of the measures' designed purpose.[83] However, since the United States failed to consult with Antigua before imposing the restrictive measures, the Panel determined that the important reasons for imposing restrictions that could render the measures necessary do not outweigh the U.S. failure to consult with Antigua on other available alternatives.[84]

Despite the Panel's necessity ruling, it further proceeded to determine if the measures were applied in an arbitrary or discriminatory way—whether the application violated the chapeau.[85] In its findings, the Panel concluded that the United States did not demonstrate that it applied the disputed laws, the IHA in particular, in a non-discriminatory manner between domestic and foreign-service suppliers.[86]

On appeal, the Appellate Body affirmed the Panel's Article XIV(a) conclusions that the U.S. measures were "designed" to protect public order; the requirements of footnote 5 were also met.[87] The contours of the

82. *Id.* ¶ 3.279.

83. *Id.* ¶ 6.487.

84. *Id.* ¶¶ 6.532-6.534 (noting the U.S. obligation to pursue WTO-consistent alternatives in good faith, regardless of the possible U.S. belief that such negotiations would not be fruitful).

85. *Id.* ¶¶ 6.569-6.608.

86. *Id.* ¶ 6.607 (concluding that the United States had failed to meet its evidentiary burden). The Panel specifically mentioned the "ambiguity" surrounding the Internet Horseracing Act. *Id.*

87. Appellate Body, *supra* note 1, ¶ 298 (noting that the Panel's lack of numerous explicit references to

"necessity" test were then reviewed. The Appellate Body noted that while the evidentiary burden lies on the United States, it does not have the impractical burden of identifying the universe of less restrictive reasonable alternatives to the measures in question.[88] As an unwarranted procedural hurdle, the Appellate Body refuted the Panel's requirement that a measure's "necessity" requires consultation; rather, necessity is based on an objective assessment of reasonable alternatives.[89] All of the other factors expressed by the Panel weighed in favor of necessity—e.g., "very important societal interests" warranting strict controls, and the three statutes in question "contribute to the realization of the ends that they pursue"—so the Appellate Body determined that the U.S. measures did, in fact, satisfy the necessity test.[90]

Having reversed the Panel's conclusions on necessity, the Appellate Body went on to consider whether the U.S. measures were discriminatory under the chapeau. The Appellate Body disagreed with the Panel's finding that the United States enforced its gambling laws more strictly against foreigners than against domestic suppliers,[91] but the Appellate Body deemed that the Panel was

---

footnote 5 did not mean that its requirements were not considered by the Panel).

88. *Id.* ¶¶ 309-10 (indicating that a responding party is merely obligated to make a prime facie showing of necessity).

89. *Id.* ¶¶ 316-17.

90. *Id.* ¶¶ 322-27 (adding that the restrictive trade impact of the U.S. measures was tempered by "the specific concerns associated with remote gambling," such as the specific problems of anonymity on the internet).

91. *Id.* ¶¶ 355-56 (arguing that the Panel erred by basing its conclusions on enforcement actions in five cases because contextual considerations mandate an assessment of the overall patterns of enforcement).

partially correct when it determined that the IHA is potentially discriminatory.[92] Because of the textual similarities between Article XX of the GATT and Article XIV of the GATS, the Appellate Body acknowledged that its previous interpretations of Article XX are applicable in analyzing Article XIV.[93]

II. ANALYSIS

The function of the Panel is to make "an objective assessment of the matter before it."[94] The Appellate Body determined that with respect to Article XIV of the GATS, the Panel did not fail to make an objective assessment of the facts.[95] The Appellate Body therefore erroneously reversed key aspects of the

92. *Id.* ¶ 361 (accepting Antigua's argument that the Interstate Horseracing Act, "on its face, authorizes domestic service suppliers, but not foreign service suppliers, to offer remote betting services in relation to certain horse races").

93. *Id.* ¶ 291 (finding that the language in both Article XIV of the GATS and Article XX of the GATT are similar, notably the use of the word "necessary," as well as the requirements set out in the respective chapeaus); *see also* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 917-18 (1999) (distinguishing between "formal bindingness" and "not formally binding, but having force" as a difference between "authoritative" and "persuasive" forces characterized by degree).

94. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401 (1994).

95. Appellate Body Report, *supra* note 1, ¶ 373 (finding that the Panel did not fail to meet its requirements under Article 11 of the DSU, but reversed the Panel's findings regarding paragraph (a) and the chapeau).

Panel's findings. The Appellate Body's finding that the United States' restrictions on Internet gambling qualified for an exception under Article XIV of the GATS, which reversed the Panel's decision, also did not adhere to previous WTO decisions interpreting Article XX of the GATT.[96]

Following the two-tiered analysis, the Appellate Body erred both when it determined that the United States' Internet gambling restrictions fell within one of the paragraphs of Article XIV and when it determined that the measure satisfied the requirements of the chapeau of Article XIV.[97] The Appellate Body also failed to comply with its obligation to adequately uphold the free trade objectives of the GATS.[98]

A. THE APPELLATE BODY FAILED TO ADEQUATELY APPLY THE NECESSITY TEST

96. *See* Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 3 (1999) (arguing that precedent guides the WTO because of "the custom or habit of the tribunal, the tribunal's sense of justice (particularly to treat likecases alike), the tribunal's need for efficiency," and the tribunal's desire to make decisions that are consistent with the expectations of all parties).

97. *See* World Trade Organization, WTO Analytical Index: General Agreement on Trade in Services, General Agreement on Trade in Services, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_02_e.htm#fnt39 (last visited May 3, 2006) (noting that because Article XIV constitutes an exception provision, it should be narrowly interpreted and its scope cannot be expanded to cover other regulatory objectives than those listed).

