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THE "NECESSARY" CONNECTION BETWEEN THE DUTY TO NEGOTIATE AND LEAST RESTRICTIVE MEASURES ANALYSIS: THE *GAMBLING* DISPUTE RECONSIDERED

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ABSTRACT

This article evaluates two potential interpretations of the duty to negotiate as it was addressed in the Appellate Body's *Gambling* opinion, and considers whether either interpretation is reconcilable with the Appellate Body's holdings in *Turtle-Shrimp* and *Gasoline*. Specifically, it argues that under a practical interpretation of *Turtle-Shrimp* and *Gasoline*, the duty to negotiate depends upon a finding of trade discrimination *and* a reasonably available less restrictive measure. The *Gambling* opinion severs the necessary connection between least restrictive measures analysis, a finding of discrimination, and the duty to negotiate, and as such leads to analytical inconsistencies in the Appellate Body's treatment of the duty to negotiate. Indeed, not only does a closer look at *Gambling* lead to analytical inconsistencies, it also leads to the conclusion that (1) the Appellate Body's holding in *Turtle-Shrimp* does not provide appropriate incentives for states to negotiate in good faith, and (2) the Appellate Body should reconsider its approach to Article XX GATT and Article XIV GATS by conducting a least restrictive measures inquiry under the chapeau in both "necessary" clause and "relating to" clause cases.

I. Introduction

Although much has been written about the duty to negotiate as it appears in the Appellate Body's *Turtle-Shrimp* and *Gasoline* opinions, the circumstances under which that duty will be imposed remain uncertain. Is there a procedural duty to negotiate under the chapeau of Article XX GATT? Is the imposition of a unilateral measure itself, without empirical evidence that the measure results in trade discrimination, a form of arbitrary and unjustifiable discrimination under the chapeau? If the answers to these questions are "yes," under what circumstances is there a stand-alone, procedural duty to negotiate under the chapeau, and how is the procedural duty to negotiate discharged? Moreover, given that the Appellate Body's two prior cases dealing with the duty to negotiate, *Turtle-Shrimp* and *Gasoline*, were considered under the "relating to" clause of Article XX GATT, does the duty exist outside the "relating to exhaustible natural resources" context of Article XX(g) GATT? If so, how is the duty affected by the Article XX GATT exception under which a suit is defended? Is the duty to negotiate altered or otherwise affected if a charge is defended under one of Article XX GATT's "necessary" clauses instead of the "relating to" clause of Article XX(g) GATT?

This article examines the foregoing questions, as well as others, through the lens of the *Gambling* opinion's treatment of the duty to negotiate, and considers whether it is reconcilable with the Appellate Body's holdings in *Turtle-Shrimp* and *Gasoline*. It argues that a closer look at *Gambling* not only leads to analytical inconsistencies in the Appellate Body's treatment of the duty to negotiate in "relating to" cases as opposed to "necessary" cases, but also leads to the conclusion that the Appellate Body's holding in *Turtle-Shrimp* does not provide member states with appropriate incentives to negotiate in good faith. It also argues that the Appellate Body should reconsider its approach to Article XX GATT and Article XIV GATS by conducting its least restrictive measures inquiry under the chapeau in both "necessary" clause and "relating to" clause cases, rather than conducting this inquiry under "necessary" clause in "necessary" cases. Part II of this paper reviews the Panel and Appellate Body opinions in *Gambling*. Part III of this paper considers two possible interpretations of the *Gambling* opinion, and finds that both interpretations lead to analytical problems for future WTO jurisprudence. Particularly, it argues that there is a necessary connection between a finding of discrimination, least restrictive measures analysis, and the duty to negotiate. Because of this connection, it finds that under one

plausible interpretation of *Gambling*, the duty to negotiate will practically be foreclosed from application in "necessary" cases, while under the second interpretation of *Gambling*, the chapeau of Article XX GATT or Article XIV GATS will not only be made inutile in "necessary" cases, but should be construed as inutile to avoid harming the complainant's case and jeopardizing the panel's least restrictive measures analysis. Part IV of this paper proposes two solutions to these problems. First, contrary to the *Turtle-Shrimp* opinion's imposition of a procedural duty to negotiate, the Appellate Body should only impose the duty to negotiate when (a) it is imposed pursuant to a less restrictive measure that is designed to remedy an explicit finding of trade discrimination, and (b) it requires that negotiations be fruitful and result in a less restrictive measure. Second, in order to make the chapeau utile and the duty to negotiate analytically accessible in "necessary" cases, the Appellate Body should avoid conducting a least restrictive measures analysis under the "necessary" clauses and instead conduct that analysis under the chapeau.

II. *Gambling*: The Original Panel and Appellate Body Reports

In *Gambling*, Antigua and Barbuda (hereinafter referred to as "Antigua") pursued claims against the United States under the General Agreement on Trade in Services (GATS), challenging a number of federal and state statutes that in effect amounted to a total ban on the remote supply of gambling services to users in United States territory.[1] Antigua argued that because the United States had made an open, unqualified market access commitment to the provision of gambling services from foreign providers, federal laws that criminalized the provision of remote gambling services – for example, the Wire Act, the Travel Act, and the Illegal Gambling Business Act – constituted a quantitative restriction on the foreign provision of gambling services in violation of Article XVI GATS, and that those same measures amounted to discrimination between "like" foreign and domestic services under Article XVII GATS.[2] The Panel Report in *Gambling* found that the United States had indeed made a market access commitment to the foreign provision of gambling services in its schedule of commitments under the GATS.[3] It also found that laws which amounted to a total ban on the foreign provision of

[1] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (2005), paras. 3.30-39 (hereinafter "Panel Report, *Gambling*").
[2] *Id*. at para. 6.133.
[3] *Id*. at para. 6.420.

gambling services were quantitative restrictions under Article XVI GATS, thus establishing a violation of a material obligation.[4]

The United States did not contest that its laws amounted to a total ban on the foreign provision of gambling services. Instead, the United States claimed that the violation of Article XVI of the GATS was justified because the challenged laws were "necessary to protect public morals or to maintain public order" under Article XIV(a) GATS.[5] The United States only claimed that it was justified in imposing an import ban on the provision of *remote* gambling, as opposed to gambling that requires the physical presence of the gambler in a regulated, domestic setting, and that with respect to remote gambling, the United States laws did not discriminate between foreign and domestic providers of gambling services.[6] According to the United States, its total ban on the provision of remote gambling services applied equally to both foreign and domestic providers.[7] Of course, a ban on the provision of remote gambling services would likely affect foreign providers more severely than most domestic providers, but the United States claimed that this was justified by the special dangers of law enforcement, eligibility verification, and public health associated with remote gambling.[8] For example, the United States claimed that the risk of money laundering, fraud, compulsive gambling, and underage gambling were higher in remote gambling situations as compared to physical presence gambling in domestic locations.[9]

The Panel then considered whether the measures at issue were "necessary" to protect public morals.[10] According to the Appellate Body, assessment of whether a measure is

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[4] In the name of judicial economy, the Panel did not consider whether there was also a violation of the national treatment requirement of Article XVII. It therefore did not, at that stage of the litigation, consider whether physical presence gambling and remote gambling were "like" services. *Id*. at para. 6.426.
[5] *Id*. at para. 6.457.
[6] *Id*. at 6.479-6.493.
[7] *Id.*
[8] *Id.*
[9] *Id*.
[10] The Panel held, and the Appellate Body later affirmed, that the decisions pertaining to the law of justification under Article XX of the GATT were relevant to the law of justification under the GATS, and thus the Article XX GATT decisions of the Appellate Body would apply equally to *Gambling*. *See* Panel Report, *Gambling*, para. 6.448; Appellate Body Report, *Gambling*, at para. 291. Article XX provides, in pertinent part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life;

"necessary" in all cases requires a weighing and balancing of a number of factors.[11] First, the panel considers the vitality of the interests at stake by taking "into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect."[12] The more vital or important the interest, the easier it will be for the panel to characterize the measure as "necessary."[13] Second, the panel considers the effectiveness of the measure at issue. The more a measure contributes to the end pursued, the easier it will be to characterize the measure as "necessary."[14] Third, the panel considers the effect of the measure on trade. If a measure is highly trade restrictive, it will be less likely to qualify as "necessary," and vice-versa.[15] Fourth, and most importantly, the panel considers whether there are reasonably available, WTO-consistent alternative measures available to the respondent.[16] A measure is not reasonably available if it is "merely theoretical in nature."[17] Although the Appellate Body has not explicitly held that a proposed alternative measure is theoretical in nature, a panel may so find if the party is not capable of taking the alternative measure or it imposes undue

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> ….
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . .
> ….
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
> ….

The operative language of Article XIV of the GATS is in the most important respects identical to the Article XX of the GATT. The respective chapeaus are identical, and the relevant exceptions can also be found in Article XX. Article XIV of GATS provides, in pertinent part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary and 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 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 . . . .

[11] *See Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS 161/AB/R (2000) (Report of the Appellate Body) at paras. 161-65 (hereinafter "*Korea Beef*").
[12] *Korea Beef*, at para. 162.
[13] *Id*.
[14] *Korea Beef*, at para. 163.
[15] *Id*.
[16] This article uses the term "least restrictive measures analysis" to refer to this test.
[17] *See Korea Beef*, at para. 164.

administrative burdens and costs on the member.[18] A measure is also not "reasonably available" if it does not preserve for the respondent the ability to achieve its desired level of protection. A paradigm example of this is *EC-Asbestos*, in which the Appellate Body upheld the European Communities' absolute ban on asbestos-containing products, despite an alternative proposal by Canada for a controlled-use asbestos regime.[19]

As is the case with any weighing and balancing test, the four factors do not operate independently of one another; a strong showing under one factor can make up for a deficiency under another factor. Again, the *Asbestos* ruling provides an instructive example. The measure in that case completely restricted trade, yet in the Appellate Body's view, the purpose of the absolute ban – the protection of human life from the carcinogenic effect of asbestos – overwhelmed the other factors. It should also be noted that the first three factors ultimately serve the fourth factor, i.e., whether a reasonably available alternative measure is available to the responding party. As the Appellate Body noted in *Dominican Republic—Cigarettes*, the first three factors bear upon whether a measure is "reasonably available."[20] Indeed, GATT jurisprudence has embedded this "least restrictive measure" or "reasonably alternative measure" inquiry into the "necessary" test. Thus, a finding that a measure is too trade restrictive or is ineffective at meeting its purported goals is not in itself enough to discharge a panel's responsibility under Article XX GATT; these determinations must ultimately be supplemented by an example of an alternative measure that "fits" or corresponds with the purposes of the challenged measure. Taken together, the four-factor test to determine whether a measure is "necessary" is quite rigorous and imposes a substantial burden on responding parties. Indeed, prior to the *Gambling* decision, only *Asbestos* upheld a defense under the "necessary" test of Article XX GATT.

