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Betting on the Wrong Horse: The Detrimental Effect of Noncompliance in the Internet Gambling Dispute on the General Agreement on Trade in Services (GATS)

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BETTING ON THE WRONG HORSE: THE DETRIMENTAL EFFECT OF NONCOMPLIANCE IN THE INTERNET GAMBLING DISPUTE ON THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

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INTRODUCTION

Over the past decade, Internet gambling has become a global force. In 2003, the projected industry revenues summed five billion dollars worldwide.¹ With the click of a button, bettors could link up with counterparts in other parts of the globe for a poker tournament or a game of blackjack. As other countries embraced the operators of this new recreational activity, recognizing it as an opportunity to spur economic growth and bring in valuable tax revenue, the United States began to crack down on the industry.²

As part of this crackdown, the U.S. federal government and the states started to pass and enforce regulations prohibiting Internet gambling, resulting in the arrest and conviction of executives of foreign gambling operations who dared to set foot on U.S. soil.³ This onslaught against the foreign gaming industry did not go unnoticed, however, and eventually, one small country, Antigua and Barbuda, attempted to fight back against what it perceived as unfair discrimination against one of its primary sources of income. Antigua brought a complaint against the United States to the World Trade Organization (WTO), alleging violations of U.S. obligations under the General Agreement on Trade in Services (GATS).⁴ The WTO found the United States to be in violation of a specific provision of GATS and ordered the United States to bring federal law into

1. U.S. GEN. ACCOUNTING OFFICE, GAO-03-89 INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 1 (2002), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-89> [hereinafter INTERNET GAMBLING: AN OVERVIEW].

2. See Joseph J. McBurney, Note, *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, 340-45 (2006) (discussing the growth of the Internet gaming industry abroad and U.S. opposition to the industry).

3. See Carrie Johnson, *U.S. Raises Stakes for Online Gamblers; Super Sunday Is Biggest Betting Day*, WASH. POST, Feb. 4, 2007, at A1 (noting that "the wave of criminal charges against individual executives and businesses ... prompted a real exodus from the U.S. market"). One U.S. Attorney has stated that "[c]riminal prosecutions related to online gambling will be pursued even in cases where assets and defendants are positioned outside of the United States." *Id.*

4. See Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, ¶ II.2.1 (Nov. 10, 2004) [hereinafter Gambling Panel Report].

conformity with its GATS obligations.⁵ Though many scholars consider the violation to be minor and the fix relatively uncomplicated,⁶ thus far the United States has failed to comply with the WTO's recommendations.⁷

The Dispute Settlement Understanding (DSU) governs disputes, such as this one, that arise under GATS, as well as disputes under other WTO agreements.⁸ The DSU vests adjudicatory power in the WTO for all disputes that arise under WTO agreements.⁹ Although WTO member nations have failed to comply on occasion with WTO decisions involving violations under other agreements—such as the General Agreement on Trade in Tariffs (GATT) or Trade-Related Aspects of Intellectual Property Rights (TRIPS)—this lack of compliance has not proved fatal to these agreements.¹⁰ GATS, however, is a fairly young multinational trade agreement, and some scholars argue that GATS has struggled to shape its identity amidst problems with overly flexible provisions and lack of attention from WTO ministers.¹¹ Although most countries are likely to acknowledge that the agreement has been a relative success thus far,¹² it has yet

5. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, ¶¶ 373(D)(vi)(a), 374 (Apr. 7, 2005) [hereinafter *Gambling Appellate Body Report*].

6. See, e.g., I. Nelson Rose, *U.S. Ignores Deadline in WTO Fight with Antigua*, 10 GAMING L. REV. 225, 225-26 (2006) (arguing that the WTO Appellate Body decision was a “big win” for the United States and that compliance with the decision would require “just a little tweaking of the Interstate Horseracing Act”).

7. See *infra* Part II.D.

8. See World Trade Org., Dispute Settlement System Training Module ch. 4: Legal Basis for a Dispute, § 4.4, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c4s4p1_e.htm (last visited Nov. 29, 2007) [hereinafter *Legal Basis for a Dispute*].

9. David Evans & Celso de Tarso Pereira, *DSU Review: A View from the Inside*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 251, 252 (Rufus Yerxa & Bruce Wilson eds., 2005).

10. See *infra* Parts III.D-E.

11. See Rudolf Adlung, *Services Negotiations in the Doha Round: Lost in Flexibility?*, 9 J. INT'L ECON. L. 865, 865-66 (2006) (“Services have not attracted much attention in most World Trade Organization ... Ministerial Conferences.... [I]t became increasingly clear ... that the absence of negotiating frictions coincided with, and might have been attributable to, an almost complete lack of commercially meaningful substance.”).

12. Juan A. Marchetti & Petros C. Mavroidis, *What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution*, 5 EUR. BUS. ORG. L. REV. 511, 524 (2004) (“[T]he WTO membership does not seem to be discontent with the GATS architecture.... [F]or the time being at least, there is widespread belief among institutional players (the WTO Members) that the GATS is a satisfactory compromise.”).

to weather any serious tests to its legitimacy. Because it was instrumental in the formation of GATS,¹³ other countries will likely look to the United States as an example when deciding whether to comply with WTO decisions under GATS.

The outcome of the gambling dispute may prove to be a bellwether for the success or failure of the agreement as a mechanism for regulating trade in services. This Note argues that if the United States fails to respond appropriately to the recommendations made by the WTO, the legitimacy of GATS as a mechanism for regulating trade in services disputes will be undermined. Without legitimacy, GATS becomes nothing more than symbolic lip service to the importance of liberalization in the service trade. Member nations will perceive the agreement as a weak guarantor of rights and, as a result, will be less likely to resort to the GATS dispute mechanism should a service trade dispute arise. This in turn may compel WTO members to take unilateral action to enforce their rights, leading to elevated hostilities and possible trade wars. To avoid these devastating results and to preserve GATS, the United States should adopt the WTO recommendations proffered in the gambling dispute.

Part I provides background on the Internet gambling industry, both in Antigua and worldwide. Part II discusses Antigua's complaint against the United States and the WTO decision in the gambling dispute and sets forth the basic GATS and DSU provisions governing such a dispute. Part III considers the benefits of maintaining a strong mechanism for resolving service trade disputes under GATS and addresses specific compliance issues under the DSU generally. Part IV analyzes previous compliance issues under other WTO agreements and explains why noncompliance in the gambling dispute, in particular, is more likely to damage the pertinent multilateral trade agreement, GATS. Finally, this Note argues for the United States's quick adoption of the WTO recommendations in the gambling dispute to preserve the legitimacy of GATS.