98. *See* Anup Shah, Free Trade and Globalization, The WTO And Free Trade, http://www.globalissues.org/TradeRelated/FreeTrade/WTO.asp?p=1 (last updated Dec. 27, 2001) (criticizing the WTO for its inability to promote cooperation between rich and developing countries, with regards to international trade).

The Appellate Body erred when it found that these measures are "necessary."[99] The purpose of this requirement under Article XIV(a), that a measure be necessary or that there is no reasonably available WTO-consistent alternative, reflects the shared understanding that Members should not deviate from their substantive GATS obligations unless there is an absolute need.[100] Because previous WTO decisions in *United States—Gasoline*, *United States—Shrimp*, and *Korea—Beef* demonstrated a recent trend towards a stricter interpretation of the term "necessary," the Appellate Body should have applied a stricter standard for necessity in its analysis.[101]

Like the Panel in *Korea—Beef*, which found the dual retail system is a disproportionate measure not necessary to secure compliance with Korean law against deceptive practices,

---

99. *See* Appellate Body Report, *supra* note 1, ¶ 304 (noting that the "standard of 'necessity' provided for in the general exceptions provision is an objective standard"); *see also* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 22 (finding in other instances where fraudulent sales occurred, Korea did not apply a dual retail system, which was evidence that the dual retail system was not necessary to secure compliance with laws or regulations).

100. *See* John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 AM. U. INT'L L. REV. 1173, 1182-83 (1999) (arguing that consistently adjudicating litigants' claims is the objective "if the WTO dispute system is to achieve and maintain legitimacy under international law").

101. *See generally* Steve Charnovitz, *An Analysis of Pascal Lamy's Proposal on Collective Preferences*, 8 J. INT'L ECON. L. 449, 469 (2005) (arguing that when the WTO uses the weighing and balancing technique to evaluate "necessity," it needs to weigh the societal benefits of the measure with the potential "damage of the measure to the multilateral negotiating framework").

the Appellate Body should have found that the U.S. trade-restrictive measures against Internet gambling were not necessary to invoke a public order exception.[102] The Appellate Body in this case did not examine other less trade-restrictive measures that the United States could have taken.[103] Rather than implementing the trade-restrictive Wire Act, Travel Act, and the IGBA, the United States could have entered into negotiations with Antigua in order to find other reasonable laternatives to prevent or reduce the alleged harm associated with the remote supply of gambling.[104]

1. The Appellate Body Erroneously Shifted the Burden of Proof Away from the United States

In determining necessity, the Appellate Body failed to adequately balance a series of factors. One factor is the extent to which the measure contributes to the realization of the goal pursued.[105] In this case, the United States argued that the implementation of Internet gambling regulations was necessary to maintain public order and/or to protect public

---

102. *See* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 163 (finding that alternative, WTO-consistent measures were reasonably available to Korea to meet its enforcement level; therefore Korea could not justify the dual retail system as necessary under Article XX).

103. *See* discussion *supra* Part I.B.3 (arguing that a Member must first explore and exhaust all GATT/WTO compatible alternatives before resorting to WTO-inconsistent measures).

104. *See generally* Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. ON DISP. RESOL. 141, 142 (2003) (arguing that negotiation should be used to settle disputes between parties and that the failure to reach early settlements in disputes particularly harms developing countries).

105. *See* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 163 (noting that a measure is likely considered necessary if it greatly contributes to the pursued goal).

morals.[106] Although the Panel confirmed that the United States had certain concerns that were specific to the remote supply of gambling and betting services, it did not analyze the extent to which the Wire Act, the Travel Act, and the IGBA are necessary in contributing to the realization of the goal pursued.[107]

The Panel in *Korea—Beef* established that because Korea had a measure that was inconsistent with the GATT, it had the burden of showing that there were no WTO-consistent measures reasonably available.[108] The *United States—Antigua* Panel correctly looked to *Korea—Beef* and determined that a key element of the application of the "necessity" test of Article XIV is whether the United States explored and exhausted reasonably available WTO-consistent measures.[109] The Appellate Body

106. Panel Report, *supra* note 3, ¶ 6.521 (arguing that because the U.S. concerns are "specific to the remote supply of gambling and betting services," measures enacted to alleviate those concerns relating to the "non-remote supply of gambling and betting services cannot be compared and examined as WTO-consistent alternatives").

107. *See id.* ¶ 6.522 (noting there were other WTO consistent alternatives because Antigua argued that "it has in place a regulatory regime that is sufficient to address the specific concerns identified by the United States with respect to the remote supply of gambling services"). Antigua's regulations include "requirements for identity verification, fraud prevention and gambling addiction," and Antiguan law that specifically prohibits underage gambling by Antiguan law. *Id.*

108. Panel Report, *Korea—Beef*, *supra* note 59, ¶ 665; *see also* discussion *supra* Part I.B.3 (emphasizing that a Member must explore and exhaust all GATT/WTO compatible alternatives before resorting to WTO-inconsistent measures).

109. Panel Report, *supra* note 3, ¶ 6.531 (determining that in "rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or

erred when it reversed the Panel's decision on the basis that the Panel did not focus on a specific alternative measure that was reasonably available to the United States.[110] Specifically, the Appellate Body stated that the Panel's "necessity" analysis was flawed because "it did not focus on an alternative measure that was reasonably available to the United States."[111] In making that determination, the Appellate Body deviated from previous WTO decisions, such as *Korea—Beef*, where the burden was on Korea to demonstrate to the satisfaction of the Panel that alternative measures consistent with the WTO agreement were not reasonably available.[112] Based on prior jurisprudence, the Appellate Body in the *United States—Antigua* dispute wrongfully shifted the burden of finding reasonable alternative measures away from the United States.[113]

---

negotiations, the United States failed to pursue in good faith a course of action" that may have resulted in determining "a reasonably available WTO-consistent alternative").