The Panel in *Gambling* framed its inquiry by focusing upon the remote supply of gambling.[21] According to the Panel, the remote supply of gambling presented risks that justified

[18] It is arguable whether this was the case in *Gambling*. *See infra*, Parts III.B, IV.A. In at least two cases, it seemed like there was a compelling case for substantial administrative difficulty, especially because it appeared that the respondents would not be able to achieve the desired level of protection in the absence of such protective measures. *See generally Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R (2005) (hereinafter "*Dominican Cigarettes*"); *Korea Beef*.

[19] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS 135/AB/R (2001) (hereinafter "*Asbestos*").

[20] *See Dominican Cigarettes*, at para. 70.

[21] Panel Report, *Gambling*, at para. 6.493.

different treatment of remote and physical presence gambling.[22] With respect to the vitality of the interests at stake, the Panel largely agreed with the United States' views as to dangers associated with remote gambling, finding that those interests were "vital and important in the highest degree."[23] The challenged federal measures also contributed, "at least to some extent," to the end of prohibiting the remote supply of gambling.[24] Although the trade impact of the measures had the potential effect of prohibiting the foreign provision of gambling services, the Panel noted that reasonably available alternative measures in existence at the time of the dispute (for example, credit card gateways to verify whether a gambler is of an appropriate age) were inadequate to address the United States' concerns regarding remote gambling.[25] Despite the fact that it found that there were not reasonably available alternative measures in existence at the time, the Panel cited *Turtle-Shrimp* and *Tuna-Dolphin II* for the proposition that the member states should pursue multilateral solutions to multilateral problems.[26] The Panel found that the United States had an obligation to explore and exhaust reasonable alternative measures through consultations and negotiations with Antigua that would insure the level of protection the United States desired.[27] This was especially the case because the Panel viewed this as a realistic option – Antigua had offered on more than one occasion to engage in bilateral or multilateral negotiations to consider whether the United States' concerns could be addressed in a WTO-consistent manner, which the United States repeatedly declined.[28] Accordingly, although it acknowledged that the measures were designed to protect the public morals, the Panel found that the measures could not be found "necessary" to protect public morals unless the United States explored and exhausted reasonably available options via consultations with Antigua.

Although it found that the requirements of the "necessary" clause were not met, the Panel nevertheless moved to the chapeau of Article XIV. The chapeau is often called the "exception to the exception" because once the respondent's measures are provisionally justified under either the "necessary" or "relating to" clause, the respondent must show that the measure "is not applied in a manner" that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," or is a "disguised restriction" on trade. According to the

[22] Panel Report, *Gambling*, at para. 6.493.
[23] Panel Report, *Gambling*, at para. 6.492.
[24] *Id*.
[25] *Id*. at para. 6.518.
[26] *Id*. at para. 6.526.
[27] *Id.*
[28] *Id*. at para. 6.529.

Appellate Body and the negotiating history of GATT 1947, the chapeau analysis prevents member states from abusing or misusing the exceptions of Article XX GATT or Article XIV GATS.[29] The Appellate Body has strongly emphasized two things about the chapeau. First, because the measure has usually gained provisional justification prior to reaching the chapeau, the emphasis in the chapeau analysis is not upon the specific content of the measure, but rather upon the manner of its application.[30] Second, the chapeau analysis is different in kind from the initial inquiry of whether the respondent has violated a material obligation, for example, under Article I GATT, III GATT, or XI GATT, and is also different in kind from the inquiry under the specific clauses of Article XX GATT.[31] In other words, the chapeau is not meant to be redundant of prior inquiries under Article XX GATT or XIV GATS.

The Panel in *Gambling* proceeded to the chapeau not out of necessity, but because it believed that reaching the chapeau would help the parties to fully resolve their dispute.[32] Under the chapeau, Antigua argued that the United States' measures were arbitrary or unjustifiable because the challenged measures did not apply equally to domestic and foreign providers. Antigua's two main arguments were that (1) the United States did not take enforcement operations against large-scale internet gambling operators in the United States, but did take such action against foreign operators; and (2) the Interstate Horseracing Act (IHA), a federal civil statute, on its face exempted pari-mutuel wagering on horse races by remote means from the challenged measures, so long as the activity is legal in the state of the user and the supplier, yet the IHA did not exempt foreign providers from the measures at issue.[33] The Panel found that with respect to both allegations, the United States did not present enough evidence to demonstrate that the IHA and its enforcement patterns regarding the challenged measures did not violate the chapeau.[34] Thus, the Panel only signaled that the United States did not carry its burden to demonstrate consistency with the chapeau, although it did not specifically find discrimination in application of the measures under the chapeau.

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[29] Appellate Body Report*, Gasoline*, at 22.
[30] *Id*.
[31] *See id.*, at 23 ("The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.")
[32] Panel Report, *Gambling*, at para. 6.566.
[33] *Id*. at para. 6.586-6.606. Antigua also argued that the legal use of video lottery terminals in some states constituted "remote" gambling, and that the intra-state provision of remote gambling services may violate the GATS. *Id*.
[34] *Id*. at paras. 6.589, 6.600.

In its appeal to the Appellate Body, the United States challenged the Panel's ruling that it was required to explore and exhaust reasonably available WTO-consistent alternatives before adopting the challenged measures. The Appellate Body reversed the Panel's holding on the duty to negotiate, finding that the U.S. had no such duty in this case:

> In our view, the Panel's "necessity" analysis was flawed *because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives* regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, *with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures*, was not an appropriate alternative for the Panel to consider because *consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue*.[35]

Because the Appellate Body overruled the Panel's finding of a duty to negotiate under the "necessary" test, it found that the challenged measures were in fact the least restrictive measures available to the United States under the "necessary" test.[36] As the Appellate Body noted, the Panel found that the interests of the United States were vital and important, that the measures contributed to the end of prohibiting remote gambling, and that there were no other less trade restrictive alternatives in existence that would secure the level of protection the United States desired.[37] Without the duty to negotiate, then, the Panel opinion itself would have recognized that the United States' measures were necessary.[38] Moving to the chapeau, the Appellate Body acknowledged, as the Panel did, that it was faced with a lack of evidence as to the inconsistent enforcement of the challenged measures with respect to foreign providers when compared with domestic providers, as well as the effect of the IHA on the challenged measures.[39] Because of this lack of evidence, the Appellate Body held that the Panel should have focused only on the wording of the measures at issue to determine whether there was arbitrary or unjustifiable discrimination under the chapeau.[40] According to the Appellate Body, because the challenged federal statutes did not facially discriminate between domestic and foreign providers of remote gambling services, the wording of those measures did not violate the chapeau.[41] However,

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[35] Appellate Body Report, *Gambling*, at para. 317 (emphasis added).
[36] *Id*. at para. 326.
[37] *Id*. at paras. 323-26.
[38] *Id*.
[39] *Id.* at para. 357.
[40] *Id*.
[41] *Id*.

because the wording of the IHA seemed to allow an exception to domestic service providers with respect to pari-mutuel wagering on horseracing, the IHA discriminated between domestic and foreign providers on its face, and thus failed to carry its burden under the chapeau.[42] The Appellate Body stopped short, however, of saying that the United States' violated the chapeau. The Appellate Body thus overruled the Panel's finding with respect to inconsistent enforcement of the measures, and upheld the Panel's finding with respect to the IHA.

III. Two Interpretations of *Gambling*: The Duty to Negotiate, Discrimination, and Least Restrictive Measures Analysis

The *Gambling* opinion sits alongside the *Gasoline* and *Turtle-Shrimp* rulings as the only Appellate Body opinions that address the scope of the duty to negotiate. Unfortunately, however, the *Gambling* opinion does little to clarify when the duty to negotiate will be imposed upon a member state. Indeed, based simply on the language of *Gambling*, it is difficult to discern exactly what the Appellate Body held. In Recital 317, the Appellate Body states that the Panel's "analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States . . . because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case."[43] This declaration can potentially mean two things. First, it could mean that negotiations are simply never a reasonably alternative measure that can be considered by a panel under the "necessary" test. If there is a duty to negotiate, it can only arise, as it did in *Turtle-Shrimp* and *Gasoline*, under the chapeau.[44] Under this interpretation, the *Gambling* opinion limits itself to the question of whether the duty to negotiate can be contemplated under the "necessary" test of Article XX GATT and Article XIV GATS, and does not technically address the scope of the duty to negotiate under the chapeau. Second, it could be that the Appellate Body was rebuking the panel's notion that there is a stand-alone, procedural duty to negotiate under the "necessary" test. Under this interpretation, the duty to negotiate can only arise under the "necessary" test if the panel can point to a reasonably available alternative measure that was the result of cooperation and negotiations. Where, as in *Gambling*, there was no example of bilateral

[42] *Id*.
[43] *Id*. at para. 317.
[44] *See* Bradly Condon, Environmental Sovereignty and the WTO: Trade Sanctions and International Law 123 (2005) (arguing that after *Gambling*, "if there is a duty to negotiate, the obligation will arise in the context of the chapeaux").

or multilateral solutions to the remote gambling problem or multilateral or bilateral solutions to a similar problem, the panel could not impose a duty to negotiate.

The following sections of this paper will consider these two plausible interpretations of the *Gambling* opinion. In doing so, however, it will also address problematic issues relating to Article XX GATT and Article XIV GATS that do not directly bear on the duty to negotiate, but nevertheless come to light in considering the duty to negotiate after *Gambling*. Indeed, the *Gambling* decision's treatment of the duty to negotiate leads to a deeper, more systemic critique of the operation of Article XX GATT and Article XIV GATS.

A. Interpretation 1 of *Gambling* – The Duty to Negotiate Will not Arise Under the "Necessary" Clause

Interpretation 1 of *Gambling* states that panels should only consider the duty to negotiate in the context of the chapeau, as was the case in *Turtle-Shrimp* and *Gasoline*, because consultations are merely a process with uncertain results, making it inappropriate to require consultations as a "measure" under the "necessary" test. Accordingly, the duty to negotiate can only arise under the chapeau, i.e., upon a finding of arbitrary or unjustifiable discrimination. The problem with this interpretation is that it fails to appreciate the deep connection between least restrictive measures analysis, a finding of discrimination, and the duty to negotiate. In fact, a review of *Turtle-Shrimp*, *Gasoline*, and *Gambling* demonstrates that the existence of a duty to negotiate depends upon a dual finding of discrimination *and* a less restrictive measure, and that to analytically separate the question of whether there is a duty to negotiate from the least restrictive measures inquiry under the "necessary" clause leads to the conclusion that the duty to negotiate will not be imposed in "necessary" cases.

