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KNOW WHEN TO FOLD 'EM: THE INTERNATIONAL EFFECTS OF *MURPHY V. NCAA* AND WHY ANTIGUA HOLDS THE CARDS

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INTRODUCTION

The Gambler's Fallacy: the misconception that a certain random event is less likely or more likely, given a previous event or a series of events.[1] Often termed the "Monte Carlo fallacy," the Gambler's Fallacy has functioned to the benefit of a few, but to the detriment of many more.[2] Based purely on the maturity of chances, such logic seems rational, making the Gambler's Fallacy an easy trap for decision-makers across many contexts. Indeed, the misperception has been shown to negatively influence refugee asylum judges, loan officers, and baseball umpires.[3] Nonetheless, while the erroneous rationale is generally spoken of in unfavorable

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[1] Rachel Croson & James Sundali, *The Gambler's Fallacy and the Hot Hand: Empirical Data from Casinos*, 30 J. RISK UNCERTAINTY 195 (2005).

[2] *See* Esther Inglis-Arkell, *The Night the Gambler's Fallacy Lost People Millions*, GIZMODO (Jan. 8, 2014, 12:00PM), https://io9.gizmodo.com/the-night-the-gamblers-fallacy-lost-people-millions-1496890660 (revisiting a 1913 roulette game that took place in the Monte Carlo Casino Hotel where the ball landed on black 26 times) ("The thought process was that the ball had fallen on black so many times that it had to fall on red sometime soon. Eventually, it did fall on red, but not until after 26 spins of the wheel, each of which saw a greater number of people pushing their chips over to red. The people who put money down on red for the 27th spin won money, of course, but even they lost much of their winnings because they believed that a long streak of black had to be followed by a long streak of red.").

[3] Daniel Chen & Tobias Moskowitz, *Decision-Making Under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires*, 131(3) Q. J. OF ECON. 1181, 1181–1241 (2016).

terms, is there a time that the fallacy could prove cogent? This article argues that the United States could benefit from the logic that an event is more likely to occur based on its lack of transpiration over time.

Indubitably, "Americans have never been one mind about gambling."[4] However, the country's past demonstrates a long history of discomfort with the concept of betting, especially within the domain of sports. Accordingly, the United States has integrated such concerns into the country's legal scheme, both nationally and at the state level. Recently, however, the gambling landscape within the United States has evolved. With the advancement of gambling platforms, popularity of sports, ascension of fantasy leagues, and a recent ruling by the Supreme Court, sports gambling has largely become integrated within the country's recreational culture. However, the effects of such a cultural lifestyle innovation are much broader in scope.

The much-discussed case of *Murphy v. NCAA* has obvious implications for domestic providers of sports gambling within states that legalize the activity. However, the international consequences of the decision have largely been ignored. In a 2003 World Trade Organization dispute, various international sovereigns complained that the lack of access to the United States' gambling market constituted a stark violation of world trade obligations. The United States claimed morality as a defense and argued that the country's general sentiment for gambling constituted a legitimate excuse for limiting market access. The United States won this battle, but lost the war on other grounds and has been subject to an annual judgment in favor of the claimants—an obligation with which the United States has refused to comply. Notwithstanding this aftermath, a changing of the tide within the country on the issue of gambling produces an important consideration. While a defense of public morality was a compelling argument at the time it was invoked, does this contention have any legitimacy in the United States of today?

This article argues that the United States should acknowledge its internal cultural evolution and accept its own transformation. On an international scale, this means taking action to prevent trade disputes from re-emerging. The country must look to its past and employ the Gambler's Fallacy. Nearly two decades have passed since the United States has justified its international policy on gambling by pointing to public morality. Yet, this span

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[4] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1468 (2018).

of time without international intervention should be scrutinized by the United States with the "maturity of chances" to become wary that tranquility is near its end. Accordingly, the article takes a proactive approach to international relations and politics in the trading of gambling services.

This article begins by reflecting on the United States' journey to recognizing states' rights to control betting legislation within their own borders. In Section II, the article provides a brief overview of trade in services on an international level by discussing the General Agreement on the Trade in Services and some of its key features such as the Most Favored Nation concept, general exceptions to trade obligations, and in particular, the "public morals" defense. The article discusses specific commitments within Member Schedules and turns to the most significant dispute dealing with commitments: U.S. – Gambling Services. Section III ties Sections I and II together by considering what effect the legalization of sports gambling has on the international marketplace and whether we will see the re-emergence of the arguments cast at the United States pertaining to certain federal provisions such as the Wire Act. This article concludes by arguing that Murphy v. NCAA invalidates the latitude afforded to the United States to violate trade obligations under the General Agreement on the Trade in Services because the nation no longer shares the view that sports gambling stands in utter contrast to the ideals of its people.

I. SPORTS GAMBLING

A. HISTORY OF SPORTS BETTING

The first horse-racing track in America was established in 1665 in Long Island, New York.[5] Prior to the Revolutionary War, colonists continued to exercise cultural staples from the homeland, and one of the most prominent was that of horse racing.[6] By 1868, the American Stud Book—a catalogue of

[5] *There Used to Be a New York Racetrack There: But Where Was It?*, ALB. L. 1 (last visited Apr. 20, 2019), https://www.albanylaw.edu/media/user/glc/racing_gaming/there_used_to_be_a_racetrack_but_where11.pdf.

[6] John Eisenberg, *Off to the Races*, SMITHSONIAN MAGAZINE (Aug. 2004), https://www.smithsonianmag.com/history/off-to-the-races-2266179/#ci2c3vEcUrBSkpbJ.99 ("In wealthy Annapolis, [Maryland], whose inhabitants, it was said, were more British than the

American thoroughbreds—was published, which led to the development of horse racing into a much more "organized enterprise" in the United States.[7] But by the early 1900s, gambling was largely outlawed throughout the country.[8] While many point to the financial climate in the early 1900s as the primary reason for the increasing social distaste[9] of sports betting, the economy was the very cause of its resurrection years later.[10] The country turned to stakes and odds to increase the nation's revenue—an act

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British, the highlight of the social season was a week of parties and plays organized around a racing meeting.").

[7] Richard Johnson, *The Centuries-Old History of How Sports Betting Became Illegal in the United States in the First Place*, SB NATION (May 18, 2018), https://www.sbnation.com/2018/5/18/17353994/sports-betting-illegal-united-states-why.

[8] NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT 2-1 (1999); STEVE DURHAM & KATHRYN HASHIMOTO, THE HISTORY OF GAMBLING IN AMERICA 34–35 (2010); *The History of Sports Betting Legislation in the USA (Part 1)*, SPORTS BETTING DIME (last updated Aug. 3, 2018), https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-i/ ("The sudden change in attitude towards gambling was also related to the broader economic climate in the United States, directly related to the Panic of 1910-1911 (which resulted in an economic downturn). During this era of populism, many developed a strong distaste for activities associated with the super-rich, including horse racing.").

[9] During the 1919 World Series, eight members of the White Sox were charged with intentionally losing the series to the Cincinnati Reds. *The History of Sports Betting Legislation in the USA (Part 1)*, *supra* note 8. They were incentivized to do so by noted mobster Arnold Rothstein's sports betting syndicate. *Id.* The significance of this event soured Major League Baseball on anything to do with sports betting and established a precedent that betting on professional sports compromised the integrity of the sports themselves. *Id.*

[10] In 1941, Nevada legalized sports betting in hopes of increasing its tourism industry. *Gambling in America—An Overview-Historical Review*, LIB. INDEX, https://www.libraryindex.com/pages/1560/Gambling-in-America-An-Overview-HISTORICAL-REVIEW.html (last visited Apr. 20, 2019). Notably, "Nevada's divorce laws were also changed in the early 1930s to allow the granting of a divorce after only six weeks of residency. People from other states temporarily moved into small motels and inns in Nevada to satisfy the residency requirement." *Id.*

of desperation that commenced one of the most profitable, yet controversial industries in American history.[11]

In 1931, in hopes of boosting its economy, Nevada passed the Wide Opening Gambling Bill and issued the first set of gambling licenses.[12] However, when Prohibition ended in 1933, organized crime families became heavily involved in the legal gambling industry.[13] In 1949, Nevada legalized sports betting, attracting slews of people and businesses, including infamous mobster Bugsy Siegel, who helped finance the Las Vegas Strip.[14] Foul play continued to dominate the industry into the '60s, when United States Attorney General Robert F. Kennedy saw a need for change. Kennedy acted as a catalyst for a collection of laws still effective today. The congressional attempt to rein in organized crime's involvement in illegal gambling produced what is today known as the Federal Wire Act (1961), the Travel Act of 1961, the Interstate Transportation of Paraphernalia Act of 1961, the Sports Bribery Act of 1964, and the Illegal Gambling Business Act of 1970.[15]

Despite the legislature's attempt to suppress gambling's rapid expansion within the United States, the consensus on betting was hardly uniform. Indeed, many held the view shared by the Commission on the Review of the National Policy Toward Gambling:[16] "Gambling is inevitable. No matter what is said or

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[11] The American Gaming Association ("AGA") estimates at least $150 billion a year is gambled on sports in the U.S. and 97% of that amount was bet illegally. A.J. Perez, *What It Means: Supreme Court Strikes Down PASPA Law that Limited Sports Betting*, USA TODAY (May 14, 2018, 10:34 AM), *https*://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/.

[12] *See Gambling in America—An Overview-Historical Review*, *supra* note 10 (noting the state's sparse population and lack of natural resources).

[13] *Id.*

[14] Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTS HANDLE (Nov. 13, 2017), https://sportshandle.com/gambling-laws-legislation-united-states-history/.