110. Appellate Body Report, *supra* note 1, ¶ 317 (arguing that consultations with Antigua "was not an appropriate alternative for the Panel to consider because consultations are a process, the results of which are uncertain").

111. *Id.*

112. *See* discussion *supra* Part I.B.3 (noting that the Member enacting WTO-inconsistent regulations has the burden of showing that it explored other means).

113. *See* Elizabeth Barrett Ristroph, *How Can the United States Correct Multi-National Corporations' Environmental Abuses Committed in the Name of Trade?*, 15 IND. INT'L & COMP. L. REV. 51, 65 (2004) (arguing that the WTO's determination of which party has the burden of proof shows "the WTO's pro-trade bias" because the country enacting trade restrictive measures has the burden of justifying those measures). The number of disputes resolved by the WTO DSB addressing objections under Article XX of the GATT indicates that the challenging party often has the advantage. *Id.*

2. The Appellate Body Failed to Address the Restrictive Trade Impact of the United States' Measures

Another factor in the necessity test is the extent to which complying with the measures produces restrictive effects on international commerce.[114] Antigua argued that the U.S. federal restrictions on Internet gambling, when read together with the relevant state laws, have the effect of total prohibition, which is the most trade-restrictive approach possible.[115] The United States defended its regulations by arguing that a Member has the right to heavily restrict a highly risky service, by allowing the use of a less risky service, which in this case is gambling by non-remote means.[116] Although the United States may have a valid interest in maintaining public order or protecting public morals, it chose to do so in the most trade-restrictive means possible, rather than finding

114. *See* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 163 (explaining that a "measure with a slight impact on imported products might be more easily considered as necessary, compared to a measure with intense or broader restrictive effects"); *see also* Appellate Body, *United States—Shrimp*, *supra* note 28, ¶ 138 (stating that if Article XX allowed Members to adopt any measure conditioning access to its market, "market access could become subject to an increasing number of conflicting policy requirements for the same product", thus leading to "the end of the WTO multilateral trading system").

115. *See* Appellate Body Report, *supra* note 1, ¶ 309 (arguing that it would be an impossible burden if the WTO required a responding party to identify all less restrictive alternative measures and to "show that none of those measures achieve the desired objective").

116. *See id.* ¶ 95.

alternative methods of accomplishing its goal.[117]

Although the Panel agreed that the Wire Act, the Travel Act, and the IGBA have a significantly restrictive trade impact, its analysis revealed that it did not place much weight on the restrictive trade impact of the three federal statutes.[118] Further, the Appellate Body did not completely address this aspect of the Panel's Report, so neither the Panel nor the Appellate Body gave this factor enough weight in the necessity test when analyzing the restrictive effects of the disputed measures on international commerce.[119]

B. THE PANEL AND APPELLATE BODY FAILED TO ADEQUATELY ADDRESS FOOTNOTE 5 OF GATS ARTICLE XIV

In their analyses, both the Panel and the Appellate Body did not adequately address a relevant component of Article XIV, namely footnote 5, and therefore did not examine the entire textual context.[120] The Panel mentioned footnote 5 once in its analysis,[121] and that

---

117. *See* Sykes, *supra* note 57, at 415-16 (noting that other factors used in a least-restrictive means test used in previous GATT cases include "the effect of alternative policies on trade, the administrative difficulties and resource costs associated with alternative policies, and the regulatory efficacy of those polices").

118. Panel Report, *supra* note 3, ¶ 6.521 (determining that the United States had legitimate concerns specific to the remote supply of gambling, which it found suggested that the measures in question were necessary).

119. *Cf.* Appellate Body, *Korea—Beef*, *supra* note 53, ¶ 158.

120. *Cf.* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281-82 (1989) (remarking on the potential importance of a footnote by highlighting the well known "footnote 4" from *Carolene Products*).

121. *See* Panel Report, *supra* note 3, ¶ 3.279 (finding that the specific threats posed by organized crime, which stems from the remote supply of gambling, meet the high standard of footnote 5).

conclusion was approved by the Appellate Body.[122] A footnote is an important part of the text and has as binding a force and effect as the text itself.[123] Footnote 5 of Article XIV sets a high standard in terms of when an exception to the GATS should be invoked, determining that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat" to a fundamental interest of society.[124]

Footnote 5 sets a higher standard because it is a two-step analysis, whereby the Appellate Body should first determine if the disputed measures satisfy Article XIV(a) and then continue its analysis to determine if the measures satisfy the requirements of the footnote.[125] Additionally, it is significant that although Article XIV of the GATS and Article XX of the GATT are similar in language and purpose, GATT Article XX does not contain anything equivalent to footnote 5, indicating that the drafters intended to set a higher

122. *See* Appellate Body Report, *supra* note 1, ¶¶ 298-99 (noting that the Panel referred to footnote 5 in a manner that understood the requirements for the public order exception). Because the Panel defined public order and analyzed the facts of the case under that definition, "the Panel was not required to make a separate, explicit evaluation that the standard of footnote 5 had been met." *Id.*

123. *Cf.* Robert A. James, *Are Footnotes in Opinions Given Full Precedential Effect?*, 2 GREEN BAG 2D 267 (1999) (arguing that the location of significant language, whether in the text or a footnote, is a matter of style which should be left up to the writer of an opinion).

