

CLICK THE MOUSE AND BET THE HOUSE: THE UNITED STATES' INTERNET GAMBLING RESTRICTIONS BEFORE THE WORLD TRADE ORGANIZATION

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I. PLAYING ON TILT: THE EVER-GROWING PRESENCE OF GAMBLING AND THE EMERGENCE OF INTERNET GAMBLING IN THE UNITED STATES

The United States is a nation of gamblers. Americans wager more than \$630 billion annually on state-sanctioned gambling activities such as lotteries, riverboat casinos, and horse- and dog-track betting.¹ The National Gambling Impact Study Commission (NGISC), created by Congress to study the social and economic effects of gambling in the United States, reported, "Commercial gambling has become an immense industry. Governments are now heavily involved and increasingly active in pursuit of gambling revenues"²

The first Internet gambling establishment opened for business on August 18, 1995.³ Currently, 1500 to 1800 gambling Web sites are in operation, and annual revenues from such enterprises are likely to exceed \$7.5 billion, thereby making Internet gambling the highest

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1. Thomas James Friedrich, Comment, *Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition*, 11 *COMMLAW CONSPECTUS* 369, 369-70 (2003); Dan Ackman, *Antigua Gets a Piece of the Action*, *FORBES.COM*, Nov. 11, 2004, http://www.forbes.com/business/services/2004/11/11/cx_da_1111topnews.html. See also NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 1-1 to -2 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/1.pdf> [hereinafter FINAL REPORT]. For links to each part of the report, see National Gambling Impact Study Commission Final Report, <http://govinfo.library.unt.edu/ngisc/reports/finrpt.html> (last visited Nov. 15, 2005).

2. FINAL REPORT, *supra* note 1, at 1, available at http://govinfo.library.unt.edu/ngisc/reports/exsum_1-7.pdf (executive summary).

3. Jenna F. Karadbil, Note, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 *ARIZ. J. INT'L & COMP. L.* 413, 415 (2000).

revenue-generating online business.⁴ Fifty to seventy percent of this revenue originates from within the United States.⁵ Experts forecast that by 2010 “the Internet gambling market is expected to grow to \$18.4 billion.”⁶

While traditional, land-based gambling establishments have become deeply entrenched in American culture, Internet gambling has the potential to revolutionize American gambling “because it opens up the possibility of immediate, individual, 24 hour access to the full range of gambling in every home.”⁷ Despite the extensive presence of land-based gambling enterprises, the U.S. federal government, for various reasons that will be discussed in more detail below, has deemed Internet gambling a significant problem that must be curtailed.

Similar to the attempts to combat alcohol during Prohibition and narcotics during the War on Drugs, the U.S. prohibition of Internet gambling has resulted in significant adverse consequences. Gambling institutions that likely would not be licensed in the United States, had the country been willing to regulate rather than prohibit Internet gambling, now have control over billions of American consumers’ dollars. As the recent World Trade Organization (WTO) dispute between the United States and Antigua and Barbuda illustrates, the U.S. prohibition of Internet gambling fuels tensions in international trade relations. By regulating rather than prohibiting Internet gambling, the United States would stand a better chance of having its concerns heard both by nations licensing the Internet gambling operations and by the Internet gambling operations themselves.

II. THE HOUSE ALWAYS WINS: DOMESTIC AND INTERNATIONAL REGULATION OF GAMBLING

Before analyzing regulation of Internet gambling, this piece will first examine regulation of “brick-and-mortar” or land-based gambling. Such regulations occur mainly at the state level, though some federal laws also are used to police gambling.⁸

Historically, gambling prohibitions in the United States existed from the time of colonial independence through the first two decades of the

4. S. REP. NO. 108-173, at 2 (2003); John D. Andrle, Note, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT’L L. 1389, 1390–91 (2004); Marilyn Geewax, *U.S. Appeals Trade Ruling in Favor of Internet Gambling*, COX NEWS SERV., Jan. 14, 2005, available at <http://www.lexisnexis.com>.

5. S. REP. NO. 108-173, at 2.

6. Tony Batt, *Congress Unlikely to Act on Internet Gambling*, LAS VEGAS REV.-J., Oct. 27, 2004, at 1D, available at http://www.reviewjournal.com/lvrj_home/2004/Oct-27-Wed-2004/business/25103578.html.

7. Andrle, *supra* note 4, at 1391.

8. See *Chun v. State*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (“The scope of laws regulating gambling and lotteries is clearly a matter of predominantly state concern.”); *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) (“Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution.”).

nineteenth century.⁹ In the aftermath of the Civil War, some states legalized various forms of gambling to help boost the Southern economy.¹⁰ The Great Depression brought on a new wave of gambling in the United States as thirty-eight states introduced state lotteries.¹¹ New Jersey and Nevada, in particular, have legalized casino gambling, and Missouri, Indiana, and Illinois have legalized riverboat casino gambling.¹² The only remaining states with total prohibitions on gambling are Hawaii and Utah.¹³ Despite the increased legalization of gambling activities for land-based establishments, states have enacted new laws criminalizing Internet gambling or have applied existing gambling laws to prevent Internet gambling.¹⁴

