

2008

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Recommended Citation

Bloom, Heather A. (2008) "Upping the Ante: The Unlawful Internet Gambling Enforcement Act's Noncompliance with World Trade Organization Law," *South Carolina Journal of International Law and Business*: Vol. 5 : Iss. 1 , Article 4.

Available at: <https://scholarcommons.sc.edu/scjilb/vol5/iss1/4>

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UPPING THE ANTE: THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT'S NONCOMPLIANCE WITH WORLD TRADE ORGANIZATION LAW

*Heather A. Bloom**

I. INTRODUCTION

Armed with a public morals rationale, the United States has taken significant steps in the past decade to prohibit offshore internet gambling. In 2003, the small country of Antigua and Barbuda ("Antigua") brought a claim at the World Trade Organization (WTO) against the United States.¹ Antigua argued that the U.S. prohibition of offshore internet gambling violated commitments the U.S. had made under the General Agreement on Trade in Services (GATS).² The Panel agreed with Antigua that U.S. federal laws governing internet gambling are inconsistent with U.S. commitments and are not justified by public morals.³ The WTO panel's decision was a victory for

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¹ Panel Report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶¶ 1.1-1.2, WT/DS285/R (Nov. 10, 2004) ("Panel Report"). WTO disputes arise "when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements," or failing to abide by its obligations and commitments. Understanding the WTO: Settling Disputes, http://www.wto.org/English/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Nov. 3, 2008). A dispute may go through several stages at the WTO, including: (1) consultation, (2) the panel (panel appointment and the panel's final report), (3) appeals, and (4) enforcement (e.g. arbitration, compliance review, and sanctions). Panels are comparable to tribunals, except that expert "panelists are usually chosen in consultation with the countries in dispute." The Dispute Settlement Body, which consists of all WTO member countries, reserves the right "to accept or reject" a panel's findings or the Appellate Body's holdings. *Id.*

² See Appellate Body Report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶¶ 1-2, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report].

³ Panel Report, *supra* note 1, ¶ 6.608.

Antigua, the smallest nation ever to bring a WTO complaint against the U.S.⁴

The WTO Appellate Body, however, significantly reversed the Panel's findings, holding that the U.S. could justify the prohibition under public policy, except with regard to horseracing.⁵ Despite the WTO's decision that the U.S. modify its interstate horseracing laws,⁶ the U.S. failed to comply with the recommendation in 2006.⁷ Instead, President George W. Bush signed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which prohibits remote internet gambling, except on horseracing, by requiring (1) financial institutions to identify and block illegal internet gambling transactions; and (2) gambling businesses to stop payments through credit card, "electronic fund transfer," or check.⁸

The recently enacted UIGEA violates WTO law, in particular as analyzed against the backdrop of the WTO Appellate Body's decision in *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services* (the Antigua case). To comply with WTO law, the U.S. should (1) clarify that the UIGEA applies to horseracing; (2) amend the Interstate Horseracing Act of 1978 so that it prohibits remote internet gambling; and (3) adjust the UIGEA to fit within GATS article XIV's "public morals" exception.

Part I of this article introduces the Wire Act, the main statute used to criminalize illegal internet gambling and provides an overview of significant internet gambling cases decided prior to the Appellate Body Report. This section also serves as a starting point for explaining why Antigua brought a WTO claim against the U.S. Part II analyzes current WTO law, specifically GATS articles XIV and XVI, the

⁴ Paul Blustein, *Against All Odds: Antigua Besting U.S. in Internet Gambling Case at WTO*, WASH. POST, Aug. 4, 2006, at D1.

⁵ Appellate Body Report, *supra* note 2, at 123-26; see 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. 2005, <http://www.asil.org/insights/2005/04/insights050412.html>.

⁶ See Appellate Body Report, *supra* note 2, ¶¶ 371-72. In addition, the WTO Arbitrator recommended that the U.S. modify its existing internet gambling laws on horseracing. See Award of the Arbitrator, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶¶ 37, 64, WT/DS285/13 (Aug. 19, 2005) [hereinafter Arbitration Report].

⁷ See Compliance Report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 7.1, WT/DS285/RW (Mar. 30, 2007) [hereinafter Compliance Report].

⁸ 31 U.S.C. §§ 5363-64 (2006).

relevant provisions a WTO panel would use to examine the UIGEA. Furthermore, the section discusses the Appellate Body's application of GATS in the Antigua case and examines how the U.S. violated its commitments under GATS.

Part III analyzes the UIGEA's language and focuses on the legislative intent behind the statute. In addition, this section considers (1) whether Congress ignored WTO law when drafting the bill; (2) the new law's relation to previous internet gambling bills; and (3) the immediate effects of enacting the UIGEA. Part IV examines how a WTO panel would rule on the UIGEA. Part V argues that the UIGEA does not comply with GATS, focuses on what steps the U.S. should take to bring the UIGEA in compliance with GATS, and why the U.S. should comply with WTO law in this case.

II. THE WIRE ACT AND U.S. CASES DECIDED PRIOR TO THE APPELLATE BODY DECISION

A. USING THE WIRE ACT TO PROSECUTE ILLEGAL GAMBLING

In 1961, Congress enacted the Wire Act, 18 U.S.C. § 1084, in response to the use of race betting over wires of communication, such as telephones and telegraphs.⁹ The Wire Act prohibits a person from engaging "in the business of betting or wagering" and "knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers."¹⁰ By denying gamblers access to "information and communications infrastructure," the Wire Act's framers hoped to eliminate organized gambling.¹¹ Beginning in 1998, the Department of Justice (DOJ) began using the Wire Act to prosecute offshore internet gambling operators, claiming that the internet was a "wire communication facility."¹² In response, the United States Court of Appeals for the Second and Fifth Circuits determined that internet gambling on sporting events and contests falls within the scope of the

⁹ DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 7 (2005).

¹⁰ 18 U.S.C. § 1084(a) (2006).

¹¹ SCHWARTZ, *supra* note 9.

¹² Ted Magder, *Gambling, the WTO, and Public Morals*, 7 TELEVISION & NEW MEDIA 52, 56 (2006).

Wire Act, and that cross-border internet gambling must be legal in both the jurisdiction of the operator and the bettor.¹³

In the most prominent internet gambling case, *United States v. Cohen*, the DOJ prosecuted Mr. Cohen under the Wire Act in 2001 for running a remote internet gambling site in Antigua.¹⁴ The Second Circuit stated that the Wire Act prohibited remote internet gambling even where the bet's destination, such as Antigua, is legal.¹⁵ Mr. Cohen later discovered that the U.S. government's position on remote internet gambling was potentially vulnerable to a trade complaint and notified Antigua.¹⁶ Specifically, Mr. Cohen urged Antigua to bring a complaint at the WTO and to argue that a U.S. prohibition on offshore internet gambling violated its commitments under GATS.¹⁷

B. THE U.S. AND ANTIGUA'S POSITIONS ON THE WIRE ACT

Throughout the past few years, U.S. courts and the DOJ have drawn conflicting interpretations of the Wire Act.¹⁸ In 2002, the Fifth Circuit first limited the scope of the Wire Act's application in *In re MasterCard International, Inc.*¹⁹ The plaintiffs in this case were two credit card holders who alleged that credit card companies and issuing banks had aided a "worldwide gambling enterprise."²⁰ In interpreting

¹³ See 18 U.S.C. § 1084(b) (2006); *United States v. Cohen*, 260 F.3d 68, 73-74 (2d Cir. 2001).

¹⁴ *Cohen*, 260 F.3d at 70. Mr. Cohen's enterprise was called the World Sports Exchange.

¹⁵ *Id.* at 73.

¹⁶ See Blustein, *supra* note 4.

¹⁷ *Id.*; see also Statement of the United States at the Oral Hearing of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 36, WT/DS285/AB-2005-1 (Feb. 21, 2005), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file142_5581.pdf (noting that this dispute was "inspired by the felony conviction [of Mr. Cohen] under the Wire Act").

¹⁸ Compare *In re MasterCard Int'l, Inc.*, 313 F.3d 257 (5th Cir. 2002), and Appellant Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 198, WT/DS285/AB-2005-1 (Jan. 14, 2005), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file50_5581.pdf [hereinafter U.S. Appellant Submission].

¹⁹ *In re MasterCard*, 313 F.3d at 262, *aff'g* 132 F. Supp. 2d 468 (E.D.La. 2001).