13. See *infra* Part IV.B.

I. THE RISE AND FALL OF INTERNET GAMBLING

In 2002, the United States jailed Jay Cohen, an operator of World Sports Exchange Ltd., for violations of a federal law¹⁴ prohibiting the use of phone wires for gambling.¹⁵ Cohen had based his Internet gambling empire out of Antigua and Barbuda, a tiny island nation in the Caribbean, and the operation accepted bets from the United States.¹⁶ Cohen returned to the United States voluntarily, but, once he set foot on U.S. soil, the FBI took him into custody in an attempt to crack down on what the United States perceived as illegal Internet gambling.¹⁷ He received a twenty-one month sentence after the Court of Appeals for the Second Circuit affirmed his conviction on eight counts of conspiracy and substantive offenses in violation of the federal Wire Act.¹⁸ Just before Cohen began serving his sentence, he received a mysterious letter suggesting that the United States might be violating its international trade commitments.¹⁹ Cohen notified Antigua of this possibility, and although Antigua was reluctant to spend any of its small budget on a major legal undertaking at the WTO, the gambling industry eventually fronted the money on behalf of the island nation.²⁰

Gambling operators and bettors alike have been focused on the *Cohen* case since its inception. Internet gambling has enjoyed an explosion of popularity over the past decade and has evolved from an enjoyable pastime into a multimillion-dollar industry.²¹ By 1995, the first Internet gambling sites were up and running.²² Seven years later, about 1800 gambling websites existed.²³ These websites' oper-

14. Cohen was indicted under the Wire Act, 18 U.S.C. § 1084 (2000), which prohibits the knowing use of wire communication to transmit bets or information that assists in placing bets on sporting events or contests.

15. Paul Blustein, *Against All Odds; Antigua Besting U.S. in Internet Gambling Case at WTO*, WASH. POST, Aug. 4, 2006, at D1.

16. *Id.*

17. *Id.*

18. § 1084; see *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (affirming the judgment of the district court sentencing Cohen to a term of twenty-one months in prison).

19. Blustein, *supra* note 15.

20. *Id.*

21. See INTERNET GAMBLING: AN OVERVIEW, *supra* note 1.

22. McBurney, *supra* note 2, at 339.

23. See INTERNET GAMBLING: AN OVERVIEW, *supra* note 1.

ators often flocked to smaller countries that were willing to loosen regulations on gambling operators in exchange for the industry's attendant economic prosperity.²⁴

Antigua and Barbuda was among the first countries to allow gambling companies to locate on its shores. Initially Antigua permitted the operators to accept foreign bets without paying taxes,²⁵ and by 1999, the tiny island nation hosted 119 operators.²⁶ Antigua's only form of regulation was required licensing fees, which created revenue.²⁷ The gambling companies also provided a boost to the local economy through the creation of jobs. At its peak, the gambling industry provided around 10 percent of Antigua's gross domestic product.²⁸

Although the gambling industry on Antigua began virtually unregulated, requiring only a licensing fee, by 2001 the country had set up a Gaming Directorate to oversee the industry and had improved regulations to better protect players and reduce financial fraud.²⁹ Antigua made this shift in response to U.S. concerns about unregulated Internet gambling. The move proved costly, however, and by 2003 the number of operators on Antigua dropped to only twenty-eight, which in turn negatively affected the job market and licensing revenue.³⁰ More than 3,000 Antiguanans, or about 10 percent of the total workforce, found themselves jobless after the U.S. crackdown on Internet gambling.³¹

24. See Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 42-43 (2002); Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1570-71 (1999).

25. Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 128 (2000).

26. Gambling Panel Report, *supra* note 4, ¶ 3.5.

27. Kelly, *supra* note 25, at 128.

28. Gambling Panel Report, *supra* note 4, ¶ 3.5.

29. *Id.* ¶¶ 3.5-3.6.

30. *Id.* ¶ 3.5.

31. Carol J. Williams, *High Stakes for Antigua in Fight for Web Gaming*, L.A. TIMES, Nov. 12, 2006, at C1.

II. DISPUTE SETTLEMENT UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

A. Antigua Fights Back

Antigua's complaint to the WTO alleged that the United States's ban on "remote-access" international gambling and restrictions on international payments for such services were inconsistent with U.S. obligations under the General Agreement on Trade in Services (GATS).³² Antigua alleged that those obligations required the United States to allow other member nations equal access to its domestic gambling and betting markets.³³

In the complaint, Antigua also contended that the drastic reduction in licensed gaming operators on the island was due primarily to both "the increased standards of regulation," which drove some operators to seek out countries with more relaxed standards of operation, and to the "increasingly aggressive strategy on the part of the United States to impede the operation of cross-border gaming activities in Antigua."³⁴ As examples of such a strategy, Antigua pointed to the restrictions on international transfers and payments for gambling services in the United States,³⁵ and to the fact that the U.S. government permits local and regional

32. Gambling Panel Report, *supra* note 4, ¶ 2.1. Specifically, Antigua alleged that U.S. measures were inconsistent with its Schedule of specific commitments under GATS, in which the United States committed to the open exchange of "[o]ther recreational services (except sporting)," and with GATS Articles XVI:1-2, which deal with market access commitments; XVII:1-3, which deal with national treatment commitments; VI:1-3, which provide for the reasonable and objective administration of domestic regulations affecting trade in services; and XI:1, which prohibits restrictions on payments and transfers for transactions relating to a member's specific commitments. *Id.* ¶¶ 2.1, 3.30.

33. *Id.* ¶¶ 2.1, 3.221-224.

34. *Id.* ¶ 3.5.

35. The federal laws at issue included the Wire Act, 18 U.S.C. § 1084 (2000), prohibiting the knowing use of wire communication to transmit bets or information that assists in placing bets on sporting events or contests; the Travel Act, 18 U.S.C. § 1952 (2000), criminalizing the distribution of the proceeds of illegal activities like gambling; and the Illegal Gambling Business Act, 18 U.S.C. § 1955 (2000), criminalizing the operation of a gambling business that violates the laws of the state in which the gambling occurs.

authorities to allow many different types of gambling services while simultaneously excluding foreign providers of those same services.³⁶

B. Basic Provisions of GATS

Because Antigua's complaint dealt with Internet gambling, which is considered a service, the dispute fell under the purview of GATS. GATS was enacted in 1995 as a result of the Uruguay Round of WTO negotiations.³⁷ Its stated purpose is to "establish a multilateral framework of principles and rules for trade in services with a view to expansion of such trade under conditions of transparency and progressive liberalization" and to "promot[e] the economic growth of all trading partners and the development of developing countries."³⁸

GATS includes both general obligations, which apply to all member countries, and a schedule of sector-specific commitments, which are commitments by individual members with regard to a specific service area.³⁹ As part of the general obligations, GATS mandates most-favored-nation treatment among its members. This provision requires that each member treat the services and service suppliers of other members as favorably as it treats those of any other country.⁴⁰ The general obligations also provide for transparency among member nations with regard to relevant measures relating to services.⁴¹ Furthermore, a member is required to provide

36. Gambling Panel Report, *supra* note 4, at Annex D. The state constitutions and laws involved in Antigua's complaint were: N.J. CONST. art. 4, § VII, para. 2; N.Y. CONST. art. I, § 9; COLO. REV. STAT. § 18-10-103 (2006); LA. REV. STAT. ANN. § 14:90.3 (2006); MASS. ANN. LAWS ch. 271, § 17A (LexisNexis 2006); MINN. STAT. ANN. §§ 609.75, 609.755(1) (West 2006); N.J. ADMIN. CODE § 2A:40-1 (2006); N.Y. GEN. OBLIG. LAW § 5-401 (McKinney 2006); S.D. CODIFIED LAWS §§ 22-25A-1 to -15 (2006); UTAH CODE ANN. § 76-10-1102 (2006). Gambling Panel Report, *supra* note 4, ¶ 7.1.

