

David and Goliath:

Antigua v. United States

and

Cross-Border Gambling

by

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This white paper presents an overview of the issues involved and is divided into three parts. Part one summarizes the history of the dispute before the World Trade Organization (“WTO”) between Antigua and the United States over cross-border gambling to date. Part two examines relevant portions of the WTO decisions, the General Agreement on Trade in Services (“GATS”) and federal legislation that has been challenged thus far, by Antigua. Part three analyzes the Unlawful Internet Gambling Enforcement Act in light of commitments made by the United States under GATS<sup>2</sup> and arguments that the United States could make to defend its recent legislation before a WTO panel.

### **History of United States – Measures Affecting the Cross Supply of Gambling and Betting Services**

On March 13, 2003, Antigua requested consultation with the United States, asserting that various federal and state measures outlawed cross-border gambling in contravention of obligations the United States undertook by joining in GATS.<sup>3</sup> When these consultations failed to produce an accord between the two countries, the Dispute Settlement Body of the WTO, at Antigua’s request, composed a panel on August 25, 2003, to hear the complaint.<sup>4</sup>

Antigua asserted before the Dispute Settlement Body that a complex collection of United States federal and state laws amounted to a total prohibition on cross-border supply of gambling services, violating commitments made by the United States under GATS.<sup>5</sup> The panel ultimately rejected the theory that a “total prohibition” qualifies as a “measure” that can be challenged under GATS,<sup>6</sup> but in a separate analysis found that the

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<sup>2</sup> The issue of whether the United States had actually made any commitments regarding cross-border gambling in its GATS schedule was contested in the initial proceedings before the WTO. See Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 3.30-3.70, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report]. A WTO Appellate Body ultimately upheld the Dispute Settlement Body’s finding that the United States had made a commitment to provide full market access to gambling and betting service providers. Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 215, 373 WT/DS285/AB/R (April 7, 2005) [hereinafter Appellate Report].

<sup>3</sup> 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).

<sup>4</sup> Panel Report ¶ 1.4.

<sup>5</sup> *Id.* ¶ 3.74.

<sup>6</sup> *Id.* ¶ 6.185.

Wire Act (18 U.S.C. § 1084), the Travel Act (18 U.S.C. § 1952) (when read together with relevant state laws), the Illegal Gambling Business Act (18 U.S.C. § 1955) (when read together with relevant state laws) and four state statutes to violate Article XVI of GATS.<sup>7</sup> Finally, the Dispute Settlement Body found that these measures could not qualify under one of the exceptions to the general rule against limitation, which are found in Article XIV of GATS.<sup>8</sup>

Both the United States and Antigua filed appellant's submissions challenging various aspects of the Panel Report in January of 2005.<sup>9</sup> The Appellate Body upheld the Dispute Settlement Body's finding that the Wire Act, the Travel Act and the Illegal Gambling Business Act violated GATS Article XVI but reversed the Dispute Settlement Body's findings as to the four state laws.<sup>10</sup> The Appellate Body also agreed with the Dispute Settlement Body's conclusion that the federal legislation was not protected by Article XIV of GATS, albeit for different reasons.<sup>11</sup> The Appellate Body found that, in light of the Interstate Horseracing Act (15 U.S.C. § 3001 *et seq.*), the Wire Act, the Travel Act and the Illegal Gambling Business Act were not applied in a non-discriminatory manner.<sup>12</sup> In closing, the Appellate Body recommended that the United States be requested to bring its legislation into conformity with GATS.<sup>13</sup>

In March of 2007, the Dispute Settlement Body found that the United States had failed to comply with the recommendation to bring its legislation into conformance with GATS.<sup>14</sup> In light of this finding, a WTO arbitrator awarded relief to Antigua by granting it the right to suspend its obligations to the United States under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") in an amount not to exceed \$21,000,000 annually.<sup>15</sup>

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<sup>7</sup> *Id.* ¶6.421.

<sup>8</sup> *Id.* ¶6.608.

<sup>9</sup> Appellate Report ¶ 7.

<sup>10</sup> *Id.* ¶ 373.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* ¶ 374.

<sup>14</sup> Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 7.1, WT/DS285/RW (Mar. 30, 2007).

<sup>15</sup> Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.1, WT/DS285/ARB (Dec. 21, 2007).

## **WTO Rulings on Relevant GATS and Federal Law Provisions**

### *Article XVI of GATS*

Article XVI:1 of GATS provides that “each 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.” Article XVI:2 further provides that no member, having made a commitment to market access in a sector shall adopt measures that operate as “(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test” or that operate as “(c) limitations on the total number of service output expressed in terms of designated numerical units in the form of quotas or the requirements of an economic needs test.” A measure can fail these tests even if its text does not specifically refer to quotas or contain an express numerical component if the measure amounts to a “zero quota” on one or more means of delivery of a service.<sup>16</sup>

Applying this section of GATS, the Appellate Body held that three federal statutes created impermissible limitations on one or more modes of delivery gambling service, in particular because (a) the Wire Act prohibits using wire communication for the transmission of bets or related information in foreign or interstate commerce,<sup>17</sup> (b) the Travel Act prohibits travel or use of the mail for conducting unlawful activity (which term explicitly includes gambling that is in violation of state law)<sup>18</sup> and (c) the Illegal Business Gambling Act “prohibits the conduct, finance, management, supervision direction or ownership of all or part of a ‘gambling business’ that violates state law.”<sup>19</sup> For these reasons, the Appellate Body upheld the Dispute Settlement Body’s determination that each of the Wire Act, the Travel Act and the Illegal Gambling Business Act violated obligations of the United States under Article XVI:2 of GATS.