[15] *Id.*

[16] The Commission on the Review of the National Policy Toward Gambling was created by Congress in the Organized Crime Control Act of 1970 (P.L. 91-452). UNITED STATES COMMISSION ON

done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans." [17] The Commission specifically addressed sports betting by calling into question the fears expressed by professional sporting leagues, considering the substantial flow of revenue already generated from illegal wagering. [18] However, 1989 set the scene for governmental interference when Pete Rose, "one of the most prominent players in Major League Baseball, was banned from the sport for wagering on baseball games that he participated in."[19]

In response to a series of betting scandals, Congress looked "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime."[20] In 1992, the

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THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING X (1976). Its mission was to study gambling as it exists in America and to develop recommendations for the States to follow in formulating their own gambling policies. *Id.* In its 3 years of operation, the Commission staff collected, reviewed, and summarized all available material on gambling. *Id.*

[17] *Id.* at 1.

[18] *Id.* at 178.

[19] Justin Willis McKithen, *Playing Favorites: Congress's Denial of Equal Sovereignty to the States in the Professional and Amateur Sports Protection Act*, 49 GA. L. REV. 539, 565 (2015). Other events included a "scheme to shave points by Boston College basketball players [where] Henry Hill informed federal prosecutors that he worked with several players to shave points in nine games during the 1978–79 season. A few years later, in 1985, three Tulane University basketball players were indicted in a point-shaving case. A prominent 1986 Sports Illustrated article exemplified the growing feelings of those who saw gambling as a plague on sports: '[N]othing has done more to despoil the games Americans play and watch than widespread gambling on them. As fans cheer their bets rather than their favorite teams, dark clouds of cynicism and suspicion hang over games, and the possibility of fixes is always in the air.'" Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 29 (2016) (quoting John Underwood, *The Biggest Game in Town*, SPORTS ILLUSTRATED (Mar. 10, 1986), https://www.si.com/vault/1986/03/10/638301/the-biggest-game-in-town).

[20] S. REP. NO. 102-248, at 4 (1991).

legislature enacted the Professional Amateur Sports Protection Act ("PASPA") which made prohibited individuals and states to "sponsor, operate, advertise, promote, license, or authorize . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games."[21] PASPA also granted professional and amateur organizations the authority to sue to ensure PASPA's enforcement.[22] The primary motivations for passing the bill were to protect the integrity and character of sports, shield the country's youth from an addictive and dangerous activity, and restrict the growth of state authorized sports betting.[23] An effort that, while noble, can now be chalked up as done in vain.[24]

PASPA saw few legal challenges until two decades later, when some began to challenge its constitutionality.[25] Arguments that the law violated the Commerce Clause, the Tenth Amendment's anti-commandeering principle, and the equal sovereignty principle, all fell on deaf ears.[26] Nonetheless, New Jersey, relentless in its attempt to circumvent PASPA's scope, boost its economy, and "stanch the sports-wagering black market flourishing within [its] borders," passed a series of laws that would soon alter the legal landscape of the country and destroy the eroding barricade to sports gambling in America.[27]

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[21] 28 U.S.C. § 3702 (1992).

[22] 28 U.S.C. § 3703 (1992).

[23] *See* Fielkow, *supra* note 19, at 30 (citing S. REP. NO. 102-248, at 5).

[24] "Despite PASPA's existence, the American Gaming Association (AGA) estimates at least $150 billion a year is gambled on sports in the U.S. and 97% of that amount was bet illegally." Perez, *supra* note 11.

[25] *See e.g.*, OFC Comm Baseball v. Markell, 579 F.3d 293, 304 (3d Cir. 2009); Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder, No. CIV.A. 09-1301 GEB, 2011 WL 802106, at *1 (D.N.J. Mar. 7, 2011).

[26] *But see* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 241–45 (3d Cir. 2013) (Vanaskie, J., dissenting in part) (disagreeing with the majority and finding a violation of the anti-commandeering principle).

[27] *Id.* at 217 (quoting Brief for Appellants Christopher J. Christie, David L. Rebuck & Frank Zanzuccki at 13, *Christie I*, 730 F.3d 208 (No. 13-1715), 2013 WL 1873966, at *13).

B. MURPHY V. NCAA

On the heels of the increasing demand and infatuation with betting, particularly in the arena of competitive sports, the United States attempted both a reactive and proactive approach with the enactment of PASPA.[28] The Act prohibited state sanctioned sports gambling, with various exceptions delineated for state-sponsored sports wagering already functioning to be grandfathered in.[29] The provision also specifically allowed any sports leagues involved in sports betting, at present or in the future, to bring suit to enjoin such activity.[30] The law largely stifled the national trend towards gambling liberalization and throughout its infancy was invoked sparingly.[31]

In 2011, the New Jersey Legislature held a non-binding referendum asking voters whether sports gambling should be permitted, and 64% voted in favor of legalizing it. In response, the New Jersey legislature expeditiously amended its constitution and developed the Sports Wagering Act ("2012 Act").[32] The 2012 Act authorized certain regulated sports wagering at New Jersey casinos and racetracks and enacted an extensive regulatory scheme for licensing casinos and sporting events.[33] In 2014, former New Jersey Governor, Chris Christie, signed the bill into law.[34] Not surprisingly, all five major professional sports leagues[35] immediately sued to enjoin the commencement of New

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[28] 28 U.S.C. §§ 3701–3704 (1992).

[29] 28 U.S.C. § 3704 (1992).

[30] 28 U.S.C. § 3703 (1992).

[31] *See* In re Petition of Casino Licensees, 633 A.2d 1050 (N.J. Super. Ct. App. Div. 1993); Flager v. U.S. Att'y for Dist. of N.J., No. CIV.A. 06-3699JAG, 2007 WL 2814657, at *1 (D.N.J. Sept. 25, 2007).

[32] N.J. CONST. art. IV, § 7, ¶ 2 (D), (F) (2012).

[33] N.J. ADMIN. CODE §§ 13:69–1.1 (2012).

[34] SI WIRE, *N.J. Gov. Chris Christie Signs Law Allowing Sports Betting in New Jersey*, SPORTS ILLUSTRATED, (Oct. 17, 2014), https://www.si.com/more-sports/2014/10/17/sports-betting-law-new-jersey-chris-christie.

[35] The sports leagues were the National Collegiate Athletic Association ("NCAA"), National Football League ("NFL"), National Basketball Association ("NBA"), National Hockey League ("NHL"), and the Office of the Commissioner of Baseball, doing business as Major League Baseball ("MLB", collectively, the "Leagues"). Nat'l Collegiate Athletic Ass'n v. Christie, No. CIV.A. 12-4947 MAS, 2012 WL 6698684 (D.N.J. Dec. 21, 2012), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of N.J, 730 F.3d 208 (3d Cir. 2013).

Jersey's sports betting industry.[36] The result sent the New Jersey lawmakers back to the drawing board. They soon passed similar bill that stopped short of legalization and instead repealed casino regulations.[37] Much to the disappointment of the New Jersey revisionists, the result was the same, and the Third Circuit yet again shot down the state's attempt at circumventing PASPA's grip on the sports betting industry, holding that the new law (no less than the old law) violated PASPA by "authorizing sports gambling."[38] However, New Jersey lawmakers were given a last chance when the Supreme Court granted certiorari to review the case in 2017.[39]

New Jersey reasserted the position it had taken all along—that PASPA violated the Tenth Amendment's anti-commandeering principle.[40] In effect, the state argued that its lawmaking authority was compromised by PASPA's prohibition on modifying or repealing laws prohibiting sports gambling.[41] Thus, New Jersey's stance was that the provision was incompatible with the system of dual sovereignty embodied in the United States Constitution.[42] Alternatively, the NCAA, and the other major leagues ("Respondents") distinguished the case from the Court's previous anti-commandeering cases by arguing that "without an affirmative federal command to *do* something, . . . there can be no claim of commandeering."[43]

As the case reached the Supreme Court, the contest turned on the interpretation of the term "authorization."[44] PASPA

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[36] *Id.*

[37] N.J. STAT. ANN. §5:12A-7 (2014) (The bill effectually provided for tacit authorization of sports gambling).

[38] Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389 (3d Cir. 2016), *cert. granted sub nom.* N.J. Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n, 198 L.Ed.2d 754 (2017).

[39] *Cert. granted sub nom.* Christie v. Nat'l Collegiate Athletic Ass'n, 198 L.Ed.2d 754 (2017).

[40] *See* New York v. United States, 505 U. S. 144, 154 (1992).

[41] *See* Nat'l Collegiate Athletic Assn. v. Christie, 926 F. Supp. 2d 551, 561–62 (N.J. 2013).

[42] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

[43] *Id.* at 1471 (quoting Nat'l Collegiate Athletic Ass'n. v. Christie, 926 F. Supp. 2d 551, 561–62 (N.J. 2013)).

[44] *Id.*

provided that no state could "authorize" betting or gambling on games involving amateur or professional athletes.[45] New Jersey argued that the anti-authorization provision required states to maintain their existing laws against sports gambling without alteration.[46] The state pointed out that one of the accepted meanings of the term 'authorize' is 'permit.'[47] Therefore, New Jersey argued that "any state law that has the effect of permitting sports gambling, including a law totally or partially *repealing* a prior prohibition, amounts to an authorization."[48] Accordingly, the 2014 Act that repealed certain laws prohibiting sports gambling effectually authorized sports gambling, resulting in a clear violation of PASPA.[49]

In contrast, Respondents, as well as the United States appearing as an *amicus*, argued that to "authorize" requires some sort of affirmative action, or "[t]o empower; to give a right or authority to act; to endow with authority."[50] They argued that was what the 2014 Act did: "It empower[ed] a defined group of entities, and it endow[ed] them with the authority to conduct sports gambling operations."[51] However, Respondents contended that PASPA does not outlaw a total repeal of gambling prohibitions.[52] Because the 2014 Act operated to repeal only certain sports gambling prohibitions, and not all, the Act *authorized* sports gambling in the areas where the regulations were removed.[53] "One would not ordinarily say that private conduct is 'authorized by law' simply because the government has not prohibited it."[54] Thus, because a total repeal would pass muster under PASPA, the system of dual sovereignty stood intact.[55]

In a 7-2[56] decision, the Supreme Court issued an opinion that will forever change the sports gambling landscape in

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[45] 28 U.S.C. § 3702 (1992).
[46] *Murphy*, 138 S. Ct. at 1473.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1474.
[55] *Id.*
[56] Six justices signed onto the majority opinion, and Justice Breyer partially concurred in the judgment. *See id.* at 1488.