²⁰ *Id.* at 260.

the Wire Act, the court affirmed the lower court's conclusion that the Act only applies to gambling involving a "sporting event or contest."²¹ In contrast, the DOJ argued to the WTO panel, Appellate Body, and Arbitrator in Antigua that the Wire Act encompasses all forms of internet gambling.²² In its briefs and submissions to the WTO, the DOJ confirmed that "existing criminal statutes," in particular the Wire Act, prohibit all internet gambling, "including wagers on horse races."²³

The DOJ's position is problematic for two reasons. First, its interpretation conflicts with the Second Circuit in *In re MasterCard* by failing to limit the scope of the Wire Act to contests and sporting events.²⁴ Yet, the DOJ asserted that it was not bound by the *In re MasterCard* decision "because it was not a party to the case."²⁵ The DOJ's reasoning, however, undermines the federal court system's legitimacy.

Second, the DOJ's position suggests that the Wire Act supersedes the Interstate Horseracing Act (IHA). The IHA, 15 U.S.C. §§ 3001-3007, regulates gambling on horseracing. In 2000, Congress amended the IHA to expand "interstate off-track wager[s]" to include "pari-mutuel wagers . . . placed or transmitted by an individual in one State via telephone or other electronic media and accepted . . . in the

²¹ *Id.* at 262-63.

²² See *infra* note 23; I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, 10 U. NEV. LAS VEGAS GAMBLING RES. & REV. J. 1, 5 (2005) [hereinafter Rose, *Gambling and the Law*].

²³ Status Report by the United States: Addendum, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/15/Add.1 (Apr. 11, 2006), available at http://docsonline.wto.org/imrd/GEN_searchResult.asp; see First Written Submission of the United States, United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services, ¶¶ 33-35, WT/DS285 (Oct. 16, 2006), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file732_5581.pdf U.S. Appellant Submission, *supra* note 18, ¶ 198.

²⁴ *In re MasterCard*, 313 F.3d at 262-63; see also Jason Gross, *Internet Gambling & the Law—Prohibition vs. Regulation*, METROPOLITAN CORP. COUNS., Aug. 2006, at 11 (noting that despite the decision in *In re MasterCard*, the DOJ continues "to proclaim that Federal law prohibits [all] gambling over the Internet.").

²⁵ See Rose, *Gambling and the Law*, *supra* note 22.

same or another State.”²⁶ Under rules of statutory construction, specific statutes take precedent over “statute[s] of broad, general application.”²⁷ Thus, the recent IHA amendment takes precedent over the more general provisions of the Wire Act of 1961.²⁸

Antigua, on the other hand, interpreted the Wire Act very differently than the DOJ. In its complaint to the WTO, Antigua challenged U.S. federal and state laws, including the Wire Act,²⁹ and claimed that they prohibited “cross-border delivery of gambling services.”³⁰ The WTO Appellate Body found in its report that the U.S. primarily used the Wire Act to ban remote internet gambling.³¹ Furthermore, the Appellate Body disagreed and held that (1) the U.S. did not prove that the Wire Act governs online interstate horseracing, and (2) the IHA’s provision allowing remote internet gambling on horseracing is discriminatory.³² The DOJ, nevertheless, continues to argue that there is no need to modify its current interstate horseracing

²⁶ Interstate Horseracing Act, 15 U.S.C. §§ 3001-3007 (2006). “Pari-mutuel wagering” is a term used specifically in the horseracing context to refer to off track wagering over the internet. Specifically, the participants wager with each other rather than “against the operator” of the pool. 15 U.S.C. § 3002(13).

²⁷ Robert Penchina, *What Does DOJ Have against the Interstate Horseracing Act*, 10 GAMING L. REV. 446, 450 (2006).

²⁸ *Id.* at 450-51 (citing *Rodgers v. United States*, 185 U.S. 83, 89 (1902)); see *California v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000)); Anthony N. Cabot & Eugene Christiansen, *Why the Future of Horseracing Is at Risk: The WTO Decision and Senator Kyl*, 9 GAMING L. REV. 201, 205 (2005).

²⁹ See James Thayer, *The Trade of Cross-border Internet Gambling: The Dispute Continues*, 10 J. INTERNET L. 1 (2006). In addition, Antigua challenged two other federal laws: the Travel Act, 18 U.S.C. § 1952 (2006), and the Illegal Gambling Business Act, 18 U.S.C. § 1955 (2006). Although the government has not used the Travel Act and Illegal Gambling Business Act to prosecute illegal internet gambling, it has used these federal criminal statutes “to prosecute organizations that facilitate gambling over the telephone.”

³⁰ Joel P. Trachtman, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, 99 AM. J. INT’L L. 861, 862 (2005).

³¹ Appellate Body Report, *supra* note 2, ¶ 265. This prohibition, however, was justified under the public morals exception. See *infra* part III.B. The Wire Act also contains a safe-harbor provision allowing states to potentially discriminate against foreign countries with respect to remote internet gambling. Thayer, *supra* note 29, at 14. Although I will not address the issue of state law in this article, the safe-harbor provision might present WTO compliance problems in the future.

³² Appellate Body Report, *supra* note 2, ¶ 369.

statute because the Wire Act encompasses this type of internet gambling.³³

III. THE CURRENT STATE OF WTO LAW: GATS AND THE 2005 APPELLATE BODY REPORT

To determine whether the Wire Act and other U.S. federal statutes violated WTO law, the WTO Panel and Appellate Body applied the General Agreement on Trade in Services (GATS).

A. *THE GENERAL AGREEMENT ON TRADE IN SERVICES*

GATS, which came into effect in 1995, is a set of multilateral rules negotiated during the Uruguay Round.³⁴ GATS covers a range of international trade services, including banking, telecommunications, and as in the present case, gambling and betting services.³⁵ GATS can be divided into three main segments: (1) the main text listing member countries' general obligations, disciplines, and rules; (2) "annexes dealing with rules for specific [service] sectors"; and (3) "individual countries' specific commitments to provide access to their markets."³⁶

³³ See Penchina, *supra* note 27, at 449, 451-52 (noting that the DOJ's "position is rooted in its belief in a policy, not on a faithful application of the law as written").

³⁴ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994) [hereinafter GATS]. The Uruguay Round was a series of multilateral trade negotiations that began in Punta del Este, Uruguay and concluded in Geneva in 1993. The Uruguay Round, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jun. 10, 2007). The negotiations reformed international trading systems by extending to new areas, such as trade in services. *Id.* Ministers of countries throughout the world developed GATS at the Uruguay Round to deal with substantial growth in the area of trade services. Services: Rules for Growth and Investment, WORLD TRADE ORGANIZATION, http://www.wto.org/English/the_wto_e/whatis_e/tif_e/agrm6_e.htm (last visited Jun. 10, 2007).

³⁵ See Services: Rules for Growth and Investment, *supra* note 34.

³⁶ *Id.*

I. GATS ARTICLE XVI: MARKET ACCESS COMMITMENTS

GATS article XVI addresses commitments on market access, which are applicable to gambling and betting services. The WTO describes market access commitments as requiring individual countries to commit "open markets in specific sectors," such as gambling and betting services.³⁷ "The commitments appear in 'schedules' that list the sectors being opened, the extent of market access being given in those sectors . . . and any limitations on national treatment."³⁸

Under article XVI, market access restrictions are prohibited for "committed service sectors."³⁹ Thus, a market access violation occurs where "government intervention in the services industry . . . quantitatively restricts the very access or establishment of foreign services or service suppliers to a country's domestic market."⁴⁰

Furthermore, article XVI:2(a) and (c) state:

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

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

. . . .

³⁷ *Id.*

³⁸ *Id.*

³⁹ Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REV. 131, 136 (2005).

⁴⁰ *Id.*

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.⁴¹

Analyzing article XVI, a WTO panel would address whether a “qualitative measure” prohibiting remote internet gambling services can be “understood as a quantitative restriction” or limitation within the meaning of 2(a) and (c).⁴² For example, in the Antigua case, the UIGEA’s prohibition on remote internet gambling in effect bans the cross-border supply of gambling and betting services by *limiting to zero* the number of these suppliers, thereby violating provisions (a) and (c) of article XVI(2).⁴³ Thus, the Appellate Body in the Antigua case found that the U.S. limitation on the number of foreign suppliers was a market access violation.⁴⁴

2. GATS ARTICLE XIV: THE PUBLIC MORALS EXCEPTION

Even if a WTO panel finds a market access violation, the measure might nevertheless be permissible under the Public Morals Exception of article XIV. WTO members are permitted to adopt measures which are “necessary to protect public morals or maintain public order.”⁴⁵ The test is (1) whether a restriction fits within the public morals exception and (2) whether the restriction is necessary for the protection of these morals.⁴⁶ The public morals exception, however, cannot be applied in an arbitrary or discriminatory manner “between countries where like conditions prevail, or [as] a disguised restriction on trade in services.”⁴⁷ The U.S. would likely try to justify the UIGEA under the public morals exception because the Appellate

⁴¹ GATS art. XVI:2(a), (c).

⁴² Trachtman, *supra* note 30, at 861.

⁴³ *Id.* at 863.