According to the General Accounting Office (GAO), however, due to the international nature of Internet gambling—often with a Web site located in one country and a gambler in another—federal law is the primary vehicle used to prohibit Internet gambling in the United States.¹⁵ Three federal statutes effectively prohibit Internet gambling. First, the Wire Act of 1961 “makes it illegal for gambling providers to offer or to take bets from gamblers over telephone lines . . . unless that specific act is authorized by a particular state.”¹⁶ Second, the Travel Act prohibits travel or the use of mail or any facility in “interstate or foreign commerce with intent to distribute the proceeds of any unlawful activity . . . or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.”¹⁷ Finally, the Illegal Gambling Business Act makes it illegal to operate certain gambling enterprises that violate the law of a state in which the business is conducted.¹⁸ In addition to such laws, the federal government exerts pressure on financial institutions; as a result, the eight largest U.S. credit card-issuing banks voluntarily block credit card use for Internet gambling.¹⁹

9. Scott M. Montpas, Comment, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 DAYTON L. REV. 163, 165 (1996).

10. *Id.*

11. *Id.* at 165–66.

12. *Id.* at 166.

13. *Id.*

14. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3.72, WT/DS285/R (Nov. 10, 2004), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (follow “Panel Report” hyperlink under “Key Facts” heading) [hereinafter Panel Report]. For an example of a federal attempt to curb Internet gambling, see H.R. REP. NO. 108-145 (2003).

15. Panel Report, *supra* note 14, ¶ 3.72.

16. Karadbil, *supra* note 3, at 426–27; see 18 U.S.C. § 1084(a) (2000); see also Nicholas Robbins, Note, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7, ¶ 24 (1996). The law was originally created to thwart “organized gambling by denying gamblers the availability of interstate wire communications facilities.” Robbins, *supra*, ¶ 24. This law also applies to lotteries and state-licensed casinos. *Id.*

17. Panel Report, *supra* note 14, ¶ 6.368; see 18 U.S.C. § 1952(a), (b) (2000).

18. 18 U.S.C. § 1955(b)(1)(i) (2000).

19. S. REP. NO. 108-173, at 4 (2003).

Despite the resolute prohibition of Internet gambling throughout the United States, the lack of international uniformity for gambling laws has placed the United States in the unenviable position of needing to take unilateral action to protect its citizens from harms associated with Internet gambling. For instance, at least fifty-four countries now allow some form of Internet gambling.²⁰ Accordingly, owners of Internet casinos have moved outside the jurisdiction of the United States under the assumption that they will not be prosecuted.²¹ Coincident with this patchwork enforcement, Internet gambling has become an inevitable force.²²

By prohibiting rather than regulating Internet gambling, the United States deters legitimate U.S. casino operators from establishing online presences and effectively encourages entry by unlicensed, unregulated, and unknown “fly-by-night” entities.²³ Respected operators allowed to create Internet casinos likely would implement security measures that would block minors’ access to Internet gambling as well as anti-fraud measures that would provide Internet gambling sites with legitimacy.²⁴ Unfortunately, Internet casino operators have moved overseas to satisfy an ever-growing consumer demand, leaving the U.S. government to clean up the plethora of problems associated with Internet gambling.²⁵

III. KNOW WHEN TO FOLD ’EM: OPPOSITION TO INTERNET GAMBLING

Opponents of Internet gambling advance several arguments, including the facilitation of gambling by minors, the worsening of compulsive gambling addictions, the lack of anti-corruption measures, the provision of opportunities for money laundering, and the diversion of revenue from state-based gambling programs.²⁶ Opponents point specifically to the Internet’s anonymity and ease of access to explain why Internet gambling is even more dangerous than casino- or lottery-based gambling.²⁷ To add to the magnitude of these problems, the presence of Internet gambling operations is increasing rapidly due to the minimal start-up costs and great profitability of such sites.²⁸

20. Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, ¶ 1 (2004), <http://law.richmond.edu/jolt/v10i3/article26.pdf>.

21. Theresa E. Loscalzo & Stephen J. Shapiro, *Internet Gambling Policy: Prohibition Versus Regulation*, 7 VILL. SPORTS & ENT. L.J. 11, 18 (2000).

22. Cf. H.R. REP. NO. 104-440, pt. 1, at 4 (1995) (discussing the rapid growth of legalized gambling into “a significant social and economic force in [the United States]”).

23. See Loscalzo & Shapiro, *supra* note 21, at 19.

24. *Id.*

25. See *id.* at 18–19.

26. See generally Friedrich, *supra* note 1.

27. Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 BERKELEY TECH. L.J. 1021, 1024 (1999).

28. Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L. REV. 1045, 1074 (1999).