37. The General Agreement on Trade in Services: An Introduction 1 (2006), http://www.wto.org/english/tratop_e/serv_e/serv_e.htm [hereinafter Introduction to GATS] (follow "Introduction to GATS" hyperlink under "Introduction to Services Trade and the WTO Agreement").

38. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1168 (1994) [hereinafter GATS]; *see also* Introduction to GATS, *supra* note 37, § 1.2.

39. GATS, *supra* note 38, at 1169-80.

40. *Id.* at 1169.

41. *Id.* at 1170.

market access to all other members in the sectors specified in its Schedule.⁴²

The provision of GATS most relevant to the gambling dispute relates to national treatment. Members are prohibited from according domestic services and service suppliers more favorable treatment than accorded to other members in the sectors specified in their Schedules.⁴³ The primary thrust of Antigua's complaint against the United States was that the United States was not abiding by its commitment to treat both foreign and domestic gambling operators equally.⁴⁴ Antigua noted that each nation's Schedule of specific commitments was voluntarily adopted, and if the United States had wanted to exclude gambling and betting services from its general obligations under GATS, such as was done for national treatment and market access commitments, it simply had to say so.⁴⁵

C. Remedies Available Under the Dispute Settlement Framework

To resolve violations of GATS commitments, such as those alleged by Antigua against the United States, GATS member nations must appeal to remedies available through the WTO, whose power to resolve disputes under GATS is somewhat limited. The framework setting forth the procedure to address disputes under GATS is embodied in the Dispute Settlement Understanding (DSU).⁴⁶ The DSU was adopted after the Uruguay Round as "a single compulsory mechanism of dispute settlement for all WTO agreements."⁴⁷ Under the DSU, the parties to a complaint must first engage in consultations to try and find "a mutually agreed solution."⁴⁸ If the consultations fail to resolve the dispute, the complainant has recourse to the Dispute Settlement Body (DSB) for adjudication.

42. *Id.* at 1179.

43. *Id.* at 1180.

44. Gambling Panel Report, *supra* note 4, ¶ 2.1.

45. *Id.* ¶¶ 3.30-70.

46. See Legal Basis for a Dispute, *supra* note 8.

47. Evans & Pereira, *supra* note 9, at 252.

48. World Trade Org., Dispute Settlement System Training Module ch. 6: The Process—Stages in a Typical WTO Dispute Settlement Case, § 6.1, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s1p1_e.htm (last visited Nov. 29, 2007) [hereinafter DSU Process].

The DSB consists of a Dispute Panel and, if necessary, an Appellate Body.⁴⁹ The remedies available at the DSB level are limited to settlement, withdrawal of the measure, compensation, and retaliation.⁵⁰ When a nation takes an action that is inconsistent with its agreements under GATS, the Dispute Panel and Appellate Body may recommend that the nation come into conformity with its obligations and suggest ways to do so, but these bodies cannot add to or take away from a member's commitments or rights.⁵¹ For example, the Dispute Panel may not unilaterally eliminate a particular commitment under a nation's Schedule of specific commitments. If, after the DSB has made a recommendation, the offending member fails to bring itself into conformity with its GATS agreements, only then may the Dispute Panel and Appellate Body authorize countermeasures, such as compensation by the offending nation to the complainant, or retaliation, which usually takes the form of countermeasures such as the suspension of the offender's concessions under GATS.⁵²

D. Outcome of Antigua's Complaint

Antigua initiated its dispute in 2003 by requesting consultations with the United States, as required by the GATS dispute settlement framework.⁵³ The United States and Antigua, however, were unable to reach a satisfactory conclusion during the consultation phase of the proceedings.⁵⁴ When consultations in the gambling dispute failed to produce a result, Antigua requested that the DSB establish

49. *Id.*

50. World Trade Org., Dispute Settlement System Training Module ch. 7: Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings, § 7.1, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s1p1_e.htm (last visited Nov. 29, 2007) [hereinafter Legal Effect].

51. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1237 (1994) [hereinafter DSU].

52. Legal Effect, *supra* note 50.

53. Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/1, S/L/110 (Mar. 27, 2003); *see supra* Part II.C.

54. 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/DS285/18 (July 7, 2006).

a panel on July 12, 2003,⁵⁵ and the DSB established such a panel on July 21, 2003.⁵⁶

After considering Antigua's complaint, the Dispute Panel largely agreed with Antigua, finding that gambling and betting services did indeed fall under the purview of U.S.-specific commitments involving "other betting services."⁵⁷ Because gambling and betting services were included in its Schedule, the United States was required to allow equal access to foreign providers of such services pursuant to the national treatment provision of GATS.⁵⁸ Additionally, the Panel found that the United States had violated Article XVI of GATS, the market access provision,⁵⁹ with respect to certain federal and state laws.⁶⁰

The United States made clear that if this decision withstood appeal, it had no intention of bringing its laws into conformity with the Panel's recommendations. A senior U.S. trade official described the Panel Report as "ludicrous,"⁶¹ and the Office of the U.S. Trade Representative released a statement describing the decision as

55. *Id.*

56. *Id.*

57. Gambling Panel Report, *supra* note 4, ¶ 7.2(a).

58. *Id.* ¶ 7.2(b).

59. Article XVI of GATS, the market access provision, reads: "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." GATS, *supra* note 38, at 1179. The provision goes on to explain the specific types of measures that a member is not allowed to maintain in sectors where market access commitments are undertaken, including numerical quotas, monopolies or other limits on the number of service suppliers, the total value of service transactions, the total number of service operations, or the total number employed in that sector. *Id.* Prohibitions on limits are also placed "on the participation of foreign capital ... or the total value of individual or aggregate foreign investment" in a particular sector. *Id.*

60. Gambling Panel Report, *supra* note 4, ¶ 7.2. The laws found to be in violation included the Wire Act, the Travel Act, and the Illegal Gambling Business Act, when read together with certain state laws, as well as the state gambling laws of Louisiana, Massachusetts, South Dakota, and Utah. *See* LA. REV. STAT. ANN. § 14:90.3 (1998); MASS. GEN. LAWS ch. 271, § 17A (2000); S.D. CODIFIED LAWS § 22-25A-8 (2006); UTAH CODE ANN. § 76-10-1102(b) (2006).

