

TAKING CHANCES:

THE UNITED STATES' POLICY ON INTERNET GAMBLING AND ITS INTERNATIONAL IMPLICATIONS*

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I. INTRODUCTION

In recent years, online gambling in the form of sports betting, as well as traditional games of chance, such as poker and blackjack, has increased exponentially. With the vast availability of high-speed Internet connections in the homes of millions of Americans, it has become increasingly simple to recreate the casino experience in the comfort of one's own home. As Internet gambling has become increasingly popular, the federal government has stepped up its efforts to curb the activity. Citing an adverse effect on the American population, and deeming the existing legislation inadequate, Congress passed the Unlawful Internet

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Gambling Enforcement Act ("UIGEA"), which President George W. Bush signed into law on October 13, 2006.¹ The UIGEA is meant to prohibit the acceptance of payments relating to online gambling that are illegal under either federal or state laws.²

While it seems that Internet gambling is strictly a domestic issue, subject solely to internal laws, it has recently gained international attention due to the federal government's dispute with Antigua-Barbuda ("Antigua") over the enactment of several pieces of anti-Internet gambling legislation by the United States.³ Accusing the United States of violating international trade agreements, Antigua brought its case to the World Trade Organization ("WTO")⁴ in 2003 in an attempt to force the United States to comply with international law and to bind it to its previous international agreements, namely the General Agreement on Trade in Services ("GATS").⁵ In 2005, the Appellate Body of the WTO ("AB") found that "a prohibition on the remote supply of gambling and betting services" is, in fact, a violation of the United States' commitment to provide gambling services under the GATS.⁶ The AB held that the United States must modify its Internet gambling policies so as to eliminate inconsistencies with the trade agreements.⁷ Rather than complying, the federal government strengthened its legislation against online gambling with the UIGEA.

In May 2007, in response to consistent WTO decisions calling on the United States to comply with the GATS, the United States announced its intentions to withdraw from those commitments

¹ 31 U.S.C. § 5361 (2006).

² *Id.* § 5362.

³ Numerous news outlets and international organizations have provided coverage of the ongoing dispute. See, e.g., Simon Lester, *The WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of Its GATS Commitments*, ASIL INSIGHTS, Apr. 8, 2008, <http://www.asil.org/insights080408.cfm>. See also *Lawyer: Antigua, US Will Not Settle Internet Gambling Dispute by Deadline*, INT'L HERALD TRIB., June 4, 2008, <http://www.iht.com/articles/ap/2008/06/04/business/CB-FIN-Antigua-US-Internet-Gambling.php>; *Antigua Seeks WTO Arbitration in US Gambling Dispute*, REUTERS, Jan. 31, 2008, <http://www.reuters.com/article/mediaNews/idUSL3165644020080131?pageNumber=1&virtualBrandChannel=0>.

⁴ The WTO is an international organization, established on January 1, 1995 and currently consisting of 152 member countries, dedicated to the negotiation of trade agreements and the settlement of trade disputes. World Trade Organization, What is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Nov. 20, 2007).

⁵ ANTIGUA'S REQUEST FOR CONSULTATIONS, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285 (Mar. 27, 2003) [hereinafter ANTIGUA REQUEST FOR CONSULTATIONS], available at <http://www.antiguawto.com/WTOListPg.html>.

⁶ REPORT OF THE APPELLATE BODY, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/AB/R, ¶ 373(C)(i) (Apr. 7, 2005) [hereinafter AB REPORT], available at http://www.antiguawto.com/wto/51_Antigua%20_WTO_Appellate_Body_Report_7Apr05.pdf.

⁷ See *infra* Part III.C. The dispute between Antigua and the United States, along with the WTO decision, will be discussed in further detail below.

particular to Internet gambling.⁸ While the international implications of such a decision are numerous, withdrawal from this portion of its GATS commitments and noncompliance with the WTO decision are likely the country's best options if it insists on continuing its ban on Internet gambling. While opponents of the United States' actions suggest that a better alternative is to allow for Internet gambling while gaining significant revenue from taxation, this option is not feasible.⁹ It would be impossible to tax an international business without the cooperation of its government. Nations such as Antigua rely on online gambling to further their economies. It is unlikely that these countries, which look to Internet gambling as a major source of revenue, will cooperate with the United States and allow it to tax the online gambling industry in return for the United States allowing free trade in gambling services. Moreover, modification of legislation against online gambling for purposes of being in line with the GATS would be counterproductive and damaging to the nation in the long term.¹⁰

Prior to understanding noncompliance as the United States' best option, it is necessary to examine the progression of gambling legislation. Part II of this Note therefore addresses the history of such legislation, culminating with the passage of the UIGEA, and the federal government's justifications in enacting laws that attempt to limit online gambling. Understanding the reasons for such legislation is imperative to understanding why it is necessary in the first place, and why maintaining it remains more important than sustaining the country's international agreements under the GATS. Part III then examines the international effects of the regulation of gambling services, including the WTO dispute and the reaction of the United States to the decisions against it. This Part takes a closer look at the American commitments under the GATS in order to determine the validity of the United States' argument that the GATS was never intended to cover Internet gambling services. While such an argument would certainly be in line with noncompliance, the United States cannot rely on this argument in order to continue its regulation of Internet gambling while adhering to the GATS. The section concludes with a discussion of the decision of the Appellate Body of the WTO, as well as the United States' unsuccessful attempt to convince the WTO that it is in compliance with the GATS. Part IV includes a brief discus-

⁸ Press Release, Antigua Online Gaming Association, US Admits Defeat in Antigua Gambling Case at the WTO, (May 4, 2007), available at http://www.antiguawto.com/wto/AOGA_Press_Rel_response_USTR_PR_on_omission_May07.pdf.

⁹ See *infra* Part IV.B for a detailed discussion of taxation possibilities and the argument against taxation's effectiveness.

¹⁰ See *infra* Part IV.C for a detailed discussion.

sion of, and comparison with, other WTO disputes. It then includes an analysis of the United States' decision to withdraw from its Internet gambling commitments, followed by a discussion of the taxation possibilities, in order to show that the United States will not be able to attain significant revenue from imposing a tax on online gambling. Furthermore, it compares the international implications of noncompliance with the domestic implications of compliance to show that the country's interests in regulating Internet gambling far outweigh the possible international issues that may arise.

II. INTERNET GAMBLING LEGISLATION: FROM THE WIRE ACT TO THE UIGEA

A. Overview of Anti-Internet Gambling Legislation

Prior to the enactment of the UIGEA, the main legislation governing online gambling existed in the Wire Act of 1961.¹¹ The Wire Act prohibited "betting or wagering knowingly [using] a wire communication facility for the transmission . . . of bets or wagers on any *sporting event or contest*."¹² At the time of the Wire Act's enactment, Congress defined a "wire communication facility" as a system used to transmit information "by and of a wire, cable or other like connection between points of origin and reception of such transmission."¹³ Although initially meant to apply to telephone lines, the Wire Act has been interpreted by at least one court to be applicable to online gambling.¹⁴

The main controversy surrounding the Wire Act is its failure to explicitly mention wagering on games of chance, in addition to its mention of sporting events. While the United States government has consistently argued that the Wire Act includes all types of Internet gambling,¹⁵ the most prevalent view of the judiciary has been otherwise. The court in *In re MasterCard International Inc. Internet Gambling Litigation* concluded that "the Wire Act does not prohibit non-sports Internet gambling," an interpretation that has not yet been contradicted by other courts.¹⁶ Furthermore, the legislative history behind the Wire Act suggests that Congress intended to regulate only sports gambling, though remaining fully aware of the possibility of other forms of gambling.¹⁷ According to

¹¹ 18 U.S.C. § 1084 (2006).

