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# All Bets Are Off(line): Antigua's Trouble in Virtual Paradise

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## COMMENT

# ALL BETS ARE OFF(LINE): ANTIGUA'S TROUBLE IN VIRTUAL PARADISE

### I. INTRODUCTION

The tiny twin-island nation of Antigua and Barbuda recently sparked a debate with the United States over U.S. restrictions affecting the cross-border supply<sup>1</sup> of offshore Internet gambling<sup>2</sup> and betting services, charging that the restrictions violate free trade commitments made by the United States under the General Agreement on Trade in Services (GATS).<sup>3</sup> The dispute is in response to measures such as the Unlawful Internet Gambling Funding Prohibition Act,<sup>4</sup> which would outlaw credit-card payments to Internet casinos in attempt to block offshore gambling sites from reaching American customers who are expected to spend over \$2 billion dollars on some 1,800 offshore gambling sites in 2003.<sup>5</sup> To a small state like Antigua, being cut off from this kind of market could have severe economic ramifications.

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1. GATS: Objectives, Coverage, and Disciplines, *available at* [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Feb. 15, 2004) (Cross-border supply is defined to cover services flowing from the territory of one Member into the territory of another Member as opposed to consumption abroad, which refers to situations where a service consumer moves into another Member's territory to obtain a service).

2. Internet gambling involves any activity that takes place via the Internet and includes placing a bet or wager, generally defined by U.S. courts as any activity that involves a prize, consideration, and chance. A prize is anything of value chance is usually determined by assessing whether chance or skill predominates and consideration is something of value, such as money, that a person must pay to enter. Internet Gambling: An Overview of the Issues, *A Report to the House Committee on Financial Services and Subcommittees on Financial Institutions and Consumer Credit, and Oversight and Investigations*, GAO 03-89, Dec. 2002, at 1, n. 1, *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-03-89>.

3. United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/2 (June 3, 2003) [hereinafter U.S.-Measures Affecting the Cross-Border Supply].

4. H.R. 2143, 108th Cong. (2003), *available at* <http://thomas.loc.gov/>; S. 627, 108th Cong. (2003), *available at* <http://thomas.loc.gov/>.

5. *Internet: Senate Panel Approves Antigambling Bill*, N.Y. TIMES, Aug. 1, 2003, at C5, *available at* <http://query.nytimes.com/gst/fullpage.html?res=9B0DE6DF123EF932A357BC0A9659C8B63> (last visited Feb. 15, 2004).

A. *Globalization and trade in services*

In this era of globalization and interdependence, a country's economic well being has become increasingly more dependent on outside forces.<sup>6</sup> Although interdependence may increase a nation's wealth, every country has become vulnerable to international market forces and is impacted by the economic and social actions of other countries.<sup>7</sup> Service providers must comply with multiple regulations, often prohibiting a practice in one place while permitting it in another.<sup>8</sup> External and internal market access should be unified to ensure that the benefits of free market access are not precluded by internal or domestic trade regulations.<sup>9</sup> This idea of unity is reflected in the scope of the market access commitments made by the World Trade Organization (WTO) members under the General Agreement on Trade in Services (GATS).<sup>10</sup>

The GATS emerged in January 1995 in the Uruguay Round and was inspired by many of the same objectives as its trade in goods counterpart, the General Agreement on Tariffs and Trade (GATT).<sup>11</sup> Both agreements aim to create a credible and reliable system of international trade rules, ensure non-discrimination or fair and equal treatment for all Members, stimulate economic activity through binding trade policies, and promote development and trade by progressive liberalization.<sup>12</sup> The GATS is one of the only sets of multilateral rules governing national measures affecting trade in services and contains both general obligations binding on all 144 WTO members and specific national schedules of commitments.<sup>13</sup>

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6. Yair Aharoni, *Changing Role of Government in Services*, in CHANGING ROLES OF STATE INTERVENTION IN SERVICES IN AN ERA OF OPEN INTERNATIONAL MARKETS, at 16 (Yair Aharoni et al. eds., 1997).

7. *Id.* at 17.

8. Kalypto Nicolaidis and Joel P. Trachtman, *Liberalization, Regulation, and Recognition for Services Trade*, in SERVICES TRADE IN THE WESTERN HEMISPHERE 44 (Sherry M. Stephenson, ed., 2000).

9. GUIDE TO THE GATS: AN OVERVIEW OF THE ISSUES FOR FURTHER LIBERALIZATION OF TRADE IN SERVICES 4 (WTO Secretariat ed., 90-411-9775-3, 2000).

10. *Id.*

11. GATS: Objectives, Coverage, and Disciplines, available at [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Feb. 15, 2004).

12. *Id.*

13. GATS: Fact and Fiction at [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfiction\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.doc), available at [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfiction\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm); see General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 44 (1994)

### B. U.S. bill as a possible violation of GATS

The proposed U.S. ban on the use of credit cards and other financial instruments for Internet gambling effectively bans the supply of any offshore gambling and betting services to the United States, yet it continues to allow traditional brick-and-mortar casino gambling, horse and dog racing, lotteries, and other gambling services within its borders.<sup>14</sup> It is an internal regulation that acts primarily as an external trade barrier, closing off the U.S. gambling and betting services market from foreign providers. The United States identifies public morality and money laundering concerns as the legislative basis for the bill, but primarily cites public policy and morality as the grounds for exemption from its GATS commitments.<sup>15</sup> Whether these grounds can exempt the United States from its specific free trade and non-discrimination commitments in this industry will soon be determined by the WTO, but the odds are not in its favor.

## II. THE FIGHT BREAKS OUT

### A. Complaint & Response

Antigua and Barbuda requested consultations with the United States on March 21, 2003, charging that U.S. restrictions on the cross-border supply of Internet gambling and betting services are inconsistent with U.S. GATS obligations, citing well over sixty measures, including laws, codes, and statutes, applied by federal, state, and local authorities in all fifty states, the District of Columbia, and the territories of Puerto Rico, the U.S. Virgin Islands, and Guam.<sup>16</sup> In its request for consultations, Antigua

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[hereinafter GATS]. The European Community Treaty rules on trade in services contain similar obligations aimed at creating a unified market.

14. H.R. 2143, 108th Cong. (2003), available at <http://thomas.loc.gov/>; S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/>.

15. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov/>; Dispute Settlement Body- Minutes of Meeting Held in the Centre William Rappard on 24 June 2003, WT/DSB/M/151, Aug. 12, 2003, at <http://www.wto.org>.

16. The measures taken by the United States Congress which infringe on the obligations of the United States under the GATS include, without limitation, the following: 15 U.S.C. §§ 3001 to 3007; 18 U.S.C. § 2; 18 U.S.C. §§ 1081, 1084; 18 U.S.C. §§ 1301 to 1307; 18 U.S.C. § 1952; 18 U.S.C. § 1953; 18 U.S.C. § 1955; 28 U.S.C. §§ 3701 to 3704; 39 U.S.C. § 3005. The measures taken by the various States and Territories of the United States which infringe on the obligations of the United States under the GATS include, without limitation, the following: ALA. CODE §§ 13A-12-20 to 13A-12-31 (1977); ALASKA STAT. § 05.15.180 (1997); ALASKA STAT. §§ 11.66.200 to 11.66.280 (1978); ARIZ. REV. STAT. ANN. §§ 13-3301 to 13-3312 (2001); ARK. STAT. ANN. §§ 5-66-101 to 5-66-119 (1987); CAL. PENAL CODE §§ 319-337z (West Supp. 2003); CAL.

argued that the cumulative impact of the cited U.S. restrictions and measures is that the cross-border supply of gambling and betting services from another WTO member to the United States is illegal under U.S. law.<sup>17</sup> According to Antigua and Barbuda, the measures violate the specific U.S. GATS market access commitments as well as the GATS general rules regarding most favored nation treatment or non-discrimination, payments and transfers,

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BUS. & PROF. CODE § 19800-19807 (West, Supp. 2003); COLORADO COLO. CONST. art. XVIII, § 2; COLO. REV. STAT. §§ 18-10-101 to 18-10-108 (1999); COLO. REV. STAT. §§ 12-47.1-101 to 12-47.1-106 (1996); CONN. GEN. STAT. §§ 53-278a to 53-278g (2001); DEL. CONST. art. 2, § 17; DEL. CODE ANN. tit. 11, §§ 1401-32, 1470-73 (2002); D.C. CODE ANN. §§ 22-1701 to 22-1712 (2001); FLA. STAT. §§ 849.01 to 849.46 (2000); GA. CONST. art. 1, § 2; GA. CODE ANN. §§ 16-12-20 to 16-12-62 (2003); HAW. REV. STAT. ANN. §§ 712-1220 to 712-1231 (Michie 1973); IDAHO CONST. art. III, § 20; IDAHO CODE §§ 18-3801 to 18-3810 (1992); ILL. REV. STAT. ch. 720, §§ 5/28-1 to 5/28-9 (1993); IND. CODE §§ 35-45-5-1 to 35-45-5-8 (1998); IOWA CODE §§ 725.5 to 725.16 (1993); KAN. CRIM. CODE ANN. § 21-4303 to 21-4308 (1995); KY. REV. STAT. ANN. §§ 528.010 to 528.120 (Baldwin's 1974); LA. CONST. art. XII, § 6; LA. REV. STAT. ANN. § 14:90- 4 (West 1986); ME. REV. STAT. ANN., tit. 17, §§ 330-347 (1983); ME. REV. STAT. ANN., tit. 17, §§ 2305-2306 (1983); MD. CODE ANN., CRIM. LAW, §§ 12-101 to 12-307 (2002); MASS. GEN. LAWS ANN. ch. 271, §§ 1-50 (West 2000); MICH. COMP. LAWS ANN. §§ 750.301-750.315a (West 1990); MINN. STAT. ANN. §§ 609.75-609.763 (Supp. 2003); MISS. CODE ANN. §§ 97-33-1 to 97-33-203 (1999); MO. ANN. STAT. §§ 572.010-572.125 (West 1995); MONT. CONST. art. III, § 9; MONT. CODE ANN. §§ 23-5-101 to 23-5-810 (1993); NEB. REV. STAT. §§ 28-1101 to 28-1117 (1995); NEV. REV. STAT. § 202.450 (1999); NEV. REV. STAT. § 463.160 (2001); N. H. REV. STAT. ANN. § 647:2 (1999); N.J. CONST. art. IV, § 7; N. J. STAT. ANN. §§ 2A:40-1 to 2A:40-9 (2000); N. J. STAT. ANN. §§ 2C:37-1 to 2C:37-9 (1995); N. J. STAT. ANN. § 5:5-63 (1996); N. J. STAT. ANN. §§ 5:12-1 to 5:12-210 (1996); N.M. STAT. ANN. §§ 30-19-1 to 30-19-15 (1978); N.Y. CONST. art. I, § 9; N.Y. EXECUTIVE LAW §§ 430-439a (McKinney 1996); N.Y. PENAL LAW §§ 225.00-225.40 (McKinney 1999); N.Y. GENERAL OBLIGATION LAW §§ 5-401 to 5-423 (McKinney 2001); N. C. GEN. STAT. §§ 14-289 to 14-309.4 (1994); N.D. CONST. art. 11, § 25; N.D. CENT. CODE § 12.1-28-01 to 12.1-28-02 (1987); OHIO CONST. art. XV, § 6; OHIO REV. CODE ANN. §§ 2915.01-2915.06 (1996); OKLA. STAT. ANN. tit. 3A, § 205.6 (West 1993); OKLA. STAT. ANN. tit. 21, §§ 941-993 (West 2002); OR. REV. STAT. §§ 167.108-167.170 (2001); PA. STAT. ANN. tit. 18, § 911 (Purdon 1998); PA. STAT. ANN. tit. 18, § 5513 (Purdon 2000); PA. STAT. ANN. tit. 66, § 2902 (Purdon 2000); R.I. CONST. art. VI, § 22; R. I. GEN. LAWS §§ 11-19-1 to 11-19-45 (1993); R. I. GEN. LAWS § 11-51-1 to 11-51-2 (1979); S.C. CODE ANN. §§ 16-19-10 to 16-19-160 (Law Co-op. 1996); S.D. CODIFIED LAWS §§ 22-25-1 to 22-25-51 (Michie 1976); S.D. CODIFIED LAWS § 22-25A-1 to 22-25A-15 (Michie 2000); TENN. CONST. art. XI, § V; TENN. CODE ANN. §§ 39-17-501 to 39-17-509 (1989); TEX. PENAL CODE ANN. §§ 47.01 to 47.10 (West 2003); UTAH CODE ANN. §§ 76-10-1101 to 76-10-1109 (1998); VT. STAT. ANN. tit. 13, §§ 2133-2156 (1957); VA. CODE ANN. §§ 18.2-325 to 18.2-340 (Michie 1992); WASH. REV. CODE ANN. § 4.24.070 (West 1988); WASH. REV. CODE ANN. §§ 9.46.010 to 9.46.903 (West 1998); W. VA. CODE §§ 61-10-1 to 61-10-5 (1970); WIS. CONST. art. IV, § 24; WIS. STAT. ANN. §§ 945.01-945.13 (West 2001); WYO. STAT. §§ 6-7-101 to 6-7-104 (1996); 9 GUAM CODE ANN. §§ 64.10 to 64.22A (2003); P.R. LAWS ANN. tit. 33, §§ 1241 to 1259 (1949); V.I. CODE ANN. tit. 14, §§ 1224-1226 (1985); V.I. CODE ANN. tit. 32, §§ 602-646 (2001). United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/2 (June 13, 2003).