61. William New, *E-Commerce: U.S. Outraged at "Ludicrous" WTO E-Gambling Decision*, NAT'L JOURNAL'S TECH. DAILY (Nov. 10, 2004) (on file with author).

“deeply flawed.”⁶² This was the first time in WTO history that the United States took such a contrary position to a DSB finding.⁶³

Fortunately for the United States, the Appellate Body rejected much of the Panel’s findings on appeal. The Appellate Body agreed that the United States’s Schedule included commitments about gambling and betting services, but found that the Panel had erred in examining whether state laws were consistent with GATS.⁶⁴ The Appellate Body also found that the federal laws at issue were “necessary to protect public morals or to maintain public order”⁶⁵ and, as such, were exceptions to U.S. commitments under GATS.⁶⁶

The only finding of noncompliance occurred with respect to the Interstate Horseracing Act (IHA), which the Appellate Body found discriminated between “foreign and domestic service suppliers of remote betting services for horse racing.”⁶⁷ The IHA permits off-track pari-mutuel betting via telephone or electronic media if the bet is both sent from and received in a state where such betting is legal.⁶⁸ The Appellate Body then recommended that the United States bring the IHA into conformity with its GATS agreements.⁶⁹

After the ruling, an arbitrator set April 3, 2006, as a reasonable deadline for the United States to comply legislatively with the Appellate Body’s recommendations.⁷⁰ This deadline passed, however, without a response from the United States.⁷¹ A week later, the

62. Press Release, Office of the U.S. Trade Representative, Statement of Richard Mills, USTR Spokesman, Regarding the WTO Gambling Dispute with Antigua and Barbuda (Nov. 10, 2004), available at <http://geneva.usmission.gov/press2004/101104gambling.htm> (“[T]he Clinton Administration clearly intended to exclude gambling from U.S. services commitments.... [I]t defies common sense that the United States would make a commitment to let international gambling operate within our borders.”).

63. John Magnus, *Compliance with WTO Dispute Settlement Decisions: Is There a Crisis?*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 242, 243 & n.2 (Rufus Yerxa & Bruce Wilson eds., 2005).

64. Gambling Appellate Body Report, *supra* note 5, ¶¶ 373(A)(iii), 373(B).

65. *Id.* ¶ 373(D)(iii)(c).

66. GATS, *supra* note 38, at 1177 (providing that nothing in GATS prevents any Member from maintaining measures necessary to ensure public morals and order).

67. Gambling Appellate Body Report, *supra* note 5, ¶ 373(D)(vi)(a).

68. Interstate Horseracing Act of 1978, 15 U.S.C. § 3001-07 (2000).

69. Gambling Appellate Body Report, *supra* note 5, ¶ 374.

70. Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Dispute, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/13, ¶ 68 (Aug. 19, 2005).

71. Rose, *supra* note 6, at 226.

United States submitted a report to the WTO stating that it believed that the IHA was already in compliance with U.S. obligations under GATS.⁷² Dissatisfied with this response, Antigua requested the establishment of a panel to determine whether the United States had in fact complied with the DSB recommendations.⁷³ The Panel concluded that the United States “failed to comply with the recommendations and rulings of the DSB in this dispute.”⁷⁴ Pursuant to this ruling, Antigua applied to suspend concessions under GATS to the United States at a level that would match the “nullification or impairment of benefits accruing to Antigua and Barbuda, amounting to an annual value of US\$3.443 billion, as a result of the United State’s failure ... to bring its measures affecting the cross-border supply of gambling and betting services into compliance with the GATS”⁷⁵ The United States has requested arbitration as to the level of suspension of concessions and obligations under GATS that Antigua has called for,⁷⁶ but this arbitration has not yet taken place.⁷⁷

III. COMPLIANCE UNDER THE WTO DISPUTE SETTLEMENT FRAMEWORK

A. Benefits of a Strong Agreement for Regulation of Trade in Services

The U.S. response to the gambling dispute with Antigua threatens to undermine the process through which rights and obligations

72. Request for the Establishment of a Panel By Antigua and Barbuda, *supra* note 54.

73. *Id.*

74. Recourse to Article 21.5 of the DSU by Antigua and Barbuda—Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW, ¶ 7.1 (Mar. 30, 2007).

75. Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/22 (June 22, 2007).

76. Request by the United States for Arbitration Under Article 22.6 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/23 (July 24, 2007).

77. See Recourse by the United States to Article 22.6 of the DSU—Note by the Secretariat, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/24 (Aug. 6, 2007).

under GATS are enforced internationally. Maintaining a legitimate mechanism for regulating the service trade is important for a number of reasons. First, GATS aims at removing restrictions to international trade in services. Such liberalization increases economic growth and efficiency in the markets of GATS members, as services begin to be provided along the lines of comparative advantage.⁷⁸ Furthermore, having a centralized dispute settlement mechanism for the services trade increases “security and predictability” for all trade participants.⁷⁹ The DSU does this by providing a single forum for resolving all GATS disputes, which adds to the efficiency and timeliness of outcomes and consistency in interpretation of the GATS agreement.⁸⁰ Additionally, without a legitimate agreement under which to enforce rights and obligations, service trade commitments become nothing more than straw men that nations can abide by or ignore at will.⁸¹ Such an arrangement would clearly disfavor weaker nations, which often lack the economic and political clout to enforce their own rights on the open market.⁸² Finally, maintaining a centralized framework for regulation of the services trade under GATS decreases the likelihood of unilateral actions by members who believe their rights have been violated. Unilateral actions have a tendency to escalate to the point of trade war, with each side maintaining that its actions are justified while simultaneously condemning similar actions by a fellow member.⁸³

B. Statistics on Compliance with the DSU

Since its inception, the DSU has had considerable success as a mechanism for resolving trade disputes under the various WTO agreements. During the first ten years of its existence, the DSB saw 324 cases formally initiated, but only 107 of these cases resulted in

78. See Mahmood Bagheri & Chizu Nakajima, *Optimal Level of Financial Regulation Under the GATS: A Regulatory Competition and Cooperation Framework for Capital Adequacy and Disclosure of Information*, 5 J. INT'L ECON. L. 507, 514-16 (2002).

79. LEGAL AFFAIRS DIV. & THE APPELLATE BODY, WORLD TRADE ORG., A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 2 (2004) [hereinafter HANDBOOK ON WTO DISPUTE SETTLEMENT].