¹² *Id.* (emphasis added).

¹³ *Id.* § 1081.

¹⁴ See *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (holding that the owner of an offshore sports gambling website could be convicted under the Wire Act).

¹⁵ ANTHONY N. CABOT, FEDERAL GAMBLING LAW 119 (1999).

¹⁶ *In re MasterCard Int'l Inc. Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002).

¹⁷ CABOT, *supra* note 15, at 118.

the House Judiciary Committee Chairman at the time of the Act's passage in 1961, the Act applied to "the transmission of wagers or bets and layoffs on horse racing and other sporting events."¹⁸

The interpretation of the Wire Act as applicable solely to sports gambling is further reinforced by the fact that Congress attempted to amend the Act on several occasions to specifically include other forms of gambling.¹⁹ Congress would not need to amend the Act to prohibit non-sports Internet gambling if it already constituted a violation, unless the Act was consistently misread. However, in December 1995, Senator Jon Kyl unsuccessfully introduced the Crime Prevention Act of 1995 in an attempt "to clarify that non-sports betting is prohibited."²⁰ In 1997, legislators tried to add "contest[s] of chance or a future contingent event not under the control or influence of [the bettor]" in another failed Wire Act amendment proposal.²¹

Additionally, the Travel Act and the Illegal Gambling Business Act also deserve brief mention as predecessors to the UIGEA, as both are included in the WTO dispute between the United States and Antigua. The Travel Act of 1961 prohibits the use of "any facility in interstate or foreign commerce, including the mail . . . [to] promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity."²² For the purposes of the Travel Act, Congress defined an "unlawful activity," in part, as "any business enterprise involving gambling."²³ The Travel Act does not specifically refer to wire communications, but has on several occasions been interpreted to apply to telephone communications, and is therefore applicable to Internet gambling.²⁴ It is thus plausible to conclude that the use of the Internet "to facilitate an illegal gambling enterprise . . . would violate the law."²⁵

The Illegal Gambling Business Act ("IGBA"), enacted in 1970, sought to provide the federal government with the authority to prosecute large gambling enterprises by prohibiting the operation of illegal gambling businesses.²⁶ The IGBA was part of a lar-

¹⁸ *Id.* (quoting 107 CONG. REC. 16,533 (daily ed. Aug. 21, 1961) (statement of Rep. Celler)).

¹⁹ National Coalition Against Legalized Gambling, Unlawful Internet Gambling Enforcement Act of 2006 - Fact Sheet iii-1, [hereinafter Fact Sheet], <http://www.ncalg.org/Library/Internet/IG%20law%20booklet.pdf>.

²⁰ *Id.*

²¹ *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001).

²² 18 U.S.C. § 1952(a) (3) (2006).

²³ *Id.* § 1952(b). The Act also includes "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States" as part of the definition of "unlawful activity." *Id.*

²⁴ See, e.g., *United States v. Villano*, 529 F.2d 1046, 1052 (10th Cir. 1976); *United States v. Archer*, 486 F.2d 670, 679 (2d Cir. 1973).

²⁵ CABOT, *supra* note 15, at 130.

²⁶ 18 U.S.C. § 1955 (2006).

ger effort to curtail organized crime and racketeering. The Act defined an "illegal gambling business" as one that

(i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$ 2,000 in any single day.²⁷

As with the Travel Act, the IGBA does not make any specific mention of the use of wire facilities in gambling. Nevertheless, it may be extended to encompass Internet gambling so long as the online gambling operators fit within the above definition of an illegal gambling business.

One other federal law is relevant to the United States' dispute with Antigua: the Interstate Horseracing Act ("IHA") of 1978.²⁸ Originally enacted in response to the rising concern that interstate wagering would lead to a loss of revenue for racetracks,²⁹ Congress passed the IHA in order "to regulate interstate commerce with respect to wagering on horseracing."³⁰ The Act prohibited the acceptance of any "interstate off-track wager," but also provided exceptions.³¹ Congress amended the list of exceptions in 2000 in order to allow for bets "placed or transmitted by an individual in one State via telephone or other *electronic media* and accepted by an off-track betting system in the same or another State."³² The inclusion of "electronic media" in the IHA's wording suggests that the amendment to the IHA intended to legalize online gambling on horseracing, despite the federal government's general aversion to gambling over the Internet and its consistent efforts to regulate it.³³ Furthering this contradiction, the UIGEA, enacted in 2006, makes specific mention of the IHA, indicating that the coverage of the UIGEA does "not include any activity that is allowed under the *Interstate Horseracing Act of 1978*."³⁴ This seeming inconsistency plays an important role in the present dispute with Antigua, as the

²⁷ *Id.* § 1955(b)(1)(i)-(ii). The IGBA specifies that "gambling" "includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." *Id.* § 1955(b)(2).

²⁸ 15 U.S.C. §§ 3002, 3004 (2006).

²⁹ CABOT, *supra* note 15, at 181-82.

³⁰ 15 U.S.C. § 3001(b) (2006).

³¹ *Id.* §§ 3003, 3004.

³² *Id.* § 3002(3) (emphasis added).

³³ See Michael Grunfeld, Note, *Don't Bet on the United States's Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 455 (2007) ("[I]t is difficult to read the specific inclusion of 'electronic media' in the recent amendment to the IHA as doing anything other than legalizing Internet betting on horseracing.").

³⁴ 31 U.S.C. § 5362(10)(D)(i) (2006).

WTO has held that the existence of the IHA places the United States in violation of international law.³⁵

The UIGEA is located in a subchapter titled "Prohibition on Funding of Unlawful Internet Gambling."³⁶ The legislative history of the UIGEA indicates that it was specifically intended for the "modernization of the Wire Act of 1961."³⁷ The UIGEA, attached to the SAFE Port Act, sought "to prohibit financial intermediaries from making payments to illegal Internet gambling sites."³⁸ It essentially "prohibits Internet gambling operators from accepting money related to any online gambling that violates State or Federal law."³⁹ The UIGEA targets financial institutions, rather than individual gamblers. The language of the Act expands the activity of gambling to include more than just sporting events by specifically defining a "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance."⁴⁰ The UIGEA also seeks to preserve the authority of individual states to determine their own gambling laws by defining "unlawful Internet gambling" as gambling that "is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made."⁴¹ The UIGEA, effectively, seeks to modify already existing gambling laws by prohibiting Internet gambling in states where non-Internet gambling is already illegal. Therefore, if state law prohibits gambling in a physical casino, the UIGEA indicates that Internet gambling will be illegal there as well, unless the state law specifically allows for it.

B. *Justifications for Anti-Gambling Legislation*

Proponents of anti-gambling legislation have often argued that gambling leads to a corruption of moral values, and that Internet gambling only serves to accelerate the process. Senator Bill Frist, for instance, described gambling as "a serious addiction that undermines the family, dashes dreams, and frays the fabric of society."⁴² On the opposite end of the spectrum, those against government regulation of Internet gambling insist that the government exaggerates gambling's negative effects. This group argues that the government's contradictory stance in permitting

³⁵ See *infra* Part III.C for further explanation of the WTO decision.

³⁶ 31 U.S.C. § 5361 (2006).

³⁷ H.R. 4411, 109th Cong. (2d Sess. 2006) (enacted).

³⁸ Grunfeld, *supra* note 33, at 460.

³⁹ Fact Sheet, *supra* note 19, at 1.

⁴⁰ 31 U.S.C. § 5362(1)(A) (emphasis added).