America. The Court refused to find a distinction between a full or partial repeal, and held that in either case, any repeal of law "authorizes" those schemes.[57] Thus, the 2014 Act "authorized" sports betting in violation of PASPA.[58] The Court also refused to adhere to the proposition that there was a difference between directing a state legislature to enact a new law and prohibiting a state legislature from such. [59] Accordingly, PASPA's anti-authorization provision violated the anti-commandeering principle because it specifically mandated what a state could and could not do.

In closing, the Court expressly discussed the parties' initial concerns and shaped the current American gambling landscape:

> The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.
>
> The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate [s] state governments' regulation" of their citizens, *New* York, 505 U.S., at 166, 112 S. Ct. 2408, 120 L. Ed. 2d 120. The Constitution gives Congress no such power.[60]

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[57] *Id.* at 1475.
[58] *Id.*
[59] *Id.* at 1478.
[60] *Id.* at 1484–85.

II. INTERNATIONAL TRADE: THE GENERAL AGREEMENT ON TRADE IN SERVICES

A. THE GATS AND TRADE IN SERVICES GENERALLY

The General Agreement on Trade and Services ("GATS") governs trade in services among World Trade Organization ("WTO") members and supplies principles that regulate specific commitments entered into by member countries.[61] Specifically, the GATS consists of the framework agreement—the Articles of the Agreement—and its Annexes.[62] Importantly, the GATS schedules of specific commitments and the lists of exemptions from most favored nation ("MFN") treatment submitted by member governments are also included.[63]

Part I of the GATS explains the scope of the Agreement and states that the GATS applies to measures "affecting trade in services."[64] Notably, there is some ambiguity in where the boundaries lie, as nearly all goods have a service component. However, Article I:3 expressly limits the scope of "services" to "any service in any sector except services supplied in the exercise of government authority."[65] Nonetheless, a close look at this limitation also produces certainty as to what falls within the scope of the Agreement. Consequently, the full scope of "services" under the GATS remains unclear.

GATS Article I:2 explains "four modes of supply" for trade in services, which proves useful by distinguishing itself from trade in goods under the General Agreement on Tarriffs and Trade ("GATT"):

> (a) 'from the territory of one Member into the territory of another Member' (cross-border supply);

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[61] *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Apr. 2, 2019).

[62] *Id.*

[63] *Id.*

[64] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

[65] *Id.*

(b) 'in the territory of one Member to the service consumer of any other Member' (consumption abroad);

(c) 'by a service supplier of one Member, through the commercial presence in the territory of any other Member';

(d) 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member' (presence of natural persons).[66]

As explained below, these modes of supply are of stark importance to member's commitments within their schedules.

While GATS pertains exclusively to services, it may operate in conjunction with the GATT when measures "involve a service relating to a particular good or a service supplied in conjunction with a particular good."[67] The Appellate Body has explained that the question of whether to apply the GATS or the GATT is to be determined on a case by case basis.[68] Yet, the interplay between the two Agreements does not end there; the GATT can be used as a tool of interpretation for provisions within the GATS that are similar or identical to those found within the GATT.[69] While these Agreements are not mutually exclusive, the GATS operates under the acknowledgement that services are conceptually more difficult to understand than goods.[70] Thus, the

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[66] *Id.*

[67] *Id.*

[68] Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 221, WTO Doc. WT/DS27 /AB/R (adopted Sept. 9, 1997); *see also* Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, ¶ 19, WTO Doc. WT/DS31/AB/R (adopted June 30, 1997).

[69] *See* Appellate Body Report, *United States—Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) (noting that previous decisions under Article XX of the GATT were relevant for the analysis of the nearly identical provision located within in Article XIV of the GATS).

[70] *See* SIMON LESTER, BRYAN MERCURIO, ARWEL DAVIES & KARA LEITNER, WORLD TRADE LAW WTO: TEXT, MATERIALS AND COMMENTARY 691 (1st ed. 2008).

GATS utilizes the UN Central Product Classification system ("CPC"), which categorizes goods and services within groups and subgroups to describe all the goods and services that may be offered.[71] The list is exhaustive and the categories are mutually exclusive. Further, the CPC plays a crucial part in interpreting member schedules, their obligations, and the exception to such obligations within.[72]

B. GENERAL OBLIGATIONS AND DISCIPLINES

1. *Most Favored Nation and National Treatment*

Part II of the GATS is entitled "General Obligations and Disciplines" and discusses important rules pertaining to the duties of member countries engaging in the trade for services.[73] Generally, under the WTO agreements, countries cannot treat their trading partners differently, resulting in any type of discrimination.[74] Accordingly, if a member country lowers customs duty rates for another member's product,[75] the same has to be done for all other WTO members.[76] In international economic relations and politics, this concept is referred to as MFN status or treatment.[77] However, exceptions to this general rule are often exercised—for example, in free trade agreements.[78] Alternatively, developing countries[79] may receive favorable

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[71] *Id.*

[72] *Id.*

[73] GATS, *supra* note 64, at 286.

[74] *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 3, 2019).

[75] "Product" covers goods under the GATT. *Id.*

[76] *Id.*

[77] *Id.*

[78] *See* Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services*, 19 HOUS. J. INT'L L. 95 (1996).

[79] *See* LESTER, *supra* note 70, at 878 (noting that the WTO has declared that a country's status as a developing country be self-proclaimed but other Members can challenge this status). *But see* Barker, *supra* note 78 (explaining that "least developed countries" are distinct from developing countries and are confined to a UN list so there is no controversy regarding who meets such a qualification). The term "developing country" is frequently used to refer to both statuses.

treatment in order to grow and expand their own domestic economy.[80] Members also exercise exceptions for purposes such as regional integration.[81] For example, the United States may mainstream securities reporting requirements for Canadian small businesses, but not small businesses from other countries. Further, member countries may choose to provide favorable treatment due to "Friendship, Commerce and Navigation or investment treaties."[82]

Along the same vein is the WTO concept that foreign providers of a product must all be subject to the same treatment as domestic providers of the same product. This WTO principle is called "National Treatment."[83] In contrast to MFN, this concept only applies once the foreign products have entered the market of the importing member. Accordingly, charging a customs duty on the same import that may result in higher costs to the exporting member is not a violation of National Treatment. National Treatment is a general obligation of the GATT and the Agreement of Trade-Related Aspects of Intellectual Property Rights ("TRIPS"),[84] while the GATS only applies National Treatment rules when a commitment has been made.[85]

2. *General Exceptions: Article XIV*

Part II of the GATS contains exceptions to its default rules and "permits Members in specified circumstances to introduce or maintain measures in contravention of their obligations under the Agreement, including the MFN requirement or specific commitments." [86] Among such exceptions are Article V (Economic Integration), Article XII (Restrictions to Safeguard the Balance of Payments), Article XIV (General Exceptions), and Article XIV *bis* (Security Exceptions).[87]

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[80] *Principles of the Trading System*, *supra* note 74.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] The Agreement on Trade Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

[85] *See* LESTER, *supra* note 70, at 706.

[86] *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, *supra* note 61.

[87] GATS, *supra* note 64, at 228, 293, 294–95.

Perhaps the most powerful exception provision to the GATS is Article XIV. The general exceptions enumerated within Article XIV safeguard measures implemented by member nations that preserve ideals the member nations may deem important. Specifically, a portion of the Article states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order;
>
> (b) necessary to protect human, animal or plant life or health; . . .
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> > (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
> >
> > (ii) the protection of the privacy pf individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
> >
> > (iii) safety;[88]

As noted in Section II.A., the GATT and GATS contain similar and sometimes identical provisions that allow the dispute settlement body of the WTO to utilize decisions founded under one when formulating decisions under the other. Accordingly, the Appellate Body has done just this by analogizing Article XIV to

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[88] *Id.* at 294; *see also* General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 194 (containing nearly identical language and applying such language to the trade in goods).

previous decisions under Article XX.[89] After a member state shows prima facie that a trade obligation has been violated, the exceptions clauses in the GATT and GATS are invoked as a defense by the respondent member state.[90] The WTO has provided a two-tiered approach that must be satisfied in order for an Article XIV exception to be invoked by a member acting inconsistently with its obligations under the GATS.[91] First, a panel should look at the challenged measure and determine whether it falls within the scope of one of the particular interests identified in the Article and if there is a sufficient linkage between the challenged measure and the interest.[92] The required connection between the measure and the interest is determined by the language in the Article. Specifically, the measure must be "relating to" or "necessary" to the preservation of the member's identified interest.[93] Second, if the first tier is satisfied, a panel must assess whether the chapeau[94] of the Article has been met.[95] The chapeau requires a panel look at the application of a "measure already found by the Panel to be inconsistent with one of the obligations under the GATS but falling within one of the

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[89] Appellate Body Report, *supra* note 69, at ¶ 292; *see, e.g.*, General Agreement on Tariffs and Trade art. XX ¶ (a), (b), (d) Oct. 30, 1947, 55 U.N.T.S. 194:

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

[90] Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802, 808 (2006).