80. See *id.* at 2-7.

81. See *id.* at 2-3.

82. See *id.* at 1.

83. See *id.* at 7.

the creation of a panel to adjudicate the complaint.⁸⁴ The remaining cases were either settled through the formal consultation procedure required by the DSU or abandoned.⁸⁵ Of the 107 cases that a panel heard and that resulted in a panel report, two-thirds were later appealed, but only one-sixth led to the formation of a compliance panel.⁸⁶ These statistics reveal that, in general, the dispute settlement framework has been successful in resolving trade disputes under the WTO.

One scholar has pointed to three reasons why most nations comply with WTO mandates. These include the desire to maintain one's reputation as a member nation that adheres to its WTO agreements, fear of retaliation authorized by the WTO dispute settlement bodies, and fear of encouraging noncompliance by other member nations in future WTO disputes.⁸⁷ Larger member nations are afraid that setting an example of noncompliance will create a negative stigma and lead to distrust in future bargaining. Smaller members, already burdened with the high cost of litigating a dispute under the DSU, cannot afford to suffer economic sanctions or suspension of concessions from larger, more robust countries.

C. Problems with Compliance

Despite the WTO's success in resolving trade disputes, some roadblocks have existed along the road toward achieving compliance. One of the major problems with the DSU is that although the WTO self-describes its decisions as binding upon member nations,⁸⁸ at the end of the day these decisions are still merely recommendations. The WTO contends that usage of the term "recommendation" "should not be understood to give the party discretion as to whether

84. Bruce Wilson, *The WTO Dispute Settlement System and Its Operation: A Brief Overview of the First Ten Years*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, *supra* note 9, at 15, 20-21.

85. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 46 (2005); Wilson, *supra* note 84, at 20-21.

86. Wilson, *supra* note 84, at 21.

87. Magnus, *supra* note 63, at 244-45.

88. HANDBOOK ON WTO DISPUTE SETTLEMENT, *supra* note 79, at 88 ("After the DSB adopts a report of a panel (and the Appellate Body), the conclusions and recommendations contained in that report become binding upon the parties to the dispute.").

to follow the recommendation.”⁸⁹ As one scholar has noted, however, “the verb ‘to recommend’ is less coercive than ‘to order’ or ‘to require’, but more compulsive than ‘to suggest’, ‘to note’, or ‘to observe’.”⁹⁰ The WTO bodies therefore may construct remedies that are highly persuasive, but difficult to enforce nonetheless.

Because the WTO has no means of forcing countries to adhere to its recommendations, it has relied primarily on voluntary compliance with its decisions by member nations. As noted, this voluntary system has worked in a majority of disputes, even those involving the United States.⁹¹ In general, the United States has been compliant in cases that required only administrative action to implement the recommendations of the DSB.⁹² Between 1995 and 2004, the United States was the most active participant in dispute settlement, litigating as the respondent in fifty-seven disputes and participating thirty-nine times in cases that were appealed to the Appellate Body.⁹³ Out of those disputes that ended adversely for the United States and required only an administrative solution, the United States complied in twenty cases.⁹⁴ Yet, when legislative action has been necessary to bring U.S. measures into compliance, adversaries have faced an uphill battle to achieve their desired result. Congress first consented to passing remedial legislation in any WTO dispute in 2004, nearly ten years after the implementation of the current dispute settlement framework.⁹⁵

89. *Id.*

90. Chi Carmody, *Remedies and Conformity Under the WTO Agreement*, 5 J. INT’L ECON. L. 307, 316 (2002).

91. See *supra* notes 84-86 and accompanying text. The United States contends that its overall compliance with WTO rulings is good. Magnus, *supra* note 63, at 244 n.5 (quoting Statement by the U.S. Representative at the Meeting of the WTO Dispute Settlement Body, Geneva (Feb. 17, 2005)).

92. Wilson, *supra* note 84, at 21.

93. KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, *supra* note 9, at Annex III, IV.

94. Wilson, *supra* note 84, at 23.

95. *Id.* The United States finally passed remedial legislation in 2004 for the U.S.—FSC dispute, one notorious example of U.S. noncompliance. *Id.*

In the U.S.—FSC dispute, the European Community contended that certain sections of the U.S. tax code establishing special treatment for Foreign Sales Corporations were inconsistent with GATT. After the dispute was decided by the DSB, the WTO found that the steps taken by the United States to comply with WTO recommendations did not fully implement the ruling. Recourse to Article 21.5 of the DSU by the European Communities, *United States—Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/RW, ¶ 256 (Jan. 14,

D. Specific Issues with U.S. Compliance

A number of cases are still pending in which the United States has failed to bring itself into compliance with a WTO ruling. These cases include U.S.—Section 110(5)(b) Copyright Act; U.S.—Section 211 Appropriation Act; U.S.—Hot-Rolled Steel; U.S.—Offset Act (Byrd Amendment); and, of course, the instant case regarding Internet gambling.⁹⁶ Notably, each of these cases requires a legislative fix to achieve compliance.

1. U.S.—Byrd Amendment Dispute

The Byrd Amendment dispute is one of the most often-cited examples of U.S. reluctance to comply with a DSB recommendation. In this dispute, a number of countries initiated a complaint with the DSB with regard to the Byrd Amendment to the U.S. Offset Act;⁹⁷ the Amendment provided that domestic producers who supported petitions to investigate antidumping or countervailing duty violations could receive part of the duties imposed as a result of the investigations.⁹⁸ The complainants asserted that the Amendment violated U.S. obligations under GATT 1994 and other WTO agreements, and the Appellate Body report, issued in 2003, largely agreed.⁹⁹ The United States failed to bring the Act into conformity with its obligations within the reasonable period of time set by the DSB, however, and retaliatory sanctions were authorized.¹⁰⁰ It was not until early 2006 that Congress approved

2002). A disagreement ensued over whether the United States had complied, eventually resulting in the United States enacting new legislation in 2004, but the EC is also debating whether this new legislation brings the United States into compliance. See Second Recourse to Article 21.5 of the DSU by the European Communities, *United States—Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/RW2 (Feb. 13, 2006).

96. Magnus, *supra* note 63, at 243-48.

97. 19 U.S.C. § 1675(c) (2000).

98. Bryan Mercurio, *The Australian Contribution to the Jurisprudence of the WTO Dispute Settlement Process*, 12 CURRENTS: INT'L TRADE L.J. 43, 50-51 (2003) (explaining that Australia, Brazil, Canada, Chile, the European Community, India, Indonesia, Japan, Korea, Mexico, and Thailand all requested the establishment of a panel in the antidumping dispute).

99. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, ¶ 318 (Jan. 16, 2003).