A fundamental difference between *Turtle-Shrimp* and *Gasoline* on the one hand, and *Gambling* on the other, is that *Turtle-Shrimp* and *Gasoline* were both decided under the "relating to" clause of Article XX GATT, whereas *Gambling* was decided under a "necessary" clause. This difference is significant because the "relating to" test of Article XX(g) GATT is not nearly as rigorous as the "necessary" test. Article XX(g) GATT requires that a measure is "relating to" the protection of an exhaustible natural resource and that the measure is "made effective in conjunction" with restrictions on domestic production. In *Gasoline*, the Appellate Body found that because Article XX(g) GATT uses the word "relating to" instead of "necessary," it would be

unreasonable to assume that the drafters of the GATT intended the same type of connection in each exception between the measure under appraisal and the interests of the respondent.[45] According to the Appellate Body, a measure is "relating to" the goal of conservation if it is "primarily aimed at" conservation goals.[46] In order to determine whether a measure is "primarily aimed at" conservation goals, the panel must focus upon the "general design and structure" of the measure at stake and determine whether the means adopted by the measure are reasonably related to its ends, or in other words, there is a "substantial" connection between the measure and its purposes.[47] Unlike the "necessary" test, the "relating to" test is limited to facial consideration of both the measure and its purposes: if a measure is primarily aimed at conservation, there is no evaluation of the vitality or importance of the respondent's measures (vitality and importance are assumed in a finding that the measure is "relating to" conservation) and the panel does not consider whether the measure is effective at meeting its goals or whether there are less trade restrictive alternatives (there is no balancing of interests under Article XX(g) GATT).[48] The only questions are "whether all the trade restricting features of the scheme have some reasonable connection to . . . conservation,"[49] and whether the measure is made effective in conjunction with domestic restrictions on production and consumption. The Appellate Body has held that "in conjunction with domestic restrictions" amounts to a requirement of "even-handedness in the imposition of restrictions" on imported products and domestic products.[50] This requirement, however, also does not consider the effect of the measure on domestic and imported products.[51] Under Article XX(g) GATT, there is simply no empirical inquiry into the effect of the measure on imported products.

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[45] Appellate Body Report, *Gasoline*, at 16.

[46] *See* Appellate Body Report, *Gasoline*, at 14 (modifying the "primarily aimed at" test adopted in *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98, para. 4.6 (adopted on 22 March 1988)).

[47] *Turtle-Shrimp*, at para. 141.

[48] *See* Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 Colum. J. Envt'l L. 491, 503 (2002) (hereinafter "*Howse*") ("It does not appear to be balancing in any way the environmental benefits against the costs to trade . . . .[T]he AB does not engage in a comparative analysis [under Article XX(g)] of the environmental benefit of the measure versus its trade-restrictive effects.").

[49] *Id*. at 503.

[50] Appellate Body Report, *Gasoline*, at 18.

[51] *See* Appellate Body Report, *Gasoline*, at 19 ("We do not believe . . . that the clause "if made effective with restrictions on domestic production or consumption" was intended to establish an empirical 'effects test' for the availability of the Article XX(g) exception.").

There is, of course, nothing wrong in principle with the "necessary" test being more rigorous than the "relating to" test. Based upon a plain meaning interpretation of the language used, one can see how the word "necessary" could entail a more searching inquiry like a least restrictive measures analysis, while the words "relating to" could connote a looser connection between the measure and its objectives. However, if provisional justification is easier to achieve under the "relating to" test than the "necessary" test, one would also think that the respondent's overall burden of justification is less in "relating to" cases because the chapeau will apply with equal force to both the "relating to" exception and the "necessary" exception. Thus, Interpretation 1 of *Gambling* (which states that the duty to negotiate only arises under the chapeau) would presumably be unaffected by whether a measure is provisionally justified under the "necessary" or "relating to" clause, and thus the duty to negotiate would have an equal chance of application in either case. The problem is that, if the *Turtle-Shrimp*, *Gasoline*, and *Gambling* rulings are examined closely, it does not appear that the Appellate Body is imposing the same chapeau test in "necessary" and "relating to" cases. Indeed, in "relating to" cases such as *Turtle-Shrimp* and *Gasoline*, the Appellate Body employs what is in effect a least restrictive measures analysis to the challenged measures under the chapeau, while in a "necessary" cases like *Gambling*, the least restrictive measures analysis has already been completed and settled by the time the Appellate Body reaches the chapeau. This observation has serious consequences for the duty to negotiate because in the *Gasoline* and *Turtle-Shrimp* ruling, the duty to negotiate only arose in the context of a *de facto* least restrictive measures analysis under the chapeau. Indeed, the Appellate Body's imposition of a duty to negotiate in those cases depended upon a finding that the measure resulted in discrimination *and* that a less restrictive measure was reasonably available. For example, in *Gasoline*, the United States Congress established a program under the Clean Air Act requiring the Environmental Protection Agency to promulgate regulations to reduce pollution from gasoline combustion.[52] Venezuela and Brazil challenged the United States' "Gasoline Rule," alleging that it set different standards for foreign and domestic refiners, and that the difference in treatment violated Article III.4 GATT. The Panel found that the Gasoline Rule violated Article III.4 GATT by allowing domestic refiners to establish individual baselines while requiring foreign refiners to meet a pre-set, and likely more onerous, statutorily

[52] Appellate Body Report, *Gasoline*, at 2.

established baseline.[53] The United States then sought to justify its regulations under Article XX(g) GATT, claiming that the rules were promulgated in order to meet a conservation objective. Under the less rigorous "relating to" test of Article XX(g) GATT, the Appellate Body found that the regulations were "primarily aimed at" the conservation of an exhaustible natural resource (clean air), and that because baseline standards were imposed on both foreign and domestic refiners, the Gasoline Rule was imposed "in conjunction with restrictions on domestic consumption."[54]

After having found that the rules were provisionally justified under Article XX(g) GATT, the Appellate Body moved to the chapeau. Under the chapeau, the United States claimed that the discrimination resulting from the Gasoline Rule was not arbitrary or unjustifiable because allowing foreign refiners to set individual baselines would impose significant administrative burdens upon the EPA.[55] Specifically, the United States claimed that because of jurisdictional problems, it would be more difficult to verify and enforce adherence to individual baselines in the case of foreign refiners as compared to domestic refiners.[56] The Appellate Body found that the Gasoline Rule was both arbitrary and unjustifiably discriminatory because "[t]here was more than one alternative course of action available to the United States in promulgating regulations implementing the [Clean Air Act]."[57] According to the Appellate Body, the United States failed to show that their administrative difficulties could not be mitigated by cooperation with the Venezuelan or Brazilian government because there were:

> established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade – trade between territorial sovereigns – to go on and grow. The United States *must have been aware* that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned *would have been necessary and appropriate*.[58]

Because there were "established techniques" for verification and enforcement available to the United States, the Appellate Body found that it discriminated against Venezuelan and Brazilian

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[53] Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (1996), para. 8.1 (hereinafter "Panel Report, *Gasoline*").
[54] Appellate Body Report, *Gasoline*, at 12-19.
[55] *Id.*
[56] *Id*. at 23.
[57] *Id*. at 22.
[58] *Id*. at 24 (emphasis added).

refiners by failing to pursue negotiated solutions to its administrative problems before it promulgated the Gasoline Rule.[59] This failure to pursue negotiated solutions when other less restrictive measures were available was also the backbone of the *Turtle-Shrimp* ruling. In that case, the United States banned imports on shrimp from several countries because the shrimp-fishing methods utilized did not adequately protect endangered sea turtles that are incidentally caught during the shrimp-fishing process. Malaysia, along with other member states, challenged the regulations under Article XI.1 GATT, arguing that the general import ban discriminated against foreign shrimp producers. As in *Gasoline*, the Appellate Body found that the United States' measures were provisionally justified under Article XX(g) GATT because the regulations were "primarily aimed at" sea turtle conservation, and the regulations were imposed in conjunction with restrictions on domestic production.[60] Under the chapeau, however, the Appellate Body found that the United States discriminated against foreign producers by (1) requiring similarly situated members to adopt "essentially the same policy" as the United States without considering whether the members' sea turtle protection policies were equivalent in effect to the United States' required policies; (2) failing to consider whether the United States' measures were appropriate to the conditions prevailing in other countries; (3) failing to engage in negotiations with similarly situated countries "*with the objective* of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles;"[61] and (4) favoring some countries more than others in its negotiation efforts.[62] Because the United States successfully negotiated the Inter-American Convention for the protection of sea turtles, the Appellate Body held that multilateral solutions were "available and feasible" to the United States for the protection of sea turtles.[63]

What is common to both *Turtle-Shrimp* and *Gasoline* is that the imposition of the duty to negotiate occurred within the context of a finding of discrimination under the chapeau.[64] For

[59] *Id*. at 26 (stating that the United States failed "to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners").
[60] *Turtle-Shrimp*, at paras. 125-145.
[61] *Id*. at para. 166 (emphasis added).
[62] *See generally id*., at paras. 163-66.
[63] *Id*. at para. 66.
[64] Indeed, it is well-recognized that the duty to negotiate was imposed in *Turtle-Shrimp* because of a finding of discrimination. *Turtle-Shrimp* is a source of controversy because its finding of discrimination was based upon a collection of factors, and it is unclear whether the absence of one or more of those factors would be sufficient to impose the duty to negotiate. *See Howse*, *supra* note 48, at 507-12 (arguing that the *Turtle-Shrimp* opinion imposes

example, in *Turtle-Shrimp*, the United States discriminated by failing to put forth equivalent negotiation efforts with similarly situated trading partners, and in *Gasoline*, the United States discriminated against foreign oil refiners by imposing more onerous baseline requirements upon them. However, to presume that the duty to negotiate can *only* be imposed based upon a finding of discrimination fails to appreciate the deep connection between the existence of discrimination, least restrictive measures analysis, and the duty to negotiate. The duty to negotiate is a remedial measure imposed to lessen the discriminatory effect of a violation, and least restrictive measures analysis is the jurisprudential tool by which the Appellate Body imposes remedies for GATT or GATS violations. Indeed, it is the fact that less restrictive measures are available that ultimately provides the justification for imposing of the duty to negotiate. As a remedy to a violation, the duty to negotiate can only be imposed *pursuant* to a less restrictive measure, and thus imposing the duty to negotiate requires a finding of both discrimination and a less restrictive measure. Indeed, what is the purpose of negotiating efforts with similarly situated trading partners if not to adopt a less restrictive trade measure? This contingent relationship between least restrictive measures analysis and the duty to negotiate does not only demonstrate that the Appellate Body imposes a least restrictive measures requirement in "relating to" cases through the back door of the chapeau. Indeed, this is practically what is happening, but the important point is that the Appellate Body has no choice in the matter. Once the Appellate Body moves beyond simply finding violations and takes on the task of proposing remedies under the chapeau, the concept of least restrictive measures is by necessity embedded in its analysis. In other words, by imposing the duty to negotiate, the Appellate Body is necessarily saying that the respondent should pursue a less restrictive trade measure.

