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The WTO Internet Gambling Dispute as a Case of First Impression: How to Interpret Exceptions Under GATS Article XIV(a) and How to Set the Trend for Implementation and Compliance in WTO Cases Involving “Public Morals” and “Public Order” Concerns?

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**THE WTO INTERNET GAMBLING DISPUTE AS A
CASE OF FIRST IMPRESSION: HOW TO INTERPRET
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HOW TO SET THE TREND FOR IMPLEMENTATION
AND COMPLIANCE IN WTO CASES INVOLVING
“PUBLIC MORALS” AND “PUBLIC
ORDER” CONCERNS?**

*Albena P. Petrova*¹

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INTRODUCTION

The gambling dispute between the United States (“U.S.”) and Antigua and Barbuda (“Antigua”)² is the first case involving Internet trade that has gone through the dispute settlement system of the World Trade Organization (“WTO”). It is brought by one of the smallest WTO members against one of its largest and most powerful members, and brings together economic development and public morals concerns. Most importantly, this is the first case decided by WTO’s Dispute Settlement Body (“DSB”) that rules on exceptions to market access under Article XIV³ of the General Agreement on Trade in Ser-

² See CIA World Factbook, Antigua and Barbuda, at <http://www.cia.gov/cia/publications/factbook/geos/ac.html> (last visited Dec. 14, 2005) (stating that the island of Antigua and Barbuda has a total area of 442.6 sq. km., a total population of 68,722, and GDP per capita \$11,000, is based on the English common law system, and is two and a half times the size of Washington, D.C.). By comparison, the United States has a total area of 9,631,418 sq km, a total population of 295,734,134 and GDP per capita \$40,100. *Id.*, United States, at <http://www.cia.gov/cia/publications/factbook/geos/us.html> (last visited Dec. 14, 2005).

³ Article XIV of GATS states in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in

vices (“GATS”).⁴ The rulings of the WTO’s Panel (“Panel”) and Appellate Body (“AB”) narrowly interpreted the request for a “public morals” exception under GATS Article XIV and this presents a challenge for compliance. Both the United States and Antigua claim a victory and a question arises whether the United States should totally lift the restrictions against Antiguan casinos in order to comply with the AB’s decision.⁵

This paper compares the similarities and differences in the interpretations of GATS Article XIV as applied by the Panel and AB. It recommends that the United States should amend the language of the U.S. Interstate Horse Racing Act⁶ (“IHA”) to allow foreign service providers the same rights as domestic service providers. This paper

this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order; [footnote 5]

[(footnote 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society].

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

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement

⁴ See WTO General Agreement on Trade in Services [hereinafter GATS] (applying to trade in services). GATS members have schedules of specific commitments that are annexed to the GATS Agreement. *Id.* The United States has committed to provide market access and national treatment to cross-border supply of “other recreational services.” *Id.* GATS Article XIV allows an exception to the principles of national treatment and market access to protect public morals. *Id.*

⁵ See United States Trade Representative, Trade Agreements – Monitoring and Compliance, at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file291_5696.pdf (last visited Dec. 13, 2005) (noting that the United States won on core issues in the gambling case); Press Release, Office of the United States Trade Representative, Executive Office of the President, U.S. Internet Gambling Restrictions Can Stand as U.S. Wins Key Issues in WTO Dispute (Apr. 7, 2005), available at http://ustr.gov/Document_Library/Press_Releases/2005/April/U.S._Internet_Gambling_Restrictions_Can_St_as_U.S._Wins_Key_Issues_in_WTO_Dispute.html (last visited Dec. 14, 2005) (suggesting that the AB ruling is a victory for the United States and that the United States only needs to clarify one narrow issue concerning Internet gambling on horse racing); Antigua Wins WTO Gaming Ruling, at <http://politechbot.com/2005/04/07/is-internet-gambling/> (last visited Dec. 13, 2005) (stating that according to Antigua, the WTO Appellate Body ruled in its favor).

⁶ See U.S. Interstate Horseracing Act (57 U.S.C. §§ 3001-3007). The Interstate Horseracing Act provides in relevant part:

§ 3004. Regulation of Interstate off-track wagering.

further recommends that both domestic and foreign service suppliers satisfy enhanced regulatory requirements before they accept and submit bets for horse racing. The paper finally recommends monetary compensation to Antigua in case the United States is unable to bring IHA into compliance by the established deadline.

Part I presents the findings of the Panel and AB. Part II analyzes, first, why the AB's narrow and objective analysis of the meaning of necessity is appropriate in WTO cases invoking public morals and public order exceptions and, second, why the AB's analysis of the GATS Article XIV chapeau is similar to interpretations of previous WTO cases under GATT Article XX. Part II focuses on whether the WTO treats gambling cases involving public morals exceptions differently from other cases and whether it is likely to find an exception under GATS Article XIV. Then, Part III recommends that the United States comply with the AB's ruling and amend the IHA to remove any arbitrary discrimination between domestic and foreign providers. This case also demonstrates the advantages of monetary compensation in cases where a small WTO member state wins a case against a large WTO member, and where public morals concerns exist. Finally, the comment concludes that the United States should amend IHA to comply with the decision of the AB while protecting its public morals and public order concerns.

I. BACKGROUND OF THE DISPUTE

A. *Timeline of the Dispute*

On March 21, 2003, Antigua requested consultations with the United States regarding measures applied in the United States, which affect the cross-border supply of gambling and betting services.⁷ Anti-

(a) Consent of host racing association, host racing commission, and off-track racing commission as prerequisite to acceptance of wager.

An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained . . .

§ 3002. Definitions.

(3) "interstate off-track wager" means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools. (emphasis supplied).

⁷ See World Trade Organization, *Timeline of the Internet Gambling Dispute*, at http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last visited

Antigua alleged that those measures prevented the cross-border supply of gambling and betting services from another WTO Member to the United States. The United States claimed that the restrictions on Internet gambling were necessary to control organized crime, to limit money laundering, and to prevent underage gambling. Antigua requested the establishment of a panel. After a second request by Antigua, the DSB established a panel. Canada, the European Communities, Japan, Mexico and Chinese Taipei reserved their third-party rights. As part of the negotiations for a mutually agreed solution to the present dispute, the parties requested the Panel to suspend the proceedings, pursuant to Article 12.12 of the WTO Dispute Settlement Understanding (“DSU”),⁸ until August 23, 2004. The parties requested a continuation of the suspension several times. The Panel resumed the panel proceedings on November 8, 2004, and issued a report on November 10, 2004, in favor of Antigua. The report concluded that the United States had failed to demonstrate that the federal laws at issue qualify for a GATS Article XIV exception.⁹ Negotiations between the United States and Antigua failed and the United States appealed the decision of the panel. The AB circulated its report on April 7, 2005.¹⁰ The AB found that the United States’ measures are justified under GATS Article XIV(a) as measures “necessary to protect public morals or to maintain public order”; and upheld, on a narrower ground, the Panel’s finding that the United States had failed to show that these measures satisfy the conditions of the chapeau of GATS Article XIV.¹¹ The DSB adopted the AB’s report and the Panel’s report, as modified by the AB’s report. The United States declared that it intends to implement the DSB’s recommendations and that it would need a reasonable period of time to do so.¹² On August 19, 2005, an

Dec. 12, 2005) (summarizing the timeline of the dispute) [hereinafter Timeline of Dispute].

⁸ See 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, 33 I.L.M. 1125 (1994) [hereinafter DSU].

⁹ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report]. See also WorldTradeLaw.net Dispute Settlement Commentary, U.S. – Gambling Services, Panel Report, at worldtradelaw.net.

¹⁰ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report]. See also WorldTradeLaw.net Dispute Settlement Commentary, U.S. – Gambling Services, Appellate Body Report, at worldtradelaw.net.