17. U.S.-Measures Affecting the Cross-Border Supply, *supra* note 3.

and domestic regulation.<sup>18</sup>

Consultations between the United States and Antigua and Barbuda were held on April 30th, 2003, but the two countries were unable to reconcile their differences,<sup>19</sup> and two months later, Antigua asked the WTO Dispute Settlement Body (DSB) for the establishment of a WTO panel to decide whether the U.S. measures violate its GATS commitments.<sup>20</sup>

The United States blocked Antigua's first panel request, with U.S. ambassador to the WTO, Linnet Deily, asserting to the DSB that U.S. law prohibits cross-border gambling and betting services "because of the social, psychological dangers and law enforcement problems that they create, particularly with respect to Internet gambling and betting."<sup>21</sup> Deily argued further that:

The United States has grave concerns over the financial and social risks posed by such activities to its citizens, particularly but not exclusively children. We are surprised that another WTO member has chosen to challenge measures taken to address these concerns— particularly in an area in which the United States has made no market access commitments.<sup>22</sup>

Antigua and Barbuda had the right to renew its request for a panel on July 21, 2003. The request was accepted and Canada,

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18. Specifically, the request for the establishment of a panel alleges that the United States' total prohibition of cross-border gambling and betting services conflicts with its general GATS obligations and GATS Schedule of Specific Commitments because: (a) The central, regional, or local authorities of the U.S. allow numerous operators of U.S. origin to offer all types of gambling and betting services in the U.S. (sometimes via exclusive rights or monopolistic structures). There appears to be no possibility for foreign operators, however, to obtain an authorization to supply gambling and betting services from outside the U.S. This appears to conflict with the country's commitments and obligations under GATS, including Articles VI:1, VI:3, VIII:1, VIII:5, XVI:2, XVII:1, XVII:2 and XVII:3 and its Schedule of Specific Commitments; and (b) U.S. authorities also restrict international transfers and payments relating to gambling and betting services offered from outside the U.S. Some of the non-legislative measures listed in Section III of the Annex are examples of measures by the Florida Attorney General and the New York Attorney General. These restrictions appear to violate Articles VI:1, XI:1, XVI:1, XVII:1, XVII:2 and XVII:3 of GATS and the United States' Schedule of Specific Commitments." United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/2 (June 13, 2003).

19. *Id.*

20. Daniel Pruzin, *WTO: U.S. Blocks WTO Panel Review of Internet Gambling Restrictions*, INT'L TRADE DAILY (BNA), June 25, 2003 [hereinafter Pruzin, *WTO Panel Review*].

21. Dispute Settlement Body- Minutes of Meeting Held in the Centre William Rappard on June 24, 2003, WT/DSB/M/151, Aug. 12, 2003, at <http://www.wto.org>.

22. Pruzin, *WTO Panel Review*, *supra* note 20.

the European Community, Mexico, Japan, and Taiwan reserved their third-party rights.<sup>23</sup> The three-member panel named in August included B.K. Zutshi, former Indian Ambassador to the GATT and New Dehli's chief negotiator on services during the last Uruguay Round designated as the panel chairman, and assisting members, Virachai Plasai, a Thai national, and Richard Plender, a U.K. attorney.<sup>24</sup> The first hearings were scheduled for December 2003, with a final ruling to be issued in late April 2004.<sup>25</sup>

### B. Possible Ramifications for Antigua

Antigua and Barbuda is a small twin-island state with a population nearing 72,000, and a workforce of approximately 32,000.<sup>26</sup> The country's service-based economy was highly dependent on tourism until the mid-1990s, when it was struck by a series of violent hurricanes, devastating the tourism industry and the economy.<sup>27</sup> Since then, Antigua and Barbuda has been diversifying its economy to lessen the effects of natural disasters, focusing on developing electronic commerce and a telecommunication infrastructure.<sup>28</sup> The country began to attract Internet gambling, providing employment to its computer-literate population and much-needed revenues to its government.<sup>29</sup>

Sir Ronald Sanders, Chief Foreign Affairs Minister of Antigua and Barbuda, named the United States "the center of the world's gambling business," with consumer spending in its commercial casinos nearing \$26 billion dollars.<sup>30</sup> Sanders warned that the Unlawful Internet Gambling Funding Prohibition Act could result in 800 lost jobs with the closure of the nearly 40 Internet casinos that operate out of Antigua and Barbuda, and the elimination of \$2.2 million dollars in annual licensing fees.<sup>31</sup> In 2001, the coun-

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23. Update of WTO Dispute Settlement Cases, Sept. 17, 2003, WTDS/OV/15, available at 2003 WL 22161820 (W.T.O).

24. Daniel Pruzin, *Electronic Commerce: WTO Chief Appoints Panelists in Complaint Against U.S. Internet Gambling Restrictions*, INT'L TRADE DAILY (BNA), Aug. 29, 2003.

25. Daniel Pruzin, *Electronic Commerce: WTO Panel Sets End of April Date to Rule on U.S. Gambling Restrictions*, INT'L TRADE DAILY (BNA), Feb. 3, 2003.

26. Background Note: Antigua and Barbuda, July 2002, Bureau of Western Hemisphere Affairs, State Dep't, at <http://www.state.gov/r/pa/ei/bgn/2336pf.htm>.

27. *Id.*

28. Dispute Settlement Body- Minutes of Meeting Held in the Centre William Rappard on 24 June 2003, WT/DSB/M/151, Aug. 12, 2003, at <http://www.wto.org>.

29. *Id.*

30. *Id.*

31. Daniel Pruzin, *Electronic Commerce: U.S. Threatened with WTO Dispute Case Over Online Gambling Restrictions*, INT'L TRADE DAILY (BNA), Mar. 24, 2003.

try was home to more than 100 licensed online casino operators<sup>32</sup> employing nearly 3,000 people,<sup>33</sup> but Sanders declared that "U.S. laws have caused these businesses to collapse."<sup>34</sup>

The United States' concerns over the inadequate regulation of the financial services sector in Antigua and Barbuda prompted the U.S. government to issue a financial advisory in 1999.<sup>35</sup> The advisory was lifted in 2001, but the United States continues to monitor the regulation of financial services.<sup>36</sup> In November 2002, Antiguan lawmakers and business leaders had the opportunity to lobby U.S. Congressmen and discuss the Caribbean's Internet gaming industry, when twenty Congressional Black Caucus members, state and local representatives, trade officials, cabinet members, and hundreds of business executives attended the Carib News Multi-National Business Conference in the West Indies. Ultimately, lobbying attempts were unsuccessful.<sup>37</sup>

Antigua and Barbuda views the WTO dispute as a David-and-Goliath type of battle, with Antigua being both the first Caribbean nation and the first nation with fewer than 100,000 people to take a dispute to the WTO.<sup>38</sup> Moreover, Antigua and Barbuda is taking on the most powerful nation in the world,<sup>39</sup> whom Antigua views as "aggressively attempting to destroy the Antiguan gambling and betting industry."<sup>40</sup> Prime Minister Lester Bird considers his country to be a pioneer in heading the fight against the U.S. Internet gambling regulations and feels victorious that the WTO has ordered the United States to answer Antigua and Barbuda's charges.<sup>41</sup>

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32. Pruzin, *WTO Panel Review*, *supra* note 20.

33. Daniel Pruzin, *Trade Policy: Antigua Seeks WTO Panel to Examine U.S. Rules Restricting Online Gambling*, INT'L TRADE DAILY (BNA), June 16, 2003.

34. Pruzin, *WTO Panel Review*, *supra* note 20.

35. Background Note: Antigua and Barbuda, July 2002, Bureau of Western Hemisphere Affairs, State Dep't, at <http://www.state.gov/r/pa/ei/bgn/2336pf.htm>.

36. *Id.*

37. *Internet Gaming Issue to be Addressed with U.S. Congressmen*, Antigua Sun (Oct. 24, 2002), available at <http://www.antiguasun.com/paper/?as=view&an=X28251102094050720034047&ac=local&aop=CADSNPAX282511029405072003>.

38. Eucila Hill, *Antigua/USA Gambling Case Historic*, ANTIGUA SUN (Aug. 28, 2003), available at <http://www.antiguasun.com/paper/?as=view&an=413117107008282003&ac=Local&aop=4723050107708282003#StoryRest>.