⁴¹ *Id.* § 5362(10)(A).

⁴² Grunfeld, *supra* note 33, at 460 (citing Aaron Todd, *Congress Passes Unlawful Internet Gambling Enforcement Act*, CASINO CITY TIMES, Oct. 2, 2006, <http://casinocitytimes.com/article.cfm?ContentAndContributorID=30109>).

state-run lotteries and horseracing wagers does not provide any support for the insinuation that gambling has only adverse effects on the country.⁴³ Such opponents argue that the government fails to demonstrate a substantial interest in curbing online gambling due to the "inconsistency of [its] position."⁴⁴

In order to gain a better understanding of the effects of gambling, including Internet gambling, Congress created the National Gambling Impact Study Commission. In 1999, the Commission issued its Final Report, including its analysis of gambling and various recommendations.⁴⁵ While acknowledging the tremendous increase in online gambling revenue, and accordingly an increase in tax revenue for the American government, the Report concluded that Internet gambling exacerbates underage and pathological gambling, as well as criminal activities associated with gambling.⁴⁶ Due to the lack of an age verification process, underage gamblers can easily access Internet gambling websites, increasing the chances for racking up debt on their parents', or even their own, credit card accounts. The addictive nature of the younger population, coupled with the relative ease with which gambling websites may be accessed and the average teenager's ability to effortlessly navigate the web, creates an environment that is conducive to the proliferation of underage gambling.⁴⁷

Furthermore, the Commission cited pathological gambling as an aggravated consequence of online gambling.⁴⁸ The Report suggested that "the high-speed instant gratification of Internet games and the high level of privacy they offer" only serve to further whet the appetites of those already suffering from a gambling addiction and increase the chances of a gambling addiction developing in those who are new to the activity.⁴⁹ The convenience of never having to leave one's own room can serve to increase gambling tendencies in those people who rarely visit physical casinos. A study conducted in 2002 lends credence to the Final Report's findings, indicating that "the availability of Internet gambling may draw individuals who seek out isolated and anonymous contexts

1.

⁴³ On at least one occasion, the United States Supreme Court "could not ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest" and therefore did not recognize the government's interest in curtailing gambling as substantial. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999).

⁴⁴ Megan E. Frese, Note, *Rolling the Dice: Are Online Gambling Advertisers "Aiding and Abetting" Criminal Activity or Exercising First Amendment-Protected Commercial Speech?*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 547, 602 (2005).

⁴⁵ NATIONAL GAMBLING IMPACT STUDY COMMISSION, FINAL REPORT (1999) [hereinafter *NGISC, FINAL REPORT*].

⁴⁶ *Id.* at 5-4 - 5-6.

⁴⁷ *Id.* at 5-4.

⁴⁸ *Id.* at 5-5.

⁴⁹ *Id.*

for their gambling behaviors.”⁵⁰

The Final Report also suggests that criminal activity is likely to proliferate with an increase in online gambling. Of primary concern is that non-Internet gambling is often associated with an increase in organized crime and prostitution. Arguably, Internet gambling is materially different from gambling within a casino. A person visiting an Internet casino from his own home may not be susceptible to the same kind of gambling inducements as in a physical casino, in which a patron is provided with an endless supply of alcohol while situated in a room without any windows or clocks. However, concerns over other types of criminal activities arise. The Internet’s lack of accountability gives rise to concerns over the possibility of abuse by gambling operators, who may refuse to pay winnings and easily shut down their sites.⁵¹ The Deputy Assistant Attorney General reported that “[l]ike scam telemarketing operations, on-line gambling establishments appear and disappear with regularity, collecting from losers and not paying winners, and with little fear of being apprehended or prosecuted.”⁵² The Final Report provides an example of an online gambler who was cheated out of \$7000 in this manner.⁵³ Unfortunately, however, beyond the limited examples available, it is difficult to determine precisely how widespread the criminal activity is because of online gambling’s lack of regulation.

Furthermore, online gambling is highly conducive to money laundering and fraud, made even simpler through the use of offshore accounts.⁵⁴ Money laundering typically involves tax evasion or false accounting in order to generate illegal profits. It is the process of transferring money obtained illegally through third parties in order to disguise the money’s origins.⁵⁵ In terms of Internet gambling, individuals may conceive elaborate schemes in which they create gambling accounts to store funds acquired illegally in order to later withdraw those funds as winnings.⁵⁶ The process legitimizes the money, allowing the individual to spend it without

⁵⁰ George T. Ladd & Nancy M. Petry, *Disordered Gambling Among University-Based Medical and Dental Patients: A Focus on Internet Gambling*, 16 PSYCHOL. OF ADDICTIVE BEHAVIORS. 76, 78-79 (2002).

⁵¹ NGISC, FINAL REPORT, *supra* note 45, at 5-5.

⁵² REPORT OF THE PANEL, UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/R ¶ 6.507 (Nov. 10, 2004) [hereinafter PANEL REPORT], available at http://www.antiguawto.com/wto/37_WTO_Panel_Report_%2010Nov04.pdf.

⁵³ NGISC, FINAL REPORT, *supra* note 45, at 5-5.

⁵⁴ *Id.* at 5-6.

⁵⁵ See Peter J. Quirk, *Money Laundering: Muddying the Macroeconomy*, FINANCE & DEVELOPMENT, Mar. 1997, at 7, available at <http://www.worldbank.org/fandd/english/pdfs/0397/0110397.pdf>.

⁵⁶ Sam Coates, *Online Casinos ‘Used to Launder Cash,’* TIMES ONLINE, Nov. 1, 2001, <http://www.timesonline.co.uk/tol/news/politics/article620834.ece>.

drawing suspicion.⁵⁷

Generally, Internet gambling is viewed by the government as a vice that must be controlled. There is both a moral, as well as criminal, concern. While, traditionally, gambling regulation has been assigned as a state responsibility, Internet gambling makes it far more difficult for individual states to exercise jurisdiction over website operators. States such as Louisiana, Texas, Illinois, and Nevada have passed legislation prohibiting Internet gambling.⁵⁸ However, the effectiveness of these prohibitions is limited. The federal government is seemingly better equipped to handle the regulation of Internet gambling that reaches across state lines.

III. THE INTERNATIONAL AFTERMATH: ANTIGUA, THE UNITED STATES, AND THE WTO

A. *Antigua's Complaint*

In recent years, Antigua has become prominent in the Internet gambling arena, providing a base for businesses to operate outside the United States. Internet gambling has become an important asset to Antigua's economy, conveniently providing access to foreign-based online gambling websites.⁵⁹ As regulation of Internet gambling by the United States has increased, however, Antigua has experienced a decline in the gaming industry, witnessing the number of licensed operators decreasing from 119 in 1999 to merely 28 in 2003.⁶⁰ Antigua has categorized this effect as causation, rather than correlation, asserting "that an increasingly aggressive strategy of the United States to impede the operation of gaming companies in Antigua was and remains a material factor in the decline of the industry in Antigua."⁶¹

Following *United States v. Cohen*, in which an American citizen in Antigua was prosecuted and convicted under the Wire Act for providing Internet gambling services to customers in the United States,⁶² Antigua filed a claim against the United States with the WTO in March 2003. The complaint alleged that United States' federal and state laws constituted a violation of the GATS agreement "to liberalize trade in services for the gambling and betting services sector."⁶³ Antigua eventually brought the case before a

⁵⁷ *Id.*

⁵⁸ NGISC, FINAL REPORT, *supra* note 45, at 5-7.

⁵⁹ Grunfeld, *supra* note 33, at 480.