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<sup>16</sup> Appellate Report ¶¶ 238-39, 251-52.

<sup>17</sup> *Id.* ¶¶ 260, 265.

<sup>18</sup> *Id.* ¶¶ 261, 265.

<sup>19</sup> *Id.* ¶¶ 262-3, 265.

*Article XIV of GATS*

Article XIV provides safe harbor exceptions for measures that would otherwise infringe on a member's commitments under GATS. Article XIV provides, in relevant part:

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

... [or]

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

The Appellate Body undertook a multi-part analysis to determine whether the federal laws at issue fit within the Article XIV exception. First, it discerned whether the laws addressed issues of public morals or public order, next whether they were “necessary” and lastly whether the statutes complied with the chapeau of this article. Both the Dispute Settlement Body and the Appellate Body looked favorably upon Congressional reports and testimony presented by the United States in determining that the Wire Act, the Travel Act and the Illegal Gambling Business Act addressed public morals and/or public order, insofar as they were designed to address ills such as “money laundering, organized crime, fraud, underage gambling and pathological gambling.”<sup>20</sup>

Once the goals of the legislation are accepted, judging necessity involves a balancing test to determine whether a WTO-consistent measure is “reasonably available.”<sup>21</sup> An alternative measure may not be “reasonably available” where the alternative is merely theoretical and incapable of implementation or where the alternative would impose an undue burden.<sup>22</sup> A party seeking protection under Article XIV is not required to show that no alternative measure is reasonably available, but if a complaining party proposes an alternative measure, the responding party does have the burden of

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<sup>20</sup> *Id.* ¶¶ 296, 299.

<sup>21</sup> *Id.* ¶¶ 305, 307.

<sup>22</sup> *Id.* ¶ 308.

demonstrating that such measure is not reasonably available.<sup>23</sup> While a demonstration that the measure at issue is “indispensable” for the achievement of its stated goals is not required, a balancing of the interests at play requires a showing that the contested measure does much more than merely contribute toward those ends.<sup>24</sup> Finding that the Wire Act, the Travel Act and the Illegal Gambling Business Act were not necessary measures, the Dispute Settlement Body relied solely on Antigua’s showing that the United States refused to engage in consultations with Antigua and therefore had not exhausted all reasonably available alternatives.<sup>25</sup> The Appellate Body rejected the proposition that negotiations with Antigua were a reasonably available measure and, as Antigua failed to raise other alternative measures, ruled that the United States established necessity under Article XIV(a).<sup>26</sup>

The final hurdle that a country must clear for its WTO-inconsistent measure to qualify for an exception under Article XIV is for the WTO to find that measure complies with the article’s chapeau. If the application of the measure is found to be arbitrary, unduly discriminatory or a disguised restriction on trade, the defense under Article XIV fails. In this analysis, segmentation of industry sectors is not disallowed. The Appellate Body found no error in the Dispute Resolution Body drawing a distinction between remote and non-remote supply of gambling services and finding that remote supply of gambling services presents unique concerns for the United States.<sup>27</sup> Antigua asserted the Interstate Horseracing Act created an inconsistency in the application of the Wire Act, the Travel Act and the Illegal Gambling Business Act because it created an exemption for remote betting for domestic interstate gambling providers but created no such exemption for foreign providers.<sup>28</sup> Both the Dispute Resolution Body and the Appellate Body were persuaded by this evidence.<sup>29</sup> The Appellate Body ruled that no Article XIV defense existed, solely on the basis that the United States failed to demonstrate consistent

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<sup>23</sup> *Id.* ¶¶ 310-11.

<sup>24</sup> *Id.* ¶ 310.

<sup>25</sup> *Id.* ¶ 325.

<sup>26</sup> *Id.* ¶ 326. On the same basis, the Appellate Body also reversed the Dispute Settlement Body’s ruling against the United States under Article XIV(c). *Id.* ¶ 336. However, since a determination had already been made under Article XIV(a), the Appellate Body found that it was not necessary to rule on the merits of the Article XIV(c) argument. *Id.* ¶ 337.

<sup>27</sup> *Id.* ¶ 347.

<sup>28</sup> *Id.* ¶ 361.