39. *Id.*

40. United States-measures Affecting the Cross-Border Supply of Gambling and Betting Services, Comments on the United States' Request for Preliminary Rulings by Antigua and Barbuda., WT/DS285 (Oct. 22, 2003), at para. 6, available at [http://www.antigua-barbuda.com/busnss\\_politics/Antigua%20comments\\_1\\_.pdf](http://www.antigua-barbuda.com/busnss_politics/Antigua%20comments_1_.pdf).

41. Natalie S. Fleming, *Round 1 to Antigua. . . USA Forced to Answer to WTO on*



## III. THE ARGUMENTS

A. *Current Legal Status*

Every state except Hawaii and Utah has legalized some form of gambling, generating over \$20 billion dollars in tax revenue for state governments in 2000.<sup>42</sup> Internet gambling, though, has generally been based in tax-haven nations because of trends in the United States towards criminal regulation of sports wagering and the appeal of more lenient tax and financial declaration requirements found offshore.<sup>43</sup> Additionally, casino operators in the United States fear that an increase in offshore Internet gambling will mean less money gambled at traditional casinos and, therefore, less gambling tax revenue for the government.<sup>44</sup> Internet gambling has generally been indirectly regulated, notably in the application of the 1916 Wire Wager Act to Antigua-based online sports wagering in *U.S. v. Cohen*.<sup>45</sup> *Cohen* extended the illegality of using "wire communication" for the transmission of gambling-related information to Internet communication as well.<sup>46</sup>

The Wire Act's restrictive effect on Internet gambling, though, is limited. In the Fifth Circuit, the case of *In Re Mastercard* held that the Wire Act concerns only gambling on "sports events or contests" and only makes accepting a bet by wire illegal, not placing a bet.<sup>47</sup> The Court goes even further by saying that the Wire Act does not apply to games of chance.<sup>48</sup> This removes the most common Internet gambling situation, where the gambler is located in the United States and the gaming operation is offshore, away from the U.S. courts' jurisdiction.<sup>49</sup> The effects of *In Re Mastercard*, combined with several failed legislative attempts to specifically prohibit Internet gambling,<sup>50</sup> has finally provoked legislation that clearly bans offshore Internet gambling.

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*Local Gaming*, ANTIGUA SUN (July 22, 2003), available at <http://www.antiguasun.com/paper/?as=view&an=48535611907222003&ac=Local&aop=325302116707222003>.

42. David B. McGinty, *The Near-Regulation of Online Sports Wagering by United States v. Cohen*, 7 GAMING L. REV. 205 (2003).

43. *Id.*

44. *Id.* at 206.

45. See *U.S. v. Cohen*, 260 F.3d 68 (2d Cir. 2001); McGinty, *supra* note 42.

46. See *Cohen*, 260 F.3d at 68.

47. See *In Re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001).

48. *Id.*; McGinty, *supra* note 42.

49. McGinty, *supra* note 42.

50. The Comprehensive Internet Gambling Prohibition Act failed three times (See S. 3006, 107th Cong. (2002), S. 692, 106th Cong. (1999), S. 474, 105th Cong. (1997)); McGinty, *supra* note 42.

## IV. THE UNLAWFUL GAMBLING FUNDING PROHIBITION ACT

A. *Opposing Viewpoints*

- i. Proponents argue that an effective prohibition is needed

Internet gambling is legal and regulated in over fifty countries and jurisdictions, but nearly ninety percent of the gaming sites are operated from the Caribbean, Europe, and the Pacific Rim,<sup>51</sup> beyond the scope of U.S. regulatory and tax laws.<sup>52</sup> Credit card companies, such as American Express and Discover, have taken preemptive steps to deter illegal offshore gambling transactions by prohibiting their customers from using their cards on Internet gaming sites.<sup>53</sup> MasterCard and Visa have taken similar, but less restrictive steps, having developed transaction codes that can be used to audit payments to gaming sites.<sup>54</sup>

States effectively regulate traditional casino gambling; however, because the Internet implicates interstate commerce, control of Internet gambling has been accorded to Congress.<sup>55</sup> The federal government has prosecuted middlemen like PayPal, a company that provides U.S. residents a means to place bets online.<sup>56</sup> Nonetheless, Internet gambling operations continue to evade initiatives to stop the gaming sites from providing their services to U.S. residents.<sup>57</sup> Representative Spencer Bachus, a Republican from Arizona and sponsor of the Unlawful Internet Gambling Funding Prohibition Act, stated, "people are going to gamble (online). It's almost impossible for states to do anything, so the way to stop it is to cut off the money."<sup>58</sup>

Proponents of the bill contend that drug dealers, terrorists, and criminals exploit the Internet and derive funding through online gaming sites.<sup>59</sup> Bachus stated, "Organized crime controls

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51. Michael Burnham, *Corralling Gamblers on the Net Frontier*, PCWORLD.COM, (Sept. 1, 2003), at <http://www.peworld.com/resource/printable/article/0,aid,112268,00.asp>.

52. S.REPUBLICAN POLICY COMM., *ILLEGAL INTERNET GAMBLING: PROBLEMS AND SOLUTIONS* (Sept. 3, 2003), available at [http://kyl.senate.gov/legis\\_center/rpc/rpc\\_090303.pdf](http://kyl.senate.gov/legis_center/rpc/rpc_090303.pdf) (hereinafter *PROBLEMS AND SOLUTIONS*).

53. Burnham, *supra* note 51; Tom Weir, *Online Sports Betting Spins out of Control*, USA TODAY (Aug. 22, 2003) at 1A.

54. *Id.*

55. *PROBLEMS AND SOLUTIONS*, *supra* note 52.

56. Burnham, *supra* note 51.

57. *PROBLEMS AND SOLUTIONS*, *supra* note 52.

58. Burnham, *supra* note 51.

59. H.R. REP. NO. 108-133 (2003), available at <http://thomas.loc.gov/>.

these sites. We know they're not good people. We know they link these sites with pornographic sites."<sup>60</sup> Republican Representative Jim Leach who proposed the bill in January 2003, said that "Internet gambling increases consumer debt, makes bankruptcy more likely, money laundering an easy endeavor, and identity theft a likely burden. The home may be considered a castle, but it should never be a casino."<sup>61</sup>

Senator Jon Kyl, sponsor of the Senate version of the bill and Chairman of the Republican Policy Committee, has cited the ease of criminal activity, encouragement of youth gambling, exacerbation of pathological gambling, cost to society, and a negative impact on sports, as problems associated with Internet gambling.<sup>62</sup> A supporter of Kyl's bill, the director of Harvard Medical School's Division on Addiction Studies, likens Internet gambling to smoking crack cocaine, as both "delivery forms" change the way in which each vice is experienced and intensify the problems associated with each.<sup>63</sup>

## ii. Opponents of the bill prefer regulation

Many of the moralistic arguments proponents put forward lose ground with lawmakers, as both the Senate and House versions of the bill exempt horse and dog racing, state lotteries, and brick-and-mortar casino gambling.<sup>64</sup> Pathological gamblers, college students, and the financially unstable are not banned from these "traditional" forms of gambling, but once they sign online, their acts are considered moral indignation severe enough to be prohibited.

Further, opponents of the bill argue that when online betting with cash becomes illegal, lawbreaking casinos will begin using other methods of payment such as "e-wallets", where overseas companies create identities online with debit accounts making it harder to identify the true owner.<sup>65</sup> Other possible alternatives include prepaid ATM, "personal checks" to draw funds directly

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60. Elsa Wenzel, *Odds Go Against Online Gambling: Congress Cracks Down on Internet Payments to Virtual Casinos*, PCWORLD.COM, (June 11, 2003) available at <http://www.pcworld.com/resource/printable/article/0,aid,110508,00.asp>.

61. *Id.*

62. PROBLEMS AND SOLUTIONS, *supra* note 52.

63. *Id.*

64. S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/>; H.R. 2143, 108th Cong. (2003), available at <http://thomas.loc.gov/>.

65. Weir, *supra* note 53.

from bank accounts,<sup>66</sup> and TeleBuy, which charges gambling transactions directly to the bettor's phone bill.<sup>67</sup> Once credit cards are no longer an option, online gamblers will likely begin setting up offshore bank accounts, creating an environment even more conducive to money laundering.<sup>68</sup>

The American Gaming Association's president, Frank Fahrenkopf, argues that the credit card industry has effectively inhibited Internet gambling transactions via credit cards, mitigating the need for the passage of the House bill.<sup>69</sup> Credit card companies, initially making money on gambling transactions, started to crack down on customers due to their inability to pay off debts.<sup>70</sup> A gambling consultant company noted a twenty percent drop in Internet gambling activity after the voluntary regulation by credit card companies; however, the unavailability of credit card use for gambling transactions has given site operators time to create new methods of payment.<sup>71</sup>

Sue Scheider, chairwoman of the Interactive Gaming Council, also contends that the bill's outright ban of cash payments for online gambling will force legitimate sites out of business, redirecting the proceeds to illegal sites.<sup>72</sup> Instead, opponents of the bill argue the United States should follow regulatory approaches similar to Australia and the United Kingdom, who plan on requiring more traditional forms of licensing standards for online casinos.<sup>73</sup> The United Kingdom's online Sportingbet.com estimates that if its \$70 million dollars in bets placed by U.S. residents were taxed like a Las Vegas casino, the Internet gambling site would be paying \$4.4 million dollars in U.S. taxes this year; Senator Kyl responded by saying, "We're not in this to make money. We're in this to maintain the integrity of sports."<sup>74</sup>

MGM Mirage Online, who had lobbied Congress to regulate rather than ban Internet gaming, closed its site one week before the House vote with a \$5 million dollar loss due to the elimination

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66. Joseph M. Kelly, *Payment Problems and New Solutions: From National Regulation to Global Solutions*, 7 GAMING L. REV. 123, 127 (2003).

67. Weir, *supra* note 53.

68. *Id.*

69. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov>.

70. Weir, *supra* note 53.

71. *Id.*

72. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov>.

73. Burnham, *supra* note 51.

74. Weir, *supra* note 53.

of U.S. gamblers from its market.<sup>75</sup> Other sites have switched to skill-based games like chess, checkers, and digital billiards, where players compete amongst themselves for small sums rather than against the 'House' in order to avoid the "gambling" label and corresponding regulations.<sup>76</sup> Harrah's Entertainment is planning to launch a games-of-skill site incorporating a subscription model, a model that is already causing members of Congress to reconsider Internet gambling.<sup>77</sup>

### *B. Recent Congressional Action*

The Unlawful Internet Gambling Funding Prohibition Act passed the House on a 319 to 104 vote on June 10, 2003.<sup>78</sup> The House bill did not include any criminal provisions, but the Senate version, S.627, does.<sup>79</sup> Senator Kyl hopes that the criminal provisions will give U.S. law enforcement the requisite authority to regulate offshore Internet gaming sites that illegally offer their services to U.S. residents.<sup>80</sup>

The Senate Banking, Housing, and Urban Affairs Committee held a hearing on the bill on March 18, 2003 and marked up S.627 on July 31, 2003.<sup>81</sup> Prior to the markup, the Senate version was similar to that passed by the House, but Committee Chairman Richard Shelby (R-Ala.) introduced a substitute amendment removing a provision of the bill that permitted online gaming in states that had allowed Internet gaming, provided that site operators could limit access to its state's citizens. The committee approved the substitute by voice vote, twenty-one to zero, passing the bill out of committee.<sup>82</sup> On October 27th, 2003, the bill was placed on the senate legislative calendar, but was not voted on before Congress adjourned for the year.<sup>83</sup> Senator Kyl, though, has stated that he will continue to push to get the bill up for a

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75. Christina Binkley, *Harrah's Places a Wager on the Web*, THE WALL STREET JOURNAL, Nov. 12, 2003, at A8.