Regarding the concern over underage gambling, opponents of Internet gambling contend that Internet users' anonymity increases the likelihood that children will engage in gambling online.²⁹ Young people are the most computer literate, use the Internet more than any other age group, and are the most susceptible to the addictive powers of gambling.³⁰ Even before the explosion of Internet gambling, a study found that six percent of children under age eighteen have a "serious gambling problem."³¹ Bill Saum, Director of Agent and Gambling Activities for the National Collegiate Athletic Association, elaborates that "the rates of pathological and problem gambling among college students are higher than any other segment of the population."³² Because Internet gambling lacks the physical limitations consistent with gambling at brick-and-mortar establishments, it presents young people with endless opportunities to gamble due to inadequate warnings and ineffective mechanisms to block access.³³

Opponents of Internet gambling also are concerned with its addictive nature as well as the risks associated with addicted gamblers. In addition to the six percent of American children that have a serious gambling problem, the approximately fifteen million Americans with gambling problems are constantly confronted with the temptations of Internet gambling.³⁴ The effects of a gambling addiction, which are as dangerous as those associated with alcohol and illegal drugs, include violence, theft, economic ruin, and suicide.³⁵ "Howard Shaffer, Director of Harvard Medical School's Division on Addictions, determined that the use of [e]lectronics as a vehicle of administration for gambling activities changes the experience to make it more dependence producing."³⁶ In particular, opponents of Internet gambling are wary of

29. S. REP. NO. 108-173, at 2 (2003).

30. *Id.*

31. *See* S. REP. NO. 108-173, at 2.

32. Panel Report, *supra* note 14, ¶ 3.18.

33. S. REP. NO. 108-173, at 2; *see* Laura H. Bak-Boychuk, Notes and Comments, *Internet Gambling: Is Avoiding Prosecution in the United States as Easy as Moving the Business Operations Offshore?*, 6 SW. J. L. & TRADE AM. 363, 370 (1999). The Federal Trade Commission (FTC) visited more than one hundred gambling Web sites and found them to be easily accessible to minors, with inadequate warnings about the prohibition of underage gambling. S. REP. NO. 108-173, at 2. Because Internet gambling operations require users to deposit funds by either a credit card, bank wire transfer, or personal check, minors may begin gambling by simply stealing their parents' credit card. Loscalzo & Shapiro, *supra* note 21, at 14. According to an informal survey conducted by the FTC, minors could access gambling sites easily because there were no effective mechanisms that could block access to the sites and minors had the ability to use their parents' credit or debit cards. Press Release, Fed. Trade Comm'n, FTC Warns Consumers About Online Gambling and Children (June 26, 2002), *available at* <http://www.ftc.gov/opa/2002/06/onlinegambling.htm>.

34. S. REP. NO. 108-173, at 3.

35. *Id.*

36. John Warren Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENV. U. L. REV. 111, 115 (2002) (quoting William H. Bulkeley, *Feeling Lucky? Electronics is Bringing Gambling into Homes, Restaurants and Planes*, WALL ST. J., Aug. 16, 1995, at A1, *available at* 1995 WLNR 1838726).

the ease of gambling online, due to “twenty-four hour access, the rapid pace of Internet games, enhanced privacy . . . , [and] lower outlays on Internet games.”³⁷ Because all that is required to gamble online is an electronic depositing of funds and periodic wagering, an Internet gambler lacks a “tangible representation of money”³⁸ and therefore is detached from the funds actually being gambled, making the addictive nature of gambling that much more profound.³⁹

Opponents also argue that Internet gamblers are more susceptible to being defrauded than traditional gamblers. Ensuring the legitimacy of the games is practically impossible because, as one commentator has critiqued, “There is no way for the user to know if the dice are actually being rolled, if the roulette table is actually spinning, if the cards are dealt randomly, or if they are part of a programmed sequence to cheat customers.”⁴⁰ This problem is unique to Internet gambling operations because although land-based gambling operations are subject to strict regulations, such as auditing and background checks, Internet gambling operations are not.⁴¹ According to U.S. Representative James A. Gibbons, “[A]llowing gambling . . . on the Internet would open the floodgates for corruption, abuse and fraud.”⁴² For example, the lack of anti-cyberfraud measures and the potential for Internet gambling operations to vanish overnight already have led to incidents of Internet casinos failing to pay out winnings.⁴³

Critics also claim that Internet gambling facilitates crime. Opponents point to Internet gambling as a boon to organized crime and money-laundering operations due to “the speed, international character, and possible anonymity of certain Internet gambling transactions, together with the potential of transferring large sums of money.”⁴⁴ According to the State Department International Narcotics Control

37. Gottfried, *supra* note 20, ¶ 28.

38. Karadbil, *supra* note 3, at 439.

39. Loscalzo & Shapiro, *supra* note 21, at 15.

40. Karadbil, *supra* note 3, at 439; *see also* Aaron Craig, *Gambling on the Internet*, 1998 *COMPUTER L. REV. & TECH. J.* 61, 71 (1998), available at <http://www.smu.edu/csr/Spring98-2-Craig.pdf>.

41. Kailus, *supra* note 28, at 1073.

42. Kindt & Joy, *supra* note 36, at 139.

43. Kailus, *supra* note 28, at 1073; *see* Loscalzo & Shapiro, *supra* note 21, at 14–15. *See generally* Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998) (concerning defendant Internet casino that refused to pay winnings).

44. Gottfried, *supra* note 20, ¶ 20; *see* S. REP. NO. 108-173, at 3 (2003). According to the NGISC, “To launder money, a person need only deposit money into an offshore account, use those funds to gamble, lose a small percent of the original funds, then cash out the remaining funds. Through the dual protection of encryption and anonymity, much of this activity can take place undetected.” FINAL REPORT, *supra* note 1, at 5-6. Similarly, the Financial Action Task Force on Money Laundering (FATF) noted, “It seems that Internet gambling might be an ideal web-based ‘service’ to serve as a cover for a money laundering scheme through the net. There is evidence in some FATF jurisdictions that criminals are using the Internet gambling industry to commit crime and to launder the proceeds of crime.” FIN. ACTION TASK FORCE ON MONEY LAUNDERING, REPORT ON MONEY LAUNDERING TYPOLOGIES: 2000–2001, ¶ 16 (2001), available at <http://www.fatf-gafi.org/dataoecd/29/36/34038090.pdf>.