100. Summary of the Dispute to Date, *United States—Continued Dumping and Subsidy Offset Act of 2000*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm#

the Deficit Reduction Omnibus Reconciliation Act, which may have finally brought the United States into compliance with the recommendations of the DSB in this dispute,¹⁰¹ subject to evaluation and acceptance by the WTO.¹⁰²

2. U.S.—Hot-Rolled Steel Dispute

A similarly contested DSB decision occurred in the hot-rolled steel case. The United States had imposed antidumping measures on Japanese imports of certain hot-rolled steel products.¹⁰³ Japan argued that such measures violated U.S. obligations under GATT 1994 and the Anti-Dumping Agreement.¹⁰⁴ Ultimately, the Appellate Body agreed with the Panel that the U.S. measure was inconsistent with the Anti-Dumping Agreement, and ordered that the United States bring its measures into conformity.¹⁰⁵ With Japan's approval, the United States was granted a number of extensions to the reasonable period of time in which to conform to DSB recommendations, originally from November 23, 2002 until July 31, 2005.¹⁰⁶ Japan also agreed not to resort to the suspension of concessions or other obligations in exchange for agreement by the United States to continue in its efforts to achieve compliance.¹⁰⁷ In its most recent status report, however, the only offering made by the United States was that legislation had been introduced in May of 2005 that would

summary (last visited Nov. 29, 2007).

101. Status Report by the United States, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/16/Add.24, WT/DS234/24/Add.24 (Feb. 7, 2006).

102. The DSU provides that when a disagreement arises as to whether measures taken will bring a member nation into compliance with a previous DSB recommendation, this disagreement will be resolved by resorting to dispute settlement procedures. The DSB, often the original dispute panel itself, will examine the measure and issue a report evaluating the nation's compliance with its recommendations. DSU, *supra* note 51, at 1238.

103. Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, ¶ 1 (Aug. 23, 2001).

104. *Id.* ¶ 3.

105. *Id.* ¶¶ 240-41.

106. Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/13, ¶ 40 (Feb. 19, 2002); Request for Modification of Reasonable Period of Time by United States, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/18 (Aug. 3, 2004).

107. Understanding Between Japan and the United States, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/19 (July 8, 2005).

bring the United States into conformity with DSB recommendations, and that the administration would continue to work with Congress to pass the legislation.¹⁰⁸ The case is still pending, more than five years after its initiation.

3. U.S.—Section 211 Dispute

In the U.S.—Section 211 Appropriations Act dispute, the European Communities (EC) claimed that Section 211 of the Omnibus Appropriations Act¹⁰⁹ prohibited Cuban nationals from registering or renewing any trademarks that were confiscated as part of the Cuban Revolution.¹¹⁰ The EC asserted that this measure violated the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which also falls under the purview of the WTO dispute settlement framework.¹¹¹ The Appellate Body eventually held that certain parts of Section 211 were inconsistent with TRIPS and ordered the United States to bring the measure into conformity with the agreement.¹¹² Much like the Hot-Rolled Steel dispute, the United States expressed its intention to conform with the DSB's recommendations but is currently still "working with ... Congress" to pass the appropriate legislation.¹¹³

4. U.S.—Section 110(5)(b) Dispute

In a final example of U.S. noncompliance, in 1999 the EC alleged violations of the TRIPS with regard to § 110(5)(b) of the United

108. Status Report by the United States, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/15/Add.46 (Sept. 18, 2006).

109. Department of Commerce Appropriations Act of 1999, Pub. L. No. 105-277, § 211, 112 Stat. 2681, 88. Section 211 was incorporated as part of the larger Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681.

110. Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, ¶¶ 4.5-9 (Aug. 6, 2001).

111. *Id.* ¶ 1.

112. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, ¶¶ 360-61 (Jan. 2, 2002).

113. Status Report by the United States, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/11/Add.46 (Sept. 18, 2006).

States Copyright Act.¹¹⁴ The EC alleged that amended sections of the Act, which exempted certain establishments below a particular size and equipment level from paying royalties to copyright holders when music was played,¹¹⁵ were violations of the TRIPS duty to protect copyright.¹¹⁶ The Panel agreed, and it ordered the United States to pay royalties to copyright holders and bring the measure into conformity with TRIPS.¹¹⁷ The United States made the royalty payments, but, as in the above three disputes, Congress has yet to pass legislation to amend the noncompliant sections of the Act.¹¹⁸

E. Differentiating Between Previous Instances of U.S. Noncompliance and the Internet Gambling Dispute

Scholars have offered a number of reasons to explain these glaring examples of U.S. noncompliance. For example, the United States often engages in a balancing test with regard to implementing the recommendations of the DSB.¹¹⁹ If the United States values retention of the noncompliant measure more highly than it fears paying compensation to, or suffering retaliation from, the victor in a WTO dispute, then it may choose to disregard DSB recommendations.¹²⁰ Furthermore, on occasion, the United States has either disagreed with the decision put forth by WTO dispute settlement bodies or has lacked enough information about the trade effects of compliance to make a decision about whether to adopt the recommendations.¹²¹

Concerns about abuse of the WTO dispute settlement system may also hinder compliance. In a few instances, complaints have been brought that would have little effect on trade no matter what the outcome, thus serving only to tie up member nations in expensive

114. Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, ¶ 1.1 (June 15, 2000) [hereinafter Copyright Panel Report].

115. Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

116. Copyright Panel Report, *supra* note 114, ¶ 3.1.

117. *Id.* ¶ 7.1.

118. Status Report by the United States, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/24/Add.23 (Nov. 10, 2006).

119. Magnus, *supra* note 63, at 245-46.

120. *Id.* at 245.

121. *Id.*

and time-consuming litigation. Refusal to adopt a measure that the United States sees as an abuse of the system may be nothing more than a symbolic gesture to other members.¹²² Finally, the United States has a history of front-loading its compliance, meaning that when it signs an international agreement, such as those that arose out of the Uruguay Round, it will make all the legislative changes it sees fit in order to come into compliance before the agreement takes effect.¹²³ Therefore, later findings of noncompliance are sometimes viewed with skepticism, as all domestic laws have been scrutinized previously and evaluated as to their consistency with U.S. commitments.¹²⁴

One or more of these factors is present in each of the disputes that is pending. Yet, even in the most hard-fought cases, including those discussed above,¹²⁵ the United States has always announced its intent to comply with DSB rulings and honor its obligations under WTO agreements.¹²⁶ Such was not the case following the initial Panel report released in the gambling dispute.

Furthermore, unlike other WTO agreements, GATS is not battle tested. At this point, a single instance of noncompliance under GATT is merely an unfortunate statistic, not a crisis. Additionally, a number of disputes have already been resolved under the terms of TRIPS, an agreement of the same age as GATS.¹²⁷ Cases continue to be brought to the WTO involving the agreements implicated in the four examples of U.S. compliance problems, suggesting that member nations continue to trust that those agreements are established enough to continue to protect their rights.¹²⁸ The

122. *Id.* at 245 & n.6.