[91] Appellate Body Report, *supra* note 69, ¶ 292.

[92] *Id.*

[93] *Id.*

[94] A term often used in reference to the "introductory clause" of a provision. Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 7.586, WTO Doc. WT/DSS453/R (Sept. 30, 2015) (adopted as modified May 9, 2016).

[95] *Id.*

paragraphs of Article XIV."[96] "[W]hether a measure is *applied* in a particular manner can most often be discerned from the design, the architecture, and the revealing structure of a measure."[97]

To illustrate, in *EC-Seals*, both the panel and the Appellate Body found the European Union' s prohibition on the importation and marketing of seal products to be "necessary to protect public morals."[98] However, the Appellate Body deemed an exception from the general ban for products of traditional indigenous hunting to be a violation of the chapeau. Specifically, the Appellate Body pointed to the "inconsistency in the measure, and that "Europe could have done more to facilitate access of Canadian Inuit to the exception."[99] In sum, the Appellate Body "focus[ed] on the cause of the discrimination," or the rationale put forward to explain its existence and determined that the EU failed to "sufficiently explain[] how the manner in which the EU Seal Regime treats IC hunts as compared to 'commercial' hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare."[100]

Undoubtedly, the general exceptions found within Article XIV of the GATS and Article XX of the GATT supply members significant flexibility to regulate domestic matters that may go against core WTO mandates. The drafters of the GATT felt that each member's national policies were important and were not to be considered subservient to international trade management.[101] Indeed, *EC-Seals* illustrates a panel and an Appellate Body

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[96] Appellate Body Report, *supra* note 69, ¶ 339.

[97] Panel Report, *supra* note 94 ¶ 7.748 (quoting Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.302, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (adopted June 18, 2014) [hereinafter Appellate Body Report, *EC—Seal Products*]).

[98] *Id.* Such a general exception to WTO obligations functions under both the GATT and the GATS. Appellate Body Report, *US—Gambling*, *supra* note 69.

[99] Rob Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO's Appellate Body Report in EC—Seal Products*, 18 AM. SOC'Y INT. L. (June 4, 2014), https://edisciplinas.usp.br/pluginfile.php/1127881/mod_resource/content/1/EC%20Seal%204.pdf (summarizing Appellate Body Report, *EC—Seal Products*).

[100] Appellate Body Report, *EC—Seal Products*, *supra* note 97, ¶ 5.320.

[101] *See* LESTER, *supra* note 70, at 373.

respectfully acknowledging the EU's seal protectionist policies. While such a recognition by the drafters is admittedly noble, this acknowledgement has resulted in an exception based in so much subjectivity, many question whether the provision is a "way to disguise . . . intent so as to hide protectionist policies" in measures superficially intended to fall within one of the enumerated exceptions in the Articles.[102]

3. *Public Morals in Depth*

A glaring consequence of Article XIV is that the provision "could be used as a catch-all justification for all sorts of protectionist measures, given that WTO Members have (as *EC Seal Products* confirms) fairly wide latitude to define and apply for themselves the concept of public morals according to their own systems and scales of values."[103] Furthermore, the public morals exception enumerated in sub-paragraph (a) of Article XIV effectually operates as a catch all provision for general exceptions, as any of the subsequent listed policy goals could arguably be classified as "necessary to protect public morals."[104] For example, with technological development, the distinction between health, environment, and morality has become unclear.[105] In *EC-Hormones*, the EU banned the importation of hormone-treated beef in part as an attempt to preserve traditional European farming and food production methods, a policy akin to public morality.[106] Similarly, in a separate dispute, the EU adopted intense regulatory measures to control the marking of agricultural biotechnology due to concerns about health and environmental risks as well as religious and ethical considerations.[107]

Not only are the classifications within Article XIV hard to distinguish, the employment of GATS Article XIV(a) and GATT Article XX(a) themselves often seems to be a rigid

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[102] *Id.* at 374.

[103] *See* Howse, *supra* note 99 at 3.

[104] *See* LESTER, *supra* note 70, at 386.

[105] Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 2, 158, WTO Doc. WT/DS26/AB/R-WT/DS48/AB/R (Jan. 16, 1998) (finding European prohibition on import of beef treated with growth hormones to violate SPS Agreement).

[106] Marwell, *supra* note 90.

[107] *Id.*

observance of formality. "Conceivably, any law passed by a representative government prohibiting any behaviour could be considered a social judgement of what is right or wrong conduct and therefore framed as a public moral issue."[108] Notably, the public morals exception has been a part of the multilateral trading system since 1947, but the provision has only been invoked in three WTO disputes.[109] Some commentators believe this to be the result of members' hesitancy to "override objective trade rules with something as subjective as 'public morals.'"[110] Regardless of the reason the exception has so infrequently been invoked, the aforementioned rationale carries weight. The cases of *U.S.-Gambling Services*, *EC-Seal Products*, and *China-Audiovisuals* demonstrate what great latitude members are afforded in their assessment of public concern.[111] In all three cases, the panels or appellate bodies seem to operate under the conviction that "the content of [public morals] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values." [112] Accordingly, the regulation of gambling services, seal products, and certain publications and audiovisual entertainment products constituted matters of public concern in the eyes of the dispute settlement bodies.

Amid 168 WTO member countries, "public morals" could have vastly different meanings and could apply to "anything from religious views on drinking alcohol or eating certain foods to cultural attitudes toward pornography, free expression, human rights, labor norms, women's rights, or general cultural judgments

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[108] Ming Du, *Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization*, 50 J. OF WORLD TRADE 675, 694 (2016) (referencing Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INTL. L. 689, 731 (1998)).

[109] *See* Brendan McGivern, Commentary, *The WTO Seal Products Panel—The "Public Morals" Defense*, 9 GLOB. TRADE & CUSTOMS J. 70 (2014).

[110] THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 441 (Kern Alexander & Mads Andreas eds., 2008).

[111] *See generally* McGivern, *supra* note 109.

[112] Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 66.461, WT/D238/R (Nov. 10, 2004).

about education or social welfare."[113] Indeed, many states impose trade restrictions on the basis of public morality despite a lack of consensus amongst the international trading community at large.[114] Accordingly, the preservation of national autonomy and the WTO's approach to what constitutes "public morals" proves problematic in nature, especially when a morality argument bleeds into trade commitments.

C. SPECIFIC COMMITMENTS AND MARKET ACCESS

Part III of the GATS deals with the specific commitments made among and between member countries. Three types of commitments are made under this section of the GATS: market access commitments, National Treatment, and additional commitments.[115] A commitment is discretionary under the GATS and is the result of negotiations between member countries. As noted in Section II.A, specific commitments are listed in members' schedules and are either made horizontally or for exclusively distinct sectors. In either case, a schedule will contain "which commitments have been made for each mode of supply[116] in relation to market access, national treatment, and any additional [categories of] commitments."[117]

Specifically, the schedule works as follows. The four modes of supply are numbered one to four, listed at the top of a schedule, and are then inserted in the columns for the three commitments: market access, national treatment, and additional commitments.[118] This indicates the commitment for each mode of supply. Generally, three types of entries are found in member schedules: none, unbound, and partial commitments. "None" denotes a full commitment, or said another way, no limitations on treatment or access. "Unbound" means no commitment exists, and thus, no member duties with respect to that mode of supply and

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[113] Marwell, *supra* note 90, at 815.

[114] *Id.*

[115] GATS, *supra* note 64, art. XX.

[116] *Id.*

[117] *See* LESTER, *supra* note 70, at 706.

[118] *See Guide to Reading the GATS Schedule of Specific Commitments and the List of Article II (MFN) Exemptions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Mar. 24, 2019).

particular type of commitment for that sector. A partial commitment is specifically explained in the schedule.

To illustrate with market access commitments, if a schedule denotes "None" for "Cross-Border Supply" of a particular sector, that member state has made a full commitment to this mode and must not implement any Article XVI:2 [119] measures relating to cross-border modes of supply. While such an example may seem relatively straightforward, "market access" is used in many contexts, with different meanings within the GATS. Similarly, defining "National Treatment" is difficult, as its scope

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[119] 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
(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 in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.
GATS, *supra* note 64, art. XVI.

under the GATS is complex.[120] National Treatment commitments pertain to foreign services and service providers in comparison to domestic services and service providers. Again, taking the example of cross border supply, listing "None" in the schedule means that the member will not treat foreign services or service suppliers utilizing the mode of cross border supply less favorably that 'like' domestic services or service providers.[121]

Article XVI gives "market access" some substance but provides no general definition. Similarly, "National Treatment" under Article XVII has been subject to inconsistent and unclear explanations in case law. Accordingly, interpretation of specific terms within Article XVI can be complicated. For example, does "in the form of numerical quotas" found in Article XVI:2(c)[122] encapsulate a complete ban on a certain method of service supply even though technically, no numerical value is specified? Such was the question in one of the most well-known world trade disputes to date.[123] The answer—as this article will illustrate—has present day and far-reaching implications.

D. U.S. - GAMBLING SERVICES

1. *The Facts*

In 1998, the increasing consumer demand for sports, gambling, and the interplay between the two, along with the rapid growth of technological platforms and access, spurred the United States to take action against foreign-based internet betting parlors.[124] Federal prosecutors charged twenty-one U.S. citizens with violations of the Wire Act, including Jay Cohen, an American citizen who had been operating the Antigua-based

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[120] *See* LESTER, *supra* note 70, at 708.

[121] *Id.*

[122] Appellate Body Report, *supra* note 69, ¶ 216.