124. Appellate Body Report, *supra* note 1, ¶ 297.

125. *See* Debra P. Steger & Peter Van Den Bossche, *WTO Dispute Settlement: Emerging Practice and Procedure*, 92 AM. SOC'Y INT'L L. PROC. 79, 85 (1998).

standard for invoking an exception under the GATS.[126]

Because the United States presented evidence that the remote supply of gambling raised significant moral concerns, both the Panel and the Appellate Body were likely justified in determining that such concerns regarding organized crime, underage gambling, money laundering, fraud, and public health satisfied Article XIV(a).[127] Even if the United States had a justifiable argument that its measures satisfied Article XIV(a), neither the Panel nor the Appellate Body's analysis distinguished between the evidentiary requirements of Article XIV(a) and footnote 5, which seems to set a higher evidentiary burden.

After determining that the United States satisfied its burden of proving that the measures are designed to protect public morals or maintain public order based on the Article itself, the Panel should not have stopped its analysis and, consequently, failed in determining whether the U.S. concerns satisfied footnote 5. Further, the Appellate Body's analysis was incomplete when it simply determined that the Panel was not required to make a separate, explicit determination that met the standard of footnote 5.[128]

The language of footnote 5 states that the footnote applies only to public order because the footnote does not mention public morals.

---

126. *Compare* GATT, *supra* note 15, *with* GATS, *supra* note 1.

127. *See* discussion *infra* Part I.C.1.a (providing an overview of the United States' argument that it has specific concerns of public order and morals with the remote supply of gambling).

128. Appellate Body Report, *supra* note 1, ¶ 298 (finding that although the Panel Report did not discuss footnote 5 in depth, this alone does not establish that the Panel failed to determine if the statutes satisfied the footnote's criteria).

Although the Panel determined that "public morals" and "public order" are two distinct concepts, it also stated that there is significant overlap between these two terms, in effect treating the terms synonymously.[129] The Appellate Body did not evaluate the significance of this distinction, in light of the wording of footnote 5, making it difficult for future parties to determine the type of evidence or the strength of evidence required to satisfy the higher standard of the footnote.

The Appellate Body should have determined that the Panel erred by failing to apply Article XIV(a) in its entirety, constituting a failure to "make an objective assessment of the facts."[130] The language of footnote 5 plainly states that invoking the public order exception is acceptable only when there is a sufficient or serious threat, so the Appellate Body should have required that the Panel have a stricter standard in defining public order or, at the very least, explain how the

129. Panel Report, *supra* note 3, ¶ 3.279 (explaining that organized crime posed threats such as "social exploitation; corruption and subversion of the democratic processes; economic losses and instability; and diminution of the domestic security and general welfare of the United States and its people," which satisfied the public order exception in footnote 5). Further, both "public morals" and "public order" aim to protect many similar values, so there may be some overlap. *Id.* ¶ 6.468

130. *See* Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT'L ECON. L. 635, 656 (2003) (noting that a Panel should take the Member's argument into account, but ultimately, the Panel must act in accordance with the rules of treaty interpretation, as stated in the Vienna Convention); *see also* Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, ¶ 141, WT/DS76/AB/R (Feb. 22, 1999).

distinctive language of the footnote played into the analysis beyond the mere mention of public morals and public order in the opinion.

C. UNITED STATES INTERNET GAMBLING RESTRICTIONS ARE INCONSISTENT WITH THE CHAPEAU OF ARTICLE XIV

In the second step of the exceptions analysis, the Wire Act, the Travel Act, and the IGBA must meet the requirements of the chapeau, which is the introductory clause of the provision.[131] An analysis of the chapeau reveals that it requires that the measures in question 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.[132] Based on the reasoning used in previous decisions applying the chapeau of Article XX of the GATT, the Appellate Body in the United States-Antigua dispute erred when it determined that the U.S. Internet gambling restrictions satisfied the requirements imposed by the opening clauses of Article XIV.

The Appellate Body failed to adhere to reasoning used in previous WTO decisions when it determined that the U.S. Internet gambling regulations did not constitute arbitrary or unjustifiable discrimination.[133] Similar to

131. *See* Appellate Body Report, *supra* note 1, ¶ 339 (stating that the focus of the chapeau "is on the application of a measure already found by the Panel to be inconsistent with a GATS obligation," but a chapeau analysis is performed because the measure falls within one of the paragraphs of Article XIV).

132. *See id.* (arguing that "the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded other Members by the substantive rules of the GATS").

133. *See* Panel Report, *supra* note 3, ¶ 6.537 (noting that the chapeau of Article XIV is textually similar to the chapeau of Article XX of the GATT, so the Panel referred to "such jurisprudence to the extent to which it is applicable and relevant" in interpreting and

United States—Gasoline, where the WTO found that the disputed measures failed to meet the chapeau of Article XX of the GATT because the United States did not engage in cooperative agreements, thus demonstrating unjustifiable discrimination, the Appellate Body should have concluded that the U.S. failure to negotiate with Antigua amounted to unjustifiable discrimination.[134] Another example from Appellate Body jurisprudence that highlights the *United States—Antigua* Appellate Body's mistake comes from *United States—Shrimp*. In that case, the Appellate Body emphasized the importance of making a serious good faith effort to avoid a finding of unjustifiable or arbitrary discrimination. The United States demonstrated good faith through its willingness to try and partake in negotiating an agreement to avoid the trade restriction, even though the negotiation was not successful.[135] Based on the previous Appellate Body decisions in *United States—Gasoline* and *United States—Shrimp*, engaging in a good faith attempt at negotiations appears to be a requirement for satisfying the chapeau.[136]

---

applying the chapeau to Article XIV in the United States—Antigua dispute).

134. *See* Appellate Body, *United States—Gasoline*, *supra* note 31, at 25 (elaborating that the kinds of analysis "pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade").