¹¹ See *id.*

¹² See Timeline of Dispute, *supra* note 7 (summarizing the key developments in the gambling dispute); see also U.S. Offers to Comply with Gambling Ruling as

arbitrator ruled in his DSU Article 21.3 Report that the United States has until April 3, 2006, to bring its non-conforming measures into compliance with the ruling of the AB.¹³

B. Findings of the Panel

The Panel recognized that GATS Article XIV has language that is identical to the language contained in GATT Article XX. Thus, the Panel found it helpful to consider previous WTO decisions analyzing the exceptions under GATT Article XX to determine whether an exception falls under GATS Article XIV.

The Panel first examined whether the measures at issue—the Wire Act (18 U.S.C. § 1084),¹⁴ the Travel Act (18 U.S.C. § 1952),¹⁵ and

Antigua Seeks Settlement, Inside U.S. Trade, May 20, 2005 (mentioning that the United States announced its intention to comply with the ruling of the Appellate Body during a meeting of the Dispute Settlement Body on May 10, 2005, but failed to provide specific details about its plan of implementation and compliance).

¹³ See WTO Announces Deadline for USA Compliance, <http://www.rakerebatereview.com/august26/wto.asp> (last visited Dec. 14, 2005) (stating that the WTO arbitrator denied the request of the United States to have until the end of July 2006 to implement the ruling of the AB).

¹⁴ The Wire Act states in relevant part:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

¹⁵ The Travel Act states in relevant part:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or

the Illegal Gambling Business Act (“IGBA”) (18 U.S.C. § 1955)¹⁶ – are designed and necessary to protect public morals and to maintain public order, within the meaning of GATS Article XIV(a). The Wire Act makes it illegal to gamble over the telephone or use other wire devices unless authorized by a specific state. The Travel Act criminalizes illegal gambling as part of interstate travel or via interstate or foreign mail. The IGBA makes it unlawful for people engaged in the gambling business to use the Internet to place, receive, or make a bet. The Panel found that the Wire Act, the Travel Act, and the IGBA are only designed but not necessary to protect public morals and public order within the meaning of GATS Article XIV(a). The Panel applied the two-step analysis applied under GATT Article XX. The Panel first defined the meaning of the terms “public morals” and “public order,” and determined whether a measure was designed to protect public morals and to maintain public order. The Panel then determined whether the measure was necessary to protect “public morals” and to maintain

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

¹⁶ The Illegal Gambling Business Act provides in relevant part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) “illegal gambling business” means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) “gambling” includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

“public order,” and whether it was justified under the chapeau of GATS Article XIV.

1. The Measures are Designed to Protect “Public Morals” and to Maintain “Public Order” Under GATS Article XIV(a)

The Panel carefully analyzed the language of GATS Article XIV(a). It found that the term “public morals” means “standards of right and wrong conduct maintained by or on behalf of a community or nation.”¹⁷ The Panel defined the term “order” by considering footnote 5 of GATS, which refers to the “preservation of the fundamental interests of a society, as reflected in public policy and law.”¹⁸ The Panel stated that “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”¹⁹ The Panel then provided examples that the prevention of underage gambling and the protection of pathological gamblers relate to public morals, while the fight against organized crime is a matter of public order.²⁰ The prevention of money laundering and of fraud schemes could relate to both public morals and public order.²¹ The Panel noted that measures prohibiting gambling and betting services, including the supply of those services by the Internet, could fall within GATS Article XIV(a) if they are enforced pursuant to policies that have an object and purpose to “protect public morals” or “to maintain public order.”²² The Panel then referred to Congressional reports and testimony establishing that the Wire Act, the Travel Act and the IGBA came into effect to address money laundering, organized crime, fraud, underage gambling, and

¹⁷ Panel Report ¶ 6.465 (defining public order and considering the dictionary definition of public order).

¹⁸ *Id.* ¶ 6.467 (considering the dictionary definition and footnote 5 definition of public order).

¹⁹ *Id.* ¶ 6.461 (stating that states should interpret the meaning of public order according to their systems and societal values). “Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.” *Id.* It further noted that the Appellate Body has stated on several occasions that Members can determine the level of protection that they consider appropriate.

²⁰ *See id.* ¶ 6.469 (providing examples of public morals and public order).

²¹ *See id.* (providing examples that fall under both public morals and public order).

²² *See id.* ¶ 6.474 (concluding that underage and pathological gambling constitute a threat to public order and morality).

pathological gambling.²³ Based on those findings, the Panel concluded that those three federal statutes are “measures that are designed to ‘protect public morals’ and/or ‘to maintain public order’”²⁴ within the meaning of GATS Article XIV(a).²⁵ The Panel then determined whether the restrictive measures are necessary to protect public morals and to maintain public order under GATS Article XIV(a).

2. *The Measures are not “Necessary” to Protect “Public Morals” and to Maintain “Public Order” Under GATS Article XIV(a)*

In the second part of its analysis, the Panel considered whether the Wire Act, the Travel Act, and the IGBA are necessary within the meaning of GATS Article XIV(a) to protect public morals and to maintain public order, and concluded that the United States had not demonstrated the necessity of those measures. To make that determination, the Panel applied the process of weighing and balancing of a series of factors previously used by the Appellate Body in the *WTO Korea – Beef* case.²⁶ The Panel determined that “(i) the interests and values protected by [the Wire Act, the Travel Act, and the IGBA] serve very important societal interests that can be characterized as ‘vital and important in the highest degree’”; that (ii) the Wire Act, the Travel Act, and the IGBA contribute to addressing the United States’ concerns “pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling”; but that (iii) the measures in question “have a significant restrictive trade impact.”²⁷ The Panel concluded that the measures were trade-restrictive because the responding Member must have first “explored and exhausted” all reasonably available WTO-compatible alternatives before adopting a measure that is inconsistent with its obligations under the WTO

²³ See *id.* ¶ 6.486 (concluding that according to the Congressional reports and testimonies, the three acts were introduced to provide protection against organized crime, underage gambling, fraud, money laundering, and pathological gambling).

²⁴ *Id.* ¶ 6.487 (concluding that measures banning gambling and betting services fall under the provisions of GATS Article XIV because their purpose is to protect public morality and order).

²⁵ See *id.* (stating that the concerns that those three acts address fall within GATS article XIV(a)).

²⁶ See Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, ¶ 178, Jan. 10, 2001 [hereinafter *Korea–Beef* case]. The series of factors weighed in the *Korea–Beef* case are the following: (1) *the importance of interests or values* that the challenged measure is intended to protect; (2) *the extent to which the challenged measure contributes to the realization of the end pursued* by that measure; and (3) *the trade impact* of the challenged measure including whether a *reasonably available WTO-consistent alternative measure* exists. *Id.* (emphasis supplied).

²⁷ *Id.* ¶¶ 6.492, 6.494 & 6.495.

Agreement.²⁸ The Panel noted that in rejecting Antigua's invitation to engage in bilateral or multilateral consultations or negotiations, the United States "failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative."²⁹ According to the Panel, the United States had an obligation to consult with Antigua before and while imposing the WTO-inconsistent measure. The Panel ruled that because the United States refused to accept Antigua's invitation to negotiate, the Panel was not in a position to rule that the Wire Act, the Travel Act, and the IGBA are necessary, within the meaning of GATS Article XIV(a).

In sum, the Panel held that the measures at issue are designed to protect public morals and to maintain public order, but that the United States has failed to demonstrate that the measures are necessary to achieve those goals. The Panel then moved on to determine whether the measures are necessary to secure compliance under GATS Article XIV(c).

3. *The Measures Are Not Necessary to Secure Compliance Under GATS Article XIV(c)*

Pursuant to the text of Article XIV(c), the Panel analyzed whether the Wire Act, the Travel Act, and the IGBA serve as law enforcement tools to secure compliance with U.S. state gambling laws and criminal laws related to organized crime that are WTO-compliant, and as such are provisionally justified under Article XIV(c).³⁰ For that purpose, the Panel considered the following three elements:

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

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

(c) the measure for which justification is claimed must be "necessary" to secure compliance with those other laws or regulations.³¹

The Panel concluded that the Wire Act, the Travel Act and the IGA are designed to serve as law enforcement tools to secure compliance with U.S. criminal laws related to organized crime that are WTO-

²⁸ *Id.* ¶ 6.564 (stating that the three acts are necessary to enforce criminal laws in the United States, but at the same time the measures have a significant restrictive impact on trade).