Strategy Report, Internet gambling is considered a “vehicle for money laundering and tax evasion.”⁴⁵ The Department of Justice and the FBI have expressed similar concerns about Internet gambling.⁴⁶ Because so many Internet gambling sites are located outside the United States, monitoring such activities is highly difficult.⁴⁷

One relatively undisputed argument in this debate is that Internet gambling diverts money that could be spent on state gambling programs such as lotteries, thereby resulting in a net economic loss for the state.⁴⁸ Because land-based gambling operations pay licensing fees and taxes while Internet operations do not, Internet gambling drains the resources of state governments.⁴⁹ This leaves states with a limited ability to deal with the negative byproducts of gambling, including treatment of compulsive gamblers, enforcement of measures to combat fraudulent establishments, and prosecution of money laundering and other instances of organized crime.⁵⁰ The loss of state revenue due to Internet gambling is significant considering that, for example, the gambling industry in Nevada contributed \$2.2 billion in federal, state, and local taxes, and the New Jersey gambling industry paid over \$300 million in taxes in 1996.⁵¹ Those figures do not include secondary revenue associated with a land-based casino, such as the goods and services purchased when an individual attends such an establishment.⁵² Moreover, as opposed to land-based casinos, Internet gambling sites create few, if any, jobs.⁵³ In essence, the prohibition on Internet gambling serves to take money directly away from state governments that later must deal with the problems associated with Internet gambling.

45. S. REP. NO. 108-173, at 3. As stated by a Detective Inspector of the Ontario Illegal Gaming Enforcement Unit, “Internet gambling provides organized criminals with everything they could ever want from a criminal enterprise: anonymity, large amounts of cash, the ability to control the odds, very little chance of getting caught, and power. Criminals gravitate towards money and the more fast-moving the money is, the more appealing it is.” Panel Report, *supra* note 14, ¶ 3.189.

46. See Panel Report, *supra* note 14, ¶ 3.191 (“Despite its appearance of legitimacy, organized crime has already infiltrated [offshore gambling.]”); see also *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Comm. Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 10 (2003) (statement of John G. Malcolm, Deputy Assistant Att’y Gen., U.S. Department of Justice).

47. See S. REP. NO. 108-173, at 3–4.

48. Craig, *supra* note 40, at 70–71.

49. See Schwarz, *supra* note 27, at 1025.

50. *Id.*

51. FINAL REPORT, *supra* note 1, at 7-16 to -17.

52. Ryan D. Hammer, Note, *Does Internet Gambling Strengthen the U.S. Economy? Don’t Bet on It*, 54 FED. COMM. L.J. 103, 118 (2001).

53. Craig, *supra* note 40, at 70–71. According to Bernie Horn, the political director of the National Coalition Against Legalized Gambling, “There are virtually no jobs created and there’s no tax revenue derived. . . . [Internet gambling] creates kind of a black hole for people’s money.” Mary Ann Akers, *Bill Would Make Gambling on Internet a Federal Crime*, WASH. TIMES, Jan. 27, 1998, at A8, available at 1998 WLNR 380936; see Kindt & Joy, *supra* note 36, at 129.

IV. PLAYING “HEADS UP”: ANTIGUA VERSUS THE UNITED STATES AT THE WTO

A. *Building a Bankroll: Antigua’s Emergence as the Offshore Gambling Hotspot*

Since the 1960s, Antigua and Barbuda (“Antigua”), a twin-island state with a population of 72,000, has worked to diversify its agrarian economy by developing a service infrastructure focused primarily on gambling and betting services.⁵⁴ By the end of 1999, the Antiguan government was licensing 119 Internet gambling and betting operators, providing the government with more than \$7.4 million in revenue and accounting for more than ten percent of Antigua’s gross domestic product.⁵⁵ According to Antigua’s submission to the WTO, however, the results of the U.S. prohibition of Internet gambling were that “the number of licensed gambling and betting operations decreased over 710%; the number of people employed in the industry decreased 750%, along with a decrease in government licensing fees of over 410%.”⁵⁶ Antigua thus alleged that U.S. efforts to prohibit Internet gambling, such as laws criminalizing the taking of offshore bets, caused the decline of its gambling industry.⁵⁷

B. *Calling the Bluff: Whether the U.S. Prohibition of Internet Gambling Violates Article XVI of the GATS*

Antigua then attempted to engage the United States in consultations regarding the alleged restrictions on the cross-border supply of Internet gambling and betting services.⁵⁸ Because the United States effectively committed to allowing market access to Internet gambling, Antigua claimed that both U.S. state and federal laws violated U.S. market access commitments under the General Agreement on Trade in Services (GATS).⁵⁹ When these consultations proved unsuccessful, Antigua requested the establishment of a WTO Dispute Settlement Body Panel (“Panel”) to adjudicate the legality of the U.S. measures in question.⁶⁰

54. 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. 13, ¶ 4, <http://www.law.duke.edu/journals/dltr/articles/PDF/2004DLTR0013.pdf>; see Caroline Bissett, Comment, *All Bets are Off(Line): Antigua’s Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 372 (2004).