135. Appellate Body, *United States—Shrimp*, *supra* note 28.

136. *See* Kuei-Jung Ni, *Redefinition and Elaboration of an Obligation to Pursue International Negotiations for Solving Global Environmental Problems in Light of the WTO* Shrimp/Turtle *Compliance Adjudication Between*

In *United States—Gasoline*, the United States disregarded the additional costs for foreign refiners, and similarly, in the *United States—Antigua* dispute, the United States may have minimized the economic impact that its regulations have on Antiguan-based gambling companies.[137] The resulting discrimination was foreseeable by the United States because it knew that Antigua's economy depended largely on its gambling industry, so the Wire Act, the Travel Act, and the IGBA would have a great economic impact.[138] The United States may have a strong argument for imposing trade-restrictive and economically damaging measures if its goal was truly to eliminate the remote supply of gambling as a means of protecting the public morality of American society, but laws such as the IHA undermine that goal because they reveal arbitrary or unjustifiable discrimination.[139]

Malaysia and the United States, 14 MINN. J. GLOBAL TRADE 111, 134-36 (2004) (citing *United States—Shrimp* and comparing the disparate actions of the Inter-American Convention with the efforts by the United States to negotiate agreements with WTO Members). According to the author, the element of good faith that was present in the Inter-American Convention should be the benchmark for future negotiations, which the U.S. international negotiations did not measure up to because the United States failed to take "into account the situations of the other negotiating countries." *Id.*

137. *See* Sparshott, *supra* note 6 (stating that Antigua lacked natural resources, so it "built up its Internet gambling industry to supplement its tourism-driven economy" and that licensed casinos retain over 1,300 employees and produce approximately $68 million in income).

138. *See* Carmel Sileo, *Online Casino Pursues Long-Odds Lawsuit*, TRIAL, May 2005, at 98 (finding that the U.S. ban on cross-border gambling is very damaging to Antigua's economy, which is dependent on the United States' business as the world's largest consumer of gambling and betting services).

139. *See* discussion *supra* Part I.C (discussing that the Panel and the Appellate Body determined that the IHA is potentially discriminating between domestic and foreign-service suppliers).

The Appellate Body should have determined that the U.S. Internet gambling restrictions represent unjustifiable discrimination.[140] Both the Panels in *United States—Gasoline* and *United States—Shrimp* pointed out that the express terms of the chapeau in Article XX of the GATT address the manner of applying the disputed measure.[141] However, the Appellate Body in Antigua did not follow that same rationale.[142] Although the Appellate Body noted that there are situations where a statute is facially neutral, yet the application of the statute can rise to the level of discrimination, the Appellate Body discounted Antigua's evidence that the U.S. statutes were applied in a discriminatory manner.[143] The Appellate Body erred when it reversed the Panel's chapeau analysis based on its determination that the U.S. Internet gambling

140. *See* Appellate Body, *United States—Shrimp*, *supra* note 28, ¶ 123 (noting that the exceptions of Article XX should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement).

141. *See id.* ¶ 118 (citing the Appellate Body in *United States—Gasoline*, providing that the nature and quality of discriminatory application of a measure is different from the discrimination in the treatment of products which were already found to be inconsistent with one of the substantive obligations of the GATT).

142. *See* Panel Report, *supra* note 3, ¶ 6.575 (citing the Appellate Body in United States—Shrimp, stating 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").

143. *See* Appellate Body Report, *supra* note 1, ¶¶ 352-57 (showing that Antigua presented evidence that foreign suppliers of Internet gambling were prosecuted under the Wire Act, but there was a lack of enforcement against U.S. firms). Despite Antigua's evidence, the Appellate Body determined that it was inconclusive. *Id.*

restrictions, on their face, do not discriminate between United States and foreign suppliers of remote gambling services.

Antigua pointed to four U.S. firms that supposedly engaged in the remote supply of gambling services, but despite this violation, none of these firms were prosecuted under any of the disputed federal statutes.[144] Antigua then contrasted this lack of law enforcement with an Antiguan service supplier, prosecuted and convicted under the Wire Act, despite the fact that he modeled his business after a U.S. firm.[145] Based on that strong allegation, the Appellate Body should have considered Antigua's claim that an Internet sports book service based in Antigua was prosecuted and convicted under the Wire Act, whereas other similar U.S. firms had not been prosecuted.[146] If that claim were valid, it is likely that based on previous WTO decisions, this would constitute arbitrary or unjustifiable discrimination.[147] Antigua presented evidence

144. *See id.* ¶ 352 (stating that U.S. firms such as Youbet.com, TVG, Capital OTB, and Xpressbet.com engage in the remote supply of gambling services, but have not been prosecuted under the Wire Act, the Travel Act, or the IGBA).

145. *See* Panel Report, *supra* note 3, ¶ 6.585 (citing United States v. Jay Cohen, finding that "an operator of an Internet sports book service based in Antigua was prosecuted and ultimately convicted under the Wire Act, even though that operator had modeled his business on that of Capital OTB, a US company that had been offering interstate betting" by either telephone or the Internet for over twenty years without prosecution).

146. *See id.* ¶¶ 6.588-6.589 (noting that although the United States claimed that it enforced its prohibition on the cross-border supply of gambling equally to foreign and domestic suppliers, the Panel found that the United States did not provide evidence that it enforced its prohibitions in a manner consistent with the chapeau of Article XIV).