123. *Id.* at 245-46 & n.6.

124. *Id.* at 245-46.

125. *See supra* Parts III.D.1-4.

126. Magnus, *supra* note 63, at 243.

127. *See* Mariko Kunimi, *TRIPS Agreement, Is It Really Successful Achievement in the WTO?*, 3 OR. REV. INT'L L. 46, 50 (2001) ("The 16 disputes of TRIPS concern 12 different matters. Of the total, eight have been resolved.").

128. Since the U.S. compliance problems under TRIPS, Australia and the United States have both requested consultations in separate disputes involving that agreement. *See, e.g.*, Request to Join Consultations, *European Communities—Protection of Trademark Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/6 (May 1, 2003); Request for Consultations by Australia, *European Communities—Protection of Trademark Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/1 (Apr. 23, 2003). Additionally, under the Anti-Dumping Agreement, one of the most notorious

substantive commitments made under GATS, however, have yet to weather the same storm of compliance disputes that strengthened agreements like GATT and TRIPS. The U.S. response in the gambling dispute is therefore more influential than in disputes under other WTO agreements, because noncompliance will set the tone for how seriously member nations intend to take their GATS obligations.

IV. THE EFFECT OF U.S. NONCOMPLIANCE IN THE GAMBLING DISPUTE ON THE LEGITIMACY OF GATS

“The best international agreement is not worth very much if its obligations cannot be enforced when one of the signatories fails to comply with such obligations.”¹²⁹ The United States is just such a signatory whose noncompliance could bring down the entire trade in services agreement. A failure by the United States to conform to the DSB’s recommendations in the gambling dispute will be detrimental to GATS for a variety of reasons.

First, GATS suffers from skepticism among member nations regarding the strength of its provisions—a skepticism that cannot be overcome by any precedent for service trade regulation. Next, the United States was highly influential in the push for an agreement on trade in services,¹³⁰ and, along with playing a role in the development of GATS, the United States also helped shape the dispute settlement framework that governs the agreement.¹³¹ U.S. failure to abide by its commitments to the agreement would appear disingenuous and set a poor example for other GATS members. In addition, the United States’s attitude toward the Panel’s initial decision undermines the DSB’s credibility in deciding disputes under GATS. The United States lacks the typical reasons for noncompliance that have been proffered to explain previous instances of noncompliance. The inexplicable nature of U.S. non-

examples of U.S. noncompliance, the European Communities requested consultations as recently as 2006. See Request for Consultations by the European Communities, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/1 (Oct. 3, 2006).

129. HANDBOOK ON WTO DISPUTE SETTLEMENT, *supra* note 79, at 1.

130. See *infra* notes 139-40 and accompanying text.

131. See *infra* notes 141-45 and accompanying text.

compliance in the Antigua gambling dispute further emphasizes that perhaps GATS members are unwilling to take this agreement seriously. Finally, noncompliance in the Antigua dispute leaves the United States open to further challenges to its gambling laws, which could lead to repeated instances of noncompliance under GATS.

A. Fragility of GATS as a Mechanism for Regulating Trade in Services

A negative response to a WTO decision under GATS by a powerful WTO member nation, such as the United States, will be far more detrimental than a similar response under other WTO agreements. One of the greatest reasons that U.S. noncompliance in the gambling dispute will have such a strong impact is that GATS is a much younger agreement than GATT and is far less battle tested internationally.¹³² The WTO Ministerial Conferences have devoted relatively little time and attention to the issue of trade in services.¹³³ GATS is already struggling to gain respect in the face of a problem with overly flexible provisions that allow for fairly facile escape from its relevant obligations.¹³⁴

Additionally, very few cases thus far have complained exclusively of violations under GATS.¹³⁵ The often cited examples of U.S. noncompliance involved other agreements.¹³⁶ U.S. unresponsiveness to Panel recommendations involving GATS may be more damaging, therefore, than similar responses under GATT or other WTO agreements.

For example, TRIPS, promulgated at the same time as GATS, has suffered from similar dilemmas. Some scholars have worried that the U.S. response in the Section 110(5) Copyright dispute, which appears to advocate substituting compensation of victims for compliance with obligations, may likewise undercut that agree-

132. See Vanessa P. Sciarra, *The World Trade Organization: Services, Investment, and Dispute Resolution*, 32 INT'L LAW. 923, 923 (1998).

133. See Adlung, *supra* note 11, at 865.

134. *Id.* at 867.

135. Sacha Wunsch-Vincent, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US—Gambling*, 5 WORLD TRADE REV. 319, 319-20 (2006).

136. See *supra* Part III.D.

ment.¹³⁷ The precedent for international protection of intellectual property, however, was already well established prior to promulgation of TRIPS. TRIPS incorporated a prior convention governing authors and composers of music and was accompanied by a number of other older conventions as well.¹³⁸ Thus, the fact that U.S. noncompliance with a WTO decision under TRIPS, a comparable but slightly more conventional agreement than GATS, may have such a potentially negative impact on that agreement suggests that a similar U.S. response under GATS will carry even more destructive weight.

B. U.S. Influence on the Creation of GATS and the Current DSU

A further reason that U.S. noncompliance under GATS is detrimental is that the United States played a key role in the development of a multilateral agreement regarding the services industry, and, because of this early leadership, failure to honor its service sector commitments could undermine the agreement. The United States was among the first countries to advocate for the incorporation of a services agreement into the GATT. The argument originated in the 1970s, and in 1982, the United States made a formal proposal to include services at a GATT ministerial meeting.¹³⁹ GATS eventually took effect in January of 1995.¹⁴⁰

U.S. influence also shaped the current framework for dispute settlement in the WTO. This influence can be traced to a number of factors. First, the United States played a large role in the writing of the WTO treaty itself, which includes the current DSU.¹⁴¹ Further,

137. Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 394 (2006) (stating that the U.S. response in U.S.—Section 110(5) “might undercut the minimum standards of intellectual property protection under the TRIPS Agreement while creating instability in the international trading system”).

138. Kearston G. Everitt, Note, *The Latin American Musician’s “Life Would be Meaningless Without Music”: The Fight Against CD Piracy in Latin America*, 27 WHITTIER L. REV. 495, 512-13 (2005).

139. Richard B. Self, *General Agreement on Trade in Services*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 523, 523 (Terrence P. Stewart ed., 1996).

140. Introduction to GATS, *supra* note 37.

141. See Joost Pauwelyn, *The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes*, 19 OHIO ST. J. ON DISP. RESOL. 121, 121 (2003).

as discussed above, the United States has been the primary player in a majority of WTO disputes.¹⁴² During the first ten years of its existence, the United States participated in 62 percent of all panel proceedings and 66 percent of all appellate proceedings.¹⁴³ Finally, many of the lawyers participating in WTO dispute settlement proceedings—as both representatives of member nations and as part of the WTO bodies—received education or training through the U.S. legal system.¹⁴⁴ Thus, U.S. influence permeates into many aspects of dispute settlement under GATS.