55. Panel Report, *supra* note 14, ¶ 3.5; Thayer, *supra* note 54, ¶ 4.

56. Thayer, *supra* note 54, ¶ 6. Figures now show only twenty-eight operators that together employ fewer than 500 individuals. Panel Report, *supra* note 14, ¶ 3.5.

57. Panel Report, *supra* note 14, ¶ 3.5.

58. *Id.* ¶ 1.1.

59. *See id.* ¶ 3.31.

60. *Id.* ¶ 1.2.

One hundred twenty-three countries (each a “Member”) adopted the GATS in 1994 at the Uruguay Round of tariff negotiations.⁶¹ The GATS covers four modes of supply, one of which is the cross-border supply of services, defined in Article I:2(a) as the “supply of a service from the territory of one Member into the territory of any other Member.”⁶² Under the GATS, “the full nature and extent of each Member’s obligations . . . can only be determined by reference to their respective ‘schedules of specific commitments.’”⁶³ These schedules of specific commitments are lists created by a Member declaring the tariff rates it charges for each service provided by an exporting Member.⁶⁴ Therefore, the first critical issue in this case was whether the United States included gambling under its schedules of commitments.⁶⁵

According to the Panel, Antigua bore the burden of proving the U.S. commitment to gambling services.⁶⁶ As the Panel stated, proving that commitment required Antigua to establish a prima facie case

- (i) that the United States has adopted or maintained some specific measure(s);
- (ii) that the scope and meaning of the specific measure(s) adopted or maintained is [sic] such that they affect the cross-border supply of gambling services;
- (iii) that the United States has inscribed a commitment in the relevant sector of its schedule to the GATS for measures affecting those services; and
- (iv) that the commitment prohibits the maintenance or adoption of such measure(s).⁶⁷

To prove the first two elements, Antigua argued that the United States maintained a complete prohibition against Internet gambling.⁶⁸ According to Antigua’s submission, the total U.S. prohibition encompassed both state laws prohibiting Internet gambling within the state territories as well as federal laws prohibiting cross-border mechanisms from circumventing the state prohibitions.⁶⁹ Because its operators had no possibility of obtaining authorization to supply offshore gambling services, Antigua challenged the cumulative impact of state and federal laws as embodying a complete prohibition on the cross-border supply of gambling and betting services.⁷⁰

In proving the third element, Antigua claimed that if the United States wanted to exclude Internet gambling from its commitments, it

61. World Trade Organization, The Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Nov. 5, 2005). See generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1168–69 (1994), available at http://www.wto.org/english/docs_e/legal_e/03-fa.pdf [hereinafter Final Act].

62. Final Act, *supra* note 61, at 1168–69.

63. Panel Report, *supra* note 14, ¶ 3.30.

64. See *id.* ¶ 6.44.

65. See *id.* ¶ 6.4.

66. *Id.* ¶ 3.54.

67. *Id.* ¶ 3.40.

68. *Id.* ¶ 3.74.

69. *Id.* ¶ 3.106.

70. See *id.* ¶ 6.153.

needed to do so unambiguously, as had other countries such as Austria, Bulgaria, Finland, Slovenia, and Sweden.⁷¹ Instead, as Antigua emphasized in interpreting the U.S. schedules of commitments (“U.S. Schedule”) section covering “sporting and other recreational services,” particular interpretive guidelines—the Services Sectoral Classification List, W/120, and the 1993 Scheduling Guidelines—demonstrated a U.S. commitment to full market access and national treatment for the cross-border supply of gambling and betting services.⁷² Additionally, Antigua argued that the ordinary meanings of “Other recreational services (except sporting)” and “Entertainment services,” the headings of sub-sectors 10.D and 10.A of the U.S. Schedule, respectively, imply that gambling and betting services could be included under either category.⁷³

In its defense, the United States argued that its Schedule did not include gambling or betting services.⁷⁴ By focusing on the ordinary meaning of the terms in dispute, the United States contended that its commitments did not implicitly tolerate Internet gambling.⁷⁵ The United States also emphasized its specified exemption under sub-sector 10.D for “sporting,” which is the only term among the two other key terms at issue—“recreational” and “entertainment”—that dictionaries link to gambling.⁷⁶ Finally, the United States reminded the Panel that it did not schedule and would not have scheduled commitments for gambling and betting services because of its policy concerns and legal prohibitions against those services.⁷⁷

To resolve the dispute, the Panel first examined the sporting exemption in the U.S. Schedule.⁷⁸ An evaluation of several dictionaries revealed that some definitions of “sporting” were synonymous with gambling while others were not.⁷⁹ The Panel thus decided that the ordinary meaning of sporting was ambiguous in reference to gambling and betting services.⁸⁰ However, after examining the meaning of sporting in both French and Spanish, the Panel concluded that the meaning did not include gambling.⁸¹

Next, the Panel examined the meaning of the words “other recreational services” and “entertainment services” to determine whether they included gambling and betting services.⁸² The Panel again searched dictionaries for the ordinary meaning of the disputed terms.⁸³

71. *See id.* ¶ 3.37 n.108.