76. Hiawatha Bray, *Website Takes Chance on Games of Skill*, THE BOSTON GLOBE, Nov. 3, 2003, at C2.

77. Binkley, *supra* note 75.

78. H.R. 2143, 108th Cong. (2003), available at <http://thomas.loc.gov/>.

79. S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/D?c108:2:/temp/~0108SWG4d>.

80. PROBLEMS AND SOLUTIONS, *supra* note 52.

81. S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/D?c108:2:/temp/~0108SWG4d>.

82. S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/>.

83. Summary, S.627, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d108:42:/temp/~bdLtg6:@@D&summ2=M&>.

vote, despite 2004 being an election year.<sup>84</sup>

### C. *Legislative Purpose & Justification*

The Unlawful Internet Gambling Funding Prohibition Act directs federal regulators to limit the acceptance of any bank instrument<sup>85</sup> in unlawful Internet gambling transactions<sup>86</sup> in order “to give the Federal function regulators a new, more effective tool for combating offshore Internet gambling sites that illegally extend their services to U.S. residents via the Internet.”<sup>87</sup> The 107th Congress, primarily through the House Committee on Financial Services, has produced a comprehensive hearing and markup record concerning Internet gambling to support this effort.<sup>88</sup> Further, in an October 3, 2001 House committee hearing on terrorism and money laundering, the Federal Bureau of Investigation (FBI), Department of Justice (DOJ), and money-laundering experts testified that Internet gaming can be easily used as a money-laundering vehicle and is likely a source to be exploited for terrorist funding.<sup>89</sup>

The Subcommittee on Oversight and Investigations and the Subcommittee on Financial Institutions and Consumer Credit held two hearings in July 2001, where witnesses testified as to Internet gambling’s legal status, the social and financial problems it causes, and the legislative options to deal with those problems.<sup>90</sup>

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84. *Arizona Senator Plans to Push Internet Gambling Bill Again*, THE ASSOCIATED PRESS NEWSWIREs, Jan. 28, 2004.

85. A bank instrument includes any ‘restricted transaction’ made by credit, or the proceeds of credit, an electronic fund transfer or funds transmitted by or through a money transmitting business, any check, draft, or similar instrument drawn by or on behalf of the other person and is drawn on or payable at or through any financial institution, or the proceeds of any other form of financial transaction as federal regulators may prescribe. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=HR133dbname=CP108&>.

86. For the purposes of this bill, ‘unlawful internet gambling’ means to place, receive, or otherwise transit a bet or wager by any means which involves the use of the Internet where such bet or wager is unlawful under any applicable federal or state law in the state in which the bet or wager is initiated, received, or otherwise made. The term ‘bets or wagers’ means the staking or raising by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to change, including the purchase of a chance or opportunity to win a lottery or other prize. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=HR133dbname=CP108&>.

87. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=HR133dbname=CP108&>.

88. H.R. REP. No. 107-339 (2001); H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov/>.

89. H.R. REP. No. 108-133 (2003), available at <http://thomas.loc.gov/>.

90. *Id.*

Witnesses stated that offshore Internet gambling sites advertise the ease of starting betting accounts through the use of credit cards, making these sites not only vulnerable to money laundering, but also consumer credit card information abuse or odds manipulation of a particular bet to the benefit of the online casino.<sup>91</sup>

The American Gaming Association (AGA) addressed practical problems of Internet gambling, stating that:

[Offshore Internet casinos] frustrate important state policies, including restrictions on the availability of gaming within each state. [U]nregulated Internet gambling that exists today allows an unlicensed, untaxed, unsupervised operator to engage in wagering that is otherwise subject to stringent federal and state regulatory controls. These controls are vital to preserving the honesty, integrity and fairness that those in the gaming industry today have worked so hard for so long to bring about.<sup>92</sup>

The AGA doesn't believe that the technology needed to exercise the requisite control for Internet Gaming yet exists.<sup>93</sup> Adding to these arguments, the New Jersey Director of Gaming Enforcement represented the state perspective, testifying that unlike state-regulated casinos, offshore Internet gambling sites bring no tax revenue or jobs to the states.<sup>94</sup>

The National Council on Problem Gambling, the Compulsive Gambling Center, and the Christian Coalition all expressed concerns for Internet gambling's impact on society and family life, in particular, gamblers who are poor, underage, and/or compulsive.<sup>95</sup> The National Collegiate Athletic Association (NCAA) also echoed the concerns regarding youth and sports betting abuses by athletes.<sup>96</sup>

In 1999, the National Gambling Impact Study Commission recommended that Congress prohibit all Internet gambling not already authorized and adopt regulations intended to detect and prevent any other illegal operations.<sup>97</sup> The Committee asserts that the Unlawful Internet Gambling Funding Prohibition Act is designed to meet these objectives and provide a means for banks

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

and financial service providers to identify, block or prevent payments to illegal Internet gambling sites.<sup>98</sup>

#### D. Governmental Agency Concerns (GAO Report)

Per House Committee on Financial Services request, the General Accounting Office (GAO) examined credit cards and other U.S. payment systems<sup>99</sup> as they relate to Internet gambling<sup>100</sup> and assessed the vulnerability of Internet gambling to money laundering activities.<sup>101</sup> The GAO report demonstrates that the efforts of major credit card companies to restrict the use of their cards for online gambling has had some success, as gaming analysts have lowered their 2003 Internet gambling revenue forecasts—the projected growth for 2003 is down 23 percent, or a reduction in gross gaming revenue of \$1.2 billion dollars.<sup>102</sup>

Due to the success of these efforts, Internet gaming sites will likely encourage the development of newer methods of payment, like e-cash, that could soon replace the use of credit cards.<sup>103</sup> Analysts are concerned that these newer forms of electronic payments might not be subject to the same level of record keeping or transaction limits as credit cards, making them more susceptible to money laundering because of their anonymity, speed, and lower transaction costs.<sup>104</sup>

The Financial Action Task Force (FATF), the largest and most influential intergovernmental body seeking to combat money laundering, stated that some member jurisdictions had evidence that criminals were using Internet gambling to launder illicit funds.<sup>105</sup> The U.S. State Department supported this notion, stating that Internet gambling involving credit cards and offshore

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98. *Id.*

99. For the purposes of the GAO report, Internet gambling payment options include credit cards, third-party payment transfer services such as PayPal and NETeller, direct wire transfers, money orders and various checks, and electronic banking systems or processors. *Internet Gambling: An Overview of the Issues, a report to the House Committee on Financial Services and Subcommittees on Financial Institutions and Consumer Credit, and Oversight and Investigations*, GAO 03-89, Dec. 2002, available at [www.gao.gov/cgi-bin/getrpt?GAO-03-89](http://www.gao.gov/cgi-bin/getrpt?GAO-03-89) at 53 [hereinafter *GAO*].

100. For the purposes of the GAO report, types of Internet gambling include casino, sportsbook, lottery, and bets on horse and dog racing. *Id.* at 53.

101. *Id.* at 1-2.

102. *Id.* at 4.

103. The e-cash method involves the issuance of electronic units or value that can be used for payment instead of currency. *Id.* at 4-5, n. 10.

104. *Id.* at 38.

105. *Id.* at 35-6, n. 51, citing *FATF- XII: Report on Money Laundering Typologies (2000-2001)*, February 2001.



banks served as a powerful vehicle for criminals seeking to launder funds from illegal sources and to evade taxes.<sup>106</sup>

Despite these concerns, credit card and gaming industry representatives believe that Internet gambling is not necessarily more vulnerable to money laundering than any other online transactions; however, they do suggest that eliminating credit cards and other traditional forms of payment could further facilitate money-laundering activities.<sup>107</sup> Banking and gaming regulatory officials believe that credit card transaction records and lower transaction limits mitigate money laundering risks associated with Internet gambling.<sup>108</sup>

### *E. Formal Congressional Findings*

Section 2 of the House Unlawful Gambling Funding Prohibition Act states that Congress finds as follows:

- (1) Internet gambling is primarily funded through personal use of bank instruments, including credit cards and wire transfers.
- (2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which prevent them.
- (3) Internet gambling is a major cause of debt collection problems for insured depository institutions and the consumer credit industry.
- (4) Internet gambling conducted through offshore jurisdictions has been identified by United States law enforcement officials as a significant money laundering vulnerability.<sup>109</sup>

The Senate version of the bill includes the same congressional findings.<sup>110</sup> These findings do not mention the impact on society or family life, youth gambling, the integrity of athletics, or other public policy or moralistic concerns; only debt collection and money laundering problems are cited.<sup>111</sup> This omission suggests that either the bill's drafters could not sincerely include public policy

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106. GAO, *supra* note 99, at 35-6, n. 52, citing United States Department of State Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report*, March 2002.

107. GAO, *supra* note 99, at 34.

108. *Id.* at 37.

109. H.R. 2143, 108th Cong. (2003), available at <http://thomas.loc.gov/>.

110. S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/C?c108:/temp/~c1081ZjeDy>.

111. H.R. 2143, 108th Cong. (2003), available at <http://thomas.loc.gov/>; S. 627,

and morality justifications when the bill exempts traditional forms of gambling associated with the same problems, or, 2) that money laundering and debt collection are the drafters' true concerns, and public policy and morality arguments are being made outside of the text to garner support from conservative legislators.

### *F. Foreign Jurisdictions*

As to Internet gambling in or through foreign jurisdictions, the Senate version of the bill states that the U.S. government, in any deliberations concerning money laundering, corruption, or crime in another country, should:

- (1) [E]ncourage cooperation by foreign governments and relevant international for in identifying whether Internet gambling operations are being used for money laundering, corruption, or other crimes;
- (2) [A]dvance policies that promote the cooperation of foreign governments, though information sharing or other measures, in the enforcement of this Act and the amendments made by this Act; and
- (3) [E]ncourage the Financial Action Task Force on Money Laundering, in its annual report on money laundering typologies, to study the extent to which Internet gambling operations are being used for money laundering purposes.<sup>112</sup>

The Senate version also requires the Secretary of the Treasury to provide Congress with an annual report on any deliberations between the United States and other countries regarding Internet gambling issues.<sup>113</sup> The inclusion of this section, combined with a failure to address any traditional, domestic forms of gambling such as casinos, pari-mutuel racing or lotteries, suggests that offshore money laundering concerns and the inability to regulate overseas Internet gambling sites, are the driving forces behind the bill— not domestic public morality or problem gambling concerns. Further, Congress seems to have ignored many of the findings by the GAO, which suggested that Internet gambling may be successfully regulated by the credit card industry and that an all-out ban of credit cards and other traditional payment forms may increase

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108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/C?c108:/temp/~c1081ZjeDy>.

