

2007

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### Recommended Citation

Irem Dogan, *Taking a Gamble on Public Morals: Invoking the Article XIV Exception to GATS*, 32 *Brook. J. Int'l L.* (2007).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol32/iss3/15>

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# TAKING A GAMBLE ON PUBLIC MORALS: INVOKING THE ARTICLE XIV EXCEPTION TO GATS

## I. INTRODUCTION

On July 31, 2001, the U.S. Second Circuit Court of Appeals handed down a decision against Jay Cohen<sup>1</sup> that became the basis of a landmark trade dispute against the United States in the World Trade Organization (“WTO”). Jay Cohen is an American citizen who moved to the tiny Caribbean twin island nation of Antigua and Barbuda (“Antigua”)<sup>2</sup> to establish the World Sports Exchange, an internet and telephone based gambling business directed at customers in the United States.<sup>3</sup> After being convicted of violating the Wire Communications Act<sup>4</sup> for operating this gambling service, Cohen found an ally in his adopted home, Antigua. Claiming that the United States was violating the General Agreement on Trade in Services (“GATS”),<sup>5</sup> Antigua brought the issue

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1. See *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001) (affirming the district court’s conviction and twenty-one month imprisonment sentence of Cohen for facilitation of offshore gambling activities).

2. See CIA World Factbook, *Antigua and Barbuda*, available at <https://www.cia.gov/cia/publications/factbook/geos/ac.html>.

3. *Cohen*, 260 F.3d at 70.

4. 18 U.S.C. § 1084 (1961). The statute states, in pertinent part, the following:

(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.

*Id.*

5. General Agreement on Trade in Services, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1144, 1167 (1994) [hereinafter GATS].

to the WTO in a case that was characterized by referral to the biblical battle between David and Goliath.<sup>6</sup>

Initially, an adjudicatory panel established by the WTO's Dispute Settlement Body issued a Report ruling in favor of Antigua.<sup>7</sup> However, on appeal the Panel's holding was subsequently reversed by the Appellate Body based on the argument by the United States that it has the right to prohibit internet gambling services.<sup>8</sup> The United States claimed that this right exists under the general exceptions clause, Article XIV of the GATS, which allows Members to implement measures that protect public morals and order, even if the measures violate the GATS.<sup>9</sup> Part II of this Note will discuss in detail the background of this dispute, the claims made by Antigua, the defense asserted by the United States, and the rulings of the Panel and Appellate Body.

Part III of this Note will specifically focus on the analyses employed by the Panel and the Appellate Body in determining whether the United States' measures prohibiting internet gambling services fell within the protection of Article XIV of the GATS. Although the methods of the Panel and Appellate Body were largely parallel, they diverged on the crucial issue of burden of proof.<sup>10</sup> In its ruling, the Panel reproved the United States for not having thoroughly investigated WTO-consistent alternatives to its violating measures, and found that the United States thus did not meet its burden of proof.<sup>11</sup> The Appellate Body, however,

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6. See, e.g., James D. Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, 2004 DUKE L. & TECH. REV. 0013, Abstract (2004), <http://www.law.duke.edu/journals/dltr/articles/2004dltr0013.html>; Joost Pauwelyn, *WTO Condemnation of U.S. Ban on Internet Gambling Pits Free Trade Against Moral Values*, THE AM. SOC'Y OF INT'L L., Nov. 2004, available at <http://www.asil.org/insights/2004/11/insight041117.html>; Ellen Gould, *The US-Gambling Decision: A Wakeup Call for WTO Members*, CAN. CTR. FOR POLICY ALTERNATIVES, Trade and Investment Series Vol. 5 No. 4 (2004); *WTO Rules Against US Gambling Ban*, BBC NEWS, Nov. 11, 2004, available at <http://news.bbc.co.uk/2/hi/business/4001793.stm>.

7. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter Internet Gambling Panel Report].

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

9. Dispute Settlement: Dispute DS285, Key Facts and Summary of the Dispute to Date *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm) (last visited May 17, 2007) [hereinafter Key Facts and Summary].

10. *Id.*; see also Internet Gambling Appellate Body Report, *supra* note 8.

11. Internet Gambling Panel Report, *supra* note 7.

found that the failure of the United States to research or offer substitute measures did not bar it from satisfying its burden of proof, and accepted the Article XIV defense.<sup>12</sup>

Part IV of this Note will examine the issue of burden of proof in the use of the Article XIV defense by comparing the findings of the Panel and the Appellate Body with prior uses of similar defenses in WTO disputes. Finally, Part V of this Note will argue that, once a party's measures are found to be in violation of a WTO agreement, it is that party's burden to show that the measures at issue satisfy the requirements of a general exceptions clause. This is a high burden requiring, among other things, that the violating measures are *necessary* for the protection of public morals or order.<sup>13</sup> Contrary to the decision of the Appellate Body, Part V of this Note will conclude that the Panel was correct in originally rejecting the defense argued by the United States.<sup>14</sup> The United States did not have a valid claim for taking exception to its trade obligations by prohibiting trade in the service of cross-border remote gambling without seeking in good faith WTO-consistent alternate measures.<sup>15</sup> The United States had the burden to show that its prohibitions met the requirements of Article XIV, and it did not meet that burden. Part V of this Note will also contend that the holding of the Appellate Body that a Member such as the United States could implement measures that violate the GATS without having sought WTO-consistent alternative measures to meet its policy goals undermines the integrity of the heavily-negotiated trade agreements and the overall goal of the WTO to liberalize trade.<sup>16</sup>

## II. CLAIM BY ANTIGUA AGAINST THE UNITED STATES

Antigua, one of the smallest nations in the world with a population of only 68,108,<sup>17</sup> is a base for many international internet gambling operations. Its economy is largely connected to trade in this service,<sup>18</sup> which

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12. Internet Gambling Appellate Body Report, *supra* note 8.

13. GATS, *supra* note 5, 33 I.L.M. at 1167, art. XIV.

14. Internet Gambling Panel Report, *supra* note 7.

15. *Id.*

16. Ctr. for Int'l Env'tl. Law, A Center for International Environmental Law Issue Brief For the World Summit on Sustainable Development 26 August – 4 September 2002: WTO Negotiations to Liberalize Trade in Services: New Challenges for Sustainable Development (2002), available at <http://www.ciel.org/Publications/services.pdf>.

17. CIA World Factbook, *supra* note 2.

18. Thayer, *supra* note 6. In an attempt to diversify its economy from reliance on sugar and tourism, Antigua developed an infrastructure to support internet based gambling and betting services. By 1999, three thousand people were employed by the gambling and betting industry in Antigua and the government was receiving over \$7.4 million

has helped Antigua weather downturns in its sugar and tourism sectors.<sup>19</sup> Recently, however, Antigua's gambling and betting services industry suffered a drastic decline<sup>20</sup> for which it specifically blamed U.S. prohibitions and market access restrictions on cross-border gambling services.<sup>21</sup>

In March of 2003, Antigua requested consultations with the United States regarding measures applied by U.S. central, regional and local authorities which made illegal the cross-border supply of gambling and betting services.<sup>22</sup> Antigua argued that these prohibitive measures constituted an infringement of the obligations of the United States under the GATS Articles II, VI, VIII, XI, XVI, and XVII,<sup>23</sup> and the U.S. Schedule of Specific Commitments annexed to the GATS.<sup>24</sup>

The GATS consists of general principles which govern trade in services among WTO Members and regulate the specific commitments that each Member assigns to it.<sup>25</sup> Under the GATS, Members are required to establish "schedules of specific commitments" listing their terms of trade for various services.<sup>26</sup> Members decide which services to commit to the provisions of the agreement and what limitations they want to place on the commitment of that service.<sup>27</sup> This list of commitments makes up the GATS Schedule of the Members, which is then annexed to the GATS.<sup>28</sup>

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annually from the licensing fees of 119 internet gambling and betting operations, which accounted for over ten percent of the nation's gross domestic product. *Id.*

19. *WTO Rules Against US Gambling Ban*, *supra* note 6; Thayer, *supra* note 6.