⁶⁰ Michael Park, Note and Comment, *Market Access and Exceptions Under the GATS and Online Gambling Services*, 12 SW. J.L. & TRADE AM. 495, 499 (2006).

⁶¹ FIRST SUBMISSION OF ANTIGUA AND BARBUDA, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285, ¶ 36 (Oct. 1, 2003), [available at](http://www.antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf)

http://www.antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf.

⁶² 260 F.3d 68 (2d Cir. 2001).

⁶³ Park, *supra* note 60, at 499.

WTO Panel.⁶⁴ In its request for a Panel, Antigua alleged that while the United States allowed gambling services that were domestically-based, it prohibited businesses from outside the United States from providing the same services.⁶⁵ The complaint named several pieces of federal legislation as evidence of a GATS violation, including the Wire Act and the IHA.⁶⁶ It also included legislation passed individually by the states.⁶⁷ With the passage of the UIGEA in 2006, the United States further blocked Antigua's access to the American gambling market by prohibiting financial institutions from processing payments to online gambling businesses outside the country.⁶⁸

B. American Commitments Under the GATS

The ongoing dispute between Antigua and the United States has revolved almost entirely around the precise meaning of the commitments of the United States under the GATS. Prior to examining the United States' recent withdrawal from its Internet gambling commitments under the GATS, it is necessary to understand precisely what the GATS entails and what both parties to the dispute perceive the commitments to mean.

The GATS came into force in January of 1995 as a result of the Uruguay Round of trade negotiations.⁶⁹ Article I envisions trade in services through four modes of supply, including:

- (1) cross-border supply, from the territory of one member into that of another;
- (2) consumption abroad, in which the service is supplied in the territory of one member to the consumer of another;
- (3) supply through commercial presence, in which the service supplier is legally established in the export market; and
- (4) supply through the movement of natural persons, meaning the temporary presence of individuals without legal personality to supply services in a Member's market.⁷⁰

As part of their GATS requirements, each signatory member created a schedule of commitments describing the extent to which

⁶⁴ REQUEST FOR THE ESTABLISHMENT OF A PANEL BY ANTIGUA AND BARBUDA, UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/2 (June 13, 2003), available at http://www.antiguawto.com/wto/03_AB_request_panel_13june03.doc.

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 3-8.

⁶⁸ Fact Sheet, *supra* note 19, at 1.

⁶⁹ World Trade Organization, GATS Training Module, http://www.wto.org/English/tratop_e/serv_e/cbt_course_e/clslpl_e.htm (last visited Nov. 4, 2007).

⁷⁰ Park, *supra* note 60, at 497-98 (citing Uruguay Round Agreement: General Agreement on Trade in Services, Apr. 15, 1994, Art. I(2)(a-d) [hereinafter GATS], available at http://www.wto.org/English/docs_e/legal_e/26-gats.pdf).

they were willing to participate in each individual sector.⁷¹ The treaty contains several other requirements as well. For instance, each member is required to treat international services "no less favourable[y]" than it treats itself.⁷² When defining its commitments, the United States included "Other Recreational Services," and specifically excluded "sporting" from its schedule.⁷³ It did not, however, mention gambling activities. While Antigua argued that "Other Recreational Services" included Internet gambling, the United States replied that no such commitment had been made on its part.⁷⁴

The United States' argument that its schedule of commitments does not include Internet gambling is plausible, but not highly convincing. The AB correctly held in April 2005 that the United States is in fact committed to providing full market access to Internet gambling. Article I(2)(a) specifically defines one means of supply as the transfer from one territory into another.⁷⁵ It does not preclude transfer through technological means. It can be inferred that, "where a full market access commitment has been made . . . a limitation or prohibition on one or more means of delivery is a limitation on market access for the Mode, [which] includes . . . gambling services provided through the Internet."⁷⁶ A contrary result would mean that market access is, in fact, not "full," as each member guaranteed it would be when it signed onto the GATS in 1995.⁷⁷

C. WTO's Decision and the United States' Unsuccessful Appeal

In response to Antigua's complaint, on November 10, 2004, the WTO issued a Panel Report in which it concluded that the GATS did extend to "gambling and betting services," and that the United States "fail[ed] to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms . . . of the GATS."⁷⁸ A portion of the Panel's decision focused on whether the free trade commitments of the United States encompassed online gambling.⁷⁹ The Panel found that the Wire Act, among other pieces of anti-Internet gambling legislation, fell under the exceptions of Article XIV(a) in seeking "to

⁷¹ *Id.* at 498.

⁷² GATS, *supra* note 70, at Art. XVII(1).

⁷³ See Park, *supra* note 60, at 501.

⁷⁴ *Id.* at 502.

⁷⁵ GATS, *supra* note 70, at Art. I(2)(a).

⁷⁶ Park, *supra* note 60, at 506 (emphasis added).

⁷⁷ *Id.*

⁷⁸ PANEL REPORT, *supra* note 52, at ¶ 7.2(b).

⁷⁹ *Id.* at ¶ 7.2(a), (b). Article XVI requires that "each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." GATS, *supra* note 70, at Art. XVI.

protect morals” or “to maintain public order.”⁸⁰ However, in reference to the United States’ refusal to participate in negotiations proposed by Antigua, the Panel concluded that these measures failed to meet another exception: they were not “necessary” because the United States failed to “[explore] and [exhaust] reasonably available WTO-consistent alternatives to the US prohibition on the remote supply of gambling and betting services.”⁸¹

The Panel also addressed the United States’ inconsistency in regulating Internet gambling, while according different treatment to non-online gambling. It acknowledged the inherent differences between the two forms of gambling that may have justified the differences in regulation, but ultimately determined that the United States did not satisfy the “necessity” test of the GATS.⁸² It held that the United States “has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act . . . and the Illegal Gambling Business Act . . . are necessary to protect public morals and/or public order within the meaning of Article XIV(a).”⁸³ As part of its recommendations, the Panel suggested that the United States bring its various gambling legislation into conformity with its obligations under the GATS.⁸⁴

The United States promptly appealed the decision in January 2005. The government argued that the Panel erred in concluding that the GATS applied to Internet gambling and that it interpreted the “necessary” exception incorrectly.⁸⁵

In April 2005, the Appellate Body agreed with the Panel that the GATS applied to Internet gambling services. Concluding that the United States is required “to provide full market access within the meaning of Article XVI” of the GATS,⁸⁶ the AB held that restricting access to Internet gambling, while allowing for non-Internet gambling in the form of the Interstate Horseracing Act, constituted a violation of its commitments.⁸⁷ The AB construed the GATS as guaranteeing access to all types of gambling services, regardless of their form. It therefore approached the dispute by “not looking only at restrictions on Internet gambling, but rather at any restrictions on the free trade of gambling services with Antigua.”⁸⁸ Since the United States had committed to keeping all

⁸⁰ PANEL REPORT, *supra* note 52, at ¶ 6.487.

⁸¹ *Id.* at ¶ 6.528.

⁸² *Id.* at ¶¶ 6.493, 6.535.

⁸³ *Id.* at ¶ 6.535 (citations omitted).

⁸⁴ *Id.* at 7.5.

⁸⁵ APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA, UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, AB-2005-1 (Jan. 14, 2005), *available* at http://www.antiguawto.com/wto/39_US_appellant_submission_14jan05.pdf.

⁸⁶ AB REPORT, *supra* note 6, at ¶ 215.

⁸⁷ *Id.*

⁸⁸ Grunfeld, *supra* note 33, at 484.

gambling services unrestricted, the AB deemed it liable for non-compliance with Article XVI of the GATS, even though the United States' restrictions applied solely to Internet gambling.