⁴⁴ See Appellate Body Report, *supra* note 2, ¶ 265.

⁴⁵ GATS art. XIV(a).

⁴⁶ Tomer Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PA. J. INT’L ECON. L. 623, 683 (2005).

⁴⁷ GATS art. XIV; see Thayer, *supra* note 29, at 15.

Body in the Antigua case held that the public morals exception applied with respect to the Wire Act.⁴⁸

B. THE 2005 APPELLATE BODY REPORT

A WTO panel would use the Appellate Body Report as the framework for examining the UIGEA because both present the same legal issues. The Appellate Body in the Antigua case found that the U.S. had primarily used the Wire Act to ban remote internet gambling.⁴⁹ Although the U.S. prohibition on remote internet gambling under the Wire Act was a restriction on “trade in services” under GATS,⁵⁰ the Appellate Body held that the ban was permissible under the public morals exception. The Appellate Body Report can be analyzed in four main sections: (1) Commitments, (2) Prohibited Market Access Restrictions, (3) Public Morals Exception, and (4) the Horseracing Exception.⁵¹

1. U.S. COMMITMENTS

The U.S. made specific commitments to the WTO “to provide market access and nondiscriminatory treatment” regarding the cross-border supply of gambling and betting services.⁵² Although the U.S. did not explicitly list “gambling and betting services” as a committed sector, the Appellate Body found a basis for this commitment under the U.S. general commitments regarding “other recreational services

⁴⁸ See *infra* Part III.B.3.

⁴⁹ See *infra* Part III.B.3.

⁵⁰ Appellate Body Report, *supra* note 2, at 60-66; see Pauwelyn, *supra* note 5.

⁵¹ Note that the “Horseracing Exception” section falls within the context of the previous section on public morals. The Appellate Body similarly structured its report in this format. Appellate Body Report, *supra* note 2, at ii (table of contents); see Markus Krajewski, *Playing by the Rules of the Game? Specific Commitments After US-Gambling and Betting and the Current GATS Negotiations*, 32 LEGAL ISSUES OF ECON. INTEGRATION 417, 419 (2005); Pauwelyn, *supra* note 5.

⁵² Craig Pouncey & Lode Van Den Hende, *Bush's Gambling Ban Flouts WTO Commitments*, THE LAWYER, Oct. 30, 2006, <http://www.the-lawyer.com/cgi-bin/item.cgi?id=122694&d=122&h=24&f=46>; see Appellate Body Report, *supra* note 2, ¶ 213.

(except sporting).⁵³ The Appellate Body found that sporting services do not encompass gambling.⁵⁴ Moreover, the Appellate Body, like the Panel, dismissed the "U.S. argument that it never intended to make a commitment in gambling and betting," noting that "it is not for the Panel [or Appellate Body] to second-guess the intentions of the United States at the time the commitment was scheduled."⁵⁵ Instead, the WTO's role is to interpret and "apply the GATS in light of the facts and evidence before us."⁵⁶

2. PROHIBITED MARKET ACCESS RESTRICTION

Upon finding that the U.S. had made a commitment to supply gambling and betting services in a non-discriminatory manner, the Appellate Body addressed whether the U.S. had satisfied this commitment. The Appellate Body held that the U.S. domestic regulation prohibiting remote internet gambling services, whether domestic or foreign, is a prohibited market access restriction under GATS.⁵⁷ In other words, this "U.S. measure regulating *how* gambling services are to be supplied (e.g., face to face only, not remotely or over the internet), becomes a quantitative restriction" because it effectively limits "cross-border supplies of gambling services (in this case, those supplied over the internet from Antigua . . .)."⁵⁸ The Appellate Body noted, however, that article XVI:2(a) of GATS does not explicitly mention a "zero quota" because "[i]f a Member wants to maintain a full prohibition [of services], it is assumed that such a Member would not have scheduled such a [commitment]."⁵⁹ Yet, using 1993 WTO

⁵³ Appellate Body Report, *supra* note 2, ¶¶ 2, 184, 213; see Pouncey & Van Den Hende, *supra* note 52; Trachtman, *supra* note 30, at 862. The U.S. could have explicitly excluded gambling and betting services from its commitments at the time it created its committed sector schedule. See Appellate Body Report, *supra* note 2, ¶ 185.

⁵⁴ Appellate Body Report, *supra* note 2, at 67-69. The Appellate Body used the Vienna Convention rules on treaty interpretation in making this determination. Vienna Convention on the Law of Treaties, art. 31:3, 32, May 23, 1969, 1155 U.N.T.S. 331; see Krajewski, *supra* note 51, at 426.

⁵⁵ Panel Report, *supra* note 1, ¶ 5.17; see Krajewski, *supra* note 51, at 428-29.

⁵⁶ Panel Report, *supra* note 1, ¶ 7.3.

⁵⁷ Appellate Body Report, *supra* note 2, ¶ 265.

⁵⁸ Pauwelyn, *supra* note 5; see Appellate Body Report, *supra* note 2, at 86-89.

⁵⁹ Appellate Body Report, *supra* note 2, ¶ 234 (quoting Panel Report, *supra* note 1, ¶ 6.331); Krajewski, *supra* note 51, at 433.

Scheduling Guidelines, the Appellate Body held that the prohibition of a service supply “amounts to a zero quota.”⁶⁰ Therefore, the U.S. did not satisfy its commitments in GATS by prohibiting the supply of remote internet gambling services.

3. THE PUBLIC MORALS EXCEPTION

The U.S. argued to the Appellate Body that, despite a market access violation, the Wire Act and other federal laws are justifiable under the public morals exception.⁶¹ The Appellate Body agreed and determined that the U.S. measures are acceptable because they are “necessary to protect public morals or to maintain public order” under GATS article XIV(a).⁶² This exception requires that a member country satisfy a two-part test: (1) the restrictive measure must fit within the public morals exception or be “‘designed to’ achieve the goal of the exception”⁶³ and (2) “the measure must be ‘necessary’ for the protection” of culture or morals.⁶⁴

The WTO has applied the test’s first prong subjectively by focusing on the legislature’s intent.⁶⁵ In the Antigua case, the U.S. regulatory concerns under the public morals exception included money laundering, organized crime, fraud, underage gambling, and public health.⁶⁶ The Appellate Body “disposed of this issue very briefly,”⁶⁷ and was “quick to justify” the measure as falling within the scope.⁶⁸ Highlighting Congress’s moral-based concerns, the Appellate Body

⁶⁰ Krajewski, *supra* note 51, at 434-35. For criticism of this approach, see Pauwelyn, *supra* note 39.

⁶¹ See U.S. Appellant Submission, *supra* note 18, ¶ 5.

⁶² GATS art. XIV(a); see Appellate Body Report, *supra* note 2, ¶ 293.

⁶³ GATS art. XIV(a); Broude, *supra* note 46, at 684 (noting that this prong involves a subjective test, “building principally on the declared intent of the legislator”).

⁶⁴ Broude, *supra* note 46, at 683, 685 (suggesting that where the “actual effect of a measure on a protected interest is difficult to measure,” a WTO panel will often find the second prong satisfied, without examining it in great detail). For a discussion of these factors, see Appellate Body Report, *supra* note 2, ¶¶ 305-06 (citing Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000)).

⁶⁵ Broude, *supra* note 46, at 684.

⁶⁶ Appellate Body Report, *supra* note 2, ¶ 283.

⁶⁷ Broude, *supra* note 46, at 684.

⁶⁸ *Id.* at 684-85 (citing Pauwelyn, *supra* note 5); see Appellate Body Report, *supra* note 2, ¶¶ 283-84.

found that the Wire Act's purpose was related to the protection of public morals.⁶⁹

With respect to the second prong, the U.S. argued in its Submission to the Appellate Body that the Wire Act is a "necessary" measure under GATS article XIV.⁷⁰ To comply with this prong, a country must satisfy a "comparative indispensability test" known as the "chapeau," which focuses on examining whether "viable, less trade restrictive, substitute[]" measures exist.⁷¹ The chapeau requires that member countries exercise their rights under article XIV reasonably, by applying measures "in a manner that does not constitute 'arbitrary' or 'unjustifiable' discrimination."⁷² Unlike an absolute objective effectiveness test, which concentrates "on the actual efficacy of the challenged measure," the chapeau examines the measure at a comparative level.⁷³

Thus, the Appellate Body in the Antigua case examined whether there were any less restrictive trade measures the U.S. could have taken.⁷⁴ However, the Appellate Body held that it was Antigua's duty to raise "WTO-consistent" alternatives to a ban on remote internet gambling.⁷⁵ Antigua in this case did not meet this burden.⁷⁶ According to the Appellate Body, the U.S., therefore, did not need to modify its internet gambling laws, with the exception of the IHA, because they satisfied the public morals exception.