20. Thayer, *supra* note 6. From 1999 to 2003, at least thirty-five banks licensed in Antigua closed, the number of licensed gambling and betting operations decreased over 710%, the number of people employed in the industry decreased 750%, and the government licensing fees decreased over 410%. *Id.*

21. *Id.* Specifically, Antigua contended that the economic downturn in its gambling and betting services industry was a direct result of (1) the U.S. Internet Gambling Enforcement Act, H.R. 556, 107<sup>th</sup> Cong. (2002); (2) the self-regulation of the credit card industry in the United States; and (3) the Second Circuit ruling against Jay Cohen (referring to *Cohen*, 260 F.3d at 70). *Id.*

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

23. GATS, *supra* note 5, 33 I.L.M. at 1167. These Articles refer to the following: Article II: Most-Favored-Nation Treatment; Article VI: Domestic Regulation; Article VIII: Monopolies and Exclusive Service Providers; Article XI: Payments and Transfers; Article XVI: Market Access; Article XVII: National Treatment.

24. U.S. Schedule of Specific Commitments Under the General Agreement on Trade in Services, With Explanatory Materials Prepared by the U.S. International Trade Commission under Investigation No. 332-354, U.S. Int'l Trade Comm'n (May 1997).

25. See Thayer, *supra* note 6.

26. GATS, *supra* note 5, 33 I.L.M. at 1167, art. XX:1.

27. Gould, *supra* note 6, at 3.

28. *Id.* at 3.

Within the context of its own schedule, each Member must allow market access to foreign service providers and treat foreign service providers in a manner no less favorable than its own domestic suppliers of like services.<sup>29</sup>

After its consultations with the United States failed, on June 12, 2003, Antigua requested that the WTO establish an adjudicatory panel to resolve its allegations that the United States was acting in contravention to its GATS obligations. Antigua's two major complaints were that: 1) while U.S. authorities allow numerous U.S. operators to offer various gambling and betting services within the United States, there is no possibility for foreign operators to obtain authorization to supply gambling and betting services from outside the United States; and 2) the U.S. authorities restrict international transfers and payments related to gambling and betting services offered from outside the United States.<sup>30</sup>

*A. WTO Panel Report Ruling in Favor of Antigua*

The success of Antigua's case first depended on whether the WTO would interpret U.S. commitments in the GATS to include gambling services.<sup>31</sup> In its schedule to the GATS, the United States had agreed not to restrict the importation of "recreational services."<sup>32</sup> While Antigua construed this clause to allow the free flow of cross-border gambling services, the United States maintained that it had never intended that interpretation.<sup>33</sup> As evidence of its position concerning its commitments, the United States pointed to the explicit exclusion of sporting services from its commitment schedule, which, according to the United States, encompassed betting on sports.<sup>34</sup> Moreover, the United States argued that the existence of domestic prohibitions against internet gambling<sup>35</sup> further proved that it never intended to include such activity in the trade agreement. According to the United States, its prohibition represented "vital policy objectives" rendering it "incomprehensible for the United States to make [gambling services] the subject of a specific commitment."<sup>36</sup>

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29. Thayer, *supra* note 6.

30. Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/2 (June 13, 2003).

31. Gould, *supra* note 6, at 4.

32. *Id.*

33. *Id.*

34. Internet Gambling Panel Report, *supra* note 7.

35. Pauwelyn, *supra* note 6.

36. Internet Gambling Panel Report, *supra* note 7.

On the issue of whether the United States commitments included internet gambling services, the November 10, 2004 WTO Panel ruling<sup>37</sup> applied the rules of interpretation under the Vienna Convention<sup>38</sup> and sided with Antigua, holding that gambling services were indeed covered under the GATS category “recreational services” and were not a sporting service.<sup>39</sup> The Panel further found that because various U.S. federal and state laws contained restrictions on gambling services, the United States was failing to offer Antigua’s gambling service suppliers the proper treatment as set out under its GATS Schedule of Commitments.<sup>40</sup> Specifically, the Panel Report examined the Federal Wire Act,<sup>41</sup> Travel Act,<sup>42</sup> and Illegal Gambling Business Act,<sup>43</sup> and the state laws of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah that restrict or prohibit gambling.<sup>44</sup> After this review, the Panel concluded that all three federal laws and the state laws of Louisiana, Massachusetts, South Dakota, and Utah violated the specific market access commitments of the United States for gambling and betting services under the GATS Article XVI.<sup>45</sup>

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37. *Id.*

38. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31.1, 31.2, 31.3 and 32, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. In applying the Vienna Convention, the Panel looked to literal dictionary definitions for insight on “ordinary meaning” under Vienna Convention Article 31.1, as well as looking to other WTO documents as “context,” “subsequent practice,” or “supplementary means of interpretation” under Vienna Convention Articles 31.2, 31.3, and 32, respectively. Internet Gambling Panel Report, *supra* note 7.

39. Internet Gambling Panel Report, *supra* note 7.

40. *WTO Panel Rules in Favour of Antigua, Barbuda in Gambling Dispute*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEVELOPMENT, BRIDGES WEEKLY TRADE NEWS DIGEST, Vol. 8, No. 39, Nov. 17, 2004.

41. 18 U.S.C. § 1084 (1961) (prohibiting gambling business from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires).

42. 18 U.S.C. § 1952 (1961) (imposing criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including unlawful gambling).

43. 18 U.S.C. § 1955 (1970) (criminalizing under certain conditions the operation of a gambling business that violates the law of the state where the gambling takes place).

44. See COLO. REV. STAT. § 18-10-103; LA. REV. STAT. ANN. § 14:90.3 (1968); MASS. ANN. LAWS ch. 271 § 17A (1958); MINN. STAT. ANN. §§ 609.755, Subdivisions 2–3 (1963) and 609.755(1) (1963); N.J. CONST. art. IV, § 7; N.J. ADMIN. CODE § 2A:40-1; N.Y. CONST. art. I, § 9; GEN. OBLIG. § 5-401; S.D. CODIFIED LAWS §§ 22-25A-1–22-25A-15 (2000); UTAH CODE ANN. § 76-10-1102 (1973).