[123] *See* Samantha Beckett, *Antigua Rallies Non-aligned Countries in Online Gambling Battle with America*, CASINO.ORG (Sept. 21, 2016), https://www.casino.org/news/antigua-rallies-against-online-gambling-america (noting that the case, *U.S.—Gambling*, is now famous in the annals of international trade law and about which scholarly books have been written).

[124] *See* Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, 2 J. INT. COMM. & ECON. 128, 129 (2009).

World Sports Exchange.[125] "Twenty of the indicted persons entered guilty pleas, had their cases dropped, or remained outside the United States as fugitives, but Cohen returned to the United States to contest his case in court."[126]

On March 27, 2003, Antigua and Barbuda requested formal consultations with the United States and the WTO calling into question the United States' cross-border gambling ban.[127] Notably, the request to consult was presented at a time in which an Antiguan industry that once employed 4,000 people, and generated around $3.4 billion annually in revenues, had dwindled to a mere 300 to 400 jobs.[128] Antigua asserted that the country's economic crisis was, in part, directly related to the decision of the United States Court of Appeals for the Second Circuit against former Antiguan resident and bookmaker Jay Cohen.[129] Ultimately, Antigua argued that both state and federal provisions that outlawed cross-border gambling and betting services violated the GATS.[130]

2. *Specific Commitments and Quantitative Restrictions*

The WTO's Dispute Settlement Body established a panel at its meeting on July 21, 2003.[131] Subsequently, Canada, the EC,

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[125] *Id.*

[126] *Id.* (Attorney Mark Mendel of El Paso, Texas informed Antigua of what he believed to be the United States in violation of the GATS. Antigua subsequently hired Mendel to initiate resolution of the dispute at the World Trade Organization).

[127] Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1, S/L/110, (Mar. 27, 2003).

[128] Ann M. Simmons, *Why Hurricane-Ravaged Barbuda Desperately Wants to Resolve a Dispute Over U.S. Online Gambling*, L.A. TIMES (Oct. 9, 2017), http://www.latimes.com/world/la-fg-global-antigua-us-trade-2017-story.html.

[129] *See* United States v. Cohen, 260 F.3d 68, 78 (2d Cir. 2001).

[130] Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/1 (Mar. 13, 2003).

[131] Constitution of the Panel Established at the Request of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/3, (Aug. 26, 2003).

Mexico, Chinese Taipei, and Japan reserved third-party rights.[132] Collectively, the parties claimed:

> [I]n maintaining measures that prohibit cross-border supply of gambling and betting services, the United States [was] maintaining quantitative limitations that [fell] within the scope of sub-paragraphs (a) and (c) of Article XVI and that [were] therefore, inconsistent with the market access commitment undertaken in subsection 10.D (titled 'Other Recreational Services (except sporting)') of the United States' Schedule.[133]

Ultimately, the United States had undertaken to provide full market access for "Other Recreational Services" by entering "None" for mode 1 supply in the market access column.[134] However, United States law largely prohibited the ability of companies to provide "remote" gambling and betting services to citizens within its borders.[135]

The panel decided that the ban[136] on the supply of gambling and betting services "effectually 'limit[ed] to zero' the number of service suppliers and the number of service operations relating to that service."[137] Thus, such an effect operated as a

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[132] *Id.*

[133] Appellate Body Report, *supra* note 69, ¶ 216.

[134] *Id.* ¶ 138.

[135] *Id.* ¶ 259.

[136] The Panel found that the following measures violated Article XVI of the GATS:

(i) Federal Laws
   a. The Wire Act
   b. The Travel Act (when read with state laws)
   c. The Illegal Gambling Business Act
(ii) State laws:
   a. Louisiana: Section 14:90.3 of the Louisiana Revised Statutes
   b. Massachusetts: Section 17A of chapter 271 of the Annotated Law of Massachusetts.
   c. South Dakota: Section 22-25A-8 of the South Dakota Codified Laws; and
   d. Utah: Section 76-10-1102(b) of the Utah Code.

Appellate Body Report, *supra* note 69, ¶ 217.

[137] *Id.* ¶ 216.

"zero quota" and a "limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a)," as well as a "limitation on the total number of service operation or on the total quantity of service output . . . in the form of quotas within the meaning of Article XVI:2(c)."[138]

3. *The United States Asserts Art. XIV as a Defense*

In response to the general claim before the panel that the prohibition on cross-border internet betting, among other remote forms of gambling, violated several GATS provisions, the United States invoked Article XIV(a) and (c) of the GATS in defense.[139] The United States argued:

> [the] public order and public morals concerns should lead a panel to conclude that remote supply of gambling poses a grave threat to the maintenance of public order and the protection of public morals in the United States—certainly enough so to justify the maintenance and enforcement of origin-neutral restrictions on gambling such as those found in §§ 1084, 1952, and 1955.[140]

Ultimately, the United States explained that §§ 1084, 1952, and 1955 aided in the enforcement of state gambling laws and protected fundamentally important state policies relating to public health, safety, welfare, and the preservation of good order.[141] The United States claimed that "society's interest in remaining free from crime, and organized crime in particular" was paramount.[142]

Generally, the panel and the Appellate Body reports established the following to determine whether the United States gambling measure fit the bill under an Article XIV(a) exception:

> First, determine whether the issue, as a general category, falls within the scope of 'public morality' as defined textually and by reference to international state practice. Second, if the issue in general is considered a question of public

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[138] Panel Report, *supra* note 112.
[139] *Id.* ¶ 295.
[140] *Id.* ¶ 295.
[141] *Id.* ¶ 282.
[142] *Id.* ¶ 288.

> morality, examine the specific measure in question to ensure that it is legitimately directed at that moral interest. Third, if the particular measure does address a matter of public morals, ensure that the measure is not more trade restrictive than necessary, weighing the morality interest of the regulating state against the interest of other WTO Member States in trade liberalization. Finally, ensure that the measure is not applied in a nondiscriminatory fashion.[143]

The panel utilized three small paragraphs and just as many footnotes to explain that a look at various international practices established that gambling could fall under the definition of "public morals" within Article XVI(a).[144] The panel then looked at the particular challenged United States measures in relation to "public morals," and determined that that they were adequately designed to preserve these concerns.[145] Next, the panel utilized Appellate Body's "weighing and balancing" test in order to determine whether the measures implemented by the United States were "necessary" to protect public morals.[146] The panel examined the importance of interests or values that the challenged measure was intended to protect, the extent to which the challenged measure contributed to the realization of the end pursued by that measure, and the trade impact of the challenged measure.[147] The panel then noted that the Appellate Body had suggested "if the value or interest pursued is considered important, it is more likely that the measure is "necessary."[148]

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[143] Marwell, *supra* note 90, at 814.

[144] Panel Report, *supra* note 112 (noting that restrictions in Israel and the Philippines limited foreign ownership of gambling operations under a heading containing the word "morals"); *see also id.* at n. 914 (noting that the Economic Committee of the League of Nations and the European Court of Justice (ECJ) recognize gambling as a morality concern); *id.* (explaining that some jurisdictions have special legal frameworks for traditional as well as internet gambling).

[145] *See* Panel Report, *supra* note 112.

[146] *Id.* at 6.476.

[147] *Id.*

[148] *Id.* at 6.477.

The panel put great emphasis on the historical backdrop of the federal provisions challenged by Antigua in order to determine whether the laws were "necessary" to preserve what the United States identified as concerns associated with remote gambling.[149] The panel pointed to the "Congressional statements identified . . . in paragraphs 6.482-6.485. . . that indicate[d] that these Acts [were] intended to protect society against the threat of money laundering, organized crime, fraud and risks to children (*i.e.*, underage gambling) and to health (*i.e.*, pathological gambling)."[150] Specifically, the report quotes Robert F. Kennedy stating that his program (which included the Wire Act and Travel Act) allowed the federal government to "take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety."[151]

The panel conceded that the values protected by the United States laws served "very important societal interests" and

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[149] *Id.* at 6.478–6.521 (quoting a 1961 House of Representatives report on the Wire Act issued shortly before its entry into force stating that: "[t]he purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce."); *id.* (quoting *Hearing Before the S. Judiciary Comm. on the Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess., 3 (1961) (statement of Robert Kennedy, Att'y Gen. of the United States) ("These [hoodlums and racketeers who have become so rich and so powerful] use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size. Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime, all throughout the country.")).

[150] Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 6.489 WTO. Doc. WT/DS285/R (Nov. 10, 2004).

[151] *Hearing Before the S. Judiciary Comm. on the Attorney General's Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess., 3 (1961) (statement of Robert Kennedy, Att'y Gen. of the United States).

even characterized such interests as "vital and important to the highest degree."[152] However, the panel also cautiously noted that "these interests—to protect society against the threat of money laundering, organized crime, fraud and risks to children (*i.e.*, underage gambling) and health (*i.e.*, pathological gambling)—also exist in the context of the non-remote supply of gambling and betting services."[153] Thus, the panel had to decide whether the measures were justified, "particularly in light of the tolerant attitude displayed in some parts of the United States to the non-remote supply of such services."[154]

Antigua asserted that money laundering, fraud, and health are at least as grave a concern in relation to the supply of non-remote gambling and betting services as in the case of the remote supply of such services.[155] Nevertheless, the panel asserted that even though these concerns "may exist in the context of the non-remote supply of gambling and betting services," this did not prohibit the United States from addressing "differently the aspects . . . that are specific to the remote supply of gambling and betting services."[156]

The United States supported its money laundering concerns associated with remote gambling by asserting that "the remote supply of gambling and betting services is particularly well-suited to concealing and disguising the true nature, source and ownership of the ill-gotten gains of crime."[157] Similarly, the United States argued fraud as a concern because "the barriers to establishing an online gambling operation are low so that unscrupulous operators can appear and disappear within minute."[158] Moreover, "[h]ealth concerns in relation to the remote supply of gambling and betting services relate to the isolated environment in which gamblers may operate, which protects them from social stigma and enables them to gamble without interruption for extended periods of time."[159] Further, the United

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[152] Panel Report, *supra* note 112, at 6.492.
[153] *Id.* at 6.493.
[154] *Id.*
[155] *Id.* at 6.505.
[156] *Id.*
[157] *Id.* at 6.499.
[158] *Id.* at 3.17.
[159] *Id.* at 6.510.