4. THE HORSERACING EXCEPTION AND COMPLIANCE

The Appellate Body found one exception to the U.S. general public morals justification: the Interstate Horseracing Act. The Appellate Body held that the IHA potentially discriminated against foreign service suppliers by prohibiting remote horseracing bets.⁷⁷ Therefore, the 2000 amendment to the IHA, which permits pari-mutuel wagering, allows "domestic, but not foreign, service suppliers to offer

⁶⁹ Appellate Body Report, *supra* note 2, ¶ 299.

⁷⁰ U.S. Appellant Submission, *supra* note 18, ¶ 176.

⁷¹ Broude, *supra* note 46, at 683-85.

⁷² Appellate Body Report, *supra* note 2, ¶ 339.

⁷³ Broude, *supra* note 46, at 686.

⁷⁴ *Id.* at 685.

⁷⁵ Appellate Body Report, *supra* note 2, ¶¶ 57, 309, 320.

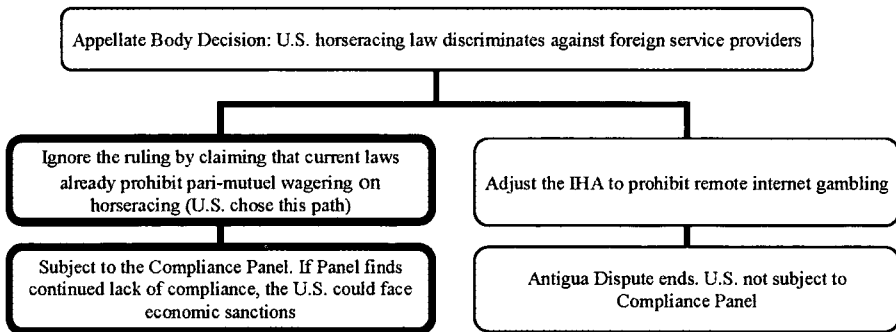
⁷⁶ *Id.* at 102-09.

⁷⁷ *Id.* ¶ 369.

remote betting services in relation to certain horse races.”⁷⁸ Upholding the Panel’s findings, the Appellate Body concluded that the U.S. had not provided “sufficiently persuasive” evidence that pari-mutuel wagering “continues to be prohibited [under the Wire Act] notwithstanding the plain language of the IHA.”⁷⁹

At arbitration, the WTO arbitrator held that the U.S. had until April 3, 2006 to implement the Appellate Body’s ruling by “either prohibit[ing] all interactive interstate horseracing or allow[ing] interstate interactive horseracing access to GATS members.”⁸⁰ But, the U.S. failed to modify the legal status of online interstate horseracing, arguing that the Wire Act already rendered online wagering on horseracing illegal.⁸¹ Despite the U.S. position, a WTO compliance panel ruled that the U.S. “failed to take any measures to bring its restrictions on online gambling in line with the WTO’s findings.”⁸²

TWO LIKELY PATHS AVAILABLE TO THE U.S. FOLLOWING THE APPELLATE BODY DECISION



⁷⁸ Pauwelyn, *supra* note 5. For a discussion of the IHA amendment, see *supra* Part I.B.

⁷⁹ Appellate Body Report, *supra* note 2, ¶ 364.

⁸⁰ Arbitration Report, *supra* note 6, ¶ 68; Interview, *Clash in the Caribbean: Antigua and U.S. Dispute Internet Gambling and GATS: An Interview with Joseph M. Kelly*, 10 UNLV GAMING RES. & REV. J. 15, 15-16 (2006) [hereinafter *Clash in the Caribbean*].

⁸¹ See *supra* Part I.B; Daniel Pruzin, *WTO Panel Rules U.S. Failed to Comply with Gambling Ruling*, INT’L TRADE R., Jan. 26, 2007 [hereinafter Pruzin, *WTO Panel*].

⁸² Pruzin, *WTO Panel*, *supra* note 81.

C. THE 2007 COMPLIANCE REPORT

The Compliance Panel found in 2007 that the U.S. had failed to comply with the Appellate Body Report in the Antigua case.⁸³ The Panel reaffirmed the original Panel's finding in the Antigua dispute, noting that "there is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act."⁸⁴ The ruling did not examine the UIGEA and whether it satisfies GATS.⁸⁵ The Panel observed that (1) the U.S. "had an opportunity to remove the ambiguity and thereby comply" with the Appellate Body Report and (2) instead of taking this opportunity, the U.S. "enacted legislation that confirmed that the ambiguity" in the Antigua case remains and therefore has failed to comply.⁸⁶ The Compliance Panel, therefore, did not rule on whether the UIGEA would satisfy GATS, in particular, article XIV.

In response to the Compliance Panel decision, the U.S. attempted on May 4, 2007 to modify its gambling services commitments under GATS.⁸⁷ To avoid complying with the Appellate Body Report, the U.S. evaded the WTO decision altogether.⁸⁸ As a result of the U.S. attempt to alter its commitments, Antigua filed a request for arbitration

⁸³ Compliance Report, *supra* note 7, ¶ 7.1.

⁸⁴ *Id.* ¶ 6.134 (citing Panel Report, *supra* note 1, ¶ 6.599); *see also supra* note 80 (upholding the Panel Report's finding that the U.S. had not proven that the Wire Act trumped the 2000 IHA amendment).

⁸⁵ *See* Compliance Report, *supra* note 7, ¶¶ 6.35, 6.130.

⁸⁶ *Id.* ¶ 6.135.

⁸⁷ Daniel Pruzin, Antigua to Seek WTO OK for \$3.4 Billion in Sanctions on U.S. Imports in Gaming Case, INT'L TRADE R., June 21, 2007.

⁸⁸ *See* Gary G. Yerkey, *Reps. Frank, Conyers Call on Administration to Settle Gambling Dispute with Legislation*, INT'L TRADE R., Nov. 22, 2007 (commenting on Rep. Frank and Conyers' concern with the "relatively unprecedented" U.S. approach and "interest in considering possible legislative solutions [such as the Internet Gambling Regulation and Enforcement Act of 2007, H.R. 2046, 110th Cong. (2007)] that might restore U.S. compliance with the GATS agreement") (quoting Frank and Conyers' November 19 letter to U.S. Trade Representative Susan C. Schwab). For further discussion of H.R. 2046, *see* Amy Tsui, *Bill Legalizing Internet Gambling Could Be Solution to WTO Problem, Panelist Says*, INT'L TRADE R., Nov. 15, 2007. In line with Rep. Frank and Conyers' concerns, this Note considers the route the U.S. should take to avoid additional compensation claims and renegotiating its GATS commitments.

in January 2008 to reach a compensation deal,⁸⁹ and continue[d] to affirm that “[t]here is no negotiating history suggesting that the United States intended to make a commitment in this [gambling and betting services] area.”⁹⁰

IV. THE CURRENT STATE OF U.S. LAW: THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

Although the U.S. failed to take any measures to comply with the Appellate Body Report, it took steps to further prohibit cross-border internet gambling by enacting the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).⁹¹ The UIGEA clarifies the status of remote internet gambling under existing U.S. laws and requires financial institutions to identify and block illegal internet gambling transactions.⁹²

A. STATUTORY LANGUAGE: KEY PROVISIONS OF THE UIGEA

1. THE UIGEA’S PURPOSE

The UIGEA begins by addressing Congressional Findings and its Purpose under § 5361, which are relevant in determining whether the

⁸⁹ Daniel Pruzin, *Intellectual Property Group Argues IP Retaliation Feasible in WTO Disputes Against U.S. Measures*, INT’L TRADE R., May 22, 2008. A WTO arbitration panel on December 21, 2007 also gave Antigua the right to impose trade sanctions against the U.S. and suspend intellectual property rights protections against U.S. patent holders. *Id.*

⁹⁰ Pruzin, *supra* note 87. In addition, at the time of this Note, the U.S. settled compensation claims with the E.U. and Costa Rica, but is currently negotiating compensation claims with India, Macao, and of course, Antigua. Associated Press, *EU and US Make Deal in WTO Internet Gambling Dispute*, INT’L HERALD TRIB., Dec. 17, 2007, <http://www.iht.com/articles/2007/12/17/technology/gamble.php>; Daniel Pruzin, *Costa Rica Drops Gambling Arbitration Claim*, INT’L TRADE R., Mar. 6, 2008.

⁹¹ The UIGEA, 31 U.S.C. §§ 5361-67, was added to the Port Security Bill, H.R. 4954, and signed into law by the President on October 13, 2006. See William Branigin, *Bush Signs Bill to Enhance Port Security*, WASH. POST, Oct. 13, 2006. The UIGEA was based in part on prior internet gambling bills, as will be discussed later in this article.