45. Key Facts and Summary, *supra* note 9. However, the Panel decided that the measures at issue did not violate the domestic regulation provisions of the GATS Article VI, and did not rule as to Antigua’s claims concerning payments and transfers provisions

In its defense the United States was forced to rely on the invocation of the never-before used GATS Article XIV exception provision for protection of public morals or public order, or for securing compliance with U.S. laws or regulations.<sup>46</sup> The United States depended heavily on this Article XIV exception in order to win its case. Specifically, the United States argued for protection under XIV(a) by claiming that the Wire Act, the Travel Act and the Illegal Gambling Business Act are necessary to protect “public morals” and “public order” within the meaning of Article XIV(a) because of the heightened risks that remote gambling posed to society.<sup>47</sup> The United States presented evidence demonstrating that minors could too easily access internet gambling sites,<sup>48</sup> and argued that the

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of GATS Article XI or national treatment provisions of GATS Article XVII for the sake of judicial economy. *Id.*

46. *Id.* Article XIV of the GATS provides, in relevant part, that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in 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: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society);

...

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety; . . .

GATS, *supra* note 5, 33 I.L.M. at 1167, Art. XIV.

47. Internet Gambling Panel Report, *supra* note 7.

48. *Id.* (citing Amit Asaravala, *Why Online Age Checks Don't Work*, WIRED NEWS, Oct. 10, 2002). Also, the Panel referred to a quote by the Senior Vice President for Public Policy of Visa U.S.A. in his testimony before the Commission on Online Protection in 2000 where he stated that

[T]he [Child Online Protection] Act basically assumes that only adults have access to a credit card or debit card. To the contrary...[a]ccess to a credit card or a debit card is not a good proxy for age. The mere fact that a person uses a credit card or a debit card in connection with a transaction does not mean that this person is an adult.

sites were vulnerable to use by organized crime for laundering money.<sup>49</sup> In response, Antigua questioned the validity of the argument by the United States for the protection of public morals and public order on the bases that the United States is itself a significant consumer of gambling and betting services and that state-sanctioned gambling opportunities are available in forty-eight states.<sup>50</sup>

Furthermore, regarding its defense under Article XIV(c), the United States argued that the Wire Act, the Travel Act and the Illegal Gambling Business Act serve as law enforcement tools to secure compliance with other WTO-consistent U.S. laws, in particular, state gambling laws and criminal laws relating to organized crime.<sup>51</sup> As to this defense, Antigua responded that the United States did not meet its burden to provide sufficient information on the laws upon which it relied for the defense.<sup>52</sup> In rebuttal, the United States stated that Members' legislation is presumed to be WTO-consistent, including all legislation invoked by the United States in support of its Article XIV defense.<sup>53</sup>

The Panel applied a two-tiered test to evaluate the Article XIV defense. Thus, in order for the United States to successfully claim protection under this exception, the Panel would first have to find that its measures were necessary to protect public morals or public order, or to secure compliance with its laws.<sup>54</sup> Second, the measures must not have been

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Mark MacCarthy, Senior Vice President for Pub. Policy, Visa U.S.A., Testimony Before the Commission on Online Protection (June 9, 2000).

49. Internet Gambling Panel Report, *supra* note 7.

50. *Id.* In its first submission to the WTO Panel, Antigua claimed that “[t]he United States is the world’s largest consumer of gambling and betting services, with a massive domestic industry responsible for generating gross revenues of approximately US \$68.7 billion in 2002.” First Submission of Antigua and Barbuda, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Oct. 8, 2003), available at [http://www.antigua-barbuda.com/business\\_politics/pdf/Antigua\\_FirstSubmission\\_ExecutiveSummary.pdf](http://www.antigua-barbuda.com/business_politics/pdf/Antigua_FirstSubmission_ExecutiveSummary.pdf) (citing Joe Weintert, *U.S. Gambling Losses Hit \$68.7B. Last Year*, PRESS OF ATLANTIC CITY (N.J.), Aug. 17, 2003, at G3). Among the estimated 1800 internet gambling operations currently in existence globally, up to 70% of all bets come from within the United States. Megan E. Frese, *Rolling the Dice: Are Online Gambling Advertisers “Aiding and Abetting” Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 547, 549–50 (2005).

51. Internet Gambling Panel Report, *supra* note 7.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

applied arbitrarily or discriminatorily, as required by the *chapeau*, or introductory provision of Article XIV.<sup>55</sup>

Ultimately, the finding of the Panel against the United States in this case hinged on its ruling that the United States did not successfully meet the requirements to invoke an Article XIV defense. The Panel held that, because the United States did not sufficiently seek alternate measures that would meet U.S. policy objectives without violating its GATS commitments, it did not meet its burden to prove that its measures at issue were “necessary” under Article XIV(a).<sup>56</sup>

Further, as for the exception claimed by the United States under Article XIV(c), the Panel went through the same pattern of analysis as it did for Article XIV(a), and reached the same conclusions.<sup>57</sup> Specifically, the Panel held that while the interest protected by the disputed statutes are important and make a significant contribution to enforcing criminal laws relating to organized crime, the measures have a significant impact on trade.<sup>58</sup> The United States was thus at fault for its failure to explore and exhaust WTO-consistent alternatives by consulting and/or negotiating to determine whether there was a way to address its concerns in a WTO-consistent manner.<sup>59</sup>

This finding that the United States inadequately sought WTO-consistent alternatives effectively defeated the defense claimed by the United States in this dispute. Nevertheless, the Panel moved to the second tier of analysis in the provision, the introductory provisions of Article XIV, the so-called *chapeau*, by considering Antigua’s other claims against the United States.<sup>60</sup> The Panel found that the United States may be applying its measures in a way that violates the requirement in the *chapeau* to Article XIV of the GATS that “measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail.”<sup>61</sup> The Panel based this conclusion on evidence that inconsistent U.S. enforcement efforts benefited U.S.-based suppliers of gambling services in that foreign suppliers were more often the targets of prosecution than U.S.-based suppliers.<sup>62</sup>

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Key Facts and Summary, *supra* note 9.

62. Pauwelyn, *supra* note 6.

The ruling of the Panel was a major triumph for Antigua, yet there were serious doubts as to whether Antigua could garner enough strength to enforce the decision, and whether the ruling would survive appeal by the United States.<sup>63</sup> Further dampening Antigua's victory, the United States suggested it would refuse to accept the WTO ruling or to adjust its laws to conform to that ruling.<sup>64</sup> In fact, the United States went so far as to threaten to activate its right to change the terms under which it joined the WTO in the first place.<sup>65</sup> As expected, the United States did appeal the Panel ruling on January 7, 2005.<sup>66</sup>

### *B. U.S. Victory in the WTO Appellate Body Ruling*

On April 7, 2005 the Appellate Body of the WTO handed down its noteworthy decision regarding Antigua's dispute, reversing the Panel's decision against the United States.<sup>67</sup> The Appellate Body affirmed the Panel's finding that the U.S. Schedule under the GATS did indeed include a commitment to grant full market access in gambling and betting services, though the Appellate Body relied on different instruments to come to this conclusion than did the Panel.<sup>68</sup> Next, the Appellate Body

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63. *US-Antigua Gambling Dispute Raises Systemic Issues*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEVELOPMENT, BRIDGES WEEKLY TRADE NEWS DIGEST, Vol. 8, No. 40, Nov. 24, 2004.