²⁹ *See* Panel Report ¶ 6.531.

³⁰ *See id.* ¶¶ 6.563-6.565 (providing detailed reasoning of the Panel and its conclusions).

³¹ *See id.* ¶¶ 6.536-6.537 (explaining that GATS Article XIV(c) is very similar to GATT Article XX(d), and therefore the analysis applied by the Appellate Body in *Korea-Beef* is relevant here).

consistent. Since Antigua has not challenged U.S. criminal laws related to organized crime as inconsistent with the GATS, the United States could rely on the Racketeer Influenced and Corrupt Organization Statute ("RICO")³² as a defense under Article XIV(c).³³ The Panel then concluded that the Wire Act, the Travel Act, and IGBA all assist in enforcing RICO because they help curb organized crime, and on that basis the three acts secure compliance with RICO. The Panel then weighed and balanced the three elements under the *Korea—Beef* case, listed under the Article GATS XIV(a) analysis above,³⁴ and concluded that the interests protected by RICO are very important societal interests, make significant contributions to the enforcement of criminal laws against organized crime, but are trade-restrictive. The Panel concluded that the United States had failed to explore WTO-consistent alternatives such as consultations or negotiations with Antigua to determine whether WTO-consistent means are available to address its organized crime concerns. Thus, the Panel concluded that the United States has not been able to provisionally justify that the Wire Act, the Travel Act and the Illegal Gambling Business Act are necessary within the meaning of Article XIV(c) of GATS to secure compliance with the RICO statute. Next, the Panel considered whether the measure satisfies the requirements of the chapeau under GATS Article XIV.

4. The Measures Are Not Justified Under the Chapeau of GATS Article XIV

After the Panel concluded that the United States has been unable to provisionally justify, under Article XIV(a) and (c) of the GATS, that the Wire Act, the Travel Act and the IGBA are necessary to protect public morals and to maintain public order, the Panel determined whether the measures meet the requirements of the introductory provisions of Article XIV known as the "chapeau." The chapeau requires that the measures in question are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. The Panel noted that since the chapeau here is very similar to

³² See Department of Justice, Criminal Resource Manual, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm#9-110.100 (last visited Dec. 27, 2005). On October 15, 1970, the Organized Crime Control Act of 1970 became a law. *Id.* Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§ 1961-1968), which is referred to as the RICO statute. *Id.* The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." *Id.*

³³ See Panel Report ¶ 6.539 (clarifying that a measure need not be designed for the sole purpose to comply with the justifying law).

³⁴ See *supra* notes 24-27 and accompanying text.

the chapeau under GATT Article XX, it would apply the jurisprudence under GATT Article XX.

The Panel reviewed the evidence to determine whether the United States applied the restrictive measures to create arbitrary and unjustifiable discrimination. The Panel held that the United States did not consistently apply its prohibition to the remote supply of gambling services domestically and from other WTO Members. The Panel noted that the United States had failed to make a showing that its enforcement actions against large-scale Internet operators in the United States that provide remote supply of gambling and betting services, such as TVG, Capital OTB and Xpressbet.com, are consistent with the requirements of the chapeau. The Panel also concluded that the manner in which the United States applied the U.S. federal prohibition on the remote supply of gambling and betting services domestically is not inconsistent with the requirements of the chapeau under GATS Article XIV as it applies to video lottery terminals.

The Panel then found that the United States had failed to demonstrate that the IHA does not permit interstate betting for horse racing over the telephone or the Internet. The Panel ruled that the IHA permits the remote supply of gambling and betting services for horse races and that the federal laws that prohibit the use of remote communication to supply gambling and betting services do not apply to horse race-betting because the IHA effectively exempts such betting from the application of the relevant federal laws. The text of the IHA does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or via other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states. Thus, IHA authorizes domestic service suppliers but not foreign service suppliers to offer remote betting services to horse races, and as such constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade."³⁵

Next, the Panel concluded that Nevada bookmakers offer their services to home-users on a local private network and not on the publicly accessible Internet, and therefore, the manner in which the United States applies the prohibition on the remote supply of gambling and betting services as regards to Nevada is consistent with the chapeau of GATS Article XIV. Finally, the Panel concluded that the two letters of the president of an U.S. association of state lotteries stated that the association takes no position on Internet gambling on its face and such statements do not show that the manner in which the United States applied its prohibition on the remote supply of gambling

³⁵ Panel Report ¶ 6.582 (concluding that the United States failed to submit evidence that it applied the ban consistently).

and betting services is inconsistent with the requirements of the chapeau.

In sum, the Panel found two instances revealing that the measures at issue discriminate between domestic and foreign service suppliers. The Panel found that the manner in which the United States enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is inconsistent with the requirements of the chapeau. The Panel also found that the IHA does not permit foreign service suppliers to offer remote betting services to horse racing over the telephone and the Internet, and this goes against the requirements of the chapeau. Therefore, according to the Panel, the WTO-inconsistent measures failed to comply with the requirements of the chapeau under GATS Article XIV.³⁶ The next section summarizes the findings of the Appellate Body.

C. Findings of the Appellate Body

The AB upheld the Panel's finding that the concerns, which the Wire Act, the Travel Act and the IGBA seek to address, fall within the scope of public morals and public order. The AB, however, reversed the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the measures as necessary to protect public morals or to maintain public order.³⁷ Unlike the Panel, the AB found that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or to maintain public order.³⁸ The AB reversed the Panel's finding that, because the United States did not enter into consultations with Antigua, the measures are not necessary to secure compliance with RICO.³⁹ The AB decided that, for reasons of judicial economy, it did not need to determine whether the Wire Act, the Travel Act, and the IGBA are measures justified under GATS Article XIV(c).⁴⁰

Regarding the chapeau of Article XIV, the AB reversed the Panel's finding that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpress-

³⁶ Panel Report, Conclusion ¶ 7.4 (concluding that the Panel's decision does not rule that WTO members are banned from regulating gambling and betting activities, but that the U.S. measures are inconsistent and discriminatory in the instant case and do not comply with its scheduled commitments).

³⁷ See Daniel Pruzin, *WTO Body Rules on Internet Gambling; Both Sides Find Advantages in the Decision*, INT'L TRADE DAILY, Apr. 8, 2005.

³⁸ *Id.*

³⁹ Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R at ¶ 290.

⁴⁰ *Id.*

bet.com is consistent with the requirements of the chapeau.⁴¹ The AB found that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or maintain public order pursuant to Article XIV(a), but failed to demonstrate that the prohibitions embodied in those measures are applied nondiscriminatory to both foreign and domestic service suppliers of remote betting services for horse racing under IHA, and, therefore, these measures fail to satisfy the requirements of the chapeau.⁴²

The AB followed the same analysis of GATS Article XIV as the Panel by starting from the exceptions under Article XIV and then focusing on the chapeau.⁴³ The AB found previous decisions under GATT Article XX to be relevant in the instant case and accordingly applied the two-tier analysis used in *Korea — Beef* and followed by the Panel.⁴⁴ The next subsections analyze the main findings and conclusions made by the AB, and focus on the Panel's analysis that the AB reversed.