112. S. 627, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/C?c108:/temp/~c1081ZjeDy>.

113. *Id.*

the chances of site exploitation by money launderers.<sup>114</sup>

### G. *True congressional intent?*

If the most effective way to regulate Internet gambling is through the credit card and financial services industry and the proposed bill disregards public morality as it relates to traditional forms of American gambling, it seems as though the bill's drafters have a different objective in mind. As U.S. courts have removed Internet gambling as a source of revenue for American gaming operators and U.S. governments,<sup>115</sup> Congress surely finds little reason to regulate rather than eliminate this troubled industry. In 2002, the U.S. commercial casino tax revenue totaled \$4 billion dollars;<sup>116</sup> however, the industry's growth rate has declined in recent years.<sup>117</sup> Congress's true objective may be to channel American gamblers and their funds away from offshore Internet gambling sites and back into U.S. Casino halls.

## V. COMBATING MONEY LAUNDERING

### A. *The Financial Action Task Force (FATF)*

The FATF was established in 1989 by the G-7 Summit in Paris in order to form a coordinated international response to money laundering concerns, concerns that are valid when considering that globally, money laundering is estimated to have generated two to five percent of the world's gross domestic product.<sup>118</sup> There are twenty-nine countries and jurisdictions represented in the FATF, including all the major financial center countries of North and South America, Europe, and Asia, working in close collaboration with other international bodies to eliminate money laundering.<sup>119</sup> Towards this end, the FATF developed the Forty

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114. GAO, *supra* note 99, at 38.

115. See generally U.S. v. Cohen, 260 F.3d 68 (2d Cir. 2001).

116. American Gaming Association, *Industry Information, Fact Sheets: Tax Contributions* (April 2003), at [http://www.americangaming.org/industry/factsheets/statistics\\_detail.cfv?id=10](http://www.americangaming.org/industry/factsheets/statistics_detail.cfv?id=10).

117. American Gaming Association, *Industry Information Fact Sheets: Gaming Revenue: 10 Year Trends*, at [http://www.americangaming.org/Industry/factsheets/statistics\\_detail.cfv?id=8](http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=8).

118. Financial Action Task Force on Money Laundering, *Basic Facts About Money Laundering*, available at [http://www1.oecd.org/fatf/Mlaundrying\\_en.htm](http://www1.oecd.org/fatf/Mlaundrying_en.htm). [hereinafter FATF *Basic Facts about Money Laundering*]

119. Financial Action Task Force on Money Laundering, *Financial Action Task Force on Money Laundering, Annual Report 2002-2003* (June 20, 2003), at [http://www1.oecd.org/fatf/pdf/AR2003\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR2003_en.pdf) at 3 [hereinafter FATF *Annual Report*] (the United States is a member of FATF; Antigua and Barbuda is not).

Recommendations, setting forth policies and measures that governments should undertake to eliminate money-laundering activities.<sup>120</sup>

The Forty Recommendations are recognized by the World Bank and IMF as the international standards for combating money laundering,<sup>121</sup> and have been endorsed by more than 130 countries.<sup>122</sup> The FATF is also fully committed to regional bodies concerned with combating money laundering, such as the Caribbean Financial Task Force (CFATF), organized similarly to the FATF.<sup>123</sup>

The CFATF's main objective is to effectively implement and comply with the FATF's Forty Recommendations.<sup>124</sup> Antigua and Barbuda's Chief Foreign Affairs Officer, Sir Ronald Sanders, was recently named chairman of the CFATF and asserted that his main task as chairman would be to create a harmonized anti-money laundering program with a more closely integrated membership.<sup>125</sup>

The United States is one of the CFATF's Cooperating and Supporting Nations that recognize the correlative relationship between the FATF and CFATF's objective to implement the Forty Recommendations.<sup>126</sup> To more effectively investigate and prosecute money-laundering cases, the CFATF has developed a regional program for technical assistance and training, a program that the United States partially funds.<sup>127</sup>

The FATF has revised the Forty Recommendations to extend anti-money laundering measures to certain non-financial businesses, including casinos and Internet casino sites.<sup>128</sup> Customer due diligence and record keeping is required for Internet gambling

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120. FATF *Basic Facts about Money Laundering*, *supra* note 118, at 2.

121. *FATF Annual Report*, *supra* note 119 at 2.

122. Financial Action Task Force on Money Laundering, *Annual Report 2002-2003, Annex A, The Forty Recommendations* (June 20, 2003), at [http://www1.oecd.org/fatf/pdf/AR2003-Annexes\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR2003-Annexes_en.pdf) at 1 [hereinafter *Forty Recommendations*].

123. *FATF Annual Report*, *supra* note 119, at 3.

124. Financial Action Task Force on Money Laundering, *Annual Review of Non-Cooperative Countries or Territories*, (June 20, 2003), available at [http://www1.oecd.org/fatf/pdf/NCCT2003\\_en.PDF](http://www1.oecd.org/fatf/pdf/NCCT2003_en.PDF).

125. Sir Ronald Michael Sanders, Address to the Council of Ministers meeting of the CFATF (Oct. 23, 2003) at <http://www.antigua-barbuda.com>.

126. Caribbean Financial Action Task Force, *CFATF Overview*, at <http://www.cfatf.org/>.

127. *Id.*

128. Financial Action Task Force on Money Laundering, *New Anti-Money Laundering Standards Released* (June 20, 2003) at [http://www1.oecd.org/fatf/pdf/PR-20030620\\_enPDF](http://www1.oecd.org/fatf/pdf/PR-20030620_enPDF) at 1; Financial Action Task Force on Money Laundering, *Annual*

transactions that meet or exceed a designated threshold.<sup>129</sup> The Recommendations also maintain that Internet casinos should be subject to regulations and supervision that would ensure effective implementation of anti-money laundering and terrorist-financing measures. At a minimum, Internet casinos should be licensed, and competent authorities should make certain that Internet casinos are effectively supervised and comply with the requisite measures to ensure that known criminals do not own, hold interest in, manage, or operate Internet casinos.<sup>130</sup> While an effective undertaking of these measures is necessary to deter money laundering, countries are prohibited from impeding the freedom of capital movements in any way, and International cooperation is strongly encouraged.<sup>131</sup>

Additionally, the FATF identifies non-cooperative countries and territories (NCCTs) that impede international cooperation due to loopholes in their financial regulations, inadequate regulatory requirements, or inadequate resources for preventing and detecting money laundering.<sup>132</sup> The current list of NCCTs include the Cook Islands, Egypt, Guatemala, Indonesia, Myanmar, Nauru, Nigeria, the Philippines, and the Ukraine, all of which are strongly encouraged to improve their existing anti-money laundering and terrorist financing procedure rules as quickly as possible.<sup>133</sup> In light of the continual non-compliance by some countries, the FATF provides possible counter-measures to be implemented by FATF members to protect their own economies.<sup>134</sup> These measures should be gradual, proportionate, and taken in collaboration.<sup>135</sup>

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*Report 2001-2002, Annex A, Glossary*, at 13, at [http://www1.oecd.org/fatf/pdf/AR2003-Annexes\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR2003-Annexes_en.pdf).

129. *Forty Recommendations*, *supra* note 122, at 6 (The designated threshold for casinos and Internet casinos is 3,000 USD. Financial Task Force on Money Laundering); Financial Action Task Force on Money Laundering, *New Anti-Money Laundering Standards Release* at 1 (June 20, 2003), at [http://www1.oecd.org/fatf/pdf/PR-20030620\\_en.PDF](http://www1.oecd.org/fatf/pdf/PR-20030620_en.PDF); Financial Action Task Force on Money Laundering, *Annual Report 2002-2003, Annex A, Interpretive Notes to the Forty Recommendations* at 17, at [http://www1.oecd.org/fatf/pdf/AR2003-Annexes\\_en.pdf](http://www1.oecd.org/fatf/pdf/AR2003-Annexes_en.pdf).

130. *Forty Recommendations*, *supra* note 122, at 8-9.

131. *Id.* at 7-9.

132. Financial Action Task Force on Money Laundering, *Annual Review of Non-Cooperative Countries or Territories*, (June 20, 2003), available at [http://www1.oecd.org/fatf/pdf/NCCT2003\\_en.PDF](http://www1.oecd.org/fatf/pdf/NCCT2003_en.PDF).

133. *Id.* at 17.

134. *Id.* at 3.

135. *Id.* at 5.

### B. *U.S. Regulations*

Under current U.S. regulations, all money services businesses and financial institutions are required to report any suspicious transactions that may be related to illegal activities.<sup>136</sup> Traditional financial institutions such as banks and brokers are subject to this regulation, as are casinos, money transmitters like PayPal, check cashers, and any entities that deal with traveler's checks, money orders, or stored value.<sup>137</sup> As these existing safeguards ensure the integrity of a variety of U.S. financial institutions and money services businesses, they also seem appropriate for administering the cross-border provisions of foreign financial services and gambling and betting services, while also ensuring the benefits of free trade.

Furthermore, anyone subject to U.S. jurisdiction is required to report any financial interest such as a financial account in a foreign country.<sup>138</sup> This provision may already capture some of the alternative methods of payment for online gaming transactions like "e-wallets".

### C. *Antiguan Safeguards*

An Antiguan representative recently advised the DSB that his country was found to have cooperated fully with the FATF on money laundering and counter-terrorism issues, had amended legislation to meet FATF standards, and had devoted scarce human and financial resources to more effectively regulate and supervise Internet gambling and other financial services transactions.<sup>139</sup> The representative also stated that Antigua's developing Internet

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136. 31 C.F.R. §103.20a (2003).

137. A financial institution includes banks, brokers in dealers in securities, money services businesses, telegraph companies, and casinos. 31 C.F.R. §103.11n (2003). Money services businesses include currency dealers or exchangers, check cashers, issuers, sellers, or redeemers of traveler's checks, money orders or stored value, money transmitters, and the United States Postal Service. 31 C.F.R. §103.11uu (2003). Money transmitters engage in the business in accepting currency, or funds denominated in currency, and transmits them by any means through a financial agency or institution, a Federal Reserve Bank, an electronic funds transfer network, or is any other person engaged as a business in the transfer of funds. 31 C.F.R. §103.11uu5 (2003); PayPal is licensed in more than 20 U.S. states under money transmitter acts, sales of checks or check-cashing acts, or money order and travelers checks acts. PayPal Inc., *State Licenses*, at <http://www.paypal.com/cgi-bin/webscr?cmd=p/ir/licenses-outside>.