64. *Id.*

65. WTO Rules Against US Gambling Ban, *supra* note 6.

66. Notification of Appeal by the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/6 (Jan. 7, 2005).

67. Internet Gambling Appellate Body Report, *supra* note 8. The Appellate Body's ruling in favor of the United States was in fact a largely expected outcome. Joost Pauwelyn, *WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation*, THE AM. SOC'Y OF INT'L L., Apr. 2005, available at <http://www.asil.org/insights/2005/04/insights050412.html>.

68. Key Facts and Summary, *supra* note 9. Specifically, the Appellate Body disagreed with the Panel's use of some dictionaries' inclusion of "gambling" or "betting" in their definitions of "sporting," "recreational services," and "entertainment" in order to conduct an "ordinary meaning" interpretation under Article 31 of the Vienna Convention. *Id.* The Appellate Body also disapproved of the Panel's reliance on a GATS Services Sectoral Classification List and the General Agreement on Tariffs and Trade 1993 Scheduling Guidelines for an Article 31 context based interpretation because these documents were not agreements relating to the GATS that were accepted by the parties as binding. *Id.* Instead, the Appellate Body sought context in the United States' Schedule as a whole and the structure of the GATS itself. *Id.* Comparing the United States' Schedule with those of other Members, the Appellate Body noted that unlike the United States, other Members had explicitly committed or excluded gambling and betting services. *Id.* Also, there were no other examples where the category of "sporting services" clearly included gambling and betting services. *Id.* Finding this inconclusive, the Appellate Body then turned to an Article 32 means of interpretation, namely by using the GATS Services Sectoral Classifi-

upheld the finding by the Panel that the federal Wire Act, Travel Act and Illegal Gambling Business Act violated the GATS market access obligations under Article XVI, though it reversed the Panel's finding of GATS violations in the state laws of Louisiana, Massachusetts, South Dakota, and Utah because of Antigua's inability to establish a *prima facie* case on that issue.<sup>69</sup>

The Appellate Body proceeded by conducting a substantive review of the Article XIV defense claimed by the United States.<sup>70</sup> In examining the Panel's analysis of Article XIV(a), the Appellate Body upheld the finding of the Panel that the federal Wire Act, Travel Act, and Illegal Gambling Business Act were designed to protect public morals.<sup>71</sup> The Appellate Body also considered the alleged discriminatory application of the U.S. federal statutes by reviewing the Panel's finding that the United States had not prosecuted certain domestic remote gambling service providers and that the U.S. Interstate Horseracing Act ("IHA")<sup>72</sup> may allow remote betting within the United States.<sup>73</sup> However, on this issue of discriminatory application, the Appellate Body reversed the ruling of the Panel that the United States did not satisfy the *chapeau* of Article XIV.<sup>74</sup>

The Appellate Body then made a crucial departure from the Panel by finding that the measures at issue were necessary, without requiring the United States to have sought WTO-consistent alternatives.<sup>75</sup> Thus, the Appellate Body reversed the ultimate finding of the Panel against the

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cation List and the General Agreement on Tariffs and Trade 1993 Scheduling Guidelines as relevant "preparatory work". *Id.* Within these documents the Appellate Body found sufficient evidence that the United States' GATS commitments include gambling and betting services. *Id.*

69. Internet Gambling Appellate Body Report, *supra* note 8.

70. *Id.*

71. *Id.*

72. The Interstate Horseracing Act ("IHA") allows an off-track betting system to accept interstate off-track wagers via telephone or other electronic media in the same or another state with respect to a horserace. 15 U.S.C. § 3002 (1978).

73. Internet Gambling Panel Report, *supra* note 7.

74. Internet Gambling Appellate Body Report, *supra* note 8. Although the Appellate Body upheld the finding of the Panel regarding the discriminatory nature of the IHA, the Appellate Body disagreed with the Panel regarding the enforcement of the other three federal statutes. *Id.* Because these statutes were facially neutral, the Panel looked to evidence of discriminatory application, which consisted of five cases: one case of prosecution against a foreign service supplier, one case of pending prosecution against a domestic supplier and three cases of no prosecution against domestic suppliers. *Id.* The Appellate Body viewed these cases as "isolated instances of enforcement" that did not merit dependence by the Panel. *Id.*

75. Internet Gambling Appellate Body Report, *supra* note 8; Internet Gambling Panel Report, *supra* note 7.

Article XIV defense claimed by the United States, and found that the United States did sufficiently show that the federal statutes in question are “necessary to protect public morals or to maintain public order” and are justified as such because they are not applied arbitrarily or discriminatorily.<sup>76</sup>

To counter the finding of the Appellate Body that the U.S. measures are protected under Article XIV, Antigua raised a due process argument that the Panel should not have even considered the defense claimed by the United States because its delayed presentation of that defense deprived Antigua of “a full and fair opportunity to respond to the defence.”<sup>77</sup> However, based on Antigua’s comments at the appellate hearing and Antigua’s failure to raise this objection to the Panel, the Appellate Body reasoned that Antigua was apparently aware that the United States might argue for exception under Article XIV and had an adequate opportunity to respond.<sup>78</sup> The Appellate Body also considered arguments from both the United States and Antigua regarding accusations against the Panel for forming arguments and rebuttals in place of the parties whose responsibility it was to do so.<sup>79</sup> The Appellate Body ruled that the Panel had not usurped the respective duties of the parties to present their own arguments and rebuttals.<sup>80</sup>

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76. Key Facts and Summary, *supra* note 9. Because the Appellate Body already established that Antigua failed to make a *prima facie* claim against the eight U.S. state laws in its dispute, the Appellate Body limited its review of the U.S. Article XIV defense to only the three federal laws that were found to be in violation of U.S. GATS Article XVI commitments. Internet Gambling Appellate Body Report, *supra* note 8.

77. *Id.* (quoting Antigua’s other appellant’s submission, para. 73).

78. *Id.*

79. *Id.* Antigua accused the Panel of bearing the burden of the United States by constructing an Article XIV defense for the United States. *Id.* To support this claim, Antigua identified three public morals or public order concerns that the Panel raised on its own initiative: money laundering, fraud, and public health. The United States made a parallel contention that after it established a proper Article XIV defense for the three federal acts in question, the Panel improperly constructed a rebuttal under the Article XIV chapeau when Antigua itself failed to do so. *Id.* According to the Appellate Body, a panel may freely use the arguments submitted by the parties or develop its own legal reasoning to support its findings and conclusions, though it may not put forward evidence in support of a defense or rebut a claim. *Id.* Nevertheless, the Appellate Body easily dismissed Antigua’s claim here because it found that the United States had in fact raised all of its public morals and public order concerns. *Id.* Also, as to the claim regarding the rebuttal under the chapeau, the Appellate Body found evidence that the United States had stated that its laws were applied in a nondiscriminatory fashion and that Antigua had contested this by stating the opposite. *Id.*

80. *Id.*

Thus, the United States successfully justified its inconsistent measures under Article XIV(a) of the GATS through the Appellate Body's finding that although the federal Wire Act, Travel Act, and Interstate Gambling Act violate U.S. commitments under the GATS, those measures are necessary to protect public morals or maintain public order, and are not applied arbitrarily or discriminatorily.<sup>81</sup>