72. *See id.* ¶¶ 3.48–49, .124.

73. *Id.* ¶¶ 3.31, .33.

74. *Id.* ¶ 3.45.

75. *Id.* ¶ 3.51.

76. *Id.* ¶¶ 3.51, 6.133.

77. *Id.* ¶ 6.135.

78. *See id.* ¶¶ 6.51–61.

79. *Id.* ¶¶ 6.54–59.

80. *Id.* ¶ 6.59.

81. *Id.* ¶ 6.60.

82. *Id.* ¶ 6.62.

83. *Id.*

Upon finding ambiguity among the dictionary definitions, the Panel then analyzed the terms “in their context and in the light of the object and purpose of the treaty.”⁸⁴ Finally, the Panel consulted the 1993 Scheduling Guidelines and W/120, generally considered indispensable guides for interpreting Members’ schedules of commitments.⁸⁵ After examining these guidelines, the Panel concluded that the United States made a specific commitment on gambling and betting services under sub-sector 10.D.⁸⁶

Once the panel established that the United States scheduled gambling as part of its trade commitments, Antigua alleged that the total U.S. prohibition on cross-border gambling and betting services violated GATS Article XVI:2(a) and 2(c) because it limited the number of service suppliers.⁸⁷ As Article XVI:1 demands, “[E]ach Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”⁸⁸ To evaluate Antigua’s allegation, the Panel identified the relevant federal and state laws.⁸⁹ The Panel scrutinized three federal statutes: the Wire, Travel, and Illegal Gambling Business Acts.⁹⁰ The Panel also examined state laws prohibiting Internet gambling in Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah.⁹¹ The Panel concluded that all three federal statutes prohibited at least one or more means of delivery in the United States’ implicit commitment to the cross-border supply of gambling and betting services because they constituted numerical limitations, or quotas, as prohibited under Article XVI:2.⁹² Additionally, the Panel found that the state laws of Louisiana, Massachusetts, South Dakota, and Utah violated Article XVI:2.⁹³

C. Aces in the Hole: Whether the U.S. Prohibition on Gambling Qualifies for Protection Under Article XIV of GATS

Despite the Panel’s finding that the United States had violated its commitments under the GATS, the United States invoked Article

84. *Id.* ¶¶ 6.67–68.

85. *See id.* ¶¶ 6.77–81. The 1993 Scheduling Guidelines are thought to “explain the intentions of Members with regard to the nature and scope of the Members’ GATS scheduled commitments and how Members should and can read each other’s Schedules.” *Id.* ¶ 6.86.

86. *Id.* ¶ 6.93.

87. *See id.* ¶¶ 6.376, .422–424. Although Antigua offered other claims under GATS Article XVII, the Panel did not elect to review such claims because it already had found that the United States violated Article XVI. *Id.* ¶ 6.424. Also, the Panel rejected Antigua’s due process and transparency claims under Article VI as not being relevant in the instant dispute. *See id.* ¶¶ 6.427–437.

88. *Id.* ¶ 3.129.

89. *Id.* ¶¶ 6.219–221.

90. *See id.* ¶¶ 6.220–223.

91. *Id.* ¶ 6.249.

92. *Id.* ¶¶ 6.362–365, .368–373, .376–380.

93. *See id.* ¶¶ 6.388, .395, .412, .418.

XIV(a) of the GATS as an affirmative defense to preserve its prohibition of Internet gambling, claiming that the measures in question were “necessary to protect public morals or to maintain public order.”⁹⁴ Interpreting Article XIV of the GATS presented an issue of first impression; to guide its analysis, the Panel relied on its existing jurisprudence in the highly similar Article XX of the General Agreement on Tariffs and Trade (GATT) of 1994.⁹⁵

Article XIV(a) provides, “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.”⁹⁶ In defining the terms, the Panel determined that “public order” meant “the preservation of the fundamental interests of a society” and that “public morals” referred to the “standards of right and wrong conduct maintained by or on behalf of a community or nation.”⁹⁷ In light of these broad definitions, the Panel afforded Members a degree of deference in defining and applying the concepts.⁹⁸ Even the WTO Secretariat commented that such measures prohibiting Internet gambling could be justified based on these definitions.⁹⁹ In considering whether Internet gambling posed a “genuine and sufficiently serious” threat to public order and morals, the Panel agreed with the United States that an increase in organized crime and minors’ access to Internet gambling constituted such threats.¹⁰⁰ The Panel acknowledged that the income from gambling was the “lifeline of organized crime” and that the Wire, Travel, and Illegal Gambling Business Acts were necessary to combat organized crime.¹⁰¹

Nevertheless, the Panel rejected the necessity of the disputed measures, noting that Antigua already maintained a regulatory regime that allegedly addressed U.S. concerns with Internet gambling.¹⁰² For example, Antigua emphasized its membership in the Caribbean Financial Action Task Force (CFATF), which limits the impact of organized crime.¹⁰³ Regarding U.S. concerns over the possibility of underage gambling, Antigua explained that its enterprises imposed several obstacles to minors accessing and using their sites, including age verification systems, limits on the ability of minors to fund their wagers and receive direct payment of winnings, and available parental

94. *Id.* ¶¶ 3.253, .278.

95. *Id.* ¶ 3.254.