1. The Measures are Designed to Protect "Public Morals" and to Maintain "Public Order" Under GATS Article XIV(a)

The AB upheld the Panel's finding that the concerns which the Wire Act, the Travel Act and the IGBA seek to address fall within the scope of public morals and/or public order under GATS Article XIV(a).⁴⁵ The AB concluded that the Panel referred to footnote 5 of the GATS in a way that demonstrated that it understood the requirement in the footnote to be part of the meaning of the term public order.⁴⁶ The AB concluded that a simultaneous reading of the definition of the term "order" and GATS footnote 5 suggests that public order refers to the preservation of important and fundamental societal interests.⁴⁷ The AB also concluded that since the Panel defined public order to include the standard defined in GATS footnote 5, and then applied that definition to the facts before it to conclude that the measures are designed to protect public morals and/or to maintain public order, the Panel did not need to make a separate, explicit determination that the standard of GATS footnote 5 had been met.⁴⁸ On that basis, the AB upheld the Panel's finding that the measures are designed to address concerns that fall within the scope of public morals and/or public order

⁴¹ *Id.* at ¶ 290 (explaining the findings made by the Panel).

⁴² *Id.* at ¶ 299.

⁴³ *Id.* at ¶ 291.

⁴⁴ *Id.* at 305.

⁴⁵ *Id.* at 327.

⁴⁶ *Id.* at ¶ 296.

⁴⁷ *Id.*

⁴⁸ *Id.* at ¶ 298.

under GATS Article XIV(a).⁴⁹ The next paragraph focuses on the AB's findings as to whether those measures are necessary to protect public morals and to maintain public order.

2. *The Measures are "Necessary" to Protect "Public Morals" and to Maintain "Public Order" Under GATS Article XIV(a)*

The AB agreed that GATS Article XIV allows an exception from WTO services commitments for trade restrictive measures if this is necessary to protect public morals, to maintain public order, or to ensure compliance with national laws and regulations related to the prevention of deceptive and fraudulent practices, individual privacy, and safety. The AB reversed the Panel's finding that the Wire Act, the Travel Act, and the IGBA are unnecessary to protect public morals, and/or to maintain public order.⁵⁰ The AB noted that the necessity exception is an objective standard and that the text of federal statutes best defines its meaning.⁵¹ The AB agreed with the Panel that the weighing and balancing of the factors applied in *Korea—Beef* is most helpful.⁵² The AB, however, concluded that, with regards to the second and the third element under the *Korea—Beef* test, not only weighing and balancing, but also a comparison between the challenged measure and possible alternatives should be required to determine whether a measure is necessary or reasonably available.⁵³ According to the AB, the results of the comparison should be considered in view of the interests at issue.⁵⁴

Thus, the AB concluded that the Panel should have decided whether the measure is necessary by first weighing and balancing, then comparing the measures, and finally considering the interests at issue.⁵⁵ Based on that analysis, the Panel should have determined whether a measure is necessary or another WTO-consistent measure is reasonably available. According to the AB, an alternative measure is not reasonably available when it is solely theoretical in nature.⁵⁶ In addition, the responding party has the burden to make a *prima facie* case that a measure is necessary.⁵⁷ If a responding party demonstrates that there is no reasonably available alternative, then the challenged measure is necessary under GATS Article XIV.⁵⁸

⁴⁹ *Id.* at ¶ 299.

⁵⁰ *Id.* at ¶ 321.

⁵¹ *Id.* at ¶ 304.

⁵² *Id.* at ¶¶ 305-306.

⁵³ *Id.* at ¶ 308.

⁵⁴ *Id.*

⁵⁵ *Id.* at ¶ 306.

⁵⁶ *Id.* at ¶ 309, 311.

⁵⁷ *Id.* at ¶ 310.

⁵⁸ *Id.* at ¶ 311.

Based on that analysis, the AB agreed with the Panel that the three federal statutes protect very important public interests and that the statutes reach the goals they try to achieve.⁵⁹ The AB, however, reversed the Panel's finding that the GATS Article XIV exception was not justified because the United States failed to discuss with Antigua less trade-restrictive alternatives before imposing the ban.⁶⁰ According to the AB, the Panel's analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve its objectives to protect public morals and public order.⁶¹ Engaging in consultations with Antigua was not an appropriate alternative for the Panel to consider because consultations, by definition, constitute a process, the results of which are uncertain and as such cannot be compared with the measures at issue in this case.⁶² The AB agreed with the United States that the only basis for the Panel's adverse conclusion was its finding relating to the requirement of consultations with Antigua.⁶³ The AB found that the Panel was wrong to find that consultations with Antigua constitute a measure reasonably available to the United States.⁶⁴ Since Antigua raised no other measure that could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA, there is no reasonably available alternative measure establishing that the three federal statutes are not necessary within the meaning of GATS Article XIV(a).⁶⁵ In sum, because the United States made its *prima facie* case of necessity, and Antigua failed to identify a reasonably available alternative measure, the AB concluded that the United States demonstrated that its three federal statutes are necessary to protect public morals and to maintain public order.

The AB refused to consider whether the Wire Act, the Travel Act and the IGBA fall under GATS Article XIV(c) for reasons of judicial economy after it concluded that they do fall under GATS Article XIV(a).⁶⁶ The AB concluded that its analysis under GATS Article XIV(a) also applies to GATS Article XIV(c).⁶⁷ Thus, the AB reversed the Panel's findings under GATS Article XIV(c) on the same grounds. The next subsection presents the AB's findings regarding the chapeau of GATS Article XIV.

⁵⁹ *Id.* at ¶ 313.

⁶⁰ *Id.* at ¶ 317, 321.

⁶¹ *Id.* at ¶ 317.

⁶² *Id.*

⁶³ *Id.* at ¶ 325.

⁶⁴ *Id.* at ¶ 318.

⁶⁵ *Id.* at ¶ 326.

⁶⁶ *Id.* at ¶ 337.

⁶⁷ *Id.* at ¶ 325.

3. *The Measures Are Not Justified Under the Chapeau of GATS Article XIV*

The AB reversed the Panel's finding that the United States has failed to demonstrate that the manner in which it enforces the prohibition of remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau.⁶⁸ The AB applied a statutory interpretation and noted that the wording in each of the three statutes does not discriminate on its face between United States and foreign suppliers of remote gambling services.⁶⁹ As a result, the AB concluded that the Panel should have considered the neutral language of the statutes.⁷⁰

The AB further noted that isolated instances of enforcement and lack of enforcement without proper evidence could not provide sufficient evidence on the patterns of enforcement and reasons for lack of enforcement.⁷¹ Such evidence might include evidence on the overall number of suppliers, patterns of enforcement, and reasons for particular instances of non-enforcement.⁷² Evidence is important because enforcement agencies may refrain from prosecution for reasons unrelated to discriminatory intent and without discriminatory effect.⁷³ Thus, the Panel should have carefully reviewed the wording of the measures and should have followed an objective and neutral analysis of the wording on the face of the statutes.⁷⁴

The AB upheld the Panel's finding that the prohibitions in the International Horseracing Act (IHA) do not apply to both foreign and domestic service suppliers of remote betting services for horse racing, and, as such, violate the chapeau. The IHA, on its face, authorizes domestic service suppliers, not foreign service suppliers, to offer remote betting services in horse races and also exempts domestic service suppliers from the prohibitions of the other three federal statutes.⁷⁵ Allowing online gambling on horse racing to domestic service suppliers while banning the remote supply of gambling services from overseas suppliers violates the chapeau of GATS Article XIV.

In sum, the AB concluded that the U.S. demonstrated that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or maintain public order, but that it has not shown, that the prohibitions in IHA apply to both foreign and domestic service suppli-

⁶⁸ *Id.* at ¶ 354.

⁶⁹ *Id.*

⁷⁰ *Id.* at ¶ 357.

⁷¹ *Id.* at ¶ 356.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 357.