States supported the argument by pointing to the fact that online gambling is always available to gamblers.[160] Finally, the United States explained that online gambling was a particular risk for children as "[i]nternet gambling businesses have no reliable way of confirming that gamblers on their website are not minors who have gained access to a credit card."[161]

Notably, as the panel concluded its analysis, it declared that the United States' concern of organized crime was insufficient as it pertained to remote gambling services because non-remote supply of gambling and betting services *was* permitted in much of the United States, even though it too gave rise to concerns with respect to organized crime.[162] Thus, the United States had identified certain concerns specific to the supply of remote gambling that could therefore not be compared to non-remote gambling. However, organized crime was not one of them.

In the end, the panel acknowledged the United States' interests to be extremely important and substantially related to the preservation of public morality,[163] but ultimately that they also had a "significant restrictive trade impact."[164] To the panel, this factor defeated the possibility that the United States' provisions in dispute were necessary under Article XIV and consistent with the chapeau.[165]

4. *The Appellate Body's Findings and Orders*

On appeal, the Appellate Body agreed with the findings of the panel that certain United States federal statutes operated to violate Article XVI:2(a) and (c).[166] Further, the Appellate Body upheld the panel's finding that the United States' measures were designed "to protect public morals or to maintain public order" within the meaning of Article XIV(a).[167] However, it reversed the panel's finding that the United States had not shown that its measures were "necessary" to do so because the panel had erred

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[160] *Id.* at 6.511.

[161] *Id.* at 6.516.

[162] *Id.* at 6.520 (emphasis added).

[163] *Id.* at 6.535.

[164] *Id.* at 6.495.

[165] *Id.* at 6.535 (emphasizing the United States' failure to engage in negotiations with Antigua about less trade-restrictive alternatives to a total prohibition).

[166] Appellate Body Report, *supra* note 69, ¶ 265.

[167] *Id.* at 299.

in considering consultations with Antigua to constitute a "reasonably available" alternative measure.[168] Ultimately, the Appellate Body found that the measures were "necessary" because the United States had made a prima facie case showing of "necessity" and Antigua had failed to identify any other alternative measures that might be "reasonably available."[169]

The Appellate Body reversed the panel's finding that the measures did not meet the requirements of the chapeau because the United States had discriminated in the enforcement of those measures.[170] However, the Appellate Body upheld the second ground upon which the panel based its finding:

> [N]amely that in the light of the Interstate Horseracing Act (which appeared to authorize domestic operators to engage in the remote supply of certain betting services), the United States had not demonstrated that its prohibitions on remote gambling applied to both foreign and domestic service suppliers, i.e. in a manner that did not constitute 'arbitrary and unjustifiable discrimination' within the meaning of the chapeau.[171]

The parties commenced consultations to decide what would constitute a reasonable for the United States to bring its measures into compliance, but resorted to arbitration after they were unable to agree.[172] In arbitration, "the Arbitrator determined that the 'reasonable period of time' for the United States to implement the recommendations and rulings of the DSB ("Dispute Settlement Body") was 11 months and 2 weeks from 20 April 2005, which was the date on which the DSB adopted the

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[168] *Id.* at 321.

[169] *Id.* at 325–26.

[170] WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES, 118–19 (2017 ed.) https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285sum_e.pdf.

[171] *Id.*

[172] Article 21.3(c) Arbitration Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 2, WTO Doc. WT/DS285/13 (Aug. 19, 2005).

Panel and Appellate Body Reports."[173] After the United States failed to meet such a deadline, Antigua requested an authorization to suspend the application to the United States of "concessions and related obligations" of Antigua under the GATS and the TRIPS Agreement, in an amount of an "annual value of US$3.443 billion", which it considered to "match the level of nullification or impairment of benefits accruing to Antigua and Barbuda."[174] The arbitration panel reduced the award to $21 million annually.[175] Notably, this sum was procured by looking at the United States horse gambling market and estimating the possible revenue Antigua could have attained through unrestricted market access.[176]

Despite the WTO's ruling, the United States has refused to comply with the award.[177] Subsequently, the WTO authorized Antigua to lift payments on United States intellectual property, a circumvention to the standard copyright fees that would otherwise be owed.[178] Antigua never resorted to this recourse in hopes that the United States would eventually comply with the DSB orders.[179] In November 2016, the amount owed to Antigua was valued at over $200 million.[180] In 2017, Antigua was devastated by Hurricane Irma and again asserted their right to recourse in hopes of funding the process or reparation to its people and infrastructure.[181] Finally, in June 2018, Antigua Ambassador Ronald Sanders remarked to the DSB that he was "losing all hope"

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[173] *Id.* at 68.

[174] Recourse to Article 22.6 Arbitration Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 2.3, WTO Doc. WT/DS285/ARB (Dec. 21, 2007).

[175] *Id.* at 6.1.

[176] *Id.* at 3.186. The Arbitrator noted that this number was likely influenced by the U.S. measures in question, so the figure was determined by looking to the "pari-mutuel net receipts in the non-remote gambling market from the Bureau of Economic Analysis statistics on consumption expenditures." *Id.* at 3.187.

[177] Aaron Gray, *The Internet Age: Legislation in the Era of Online Sportsbooks (Part III)*, SBD (last updated Mar. 19, 2019), https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-iii/.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

that the United States would comply and that "Antigua and Barbuda is now contemplating, once again, approaching the (WTO) Director-General . . . to join in seeking a mediated solution that would bring much needed relief after these arduous 15 years of damage to our economy."[182] Nevertheless, the United States may have inadvertently expedited such a settlement after *Murphy*.

III. *MURPHY V. NCAA* AND THE INTERNATIONAL TRADE IMPLICATIONS

A. THE WIRE ACT STILL OPERATES TO MINIMIZE THE REALISTIC EFFECTS OF MURPHY BOTH WITHIN THE UNITED STATES AND ABROAD

1. *Domestic Effects*

While PASPA was at issue in *Murphy*, the Court hinted at the possible reinterpretation of another crucial gambling prohibition, 18 U.S.C. § 1084 or the Wire Act. Indeed, in explaining the federal government's general approach to gambling regulations, the Court referenced several federal laws, including the Illegal Gambling Business Act, the Interstate Transportation of Gambling Paraphernalia Act, and the Travel.[183] It cited these laws to juxtapose PASPA, which federally criminalized sports betting despite the underlying state law.[184] In contrast, the Court explained that the other provisions "implement a coherent federal policy" by requiring a predicate state offense. [185] This approach acts to "respect the policy choices of the people of each State on the controversial issue of gambling."[186]

Despite the Court's discussion of the American scheme, the Wire Act's plain language offers a different interpretation. The pertinent portion of the provides:

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[182] Tom Miles, *Antigua "Losing All Hope" of U.S. Payout in Gambling Dispute*, REUTERS (June 22, 2018, 1:33 AM), https://www.reuters.com/article/uk-usa-trade-antigua/antigua-losing-all-hope-of-u-s-payout-in-gambling-dispute-idUSKBN1JI0VZ.

[183] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1465–82 (2018).

[184] *Id.*

[185] *See id.*

[186] *Id.*

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility[187] for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[188]

Subsection a of the Wire Act does not contain language clarifying its interrelation with a state prohibition operating in conjunction with it.[189] However, the Illegal Gambling Business Act,[190] the Interstate Transportation of Gambling Paraphernalia Act,[191] and the Travel Act[192] expressly require a predicate state offense for a violation to occur. Basic statutory interpretation has resulted in all federal courts have found that the Wire Act functions independently from state law, lacking the need for a predicate violation.[193] Thus, although *Murphy* allows for the legalization of sports betting within a state's own boundaries, the plain language of the Wire Act effectively still prevents cross-border wire communication related to gambling.

Subsection b of the Wire Act offers a safe harbor for information related to a bet or wager transmitted across state borders, so long as the jurisdictions in which the information was

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[187] Jeffrey Rodefer, *Federal Wire Wager Act*, GAMBLING LAW U.S., http://www.gambling-law-us.com/Federal-Laws/wire-act.htm (last visited Mar. 23, 2019).

[188] 18 U.S.C. § 1084(a).

[189] *Id*.

[190] 18 U.S.C. § 1955.

[191] 18 U.S.C. § 1953.

[192] 18 U.S.C. § 1952(a)(3) & (b)(1).

[193] *See* United States v. McDonough, 835 F.2d 1103, 1104 (5th Cir. 1988); United States v. Corrar, 512 F. Supp. 2d 1280, 1289 (N.D. Ga. 2007); United States v. Kaczowski, 114 F. Supp. 2d 143, 155 (W.D.N.Y. 2000) ("Conviction for violating 18 U.S.C. § 1084 does not depend on commission of a predicate state offense.").

both sent and received legalizes the underlying form of gambling.[194]

Noticeably, the language in § 1084(b) differs from that in § 1084(a) by only honing in on the transmission of *information*, leaving § 1084(a)'s prohibited activities, despite the underlying jurisdiction's policies. Some commentators believe the safe harbor provision in § 1084(b) to be what the Court was addressing in its discussion of the Wire Act in *Murphy*.[195] Nonetheless, § 1084(a) remains, and its plain reading has resulted in one court conclusively deciding the very issue posed post-*Murphy*: when two states have legalized sports betting within their borders, the Wire Act still operates to criminalize such activity.[196]

Opponents of this view may cite the statute's legislative history to assert the idea that the Wire Act's purpose was, in fact, to reinforce various states' anti-gambling stance.[197] Indeed, as the

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[194] "Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." 18 U.S.C. § 1084(b).