While agreeing with the Panel on this particular issue, the AB reversed on a variety of other points, most significantly finding that the Wire Act, along with the Travel Act and the Illegal Gambling Business Act, were in fact "necessary to protect public morals or to maintain public order."⁸⁹ The AB held that the failure of the United States to participate in negotiations with Antigua was not dispositive of its failure to comply with the GATS, and therefore did not preclude the United States from satisfying the exception requirements of Article XIV. Furthermore, the AB found that the three acts in question "on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services,"⁹⁰ and thereby satisfy the public morals exception.

Despite these findings, the AB still found the United States to be in violation of its GATS requirements because of the Interstate Horseracing Act.⁹¹ While Antigua did not include the IHA in its complaint due to the fact that it does not actually prohibit Internet gambling, its existence as gambling legislation became pivotal to Antigua's case against the United States. The IHA underscored discrepancies within United States gambling laws. It thus became imperative to determine "whether the IHA carves out from those federal laws an area in which Internet gambling is not prohibited, regardless of whether the carve-out is done in a discriminatory manner."⁹² Ultimately, while it was held that the IHA did allow for Internet gambling, the AB came up short of deciding that it discriminated against foreign providers. The AB did, however, hold that the United States was in violation of the GATS due to the fact that the IHA allows certain forms of gambling, while other forms remain restricted.⁹³

Shortly thereafter, the WTO ruled on the timeframe the United States would have to realign its anti-Internet gambling regulations in accordance with the GATS and the AB decision. Since the AB determined that "by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations" under the GATS, compliance would involve altering gambling legislation to resolve any inconsistencies.⁹⁴ Pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*

⁸⁹ AB REPORT, *supra* note 6, at ¶ 373(D) (iii) (c).

⁹⁰ *Id.* at ¶ 357.

⁹¹ *Id.* at ¶ 373(D) (v) (c); see *supra* Part II.A for a history of the IHA.

⁹² Grunfeld, *supra* note 33, at 490.

⁹³ PANEL REPORT, *supra* note 52, at ¶ 6.599.

⁹⁴ AB REPORT, *supra* note 6, at ¶ 373(C) (ii).

("DSU"), the United States could be allowed a "reasonable period of time" in which it would conform to its commitments under the GATS.⁹⁵ Taking into consideration that compliance in this case would only be possible through a lengthy legislative process, the arbitrator allowed the United States approximately eleven months, until April 3, 2006, in which to bring the Wire Act, the Travel Act, and the Illegal Gambling Business Act into compliance with its obligations to provide full market access to Internet gambling.⁹⁶

Despite this ruling, the United States government continued to maintain that its anti-Internet gambling legislation did not violate Article XIV of the GATS and that the IHA did not contribute to the alleged violation. The government insisted that the existence of the IHA, alongside the Wire Act, Travel Act, and the Illegal Gambling Business Act, did not constitute an inconsistent stance on gambling. Several days after the expiration of its deadline for compliance, the United States issued a status report in which it continued to insist that the IHA did not require amending and that, "[i]n view of these circumstances, the United States is in compliance with the recommendations and rulings of the [WTO] in this dispute."⁹⁷

Notwithstanding the stance of the United States on the matter, the WTO continued to rule against it, finding that it remained out of compliance with the GATS. In a Panel Report in March 2007, the Panel had an opportunity to analyze the dispute following the enactment of the UIGEA. The Panel examined language of the UIGEA pertaining to the IHA, which stated that "the term 'unlawful Internet gambling' shall not include any activity that is allowed under the Interstate Horseracing Act of 1978."⁹⁸ The Panel asserted that the enactment of the UIGEA contributed to the inconsistency that the IHA created in terms of anti-Internet gambling legislation.⁹⁹ The Panel therefore concluded that, de-

⁹⁵ ARBITRATION UNDER ARTICLE 21.3(C) OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/13, ¶ 27 (Aug. 19, 2005), available at http://www.antiguawto.com/wto/57_wto_arbitration_ruling_on_article_21_3.doc.

⁹⁶ *Id.* at ¶ 68.

⁹⁷ STATUS REPORT BY THE UNITED STATES, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/15/Add.1 (Apr. 11, 2006), available at http://www.antiguawto.com/wto/58_USstatusReportCompliance_11Apr06.doc.

⁹⁸ 31 U.S.C. § 5362(10)(D)(i) (2006).

⁹⁹ REPORT OF THE PANEL, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/RW, ¶ 6.135 (Mar. 30, 2007), available at <http://www.antiguawto.com/wto/72Article215Paneldecision.pdf> ([S]ince the original proceeding the United States had an opportunity to remove the ambiguity and thereby comply with the recommendations and rulings of the [WTO]. Instead, rather than take that opportunity, the United States enacted legislation that confirmed that the ambiguity at the heart of this dispute remains and, therefore, that the United States has not complied.

spite its insistence to the contrary, the United States had failed to comply with the AB ruling against it.¹⁰⁰

In May 2007, rather than further appealing the WTO ruling, the United States announced its intentions to withdraw from its Internet gambling commitments under the GATS.¹⁰¹ Pursuant to Articles XXI(1)(a) and (2)(a), "a Member . . . may modify or withdraw any commitment in its Schedule."¹⁰² A modification or withdrawal warrants any party affected by such action to "enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment."¹⁰³ Effectively, while allowing for withdrawal, Article XXI also sets consequences for such an extreme measure in the form of monetary damages. The United States decided to invoke Article XXI of the GATS so as "to correct its schedule in order to reflect the original U.S. intent – that is, to exclude gambling from the scope of the U.S. commitments under the GATS," blaming an "oversight" on the part of the United States and the rest of the WTO for the original, purportedly incorrect, schedule.¹⁰⁴ The United States has asserted that Antigua is not eligible for compensatory damages in light of the fact that, "since no WTO Member either bargained for or reasonably could have expected the United States to undertake a commitment on gambling, there would be very little, if any, basis for such claims."¹⁰⁵ In December 2007, following arbitration with the WTO to determine the appropriate amount of compensation, Antigua was awarded \$21 million annually to recompense for the United States' withdrawal.¹⁰⁶ The United States, however, is appealing that decision.

IV. WITHDRAWAL AS THE NATION'S BEST OPTION

A. *Withdrawal over Noncompliance and the International Reaction*

Between January 1995 and March 2007, the United States had been the subject of adverse rulings thirty-three times.¹⁰⁷ It has ei-

) (citation omitted).

¹⁰⁰ *Id.*

¹⁰¹ Press Release, Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI (May 4, 2007), [hereinafter Press Release, USTR], available at http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_of_Deputy_United_States_Trade_Representative_John_K_Veroneau_Regarding_US_Actions_under_GATS_Article_XXI.html.

¹⁰² GATS, *supra* note 70, at Art. XXI(1)(a).

¹⁰³ *Id.* at Art. XXI(2)(a).

¹⁰⁴ *Id.*

¹⁰⁵ Press Release, USTR, *supra* note 101.

¹⁰⁶ DECISION BY THE ARBITRATOR, UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285/ARB, ¶ 6.1 (Dec. 21, 2007), available at http://www.antiguawto.com/wto/84_22_6_ArbitrationReport_21Dec07.pdf.