⁹² 31 U.S.C. §§ 5361-67; I. Nelson Rose, *Gambling and the Law: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed* (2006), http://www.gamblingandthelaw.com/columns/2006_act.htm [hereinafter Rose, *UIGEA*].

UIGEA seeks to address public morals.⁹³ The Act relies on the National Gambling Impact Study Commission[‘s] (NGISC) recommendations in 1999,⁹⁴ which called for wire transfers to internet gambling sites to be blocked.⁹⁵ The NGISC studied gambling’s “social and economic impacts” and suggested that Congress prohibit internet gambling due to “the difficulty of policing and regulating [internet gambling] to prevent such things as participation by minors.”⁹⁶

Furthermore, § 5361 refers to the following purposes behind the UIGEA: (1) debt collection problems for financial institutions and (2) inadequate law enforcement mechanisms to regulate internet gambling.⁹⁷ Importantly, this section of UIGEA does not “alter, limit, or extend” any federal, state, or tribal law.⁹⁸ Therefore, the UIGEA changes neither the scope of the Wire Act nor the Interstate Horseracing Act.

2. DEFINING KEY TERMS WITHIN THE INTERNET GAMBLING CONTEXT

Section, 5362, provides a list of definitions, including “unlawful internet gambling.” These definitions clarify the status of unlawful internet gambling. The UIGEA defines a “bet or wager” as:

staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or

⁹³ See *supra* Part III.B.3.

⁹⁴ The National Gambling Impact Study Commission Act created the NGISC, whose duty was “to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States.” National Gambling Impact Study Commission Act, Pub. L. No. 104-169, § 4, 110 Stat. 1482 (1996). Congress required the NGISC to assess the effects of internet gambling, “the relationship between gambling and levels of crime,” and gambling’s impact on families. *Id.*

⁹⁵ 31 U.S.C. § 5361(a)(2).

⁹⁶ Pub. L. No. 104-169, 110 Stat. 1482 (1996); National Gambling Impact Study Commission, June 19, 1999, at 5-12 (“NGISC”). Protecting minors is a key public morals concern.

⁹⁷ 31 U.S.C. § 5361(a)(3)-(4).

⁹⁸ 31 U.S.C. § 5361(a).

another person will receive something of value in the event of a certain outcome.⁹⁹

This definition encompasses contests, “sporting event[s],” and lotteries on sporting events;¹⁰⁰ thus, the UIGEA’s definition of “bet or wager” is in line with the Fifth Circuit’s understanding in *In re MasterCard*.¹⁰¹ “Bet or wager” also “includes any instruction or information” regarding the transfer of funds by the bettor.¹⁰²

The UIGEA also defines a “Financial Transaction Provider” as a credit card company or banking institution that permits electronic transfers or transactions.¹⁰³ Finally, § 5362 notes that “unlawful Internet gambling means to place, receive, or otherwise knowingly transmit a bet or wager by any means” involving the internet, where the bet or wager is illegal under federal, state, or tribal law.¹⁰⁴ Therefore, the UIGEA “covers internet gambling that was already illegal” under preexisting laws.¹⁰⁵ The definitions within § 5362 simply clarify the legal status of internet gambling. For example, the UIGEA excludes bets or wagers permissible under the Interstate Horseracing Act, thereby not changing the legality of horseracing activities.¹⁰⁶ The UIGEA also defines internet gambling within the same scope as the Wire Act, by looking to where a bet was “made or received” and not to intermediary computers.¹⁰⁷

⁹⁹ 31 U.S.C. § 5362(1)(A).

¹⁰⁰ 31 U.S.C. § 5362(1)(A)-(B).

¹⁰¹ See *supra* Part II.B.

¹⁰² 31 U.S.C. § 5362 (1)(D); see Rose, *UIGEA*, *supra* note 92.

¹⁰³ 31 U.S.C. § 5362(4). The UIGEA states that a financial transaction provider is “a creditor, credit card issuer, financial institution, [or] operator of a terminal” allowing “electronic fund transfer[s]” or “credit transaction[s].” *Id.*

¹⁰⁴ 31 U.S.C. § 5362(10)(C).

¹⁰⁵ Pouncey & Van Den Hende, *supra* note 52.

¹⁰⁶ 31 U.S.C. § 5362(10)(D)(i); see also 31 U.S.C. § 5362(10)(D)(iii) (noting that “[i]t is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law).

¹⁰⁷ See Rose, *UIGEA*, *supra* note 92. Additionally, bets or wagers made and received within a single state do not fall under the definition of “unlawful internet gambling.” 31 U.S.C. § 5362(10)(B).

3. THE HEART OF THE UIGEA: BLOCKING INTERNET GAMBLING TRANSACTIONS

In section 5363, the UIGEA prohibits acceptance of any financial instrument for unlawful internet gambling.¹⁰⁸ In addition, federal regulators had until mid-July 2007 to develop regulations “to identify and block” restricted transactions to internet gambling websites.¹⁰⁹ One question this section leaves open is whether those financial institutions not subject to the U.S. regulations will follow this measure.¹¹⁰ Thus far, this provision of the UIGEA has caused many remote internet gambling operations to shut down services to U.S. customers.¹¹¹

4. SECTION 803 OF THE UIGEA AND MORAL-BASED CONCERNS

The UIGEA’s final section, section 803, requests but does not require the U.S. Government to “encourage cooperation by foreign governments” in determining whether internet gambling is being used for “money laundering, corruption, or other crimes.”¹¹² The section calls upon the Financial Action Task Force on Money Laundering to prepare a report each year detailing their study of “the extent to which Internet gambling operations are being used for money laundering purposes.”¹¹³ Section 803 is important in that it is the only section of the Act that references moral-based concerns such as “money laundering” and suggests that such crimes might have been a rationale behind the UIGEA.

¹⁰⁸ 31 U.S.C. § 5363 (stating that “[n]o person engaged in the business of betting or wagering may knowingly accept” monetary transactions from another person involved in “unlawful Internet gambling”).

¹⁰⁹ 31 U.S.C. § 5364.

¹¹⁰ See Rose, *UIGEA*, *supra* note 92.

¹¹¹ See *infra* Part IV.C.

¹¹² Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, 120 Stat. 1952, 1962 (2006).

¹¹³ *Id.*

B. *LEGISLATIVE HISTORY AND PRIOR INTERNET GAMBLING
BILLS*

The committee reports dealing with the UIGEA contain no references to WTO commitments or the Appellate Body Report.¹¹⁴ Congress seemed oblivious to the WTO Appellate Body Report when drafting the UIGEA. Instead, Rep. James A. Leach (R-IA) asserted that the UIGEA is designed to support the “integrity” of sports games, as well as “the unity of the American family.”¹¹⁵ Sponsors of the bill specifically noted that transactions complying with the IHA are not within unlawful internet gambling’s scope.¹¹⁶

The UIGEA is based in part on a number of previous, unsuccessful internet gambling bills, in particular Rep. Leach and Rep. Goodlatte’s (R-VA) bills.¹¹⁷ Unlike these prior bills, however, the UIGEA’s purpose is not to update the Wire Act.¹¹⁸ Instead, the UIGEA serves as a supplement to clarify the legal status of unlawful internet gambling and block transactions to gambling sites. Furthermore, the

¹¹⁴ See *id.*

¹¹⁵ 152 CONG. REC. H4984 (2006).

¹¹⁶ Tom LaMarra, *Horse Racing Safe as Internet Gambling Ban Passes*, July 14, 2006, <http://news.bloodhorse.com/article/34360.htm>

¹¹⁷ Rep. Jim Leach (R-IA) introduced H.R. 4411, known as the Unlawful Internet Gambling Funding Prohibition Act in 2005. The bill focused on blocking payments used to fund unlawful internet gambling sites. *House Approves Goodlatte Legislation to Combat Illegal Gambling*, Current News Releases, July 11, 2006, http://www.house.gov/list/press/va06_goodlatte/061106.html. While H.R. 4411 prohibited all forms of internet gambling, not just sports betting, it did carve an exception for horseracing. *Legislative Bulletin on H.R. 4411*, Republican Study Committee (2006), available at <http://www.house.gov/pence/rsc>. H.R. 4411 also included a title on the “Modernization of the Wire Act,” which expanded the definition of “communication facility” to include internet technologies. H.R. 4411, 109th Cong. (2006). Like H.R. 4411, Rep. Bob Goodlatte (R-VA) introduced the Internet Gambling Prohibition Act (H.R. 4777) in 2006. The bill’s main purpose was to update the Wire Act by applying it to internet gambling. Joseph J. McBurney, Note & Comment, *To Regulate or To Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry’s Future in the United States*, 21 CONN. J. INT’L L. 337, 363 (2006); see Karen L. Werner, *Internet Gambling Provisions Pass Congress Barring Use of Credit Cards in Transactions*, INT’L TRADE R., Oct. 3, 2006 (noting that despite the UIGEA, Rep. Goodlatte is preparing a new initiative to update the federal Wire Act). At the time it was introduced, H.R. 4777 did not address the legal status of online wagering on horseracing. H.R. 4777, 109th Cong. (2006).