96. *Id.* ¶ 3.278.

97. *Id.* ¶¶ 6.465, .467.

98. *See id.* ¶ 5.17.

99. *Id.* ¶ 3.278.

100. *Id.* ¶ 3.279.

101. *See id.* ¶¶ 6.484–.486.

102. *Id.* ¶¶ 6.522, .531.

103. *Id.* ¶ 3.6. According to a recent CFATF Report that was presented to the Panel, Antigua “has shown a clear commitment to a regulatory anti-money laundering regime that meets international standards’ . . . and . . . ‘is adequate and compliant with international standards.’” *Id.* ¶ 6.522 n.972 (quoting CARIBBEAN FIN. ACTION TASK FORCE, MUTUAL EVALUATION REPORT ON ANTIGUA & BARBUDA: SECOND ROUND 3, 38 (2002)).

controls.¹⁰⁴ In response to U.S. claims of fraud, Antigua noted that each site operator maintained an anti-fraud department intended to prevent “abuses of the gambling systems, collusion among players, financial fraud and credit card abuse, under age playing and other occurrences which can result in financial losses to the operator.”¹⁰⁵ Finally, Antigua allayed U.S. concerns about the Internet’s effect on compulsive gamblers by pointing to required displays that warn gamblers about the addictive possibilities of gambling, as well as links to the Web sites of self-help groups such as Gamblers Anonymous.¹⁰⁶

Regardless of the effectiveness of Antigua’s regime in addressing the unique problems associated with Internet gambling, Antigua sufficiently demonstrated to the Panel that it was willing to take action to address U.S. concerns. Thus, these efforts, coupled with Antigua’s offer to consult with the United States about any remaining concerns, tilted the decision in Antigua’s favor.¹⁰⁷ Because a critical element of Article XIV is whether a Member “has explored and exhausted reasonably available WTO-consistent alternatives” to prohibition, the Panel showed disdain for the United States’ unwillingness to engage in consultations that might lead to multilateral cooperation.¹⁰⁸ The Panel found that, by rejecting Antigua’s offer to consult regarding U.S. concerns, the United States failed to put forth a good faith effort to find reasonable alternatives consistent with its WTO obligations.¹⁰⁹ In concluding its analysis of the exception, the Panel held that the United States was obliged to consult with Antigua regarding U.S. concerns in order to find reasonable, WTO-consistent alternatives and was required to bring U.S. laws into compliance with the GATS so as to conform to the U.S. acceptance of gambling and betting services implied under the U.S. Schedule.¹¹⁰

D. Was It Beginner’s Luck?: A Victorious United States After the Appellate Body’s Reversal of the Panel’s Decision

The United States appealed the Panel’s decision in favor of Antigua.¹¹¹ On appeal, the Appellate Body first examined the Panel’s holding that the U.S. Schedule included a commitment to gambling and

104. *Id.* ¶ 3.4.

105. *Id.*

106. *Id.*

107. *See id.* ¶¶ 6.523, 531.

108. *See id.* ¶¶ 6.526–529. The Panel encouraged the use of Antigua and the United States’ Mutual Legal Assistance Treaty as the “framework within which such consultations could take place.” *Id.* ¶ 6.529.

109. *Id.* ¶ 6.531.

110. *Id.* ¶¶ 6.534, 7.5.

111. *See* Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 7, WT/DS285/AB/R (Apr. 7, 2004), available at http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf. Antigua also appealed certain issues of law. *Id.*

betting services.¹¹² Despite finding certain errors in the Panel's interpretation of the U.S. Schedule, such as the Panel's analysis of dictionary definitions and the use of foreign language definitions, the Appellate Body still found from the ordinary meaning and context of the terms in question that sub-sector 10.D of the U.S. Schedule included an implicit commitment with respect to gambling and betting services.¹¹³ Thus, it rejected the United States' appeal of this aspect of the Panel's decision.¹¹⁴ Following that finding, the Appellate Body also upheld the Panel's holding that the three U.S. federal laws in question were inconsistent with the U.S. Schedule and thus violated Article XVI:2 of the GATS.¹¹⁵

Although the Appellate Body affirmed these aspects of the Panel's decision, it reversed the Panel's analysis of Article XIV of the GATS.¹¹⁶ The Appellate Body first upheld the Panel's finding that the Wire, Travel, and Illegal Gambling Business Acts were intended to maintain "public morals" and "public order" under Article XIV(a).¹¹⁷ However, in departing from the Panel's analysis, the Appellate Body found the Panel's scrutiny of the "necessity" of the disputed measures to be flawed because engaging in such consultations was not required.¹¹⁸ Besides Antigua's failure to identify a reasonably available alternative, the Appellate Body highlighted the Panel's concession that but for the United States' failure to negotiate with Antigua, the three U.S. federal acts would have been "necessary" under Article XIV to "protect public morals and maintain public order."¹¹⁹ On that basis, the Appellate Body reversed the Panel's ruling in favor of Antigua.

V. KNOWING WHEN TO WALK AWAY AND CUT YOUR LOSSES: THE APPELLATE BODY'S DECISION AS A PUSH FOR THE UNITED STATES

While it may seem the United States came out ahead in the aftermath of the Appellate Body's reversal of the Panel's decision, in the long term this reversal will only fortify an ineffective and futile stance on a crucial social issue. Because Internet gambling is increasing rapidly and the U.S. prohibition is not likely to slow the momentum, an increasing consumer demand for such services will cause suppliers to operate overseas, away from the reach of U.S. jurisdiction.