147. *See id.* ¶ 6.585 (noting Antigua's argument that the U.S. actions constitute unjustifiable discrimination because large-scale Internet operators in the United States offer betting services via the

of the United States' unjustifiable discrimination and the United States did not provide concrete evidence refuting Antigua's claims.[148] Therefore, the Appellate Body had no basis for discounting Antigua's claims.[149]

The IHA further demonstrates that the United States enacted an Internet gambling law that benefited its domestic business.[150] In effect, the IHA allows betting on horse races by phone or computer, but that right is limited only to U.S. states where it is legal to place and accept bets, therefore demonstrating outright discrimination against foreign companies.[151] If

---

Internet, but the United States does not take enforcement action against them).

148. *See* Appellate Body Report, *supra* note 1, ¶ 352 (indicating that the United States produced evidence of pending prosecution proceedings against one domestic remote supplier of Internet gambling, but stated that it had no evidence as to whether enforcement action was being taken against the other domestic suppliers identified by Antigua).

149. *See id.* ¶ 356 (finding that more persuasive evidence should have been submitted, such as "evidence on the overall number of suppliers, and on patterns of enforcement, and on the reasons for particular instances of non-enforcement").

150. *See* Panel Report, *supra* note 3, ¶ 6.597 (agreeing with Antigua that the text of the Interstate Horseracing Act appears to permit interstate wagering over the telephone or other modes of electronic communication, which would presumably include the Internet, as long as such wagering is legal in both states). *See generally* U.S. GEN. ACCOUNTING OFFICE, *supra* note 4 (stating that the 2000 amendments to the Interstate Horseracing Act expanded the definition of interstate off-track wagering to include the Internet).

151. *See* Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is it Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 210 (2003) (noting that the Interstate Horseracing Act "applies to wagers placed in one state on the outcome of races held in another state"). It is up to the discretion of state

the United States wanted to continue to ban Internet gambling in the name of protecting public morals by restricting foreign operators, it would have to block all remote gambling, something that is unlikely given the popularity of interstate horseracing gambling, made legal under the IHA.[152] Although the United States has the right to enact laws to protect its residents from the "dangers" of gambling, it cannot unjustifiably discriminate against foreigners to protect its local businesses.[153]

The discriminatory nature of the IHA is clear evidence that the United States has laws that are more favorable to domestic businesses, at the expense of foreign companies.[154] If the Panel and the Appellate Body agreed that the IHA is unjustifiably discriminatory, it is not only a clear

---

racing or gaming officials to monitor other aspects of horseracing, such as licensing and policing. *Id.*

152. *See* Kurt Eichenwald, *At PartyGaming, Everything's Wild*, N.Y. TIMES, June 26, 2005, at 31 (arguing that although American federal statutes state that providing online gambling is illegal, London-based businesses such as PartyPoker.com continue to operate without government intervention). In 2004, the company amassed $600 million in revenue and $350 million in profit, with almost ninety percent coming from American gamblers. *Id.*

153. *See generally* Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 15 (2003) (stating that there are two fundamental principles of non-discrimination that underlie the WTO system). The National Treatment principle states that "no foreign business should be treated less favorably than a domestic business." *Id.*

154. *See* Appellate Body Report, *supra* note 1, ¶ 372 (finding that based on the implementation of the Interstate Horseracing Act, the United States did not satisfy the chapeau requirements of Article XIV because the United States did not demonstrate that the prohibitions embodied in the Interstate Horseracing Act are applied equally "to both foreign and domestic service suppliers of remote betting services for horseracing").

indication that the U.S. measures rise to the level of "arbitrary" or "unjustifiable" discrimination, but it also undermines the main U.S. argument that its goal is to protect public morals from the dangers of remote gambling. Bets involving horse racing are still gambling activities and the "moral" implications associated with them are not inherently distinct from other forms of gambling.

Rather than finding that the United States did not meet the standards specified in the chapeau of Article XIV, the Appellate Body ruled that if the United States alters the IHA, so that it is not discriminatory toward foreign companies, the United States will be in compliance with its WTO treaty obligations.[155] Both the Panels in *United States—Gasoline* and *United States—Shrimp* interpreted the chapeau of Article XX as an expression of the principle of good faith, which is a general principal of international law and also controls the exercise of rights by States.[156] The discriminatory nature of the IHA, combined with the U.S. failure to engage in negotiations with Antigua and its disregard for the impact of the statutes, demonstrate

155. *See* I. Nelson Rose, *Internet Gaming: U.S. Beats Antigua in WTO*, CASINO CITY TIMES (May 22, 2005), http://rose.casinocitytimes.com/articles/19020.html (noting that Congress will likely amend the Interstate Horseracing Act to permit Americans to wager on foreign races and additionally, to permit foreign bettors to gamble on American races). Once that amendment is made, the United States could continue to prohibit both foreign and domestic Internet gambling. *Id.*

156. *See* discussion *infra* Parts I.B.1-B.2 (noting that the Appellate Body in both cases determined that the United States failed to make a good faith effort in reaching an agreement with the disputing parties).

that the United States was not acting in good faith; thus the Appellate Body erred when it determined that the United States met the requirements under the chapeau of Article XIV.

III. RECOMMENDATIONS

The WTO Appellate Body should have found that the U.S. Internet gambling restrictions violated the provisions of the GATS and that these restrictions did not qualify for an exception under Article XIV. The Appellate Body's decision was flawed for three main reasons: its interpretation did not adhere to the textual language of Article XIV and footnote 5, its analysis unduly expanded the definition of necessary, and it was inconsistent with the chapeau of Article XIV. Inevitably, the WTO will face similar problems and inconsistencies in its Appellate Body rulings unless the WTO further addresses the binding nature of previous Panel and Appellate Body reports in its Dispute Settlement system. Other alternatives for resolving inconsistent decisions include making the language of the GATS more precise or having the Appellate Body make efforts to strictly adhere to the textual language. Further, because the Internet gambling industry is rapidly growing in size and revenue,[157] the parties in this case should consider looking at other countries' decisions to regulate Internet gambling and the potential benefits of international regulation.