Perhaps the best illustration of the necessary connection between discrimination, least restrictive measures, and the duty to negotiate is provided through the lens of the *Gambling* opinion, because that opinion demonstrates what would happen in "necessary" cases if Interpretation 1 is the correct interpretation of *Gambling*. Under Interpretation 1, the least restrictive measures analysis is analytically separated from the chapeau inquiry, i.e., the question of whether a less restrictive measure is available is analytically separated from the question of whether there is discrimination and a duty to negotiate. As *Gambling* demonstrates, the logical

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the duty to negotiate only insofar as it remedies discrimination in negotiations); *Condon, supra* note 44, at 115-19 (arguing that while the duty to negotiate must be linked to discrimination, the mere fact that a unilateral measure is imposed to regulate a transboundary environmental resource can constitute discrimination under *Turtle-Shrimp*).

conclusion of Interpretation 1 is that the duty to negotiate would likely never be imposed in "necessary" cases because by the time the Appellate Body has reached the question of the duty to negotiate under the chapeau, it has already decided under the "necessary" clause that less restrictive measures are not available to the respondent. In *Gambling*, the Appellate Body decided under Article XIV(a) GATS that the United States' zero-risk regime with respect to the provision of remote gambling services was GATS-consistent, and that there were no reasonably available alternative measures available to address the United States' chosen level of risk.[65] When the Appellate Body moved to the analysis under the chapeau, Antigua raised two major claims: first, that the United States discriminated in its enforcement of the challenged measures, and second, that the IHA granted an exclusive exception to domestic providers from the challenged measures, while failing to give a similar exception to foreign providers.[66] The Appellate Body found for Antigua on the latter claim, ruling that the United States discriminated against Antiguan service providers.[67] But what if in its chapeau analysis the Appellate Body wished to impose a duty to negotiate on the United States to remedy the IHA's discrimination, as it did in *Turtle-Shrimp* and *Gasoline*? It could not, because imposing such a duty would implicitly say that the challenged measures were not the least restrictive measures available to the United States – an inquiry that was already considered and concluded under the "necessary" clause. Because the Appellate Body in *Gambling* could not use least restrictive measures analysis as a jurisprudential tool under the chapeau, it was limited to a finding of discrimination, without more. Yet a finding of discrimination under the chapeau is not enough to support the imposition of the duty to negotiate, unless the Appellate Body is willing to revisit its least restrictive measures analysis under the "necessary" clause. This it is unlikely to do, however, because doing so would completely undermine its analysis under the "necessary" clause. Indeed, it would lead to a finding that the measures were in fact not "necessary" in the first instance.

On one level, it is easy to see why the Appellate Body conducts a least restrictive measures inquiry in "relating to" cases under the chapeau. "Necessary" and "relating to" may imply different levels of scrutiny, but it is difficult to believe that the drafters of the GATT, especially in 1947 before conservation efforts became front-and-center national policy, intended for the level of scrutiny under "necessary" and "relating to" cases to be so vastly different.

[65] Appellate Body Report, *Gambling*, at para. 326.
[66] *Id*. at paras. 352-357, 361-66.
[67] *Id*. at para. 366.

Doing a miniature least restrictive measures analysis under the chapeau can thus be seen as a way to equilibrate the levels of scrutiny in "necessary" and "relating to" cases. Similarly, Interpretation 1 of *Gambling* could also be an attempt at making "necessary" and "relating to" cases analytically consistent by locating the duty in the chapeau for both types of cases.[68] The problem is that Interpretation 1 of *Gambling* in fact widens the gulf between "necessary" and "relating to" cases. Without the jurisprudential tool of least restrictive measures, Interpretation 1 of *Gambling* essentially eliminates the possibility that the duty to negotiate will be imposed in "necessary" cases. Yet as the *Gasoline* opinion demonstrates, the duty to negotiate is not limited to transboundary cases like *Turtle-Shrimp*, but can arise wherever international cooperation reduces the discriminatory effects of a measure. Because the chapeau applies to all of Article XIV GATS and Article XX GATT, it should apply equally to both "necessary" and "relating to" cases. The arbitrary effect of Interpretation 1 is especially noticeable where, as the *Gasoline* and *Turtle-Shrimp* rulings demonstrate, the Appellate Body is in fact conducting a least restrictive measures analysis under the chapeau when it imposes a duty to negotiate in "relating to" cases, yet it is effectively prevented from doing so in "necessary" cases. Indeed, requiring that the duty to negotiate be analytically separated from the least restrictive measures analysis, as Interpretation 1 requires, calls into question the analytical approach utilized in *Turtle-Shrimp* and *Gasoline*.

B. Interpretation 2 -- No Duty to Negotiate Without a Reasonably Available Alternative Measure

Interpretation 2 of *Gambling* holds that the duty to negotiate can be imposed under the chapeau *or* the "necessary" clause, and that the Appellate Body was only rebuking the notion that there is a procedural duty to negotiate under the "necessary" test in the absence of a reasonably available alternative measure that is the result of negotiations. In other words, in order to impose a duty to negotiate, the panel must point to situations in which negotiations or international cooperation with respect to the subject matter of the measures (*Turtle-Shrimp*) or with respect to a related subject matter that presents similar issues (*Gasoline*) resulted in a less restrictive measure. Interpretation 2 thus eliminates the problems presented by Interpretation 1

[68] *See Condon, supra* note 44, at 116 (suggesting that for the duty to negotiate to be consistent in "necessary" and "relating to" cases, it should be considered under the chapeau).

in "necessary" cases, because it explicitly couches the duty to negotiate within a least restrictive measures analysis. Nevertheless, Interpretation 2 leads to unique problems as well. First, it raises a question as to whether the chapeau is not only inutile in "necessary" cases, but may in fact be harmful to complainants in "necessary" cases. Second, it weighs against a popular interpretation of *Turtle-Shrimp*, which holds that there is a stand-alone, procedural duty to negotiate implicit in the chapeau.

1. The Necessary Inutility of the Chapeau in "Necessary" Cases

The first problem with Interpretation 2 is that it renders the chapeau in "necessary" cases essentially inutile. This is a serious issue because, as the Appellate Body has emphatically stated, "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[69] An instructive example of the inutility of the chapeau in "necessary" cases can be seen by a comparison of the Panel and Appellate Body reports in *Gasoline*. Recall that in *Gasoline*, Venezuela and Brazil challenged a United States measure that imposed a more onerous statutory baseline on imported gasoline, while allowing domestic refiners to meet an individually tailored baseline. The Panel found that the regulation in effect amounted to discrimination against foreign refiners under Article III.4 GATT. At the Panel level, the United States defended its measures under both Article XX(b) GATT (a "necessary" clause) and Article XX(g) GATT (the "relating to" clause). The Panel first addressed Article XX(b) GATT, and found that the regulations were not "necessary" to the achievement of the United States' objectives because less trade restrictive alternatives existed for verification and enforcement of baselines.[70] What is interesting to note, however, is that when the Panel reached the Article XX(g) GATT question, it essentially relied upon the same analysis that it conducted under the "necessary" clauses, and found that the United States' measures were not "primarily aimed at" conservation goals.[71] On appeal, the United States did not challenge the Panel's "necessary" clause ruling under Article XX(b) GATT, but it did challenge the "relating to" clause ruling under Article XX(g) GATT. The Appellate Body sharply criticized the Panel for conducting what was in effect the same inquiry under the "relating to" clause as it

[69] Appellate Body Report, *Gasoline*, at 21.
[70] Panel Report, *Gasoline*, at paras. 6.20–6.29.
[71] *Id*. at paras. 6.38-6.41.

did under the "necessary" clause.[72] However, after correcting the Panel's mistake and adopting the more modest "relating to" inquiry under Article XX(g) GATT, the Appellate Body moved to the chapeau and decided against the United States based upon exactly the same conclusions and facts as the Panel.[73] Not only did it couch the duty to negotiate in a least restrictive measures analysis under the chapeau, but the Appellate Body cited the Panel's *entire* "necessary" clause analysis as the basis for its conclusions under the chapeau.[74] Perhaps more importantly, the Appellate Body did not put forth a measure or circumstance in the case that was unique to the chapeau, but merely took the Panel's least restrictive measure analysis under the "necessary" clause and incorporated it wholesale into its determinations under the chapeau.[75] What is the difference, then, between the Appellate Body's analysis of the "manner" in which a measure is applied under the chapeau and its necessity inquiry under the "necessary" clause? Are there any considerations unique to the chapeau? The answer in "necessary" cases is that there is no substantive difference between the chapeau and the "necessary" clause. Indeed, before the *Gambling* opinion, once a panel approved of the level of risk adopted by the respondent and found that the measures adopted were the only reasonably available alternative measures, the inquiry was over (and the chapeau analysis useless) because in doing the least restrictive measures analysis, the panel already considered the design, content, and application of the measure.[76] The distinction between the "application" of a measure and its "design and content" thus appears to be an artificial one, and it is difficult to see what purpose the chapeau serves in "necessary" cases.

What is interesting about *Gambling* is that it is the only case in WTO jurisprudence that has arisen under the "necessary" clause in which *any* measures were addressed under the chapeau. While this may lead some to believe that the chapeau is in fact not inutile in "necessary" cases, a closer examination of *Gambling* leads to the contrary conclusion: not only is the chapeau inutile in "necessary" cases, but it *should* be inutile in "necessary" cases. Indeed, the practical effect of considering the consistency of measures with the chapeau after the panel

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[72] *See* Appellate Body Report, *Gasoline*, at 15 ("Furthermore, the Panel appears to have utilized a conclusion it had reached earlier in holding that the baseline establishment rules were not "necessary" for the protection of human, animal, or plant life . . . . In other words, the Panel Report appears to have applied the "necessary" test not only to examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g).").
[73] *See* Appellate Body Report, *Gasoline*, at 23-24 (citing paragraphs 6.26 and 6.28 of the Panel Report).
[74] *See id*., at 24 (stating that the Appellate Body "agrees with the findings above made in the Panel Report").
[75] *Id*.
[76] *See generally Asbestos* (including no analysis of whether France nevertheless violated the chapeau of Article XX).

has already completed the least restrictive measures inquiry is to take potential remedies away from the complainants, as well as to call the panel's entire least restrictive measures inquiry into question. In this sense, the *Gambling* opinion itself commits the mistake highlighted by the preceding analysis of Interpretation 1; it analytically separates the least restrictive measures analysis from a finding of discrimination under the chapeau. To illustrate this point, consider again the Appellate Body's analysis of the chapeau in *Gambling*. Antigua alleged that the United States discriminatorily enforced the measures against foreign providers, and that the IHA exempted only domestic providers from the reach of the challenged measure (the Wire Act) in violation of the chapeau. Like the predicament that arose under Interpretation 1, the Appellate Body was put in a position where it could not impose the duty to negotiate on the United States unless it revisited its least restrictive measures analysis under the "necessary" clause, which it would be unlikely to do. However, for the purpose of this section, the larger question is why the IHA and inconsistent enforcement measures were being considered under the chapeau in the first place. What is it about these measures that qualify them for treatment under the chapeau but not under the "necessary" clause?[77] If the United States claims under the "necessary" test that that the challenged measures in *Gambling* were the least restrictive measures available to address its chosen level of risk, doesn't the existence of the IHA demonstrate, especially because the Appellate Body found that the IHA discriminates against foreign service providers, that the challenged measures were in fact *not* the least restrictive measures available to the United States? If *Gambling* was a "relating to" case, the fact of contradictory enforcement schemes or contradictory statutes would have been part and parcel of the discrimination/least restrictive measure analysis under the chapeau, whereas in *Gambling*, measures inconsistent with the challenged measures were shielded from least restrictive measures scrutiny. Thus, while Interpretation 2 demonstrates the inutility of the chapeau in "necessary" cases, the Appellate Body's Report in *Gambling* demonstrates that if a panel wishes to do the least restrictive