¹⁰⁷ Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings:*

ther complied or is currently in the process of complying with twenty-six of those adverse rulings, all of which require mainly administrative action on the part of government agencies.¹⁰⁸ Seven cases, not including the present dispute on Internet gambling, require legislative action to bring the United States into compliance with the respective WTO decisions against it.¹⁰⁹

The strong national record of compliance as a response to WTO decisions against it begs the question of why this particular dispute has caused the United States to not only refuse to comply, but also to entirely withdraw from its Internet gambling commitments under the GATS.¹¹⁰ A superficial analysis suggests that it is simpler to comply with decisions requiring administrative, rather than legislative, action. It is generally understood that "the enactment of corrective remedies through changes to national statutes usually takes a longer period of time in most national systems."¹¹¹ However, this does not justify withdrawal, a move so rare that it has only been invoked one other time in the history of the WTO, which was during the enlargement of the European Union.¹¹² The United States government has made its position against Internet gambling clear,¹¹³ and yet it has not presented reasons for opting for the extreme choice of withdrawal over non-compliance and the subsequent repercussions of that choice.

The decisions of the WTO are not binding on its members and serve instead as guidance in the international arena. Compliance with WTO decisions, however, is necessary for the purposes of international stability. A complete disregard for the judgments set forth by the AB would lead to the collapse of the WTO as an effective institution. In instances where nations have chosen to disregard WTO decisions, the WTO authorized the affected parties to take retaliatory action against the offending nation. Within the aforementioned period between January 1995 and March 2007, only eight cases out of the total 109 disputed have resulted in requests for, and authorization of, retaliatory measures.¹¹⁴

The Record to Date, 10 J. INT'L ECON. L. 397, 400 (2007).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 399. Generally, the WTO's member nations have a positive compliance record in cases in which violations have been found against them, and "[i]n virtually every one of these cases, the WTO Member found in violation of its WTO obligations has indicated its intention to bring itself into compliance and in most cases has already done so." *Id.*

¹¹¹ *Id.*

¹¹² Lester, *supra* note 3.

¹¹³ See *supra* Part II.B for a discussion of the government's motivations for anti-Internet gambling legislation.

¹¹⁴ Wilson, *supra* note 107, at 402. In *United States - Tax Treatment for "Foreign Sales Corporations"*, for instance, the WTO authorized retaliation against the United States by the European Community ("EC"). After the EC actually imposed its retaliatory measures, the United States repealed the particular legislation under dispute. REPORT OF THE APPELLATE BODY, UNITED STATES - TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS,"

In the present dispute, possible retaliatory measures from Antigua as a result of United States noncompliance would be barely noticeable for the American economy. Antigua itself has admitted that economic sanctions against the United States would be entirely ineffective. Following the announcement of the United States for its withdrawal, Antigua admitted that

[T]he imposition of additional import duties on products imported from the United States or restrictions imposed on the provision of services by the United States . . . will have a disproportionate adverse impact on Antigua . . . by making these products and services materially more expensive to the citizens of the country.¹¹⁵

Although the official reason for withdrawal remains the correction of an oversight, it is unclear whether the United States actually erred or is now simply trying to escape its commitments. By withdrawing, the United States took drastic measures. Yet, the government is arguing that its withdrawal now places it in compliance with the GATS, thereby making any furtherance of the dispute unnecessary.¹¹⁶ The move itself has been characterized by Mark Mendel, one of the attorneys for the Antiguan government, as "a most shocking development" that when used "in the face of an adverse DSU ruling is nothing short of "incredible."¹¹⁷ The withdrawal of the United States may also be viewed as cowardly and insulting to the rest of the WTO community, and has in fact resulted in accusations of bad faith on the part of a nation unwilling to succumb to the continuous adverse rulings against it.¹¹⁸

The official version presented by the United States Trade Representative perhaps partially explains the reasons for the United States' actions. In the view of the United States government, a clarification of its GATS commitments through withdrawal pursuant to Article XXI serves to put an end to the ongoing battle it has been undergoing with Antigua and leaves no basis for any compensatory claims against it.¹¹⁹ The fact that withdrawal is allowed under the GATS is itself noteworthy. The United States is

WT/DS108/AB/R (Feb. 24, 2000), available at http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/108ABR.DOC.

¹¹⁵ RECOURSE BY ANTIGUA AND BARBUDA TO ARTICLE 22.2 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, WT/DS285, 3 (June 22, 2007), available at http://www.antiguawto.com/wto/73_AntiguaArticle_22v2_Recourse_22June07.pdf.

¹¹⁶ Press Release, USTR, *supra* note 101.

¹¹⁷ Posting of Simon Lester to Int'l Econ. Law & Policy Blog, http://worldtradelaw.typepad.com/ielpblog/2007/05/developments_in.html (May 4, 2007, 12:23 EST).

¹¹⁸ Lester, *supra* note 3.

¹¹⁹ Press Release, USTR, *supra* note 101.

ultimately not violating international law by invoking Article XXI of the GATS. Any potential political implications of this move by the United States ultimately are outweighed by the domestic policy concerns regarding Internet gambling.¹²⁰

According to the United States' interpretation of the rules of withdrawal, it would be able to continue its domestic anti-Internet gambling legislation without violating the GATS. Although the latest decision by the WTO requires the United States to pay compensatory damages to Antigua, it also allows for the withdrawal to remain in effect and for the United States to continue focusing on its domestic concerns with Internet gambling. In contrast, non-compliance by the United States would invite retaliatory measures by both Antigua and other members of the WTO community. The European Union has consistently stressed that it would take measures that would protect its own gambling industry, one that has suffered its own economic losses due to the restrictions by the United States on Internet gambling.¹²¹ In light of the aforementioned circumstances, it seems logical that the United States would choose withdrawal over noncompliance.

B. Taxation Possibilities

Opponents of anti-Internet gambling legislation have put forth proposals to tax the industry as an alternative to its elimination. Authors of such proposals argue that the United States could use the industry "as an additional source of tax revenue,"¹²² and estimate that "state governments within the United States could be losing at least \$650 million in tax revenue"¹²³ by opting to prohibit online gambling. This argument holds that states should take advantage of this source of income, particularly since the online gambling industry has been characterized as too far out of control for the government to prohibit successfully.¹²⁴ It has purportedly permeated the lives of Americans to such an extent that any restriction that the United States government would attempt to force upon it would only lead to "increasing the chances of fraudulent or predatory sites that may take advantage of children and addictive gamblers."¹²⁵ Rather than shutting the industry down, there-

¹²⁰ See *infra* Part IV.C.

¹²¹ *Plot Thickens in U.S.-Antigua Internet Gambling Dispute*, INT'L HERALD TRIB., May 22, 2007, <http://www.iht.com/articles/ap/2007/05/23/business/EU-FIN-ECO-WTO-US-Internet-Gambling.php?page=1>.

¹²² Kelly Ann Tran, *Compliance Panel Sets the Record Straight: Analyzing the Compliance Panel and Appellate Body Decisions in the Antigua-United States Internet Gambling Dispute*, 11 GAMING L. REV. 403, 410 (2007).

¹²³ Joseph J. McBurney, Note and Comment, *To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 CONN. J. INT'L L. 337, 338 (2006).

¹²⁴ Tran, *supra* note 122, at 409.