138. 31 C.F.R. §103.24a (2003).

139. Dispute Settlement Body- Minutes of Meeting Held in the Centre William Rappard on 24 June 2003, WT/DSB/M/151, (Aug. 12, 2003), at <http://www.wto.org>.

gambling business may be more effectively regulated and supervised than anywhere else in the world.<sup>140</sup>

Antigua and Barbuda has enacted and amended rules and procedures governing the Internet gambling industry, including the International Business Corporations Act, Interactive Gaming & Interactive Wagering Regulations, the Money Laundering Prevention Act, Anti-Money Laundering Guidelines for Financial Institutions, and the Proceeds of Crime Act.<sup>141</sup> These regulations incorporate a two-part framework composed of the direct regulation by the gaming regulations and the anti-money laundering requirements imposed on the Internet gambling.<sup>142</sup>

The regulations provide for strict standards for obtaining and renewing a gambling license, and give investigatory, supervisory, monitoring, and licensing powers to an independent commission. Furthermore, they directly address social issues by creating age limitations, requiring operators to display gambling addiction warnings and information, providing rules governing the maintenance and operation of player accounts, and requiring licensees to fully register and verify player identities and maintain player confidentiality.<sup>143</sup>

The comprehensive money laundering provisions regulate player and licensee identity requirements, the taking and making of player payments, as well as prohibit taking cash from players.<sup>144</sup>

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140. *Id.*

141. Sir Ronald Michael Sanders, *Antigua's Impudence: It's a Case Against the US at the WTO*, Address to the Antigua and Barbuda Chamber of Commerce and Industry at the Royal Antigua Hotel (Aug. 26, 2003), at <http://www.antigua-barbuda.com/>; see also First Submission of Antigua and Barbuda, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 (Oct. 1, 2003) at para. 29-31, nn. 2025 at [http://www.antigua-barbuda.com/busnss\\_politics/Antigua%20First%20Submission.pdf](http://www.antigua-barbuda.com/busnss_politics/Antigua%20First%20Submission.pdf) citing *Statutory Instruments Antigua and Barbuda*, No. 20, "Virtual Casino Wagering and Sports Book Wagering Regulations 1997" (1997); *Acts of Antigua and Barbuda*, No. 9 (1996); *Acts of Antigua and Barbuda*, No. 9 (1999); *Acts of Antigua and Barbuda*, No. 20 (2000); *Acts of Antigua and Barbuda*, No. 6 (2001); *Acts of Antigua and Barbuda*, No. 17 (2002); *Statutory Instruments Antigua and Barbuda*, No. 35, "Money Laundering Prevention Regulations 1999" (1999); *Statutory Instruments Antigua and Barbuda*, No. 16, "Interactive Gaming and Interactive Wagering Regulations of 2001" (2001).

142. First Submission of Antigua, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 at para. 48 (Oct. 1, 2003), at [http://www.antigua-barbuda.com/busnss\\_politics/Antigua%20First%20Submission.pdf](http://www.antigua-barbuda.com/busnss_politics/Antigua%20First%20Submission.pdf).

143. *Id.* at para. 48-55.

144. See First Submission of Antigua and Barbuda United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, *supra* note 142, at para. 48-55.

This removes two money laundering facilitators, anonymity and cash payments, from the gambling transaction.

#### *D. U.S. disregard for the FATF & current regulations*

While the United States recognized the FATF in the Unlawful Gambling Funding Prohibition Act, the Act itself seems to violate the terms of the FATF. Antigua and Barbuda has not been named a NCCT, rather, it has been found to be a fully cooperative member in light of its recent regulatory action.

The Unlawful Internet Gambling Funding Prohibition Act is effectively a ban on the supply of offshore gambling services in an attempt to stop money laundering activities; it is not a gradual, proportionate, or flexible approach taken in collaboration with cooperative countries like Antigua and Barbuda to regulate the industry. The bill also impedes the freedom of capital movement, violating another provision of the FATF. The United States' apparent disregard of the FATF provisions and Antigua and Barbuda's comprehensive Internet gambling and money laundering regulatory schemes will likely be taken into account when the DSB determines whether the bill was in fact a measure "necessary" to meet the objectives invoked to exempt the United States from its GATS commitments. Furthermore, the availability of safeguards such as those applicable to U.S. financial institutions and money services businesses may also be considered when determining whether the proposed U.S. ban is "proportional" to U.S. objectives.

## VI. THE ARGUMENT UNDER GATS

### *A. The GATS Framework*

#### *i. Purpose and structure*

A country's GATS commitments reach all forms of international trade in services and operate as a legally binding guarantee that foreign firms can supply their services under stable conditions,<sup>145</sup> making GATS a factor that global economic actors and participants, members of Congress, and regulatory bodies must keep in mind.<sup>146</sup>

The three basic considerations that controlled the GATS

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145. GATS: Fact and Fiction at [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_factfiction\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.doc).

146. WTO Secretariat, Trade in Services Division, *An Introduction to the GATS* at 1 (Oct. 1999), available at [http://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc).



agreement are set out in the preamble: (1) the aim of GATS is to progressively open trade in services and to help trade expand and enhance worldwide economic development; (2) the agreement recognizes that WTO Members and developing countries have the right to regulate the supply of services within their territories to meet national policy objectives; and (3) WTO Members should help developing countries increase their participation in the trade in services exports through strengthening their domestic services capacity, efficiency and competitiveness.<sup>147</sup>

The GATS has a three-pillar framework consisting of the basic obligations applicable to all WTO member countries; additional specific commitments for continuing liberalization contained in national schedules of commitments; and annexes that address special situations of particular service sectors.<sup>148</sup>

## ii. General Obligations

The general obligations and disciplines of GATS are set out in Part II of the agreement and include most-favored-nation treatment (MFN) and Transparency. They are applicable generally to all Members and all services and are closely equivalent to many of the key provisions of the General Agreement of Tariffs and Trade (GATT).<sup>149</sup> GATS Article II requires Members to extend "immediately and unconditionally to services and services suppliers of any other Member treatment no less favorable than that it accords to like services and services suppliers of any other country."<sup>150</sup> This provision essentially prohibits preferential treatment or trade arrangements and reciprocity provisions that limit trade access benefits among groups of WTO Members in specific sectors.<sup>151</sup> Other Part II provisions require generally applicable measures affecting trade in services in sectors where a country has made specific commitments to be applied reasonably, objectively and impartially to ensure that GATS benefits are not made futile by domestic regulations.<sup>152</sup>

GATS Article VIII, concerning monopolies, is very similar to

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147. *Id.* at 2; see generally GATS, *supra* note 13, at 3.

148. Legal Texts: the WTO Agreements, available at [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#Agreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Agreement).

149. WTO Secretariat, *supra* note 146, at doc. 3-4, at 35.

150. GATS, *supra* note 13, at Art. II, at 3.

151. WTO, GATS: Objectives, Coverage, and Disciplines at [http://www.wtop.org/english/tratop\\_e/serv\\_e/gats1a\\_e.htm](http://www.wtop.org/english/tratop_e/serv_e/gats1a_e.htm).

152. WTO Secretariat, *supra* note 146, doc. 5, at 35.

GATT Article XVII regarding state trading.<sup>153</sup> Under both articles, monopoly service suppliers must comply with Member states' MFN obligations and specific commitments.<sup>154</sup> Negotiations for compensation will be required if a Member has made specific commitments allowing other Members to supply a service and later grants monopoly rights for the supply of that service, nullifying or undermining the commitments.<sup>155</sup>

Part III applies only to scheduled market sectors or specific commitments made by Members, which can be tailored freely to reflect national policy objectives and constraints.<sup>156</sup> The two main articles of Part III relate to market access and national treatment.<sup>157</sup> Article XVI requires Members to give no less favorable treatment to the services and service suppliers of other Members than the minimum level of treatment that is provided in its schedule of commitments.<sup>158</sup>

Article XVII prohibits Members from using discriminatory measures that benefit domestic services or services suppliers.<sup>159</sup> Similar to market access, national treatment gives foreign suppliers and services a minimum level of equal treatment.<sup>160</sup> Formally identical treatment of foreign and domestic suppliers is not required because formally identical measures can result in de facto discrimination, or less favorable treatment of foreign suppliers.<sup>161</sup> The crucial requirement is not to modify competitive conditions in favor of a Member's own service industry.<sup>162</sup>

### iii. Specific Commitments

The debate between Antigua and Barbuda and the United States over the allegations of specific commitment violations is centered on the meaning of, and the United States' level of com-

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153. *Id.* at 5.

154. *Id.* at 6.

155. *Id.*

156. WTO, GATS: Objectives, Coverage, and Disciplines, *supra* note 151, at 36.

157. *See generally* GATS, *supra* note 13 at Part III at 60-1.

158. WTO Secretariat, *supra* note 146, doc. 5, at 35; GATS, *supra* note 13 at art. XVI.

159. GATS, *supra* note 13 at art. XVII; WTO, GATS: Objectives, Coverage, and Disciplines, *supra* note 151.

160. WTO, GATS: Objectives, Coverage, and Disciplines, *supra* note 151.

161. WTO COUNCIL FOR TRADE IN SERVICES, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS) (Mar. 23, 2001) [hereinafter WTO COUNCIL FOR TRADE IN SERVICES] available at <http://tsdb.wto.org/wto/Public.nsf/WhatUGetFrmSet?OpenFrameset>.

162. WTO, GATS: Objectives, Coverage, and Disciplines, *supra* note 151.

mitment under, "sporting and other recreational services."<sup>163</sup>

The interpretation of whether Internet gambling betting and supply services falls under the "sporting and other recreational services" category found in the U.S. schedule of commitments and under chapter 10.D of the WTO Services Sectoral Classification List<sup>164</sup> is to be made in light of the United Nations' Central Product Classification (CPC) system hierarchy and explanatory notes.<sup>165</sup> Internet gambling would likely fall under Group 964, "Sporting and other recreational services," Class 9646, "Other recreational services," Subclass 96492, "Gambling and betting services;" however, there are no explanatory notes available for the "Gambling and betting services" code.<sup>166</sup>

### B. *The Allegations*

Antigua's allegations of United States' GATS violations fall under Part II, General Obligations and Disciplines, Part III, Specific Commitments, and Part IV, Progressive Liberalization.<sup>167</sup> Specifically, the allegations under Part II of the agreement include violations of Article VI, Domestic Regulation, requiring reasonable, objective domestic regulation of general application, Article VIII, Monopolies and Exclusive Service Suppliers, requiring Members to ensure non-discrimination principles, and Article XI, Payments and Transfers, prohibiting restrictions on transactions relating to a Member's specific commitments.<sup>168</sup> Part III alle-

163. WTO COUNCIL FOR TRADE IN SERVICES, *supra* note 161, at 37.

164. Pruzin, *WTO Panel Review*, *supra* note 20.

165. WTO COUNCIL FOR TRADE IN SERVICES, *supra* note 161, at 37.

166. U.N. STATISTICS DIVISION-CLASSIFICATIONS REGISTRY, *available at* <http://unstats.un.org/unsd/cr/regsitry>.

167. U.S.-Measures Affecting the Cross-Border Supply, *supra* note 3 at 6.

168. *Id.*; Specific Part II allegations include violations of Article VI:1, "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner,;" Article VI:3, "Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application,;" Article VIII:1, "Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II [Most-Favored-Nation Treatment] and specific commitments,;" Article VIII:5, "The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of

gations include violations of Article XVI, Market Access, providing for a minimum level of favorable market access treatment, and Article XVII, National Treatment, requiring identically favorable treatment of both domestic and Member service providers. Part IV allegations include violations of Article XX, Schedules of Specific Commitments, requiring all terms and conditions of specific commitments to be set forth in each national schedule.<sup>169</sup>

### C. Exceptions

There are general exceptions to the GATS found in Part II, Article XIV, which are perhaps the closest equivalents of any GATT provisions.<sup>170</sup> Under both agreements, the exceptions exempt a Member from its general obligations provided that the

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service suppliers and (b) substantially prevents competition among those suppliers in its territory.”; and Article XI:1, “Except under the circumstances envisaged in Article XII [Restrictions to Safeguard the Balance of Payments], a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.”; *See generally* GATS, *supra* note 13.