[77] The conclusion in *Gambling* is especially confusing because of the Appellate Body's finding that the Panel should have considered the "wording of the measures at issue" to determine whether the chapeau was violated. *See* Appellate Body Report, *Gambling*, para. 357. In the case of discriminatory enforcement of the challenged measures, the wording of the measure, and whether by design the measure was discriminatory, is precisely what should considered under the "necessary" or "relating to" clause. With respect to the IHA, it is simply unclear why the IHA can be categorized as the "application" of the challenged measures because it is a federal, civil statute that stands alongside the challenged measures as part and parcel of the United States' legal regime with respect to remote gambling. Thus, the question of whether the IHA discriminated against foreign providers on its face should have been considered under the "necessary" clause.

measures analysis correctly, the chapeau *should be* inutile in "necessary" cases. Otherwise, the complainant's case is harmed (there is no remedy available to the complainant despite the demonstration of discrimination under the chapeau), the chapeau is applied inconsistently (there *would be* a remedy available, such as the duty to negotiate, if it were a "relating to" case) and the least restrictive measures analysis under the necessary clause is left incomplete (information relevant to the least restrictive measures inquiry was not considered under the "necessary" clause).

Indeed, a review of the compliance panel's Article 21.5 GATT ruling in *Gambling* ("*Gambling 21.5*") demonstrates the prejudice that Antigua suffered by the Appellate Body's failure to integrate the least restrictive measures analysis with its analysis of discrimination under the chapeau.[78] In *Gambling 21.5*, Antigua requested a compliance panel pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU), arguing that the United States had failed to bring the IHA in compliance with the Appellate Body's ruling. During the course of the proceedings, a significant amount of evidence regarding the IHA – evidence that was not put before the original Panel – was before the compliance panel.[79] For example, Antigua cited the laws of eighteen states specifically citing the IHA that expressly authorized "account wagering," and pointed to the Unlawful Internet Gambling Enforcement Act (UIGEA), enacted after the Appellate Body ruling, which specifically stated that the "term 'unlawful Internet gambling' shall not include any activity that is allowed under the Interstate Horseracing Act of 1978.'"[80] In the compliance panel's own words, the cumulative evidence put forth demonstrated "the existence of a flourishing remote account wagering industry on horse racing in the United States operating in ostensible legality."[81] For various reasons, the compliance panel eventually ruled that this collective evidence did not squarely resolve the issue of whether the IHA constituted an exception to the Wire Act. With respect to the evidence regarding state laws, the Panel held that it was not established that suppliers actually transmit bets and wagers in interstate or foreign commerce in violation of the Wire Act, because it was also possible for those activities to fall

[78] Compliance Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Recourse to Article 21.5 of the DSU by Antigua and Barbuda, WT/DS285/RW (2007) (hereinafter "Compliance Panel Report, *Gambling*").
[79] *Id*. at 6.111-6.115.
[80] *Id*. at para. 6.115.
[81] *Id*. at para. 6.116.

within the Wire Act's safe harbor provisions.[82] Similarly, the compliance panel held that the UIGEA definition of "unlawful Internet gambling" applied only to the UIGEA, and the Act did not apply to the relationship between the IHA and the Wire Act.[83] According to the compliance panel, the evidence produced did not settle the specific question remaining from the Appellate Body's prior ruling, i.e., whether the IHA amounts to an exemption from the reach of the Wire Act, and whether activities under the IHA in fact contradict the Wire Act. The compliance panel thus held that the relationship between the IHA and the Wire Act remained ambiguous, and that the Appellate Body's ruling with respect to the IHA was unaffected by the evidence presented.

While it may be true that Antigua did not establish a contradiction of the Wire Act, it cannot be doubted that this evidence tends to demonstrate that the United States' challenged measures were not "necessary;" the evidence would have called into question both the United States chosen level of risk, whether the measures adopted were the least restrictive, and whether the Appellate Body correctly assessed these issues.[84] The problem for Antigua was precisely that the Appellate Body's ruling in *Gambling* tried to utilize the chapeau in a "necessary" case. The compliance panel's ruling was thus conducted in the shadow of the Appellate Body's least restrictive measures decision under the "necessary" clause, which foreclosed any consideration of less restrictive measures under the chapeau and restricted the compliance panel's ability to impose remedies in favor of Antigua. For example, if Antigua's challenge was whether the United States failed to adopt a less restrictive measure (as it would be if the challenge arose directly under the "necessary" clause or the chapeau in a "relating to" case), the question before the compliance panel would have been fairly straightforward: in order to comply, the United States would have had to eliminate the discriminatory effects of the challenged measure and adopt a less trade restrictive measure.[85] Although there may be a dispute as to whether the measures taken by the United States were sufficient for compliance, there is usually not a dispute as to whether any compliance measures must be taken by the United States at all. Yet in this

[82] *Id*.
[83] *Id*. at para. 6.134.
[84] Indeed, Antigua did in fact make an argument that the new evidence demonstrated that the United States absolute prohibition on remote gambling was not "necessary." The compliance panel did not address that question. *Id*. at para. 5.33.
[85] This question of compliance was decidedly not straightforward in *Turtle-Shrimp* as well. However, in that case, the reason it was not straightforward was because the scope of the duty to negotiate was unclear, which is a different point than the one made in this section. For a discussion on the meaning of the duty to negotiate in *Turtle-Shrimp*, *see infra* Part III.B.2.

case, that is precisely what happened. The United States argued that because the challenged measures were justified under Article XVI(a) GATS as the least restrictive measures available, it was not required to adopt a less restrictive measure, but only needed to prove that the IHA was consistent with the challenged measures.[86] Although the compliance panel eventually ruled that the United States failed to eliminate the ambiguity in the relationship between the Wire Act and the IHA, the Appellate Body's prior finding that the challenged measures were the least restrictive measures available required the compliance panel to stop short of deciding what the United States must do in order to maintain GATS compliance, instead leaving the choice to the United States. Even a finding that the IHA was in fact an exemption from the Wire Act would not have required the United States to extend any protections to Antiguan providers – it would only require the United States to eliminate the inconsistency in treatment. Simply put, even if there was a finding of inconsistency, the United States would have the *choice* whether to amend the IHA so as to maintain consistency with the Wire Act, or extend the IHA to Antiguan providers. If the IHA issue was considered under the "necessary" clause or the chapeau in a "relating to" case, however, the United States would have no such choice. It would have to extend the protection to Antiguan providers or be in default of its GATS obligations. Thus, the Appellate Body and original Panel decision to make a finding of discrimination under the chapeau after completing the least restrictive measures inquiry not only called into question whether the challenged measures were the least restrictive; it prejudiced Antigua's case.

2. No Procedural Duty to Negotiate in "Necessary" Cases

The second problem with respect to Interpretation 2 is that it weighs against the argument that there is a stand-alone, procedural duty to negotiate with respect to transboundary environmental issues under the chapeau. Although much has been written about the *Turtle-Shrimp* rulings by the original Panel, the Appellate Body, and the compliance rulings,[87] much of this writing often clouds the fact that the Appellate Body's finding of unjustifiable or arbitrary discrimination was based on only three grounds: (1) *Discrimination in Negotiations* – the United

[86] *Id.*

[87] Compliance Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 by Malaysia,* WTO Doc. WT/DS58/RW (2001), para. 5.67 (hereinafter "Compliance Panel Report, *Turtle-Shrimp*"); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (2001), para. 122, 123 (hereinafter "21.5 Appellate Body Report, *Turtle-Shrimp*").

States failed to treat similarly situated trading partners equally by putting more effort toward a multilateral agreement with its American trading partners than its Asian trading partners; (2) *Equivalence* – The Appellate Body took an expansive view of "unjustifiable discrimination" under the chapeau by linking it to the doctrine of equivalence. According to the Appellate Body, "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in exporting countries."[88] Thus, a challenged measure must also demonstrate that it took into account turtle-protection methods that were functionally different but equivalent in effect to the United States' measures, as well as whether the proposed measure is appropriate to the level of risk faced by exporting countries;[89] (3) *Circumstantial Anti-Unilateralism* – the Appellate Body found that the nature of the resource sought to be regulated, combined with evidence from the WTO itself and other multilateral agreements, demonstrated a strong preference toward multilateral and cooperative action for the regulation of migratory sea turtles.[90] Moreover, the fact that the United States had concluded the Inter-American Convention demonstrated that multilateral solutions were possible through serious, good-faith negotiation efforts.[91] These combined factors demonstrated that the Appellate Body should strongly discourage unilateralism under the circumstances. What is most interesting about the compliance ruling by the panel and the Appellate Body, however, is that it expressly found that the United States was no longer in violation of its holding with respect to discrimination in negotiations and with respect to equivalence because the United States put forth serious, good faith efforts to negotiate and inserted sufficient flexibility into the challenged measure. Nevertheless, the compliance panel held, and the Appellate Body agreed, that:

> In a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the United States in this case may only be accepted under Article XX if they were allowed under an international agreement, or if they were taken further to the completion of serious good faith negotiation efforts to reach a multilateral agreement, the possibility to impose a unilateral measure to protect sea turtles under Section 609 is more to be seen, for the purposes of Article XX, as the possibility to adopt *provisional* measures allowed for emergency reasons than as a definite "right" to take a

[88] *Turtle-Shrimp*, at para. 165.
[89] 21.5 Appellate Body Report, *Turtle-Shrimp*, at para. 141.
[90] *Turtle-Shrimp*, at para. 168.
[91] *Id*. at 170.

> permanent measure. The extent to which serious good faith negotiation efforts continue may be reassessed at any time.[92]

In other words, elimination of discrimination in negotiations and the introduction of sufficient flexibility into the measure were not enough to discharge the duty to negotiate, although it was enough to provisionally justify the measure under Article XX GATT. Presumably, in order to discharge the duty to negotiate, the United States would have had to actually conclude a multilateral treaty with its Asian partners. Thus, the duty appears to be procedural and continual – it may never result in a less restrictive multilateral measure and need not result in a measure, but until it does, the United States has a continuing duty to negotiate.