### III. ANALYSIS OF THE RULINGS OF THE WTO PANEL AND APPELLATE BODY REGARDING THE GATS ARTICLE XIV EXCEPTION

#### *A. Article XIV Analysis of the WTO Panel*

When evaluating the Article XIV exception, the Panel applied the two-tiered analysis developed in other cases concerning Article XX of the General Agreement on Tariffs and Trade ("GATT")<sup>82</sup> to aid in interpretation since Article XIV had not been previously invoked.<sup>83</sup> Reliance on Article XX of the GATT was based on the finding of "textual similarity between Article XX of the GATT of 1994 and Article XIV of the GATS" and "similar purposes that both Articles are designed to serve."<sup>84</sup> According to this "two-tiered" approach, a measure must first fall within the scope of one of the recognized exceptions in order to enjoy provisional justification, and second, must meet the requirements of the introductory provisions of the Article, the *chapeau*.<sup>85</sup> There are two elements

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81. *Id.*

82. General Agreement of Tariffs and Trade 1994, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreement on Trade in Goods, 1867 U.N.T.S. 187, 33 I.L.M. 1144, 1153 (1994) [hereinafter GATT]; General Agreement on Tariffs and Trade, Oct. 30 1947, 55 U.N.T.S. 194, 61 Stat. A3, A32 (1947) [hereinafter GATT 1947].

83. Internet Gambling Panel Report, *supra* note 7.

84. *Id.* See also Caroline Bissett, *Comment: All Bets are Off(line): Antigua's Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 397 (2004). Specifically, the Panel reviewed the Appellate Body's findings in the following disputes: Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996) [hereinafter Gasoline Appellate Body Report]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimp Appellate Body Report]; Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter Beef Appellate Body Report].

85. Internet Gambling Panel Report, *supra* note 7. See also Hans-Joachim Priess & Christian Pitschas, *Protection of Public Health and the Role of the Precautionary Principle Under WTO Law: A Trojan Horse Before Geneva's Walls?*, 24 FORDHAM INT'L L. J.

necessary for the successful invocation of Article XIV(a): (1) the measure must be designed to “protect public morals” or to “maintain public order”; and (2) the measure must be “necessary” to serve this purpose.<sup>86</sup> Taking into consideration the sensitive nature of classifying “public morals,” the Panel easily decided that the first of the above two elements may be satisfied by U.S. legislation against internet gambling.<sup>87</sup>

Regarding the second element, the Panel used the “process of weighing and balancing a series of factors” developed by the Appellate Body in the *Korea—Various Measures on Beef* and *EC—Asbestos* disputes in order to determine necessity.<sup>88</sup> This test assesses:

- (a) the importance of interests or values that the challenged measure is intended to protect....
- (b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure.... [and]
- (c) the trade impact of the challenged measure.<sup>89</sup>

The Panel found that the first part of the balance test was satisfied because the legislative history of the measures at issue showed that the societal interests served by the measures were “vital and important in the highest degree,” comparable to the interest in protecting human life and health against a life-threatening health risk in the asbestos dispute.<sup>90</sup> The

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519, 536 (2000) (discussing the application of the “two-tiered approach” in article XX cases).

86. Priess & Pitschas, *supra* note 85.

87. Internet Gambling Panel Report, *supra* note 7.

88. Beef Appellate Body Report, *supra* note 84. *See also* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, (Mar. 12, 2001) [hereinafter Asbestos Appellate Body Report].

89. Internet Gambling Panel Report, *supra* note 7.

90. *Id.* Specifically, the Panel recited comments made in 1961 by then Attorney General Robert F. Kennedy about the intended effect of the Wire Act and the Travel Act, that “profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime, all throughout the country,” Testimony of Attorney General Robert Kennedy, Hearings Before the Senate Judiciary Committee on the Attorney General’s Program to Curb Organized Crime and Racketeering, 87<sup>th</sup> Cong., 1st Sess., p. 4 (1961), and the Congressional statement of findings prefatory to the Illegal Gambling Business Act:

- (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling...and other forms of social exploitation; (3) this money and power are increasingly used to infil-

second part of the balance test was also easily satisfied by the inherent prohibitions in the disputed measures.<sup>91</sup>

In evaluating the third part of the balancing test, the Panel focused on the difference between the harms caused by the remote and non-remote supply of gambling because of its conclusion that “the United States does not prohibit outright the non-remote supply of gambling and betting services.”<sup>92</sup> The Panel found specific harms related to remote gambling, “namely the volume, speed and international reach of remote gambling transactions combined with the offshore locations of most remote suppliers and the virtual anonymity of such transactions.”<sup>93</sup> These factors purportedly facilitate use by minors, money laundering, fraud, and health problems related to the isolated environment of online gambling that protects gamblers from social stigma and allows them to gamble without interruption for extended periods of time.<sup>94</sup> For these reasons, the Panel concluded that the application of U.S. laws towards domestic non-remote gambling operations was not discriminatory in relation to its prohibition of remote gambling services despite having a significant impact on trade.<sup>95</sup>

However, to complete the evaluation of whether the measures in dispute were “necessary,” the Panel reiterated that Members may only derogate their GATS obligations under Article XIV if they have “explored and exhausted reasonably available WTO-consistent alternatives” to those measures.<sup>96</sup> Further, the Panel restated the finding of the Appellate Body in the *U.S.—Malaysia* shrimp dispute that although there may be situations where unilateral measures are justified under Article XX of

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trate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organization, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.

Congressional Statement of Finding and Purpose, Note on 18 U.S.C. § 1961 (1970), p. 812.

91. Internet Gambling Panel Report, *supra* note 7.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* This approach is taken from a WTO Panel decision against the United States, which was not adopted, in its dispute against Mexico regarding tuna and dolphin protection measures under Article XX of the 1947 General Agreement on Tariffs and Trade. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155 (Sept. 3, 1991) [hereinafter Tuna I Panel Report].

the GATT of 1994, a multilateral approach is strongly preferred “as far as possible.”<sup>97</sup>

It is at this key element regarding WTO-consistent alternatives that the United States failed to satisfy the standard put forth by the Panel for the invocation of the Article XIV exception. Addressing this critical issue, Antigua asserted that it had regulatory regimes in place to address the specific harms of remote gambling services.<sup>98</sup> Antigua further claimed that it had offered to consult with the United States to meet any remaining concerns notwithstanding its regulatory regime, but that it was repudiated by the United States even in its invitation to engage in international cooperation to deal with the specific concerns of the United States regarding remote gambling and betting services.<sup>99</sup>

The United States, on the other hand, countered that it had significant interactions with Antigua on law enforcement issues, but that it found it impossible to consider assistance from Antigua effective in curtailing illegal and harmful internet gambling operations.<sup>100</sup> The United States also claimed that it was reluctant to work with Antigua after Antigua took a public position against the United States by filing an amicus-brief in support of Cohen, the aforementioned founder of the Antigua-based World Sports Exchange gambling site, to the Supreme Court.<sup>101</sup> Further, the United States pointed out the inconsistency of expecting it to engage in international negotiations to establish a regime allowing the cross-border supply of a service while no domestic regulatory regime exists permitting that service’s remote supply.<sup>102</sup>

The Panel considered the argument of the United States, yet determined that it failed to pursue in good faith a course of action to explore the possibility of finding a reasonably available WTO-consistent alternative, and was therefore not protected by Article XIV.<sup>103</sup>