[195] *See* Daniel Wallach, *Did the Supreme Court Reinterpret The Wire Act to Allow Cross-Border Internet Sports Betting?*, FORBES (July 8, 2018, 10:05 PM), https://www.forbes.com/sites/danielwallach/2018/07/08/did-the-supreme-court-reinterpret-the-wire-act-to-allow-cross-border-internet-sports-betting/#3bcf902846c5 (quoting Gaming lawyer Mark Hichar, a fellow member of the International Masters of Gaming Law and a partner of the Hinckley Allen law firm).

[196] United States v. Corrar, 512 F. Supp. 2d 1280, 1289 (N.D. Ga. 2007) ("[E]ven if internet gambling were permissible under state law, using interstate wire communication facilities to promote it would not be. This is why the Wire Act, unlike the Travel Act and 18 U.S.C. § 1955, does not require an underlying violation of state law.").

[197] *See* H.R.REP. NO. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631 ("The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.").

Fifth Circuit explained, "[t]he legislative history [of the Wire Act] sets forth a dual purpose—to assist the various states in enforcing their gambling laws and to aid in the suppression of organized gambling activities . . . ."[198] However, the Fifth Circuit made clear that the legislature said what it meant in § 1084(b) and that § 1084(a) was to be construed differently: "Nothing in the exemption, however, will permit the transmission of bets and wagers . . . from or to any State *whether betting is legal in that State or not.*"[199]

In the end, the public has viewed *Murphy* as a huge win for the gambling sector within the United States, with each state now being at liberty to determine its own rules within its borders. However, little discussion has transpired regarding remaining limitations on sports betting. The Wire Act operates as a huge obstacle for the betting marketplace by prohibiting cross-border gambling among states. Perhaps more significant is the effect the Wire Act still has on the international gambling marketplace.

2. *International Effects*

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[200] However, statutes may be given extraterritorial effect if the law itself allows, and Congress intends it.[201] The Wire Act (as well as the Travel Act and the Wagering Paraphernalia Act) expressly refers to foreign commerce, which is likely indicative of the congressional intent to extend the reach of these provisions beyond the United States' borders.[202] Not surprisingly, some

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[198] United States v. McDonough, 835 F.2d 1103, 1104-05 (5th Cir. 1988) (quoting H.R.REP. NO. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631).

[199] *Id.* (quoting H.R. REP. NO. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631).

[200] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010) (quoting E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

[201] United States v. Noriega, 746 F. Supp. 1506, 1515 (S.D. Fla. 1990).

[202] Lawrence Walters, *The Long Arm of the Law—Can the UIGEA Be Applied to Candian Gaming Operations?*, WESTON, GARROU, WALTERS, AND MOONEY,

courts have held as much.[203] A First Circuit case, brought under the Wire Act with the question of whether the statute applies abroad, is on point.[204] The court explained that the Wire Act "explicitly applies to transmissions between the United States and a foreign country," which evinces the congressional intent of extraterritoriality.[205] Thus, if communications giving rise to a Wire Act violation have "at least one participant inside the United States [the acts] fall within the statute's scope."[206]

Yet again, *Murphy*'s effective legalization of sports gambling creates the possibility of confusion, primarily among foreign enterprises wishing to legally take part in an extremely lucrative market within the United States. Specifically, because the Wire Act remains intact, and because the law operates abroad, foreign gambling enterprises remain precluded from accessing a booming market within the United States. The international trade implications of such a result are discussed *supra* Section III.C.

Further, the Wire Act's safe harbor provision will not act as an escape device to foreign defendants despite the fact that sports betting is or will be legal in many states. Recall that the safe harbor section of the Wire Act (subsection b) precludes a violation of the Act (subsection a) from occurring if the transmission of information for the assistance of placing a sports bet travels both to and from a jurisdiction that permits the underlying form of gambling.[207] As the First Circuit illustrated, "if New York allows betting on horses at race tracks in New York, and if Nevada allows betting in Nevada on the results of New York horse races, then information may be wired from New York to Nevada to assist in

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http://apps.americanbar.org/buslaw/committees/CL430000pub/newsletter/200905/chair-longarm.pdf (last visited Apr. 23, 2019).

[203] United States v. Cohen, 260 F.3d 68 (2d Cir. 2001); New York v. World Interactive Gaming Corp., 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).

[204] United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014).

[205] *Id.* (citing Pasquantino v. United States, 544 U.S. 349, 371–72 (2005) (stating that "the wire fraud statute punishes frauds executed in 'interstate or foreign commerce,'" and therefore can be applied extraterritorially because Congress did not have "only 'domestic concerns in mind.'")).

[206] *Id.*

[207] 18 U.S.C. § 1084(b).

the betting in Nevada without violating the statute.[208] As discussed *supra* Section III.A.i., and most notably, the safe harbor provision only applies to the transmission of *information* assisting in the placing of bets and does not exempt from liability the interstate transmission of *bets themselves.*[209]

Furthermore, the Wire Act is effectually more powerful as applied to foreign enterprises or businesses; the Act's legislative history indicates its scope to be narrow enough to encapsulate only those engaged in the business of wagering.[210] The Act's primary advocate, Attorney General Robert Kennedy, "took pains to emphasize that his bill would not target people who gambled for fun, but only those who illicitly profited from the business of gambling."[211] Thus, foreign enterprises engaging in organized gambling fall precisely within the crosshairs of the Act, and therefore are more likely subject to liability than an individual placing casual bets over the phone inside his or her own home.

Murphy could easily function as a trap for unwary foreign enterprises, or just as easily, domestic businesses operating offshore. While the legalization of sports gambling creates opportunity for many domestic businesses, organized foreign gambling enterprises remain stuck in the past and subject to the

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[208] United States v. Lyons, 740 F.3d 702, 713 (1st Cir. 2014).

[209] *Id.* (citing United States v. McDonough, 835 F.2d 1103, 1104–05 (5th Cir. 1988).

[210] "Law enforcement is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances. That is not the purpose of this legislation. However, it would not make sense for Congress to pass this bill and permit the professional gambler to frustrate any prosecution by saying, as one of the largest layoff bettors in the country has said, 'I just like to bet. I just make social wagers.' This man, incidentally, makes a profit in excess of a half million dollars a year from layoff betting. Therefore, there is a broad prohibition in the bill against the use of wire communications for gambling purposes." *Hearings on S.1653, S.1654, S.1655, S.1656, S.1657, S.1658, S.1665 Before the S. Comm. on the Judiciary*, 87th Cong., 1st Sess. at 12–13 (1961).

[211] David G. Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14 GAMING L. REV. AND ECON., 533, 535 (2010).

same prohibitive measures foreign providers have opposed for years.[212]

B. INTERNATIONAL ACCESS IS IMPERATIVE: A PANEL'S FIRST OPPORTUNITY TO STRICTLY SCRUTINIZE ARTICLE XIV(A)'S 'PUBLIC MORALS' STANDARD

1. *The Exception's Inequities*

The panel in *US-Gambling* declared that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."[213] Further, the panel explained that these concepts for members can vary in time and space, depending upon a range of factors, including prevailing "social, cultural, ethical, and religious values."[214] Consequently, members "should be given some scope to define and apply for themselves the concept of 'public morals' . . . according to their own systems and scales of values."[215]

The DSB's analysis of what constitutes "public morals" under both the GATT and the GATS has been limited, and the term remains ill-defined. However, one aspect is certain—the WTO refuses to conduct a thorough examination of a member's self-determined public morality defense.[216] In each dispute involving the public morality exception, almost complete deference is afforded to members to unilaterally assert an ideal as a heightened focal point within its society. Obviously, such a subjective framing of defenses in dispute resolution creates issues for other members who may indeed have brought a worthy claim

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[212] *See* Appellate Body Report, *supra* note 69 (not only Antigua and Barbuda, but China, Mexico, Canada, and the EC challenge the state of U.S. federal gambling prohibitions).

[213] Panel Report, *supra* note 112.

[214] *Id.*

[215] *See* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, WT/DS363/R, at ¶ 7.759 (Jan. 10, 2010) (adopting same methodology).

[216] *See* Julia Möllenhoff, *Framing The 'Public Morals' Exception After EC—Seal Products with Insights From the ECTHR and the GATT National Security Exception*, THE GRADUATE INST. OF INT'L AND DEV. STUDIES, (2015) ("[T]he analysis of public morals . . . comes extremely close to a mere subjective review, i.e. leaving almost limitless discretion to the Member provided that it is itself convinced of the necessity of a measure.").

to the DSB and should rightfully be awarded recompense. Moreover, perhaps a larger problem lies with members who are being wronged by another member under a trade agreement, but may not choose to pursue their deserved remedies because of the possibility that the violation may fall within the scope of Article XIV(a)'s vague requirements.

Finally, the most regrettable group harmed by the current state of "public morals" jurisprudence is certainly the members who have lost the battle to GATS Article XIV or GATT Article XX. They continue to be impaired under the exception's unremitting governance, even though the member who invoked the defense clearly no longer recognizes the issue as one of "public concern." Such a member likely acknowledges the defense's inequity when it is employed, but when the defense no longer applies, that nation likely feels a sense of injustice. Antigua may be such a member.