¹¹⁸ See Rose, *UIGEA*, *supra* note 92, at 1.

UIGEA "incorporates an agreement between the Justice Department and the horseracing industry," by creating an exception for wagering on horseracing.¹¹⁹ Thus, the UIGEA is distinguishable from prior internet gambling bills, in part because its aim is not to modernize the Wire Act.

C. INTERNATIONAL RESPONSES TO THE UIGEA

In response to Congress's enactment of the UIGEA, a number of WTO member countries have suggested that the UIGEA, which was "rushed through Congress," represents U.S. indifference toward WTO law.¹²⁰ Antigua claims the new law "flies in the face of the [2005] WTO ruling."¹²¹ While some internet gambling sites in Caribbean countries, such as BoDog and PokerStars, plan to continue reaching U.S. customers, operations in other countries, such as the United Kingdom, have closed off their businesses to the U.S. as result of the UIGEA.¹²²

The United Kingdom's internet gambling industry has experienced the greatest effects of the UIGEA's enactment. For example, London-based PartyGaming's stock price crashed 57% after Congress enacted the UIGEA, which accounted for 7 billion USD.¹²³ Similarly, London-based BetOnSports stopped accepting wagers from U.S. customers¹²⁴ and entered a settlement in the U.S. in early November, requiring it to refund wagers from U.S. customers.¹²⁵ U.S. prosecutors also arrested two founders of one of the largest internet

¹¹⁹ Werner, *supra* note 117.

¹²⁰ See, e.g., Ryan Nakashima, *Gamblers Take Aim at Internet Ban*, USA TODAY, Nov. 16, 2006, http://www.usatoday.com/tech/news/2006-11-16-net-gambling-change_x.htm; Tony Batt, *Net Betting Ban Violates WTO Ruling*, Lawyer Says, REVIEWJOURNAL.COM, Oct. 5, 2006, http://www.reviewjournal.com/lvrj_home/2006/Oct-05-Thu-2006/business/10050242.html.

¹²¹ Batt, *supra* note 120.

¹²² See Andy Sullivan, *New Law Won't Stop Internet Gambling*, PC WORLD, Nov. 21, 2006, <http://www.peworld.com/article/id,127928-page,1/article.html>.

¹²³ *Id.*; Parmy Olson, *Online Bets Are Off*, FORBES.COM, Oct. 2, 2006, http://www.forbes.com/business/2006/10/02/internet-gambling-offshore-tech-ebiz-cx_po_1002gambling.html (noting that another UK gambling site's, 888 Holding, stock value fell dramatically).

¹²⁴ Anne Broache, *U.S. Permanently Bans BetOnSports*, CNET NEWS.COM, Nov. 10, 2006, http://news.com.com/U.S.+permanently+bans+BetOnSports/2100-1030_3-6134433.html.

¹²⁵ *Id.*

gambling companies, British payment processor NETeller.¹²⁶ As a result of the arrests, NETeller was forced to close down its U.S. internet gambling services, which “wipe[d] out over 65 percent of its business.”¹²⁷ The U.K. does not plan on prohibiting remote internet gambling, but will continue to regulate it.¹²⁸

V. A WTO PANEL WILL MOST LIKELY FIND THAT THE UIGEA IS NOT IN COMPLIANCE WITH WTO LAW

A. *A WTO Panel Should Rule that the UIGEA Does Not Comply with GATS*

A WTO panel would likely format its decision using the structure of the Appellate Body Report in the Antigua case: (1) Commitments; (2) Prohibited Market Access Restrictions; (3) Public Morals Exception; and (4) the Horseracing Exception.¹²⁹

1. U.S. COMMITMENTS

First, based on the same analysis in the Appellate Body ruling, a WTO panel would find that the U.S. established commitments to supply market access and non-discriminatory treatment in gambling and betting services under GATS.¹³⁰ As the Appellate Body held, sporting services do not include gambling or betting.¹³¹ Rather, gambling and betting fall under the committed sector of “other recreational services.”¹³²

¹²⁶ Pete Harrison, *U.S. NETeller Arrests Deal Blow to Net Gambling*, REUTERS, Jan. 18, 2007, <http://www.reuters.com/article/internetNews/idUSL181000020070118?sp=true>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See supra* Part III.B.

¹³⁰ *See id.* Although the U.S. has attempted to withdraw its commitments, its decision circumvents the Appellate Body Report, and undercuts the legitimacy of the WTO dispute process. *See supra* note 87 and accompanying text.

¹³¹ *Id.*

¹³² Appellate Body Report, *supra* note 2, ¶ 201.

2. PROHIBITED MARKET ACCESS RESTRICTION

The UIGEA's internet gambling prohibition violates U.S. commitments under the WTO. Thus, the UIGEA falls within the prohibited "market access restriction" category because it bans remote suppliers from providing gambling services.¹³³ The UIGEA defines "unlawful internet gambling" as betting, receiving, or transmitting bets that are *already illegal* under existing federal, state, or tribal law, such as the Wire Act.¹³⁴ A WTO panel would therefore follow a similar analysis to that of the Appellate Body Report in making a market access restriction determination, because the UIGEA does not amend the Wire Act or other federal laws.¹³⁵ A panel would almost assuredly find a violation here, because the effect of the UIGEA's ban on remote internet gambling is even more apparent than in the Antigua case. For example, as a result of the UIGEA's passage the effects on the United Kingdom's internet gambling industry have been substantial, causing a number of internet gaming sites and payment processors to shut down service in the U.S.¹³⁶

3. THE PUBLIC MORALS EXCEPTION: A TWO-PRONGED
ANALYSIS

The public morals exception presents the most substantial issue for a WTO panel. Although the UIGEA violates U.S. commitments under the WTO, the U.S. would try to justify the UIGEA under the public morals exception, as it did in the Antigua case.¹³⁷ The U.S. would make similar arguments to those it made in the Antigua case because the UIGEA does not alter the scope of the Wire Act;¹³⁸ thus, many of the same U.S. contentions would apply.¹³⁹ Furthermore, given the success of the U.S. public morals exception argument before

¹³³ See Appellate Body Report, *supra* note 2, ¶ 252, 265; see also Pauwelyn, *supra* note 5.

¹³⁴ 31 U.S.C. § 5362; see Rose, *UIGEA*, *supra* note 92, at 1.

¹³⁵ See *supra* Part IV.A.1-2.

¹³⁶ See *supra* Part IV.C.

¹³⁷ The United States argued in its brief to the WTO Appellate Body that the Wire Act was justified under the public morals exception. See U.S. Appellant Submission, *supra* note 18, ¶ 5.

¹³⁸ See *supra* Part IV.A.1-2.

¹³⁹ As in the Antigua case, the U.S. would argue that (1) the UIGEA fits within the scope of the public morals exception, and (2) the Wire Act is a "necessary" measure under GATS article XIV. See *supra* Part II.B.3.

the Appellate Body, the U.S. would likely assert that exception to the UIGEA.¹⁴⁰ However, the U.S. will have a harder time arguing that the public morals exception should apply to the UIGEA, as compared to its argument concerning the Wire Act in the Antigua case.¹⁴¹

a. *THE FIRST PRONG: THE SCOPE OF THE PUBLIC MORALS
EXCEPTION*

In applying the two-part public morals exception test, a WTO panel must first ask: does the UIGEA fall within the scope of the public morals exception?¹⁴² Because the WTO tends to interpret this first step broadly,¹⁴³ the UIGEA will likely fall within the scope of the public morals exception. Satisfying this factor, however, will not be a simple task for the U.S. The U.S. would need to emphasize the UIGEA's intent, rationale, and legislative history to argue successfully that the Act's main purpose is to protect the U.S. from fraud, money laundering, and underage gambling.

A WTO panel would address two main questions regarding this prong. First, does the UIGEA's measures suggest a moral or cultural rationale? The U.S. would emphasize, as it argued in its brief to the Appellate Body, that the UIGEA is not a "disguised restriction on trade in services."¹⁴⁴ Moreover, the DOJ would contend that the UIGEA has "nothing to do with protectionism" and is "applied to protect society from the continuing threats to . . . public morals."¹⁴⁵ Despite these arguments, a WTO panel would have to balance whether the measure is more economic than morals-based, and whether the government's main purpose is to "eliminate an untaxed competitor."¹⁴⁶ It will be more difficult for the U.S. to satisfy with respect to the UIGEA, as opposed to the Wire Act in the Antigua case. Congress enacted the latter "long before Internet gambling was even thought possible" and thus for reasons unrelated to the "protection" of the domestic internet gambling

¹⁴⁰ See *supra* Part III.B.3.