#### *B. Article XIV Analysis of the WTO Appellate Body*

In conducting a substantive review of the Article XIV defense claimed by the United States, the Appellate Body took the same approach as the Panel and relied on prior uses of the textually similar defense under Arti-

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97. Internet Gambling Panel Report, *supra* note 7 (quoting Shrimp Appellate Body Report, *supra* note 84).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

103. *Id.*

cle XX of the GATT.<sup>104</sup> The Appellate Body also recognized the two-tiered analysis the Panel used, to wit, that a measure must fall within the scope of one of the exceptions listed under Article XIV and that the measure must not be applied discriminatorily or arbitrarily.<sup>105</sup>

After having upheld the Panel's finding that the federal Wire Act, Travel Act, and Illegal Gambling Business Act were designed to protect public morals,<sup>106</sup> the Appellate Body next considered whether the measures were "necessary" pursuant to Article XIV(a).<sup>107</sup> On this issue, both the United States and Antigua raised arguments against the Panel's ruling.<sup>108</sup> Antigua claimed that, as a finding of necessity requires a sufficient nexus or degree of connection between the measure and the interest protected, the Panel failed to establish that nexus between gambling and the concerns raised by the United States.<sup>109</sup> Also, Antigua argued that the Panel did not adequately discuss the "reasonably available alternatives" that Antigua had offered to counteract the concerns of the United States because the Panel limited its analysis to the realm of existing U.S. regulatory measures.<sup>110</sup>

The United States argued against the Panel's conclusion that the United States must have first explored and exhausted all reasonably available WTO-consistent alternatives before adopting an inconsistent measure, ostensibly by consulting with Antigua regarding the prohibition on the cross-border supply of gambling and betting services.<sup>111</sup> In so doing, the United States contended, the Panel erroneously imposed on it "a procedural requirement...to consult or negotiate with Antigua before the United States may take measures to protect public morals [or] protect public order."<sup>112</sup> The United States further argued that in previous dis-

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104. GATT, *supra* note 82, 33 I.L.M. at 1153, art. XX. This article, like Article XIV of the GATS, allows exceptions for measures that are, to name a few,

(a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; ... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

*Id.*

105. Internet Gambling Appellate Body Report, *supra* note 8.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (quoting United States' appellant's submission).

putes, the availability of theoretical alternative measures did not preclude the Panel from deeming the challenged measures “necessary.”<sup>113</sup>

According to the Appellate Body, a measure is “necessary” where it is relatively important, realizes the ends it pursues, and does not restrictively impact international commerce disproportionate to its importance, and where there are not reasonably available WTO-consistent alternatives.<sup>114</sup> An alternative would not be considered “reasonably available,” for example, if the responding Member cannot use it, if it imposes an undue burden on the Member, or if it does not provide the level of protection sought under Article XIV(a).<sup>115</sup>

Notwithstanding the consideration of “necessity,” the Appellate Body followed the same reasoning as the Panel until making a crucial departure in deciding the issue of burden of proof. The Appellate Body sided with the United States, affirming that the party invoking a defense bears the burden of demonstrating that its violating measure satisfies the requirements of the invoked defense,<sup>116</sup> but holding that it is *not* the burden of the responding Member to identify WTO-consistent reasonably available alternative measures.<sup>117</sup> According to the Appellate Body, after the responding Member has established a *prima facie* case for the use of a defense, the complaining party may raise valid alternative measures.<sup>118</sup> Subsequently the burden would shift back to the responding Member to respond in rebuttal that the alternatives are not legitimate.<sup>119</sup>

The Appellate Body further disagreed with the focus of the Panel on whether the United States in good faith consulted with Antigua regarding WTO-consistent alternative measures because “consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.”<sup>120</sup> The Appellate Body firmly held that consultations should not be considered an alternative measure reasonably available to the United States.<sup>121</sup> Also, because the emphasis placed by the Panel on the absence of consultations

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113. *Id.*

114. *Id.*

115. Asbestos Appellate Body Report, *supra* note 88; Irene McConnell, *The Asbestos Case at the World Trade Organization: The Treatment of Public Health Regulations Under the General Agreement of Tariffs and Trade 1994 and the Agreement on Technical Barriers to Trade*, 10 TULSA J. COMP. & INT'L L. 153, 165–6 (2002); *see also* Beef Appellate Body Report, *supra* note 84.

116. Internet Gambling Appellate Body Report, *supra* note 8.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

showed that the Panel did in fact consider alternatives not currently in place in the United States, the Appellate Body dismissed the argument by Antigua that the review of the Panel was prohibitively limited.<sup>122</sup> Additionally, since it decided that the responding party does not bear the burden of identifying alternative measures, the Appellate Body rejected the contention by Antigua that the Panel should have continued an analysis into additional alternative measures that Antigua did not itself present.<sup>123</sup>

Having found that the United States established a *prima facie* case of necessity and that Antigua did not provide a reasonably available alternative measure, the Appellate Body reversed the determination of the Panel that the failure of the United States to enter consultations with Antigua precluded a finding that the inconsistent federal measures were “necessary” pursuant to Article XIV.<sup>124</sup> The defense claimed by the United States therefore prevailed and Antigua’s victory was overturned.

#### IV. COMPARATIVE ANALYSIS OF THE STANDARD FOR BURDEN OF PROOF IN PREVIOUS USES OF THE GENERAL EXCEPTIONS PROVISION

Many times, the successful invocation of a general exceptions provision, such as Article XIV of the GATS and Article XX of the GATT, turns on the existence of any reasonable WTO-consistent alternative measure that nullifies a “necessity” requirement. Even where the invoked exception does not explicitly contain a “necessity” requirement, as in Article XX(g), the WTO has interpreted the *chapeau* as implicitly containing it.<sup>125</sup> Article XX, and specifically its “necessity” requirement, have consistently been narrowly interpreted by the Dispute Settlement Bodies of the WTO.<sup>126</sup> Throughout cases involving the use of these de-

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122. *Id.*

123. *Id.*

124. *Id.*

125. A responding party may claim protection under an exception that has a lower standard for the required nexus between the measure and its goal. A common example of such is GATT Article XX(g), which allows protection for measures “relating to the conservation of exhaustible natural resources...” (emphasis added). GATT, *supra* note 82, 33 I.L.M. at 1153, art. XX. In these cases, the WTO has nevertheless sought necessity within its second-tier analysis of the *chapeau*, when examining whether the measure was applied in an arbitrary or unjustifiably discriminatory manner. Arie Reich, *Privately Subsidized Recycling Schemes and Their Potential Harm to the Environment of Developing Countries: Does International Trade Law Have a Solution?*, 23 VA. ENVTL. L.J. 203, 242 (2004). See also John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1 (2004).

126. Salmon Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 69 (2001) (expanding on the scope and practice of Article XX).

fenses, the burden of proof has always been on the party invoking the exception to justify its WTO-inconsistent measure.<sup>127</sup> A responding Member's use of a general exceptions clause has been allowed only where it could establish its *prima facie* case for the use of the defense by proving that there were no WTO-consistent alternative measures available.<sup>128</sup> Based on the rulings in these previous disputes, the use of the general exceptions clause by the United States does not pass muster.