⁷⁵ *Id.* at ¶ 371.

ers of remote betting services for horse racing and, therefore, IHA fails to satisfy the requirements of the chapeau.⁷⁶ Based on those findings, the AB recommended that the DSB request that the U.S. bring the IHA into conformity with its WTO obligations.⁷⁷

II. ANALYSIS OF THE FINDINGS OF THE PANEL AND THE APPELLATE BODY

A. *Balancing Economic Development and Public Morals/Order Concerns*

The Internet Gambling case brings together economic development and public morals/order concerns. On one hand, Antigua is among the smallest WTO members and revenues from Internet gambling are vital for its economic development. For example, Antiguan authorities complained that the U.S. restrictions led to the closure of three-quarters of the island state's 119 Internet gambling enterprises and resulting losses of \$90 million.⁷⁸ The online gambling industry employs about 3,000 people in Antigua and includes an estimated 1,800 online gambling sites.⁷⁹ In 2004, those sites accepted more than \$7 billion in wagers and that number is expected to exceed \$18 billion by 2010.⁸⁰

The WTO Internet gambling case is a landmark victory for Antigua as one of the smallest WTO members defeated one of the largest and most powerful WTO members.⁸¹ The AB ruling is anticipated to create new financial and media opportunities for Antiguan gaming operators. Previously, large U.S. companies with international operations were discouraged from conducting financial transactions or broadcasting advertisements involving online gaming products.⁸² Based on the WTO ruling, ended subpoenas and threats of prosecution

⁷⁶ *Id.* at ¶ 373(D)(vi); *see supra* note 37.

⁷⁷ *Id.* at ¶ 374.

⁷⁸ *See id.* (describing Antigua's position on the outcome of the case and the effect of the U.S. gambling restrictions on the economy of Antigua).

⁷⁹ *See* Danielle Belopotosky, *Both Sides Claim Win in WTO Ruling on New Gambling*, E-COMMERCE, Apr. 7, 2005 (emphasizing the economic importance of gambling in Antigua).

⁸⁰ *See id.*

⁸¹ *See id.*; *see also* James Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, 2004 DUKE L. & TECH. REVIEW 13 (2004).

⁸² *See* Pruzin, *supra* note 37 (noting that those companies included Citibank, Chase Manhattan, Bank of America, Clear Channel Communication, Discovery TV, Yahoo and MSN).

from the U.S. federal government to U.S. companies who choose to do business with Antigua offshore gaming companies.⁸³

Since this is a case between a large and a small member of the WTO, the effects of anti-U.S. retaliation, whether threatened or actual, would be minor and weak. This case also raises significant public policy issues. The United States is concerned with threats of compulsive gambling, underage gambling and organized crime, all of which are as equally important, as economic development needs. Consequently, public order and public morals concerns of the United States are likely to outweigh its interest in amending its law to allow for unlimited and unregulated access to overseas gambling providers from Antigua.

Clearly, both the Panel and the AB balanced the economic development needs of Antigua and the public policy interests of the United States. The DSB recognized the public morals and public order concerns of the United States even though it did not allow an exception to GATS Article XIV on public morality grounds. The DSB appropriately failed to suggest specific steps that the United States should follow to amend its WTO non-compliant law. Thus, the United States is left to apply creative lawyering to protect its public morals/order interests while bringing its violating law into compliance with the WTO Agreement. The next section analyzes how the AB chose to apply a narrow interpretation of the exceptions under GATS Article XIV(a) to balance interests of economic development and public morality while ensuring stability and predictability in the WTO dispute settlement system.

B. A Narrow Interpretation of the Exceptions Under GATS Article XIV(a) Ensures Stability and Predictability in the WTO System

A narrow interpretation of the public morality and public order exceptions under GATS Article XIV(a) ensures that such exceptions are invoked under limited and exceptional circumstances. The AB agreed that Internet gambling laws are necessary to protect public morals or maintain public order, and reversed the Panel's less objective analysis. The AB determined that the Panel's analysis was flawed because it failed to apply an objective standard and erroneously searched for all available alternative measures.⁸⁴ The AB found that the United States applied IHA in a discriminatory fashion in the prohibition on Internet betting on horse racing through foreign suppliers.⁸⁵

⁸³ See *id.* (speculating that Internet search engines will have to allow advertising from Antiguan online casinos).

⁸⁴ *Supra* note 39 at ¶ 373(D)(iv)(a).

⁸⁵ *Id.* at ¶ 373(D)(vi)(a).

1. *The Appellate Body Correctly Concluded that the Measures are Necessary to Protect Public Morals and to Maintain Public Order*

The AB applied a more objective approach than the Panel. It allowed a comparison in addition to the weighing and balancing, and then it applied the vital necessity prong as described earlier in the paper. The AB did not focus on whether the United States looked for reasonably available alternative measure and consulted with Antigua. The AB rejected the requirement that consultations had to take place between United States and Antigua to address the concerns of Antigua.⁸⁶ The Panel's "weighing and balancing" was much narrower and was less clear than in previous WTO/GATT cases because the Panel considered whether the United States had exhausted reasonably available alternative measures through consultations. It makes more sense to consider whether a reasonably available alternative measure existed by applying the objective standard applied by the AB as opposed to the Panel's analysis whether the United States looked to exhaust reasonably available WTO-consistent measures through bilateral and multilateral consultations with other WTO members. It is burdensome to impose such consultations and negotiations requirements on a party because doing so would delay the resolution of WTO disputes. In this case, the parties already had difficulty reaching negotiations and a mutually acceptable solution, and it is likely that subsequent negotiations would not have been successful.

The AB did not refer to an obligation to "explore and exhaust" reasonably available alternative measures through consultations. In that way, the AB's approach was similar to previous GATT Article XX Appellate Body reports that examined alternative measures proposed by the complainant or the Panel. See *Korea-Beef*.⁸⁷ Thus, both previous case law and the *Internet Gambling* AB ruling, focused on whether, objectively speaking, a reasonably available alternative measure existed and whether it could achieve the same objective. Under previous WTO cases, the Panels/Appellate Bodies examined specific alternative measures proposed by the complainant or the panel.⁸⁸ The Panel's approach, on the other hand, focused on whether the defendant actually sought such a measure and consulted with its trading partners, and not on whether such a measure existed. The Panel surprisingly did not ask the United States to explain whether it had considered less-restrictive alternative measures and failed to consider such measures that were proposed by Antigua. The Panel's proposed shift in analysis would cause time-consuming consultations between

⁸⁶ *Id.* at ¶ 373(D)(vi)(a).

⁸⁷ See *Korea-Beef*, *supra* note 26.

⁸⁸ *Id.*

trading parties and further delay the outcome of the case. The Panel should have placed the burden on the United States to explain whether it had considered less trade-restrictive measures and the nature of any such alternatives.

Any requirement imposed on the responding party to engage in consultations to justify measures under the public morals/order exception is inefficient and burdensome on both the complaining party and the responding party, and slows down the functioning of the DSB. Thus, the AB rightfully reversed the Panel's analysis and followed the reasoning of previous Appellate Bodies under GATT Article XX cases. The narrow comparison approach the AB applied in addition to a simple weighing and balancing test makes it harder to find an exception under GATS Article XIV(a). This conclusion aligns with the WTO Agreement principle that members should invoke exceptions rarely and under exceptional circumstances. The narrow but objective analysis AB applied justifies the restrictive measures applied by the United States as necessary and rightfully falling under an exception of GATS Article XIV(a).

2. *The Appellate Body Correctly Applied a Narrow Interpretation of the Chapeau Requirement and Followed the Analysis of Article XX in Previous WTO Cases*

The analysis of the Article XX chapeau in the *Shrimp-Turtle* case is instructive and the AB correctly followed it to determine the meaning of discrimination.⁸⁹ In the *Shrimp/Turtle* case, the main issue was whether the United States could ban import of shrimp from countries who did not have adequate conservation policies for the protection of endangered sea turtles on the grounds that sea turtles were an exhaustible natural resource under GATT Article XX.⁹⁰ The AB in *Shrimp-Turtle*, analyzed the ordinary meaning of the words of the chapeau, and noted that the precise language of the chapeau required that a measure not be applied in a manner which would constitute (1) a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or (2) a "disguised restriction on international trade."⁹¹ In order to violate the first requirement, the AB noted that three elements must exist.⁹² First, the measure must

⁸⁹ See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Oct. 12, 1998 [hereinafter *Shrimp-Turtle case*].