¹⁴¹ See *supra* Part II.

¹⁴² See *supra* Part III.B.3.

¹⁴³ See Broude, *supra* note 46, at 684.

¹⁴⁴ U.S. Appellant Submission, *supra* note 18, ¶ 204.

¹⁴⁵ *Id.*

¹⁴⁶ SCHWARTZ, *supra* note 9, at 8; see Dana Gale, *The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, (Benjamin N. Cardozo Sch. of Law Working Paper, 2006), at 16-17, available at <http://ssrn.com/abstract=942689>.

industry¹⁴⁷ and enacted the former when internet gambling was at its peak. It is more likely, therefore, that the UIGEA was based, at least in part, on protectionism.

Second, does the UIGEA's legislative history suggest a moral or cultural rationale? The congressional record on the UIGEA mentions little in the way of fraud, money laundering, or other similar purposes. Instead, the record comments vaguely on the "devastating losses of internet gambling" and expresses concern for the "unity of the American family."¹⁴⁸ Furthermore, section 5361 references only debt collection problems and the difficulty of enforcing internet gambling laws as the Act's purposes.¹⁴⁹

Yet, references to money laundering and other public morals concerns in the UIGEA and its session law form indicate that Congress had a moral rationale. For example, section 803 encourages foreign governments to cooperate in identifying where internet gambling is being used for "money laundering, corruption, or other crimes."¹⁵⁰ Section 803 also promotes the establishment of a task force to examine the extent to which internet gambling is used for money laundering purposes.¹⁵¹ Finally, the National Gambling Impact Study Commission's report, cited in section 5361 of the UIGEA, also highlights moral-based concerns, such as protecting minors.¹⁵² These references suggest that Congress expressed concern about money laundering and other crimes when drafting the UIGEA.

Emphasizing section 803's explicit concern regarding public morals, the WTO will likely conclude that the UIGEA's measures are moral-based. A WTO panel would not find that Congress enacted the UIGEA for *solely* economic purposes.¹⁵³ Thus, despite the absence of an explicit moral rationale in the UIGEA's legislative history, the WTO will likely interpret this first prong broadly, as it did in the Appellate Body Report.

¹⁴⁷ See U.S. Appellant Submission, *supra* note 18, ¶ 204.

¹⁴⁸ 152 CONG. REC. H8029 (2006) (statement of Rep. Leach).

¹⁴⁹ 31 U.S.C. § 5361(a)(3)-(4)(2006).

¹⁵⁰ Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, 120 Stat. 1952, 1962 (2006).

¹⁵¹ *Id.*

¹⁵² NGISC, *supra* note 96, at 5-12.

¹⁵³ Section 803 of Pub. L. No. 109-347, 120 Stat. 1952, and its reference to the NGISC suggest that Congress's rationale was at least partially moral-based.

b. THE SECOND PRONG: THE NECESSITY TEST

Under the public morals exception, a WTO panel would examine whether the UIGEA is “necessary” to protect American culture and morals.¹⁵⁴ The U.S. will have more difficulty proving that the UIGEA is “necessary” than demonstrating that it falls within the public morals exception.¹⁵⁵ A panel would apply the comparative indispensability test, inquiring whether there are less trade-restrictive alternatives, also known as “WTO-consistent alternative measures.”¹⁵⁶ In the case of the UIGEA, there is a WTO-consistent alternative: if the U.S. prohibited all forms of remote internet gambling, including pari-mutuel wagering on horseracing, it would still meet its public morals goals, while at the same time not discriminating against foreign service suppliers.

While Antigua failed to meet its burden to raise less trade-restrictive alternatives, other member countries that raise complaints against the U.S. regarding internet gambling will have learned the importance of raising alternative means.¹⁵⁷

4. HORSERACING EXCEPTION

Finally, by explicitly excluding the IHA from its scope, the UIGEA allows an exception for pari-mutuel horseracing.¹⁵⁸ As noted in the Appellate Body Report, this exception discriminates against foreign suppliers of remote internet gambling services.¹⁵⁹ Therefore, even if the public morals exception is applied to the UIGEA, it nevertheless discriminates against remote service suppliers of pari-mutuel horseracing.

¹⁵⁴ GATS art. XIV(a).

¹⁵⁵ Broude, *supra* note 46, at 684.

¹⁵⁶ See Appellate Body Report, *supra* note 2, § 305-06 (citing Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R(Dec. 11, 2000)); Broude, *supra* note 46, at 683-85.

¹⁵⁷ See Thayer, *supra* note 29, at 17.

¹⁵⁸ See 31 U.S.C. § 5362(10)(b)(iii)(I).

¹⁵⁹ See *supra* Part III.B.4.

VI. PROPOSED MEASURES THE U.S. SHOULD TAKE TO COMPLY WITH GATS AND WHY COMPLIANCE IS NECESSARY

A. *PROPOSED MEASURES*

To comply with GATS, the U.S. should first clarify that the UIGEA applies to betting on horseracing, as well as amend the IHA to prohibit internet gambling on pari-mutuel wagering. Second, the U.S. should adjust the UIGEA to fit within the GATS public morals exception. The following suggestions are the most practical measures for the U.S. to take because they involve little change to existing U.S. law, yet are significant enough to prevent further internet gambling complaints from member countries.¹⁶⁰ Amending the UIGEA would put the U.S. in a better position should future WTO complaints against the U.S. arise. Modifying existing U.S. law is necessary because it is difficult to amend the list of GATS commitments.¹⁶¹

1. THE U.S. SHOULD MODIFY THE IHA AND UIGEA TO APPLY TO ONLINE WAGERING ON HORSERACING

First, the U.S. should amend the IHA and clarify that the UIGEA applies to betting on horseracing.¹⁶² Currently, the IHA discriminates against foreign service suppliers: it permits "domestic, but not foreign, services suppliers to offer remote betting service in relation to certain horse races."¹⁶³ Despite the DOJ's position that all types of remote internet gambling are illegal under existing federal law, the U.S. should follow the Appellate Body's interpretation and modify the IHA and

¹⁶⁰ Note that the measures outlined below overlap at times.

¹⁶¹ I. Nelson Rose, *U.S. Ignores Deadline in WTO Fight with Antigua*, 10 GAMING L. REV. 225, 228 (2006) [hereinafter Rose, *U.S. Ignores Deadline*] ("[T]o add gambling to the excluded list, the United States would have to give up" another committed sector, which is extremely unlikely.). Nevertheless, on May 4, 2007, the U.S. took an unprecedented move by choosing to evade the WTO compliance decision and altering its GATS market access schedules. As a result, the U.S. must offer significant compensation to Antigua as well as other affected countries, such as the E.U. See Yerkey, *supra* note 89. At the time of this article, compensation agreements are still in progress.

¹⁶² This is the most realistic solution for the U.S., given that it is unlikely Congress will expand the scope of legal gambling. *Id.* at 227.

¹⁶³ Pauwelyn, *supra* note 5.

UIGEA.¹⁶⁴ The DOJ's position conflicts with (1) the Fifth Circuit's holding in *In re MasterCard*;¹⁶⁵ (2) general principles of statutory construction;¹⁶⁶ and (3) the exceptions carved out in the UIGEA.¹⁶⁷

2. THE U.S. SHOULD MODIFY THE UIGEA TO ENSURE THAT IT FALLS WITHIN THE PUBLIC MORALS EXCEPTION

Second, the U.S. should adjust the UIGEA to fit within the public morals exception. Although a WTO panel would likely find that the UIGEA satisfies the first prong of the public morals test, the scope of public morals exception, the U.S. should nevertheless amend the statute to clarify that the purpose of the UIGEA is not only to target debt collection and to improve law enforcement, but also to prevent fraud, money laundering, and underage gambling.¹⁶⁸ With respect to the second prong of the public morals test, the necessity requirement, the U.S. should amend the UIGEA to ban all forms of remote internet gambling. Prohibiting all offshore internet gambling is a more "WTO-consistent alternative measure" that the U.S. should take, given the likelihood that future complaints against the U.S. would focus on this second prong.¹⁶⁹ Thus, the best way for the U.S. to prohibit all forms of remote internet gambling is to apply the ban to horseracing.¹⁷⁰

¹⁶⁴ See Albena P. Petrova, *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?*, 6 RICH. J. GLOBAL L. & BUS. 45 (2006)(finding that the U.S. should amend the IHA).

¹⁶⁵ See *supra* Part II.B.

¹⁶⁶ See *supra* Part II.B.

¹⁶⁷ See *supra* Part IV.A.2.

¹⁶⁸ See *supra* Part V.B.3.

¹⁶⁹ See Appellate Body Report, *supra* note 2, ¶ 311.