¹²⁵ *Id.*

fore, the federal government could instead allow it to continue under its supervision and thereby benefit from it tremendously. One critic of the current policy points out:

[T]he chief reason Las Vegas has been so successful is that its gambling revenues largely come from external sources. Thus, the city enjoys the benefits of gambling – a large influx of money – but does not have to suffer many of its harmful effects. While what happens in Vegas may, proverbially, stay in Vegas, the addiction, bankruptcy, and family strife generally leave with the gamblers. In the Internet context, America has become the problem gambler, not the prospering casino; we bear all of the costs without receiving the benefits that would offset them. The rest of the world has become a virtual Las Vegas.¹²⁶

To some extent, the government's attempt to prohibit Internet gambling may be likened to the government's unsuccessful attempt to limit alcohol consumption during the 1920s. The enactment of the Eighteenth Amendment prohibiting alcohol sales led to the growth of a successful black market, such that the government was forced to repeal the prohibition due to its failure to control the growth of the very thing it aimed to eradicate.¹²⁷ Furthermore, it has been suggested that the repeal of the Eighteenth Amendment by the Twenty-first Amendment was encouraged in large part by the revenue-generating prospects that would accompany the legalization of alcohol sales.¹²⁸

Other supporters of the taxation of the Internet gambling industry liken the situation to that of taxation on the tobacco industry. In addition to generating revenue for the government, a cigarette tax has "proven to be one of the most effective means of reducing tobacco use."¹²⁹ It has been most effective with the younger population who cannot afford the higher cigarette prices.¹³⁰ The issue of cigarette taxation has become further analogous to Internet gambling in recent years with the sale of cigarettes online. The sale and purchase of cigarettes online allows both vendors and purchasers to escape a cigarette tax. Vendors evade paying taxes on the income they generate from the sale of cigarettes, thereby giv-

¹²⁶ Ryan S. Landes, Note, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. REV. 913, 927 (2007).

¹²⁷ Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 172 (2006) (indicating that the repeal of the Eighteenth Amendment mirrored "the growing national sense that prohibition was simply not worth the costs of its enforcement").

¹²⁸ Donald J. Boudreaux & A. C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 5 (1994) (asserting that, with the end of prohibition of alcohol sales, "Congress was attempting to overcome a sudden, unexpected, and substantial revenue shortfall that threatened wealth redistribution").

¹²⁹ Samantha K. Graff, *State Taxation of Online Tobacco Sales: Circumventing the Archaic Bright Line Penned by Quill*, 58 FLA. L. REV. 375, 377 (2006).

¹³⁰ *Id.* at 381 (citations omitted).

ing consumers the opportunity to purchase tobacco more cheaply.¹³¹ As state governments are facing a loss of millions of dollars of revenue from unpaid cigarette taxes, many are enacting laws in an attempt to collect those unpaid taxes.¹³²

The similarities between the justifications for the prohibition of alcohol in the beginning of the twentieth century, as well as the taxation of the tobacco industry, and the UIGEA's prohibition of Internet gambling lend support to the argument that refusal to tax online gambling, instead of prohibiting it entirely, will serve only to exacerbate the problems that it allegedly creates. Members of Congress have explicitly characterized anti-Internet gambling laws just as doomed as the alcohol prohibition laws of the 1920s.¹³³ However, proponents of taxation of the Internet gambling industry, whether state-wide or federal, fail to understand the complexity of taxing a business that is located outside of the jurisdiction of the United States. Taxing a domestic corporation involved in online gambling seems simple enough. As has been suggested:

Companies could be taxed on gross income or they could be required to identify gross winnings from each participating state based on the residence of individual players. By strictly regulating the Internet gambling operations, state governments would have the best chances to collect taxes based on the winnings of players.¹³⁴

This proposition has been implemented fairly successfully with the imposed cigarette tax. Yet, the issue becomes far more complicated when the company is located outside of the United States. The United States government does not have the authority to tax a business located in Antigua without the consent of the Antiguan government. Understandably, the Antiguan government is unlikely to consent to such taxation, considering that it derives a substantial portion of its own revenue from the online gambling industry that has found a home on the island nation. Furthermore, even if Antigua were to consent to such taxation, it is unlikely that the portion that it would allow the United States to tax would be enough to convince the United States to forgo prohibition of Internet gambling.

Arguments have also been made that the federal government can tax its citizens' income, regardless of their whereabouts in the

¹³¹ *Id.*

¹³² *Id.* at 377-78 (identifying various strategies that several states have used, including a complete ban on the online sale of tobacco, as well as the requirement that sellers notify purchasers of the state taxes owed).

¹³³ Representative Barney Frank of Massachusetts voiced his expectation that "the American experience with alcohol in the '20s and '30s would have made my colleagues far more skeptical of new forms of prohibition than they have been." Frese, *supra* note 44, at 597.

¹³⁴ *McBurney, supra* note 123, at 356.

world.¹³⁵ However, while the government has the authority to do so, it does not have the ability to tax the winnings of each individual Internet gambler. In a physical casino, taxes are immediately subtracted from winnings when an individual cashes out. Gamblers using websites, in contrast, are able to bypass the taxation process entirely by not reporting their winnings when reporting their annual incomes. This distinction points out the fatal flaw of the aforementioned argument that suggests that the United States benefits from Internet gambling in the same way that Las Vegas benefits from traditional gambling.¹³⁶ The very nature of Internet gambling does not allow the federal government to profit as easily.

Also, while it is undisputed that the government can tax the earnings of gambling website operators who are citizens of the United States, it certainly cannot tax those who are citizens of another country. It is also for this reason that the government cannot employ tactics similar to those used for cigarette taxes, since there is no way to force foreign gambling website operators to immediately set aside a taxed amount for the United States only because their websites are accessible by American citizens.

Establishing a tax regime would potentially place the United States in compliance with the WTO on the WTO's terms, as it would mean the continuation of Internet gambling. However, until an effective and realistic method for the taxation of foreign corporations can be developed, and until the foreign governments permit such taxation, the taxation of the Internet gambling industry is an impossibility that works only in theory. When examined in closer detail, it becomes evident that the international nature of Internet gambling, and its inherent differences from the domestic sale of cigarettes, leads to the conclusion that it simply cannot be taxed in the same way as cigarettes. The United States could not rely on taxation as an alternative to withdrawing from its Internet gambling commitments.

C. *Domestic vs. International Concerns*

In addition to the lack of feasible taxation opportunities, the international implications of withdrawal from Internet gambling commitments under the GATS are not sufficient to warrant compliance by the United States in light of the WTO decision against it. The domestic concerns that are associated with Internet gambling far outweigh any international aftereffects of withdrawal. In effectively putting an end to gambling over the Internet, the federal government addressed its various concerns that the industry leads to a deterioration of moral values and an increase in

¹³⁵ *Id.* at 355-56.

¹³⁶ See generally Landes, *supra* note 126.

crime.¹³⁷ Critics of anti-Internet gambling legislation, however, have argued that these concerns are unfounded and exaggerated by the government.¹³⁸ Opponents of a prohibition of Internet gambling argue that problems dealing with fraud are often merely discussed in the abstract without concrete instances for support.¹³⁹ These same critics have insisted that regulation of the Internet gambling industry through a system of oversight and taxation is the best solution, albeit an imperfect one, to the problems the federal government associates with Internet gambling.¹⁴⁰ All the legislation that has been passed in an effort to eliminate online gambling will not serve as an effective deterrent, as gamblers will simply find ways around the system.

Deducible from the aforementioned argument is the idea that domestic concerns – which, according to some, are overstated – are insignificant compared to the international implications of withdrawal for the United States. Setting aside the virtually ineffective potential economic repercussions from Antigua as a result of actions by the United States, other members of the international community who wish to protect their own Internet gambling industries may choose to take measures against the United States in response to its withdrawal from its trade commitments in these services under the GATS. Nations such as England and Australia, for instance, both members of the WTO, have taken steps against the prohibition of Internet gambling.¹⁴¹ In fact, Australia legalized Internet gambling in 1997, which was before many other countries took any steps at all to recognize the growing industry.¹⁴² Since then, the Australian government's growing concerns with online gambling, similar to those of the United States government, led to the enactment of the Interactive Gambling Act of 2001 ("IGA").¹⁴³ The IGA prohibited online versions of games of chance, while still allowing sports betting.¹⁴⁴ However, the IGA did not prohibit the use of websites for games of chance based in jurisdictions outside of Australia.¹⁴⁵ In this regard, while Australia limited its domestic Internet gambling operations, it did not in-

¹³⁷ See *supra* Part II.B for a detailed discussion on the motivations behind anti-Internet gambling legislation.