2. *Geopolitical Implications: Call for Change*

The United States must respond to WTO orders and comply with the award for various reasons. First, the United States relies on the WTO to counter trade practices that it feels are wrong and cause harm to the nation's international trade network. As of 2018, the United States had been a complainant in 123 trade disputes, a respondent in 151 cases, and a third party in 144.[217] These numbers represent a large disparity in dispute involvement between the United States and other members.[218] Since 2009, the United States has filed almost 30 complaints with the WTO—five occurring under the administration of President Donald Trump.[219] Despite numerous members recently taking issue with the United States' Section 232 tariffs on steel, the United States has itself been a victim of non-compliance.[220] For example, in 2011 the EU

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[217] *United States of America and the WTO*, WTO, https://www.wto.org/english/thewto_e/countries_e/usa_e.htm (last visited Mar. 19, 2019).

[218] *Id.* (documenting China, EU, and various other members' utilization of the dispute resolution system).

[219] Andrew Lumsden, *Hurricane Irma Sends Decades-Old US-Antigua Dispute Back into the Spotlight*, CARIBBEAN 360 (Aug. 21, 2018), http://www.caribbean360.com/opinion/hurricane-irma-sends-decade-old-us-antigua-dispute-back-into-the-spotlight.

[220] *What You Need to Know About Section 232 Investigations and Tariffs*, U.S. DEP'T COM. (Mar. 8, 2018),

had coffered more than $18 million in subsidies to the aircraft manufacturing company, Airbus, and continued to do so despite a ruling by the WTO in a suit brought by the United States.[221] "Furthermore, just this past January, the Trump Administration issued a scathing report detailing several cases of China flouting unfavorable WTO rulings, and, declaring Beijing's noncompliance as a cause for unilateral imposition of tariffs against Beijing, the first of which took effect in July 2018."[222] Accordingly, the United States' own non-compliance with the WTO dispute resolution system provides a perfect justification for other members to follow suit and effectually undermine the entire international trade network.

Relationships are the critical bedrock of the international trading system.[223] Presently, disputes, disagreements, and non-compliance are at their peak among members of the WTO.[224] Thus, it is of grave importance to mend or retain relationships with member countries in an effort to preserve the allegiance of any allies the United States may have. In 2017, the State Department and the U.S. Agency for International Development Budget received a total budget of $50.1 billion, which amounted to slightly more than 1% of the total federal budget.[225] A great percentage of this amount was proffered to counties with which

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https://www.commerce.gov/news/blog/2018/03/what-you-need-know-about-section-232-investigations-and-tariffs.

[221] Press Release, U.S. Trade Rep., United States Prevails in Showing EU Subsidies to Airbus Continue to Break WTO Rules (May 15, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/united-states-prevails-showing-eu#.

[222] Lumsden, *supra* note 219.

[223] Ryan Monarch & Tim Schmidt-Eisenlohr, *Learning and the Value of Relationships in International Trade*, 1218 INT'L FIN. DISCUSSION PAPERS BD. OF GOVERNORS OF THE FED. RESERVE SYS., 1 (2017).

[224] Lawrence Herman, *Global trade order suffers under chaos and stress wrought by Trump*, THE GLOBE AND MAIL (Mar. 5, 2018), https://www.theglobeandmail.com/opinion/global-order-suffers-under-the-chaos-and-stress-wrought-by-donald-trump/article38201615/.

[225] Adam Edelman, *Trump Announces Plan to Slash Federal Costs to Make Way for Boost in Military Spending*, N.Y. DAILY NEWS (Feb. 28, 2017), http://www.nydailynews.com/news/politics/trump-slash-federal-costs-boost-military-spending-article-1.2985016.

the United States is at odds, such as China.[226] Conversely, "China has . . . for years been quietly expanding its presence in the Caribbean; providing loans, donations or investment to build roads, port facilities, government buildings and even stadiums."[227] In June 2018, Antigua and Barbuda agreed to become part of China's "Belt and Road Initiative," evidencing the intent to "encroach on a region traditionally viewed as the United States' backyard."[228]

Accordingly, as President Trump plans to implement massive budget cuts, aid to these counties is likely to shrink, despite the United States already being dubbed as "neglectful."[229] At a WTO DSB meeting on June 22, 2018, Barbados, Cuba, Jamaica, Venezuela, and Dominica (for the Organization of Eastern Caribbean States) made statements in support of Antigua and Barbuda, as Antigua once more asserted its right to recompense from the United States.[230] Thus, it is imperative that the United States take some variation of action to evidence its desire to improve ties with nations completely susceptible to external sovereign geopolitical, economic, and military influence.[231]

3. *Domestic Culture Invalidates the United States' Justifications for Its Market Access Prohibition in the Gambling Industry*

In September 2018, District of Columbia ("D.C.") Councilmember Jack Evans introduced The Sports Wagering

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[226] *US Foreign Aid By Country: China (P.R.C.)*, U.S. AID, https://explorer.usaid.gov/cd/CHN (last visited Apr. 19, 2019).

[227] Harriet Alexander, *China Steps in to Help Rebuild Barbuda as the West Accused of Benign Neglect*, THE TELEGRAPH (Sept. 23, 2018), https://www.telegraph.co.uk/news/2018/09/23/china-steps-help-rebuild-barbuda-west-accused-benign-neglect/.

[228] *Id.*; *China Seeks to Fill Void Left by Western 'Neglect' in Antigua and Barbuda in Wake of Hurricane Irma*, S. CHINA MORNING POST (July 15, 2018), https://www.scmp.com/news/china/diplomacy-defence/article/2155319/china-seeks-fill-void-left-western-neglect-antigua-and.

[229] Alexander, *supra* note 227.

[230] *WTO Members Review Requests for Panels on Canadian Wine Sale Measures, US Fish Duties*, WTO (June 22, 2018), https://www.wto.org/english/news_e/news18_e/dsb_22jun18_e.htm.

[231] Lumsden, *supra* note 219.

Lottery Amendment Act of 2018.[232] The bill would operate to "legalize sports betting in the District of Columbia, while also creating strong regulatory structures that ensure consumer confidence."[233] The Act would legalize "both *online* and in-person wagering, with the District Lottery in charge of regulatory oversight."[234] However, D.C. is just one of many in the race to legalize intrastate sports betting. As of October 2018, six states had taken advantage of PASPA's demise, with newly active sports betting industries, while many more states were in the works to establish their own framework.[235] Notably, all but one of the six states that took action to liberalize sports gambling, also legalized online sports betting.[236] Such a movement carries remarkable significance, as remote betting has been the very cause of trepidation in the United States' historical discomfort with sports gambling.[237] The states' shift muddies the United States' apparent stance on remote gambling operations and frame its posture within the WTO as artificial.

Despite the WTO and the United States' interdependency upon one another for the effective exchange of goods and services across borders, relations have increasingly soured as the United States continues to hamper the DSB's judicial appointments.[238] Taking place "[a]t a time when the United States' protectionist policies have sparked a wave of trade wars, the institution best placed to help settle international trade differences and avoid further escalation" is facing the potential inability resolve disputes.[239] This dilemma speaks to much broader issues. Possible

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[232] Dustin Gouker, *New Bill in District of Columbia Would Legalize Sports Betting Via Lottery*, LEGAL SPORTS REPORT (Sep. 18, 2018), https://www.legalsportsreport.com/24200/new-bill-dc-sports-betting/.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.* § II.3.D.

[238] Gary Hufbauer, *WTO Judicial Appointments: Bad Omen for the Trading System*, PETERSON INST. FOR INT'L ECON. (June 13, 2011), https://piie.com/blogs/realtime-economic-issues-watch/wto-judicial-appointments-bad-omen-trading-system.

[239] *US Refusal of WTO Trade Judge Could Cripple Arbitration* System, THE NATIONAL (Aug. 28, 2018),

consequences of the DSB's ability to properly function and resolve disputes—many likely to include the United States as a party—are troublesome.

The United States has, for better or worse, alienated itself from some of its largest trading partners, its smaller supporters, the DSB, and the global trading network as a whole. Consequently, such disagreement could culminate at a point in the future where the United States has something it stands to lose. The United States can and should be prudent to control what it is can, while still standing by its foreign policy goals and principles. *Murphy* offers the country an opportunity to mend relations, maintain allies, show worldwide rectitude, and submit to compliance. By settling the longstanding gambling dispute with Antigua, the United States circumvents the quintessential opportunity for the DSB to retaliate against it. The WTO's public policy exception has been invoked sparingly but criticized greatly. Thus, reemergence of the *US-Gambling* dispute would supply the DSB with motives to improve upon what many see as a limitless exception. Some might argue that the United States has much larger issues to resolve in the area of geopolitical relations than its dispute with Antigua. However, given the economic stakes, the dispute could have enormous consequences.

IV. CONCLUSION

The perception of sports gambling in the United States has ebbed and flowed over time. However, *Murphy* functions to solidify the country's sentiment on an activity historically associated with immoral activity. Sports gambling is no longer prohibited within each state, and with the liberalization of a new domestic market, international parties are certain to take note. If these members remain subject to remote gambling prohibitions, *U.S.-Gambling* has established the framework for members of the WTO to pursue a claim against the United States, and after *Murphy*, the United States is much more vulnerable to claims. Public morality is no longer a defense and the United States must recognize the changing of the tide within its borders. Its outstanding judgement to Antigua has afforded the United States nearly a decade to procrastinate. However, now is the time to settle the Antiguan dispute in order to prevent other parties from coming to Antigua's aid in the midst of hostile international relations. Further, the United States must be mindful of the difficulties it has

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https://www.thenational.ae/world/the-americas/us-refusal-of-wto-trade-judge-could-cripple-arbitration-system-1.764591.

caused the WTO in its failure to comply, as well as its blocking of WTO judicial appointments. Such actions could prove harmful in future disputes involving the United States. In sum, the current state of international and domestic affairs demonstrate that the United States must act with haste in reaching an agreement with Antigua, and as opposed to the last decade, the stakes are now high.