¹⁷⁰ In addition, the UIGEA does not prohibit states from discriminating against remote internet gambling suppliers. The Wire Act's safe harbor provision permits states to discriminate in this manner if they so choose. Thayer, *supra* note 29, at 14. While this Article does not attempt to address state internet gambling laws, it is important to note that this issue might arise in future WTO claims as a market access violation.

*B. THE U.S. SHOULD COMPLY WITH THE WTO TO AVOID
FUTURE COMPLAINTS AND RETALIATION FROM MEMBER
COUNTRIES, AND TO SUPPORT THE LEGITIMACY OF THE WTO*

The U.S. should comply with GATS and the Appellate Body's decision in the Antigua case for three reasons. First, compliance would help avoid future complaints from larger WTO member countries or the European Union.¹⁷¹ For example, the European Union has already considered raising a prospective WTO claim regarding the new law.¹⁷² Future complaints will most likely focus on whether the new UIGEA excludes pari-mutuel betting on horseracing and meets both prongs of the public morals exception.

Second, complying with GATS is important to avoid patent retaliation from member countries. Under WTO law, if the U.S. ignores a WTO finding or decision, member countries will have the option to disregard treaties requiring them to comply with U.S. patent laws.¹⁷³ For example, because the U.S. refused to follow the Compliance Panel's findings in the Antigua case, WTO arbitration panel gave Antigua the right to disregard U.S. copyrights on (e.g.) videos, music, electronics, or software.¹⁷⁴ This type of retaliation will pose serious ramifications for the U.S. if larger WTO member countries bring internet gambling complaints. Moreover, member countries

¹⁷¹ Pouncey & Van Den Hende, *supra* note 52.

¹⁷² Tobias Buck, *EU Calls US Betting Law 'Protectionist'*, FIN. TIMES.COM, Jan. 30, 2007, <http://www.ft.com/cms/s/4c93a6fa-b091-11db-8a62-0000779e2340.html> (noting, however, that "it is not clear whether the Union will follow through" on this threat).

¹⁷³ Henry Lanman, *Rolling the Dice: The United States' Big Legal Gamble with Internet Gaming*, SLATE, Nov. 15, 2006. Under WTO law, states are permitted to retaliate by imposing trade sanctions, such as suspending their compliance with (e.g.) U.S. intellectual property laws. *Id.*; Understanding the WTO: Settling Disputes, *supra* note 1; see also Tuan N. Samahon, *TRIPS Copyright Dispute Settlement After the Transition and Moratorium: Nonviolation and Situation Complaints Against Developing Countries*, 31 INT'L BU. 1051, 1071-72 (2000) (noting that while retaliation is an available remedy under the WTO, it is "generally disfavored" as a first resort).

¹⁷⁴ James Kanter & Gary Rivlin, *Ruling Lets Antigua Be Pirate to Punish U.S. in Trade Fight*, N.Y. TIMES, Dec. 22, 2007, at C3; Pruzin, *Intellectual Property*, *supra* note 89; see Lanman, *supra* note 172; Radley Balko, *You Go, Antigua*, THE AGITATOR.COM, Oct. 19, 2006, <http://www.theagitator.com/archives/027144.php>.

might also retaliate by refusing to allow U.S. companies to use certain geographical indications.¹⁷⁵

Third, the U.S. has “interests in supporting the legitimacy of the WTO.”¹⁷⁶ Continuing to ignore its commitments under the WTO with respect to the new law will cost the U.S. “significant trade capital” and lead to trade sanctions or concessions.¹⁷⁷ If the U.S. ignores its WTO obligations, then other countries might ignore their WTO obligations toward the U.S.¹⁷⁸

C. CRITICISM

There are three main counterarguments in response to this proposal that focus on the public morals exception. First, critics might argue that a WTO panel should hold that the U.S. has not met the first prong of the public morals exception, and find that the U.S. intent behind the UIGEA is economic-based. Second, existing U.S. federal laws are the most WTO-consistent measures available. Third, the U.S. should not prohibit online wagering on horseracing.

1. THE U.S. HAS NOT MET THE FIRST PRONG OF THE PUBLIC MORALS EXCEPTION

First, because the UIGEA presents no clear moral or cultural rationale in either its text or legislative history, a WTO panel might find that the public morals exception cannot encompass the UIGEA. Proponents of this view argue that the purpose behind the UIGEA is almost entirely “economic in nature.”¹⁷⁹ The problem with this argument, however, is that the UIGEA’s reference to money laundering and corruption in section 803 suggests that there are moral-based purposes behind the statute.¹⁸⁰ Moreover, because the WTO tends to

¹⁷⁵ I am indebted to Carolyn Bleck, J.D., 2008, The George Washington University Law School for this idea. For a general discussion of the current debate on geographical indications, see Broude, *supra* note 46, at 625-34. For an example of retaliation under the WTO, see Ecuador Retaliation, http://www.wipo.int/documents/en/meetings/2001/geo_mvdpdf/geomvd_2.pdf

¹⁷⁶ Thayer, *supra* note 29, at 18.

¹⁷⁷ *Id.*

¹⁷⁸ *Clash in the Caribbean*, *supra* note 80, at 18.

¹⁷⁹ See Gale, *supra* note 146, at 3.

¹⁸⁰ See *supra* Part IV.A.4.

loosely interpret the public morals exception's scope, section 803's reference to morals will be enough to satisfy this prong.¹⁸¹

2. EXISTING FEDERAL LAWS ARE WTO-CONSISTENT

Second, another area of contention centers on whether the U.S. could use any less trade-restrictive alternatives.¹⁸² In line with the DOJ's position, critics argue that prohibiting all types of internet gambling is not a less trade-restrictive alternative, because the Wire Act already prohibits all forms of internet gambling. This reasoning, however, conflicts with the Appellate Body Report as well as the *In re MasterCard* decision.¹⁸³

3. THE U.S. SHOULD NOT PROHIBIT INTERNET WAGERING ON HORSERACING

Lastly, the U.S. should not prohibit pari-mutuel wagering on horseracing.¹⁸⁴ Proponents of the horseracing industry have argued that horseracing is a major industry in the United States, whose "fastest growing segment" is the pari-mutuel business.¹⁸⁵ Carving out an exception for the IHA, however, discriminates against foreign internet

¹⁸¹ See *supra* Part V.A.3. In addition, based on the legislative history of Rep. Goodlatte's past internet gambling bills, which served as a basis for the UIGEA, it is unlikely that the UIGEA's sole purpose is economic. See Posting of Simon Lester to International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ielpblog/2006/11/why_did_the_us_.html (Nov. 10, 2006, 17:58 EST). Rep. Goodlatte's bills focused specifically on "protecting children" and on corruption. CONG. REC. E191 (daily ed. Feb. 16, 2006) (statement of Rep. Goodlatte); see also House Approves Goodlatte Legislation to Combat Illegal Gambling, Current News Release, July 11 2006 (noting that H.R. 4411 will help combat interstate internet gambling, which "serve[s] as a vehicle for money laundering" and "undermine[s] families"). While this Note agrees that the UIGEA would benefit from a revised "Congressional Findings and Purpose" under § 5361, it does not call for a substantial overhaul at this point.

¹⁸² The WTO also referred to "less trade-restrictive alternative[s]" as "WTO-consistent trade alternatives" or "WTO-consistent alternatives." See Appellate Body Report, *supra* note 2, ¶ 308.

¹⁸³ See *supra* Part II.B.

¹⁸⁴ See Cabot & Christiansen, *supra* note 28, at 201, 203-04.

¹⁸⁵ *Id.* at 201-02; see Matt Hegarty, *Congress Passes Internet Gambling Bill*, DAILY RACING FORM, Oct. 2, 2006, <http://www.ntra.com/content.aspx?type=fedleg&style=red&id=20470>.

service providers. If the U.S. does not wish to outlaw online betting on horseracing, its only other option is to allow "foreign racebooks to take [horseracing] bets" from the U.S., which would have "virtually no [negative] impact" on the current status of internet gambling.¹⁸⁶ Yet, Congress is not likely to pass a law expanding the scope of legal internet gambling.¹⁸⁷ Thus, the most realistic option for the U.S. is to include pari-mutuel wagering on horses within the overall reach of the UIGEA.

VII. CONCLUSION

The UIGEA violates GATS, in particular as examined against the backdrop of the Appellate Body Report. To comply with GATS, the U.S. should modify the law to include interstate gambling on horseracing and to satisfy the public morals exception. Instead of evading its WTO commitments altogether, the U.S. should amend the UIGEA as soon as possible to avoid future WTO complaints from larger member countries or the European Union.

¹⁸⁶ Rose, *U.S. Ignores Deadline*, *supra* note 161, at 227.

¹⁸⁷ *Id.*