It is this aspect of the *Turtle-Shrimp* ruling that is inconsistent with Interpretation 2 of *Gambling*. Under this narrower view, the duty to negotiate is tied to a finding of discrimination and a less restrictive measure, and the duty to negotiate is only discharged when discrimination is remedied by the adoption of a less restrictive measure. Accordingly, if a multilateral solution was required to remedy discrimination, as in *Gasoline*, the duty to negotiate would only be discharged when the less restrictive multilateral solution was adopted. This requirement that the duty to negotiate results in a measure is missing from *Turtle-Shrimp* for one simple reason: the Appellate Body imposed the duty to negotiate not only to cases where it found actual discrimination (for example, discrimination in negotiations and a lack of flexibility for equivalent measures), but continued to impose the duty to negotiate because of the *presumed* discrimination that results from unilateralism. The discrimination was presumed because although the compliance rulings found that United States could apply its measure "provisionally," neither ruling presented any evidence that the measure continued to have trade-restrictive effects that were unjustifiable, nor did the rulings find that a relevant multilateral agreement produced less trade restrictive effects.[93] In this sense, the compliance rulings were nothing more than the bare assertion that multilateral measures are presumably more effective as an environmental matter and less restrictive as a trade matter.[94] Yet whether a measure is the

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[92] Compliance Panel Report, *Turtle-Shrimp*, at para. 5.88.

[93] *See* Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. Pa. J. Int'l Econ. L. 739, 806 (2001) ("Even accepting the Appellate Body's assertion that the United States made no bona fide efforts to negotiate a treaty with the Asian complainants while it seriously pursued negotiations with western hemisphere countries, absolutely no discrimination in trade resulted from such differences in foreign policy. In the absence of discrimination, the Appellate Body cannot logically find 'unjustifiable" discrimination.').

[94] *See id*. at 805-12.

most effective way to address an environmental problem is not technically a concern of the Appellate Body unless it results in unjustifiable or arbitrary *trade* discrimination under the chapeau, as the very purpose of Article XX GATT and Article XIV GATS is to justify unilaterally applied, trade restrictive measures, so long as they are consistent with the chapeau. This suggests that if the Appellate Body believed the United States measures were actually trade restrictive, it would not have allowed the challenged measure to be "provisionally" applied. Under Interpretation 2's narrow view of the duty to negotiate, this "provisional" finding would have been a final one because the imposition of a least restrictive measure must be tied to an explicit finding of discrimination under the chapeau. Once the United States removed the aspects of the challenged measures which the Appellate Body found discriminatory, the duty to negotiate would be discharged because the United States concluded a less restrictive measure that remedied the discrimination under the chapeau.

IV. How to Reconcile the Unsatisfactory Conclusions from *Gambling*?

The preceding analysis reveals that Interpretation 1 and Interpretation 2, although plausible, are not entirely satisfying. Interpretation 1 severs the connection between the duty to negotiate, discrimination, and least restrictive measures analysis. Yet as was noted in Part III.A, cases like *Gasoline* and *Turtle-Shrimp* implicitly tie the duty to negotiate to a finding of discrimination and a less restrictive measure. While this connection exists in "relating to" cases like *Turtle-Shrimp* and *Gasoline*, it does not exist under Interpretation 1 in "necessary" cases like *Gambling*. Indeed, the fact that Interpretation 1 locates the duty to negotiate within the chapeau leads to the conclusion that, in practice, the duty to negotiate is unlikely to be available in "necessary" cases because the Appellate Body's opinion in *Gambling* fails to appreciate that a decision that no less restrictive measures are available under the "necessary" clause essentially forecloses the duty to negotiate under the chapeau. Interpretation 2, on the other hand, solves some of the problems with Interpretation 1 because on balance, it appears to be more accurate representation of what is actually happening in the duty to negotiate cases under the "relating to" clause. Under this view of *Gambling*, the duty to negotiate must be pursuant to a reasonably available, less restrictive measure. In other words, the duty to negotiate follows the least restrictive measures analysis – in "necessary" cases, the duty will arise under the "necessary" clause, while in "relating to" cases it will arise under the chapeau. The problem with

Interpretation 2, however, is that it not only makes the chapeau inutile in "necessary" cases, but as the analysis of Antigua's claims related to the IHA demonstrated, it leads to the conclusion that the chapeau should be inutile in "necessary" cases. If it is not, information that is relevant to the least restrictive measures analysis, such as the existence of the IHA and its implementation, is arbitrarily excluded from that analysis and analyzed under the chapeau, which potentially prejudices the complainant. Indeed, if the duty to negotiate is to be available as a remedy in both "necessary" and "relating to" cases, the inutility of the chapeau seems to be a necessary consequence of the connection between a finding of discrimination, least restrictive measures analysis, and the duty to negotiate. Yet it is highly unlikely that the Appellate Body will declare the chapeau inutile in "necessary" cases, especially because the chapeau was intended by the GATT drafters to be a check on the exercise of Article XX GATT or Article XIV GATS rights[95] and the fact that the Appellate Body has expressly stated that it will not interpret treaty language in a way that makes a part of the treaty inutile.[96] Interpretation 2 also raises a potential inconsistency in the application of the duty to negotiate because it requires an explicit finding of discrimination under the "necessary" clause; the panel must point to a reasonably available, alternative measure that would result from negotiations. There is thus no duty to negotiate in the absence of a defined, less restrictive measure, and the respondent has the burden of actually adopting a less restrictive measure as a remedy for its breach of GATT or GATS obligations. This interpretation, however, sits uncomfortably alongside the Appellate Body's chapeau ruling in *Turtle-Shrimp*, which imposes a procedural duty to negotiate on the United States even if no agreement is eventually concluded. It also raises the possibility that the duty to negotiate is somehow different under the chapeau as opposed to the "necessary" clause, that it can be merely procedural under the former but must result in a measure pursuant to the latter. The question, then, is how to reconcile the unsatisfactory conclusions reached from this analysis of *Gambling* opinion, and how to make the duty to negotiate more consistent in "necessary" and "relating to" cases.

[95] *See* General Agreement on Tariffs and Trade, Analytical Index—Guide to GATT Law and Practice 127 (1994) (stating that the chapeau was intended to prevent the abuse or misuse of the exception by "indirect protection"); *see also Turtle-Shrimp*, para. 157 ("Any measure, to qualify finally for an exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.").

[96] *See* Appellate Body Report, *Gasoline*, at 20-21.

A. Requiring the Duty to Negotiate to Result in a Measure

One solution requires a rethinking of the duty to negotiate in light of the *Gambling* opinion, particularly a rethinking of the relationship between least restrictive measures analysis and the duty to negotiate. Interpretation 2 of *Gambling* holds that the duty to negotiate is simply part and parcel of the least restrictive measures analysis. The duty to negotiate will only be imposed by panels where it is expected to lead to a less restrictive measure, and the duty is thus discharged after unjustifiable or arbitrary discrimination is eliminated. The more expansive view, embodied in the compliance rulings in *Turtle-Shrimp*, holds that the duty may also be imposed as a procedural matter; there is no requirement that a less restrictive measure result from the negotiations. As such, the Appellate Body's ruling in *Turtle-Shrimp* imposes the duty to negotiate as a check on unilateral action under Article XX GATT because in some sense, unilateralism alone constitutes a violation of the chapeau. The question, of course, is how can unilateralism alone be unjustifiable discrimination under the chapeau? Furthermore, why isn't the narrow view of the duty to negotiate enough to guarantee both the member states' rights to invoke the exceptions of Article XX GATT or Article XIV GATS and the corollary right that those exceptions will not be abused?

One defense of the inconsistent conclusions reached in *Turtle-Shrimp* and Interpretation 2 of *Gambling* could be that the procedural duty to negotiate in *Turtle-Shrimp* was imposed under special circumstances that were not present in *Gambling*, and as such *Turtle-Shrimp* should be viewed as a limited departure from Interpretation 2 of *Gambling*. The notion is that a procedural duty to negotiate is at least justified where the resource sought to be protected is a transboundary one, which is reinforced by the belief that the WTO Agreements should be interpreted in a manner that is consistent with customary and conventional international environmental law, and that the doctrine of necessity under international environmental law requires states to cooperate and consult with one another prior to enacting unilateral environmental measures.[97] Indeed, the *Turtle-Shrimp* opinion's imposition of an open-ended duty to negotiate has been viewed by some as a triumph for international environmental law and international law generally because of its emphasis on multilateral, environmental solutions to commons problems and its incorporation of

[97] *See Condon, supra note* 44, at 175-76 ("Authority to take actions in the international arena under international law is based on coordination, whereas national law is based on subordination . . . . While the existence of a positive duty to cooperate in general international law may remain open to question, unilateral trade measures in the GATT context must be preceded by negotiation efforts in order to be justifiable under the necessity doctrine of customary international law.").

international legal norms into Appellate Body jurisprudence. What is ironic about this is that precisely because it strays too far from a more narrow view of the duty to negotiate, the procedural duty to negotiate may in fact contravene the purpose of the duty to negotiate by impeding multilateralism. This is because a more rigorously applied duty to negotiate that is firmly grounded in a finding of actual discrimination under the chapeau and that requires the parties to actually conclude an agreement may induce the parties to negotiate in good faith, whereas a procedural duty to negotiate may induce the parties to negotiate in only a ministerial fashion, with no actual effort to conclude a measure.[98] Indeed, a review of GATT and WTO cases dealing with the duty to negotiate demonstrates that the parties' incentives to negotiate in good faith are strongest where the panel or the Appellate Body does not presume that unilateralism is ineffective, but only requires that the unilateral measure meets the chapeau's requirements and, if it finds that the unilateral measure violates the chapeau, imposes the duty to negotiate in order to remedy actual discrimination by requiring the adoption of a less restrictive trade measure. In short, the values which animated the *Turtle-Shrimp* ruling, including the principles of cooperation and multilateralism which underlie international environmental law, may be better served by a stricter trade jurisprudence which only imposes the duty to negotiate based upon explicit findings of *trade* discrimination.