169. U.S.-Measures Affecting the Cross-Border Supply, *supra* note 3; Specifically, Part III allegations include violations of Article XVI:1, “With respect to market access through the modes of supply identified in Article I [Scope and Definition], each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. [footnote 8: If a Member undertakes a market-access commitment in relation to the supply of a service [from the territory of one Member to the territory of any other Member] and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital.]; Article XVI:2, “In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its schedule, are defined as: (a) limitations on the number of service suppliers. . . , (b) limitations on the total value of service transactions or assets. . . , (c) limitations on the total number of service operations or on the total quantity of service output. . . , (d) limitations on the total number of natural persons that may be employed in a particular service sector. . . , (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (f) limitations on the participation of foreign capital. . . .”; Article XVII:1, “[E]ach Member shall accord to services and service suppliers of any other Member. . . treatment no less favorable than that it accords to its own like services and service suppliers”; Article XVII:2, “A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers; Article XVII:3, “Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.” GATS, *supra* note 13.

170. WTO Secretariat, *supra* note 146, doc 5., at 35; *see* GATS, *supra* note 13 at art. XIV in comparison to the General Agreement on Tariffs and Trade, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1B,

measures taken by the Member 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 the trade in services."<sup>171</sup> General exceptions include measures that are necessary to protect public morals or to maintain public order, are necessary to protect human, animal or plant life or health, or are necessary to prevent deceptive and fraudulent practices or to deal with the effects of a default on services contracts. Others include the protection of individual privacy in the handling of personal data, equitable and effective taxation, and safety.<sup>172</sup> The public order exception is only to be invoked where a fundamental interest of society faces a genuine and sufficiently serious threat.<sup>173</sup>

#### D. *The United States' Argument under GATS*

The United States argues that the social, psychological, and financial dangers and law enforcement problems created by Internet gambling exempts the United States from its "sporting and other recreational services" commitments.<sup>174</sup> Furthermore, the U.S. contends that its regulatory measures are not discriminatory because they apply to both foreign and domestic gaming operators.<sup>175</sup>

#### E. *Application of the Exceptions*

##### i. Nullification and Impairment

The general exceptions preserve national consumer protection and privacy laws, but they remain subject to WTO interpretation. The WTO Trade in Services Council and other national governments have been campaigning for a narrow reading of the general exceptions provision as it relates to national privacy and consumer protection laws.<sup>176</sup>

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LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 29 (1994) [hereinafter GATT].

171. WTO Secretariat, *supra* note 146, doc. 5, at 35; GATS, *supra* note 13 at art. XIV; GATT, *supra* note 170 at art. XX.

172. *Id.*

173. GATS, *supra* note 13 at art. XIV.

174. Pruzin, *WTO Panel Review*, *supra* note 20.

175. Daniel Pruzin, *Electronic Commerce: WTO Sets Up Dispute Panel to Rule on U.S. Online Gambling Restrictions*, INT'L TRADE DAILY (BNA), July 22, 2003.

176. E-mail from James Love, Director of the Consumer Project on Technology, to e-commerce, tacd-e-commerce, and random-bits (Nov. 12, 1999), available at <http://www.wto.org/wto/services/2-odbis.htm>.

Article VI incorporates the idea of nullification or impairment,<sup>177</sup> providing that domestic regulations applied in a specific commitment sector must be administered in a “reasonable, objective, and impartial manner.”<sup>178</sup> Article V seeks to ensure that national measures are based on objective and transparent criteria, are not more burdensome than necessary, and that any licensing procedures are not a restriction on the supply of the service.<sup>179</sup>

Disciplines concerning national measures are also contained in Article VI where the measures both (1) nullify or impair the specific commitments in a way that could not reasonably have been expected at the time the specific commitments were made, and (2) are not based on objective and transparent criteria, are not more burdensome than necessary to ensure the quality of the service, and, for the licensing of procedures, are not in themselves a restriction on the supply of the services.<sup>180</sup> This means that where domestic regulation is concerned, nullification or impairment is necessary before redress by the DSB can be made.<sup>181</sup>

## ii. Necessity test

GATS Article XIV incorporates a “necessity test,” which has been interpreted under GATT to require national measures to be the least trade-restrictive, reasonable method to achieve the regulatory goal.<sup>182</sup> Article XIV exceptions must be “necessary” and are only available if the national 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.”<sup>183</sup>

## iii. Application of the Tests to the Unlawful Internet Gambling Funding Prohibition Act

The U.S. bill effectively bans the supply of gambling and betting services from overseas to the United States. It not only affects the bettors in the United States, but prevents sites outside of U.S. borders from providing their services to the U.S. market. This regulation does not appear to be reasonable, objective, or

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177. GATS, *supra* note 13 at art. VI.

178. *Id.*

179. GATS, *supra* note 13 at art. V.

180. GATS, *supra* note 13 at art. VI.

181. NICOLAIDIS & TRACHTMAN, *supra* note 8, at 56.

182. *Id.* at 55.

183. *Id.*; GATS, *supra* note 13 at art. XIV.

impartial, in light of the FATF provisions, GAO findings, and Antiguan Internet gambling and money laundering regulatory schemes, as it allows U.S. gambling and betting suppliers to access the U.S. market through traditional forms of gambling. Further, the FATF has established ways in which member countries are to deal with money laundering threats or concerns, and the credit card industry's attempts to combat money laundering have had more success than the less-easily regulated alternative payment systems. A de facto ban on foreign gambling service providers from accessing U.S. customers may be more burdensome than necessary to reach the objective of stopping money launderers from exploiting gaming sites. The proposed ban would also be a restriction on the supply of services and would nullify any specific commitments made under the "sporting and other recreational services" sector.

*F. How the DSB might look at the exceptions*

i. DSB procedures and "WTO Law"

The DSB panel's decision will be made according to the Dispute Settlement Understanding (DSU), which sets forth the dispute settlement rules to be administered in WTO dispute settlement proceedings.<sup>184</sup> The DSU requires panelists to "be independent and impartial, avoid direct or indirect conflicts of interest and . . . respect the confidentiality of proceedings," and likewise, requires that a panel make an objective assessment of the matter based on the facts, applicability of GATS, and conformity with GATS.<sup>185</sup>

The panel holds meetings with the parties and receives written submissions from them; the DSU allows other WTO members to intervene as third parties and to present arguments to the panel.<sup>186</sup> The burden of proof is on the party who asserts an affirmative claim, or Antigua and Barbuda in this case;<sup>187</sup> however, the U.S. invocation of the general exceptions clause of Article XIV is an affirmative defense, shifting the burden of proof to the

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184. John H. Jackson et al., *Legal Problems of International Economic Relations*, in BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 401 (4th ed. 2003).

185. See WTO COUNCIL FOR TRADE IN SERVICES, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, LT/UR/A-2/DS/U/1 (Apr. 15, 1994) available at [http://www.docsonline.wto.org/GEN\\_viewerwindow.asp?D:DDFDOCUMENTS/T/UR/FA/28-DSU.DOC.HTM](http://www.docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDOCUMENTS/T/UR/FA/28-DSU.DOC.HTM) [hereinafter WTO COUNCIL FOR TRADE IN SERVICES].

186. *Id.*

187. See Jackson et al., *supra* note 184, at 403.

U.S.<sup>188</sup>

After the panel's ruling is issued, the losing party has the opportunity to appeal to the standing appellate body whose review is limited to legal issues and legal interpretation.<sup>189</sup> There are no strict *stare decisis* mandates in the WTO, but prior well-reasoned and persuasive cases do play an important role in dispute settlement.<sup>190</sup> The appellate body relies on a close textual interpretation of the GATS provisions at issue, giving ordinary meaning to the relevant terms in light of the purposes and objectives of GATS, without rendering the provisions meaningless.<sup>191</sup>

The recommendations made by either the panel or the appellate body in an international trade dispute will be adopted unless all the members of the WTO decide by consensus against it; however, judgments can only be enforced by members of the WTO through economic persuasion.<sup>192</sup> If the losing party does not implement the recommendations, the prevailing party may seek compensation or ask the DSB to approve the suspension of concessions previously made to that Member, or "retaliation."<sup>193</sup>

The DSB normally recommends the withdrawal of all measures inconsistent with a Member's obligations, and, in order to ensure the effective resolution of disputes to the benefit of all Members, the DSU explicitly states that the withdrawal of a non-conforming measure is preferred to "temporary measures," such as compensation and suspension of concessions.<sup>194</sup>

#### *G. How the DSB has looked at previous exception cases*

GATT Article XX chapeau, requiring that domestic 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," is identical to GATS Article XIV.<sup>195</sup> The WTO Appellate Body has interpreted this language fairly restrictively in the GATT context, and

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188. First Submission of Antigua, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, *supra* note 142, at para. 202-03.

189. See Jackson et al., *supra* note 184, at 405.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 270; WTO COUNCIL FOR TRADE IN SERVICES, *supra* note 185.

195. First Submission of Antigua, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services, *supra* note 142, at para. 202.



as the language is identical in GATS, the same scrutiny would likely apply to *United States-Gambling*.<sup>196</sup> Looking at GATT cases where similar exceptions are invoked may help determine the likely outcome of this dispute.