¹³⁸ Landes, *supra* note 126 (arguing for regulation of the industry rather than an outright prohibition).

¹³⁹ *Id.* at 941 ("Newspapers and the Congressional Record describe fraud as a problem with online gambling, but rarely do we see references to actual events. To the extent the problem exists at all, it results from a few bad apples.")

¹⁴⁰ *Id.* at 943.

¹⁴¹ See Park, *supra* note 60, at 521 (indicating that England is one of several countries "liberalizing their regulations of online gambling operations"). See McBurney, *supra* note 123, at 355, for a discussion of online gambling in Australia.

¹⁴² McBurney, *supra* note 123, at 355.

¹⁴³ Interactive Gambling Act, 2001 (Austl.).

¹⁴⁴ McBurney, *supra* note 123, at 355.

¹⁴⁵ *Id.*

fringe on its international agreements by prohibiting foreign website operators from accessing the Australian market.

The anti-Internet gambling legislation in the United States, especially the UIGEA, has had a significant impact on those countries which believe in the regulation rather than prohibition of online gambling. Following the passage of the UIGEA in 2006, gambling websites traded on the London Stock Exchange lost \$8 billion.¹⁴⁶ In response to the UIGEA and the subsequent adverse impact on the English market, the United Kingdom issued a statement that discouraged the international community from prohibiting Internet gambling and criticized the United States for its actions.¹⁴⁷ Critics of the United States have argued that, while any retaliatory measures by Antigua are likely to be inconsequential, any sort of sanctions taken by nations such as England or Australia against the United States will be far more noticeable.¹⁴⁸

Moreover, it has also been argued that withdrawal from its Internet gambling commitments under the GATS, while lawful, will be damaging to the United States' reputation within the international community.¹⁴⁹ Rather than seeking a compromise and an alternate solution, the United States' decision to withdraw "could be viewed as duplicitous and would undermine U.S. credibility in any future negotiations of international agreements, even those outside the context of the WTO."¹⁵⁰ The marring of the United States' international reputation, it is thereby argued, will have a more damaging effect on the American economy and culture than a compromise that would allow for the continuation of Internet gambling.

While these arguments contain some strength, they are flawed. Setting aside agreements made as a member of the WTO, the United States has often failed to comply with international law, with minimal repercussions. On several occasions, the United States has either blatantly disregarded or manipulated aspects of the United Nations Charter so that it would better suit its own needs. The Charter is itself an international treaty of which 192 countries are members.¹⁵¹ The most obvious instances of United States violations involve its interventions in the affairs of other countries without the proper authorization from the United Nations Security Council ("SC"). While Article 2, Section 4 of the Charter explicitly prohibits the use of force against another na-

¹⁴⁶ Grunfeld, *supra* note 33, at 442.

¹⁴⁷ *Id.* at 498-99.

¹⁴⁸ Park, *supra* note 60, at 522.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ United Nations, List of Member States, <http://www.un.org/members/list.shtml> (last visited Nov. 20, 2007).

tion,¹⁵² Articles 39 through 51 allow for it under the express authorization of the SC.¹⁵³ While the SC granted authorization for the use of force during the first Gulf War, it has failed to do so for the current conflict in Iraq. Nevertheless, the United States has argued that the SC's prior authorization continues to extend to the present conflict and that the United States is not in violation of its treaty agreements to refrain from the use of force. President George W. Bush insisted that "under [the SC Resolutions authorizing the use of force in the first Gulf War] – both still in effect – the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction."¹⁵⁴

In another instance, in 1999, the United States led a campaign as a member of the North-Atlantic Treaty Organization ("NATO") for an alleged humanitarian intervention in Kosovo, once again in the absence of express authorization by the SC. This time, the United States argued that its intervention could be justified morally and politically, and that circumstances such as those in Kosovo at the time require a certain degree of flexibility in international agreements.¹⁵⁵ The government maintained that "UN Security Council resolutions mandating or authorizing NATO efforts are not required as a matter of international law."¹⁵⁶

While these instances of disregard for the United States' international responsibilities are not condonable, they do serve to illustrate that the United States is very familiar with various forms of noncompliance and manipulation of its agreements with other nations. The United States is unlikely to face significant consequences as a result of its withdrawal from its Internet gambling commitments under the GATS, and therefore can feel at ease allowing its domestic concerns to supersede any international implications that may arise as a result of its anti-Internet gambling legislation. Thus far, aside from some criticism, the international reaction has been limited to eight WTO members, requesting compensation as a result of the withdrawal.¹⁵⁷ The United States has reached settlements with all but Antigua.¹⁵⁸

¹⁵² U.N. Charter art. 2, para. 4.

¹⁵³ *Id.* at arts. 39-51.

¹⁵⁴ News Release, President George W. Bush, *Address to the Nation, President Says Saddam Hussein Must Leave Iraq Within 48 Hours* (Mar. 17, 2003), <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html>.

¹⁵⁵ *NATO's 50th Anniversary Summit: Hearing Before the S. Subcomm. on European Affairs*, 106th Cong. (1999) (statement of The Honorable Franklin D. Kramer, Assistant Secretary of Defense, International Security Affairs).

¹⁵⁶ *Id.*

¹⁵⁷ Lester, *supra* note 3.

¹⁵⁸ *Id.*

V. CONCLUSION

The Internet gambling industry has the potential to be highly lucrative for the United States. However, it also has the capacity to create more problems than it is worth. The expanding online gambling market is becoming easily accessible by a vulnerable younger population. There is still a need for a system that proves to be effective in verifying the age of Internet gamblers. The lack of such a system allows for the open access of an enticing and addictive industry to a generation that is not yet equipped to resist its adverse effects.

The government of the United States must be dedicated to promoting the safety and welfare of its citizens. This responsibility must, in turn, be balanced with the nation's international responsibilities. The current dispute between the United States and Antigua demonstrates the nation's efforts to balance those expectations. Arguably, the United States acted drastically and unnecessarily when it withdrew from its Internet gambling commitments under the GATS. However, despite being a controversial move, it was, and remains, the best option for the United States in light of the present circumstances. At the present time, the United States lacks a clear incentive to be subject to its Internet gambling commitments. Imposing a tax on the industry is currently not a feasible option, considering Internet gambling's international nature. Furthermore, the domestic importance of anti-Internet gambling legislation trumps the international implications of withdrawal from Internet gambling commitments under the GATS.

Until an effective means of regulation of the Internet gambling industry is developed, the United States must continue on its current path. If the federal government wishes to reexamine its policy on Internet gambling in the future, it will once again be forced to make a choice between domestic concerns and international implications. Perhaps differing circumstances in the future will compel the United States to reach a different conclusion.

*Yevgeniya Roysen**

* Yevgeniya Roysen, Articles Editor, CARDOZO ARTS & ENT. L.J.; J.D. Candidate, 2009, Benjamin N. Cardozo School of Law; B.A., 2006, Economics and History, magna cum laude, New York University. I would like to thank my incredible family, especially my mother, Polina Roysen, and my sister, Marianna Kliger, for their never-ending love and support. A special thank you to Gene Birz for his motivation and insight. And many thanks to Vice Dean Michael Herz for his guidance and to the staff and board of the AELJ. © 2009 Yevgeniya Roysen.