From the Appellate Body's perspective, requiring that a less restrictive measure is adopted to remedy an explicit finding of discrimination creates powerful incentives for the parties to negotiate in good faith because the measure is subject to compliance panel review. The standards under which compliance review proceeds, moreover, will in large part determine how, and to what extent, the parties will negotiate.[99] For example, in *Tuna-Dolphin II*, the panel found that unilateral measures were simply unacceptable under Article XX GATT, and that a measure would have to be multilateral to be GATT compliant.[100] After the ruling, the United States may have wanted to negotiate (after all, it was the only way its measures could achieve GATT compliance), but the ruling provided no incentive for the complainants to negotiate in

[98] *See Gaines*, *supra* note 93, at 808 ("A closer examination of the Recourse Report reveals the extent of the interpretational hazards that stem from forging a link between multilateralism and trade discrimination that has no foundation in the Article XX text.").
[99] *See generally,* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) (noting that background legal rules will affect how parties negotiate); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979) (analyzing how different legal regimes for divorce affect pre-litigation settlements).
[100] *United States—Restrictions on Imports of Tuna*, GATT Doc. DS29/R (1994) (Report by Panel not adopted).

good faith. Because the panel's ruling foreclosed any unilateral measures, the complainants and the United States would both be keenly aware that anything short of a multilateral measure would fail to achieve GATT-compliance. This lowers the incentive of the United States to negotiate because the panel's decision essentially gave the complainants a veto power over any proposed multilateral measure, resulting in vastly unequal bargaining power.[101] Indeed, with the knowledge that only a multilateral solution is acceptable, the complainants could discontinue negotiations for any reason at all, or use their increased bargaining power to extract collateral concessions from the United States in exchange for a multilateral solution.[102] It is likely that no multilateral solution would be reached after *Tuna-Dolphin II*, unless the United States was willing to pay more for its environmental measure than it would in the absence of the panel's decision.[103] This ruling can be contrasted with the *Gasoline* ruling, in which the Appellate Body found that the United States had a duty to pursue cooperation in order to mitigate its administrative burdens. In that case, the United States had a strong incentive to negotiate because the WTO-consistency of its measure depended upon pursuing cooperative solutions, and failure to do so could lead to another finding by a compliance panel that its measures were not the required, less trade restrictive measures. Importantly, the complainants in *Gasoline* also had an incentive to negotiate in good faith, because if they wished to bring a case before the compliance panel, they would have to demonstrate that international cooperation through the "established techniques" suggested by the panel and Appellate Body would in fact be less trade restrictive and mitigate the United States' burdens. In other words, they had an incentive to be sure that they were not uncooperative because this could potentially justify a finding that despite the United States' efforts to negotiate, the "established techniques" for verification and enforcement were unavailable to the United States and its restrictions on trade were justified.

Gasoline also demonstrates the benefits derived when the parties are certain about what Appellate Body's ruling requires of them, as both parties had an interest in putting forward a good-faith effort to reach an agreement. The original *Turtle-Shrimp* ruling, on the other hand,

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[101] This scenario assumes that the United States and the respective complainants are negotiating on a relatively equal basis, which is not the case, but which the Appellate Body must assume at any rate.

[102] *See* Howse, *supra* note 48, at 492 ("It is possible that a rule that it is highly restrictive of unilateral trade measures to protect the environment will lead to strategic behavior, and exacerbate hold-out problems, thereby increasing transaction costs and reducing the likelihood of cooperative solutions to global environmental problems.").

[103] *See* Bruce L. Hay & Kathryn E. Spier, *Litigation and Settlement*, in New Palgrave Dictionary of Economics & Law (noting that "cases involving a strong claim will fail to settle" because it is in the complainant's interest to extract more through negotiations than it would otherwise be able to achieve at trial).

demonstrates how uncertainty as to the import of an Appellate Body ruling will hamper the parties' ability to negotiate a multilateral solution. After the *Turtle-Shrimp* ruling, the United States insisted that it was only required to negotiate in good faith and cure its challenged measure to the extent of the Appellate Body's explicit findings of trade discrimination under the chapeau. Malaysia, on the other hand, believed that the *Turtle-Shrimp* ruling was essentially the same as *Tuna-Dolphin II* in that it required a multilateral solution. This uncertainty as to the import of *Turtle-Shrimp*, as well as the fact that both parties believed their interpretation was correct, would make it difficult for the parties to negotiate until their converging interpretations of the *Turtle-Shrimp* opinion were settled.[104] In this sense, then, the original *Turtle-Shrimp* encouraged further litigation, not settlement and negotiation; the United States unilaterally adapted its measures to the *Turtle-Shrimp* ruling and made efforts to negotiate, while Malaysia essentially refused to negotiate and sought a clarification of the *Turtle-Shrimp* by asking for the establishment of a compliance panel.[105] While the compliance rulings may have clarified the original *Turtle-Shrimp* ruling, imposing a procedural duty to negotiate in the name of multilateralism did little to encourage multilateralism. Because the United States' measure was now "provisionally" justified, it had little incentive to negotiate toward a multilateral solution. The only way it would be required to actually change its measures was if it explicitly violated the chapeau, or in other words, if its Asian trading partners could challenge its revised measures before a compliance panel with a reasonable likelihood of a finding that the United States was engaging in trade discrimination. The only way such a finding would occur, however, is if one of the United States' Asian trading partners presented a measure that was equivalent in effectiveness to the United States measures *and* the United States rejected it. Thus, the United States' only negotiating incentive was to be open to multilateral solutions insofar as a measure proposed by its Asian trading partners was equivalent in effect to its environmental measures. Indeed, because the United States effectively gained approval of its measures from the

[104] *Id.* at 5 ("[D]ivergent party beliefs about the likely outcome of trial may prevent the parties from settling. In particular, if both parties are sufficiently optimistic about their prospects in court – roughly speaking, if each expects to prevail in litigation – then there may be no mutually acceptable settlement amount.").

[105] There are, of course, a limitless amount of other factors that may motivate parties to conclude a multilateral agreement. For example, as the Appellate Body noted in its 21.5 ruling, steps were being taken to establish a multilateral treaty with the United States' Asian trading partners. *See* 21.5 Appellate Body Report, *Turtle-Shrimp*, at n. 96. While it is entirely possible that the *Turtle-Shrimp* ruling was one factor that encouraged this, the focus here is how the Appellate Body can use its opinions most effectively if it wishes to encourage multilateralism . This article thus focuses more narrowly on the immediate effects of an Appellate Body or panel ruling.

compliance panel, the United States could impede a multilateral resolution by "fake negotiating" if it wished to maintain the status quo. Its Asian trading partners, moreover, while not having an incentive to impede a resolution, would have similarly low incentives to negotiate. After the compliance rulings, it was established that the trade-restrictive effects of the challenged measures were justified, so a further complaint would be only worthwhile if the complainants proposed a measure that was equivalent in effectiveness to the United States' measure, but was rejected by the United States. The fact that no multilateral treaty was established would be of no moment to a panel or the Appellate Body so long as "good faith" negotiating efforts continued, and even a reinforcement of its prior finding – that the United States must seek a multilateral solution through good-faith negotiations – would not yield any trade benefits to the complainants because such a ruling would not change the status quo. Indeed, even if the United States' Asian trading partners believed the United States was "fake negotiating," it is hard to see how a finding that the United States was no longer negotiating in good faith would affect the status quo after the compliance rulings because the United States measures were found to be technically consistent with the chapeau. Only an explicit finding of trade discrimination would make it worthwhile for the United States' trading partners to appeal to a compliance panel or a new panel. In this sense, the United States has little to lose from "fake negotiating" and the complaining party has nothing to gain from a finding that the United States failed as a procedural matter to negotiate in good faith, and thus the procedural duty to negotiate under *Turtle-Shrimp* is unlikely to encourage the parties to come to a multilateral agreement.

The *Turtle-Shrimp* ruling is ineffective and inefficient when compared to Interpretation 2 of *Gambling* precisely because it does not make the connection between multilateralism, a reasonably available alternative measure, and a finding of trade discrimination. Instead, it assumes that multilateralism is less restrictive and less discriminatory without anchoring its finding in the text of the chapeau, to the detriment of justifiable trade measures. The foregoing analysis suggests that the member states' negotiating incentives, as well as the influence of the WTO dispute settlement panels, is at its highest when the duty to negotiate is anchored in an explicit finding of trade discrimination. It also suggests that international environmental goals are best served if the Appellate Body maintains a more rigid, textual inquiry under the chapeau, limiting itself to an assessment of whether the measure, be it unilateral or multilateral, constitutes

an arbitrary or unjustifiable restriction on international trade.[106] Anchoring the duty to negotiate in an explicit finding that a measure is an arbitrary or unjustifiable restriction on trade insures that parties will consider multilateral cooperation, if not multilateral measures, before enacting environmental legislation or bringing a case before a WTO panel. For example, before adopting unilateral legislation, members will consider whether the measure is flexible enough to accept equivalent standards and takes account of disparate conditions in different countries. In order to insure WTO-consistency, members will likely seek information from trading partners to satisfy themselves that the legal standards of the chapeau are met. Under the *Turtle-Shrimp* standard, on the other hand, "no government can ever be sure that its initiatives toward a multilateral agreement, in advance of a unilateral trade measure, will be sufficient to satisfy the trade-dispute adjudicators."[107] Moreover, it is inefficient in that it imposes a duty to negotiate in situations where a multilateral solution might not be possible because certain trading partners may benefit from polluting the environment, while placing the burden of negotiation on the country seeking to protect the environment.[108] If the duty to negotiate is to serve the policy of multilateralism, the Appellate Body should adopt an approach consistent with Interpretation 2 of *Gambling*. The duty to negotiate should thus be strongly rooted in an explicit finding of trade discrimination, whether under the chapeau or the "necessary" clause, and panels should require that negotiations be fruitful and result in a less restrictive measure.

B. Moving the Least Restrictive Measures Analysis to the Chapeau in "Necessary" Cases

A second and more ambitious solution to the problems raised by *Gambling* is that the Appellate Body needs to clarify the analysis in "necessary" and "relating to" cases, or more specifically, the Appellate Body needs to justify the vast disparity in treatment of provisional justification under the "necessary" and "relating to" clauses. Before the establishment of the

[106] *See* Gaines, *supra* note 93, at 852 ("WTO determinations that environmental trade measures are abusive or discriminatory should not be lightly made. The complaining members should be required to put forward at least a prima facie case that each element of the chapeau conditions has been breached: there is trade discrimination; the relevant conditions in the nations are the same; and the discrimination cannot be justified or is arbitrary.").
[107] *Id*. at 811.
[108] *See* Howard Chang, *Carrots, Sticks, and International Externalities*, 17 Int'l Rev. L. & Econ. 309, 313 (1997) ("By moving the threat point in the bargaining game away from environmentally friendly countries toward those that harm the environment, we reduce still further incentives to exercise restraint in exploiting the global environment.").

WTO and the Appellate Body, GATT panels conducted the "necessary" and "relating to" test in the same way by effectively conducting a least restrictive measures test in determining whether a measure was "primarily aimed at" or "necessary."[109] As has been noted in this article, although the *Gasoline* ruling did away with the more rigorous, least restrictive measures-like inquiry under the "relating to" clause, it established and operationalized the chapeau as a jurisprudential tool in "relating to" cases. While this move softened the "relating to" analysis into the proportionality test that was seen in *Gasoline* and *Turtle-Shrimp*, it also led to another shift: the question of arbitrary or unjustifiable discrimination under the chapeau effectively morphed into the question of whether the respondent could implement its policy goals in a less restrictive manner. The problem with *Gasoline* is that the Appellate Body did not appreciate the ramifications of softening the "relating to" test and operationializing the chapeau on the one hand, while on the other hand specifically declining to apply its "relating to" ruling to the "necessary" clause. Put more simply, the Appellate Body did not consider what effect the operationalization of the chapeau would have on "necessary" cases, and more specifically how the chapeau would coexist with the least restrictive measures analysis under the "necessary" clause. Instead, it made a distinction between the two clauses and kept the least restrictive measures analysis as a part of the "necessary" test, i.e., it found that the plain meaning of the two terms suggested different tests and presumably called for a different approach. As this article's analysis of *Gambling* and the duty to negotiate has demonstrated, however, the Appellate Body's decision in *Gasoline* and subsequent cases has effectively rendered the chapeau inutile in "necessary" cases, in spite of the fact that the chapeau is addressed to both "necessary" and "relating to" cases.