157. *See* Louise Kong et al., New Media, Regulations and Policies on Online Gambling, http://newmedia.cityu.edu.hk/cyberlaw/gp25/intro.html (last visited May 3, 2006) (noting that "gambling has become one of the fastest growing businesses on the Internet" and "it is expected that the revenue generated by Internet gambling will have further substantial growth in the years ahead"). Currently, there are more than 2,500 online gambling sites and the revenue brought in by these sites in 2006 "is nearly six times that of 1999." *Id.*

A. THE WTO DISPUTE SETTLEMENT SYSTEM SHOULD FURTHER ADDRESS THE BINDING NATURE OF PREVIOUS DECISIONS

Currently, the WTO has a system of de facto stare decisis, but it should further address the binding nature of previous Panel and Appellate Body decisions, in order to eliminate inconsistent Appellate Body decisions.[158] The idea of stare decisis is already prevalent in Appellate Body reports, which indicates that the current WTO dispute system already acknowledges that previous decisions have a "binding nature" and have significant precedential value.[159] However, the WTO needs to address the 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.[160] Besides offering

158. *See* Jose Felgueroso, *TRIPS and the Dispute Settlement Understanding: The First Six Years*, 30 AIPLA Q.J. 165, 223-24 (2002) (distinguishing between de jure and de facto stare decisis by arguing that de facto stare decisis depends on quasi-legal factors such as the tribunal's tendencies, the tribunal's concept of justice, or the tribunal's need for consistency and uniformity).

159. *See, e.g.*, Appellate Body Report, *supra* note 1, ¶ 291 (noting that both the Panel and the Appellate Body recognized the textual similarities between Article XIV of the GATS and Article XX of the GATT and found previous interpretations of Article XX relevant in its analysis of Article XIV).

160. *See* Allen Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 280 (1997) (noting that although the WTO has not formally adopted stare decisis, the way in which the panels interpret the TRIPS Agreement will more specifically determine the TRIPS obligations of WTO Members). *But see* Dale Arthur

stability and certainty, a system of binding precedent would also level the playing field between first and third world countries, as well as create legitimacy in Appellate Body decisions.[161]

If there is no formal legal obligation for the Appellate Body to follow its own decisions, there is a risk that, as in the *United States—Antigua* dispute, the Appellate Body will depart from or expand upon previous decisions without sufficient justification.[162] Here, the Appellate Body deviated from its past decisions, but because its decision is the final step in the WTO dispute settlement process and it has no legal obligation to adhere to its past decisions, Antigua has to suffer for the Appellate Body's deviation. Formally addressing the binding nature of previous decisions would legitimize the system, serve as a check on its decisions, and ensure that the Appellate Body adequately

---

Oesterle, *The WTO Reaches Out to the Environmentalists: Is it Too Little, Too Late?*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 1, 18 (2000) (arguing against developing WTO case law and precedent in protectionist trade barriers disputes because panels do not have the political authority or expertise to carry out that role). When there is a complicated case concerning international trade agreements, member governments should negotiate and come to a consensus, rather than have the WTO panels look to case law to make a decision. *Id.* at 19.

161. *See* Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT'L L.J. 481, 503 (2000) (noting that a trade imbalance exists between larger and smaller trading countries because smaller countries rely on market access to larger countries). Because of this trade imbalance, larger trading countries are able to shape global trade rules. *Id.*

162. *See* Raj Bhala, *The Power of the Past: Towards* De Jure *Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 900 (2001) (arguing that stare decisis serves as "a shield against judicial activism, or worse yet, judicial tyranny"). In order to avoid arbitrary discretion, courts should conform to strict rules. *Id.*

interprets and applies the law.[163] The Appellate Body's final report binds the parties unless there is a consensus of WTO Members against the report.[164] The adoption of stare decisis would also reduce tension between first and third world countries because first world countries would not be able to use their political or economic power to influence the outcome of a dispute.[165]

B. WTO MEMBERS SHOULD CONSIDER MAKING THE LANGUAGE OF THE GATS MORE PRECISE

The Members of the WTO should consider amending the language of Article XIV of the GATS to explicitly define the term "necessary."[166] General exceptions to a Member's obligations under GATS are raised under Article XIV, which requires that the exception be "necessary to protect public morals or maintain public order," "necessary

163. *See id.* at 903 (noting that stare decisis increases legitimacy when it increases the probability that similar cases will be treated in an equal manner, which is an important concept of justice).

164. *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 531-32 (2000) (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").

165. *See id.* at 907-08 (arguing that the WTO system is successful if it aids in the trade development of poorer countries and one way this can be accomplished is if all WTO Members knew that developed countries were bound to international law by prior holdings).

166. *See* discussion *supra* Part I.B.3 (explaining that the Appellate Body in *Korea—Beef* set a stricter standard of necessity, but the decision does not explain its reasoning for setting the stricter standard nor does it explain if that was the meaning intended by the WTO Members).

to protect human, animal or plant life or health," or "necessary to secure compliance with laws or regulations which are not inconsistent with provisions of [the] agreement."[167] All of the general exceptions originate from the term "necessary," making it essential to more precisely define the term.[168] If looking to past decisions, prior rulings determining "necessary" under Article XX of the GATT do not adequately define the term to such a point of clarity where there is no confusion.[169] Similar to the international standards established in the Technical Barriers to Trade ("TBT"), WTO Members should commonly determine a world standard for "necessary," rather than having each Member establish its own discretionary definition of what measures are "necessary."[170]

C. A REGULATYORY REGIME FOR REMOTE GAMBLING WOULD BETTER ACCOUNT FOR THE UNIQUE NATURE OF REGULATING INTERNET ACTIVITY

167. GATS, *supra* note 20, art. XIV.

168. *Cf.* Reif & Eckert, *supra* note 50, at 679 (agreeing that the language of Article III of the GATT is vague, which allowed the Appellate Body to exercise significant discretion in developing interpretations of this provision).