⁹⁰ See Daniel Pruzin, *EU Joins Swiss Call To Clarify Link Between Trade and Environmental Pacts*, INT'L TRADE REPORTER, Nov. 2, 2000 (discussing the findings in the *Shrimp Ban case*).

⁹¹ See *Shrimp-Turtle* ¶ 120.

⁹² *Id.*

result in discrimination, with the nature and quality of this discrimination being different from the discrimination in the treatment of products, which was already found to be inconsistent with one of the substantive obligations of the GATT.⁹³ Second, the discrimination must be “arbitrary or unjustifiable” in character.⁹⁴ Third, this discrimination must occur “between countries where the same conditions prevail.”⁹⁵ The Appellate Body in *Shrimp-Turtle* emphasized the language of the Preamble to the WTO Agreement, qualifying the original objectives of the GATT 1947.⁹⁶ Turning to the GATT Article XX chapeau, the AB determined that this provision embodies WTO recognition of the need to maintain a balance between the right to invoke a GATT Article XX exception and the substantive rights under the GATT.⁹⁷ The purpose and object of the GATT Article XX chapeau is to prevent an abuse of the exceptions of GATT Article XX.⁹⁸ According to the AB in *Shrimp-Turtle*, the language of the GATT Article XX chapeau makes it clear that each of the exceptions in GATT Article XX, paragraphs (a)-(j) is a limited exception from the substantive obligations contained in the other provisions of the GATT.⁹⁹ The AB further noted that the GATT Article XX chapeau is an expression of the principle of good faith.¹⁰⁰ Accordingly, the Appellate Body in *Shrimp-Turtle* found that a violating law constitutes arbitrary discrimination between similarly-situated countries, contrary to the requirements of the GATT Article XX chapeau.¹⁰¹ As the violating U.S. measure did not meet the requirements of the GATT Article XX chapeau, it was not justified.¹⁰² The AB overturned the Panel’s finding that the U.S. ban was not justified under GATT Article XX(g) of the GATT 1994 which allowed trade-restrictive measures to be imposed for the purpose of conserving exhaustible natural resources.¹⁰³ The Appellate Body in *Shrimp-Turtle* concluded that though the ban served an environmental objective, legitimate under GATT Article XX(g), the U.S. applied the ban in an arbitrary manner that caused arbitrary and unjustifiable discrimination between the WTO members.¹⁰⁴

⁹³ *Id.*

⁹⁴ *See id.* ¶ 150.

⁹⁵ *See id.*

⁹⁶ *Id.* at ¶ 152.

⁹⁷ *Id.* at ¶ 156.

⁹⁸ *Id.*

⁹⁹ *Id.* at ¶ 157.

¹⁰⁰ *Id.* at ¶ 158.

¹⁰¹ *Id.* at ¶ 160.

¹⁰² *Id.* at ¶ 172.

¹⁰³ *Id.* at ¶ 184.

¹⁰⁴ *Id.* at ¶ 186.

The AB in the *Internet Gambling* case applied an identical reasoning. The AB in the *Internet Gambling* case also concluded that the measures at hand were necessary to protect public morals and to maintain public order. The United States, however, applied the IHA in an arbitrary and discriminatory manner. The AB tried to strike a balance between the substantive obligations of the United States under the GATS and the limited exception allowed under GATS Article XIV. The AB used an objective analysis and carefully considered all the evidence. The AB did not resort to the legislative history of the IHA to determine whether domestic firms were prohibited from remotely supplying wagering on horseracing notwithstanding the plain language of IHA. The AB emphasized that the U.S. could conclude that domestic firms were banned from remotely supplying wagering on horseracing only if such an interpretation were explicit in the language of the statute; such was not the present case.

Since the language of GATS Article XIV and GATT Article XX was almost identical, it made sense for the AB to interpret Article XX(g) and the chapeau. This is a strategy courts commonly apply in cases of first impression. A broader interpretation of the chapeau requirement and the GATS Article XIV(a) could have led WTO members to regularly seek an exception under GATS Rule XIV, which would damage the established predictability and stability of the DSB system. Thus, the AB adopted the approach that public morals/order exceptions must be interpreted narrowly as environmental/human life exceptions, and that more leeway should be given to WTO states in their movement towards compliance when disputes involve environmental and public policy concerns. Part III focuses on issues of compliance in the *Internet Gambling* case.

III. RECOMMENDATIONS FOR COMPLIANCE WHERE PUBLIC MORALS/ORDER CONCERNS EXIST

The United States has several months to bring its non-conforming measures into compliance with the ruling of the AB, and there is presently not much information publicly available about any progress made.¹⁰⁵ Implementation of the Appellate Body decision requires a modification in the language of the IHA, which seems to allow domestic, but not foreign, companies to allow Internet betting on horse

¹⁰⁵ See U.S. Mission in Geneva, U.S. Statements at the Meeting of the WTO Dispute Settlement Body, Nov. 28, 2005, at <http://www.us-mission.ch/Press2005/1128DSBmeeting.html> (last visited Dec. 14, 2005) (including no mention of U.S. implementation and compliance efforts in the gambling case).

racings.¹⁰⁶ U.S. could either give Antigua market access for the provision of gambling and betting services or alternatively absolutely ban remote gambling. Compliance in the *Internet Gambling* case presents a dilemma for the United States that does not exist in cases not containing public moral/order exceptions. Thus, the United States should balance its public policy concerns with its obligation to comply with the WTO ruling. The United States should avoid retaliation by Antigua and should resort to monetary compensation if it is unable to comply by the established deadline. The next section recommends that the United States should amend IHA to allow Antigua market access while at the same time the United States should strictly regulate Internet gambling services provided by both domestic and foreign suppliers.

A. The United States Should Allow Antigua Market Access While Regulating the Internet Gambling Industry

The United States should amend IHA to allow foreign providers unlimited and unrestricted access to gambling and betting services. This goes against the public morals and public order concerns raised by the United States in the *Internet Gambling* case if the United States fails to strictly regulate access of domestic and foreign providers to online gambling and betting. For that purpose, the U.S. should amend IHA to also require Internet gambling companies seeking to do business with U.S. consumers to have adequate protection in place to deal with risk of underage gambling, fraud and money laundering, and organized crime before they receive any access to Internet gambling and betting.¹⁰⁷

A complete ban on online gambling and betting would not work. The United States is the “center of the world’s gambling business.”¹⁰⁸ The United States brings about half of the revenues from the worldwide Internet gambling.¹⁰⁹ An Internet gambling prohibition for

¹⁰⁶ See U.S. Offers to Comply with Gambling Ruling as Antigua Seeks Settlement, INSIDE U.S. TRADE (May 20, 2005) (discussing the options available to the U.S. to comply).

¹⁰⁷ See Pruzin, *supra* note 37 (mentioning that the United States can keep the ban on Internet gambling and should require remote Internet gaming companies from overseas to put into place an adequate protection against underage gambling, fraud, and money-laundering to be allowed to conduct business in the United States online).

¹⁰⁸ See Caroline Bissett, Comment, *All Bets Are (Off)line : Antigua’s Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 372 (2004) (stating that the consumer spending in United States casinos amounts to about 26 billion dollars every year).