The Appellate Body's decision in *Gambling* demonstrates the critical and contingent relationship between least restrictive measures analysis and a finding of discrimination under the chapeau. By its nature, the least restrictive measures test is an assessment of the relationship between policy goals and policy implementation, and as *Gambling* demonstrates, attempting to filter out some aspects of policy implementation for analysis under the chapeau only muddies the

[109] *See* Sungjoon Cho, Free Markets and Social Regulation: A Reform Agenda of the Global Trading System 37 (2003) (citing *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, B.I.S.D. 35S/98, paras. 4.4-4.7 (1988)). As Professor Cho notes, although GATT panels acknowledged that the "relating to" test covered a wider range of measures than the "necessary" test, they would apply the "primarily aimed at" test in effectively the same way. *See also* Condon, *supra* note 44, at 98-105 (noting that the Appellate Body in *Gasoline* explicitly overruled the type of cost-benefit analysis that is characteristic of the least restrictive measures test in determining whether a measure is "primarily aimed at" conservation under Article XX(g)).

least restrictive measures analysis under the "necessary" clause. It also has a tendency to harm the complainant's case. The distinction between the "application" of a measure and its "design and content" thus appears needlessly artificial because a proper least restrictive measures inquiry must consider both aspects of the measure to be effective. What the Appellate Body has demonstrated in cases like *Turtle-Shrimp* and *Gasoline*, however, is that the chapeau can be utilized as a vehicle for least restrictive measures analysis that is just as effective as the least restrictive measures analysis under the "necessary" clause. The only substantial difference between the two tests is that under the "relating to" clause, the Appellate Body does not make an independent assessment of the importance of the respondent's regulatory prerogatives, as was done in *Korea Beef*, but only considers whether the challenged measures "fit" within those regulatory prerogatives, i.e., whether there is a substantial connection between the measure and the policy goal.[110] Assessing the vitality and importance of a measure, however, is not crucial to a panel's least restrictive measures inquiry. Not only is such an assessment controversial, but in the cases that the Appellate Body has considered under the "necessary" clause, the importance or "vitality" of the respondent's measures did not appear to be necessary to the result, and the Appellate Body could just as easily have struck down the measures under the chapeau.[111] Accordingly, the Appellate Body should do in "necessary" cases what it has done in "relating to"

[110] *See Turtle-Shrimp*, para. 141 (finding a "substantial" connection where there was an "observably close and real one").

[111] This is precisely the approach that Professor Cho advocates, although his view is based upon the policy goal of preserving a member state's right to determine its policy prerogatives for itself. *See* Cho, *supra* note 109, at 48-51 ("[T]he AB could have achieved the same result as in the decision rendered by finding that the measure amounted to 'arbitrary discrimination' under the chapeau, taking into account 'like situations' where different instruments such as fines, record-keeping and policing are used."). One question that arises is how the Appellate Body should handle cases in which the challenged measures are ineffective and do not correspond to the claimed level of risk. Put more bluntly, what if the panel thinks the respondent is lying about the level of risk they are willing to accept? Indeed, this is what happened in *Dominican Cigarettes*, where the Panel found "no evidence to conclude that the tax stamp requirement secures a zero tolerance level of enforcement with regard to tax collection and the prevention of cigarette smuggling," and proceeded to propose less restrictive measures which by their nature tolerated a lower level of risk than that claimed by the Dominican Republic. *See Appellate Body Report, Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc. WT/DS302/AB/R (2005), para. 72 (quoting the Panel report). While recognizing that the solution to this problem is, of course, quite difficult (it could alone be the subject of an article), it appears that this situation can be accommodated under the chapeau because the chapeau focuses on the measure in question, not the respondent's preferred level of risk. If the challenged measure does not correspond to the respondent's purported level of risk, the panel can propose less restrictive measures that achieve the same level of risk as is *effectively* achieved by the measure in question, which is in fact what the Panel did in *Dominican Cigarettes*. In one sense, of course, this would be a bit disingenuous, because whether explicitly under the "necessary" clause or implicitly under the chapeau, the panel is making its own assessment as to the respondent's preferred level of risk. On the other hand, however, there does not seem to be a way to avoid this situation, and it becomes essentially a question of preference. The benefit of focusing on the effectiveness of the measure is that the Appellate Body will not be perceived as impugning the level of risk the respondent wishes to achieve.

cases – defer the least restrictive measures analysis to the chapeau. The problem with doing this is that the Appellate Body will have to redefine or recharacterize the entire body of jurisprudence it has built up around the "necessary" clause.[112] Yet such a redefinition may be justified by the fact that the Appellate Body *must* choose, as this is not a situation in which there are competing policy choices, but rather a situation in which one legal rule operates to the exclusion of the other legal rule. The two least restrictive measure mechanisms the Appellate Body has propped up – the "necessary" clause and the chapeau – in practice must operate to the exclusion of one another in "necessary" cases. Remedying the discriminatory effects of a challenged measure is by necessity accompanied by a least restrictive measures analysis, and as the preceding analysis of *Gambling* demonstrates, that analysis can be done under *either* the "necessary" clause or the chapeau, but not both. On the one hand, there is simply no support for the notion that the chapeau should be inoperable; the drafting history and legislative intent of the GATT demonstrates that the chapeau was meant to be the vehicle by which the implementation of members' legitimate policy goals under Article XX GATT or Article XIV GATS were assessed. The importance of the chapeau is thus supported by more than simply a statutory analysis of its plain meaning. On the other hand, the distinction between "necessary" and "relating to" cases is supported only by the Appellate Body's plain meaning distinction between the two in *Gasoline*.[113] While this distinction is by no means trivial, given the circumstances it is hard to believe that the GATT drafters intended for the chapeau to be applied differently in "relating to" cases as opposed to "necessary" cases. It is even harder to believe that the GATT drafters intended that environmental conservation efforts would be easier to provisionally justify than efforts to protect public morals and human life. Indeed, it makes little sense to impose such a sharp distinction between the two clauses when it is likely that the distinction was little more than a drafting oversight. Whether a measure is "necessary" or "relating to" a given objective should thus be limited to a facial evaluation of the relationship between the policy objective and

[112] This is not entirely inconsistent with the direction in which the Appellate Body has moved in some "necessary" cases. In cases like *Asbestos*, *Argentinean Leather*, and even *Gambling*, the Appellate Body has held that "merely theoretical" or hypothetical less restrictive measures will not suffice, and that panels can only impose a less restrictive measure on the respondent when it is reasonably available, consistent with the level of risk the respondent is willing to accept, and does not impose unreasonable administrative or technical burdens. However, deferring the least restrictive measures test to the chapeau will require a fundamental change of course for the Appellate Body because many of its rulings, such as *Dominican Cigarettes* and *Korean Beef*, appear to impose the traditional least restrictive measures test on the respondents. Such a change will require a dramatic reinterpretation of the four-factor test in *Korean Beef*.

[113] *See* Appellate Body Report, *Gasoline*, at 15-16.

the measures at issue, or in other words, whether there is a substantial connection between the policy goal and the measure. Whether measures are in fact narrowly tailored to the policy goal, i.e., whether the measure is too trade restrictive in its application, should be considered under the chapeau in "necessary" and "relating to" cases. This will introduce needed clarity into Article XX GATT and Article XIV GATS inquiry and avoid a situation like *Gambling*.

V. Conclusion

Although this article has made a number of distinct observations about the duty to negotiate, the "necessary" and "relating to" clauses, and the negotiating incentives of member states, it ultimately rests upon two conclusions. First, the central and recurring them of this article is that as a standard of justification for a judicially imposed remedy (i.e., the panel's standard of justification) *and* a disputed measure (i.e., the respondent's standard of justification), least restrictive measures analysis is an all-inclusive, unavoidable, and final judicial inquiry that serves not only as a source for imposing remedies, but also for foreclosing remedies. Indeed, the Appellate Body's *de facto* application of a least restrictive measures-like analysis in *Turtle-Shrimp* and *Gasoline* demonstrates how pervasive and unavoidable the least restrictive measures paradigm has become in the law of justification under the GATT and GATS. Similarly, the analysis of Interpretation 1 and Interpretation 2 of *Gambling* demonstrates the all-inclusiveness and finality of least restrictive measures analysis. The fundamental problem with Interpretation 1 is that it forecloses the use of least restrictive measures analysis in "necessary" clause cases by requiring that the duty to negotiate only be considered under the chapeau. Yet without embedding the duty to negotiate within the least restrictive measures analysis, Intepretation 1 forecloses the duty to negotiate as a remedy under the chapeau. The problem with Interpretation 2, moreover, was that conducting the least restrictive measures analysis and imposing the duty to negotiate under the "necessary" clause not only made the chapeau inutile in "necessary" cases, it compromised the soundness of the panel's least restrictive measures analysis and potentially harmed the complainants' case. Thus, Interpretation 2 placed the duty to negotiate within the least restrictive measures paradigm (thus curing the defect of Interpretation 1), but at the same time demonstrated that placing the least restrictive measures paradigm within the "necessary" clause effectively emptied the chapeau of any usefulness and settled the case. It is the combination of these observations that leads to the ultimate suggestion that the least restrictive

measures analysis should be conducted under the chapeau in both "necessary" and "relating to" cases, especially because the Appellate Body's decisions demonstrate that the "necessary" test as presently constituted cannot coexist with the chapeau, while the chapeau is the higher legal norm in the GATT and GATS hierarchy.

The second conclusion is that the procedural duty to negotiate as seen in *Turtle-Shrimp* should be entirely jettisoned and Interpretation 2 of *Gambling* should be adopted. The comparison between the procedural duty to negotiate in *Turtle-Shrimp* and Interpretation 2 of *Gambling* demonstrated that a panel's influence over the parties and the parties' incentives to negotiate are strongest when the duty to negotiate is supported by a reasonably available, less restrictive measure that the parties must adopt. Least restrictive measures analysis should thus be administered more literally by panels, based on an actual example of a less restrictive measure rather than the presumption of one. The Appellate Body or a panel does a greater service to environmental concerns *and* trade concerns when its decisions are firmly entrenched in explicit findings of trade discrimination under the chapeau.