*A. Thai Cigarette Dispute (1990)*<sup>129</sup>

In response to the claim by the United States that Thailand's import restrictions on cigarettes violated the GATT Article XI:1,<sup>130</sup> Thailand argued that its measures were justified under Article XX(b) for the protection of human life.<sup>131</sup> The Panel found that the import restriction was in fact inconsistent with the GATT and then considered Thailand's defense, ultimately concluding that the measure was not "necessary."<sup>132</sup> The Panel stated that Thailand's import restrictions "could be considered 'necessary'...only if there were no alternative measures consistent with the General Agreement [on Tariffs and Trade], or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its

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127. Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1137 (1999) (discussing the difficulty of meeting that burden in Article XX cases).

128. *Id.*

129. Panel Report, *Thailand—Restriction on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S/200 (Nov. 7, 1990) [hereinafter Cigarette Panel Report]. The United States brought this dispute against Thailand for placing a prohibition on the importation of cigarettes and other tobacco goods while authorizing the domestic sale of cigarettes. J.H.H. Weiler & Sungjoon Cho, *International and Regional Trade Law: The Law of the World Trade Organization: Unit VIII: General Exceptions* (2004), [http://www.nyulawglobal.org/researchtools/wto/pdfs/WTO\\_2004\\_UnitVIII.pdf](http://www.nyulawglobal.org/researchtools/wto/pdfs/WTO_2004_UnitVIII.pdf).

130. GATT 1947, *supra* note 82, 61 Stat. at A32, Art. XI. Article XI:1 reads, in pertinent part: "No prohibitions or restrictions...made effective through...import or export licenses...shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party..." *Id.*

131. Weiler & Cho, *supra* note 129, at 8. To wit, Article XX(b) of GATT 1947 excepts measures "necessary to protect human, animal or plant life or health." GATT 1947, *supra* note 82, 61 Stat. at A61, Art. XX. Thailand claimed that its import restriction was necessary for this purpose because American cigarettes posed a greater health risk than its domestic brands: they contained unknown and potentially dangerous chemicals, were more addictive, and were milder tasting and thus more attractive. Cigarette Panel Report, *supra* note 129.

132. Weiler & Cho, *supra* note 129, at 8; *see also* Kruis, *supra* note 133, at 925.

health policy objectives.”<sup>133</sup> Because the United States had suggested several alternatives to Thailand’s regulations, the Panel found that Thailand’s measures were not actually “necessary.”<sup>134</sup>

This case set a high standard of review for WTO-inconsistent measures. In naming the suggested alternative measures, such as labeling and disclosure regulations, a ban on cigarette advertisements, or higher taxes for cigarettes, the Panel ignored whether these alternatives were politically or economically feasible to Thailand.<sup>135</sup> However, in the internet gambling dispute at hand, the Appellate Body was relatively far more forgiving to the United States in evaluating its reasons for not pursuing alternative measures with Antigua.

*B. United States Tuna Dispute (1991)*<sup>136</sup>

Mexico brought a complaint against the United States for its dolphin-friendly tuna importing restrictions.<sup>137</sup> In response, the United States invoked GATT Articles XX(b) and (g) exceptions for its measures.<sup>138</sup> The necessity test was applied to this case and the Panel stated that since the United States was invoking the defense, it had the burden of proving necessity.<sup>139</sup> The Panel found that the United States had not satisfactorily pursued a consistent measure in that it did not try to negotiate any inter-

133. Elizabeth E. Krus, *The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier?*, 14 LOY. L.A. INT’L & COMP. L.J. 903, 925 (1992) (quoting Cigarette Panel Report, *supra* note 129); *see also* Ala’I, *supra* note 127.

134. Krus, *supra* note 133, at 925. According to Report,

The United States considered that Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes.

Cigarette Panel Report, *supra* note 129.

135. Reich, *supra* note 125, at 243.

136. Laura Yavitz, *The WTO and the Environment: The Shrimp Case That Created a New World Order*, 16 J. NAT. RESOURCES & ENVTL. L. 203, 207 (2001–02).

137. *Id.* at 207.

138. *Id.* at 207. GATT 1947 Article XX(b) excepts measures “necessary to protect human, animal or plant life or health” and Article XX(g) excepts measures “relating to the conservation of exhaustible natural resources...” GATT 1947, *supra* note 82, 61 Stat. at A61, art. XX.

139. Krus, *supra* note 133, at 925–6.

national cooperative arrangements for protecting dolphins.<sup>140</sup> For this reason, the United States did not meet its burden and its Article XX defense failed.<sup>141</sup> Through this analysis, the Panel indirectly inserted the requirement that in order to satisfy "necessity," the responding party must have exhausted all other options before imposing the measure.<sup>142</sup>

In the internet gambling dispute, however, the Appellate Body held that the United States neither needed to exhaust, nor even name alternative measures.<sup>143</sup> Thus, the holding of the Appellate Body in the internet gambling dispute that a complaining Member ought to raise valid alternative measures directly counters the Panel's holding in the tuna dispute that a responding Member has the burden of proving necessity. Also, contrary to the holding of the Panel in the tuna dispute, the Appellate Body dismissed the requirement that the United States pursue international cooperation, specifically with Antigua, because of the assertion by the United States that Antigua's position was deleterious to the interests of the United States.<sup>144</sup> Furthermore, the Appellate Body never suggested that the United States should have complied with the holding in the tuna dispute by attempting to initiate international agreements, even with the exclusion of Antigua, to support its concerns for public morals and public order regarding the cross-border trade in gambling and betting services.<sup>145</sup>

*C. United States Gasoline Dispute (1996)*<sup>146</sup>

In the gasoline dispute brought by Venezuela and Brazil, a United States measure was found in violation of GATT Article III,<sup>147</sup> and the United States again used Article XX(b) and Article XX(g) defenses.<sup>148</sup> The Panel decided that under Article XX(b) the measure did involve pro-

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140. Yavitz, *supra* note 136, at 216. In its decision, the panel held that the Article XX exception clause "was intended to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable." Tuna I Panel Report, *supra* note 96.

141. Yavitz, *supra* note 136, at 216.

142. Ala'I, *supra* note 127.

143. Internet Gambling Appellate Body Report, *supra* note 8.

144. *Id.*

145. *Id.*

146. Gasoline Appellate Body Report, *supra* note 84. Brazil and Venezuela brought this dispute against the United States for a U.S. rule that regulated the gasoline that could be imported into the United States. Weiler & Cho, *supra* note 129.

147. GATT, *supra* note 82, 33 I.L.M. at 1153, art. III. Article III relates to national treatment. *Id.*

148. Weiler & Cho, *supra* note 129.

tection of human, animal, and plant life or health, however the defense again failed because it was not “necessary” since there were other WTO-consistent, or less inconsistent, measures reasonably available to the United States.<sup>149</sup> The Panel clearly noted that the burden fell to the United States to prove that its objectives precluded the effective use of measures that were WTO-consistent, or less inconsistent.<sup>150</sup>

On appeal, the Appellate Body followed the standard approach of requiring the responding Member to satisfy all the elements of the general exception it is invoking, including the *chapeau* requirements.<sup>151</sup> Its decision held that the contravening measure fell within the terms Article XX(g) in that it related to the conservation of exhaustible natural resources, but that it did not satisfy the *chapeau* because the United States had not sufficiently explored means of mitigating the problem in cooperation with Venezuela and Brazil.<sup>152</sup> In this way, the Appellate Body imposed an “exploration” requirement on a responding party in order to pass a necessity test.