<sup>29</sup> *Id.* ¶ 369.

application of the Wire Act, the Travel Act and the Illegal Gambling Business Act in light of the Interstate Horseracing Act.<sup>30</sup>

### **The Unlawful Internet Gambling Enforcement Act and Aftermath of the WTO Rulings**

The United States enacted the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) as an enforcement mechanism to help authorities regulate Internet gaming. The law does not, in and of itself, make any form of gambling illegal or unlawful. Instead, it restricts a person in the gambling business from receiving credit proceeds, electronic transfers, checks and other proceeds from a financial institution in connection with another’s participation in “unlawful Internet gambling.”<sup>31</sup> Through regulation, the statute will require financial institutions to establish policies and procedures for their payment systems that will allow them to identify and block any such payments.<sup>32</sup> The meaning of “unlawful Internet gambling” under this law is “to place, receive or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”<sup>33</sup> Most intrastate and intratribal transactions and any activity that is allowed under the Interstate Horseracing Act are expressly excluded from the definition of “unlawful Internet gambling.”<sup>34</sup> Both civil and criminal penalties for violation are permitted, including injunctions, fines or imprisonment.<sup>35</sup>

Antigua or another WTO member may challenge the UIGEA under Article XVI of GATS, on the theory that the legislation prevents Antiguan operators from being able to operate in the United States market, resulting in a “zero quota”. As discussed above, such a restriction violates Article XVI when made by a country that has made a commitment to full market access in its GATS schedule. The United States might counter this argument by demonstrating that the UIGEA, itself, does not place restrictions on the identity or number of persons who may lawfully operate a gambling business serving United States consumers. Furthermore, the United States could argue that the UIGEA does not regulate actual delivery of gambling services, but rather distribution of proceeds to operators who are providing services unlawfully. In this way, the United

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<sup>30</sup> *Id.*

<sup>31</sup> 31 U.S.C. § 5363 (2006).

<sup>32</sup> *Id.* § 5364.

<sup>33</sup> *Id.* § 5362(10)(A).

<sup>34</sup> *Id.* § 5362(10)(B)-(D).

<sup>35</sup> *Id.* §§ 5365(b), 5366.

States might distinguish the UIGEA, which regulates financial transactions from the Wire Act, the Travel Act and the Illegal Gambling Business Act, which, by their wording, more closely address gambling operation, itself. This approach is risky, though, as it opens the UIGEA to attack under Article XI of GATS and footnote 8 to Article XVI, each of which restricts a country's ability to regulate financial transactions in connection with sectors to which a commitment for market access has been made.

The United States may be able to assert a defense under Article XIV of GATS if the UIGEA is found to contravene commitments made under GATS. As discussed above, the Appellate Panel and the Dispute Settlement Body readily accepted arguments that the remote supply of gambling presents special dangers that threaten public morals and/or public order. Provided that the United States can rebut proposed alternative measures that a disputing country may propose, the United States would be left to show that the UIGEA passes muster under the chapeau of Article XIV. This would be no easy task, as the UIGEA exempts activity that is lawful under the Interstate Horseracing Act from its definition of "unlawful Internet gambling". Since the Interstate Horseracing Act was the stumbling block in the Article XIV defense of the Wire Act, the Travel Act and the Illegal Gambling Business Act, it is likely that a WTO panel would similarly frustrate an Article XIV defense of the UIGEA.

In the end, however, the United States may be able to circumvent its initial GATS commitments. The United States responded to the WTO's decision in the Antigua dispute by commencing procedures in May 2007, under Article XXI of GATS to amend its GATS schedule by clarifying that its commitment to provide access to its markets for "recreational services" does not encompass gambling.<sup>36</sup> Article XXI requires a modifying member to negotiate with any affected member to reach a compensatory adjustment.

The United States announced in December 2007, that it had reached an agreement with Canada, the EU and Japan.<sup>37</sup> Under this agreement, the United States made commitments to liberalize markets for warehousing services (excluding services supplied at ports and airports), private technical testing services, private research and development services and postal services relating to outbound international letters.<sup>38</sup>

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<sup>36</sup> Press Release, Office of the United States Trade Representative, Statement on Internet Gambling (Dec. 21, 2007), *available at* [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/December/Statement\\_on\\_Internet\\_Gambling.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/December/Statement_on_Internet_Gambling.html).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



As of April, 2008, the United States and Antigua had not yet reached a settlement agreement.<sup>39</sup> Antigua has taken the position that any settlement with the United States must address both the past failure by the United States to comply with the WTO ruling and compensation for the withdrawal of its commitment going forward.<sup>40</sup> If the United States successfully completes its compensatory negotiations and amends its GATS schedule, its commitment to provide access for gambling services would cease.

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<sup>39</sup> Patricia Campbell, *Still No Clear Way Forward on Internet Gambling Matter*, ANTIGUA SUN, Apr. 7, 2008, available at [www.antiguasun.com/paper](http://www.antiguasun.com/paper).

<sup>40</sup> Patricia Campbell, *Deadline Passes for US to Settle Online Gambling Dispute*, ANTIGUA SUN, Mar. 31, 2008, available at [www.antiguasun.com/paper](http://www.antiguasun.com/paper).