169. *See id.* at 708 (pointing to flaws in the Appellate Body's decision in the Beef Hormone case because the Appellate Body never gave support for the fundamental conclusion on which the rest of its analysis is based). This raises the issue of the level of discretion used by the Appellate Body when it interprets key provisions. *Id.*

170. *See* World Trade Organization, Technical Barriers to Trade: Technical Explanation, Technical Information on Technical Barriers to Trade, http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm (last visited May 3, 2006) (determining that harmonization is an important aspect of non-discrimination and national treatment, so the TBT Agreement encourages Members to participate in international bodies to provide standards for conformity assessment procedures).

The jurisdictional and technological complexity in regulating Internet activities warrants consideration of other viable solutions beyond mere prohibition.[171] Because of the vast amount of revenue generated by online gambling and because the nature of the Internet mandates that any regulatory or prohibitory schema be constructed in the international arena, a regulatory regime for Internet gambling should be considered.[172] Several countries have successfully moved toward Internet gambling regulations, such as Britain, Australia, and Belgium, all of which passed new legislation regulating online gambling.[173] For example, Britain's new legislation establishes a new commission, as well as a body of investigators, to regulate the gambling industry, thus enabling online casinos to operate from Britain for the first time.[174]

---

171. *See generally* Roger Clarke & Gillian Dempsey, *The Technical Feasibility of Regulating Gambling on the Internet*, at 6-7 (Conf. on Gambling, Tech. & Soc'y: Regulatory Challenges for the 21st Century, Working Paper, May 1998), *available at* http://www.aic.gov.au/conferences/gambling/dempsey-clarke.pdf (reviewing the emergence and nuances associated with internet gambling).

172. *See* Andrle, *supra* note 5, at 1391-92 (noting the global nature of online gambling).

173. *See* Javad Heydary, *Advertising for Online Gambling-Is it Legal?*, E-COMMERCE TIMES, Apr. 28, 2005, *available at* http://www.ecommercetimes.com/story/42696.html (last visited August 26, 2006) (advocating a pro-Internet regulation position in light of the nonenforcement of Internet gambling laws and remote gambling's legality in several countries).

174. *See id.*

Currently, there is confusion because every country has its own policy on what types of Internet gambling it allows and whether its inhabitants can have legal access to Internet gambling. States should be encouraged to grant a limited amount of gambling licenses, which would allow countries that are worried about the effects of gambling on public morals, such as the United States, to monitor the amount of gambling and impose technical safeguards on Internet gambling providers.[175]

The rise in popularity of Internet gambling makes prohibition an ineffective solution, while a regulatory licensing scheme would be an economically beneficial solution.[176] Forcing online casinos to comply with strict licensing requirements would help to legitimize the virtual casinos that are abiding by international rules and also, fees from these licensing requirements could be used to monitor these Internet gambling sites.[177] Additionally, operators and Internet gambling sites will be more reputable if they are

---

175. *See* Jenna F. Karadbil, Note, *Casinos of the Next Millennium: A Look Into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. L. 413, 444-45 (2000) (arguing that the United States could benefit from strict licensing regulations because licensing fees will enable the United States to monitor and legitimize Internet gambling sites).

176. *See* Andrle, *supra* note 5, at 1407 (arguing that prohibition plan may exacerbate the problem of Internet gambling in the United States because "domestic laws that prohibit Internet gambling may discourage respected U.S. casino operators from entering the online casino market"); *see also* Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 171 (2000) (arguing that a regulatory proposal by the North American Gaming Regulators Association calls for a new commission composed of individuals with an expertise in Internet gambling).

177. *See* Karadbil, *supra* note 175 at 444; *see also* Kong et al., *supra* note 157 (noting that the loss of tax revenue in many countries has forced other governments to re-examine their stance towards regulating Internet gambling).

forced to comply with licensing requirements, which could include paying operating fees or subjecting to personal and credit investigations.[178]

CONCLUSION

The Wire Act, the Travel Act, and the IGBA do not meet the requirements for an exception under Article XIV of the GATS, and the Appellate Body therefore erred when it found that these restrictions are necessary to protect public morals or maintain public order. In finding that the United States' restrictions on Internet gambling qualified for an exception under Article XIV of the GATS, the Appellate Body failed to adequately balance international free trade rules with the United States' desire to continue to enforce federal restrictions relating to Internet gambling. In its decision, the Appellate Body failed to adhere to previous WTO decisions dealing with similar jurisprudence, failed to adhere to the text of Article XIV, and failed to uphold the requirements of the chapeau of Article XIV.

In order to resolve future problems and inconsistencies in its Appellate Body rulings, the WTO should further address the binding nature of previous decisions in its Dispute

178. *See* Andrle, *supra* note 5, at 1406-08 (arguing that a strong regulatory system may adequately resolve some of the societal concerns revolving around online gambling because "specialized technology such as data-tracking systems that monitor Internet casino transactions make spotting and screening out compulsive gamblers easier than land-based casinos"). Additionally, electronic records can be saved, making it easier to identify addictive and compulsive behavior. *Id.*

Settlement System. Otherwise, WTO Members should consider making the language in Article XIV of the GATS more precise. Alternatively, because of the growth and nature of the Internet gambling industry, the WTO should recommend that future parties develop a more permanent solution, such as a scheme regulating Internet gambling.