As an alternative to total prohibition, the United States, along with other countries, could attempt to regulate Internet gambling in order to

112. *See id.* ¶ 158.

113. *Id.* ¶¶ 166–168, 204–212.

114. *Id.* ¶ 213.

115. *See id.* ¶¶ 257–265.

116. *See id.* ¶ 321; *see also id.* ¶ 373.

117. *Id.* ¶ 299.

118. *Id.* ¶¶ 315–317.

119. *Id.* ¶¶ 325–327.

diminish the particular harms associated with it. One such strategy would be to adopt the code of conduct promulgated by the Interactive Gaming Council (IGC).¹²⁰ Already, the IGC maintains a membership of over seventy Internet gambling sites.¹²¹ One of the IGC's purposes is "to establish fair and responsible trade guidelines and practices that enhance consumer confidence in interactive gaming products and services."¹²² The code of conduct provides twelve standards, including the following: "(1) Compliance: Members must abide by the law and regulations of the jurisdiction where they propose to do business and provide evidence that they are licensed by the jurisdictions in which they operate, if such licenses are available"¹²³ A "seal of compliance" could be displayed when a Web site adheres to the IGC code of conduct. In contrast, Web sites without seals would lose consumer confidence and ultimately be driven out of the marketplace.¹²⁴ Having the United States as a member of the IGC would certainly imbue the organization with a strong sense of legitimacy.

Other standards could be implemented as addenda to the code of conduct. Such standards might seek to reduce the likelihood of minors accessing these sites, such as by requiring age verification systems that call for multiple forms of identification.¹²⁵ Financially, Internet casinos could be required "to be bonded and to maintain sufficient levels of capital to pay off customers' deposits and winnings on demand."¹²⁶ Internet casinos also could be required to "establish dispute resolution

120. See Interactive Gaming Council, Code of Conduct, <http://www.igcouncil.org/aboutus.php?id=3> (last visited Nov. 7, 2005) [hereinafter Code of Conduct].

121. Karadbil, *supra* note 3, at 442; see Interactive Gaming Council, Member List, <http://www.igcouncil.org/memberlist.php> (last visited Nov. 7, 2005).

122. Interactive Gaming Council, About Us, <http://www.igcouncil.org/aboutus.php> (last visited Nov. 7, 2005).

123. Code of Conduct, *supra* note 120. The other standards include the following:

(2) Integrity and Accountability: Members must make their systems and algorithms available for inspection by authorities;

(3) Consumer Privacy and Data Protection: Members will protect the privacy of their customers;

(4) Truth in Advertising: Members will insure that any advertised information about their operations is accurate;

(5) Audit Trails: Members will maintain records to facilitate auditing;

(6) Dispute Resolution: Members will retain transaction records for use in dispute resolution procedures;

(7) Limiting Access by Minors: Members shall institute reasonable measures to insure that minors cannot access their gambling systems;

(8) Controlling Compulsive/Problem Gambling: Members will implement adequate procedures to identify and curtail compulsive gambling;

(9) Banking and Transition Processing: Members will follow generally accepted standards of international banking;

(10) Prize Payouts: Members will pay all earnings and obligations;

(11) Corporate Citizenship: Members must adhere to other standards of corporate citizenship; and

(12) Member Information: Members agree to performance evaluations by the IGC.

Id.

124. See Loscalzo & Shapiro, *supra* note 21, at 24.

125. *Id.* at 23.

126. *Id.* at 24.

mechanisms whereby gamblers may seek redress for their grievances[,] . . . undergo regular audits to verify that their games are fair[, and] . . . provide prominent links to organizations designed to help problem gamblers.”¹²⁷ Adopting such measures in conjunction with the IGC code of conduct would do much to dissipate the negative effects of Internet gambling.

Through regulation rather than prohibition, the United States could legitimize the Internet gambling industry by allowing more established gambling operations to set up virtual casinos in cyberspace. These approved entities, and the standards by which they abide, would provide more certainty and perceived fairness to the consumer, thereby driving the market in a preferred direction. Furthermore, by creating a multilateral agreement encouraging the use of a seal indicating compliance with the IGC code of conduct, the United States could ensure that mechanisms that address its concerns are present throughout the market. By moderating its stance through encouragement of the regulation of Internet gambling, as opposed to a total prohibition, the United States would signal to other countries its desire to cooperate in creating a uniform set of standards. This posture likely would put the United States in a leadership position, allowing it to set the tone of the harmonized standards, which would ultimately satisfy U.S. objectives of curtailing the ills of Internet gambling.

Even though the United States came away from its dispute with Antigua without being forced to restructure its gambling laws, it should take this opportunity to reflect upon its solution to the alleged Internet gambling problem. The United States should consider developing a set of guidelines and principles through which it can incorporate its concerns about the detriments of Internet gambling to reshape the currently unregulated, “fly-by-night” Internet gambling industry. The more legitimate industry resulting from such an approach would better protect the ever-expanding population of Americans who visit virtual casinos in search of that elusive big jackpot.

127. *Id.*