¹⁰⁹ See Jenna Karadbil, Note, *Casinos of the Next Millennium: A Look Into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT’L & COMP. LAW 413, 434

both domestic and foreign service providers forces Internet gamblers in the United States to gamble and bet overseas, and the United States loses revenues as a result. Thus, enhanced government regulation is a viable alternative to a complete ban. The United States should require licenses for Internet horserace betting by using integrity and probity checks.¹¹⁰ Internet gamblers should be required to take a detailed test to prove their identity and age.¹¹¹ That keeps children from getting access to online gambling and keeps away pathological gamblers. The strict regulatory requirements in the amended IHA should require the horse-betting associations under the IHA statute to regulate gambling and betting over the Internet.¹¹² The associations should maintain a database of pathological Internet gamblers to help horseracing sites identify them and disallow them from gambling online.¹¹³ Internet horse-betting sites should be required to use strong encryption programs to limit Internet security concerns.¹¹⁴

The U.S. should implement those threshold regulatory requirements to provide an equal access to Internet gambling and betting to both domestic and foreign providers while preserving public morals/order concerns.¹¹⁵ Such a modification would bring IHA into compliance since IHA would allow foreign and domestic companies to bet on horse racing online.¹¹⁶ The amended IHA statute should state that the threshold regulatory provisions should apply equally to domestic and foreign companies, and online gambling should not be permitted unless a horsing association allows for it. The associations should have the right to make a determination on a case-by-case basis. With-

(2000) (stating that out of one billion dollars of revenues from Internet gambling in 1997, six hundred million came from the United States).

¹¹⁰ See *id.* at 434 (describing that the Queensland government in Australia introduced similar regulations in 1998, but that it was the only state in Australia that had introduced strict and comprehensive Internet gambling legislation).

¹¹¹ See *id.* (mentioning that some countries have adopted a test containing one-hundred questions that all gamblers were required to take before obtaining an access to Internet gambling services).

¹¹² See *id.* at 435 (stating that Belize had created a Computer Wagering Licensing Board, who members were appointed by the government to supervise the industry and protect the public interest, and that gambling sites created in Belize were required to post bonds and acquire an Internet gambling license).

¹¹³ See *id.* at 438-39 (suggesting that Internet data-tracking technology allows to spot and screen out compulsive gamblers and that it would be helpful to create a worldwide database of compulsive Internet gamblers).

¹¹⁴ See *id.* at 440 (stating that strong encryption programs already exist).

¹¹⁵ See *id.* (stating that the United States will not be asking U.S. Congress to weaken restrictions on Internet gambling).

¹¹⁶ See Daniel Pruzin, *WTO Chief Appoints Arbitrator to Determine U.S. Deadline To Comply in Gaming Dispute*, WTO Rep., July 6, 2005 (summarizing the findings of the Appellate Body).

out the strict above-discussed threshold requirements into place, foreign and domestic companies should not be allowed to place and receive online bids. The United States is likely to be deemed in compliance with the AB's ruling after it implements such changes even if it faces an opposition from Antigua. If Antigua opposes such changes introduced by the United States, it is likely that the case will go to a compliance panel similar to the *Shrimp Turtle* case. The WTO compliance panel, however, is likely to rule that the United States has made a good faith effort to comply and to remove the arbitrary discrimination between domestic and foreign suppliers, while at the same time preserving its public morals/order concerns. Thus, as in the *Shrimp-Turtle* case, the WTO is likely to agree that the United States has complied with the AB's ruling and that its IHA law is into compliance after the United States amends IHA and introduces strict enforcement provisions relevant to both domestic and foreign suppliers as described above.

In the *Shrimp-Turtle* case, the United States claimed it had modified the legislation in question, section 609 of Public Law 101-162 to comply with the WTO decision.¹¹⁷ The complaining party, Malaysia, stated that to be compliant, the United States must lift the shrimp import ban. The compliance panel rejected that argument and concluded that the United States had made good faith effort to conclude regional agreements on the protection of sea turtles and that it was justified in imposing the ban on a temporary basis while those negotiations were under way.

In the arguments before the compliance panel, the United States said that the Appellate Body ruling focused on the application of the shrimp ban rather than the measure itself and that it had the option of coming into compliance by modifying the measure, which it did. The United States also emphasized its good faith efforts to address the Appellate Body's objections by engaging in negotiations with Malaysia and other nations in the Indian Ocean and Southeast Asia on an agreement for the conservation of sea turtles, which have achieved remarkable progress.¹¹⁸

The compliance panel ruled in favor of the United States. The compliance panel concluded that Section 609 as implemented by the revised guidelines was justified under Article XX(g) of GATT allowing trade-restrictive measures to be imposed for the purpose of conserving

¹¹⁷ See Daniel Pruzin, *United States Scores WTO Victory in Defense of its Shrimp-Turtle Ban*, WTO Rep., May 17, 2001 (providing information about the background and compliance in the *Shrimp-Turtle* case).

¹¹⁸ See *id.* (reviewing the U.S. compliance efforts in the *Shrimp-Turtle* case).

exhaustible natural resources.¹¹⁹ The panel placed several conditions on its finding. The Article XX(g) exemption was justified as long as the United States showed “ongoing serious good faith efforts” to reach a multilateral agreement on the protection of sea turtles in the Indian Ocean and Southeast Asia. If the United States ceases to make good faith efforts to conclude an agreement, then Malaysia and the other countries that challenged the original Section 609 provisions would be entitled to seek a new compliance review against the United States.

Thus, the United States in the *Internet Gambling* case should amend its non-complying law and impose rigorous regulation requirements on both domestic and foreign providers. It should allow Antigua gambling providers access to the U.S. gambling market if they commit to comply with the amended IHA and the regulatory threshold requirements. Regulating measures to protect public morals and public order concerns should apply equally to domestic and remote gambling and betting service providers. It is likely that Antigua might request a compliance panel as in the *Shrimp—Turtle* case, but the compliance panel would likely rule in favor of the United States for its good faith efforts to bring its law into compliance while weighing and balancing its public morals concerns. The United States should amend IHA and introduce the strict regulatory requirements even though Antigua is a small country and retaliation is unlikely to affect the economic well-being of the United States. The next section recommends that the United States should avoid any retaliation measures by Antigua.

B. The United States Should Avoid Retaliation by Antigua

It is possible that the U.S. might be reluctant to amend IHA to comply with AB’s ruling.¹²⁰ In its initial response to the WTO ruling, the U.S. Trade Representative stated that the Office of the United States Trade Representative “would not ask Congress to weaken U.S. restrictions on Internet gambling.”¹²¹ That statement makes sense because retaliation from a small WTO member aimed at one of the

¹¹⁹ See Daniel Pruzin, *WTO Dispute Panel Sides with U.S. in Ruling on Shrimp-Turtle Import Ban*, BNA INT’L TRADE REP., June 21, 2001 (discussing the findings of the compliance panel).

¹²⁰ See *U.S. Unlikely to Comply with Gambling Ruling Even if Appeal Fails*, Inside U.S. TRADE, Nov. 12, 2004 (discussing the ruling of the WTO panel and the options for compliance for the U.S.).

¹²¹ See Esther Lam & Gary Yerkey, *U.S. Given Until April 2006 To Comply With WTO Ruling on Internet Gambling*, WTO Rep., Aug. 22, 2005 (noting that according to the Finance Minister of Antigua, the United States should provide Antigua market access to gambling and betting services in order to comply with the ruling of the Appellate Body and that a simple clarification of the non-compliant U.S. law is not enough).

most powerful WTO members would have a minuscule effect. If the U.S. ignores the WTO ruling, then Antigua could seek the right to retaliate from the WTO. The threat of retaliation from a small country, like Antigua, to compel the U.S. to comply with the ruling of the AB would have minor effects.¹²²

Such a behavior on the part of the United States should be avoided because reputation is important and retaliation in other sectors such as intellectual property could follow by Antigua and third parties in the case. The United States should avoid non-compliance with the ruling even though repercussions from retaliation on the part of Antigua would likely be minimal because the European Union as a third party could join in to retaliate. Non-compliance on the part of the United States would weaken its reputation as a strong supporter of the WTO system and would affect the credibility and success of the WTO dispute settlement system if its strongest supporter and also one of the largest member states is making efforts to opt of implementing WTO rulings.

In sum, even though Antigua is one of the smallest WTO members and threat of retaliation is not as significant, the United States should try to avoid retaliation because it hurts its reputation as a strong supporter of the DSB and goes against its self-interest in resorting to the DSB system in future disputes.