The exploration requirement posited by the Appellate Body in the gasoline dispute is incongruously similar to that which was disposed of by the Appellate Body in the internet gambling dispute. In the dispute over the internet gambling prohibitions of the United States, the Appellate Body claimed that the Panel erroneously focused on whether the United States attempted in good faith consultations with Antigua because consultations should not be considered an alternative measure reasonably available to the United States.<sup>153</sup> However, the exploration requirement

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149. *Id.*

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

151. Jeffrey Waincymer, *Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?*, 18 MICH. J. INT'L L. 141, 177 (1997) (asserting that, “In upholding the view that parties seeking to rely on an exempting provision should have the onus of proof under it, the Appellate Body’s approach is consistent with that of previous panels.”).

152. Weiler & Cho, *supra* note 129. Specifically, the Appellate Body concluded that

[T]he United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. . . . [The record] does not reveal what, if any, efforts had been taken by the United States [sic] to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil. . . .

Yavitz, *supra* note 136, at 219–20; see also Andrew Green, *Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules?*, 8 J. INT'L ECON. L. 143, 178–79 (2005).

153. Internet Gambling Appellate Body Report, *supra* note 8.

of the gasoline dispute, along with its reiteration that a responding Member carries the onus of proof for the invocation of an exceptions clause, indeed suggest that the United States should have at least attempted consultations with Antigua as a means of finding alternative measures.

*D. United States Shrimp Dispute (1998)*<sup>154</sup>

In the shrimp dispute, India, Malaysia, Pakistan and Thailand brought a complaint against the United States and the Appellate Body held that U.S. measures were inconsistent with GATT Article XI.<sup>155</sup> As in the gasoline dispute, the measure did fall under Article XX(g) according to the Appellate Body, but failed the necessity test imposed on it through the *chapeau* analysis.<sup>156</sup> In this part of its review, the Appellate Body applied a necessity test to the “unjustifiable discrimination” clause of the *chapeau*.<sup>157</sup> It held that failure to engage the exporting countries in negotiations, or to attempt diplomacy before applying inconsistent measures, nullifies the use of a general exceptions defense.<sup>158</sup> Specifically, recognizing the need for international cooperation, the Appellate Body expressed that the failure of a responding party to seek alternate means through international agreement rendered the measure unjustifiable.<sup>159</sup>

Once again, the ruling of the Appellate Body in the shrimp dispute, where it required a responding party to seek international cooperation to achieve the goals of its violating measure, directly contradicts its ruling in the internet gambling dispute.<sup>160</sup> In the shrimp dispute, negotiations or diplomacy by the responding Member were mandatory elements to satisfy a general exceptions clause, whereas in the internet gambling dispute, lack of consultations with the complaining Member were regarded as insignificant.

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154. Shrimp Appellate Body Report, *supra* note 84.

155. Yavitz, *supra* note 136, at 208. Article XI eliminates any kind of quantitative restrictions on imports. GATT, *supra* note 82, 33 I.L.M. at 1153, art. XI.

156. Yavitz, *supra* note 136, at 208.

157. *Id.* at 222.

158. *Id.*

159. *Id.*; see also Patricia Larios, The Fight at the Soda Machine: Analyzing the Sweetener Trade Dispute Between the United States and Mexico Before the World Trade Organization, 20 AM. U. INT'L L. REV. 649, 667 (2005) (stating that “[t]he Appellate Body concluded that the measure unjustifiably and arbitrarily discriminated between countries, mainly because of the United States’ failure to negotiate via and international agreement”).

160. Larios, *supra* note 159, at 667.

## V. CONCLUSION

Under the holding of the Appellate Body in the case against the United States for its measure prohibiting internet gambling services, it is the duty of the complaining party, not the responding party, to name alternatives. Further, failure to consult with the complaining party about alternatives cannot preclude the responding party from using a general exceptions defense because consultations are only the “process” of conceiving alternatives.<sup>161</sup> This formula imprudently creates a disincentive for WTO Members to ever consider WTO-consistent alternatives.

It is incumbent on the country invoking a general exceptions provision to prove that the measure at issue meets the standard for the “necessity” requirement in that provision.<sup>162</sup> The responding country should bear the burden because its measure is in violation of an agreed term of trade, and this carries the presumption that the measure at issue is biased to the advantage of domestic producers. Therefore it is the duty of the regulating country to substantiate that its measure is necessary, that it has exhaustively considered alternative options before adoption of that measure,<sup>163</sup> that the measure is the least trade-restrictive measure among other available alternative measures, or that there are no other reasonable WTO-consistent measures that meet its policy goals. The responding party may even satisfy its burden by showing a “good faith effort” in negotiating WTO-consistent alternatives.<sup>164</sup>

Although WTO Panel and Appellate Body decisions do not create or rely on legally binding precedent, it has been the tradition of the WTO Dispute Settlement Bodies to consider and apply interpretations and con-

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161. Internet Gambling Appellate Body Report, *supra* note 8.

162. Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?*, 16 NW. J. INT'L L. & BUS. 441, 466 (1996) (citing Panel Report, Canada—Administration of the Foreign Investment Review Act, L/5504–30/S140 (Feb. 7, 1984); Panel Report, United States—Restriction on Imports of Tuna, DS29/R (June 16, 1994)).

163. Ala'I, *supra* note 127 (referring to the standard established by the Panel in its Tuna I decision, Tuna I Panel Report, *supra* note 96).

164. Yavitz, *supra* note 136, at 227 (Identifying this standard in the gasoline and shrimp disputes).

[T]he Gasoline Appellate Body not only suggested that the conclusion of an environmental agreement would satisfy the requirements of Article XX, but...it noted that the United States failed to show that it even tried to negotiate such an agreement... [T]he Shrimp Appellate Body noted that the United States did not reach or seriously attempt to reach an environmental agreement.

*Id.*

clusions from previous disputes.<sup>165</sup> Thus, the Appellate Body should have drawn on its previous analyses and conclusions, and affirmed the decision of the Panel in Antigua's dispute with the United States on its measures prohibiting the cross-border trade in gambling and betting services. Applying the same standard for burden of proof in the GATS Article XIV defense as in the GATT Article XX defense, Members should be required to thoroughly explore or consider WTO-consistent alternatives before implementing a measure that violates its GATS or GATT commitments. Otherwise, the integrity of the international trading system and the efforts of the WTO to liberalize trade may be too easily undermined by protective policies and frivolous exceptions.

*Irem Dogan\**

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165. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 353 (1999); see also Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3(2), Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1144, 1226 (1994).

\* B.A., American University (2002); J.D., Brooklyn Law School (2007). I would like to thank the editorial staff of the *Brooklyn Journal of International Law* for their assistance. I would like to dedicate this Note to my parents Koray and Adnan Dogan, whose inspiration and encouragement got me to law school, and to my sister Didem Dogan and friends, whose invaluable camaraderie got me through law school. All errors are my own.