The WTO *United States-Shrimp and Turtle* case involved a U.S. regulation requiring all U.S. and foreign ships operating shrimp trawl vessels in any waters to use a similar type of escape net to prevent the incidental capture of sea turtles.<sup>197</sup> Malaysia argued that the U.S. regulation was inconsistent with the GATT, and constituted “unjustifiable” and “arbitrary discrimination.”<sup>198</sup> The DSB panel reported that in applying GATT Article XX, the United States’ regulation must not only be “necessary” in order to meet the particular exception invoked, but must also pass the “arbitrary” and “unjustifiable discrimination” test of the Article XX chapeau, making the analysis a two-tiered approach.<sup>199</sup>

#### i. Necessity test

The panel first looked at the provisional justification, finding that the U.S. regulation was “necessary” or proportional to the policy exception invoked—protection of endangered sea turtles.<sup>200</sup> In other words, the means were reasonably related to the ends, and the U.S. regulation was provisionally justified under Article XX.<sup>201</sup>

#### ii. Arbitrary or unjustifiable discrimination test

The appellate body then moved to the “arbitrary” or “unjustifiable discrimination” component of the test. It noted that a balance must be struck between the right of a Member to invoke an Article XX exception and that same Member’s duty to respect the treaty rights of other Members. It further stated that if the right to invoke an exception is abused, it will make the substantive treaty rights meaningless.<sup>202</sup> In a similar case, *United States-Gasoline*, the appellate body noted that although subsequent events should not determine the legal characterization of a mea-

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196. See NICOLAIDIS & TRACHTMAN, *supra* note 8, at 55.

197. United States- Import Prohibition of Certain Shrimp and Shrimp Products at 8, WT/DS58/RW (June 15, 2001) available at <http://www.docsonline.wto.org>.

198. *Id.* at 14.

199. *Id.* at 82.

200. *Id.* at 84.

201. *Id.* at 84-6.

202. *Id.* at 88.

sure, the predictable effects of a measure could be relevant.<sup>203</sup> If it is clear that a measure could not meet the objective of the Article XX exception invoked, the measure was probably not designed to meet that objective in the first place.<sup>204</sup>

Also noted in the *Gasoline* case, the United States interpreted arbitrary or unjustifiable discrimination “between countries where like conditions prevail” to mean between exporting and importing countries, as well as between exporting countries.<sup>205</sup> The *Shrimp and Turtle* appellate body recognized that the United States applies the same rigid standard throughout its own territory as well as to foreign territories, but stated it was unacceptable for one Member to require other Members to adopt the same regulatory program to achieve a policy goal without considering the different conditions in the other members’ territories.<sup>206</sup> The Appellate Body found this rigidity, inflexibility, and lack of consideration for that regulation’s appropriateness for other countries to constitute arbitrary discrimination by the United States.<sup>207</sup>

#### H. “WTO Law” Applied to United States-Gambling

As WTO cases do have some precedential value, an analysis similar to that used in the *Shrimp and Turtle* and *Gasoline* cases will likely be applied to the current dispute. In order to avoid a GATS violation, the U.S. prohibition on the use of credit cards and other financial instruments for Internet gambling transactions must be found proportional to the objective of the public policy and morality exceptions invoked. The existence of the FATF and the Forty Recommendations, Antigua and Barbuda’s full cooperation in the CFATF and comprehensive regulations, and the GAO findings that the credit card industry has been effective in combating money laundering via Internet gambling sites demonstrates that an outright ban is not a means *reasonably* related to nor proportional to the objective of stopping money laundering activities. Furthermore, the de facto ban does not appear appropriate as a means proportional to the public morality exception, as the bill does not prohibit, regulate, or mention, traditional forms of gam-

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203. United States- Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 4, 1996), available at <http://www.docsonline.wto.org> [hereinafter *Gasoline*].

204. *Id.*

205. *Id.*

206. United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/RW at 100-01 (June 15, 2001) available at <http://www.docsonline.wto.org>.

207. *Id.* at 110.

bling and betting services available to U.S. residents from within the United States. If the measure cannot meet the objective, it was not likely intended to do so, and rather serves as a disguised form of discrimination.<sup>208</sup>

Also, the DSB will likely apply a balancing test for arbitrary or unjustified discrimination, where the right of a Member to invoke an exception is weighed against the same Member's duty to the provisions of the agreement. Here, the public policy and morality exception that the United States has invoked renders meaningless the substantive free trade rights that Antigua and Barbuda has in this industry under the GATS. No balance has been struck in the instant case; rather, the United States has weighed its own public policy rights against the rights of gambling and betting service providers to supply their services in the United States and deemed its public policy rights to be of greater importance.

## VII. HARMONIZED REGULATION: EUROPEAN UNION AS A MODEL

### A. *ECJ Decisions*

The European Union (EU) has free movement of goods and services rules similar to those under the GATS, and the Court of Justice of the European Communities (ECJ) has ruled on the cross-border provision of gambling and betting services.<sup>209</sup> Richard Plender, panel member and U.K. attorney, will likely be influenced by the EU rules and ECJ decisions in determining the outcome of the *US-Gambling* case.

A recent ECJ case, *Gambelli*, involved an Italian criminal prohibition against citizens placing bets online, preventing Italians from receiving gambling services from other EU Members and creating a monopoly for the Italian gaming industry.<sup>210</sup> The ECJ directed the national court to consider (1) whether the Italian prohibition applied without distinction to gambling service opera-

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208. See Gasoline, *supra* note 203.

209. See *Italy v. Gambelli*, Case C-6/01 (ECJ Nov. 6, 2003) available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0243](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0243); see also *Associação Nacional de Operadores de Maquinas Recreativas (ANOMAR) v. Portugal*, Case C-6/01, 2003 WL 101742 (ECJ Sept. 11, 2003) available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0006](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0006).

210. *Italy v. Gambelli*, Case C-6/01 (ECJ Nov. 6, 2003) at para. 25, available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0243](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0243)

tors in both Italy and other Member States is necessary and proportional to the objective it pursues (combat fraud), “especially where involvement in betting is encouraged in the context of games organized by licensed national bodies,” and (2) whether the restriction with criminal penalties is not beyond what is necessary to achieve the objective, “especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties.”<sup>211</sup>

Similarly, *Anomar* involved a Portuguese law providing that gambling and games of chance were limited to casinos “located in permanent or temporary gaming areas created by decree-law” and the provision of gambling services was limited to public companies licensed by the state.<sup>212</sup> The court addressed whether the existence of less restrictive legislation in other Member states would invalidate the Portuguese regulation, whether the regulation was proportional, appropriate and necessary for the social policy and prevention of fraud objective pursued, and whether the regulation does not violate the principles of nondiscrimination.<sup>213</sup> The court found the regulation to meet the nondiscrimination requirement, to be justified by the public interest at stake, and, provided that the regulation complies with the European Community Treaty, the means to achieve the objective falls under national discretion.<sup>214</sup>

#### i. ECJ decisions applied to US-Gambling

The court’s analysis is similar to that undertaken in the WTO DSB cases, *supra*. In light of *Gambelli*, Plender would likely give considerable weight to the United States’ encouragement of betting in traditional, licensed casinos and state lotteries, while prohibiting state-regulated offshore operators from providing their services to the U.S. market.<sup>215</sup> Further, according to *Anomar*, the United States would have to comply with all GATS obligations before exercising its regulatory discretion.<sup>216</sup>

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211. *Id.* at para.65, 70, 72-3, 76.

212. *Anomar v. Portugal*, Case C-6/01, 2003 WL 101742 (ECJ Sept. 11, 2003) at para. 8, 12 available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0006](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0006) .

213. *Id.* at para. 7-10, 62.

214. *Id.* at para. 86-8.

215. *Italy v. Gambelli*, Case C-6/01 (ECJ Nov. 6, 2003) at para. 65, 70, 72-3, 76 available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0243](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0243) .

216. *Anomar v. Portugal*, Case C-6/01, 2003 WL 101742 (ECJ Sept. 11, 2003) at

*B. European Union & liberalization of financial services*

A de facto ban on the cross-border supply of gambling and betting services would likely incur proportionality problems; however, a harmonized regulatory scheme may be more appropriate, and the European Union's liberalization of financial services is a fitting model to follow. Similar to the GATS, the EU prohibits restrictions on the free movement of goods, services, capital, and labor in efforts to create a unified market and does so by the harmonization of multilateral standards, the mutual recognition of national laws and regulations, and individual state control.<sup>217</sup> The EU financial services regulations establish minimum requirements to be implemented by each member state and define key concepts, creating a harmonized, union-wide regulatory scheme.<sup>218</sup> This gives EU banking, insurance, and investment companies the right to operate in every EU country, not just the home country where it is registered.<sup>219</sup> The EU has had some difficulty, though, in establishing a single financial market, with many member states failing to implement directives as required,<sup>220</sup> preferring instead to stick with their own rules.

The Internet gambling industry could benefit from a harmonized regulatory scheme if states are willing to cooperate. The United States has gambling laws in effect, and Antigua and Barbuda has comprehensive Internet gambling and money laundering regulatory schemes. Both countries are members of the FATF and CFATF respectively, and both are fully cooperative in implementing those multilateral standards. Regulations and minimum standards are in place at both the national and multinational levels for money laundering and at the national level for gambling. Richard Plender and the other members of the DSB panel may find that U.S. recognition of Antigua and Barbuda's comprehensive national laws and the creation of multilateral gambling

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para. 86-8 available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0006](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0006).

217. WTO Secretariat, *Opening Markets in Financial Services and the Role of the GATS (1997)* at 19, available at [www.wto.org/english/news\\_e/pres97\\_e/finance.pdf](http://www.wto.org/english/news_e/pres97_e/finance.pdf).

218. *Id.*

219. *Id.*

220. See, e.g. *Report on the Implementation of the Internal Market Strategy (2003-2006)*, Commission of the European Communities, Jan. 1, 2004, Annex 1 at 16 available at [http://www.europa.eu.int/comm/internal\\_market/en/update/strategy/com-2004-22\\_en.pdf](http://www.europa.eu.int/comm/internal_market/en/update/strategy/com-2004-22_en.pdf).

regulations may be a more reasonable approach to administering this new multi-billion-dollar industry than eliminating it entirely.

### VIII. CONCLUSION: WHAT'S THE DECISION?

The inflexibility of the Unlawful Gambling Funding Prohibition Act and the United States' lack of consideration of the effects the bill would have on the free trade rights of other countries under the GATS will likely result in a determination by the DSB that the U.S. measures constitute unjustifiable or arbitrary discrimination, disproportionate to its public policy and morality objectives.

Furthermore, in what seems to be a masked attempt to channel American dollars away from offshore Internet gaming sites and back into American casinos, the Act's sponsors and proponents may be increasing the risk of money-laundering activities, the most prominent basis for the Act, through new, alternative payment systems that are not as easily regulated as credit cards.<sup>221</sup>

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221. Following completion of this article, the WTO issued a preliminary ruling on March 24, 2004, upholding Antigua and Barbuda's complaint. The confidential, 270-page interim report rejected the United States' argument that gambling services is not included under section 10.D of its GATS "other recreational services" commitments and recommended that the United States conform with its WTO obligations. The final ruling will be circulated to the parties by the end of April 2004, and will be made public in May 2004, after which the United States will appeal. Daniel Pruzin, *Services: Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, INT'L TRADE DAILY (BNA), Mar. 25, 2004.

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