C. Prospects for Monetary Compensation

It is in the best interest of the United States to comply with the AB's ruling and amend IHA. However, this process is likely to be slowed down because the amendment of IHA needs to be approved by the U.S. Congress. Under such circumstances, the United States would still be moving towards compliance if it provides Antigua with temporary monetary compensation while gaining time to have Congress amend the violating law. WTO DSU Article 22 does not define compensation and does not refer to compensation in money.¹²³ Nevertheless, monetary compensation was applied in the U.S. Copyright

¹²² See *U.S.—Antigua Gambling Dispute Raises Systematic Issues*, 8 ICTSD Bridges 40, Nov. 24, 2004 (suggesting that monetary compensation could work better instead of the traditional retaliation measure when a WTO dispute involves a small country against a powerful member).

¹²³ DSU Article 22 states in relevant part:

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

case.¹²⁴ Monetary compensation must be first negotiated between the United States and Antigua, and this is not a formal WTO process.¹²⁵ The parties could voluntarily refer the case to an arbitrator to determine the level of the occurred damages. Monetary compensation brings numerous advantages and is appropriate in the *Internet Gambling* case.¹²⁶ It is not trade restrictive, induces compliance, helps redress injury, does not lead to disproportionate burden on innocent bystanders, and brings fairness.¹²⁷

The Congress would need time to amend the IHA. The U.S. Congress would likely consider the opening up of the gambling and betting business to foreign providers under established restrictions that guarantee the protection of public order and morals.¹²⁸ The U.S. Congress would also likely consider amending the IHA to make Internet wagering on horseracing illegal for both domestic and foreign providers would face an opposition from the horse racing lobby.¹²⁹ The U.S. Congress would be under pressure because Internet wagering on horseracing is big business in the U.S., generating \$2.5 to \$3 billion in revenues to the \$15.5 billion horseracing industry.¹³⁰ At the same time, any measure that could be seen as expanding legalized gambling in the U.S. without strict regulatory measures is likely to face strong opposition from the anti-gambling lobby. Monetary compensation is a reasonable temporary solution while the various options to amend IHA are debated in the U.S. Congress. The United States could deposit the money in a fund combating underage gambling, fraud, and pathological gambling in Antigua, and researching the establishment of online programs seeking to protect against those public morals/order concerns, and this would benefit both Antigua and the United States.

¹²⁴ See United States- Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160/R (June 15, 2000).

¹²⁵ See Bernard O'Connor & Margareta Djordjevic, *Practical Aspects of Monetary Compensation: The U.S.-Copyright Case*, 8 J. OF INT'L ECON. L. 127 (2005) (arguing that monetary compensation is a temporary and voluntary arrangement, and that the parties in the Copyright case voluntarily submitted to an arbitrator to determine the amount of the nullification and impairment).

¹²⁶ See Marco Bronckers & Naboth Van Den Broek, *Financial Compensation In The WTO-Improving The Remedies Of WTO Dispute Settlement*, 8 J. OF INT'L ECON. L. 101 (2005) (discussing the advantages and disadvantages of monetary compensation as a remedy in WTO cases).

¹²⁷ See *id.*

¹²⁸ See *USTR Faces Implementation Challenges on WTO Gambling Decision*, INSIDE U.S. TRADE, Apr. 29, 2005 (describing how the U.S. could comply with the ruling of the WTO Appellate Body).

¹²⁹ See *id.*

¹³⁰ See *id.*

Monetary compensation, as opposed to retaliation and non-monetary compensation, does not restrict trade and opens up trade even though only temporarily.¹³¹ Financial compensation is not a novel idea and has been part of public international law for a long time and there have been proposals to implement monetary remedies even in the WTO.¹³² General public international law is relevant to WTO cases and WTO Appellate Bodies in the past have made reference to international law principles and the Vienna Convention on the Law of the Treaties.¹³³ Thus, monetary compensation in the *Internet Gambling* case makes sense as part of DSU Article 22.

Monetary compensation has several advantages. It is not trade restrictive.¹³⁴ It helps to redress the injury of the country and the private interests who actually suffer from the WTO-illegal measure.¹³⁵ Monetary compensation works well to induce compliance, because it gives the non-complying country time to comply while compensating the winning country. Monetary compensation is more effective against non-complying developed countries than the current instruments of compensation and retaliation. Monetary compensation induces compliance and is fair, redresses the injury, and is in line with public international law and therefore is appropriate in the *Internet Gambling* case.¹³⁶

Monetary compensation has certain disadvantages as well, but they are less than the advantages discussed above.¹³⁷ Monetary compensation goes in line with the WTO Dispute Settlement System's goals towards rule compliance and rebalancing of trade concessions and honoring expectations of private entities.¹³⁸ There have been concerns about the effectiveness and enforcement of monetary damages, because monetary compensation is difficult to calculate.¹³⁹ However, calculating the right amount of trade volumes in connection with trade retaliation is not much easier.¹⁴⁰

¹³¹ See Bronckers & Van Den Broek, *supra* note 126.

¹³² See Least Developed Countries' Proposal, TN/DS/W/17, Oct. 9, 2002; Ecuador, TN/DS/W/33, Jan. 23, 2003.

¹³³ See John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems* 71, in FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM (WTO Organization ed., 2000) (analyzing the meaning and potential of the early years of experience of the WTO and some of the major problems of the GATT).

¹³⁴ See Bronckerts & Van Den Broek, *supra* note 126.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

Another argument is that payment of monetary compensation by the United States to Antigua as compensation for non-compliance amounts to a violation of the Most Favored Nation ("MFN") principle and may diminish the rights of WTO members other than the complaining member. This argument is not convincing.¹⁴¹ The payment to be made by the United States to Antigua is not "an advantage, favor, privilege, or immunity" within the meaning of the MFN language.¹⁴² The WTO member that has won the WTO case and has a right to monetary compensation need not be treated differently from other WTO members.¹⁴³ Other WTO members have not been affected by the WTO illegal measure or if they were affected those members could initiate or join their own dispute settlement proceedings. In addition, monetary compensation is not an illegal subsidy because monetary damages are paid as compensation and only for the level of damages actually incurred and no benefit is transferred to Antigua as a private party.¹⁴⁴

Finally, the question comes whether the United States could extend monetary compensation indefinitely and choose not to bring IHA into compliance. There is no such danger because monetary compensation is only temporary and could continue only for a reasonable period of time. Monetary compensation under DSU Article 22 only continues until the party complies with the WTO ruling. The monetary compensation provisions were not designed for developed countries to pay instead of complying. It is likely that the United States and Antigua could resort to monetary compensation because the time is running and it is questionable that the United States would be able to amend IHA and establish strict regulatory measures overseeing on-line wagering in horse racing by April 3, 2006.

In sum, the United States should comply with the AB's ruling and amend IHA to bring it into compliance. Monetary compensation is only a temporary solution that would demonstrate the good faith effort of the United States to comply and obey the rules of the WTO Agreement.

CONCLUSION

The United States clearly has an interest to bring IHA into compliance as a strong supporter of the DSB. The United States has an interest in restraining fraud, money laundering, and under-age gambling, while at the same time contributing to the goals of development and affirming its commitment to the proper functioning of the

¹⁴¹ See O'Connor & Djordjevic, *supra* note 125.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See *id.*

DSB. The United States should amend IHA to remove the arbitrary and unjustified discrimination between domestic and foreign gambling and betting service providers while imposing strict regulatory measures. The United States should be allowed to introduce strict regulatory measures to remote gambling and betting service providers to address its “public morals” and “public order” concerns. The WTO should allow any such strict regulatory requirements because they would enable the United States to strike down the trade restricting measures while protecting its public morals concerns. Any monetary compensation to Antigua would be appropriate while the U.S. Congress is debating the amendment of IHA. While the WTO applies a narrow interpretation of the exceptions under GATT Article XIV, more leeway and creativity should be available during the implementation and compliance phases in cases involving public morals and public order concerns.