The influence the United States exerted over the passage of GATS and its dispute settlement mechanism is another of the primary reasons that an unfavorable U.S. response to decisions handed down under the agreement could have such a damaging result. Because the United States initially fought so vehemently for the adoption of GATS and the DSU, other member nations could perceive these actions as indicating that liberalized trade in services is important enough for the United States to get involved and push through an agreement, complete with a dispute settlement framework. At the same time, the United States appears to have helped construct an agreement that is binding on all members, except when the United States decides otherwise.¹⁴⁵ Member nations may identify such actions as both contradictory and hypocritical.

C. U.S. Expression of Discontent with the Panel's Ruling

Another factor contributing to the fragility of GATS as a guarantor of service sector commitments is the fact that the gambling dispute is the first instance in which the United States has ever declared publicly its intent to ignore the recommendations of a WTO body.¹⁴⁶ Even in the most notorious instances of noncompliance,

142. See *supra* note 93 and accompanying text.

143. See Wilson, *supra* note 84, at 22; see also *supra* notes 84-86 and accompanying text.

144. Pauwelyn, *supra* note 141, at 121.

145. See Rose, *supra* note 6, at 227 ("The Clinton and Bush administrations spent years convincing other countries to join and abide by [WTO] decisions. How would we feel if China announced that it would not permit American carmakers to compete against its local manufacturers, and then blew off a ruling against it by the WTO?").

146. See Magnus, *supra* note 63, at 249 ("[S]enior officials said the United States would not even attempt to comply with an adverse ruling on *US-Gambling* along the lines laid out by the

such as the Hot-Rolled Steel and Section 211 cases, the United States at least expressed that its objective was to adhere to the WTO's recommendations.¹⁴⁷ Although the United States was not forced to make good on its threat in the gambling dispute, as the recommendations of the Panel were largely overturned by the Appellate Body, such blatant disregard for the authority of the Panel sets a terrible example for other member nations. Further, other member nations may perceive the reversal of the Appellate Body as an example of U.S. attempts to strongarm the DSB into ruling in its favor, further undermining the WTO as a guarantor of service sector commitments.

Although the United States may appear to be justified in its threat given that the Panel report was overturned, the lack of deference to a legally binding judicial body is concerning. The United States has never expressed an intent to disregard a questionable DSB ruling pertaining to any other WTO agreement, suggesting that the United States takes perceived violations of GATS less seriously than it does violations of its other multilateral obligations. If other members decide that they too will not only fail to comply with WTO recommendations, but also decline to make an appearance of attempting compliance, the legitimacy of GATS will be in jeopardy.

D. Lack of Recourse to the Usual Excuses for Noncompliance

The United States has compiled a regular grab bag of excuses for its noncompliance with some of the more controversial WTO decisions noted above.¹⁴⁸ Most of these excuses, however, fail to apply to the gambling dispute as justification for the United States's lack of responsiveness. The United States partially excused its noncompliance in some of the earlier instances by pointing to the fact that some of the disputes dealt with fundamental principles of U.S. law and by indicating that making major changes to U.S. legislation is a lengthy process.¹⁴⁹

lower panel.”).

147. See *supra* Part III.D.2-3.

148. See *supra* notes 119-24 and accompanying text.

149. Magnus, *supra* note 63, at 244 & n.5.

In the gambling dispute, however, no bills have been submitted to Congress that even include a provision to address compliance.¹⁵⁰ Unlike in the Byrd Amendment and Hot-Rolled Steel cases, the United States cannot appeal to the difficulty of a legislative fix as a reason for noncompliance in this case. In fact, “with just a little tweaking of the Interstate Horseracing Act, the United States would be in complete compliance with its WTO treaty obligations.”¹⁵¹

The United States also cannot rely on the excuse that it currently lacks enough information to do an effective cost-benefit analysis of the trade effects of reforming the offending measure, as it did in the US—Section 211 Appropriation Act dispute.¹⁵² Critics concerned with the possible increase in gambling and its resulting ill effects on public morals need not fear because, in this case, bringing the IHA into compliance with WTO recommendations would have little effect on gambling in the United States. As one scholar notes, even if foreign operators were allowed to take U.S. horse racing bets, bettors would be unlikely to risk their money with less-established operators.¹⁵³ Furthermore, the United States could either ban off-track betting altogether, or it could allow foreign operators to take bets subject to the strict regulations already in place. Because many foreign operators fail to meet those regulations, they would be shut out of the market, likely making the effects on gambling minimal.¹⁵⁴

E. Vulnerability of the United States to Further Challenges Under GATS

Finally, the United States may have placed itself in a position to face further challenges from other nations intent on fostering the growth of their respective gambling industries; such challenges represent further opportunities to weaken the legitimacy of GATS. One such country is the United Kingdom, which recently passed its Gambling Act,¹⁵⁵ providing for licenses to operate remote gambling

150. Rose, *supra* note 6, at 226-27.

151. *Id.* at 225.

152. See Magnus, *supra* note 63, at 247-48.

153. Rose, *supra* note 6, at 227.

154. *Id.*

155. Gambling Act, 2005, c. 19 (Eng.).

sites that a Gambling Commission would regulate and evaluate.¹⁵⁶ The Act also provides extensive regulation to protect against crime, addiction, and exploitation of minors, as well as to promote open and fair gambling.¹⁵⁷ In its response to the initial proposal for industry reforms in Great Britain, the government found that Britain's gambling laws had "failed to keep pace with technology," and that gambling had "become part of the main stream of leisure activity."¹⁵⁸ Although retaliatory trade sanctions from a small country such as Antigua are not daunting to the United States,¹⁵⁹ the prospect of a similar trade dispute with Britain, a major trading partner, is a far greater threat. The European Union and other countries are also considering the possibility of liberalizing their gambling regulations to permit Internet gambling.¹⁶⁰

Additionally, because of a procedural error made by Antigua in the Panel stage of the dispute, the Appellate Body declined to scrutinize U.S. state laws for consistency with GATS obligations.¹⁶¹ Should another member, such as Britain or the European Union, later bring a similar case, U.S. domestic gambling laws will be on the chopping block.

If these larger, more powerful GATS members decide to pursue complaints against the United States with regard to its gambling laws, this relatively minor act of noncompliance with regard to Antigua's complaint could spiral into a glaring example of U.S. noncooperation under GATS. This would force the United States into an international dilemma: comply with the DSB and amend its gambling laws, thereby admitting its error in the current dispute, or fail to comply and seal the fate of GATS as an agreement devoid of material significance.

156. *See id.* § 70.

157. *See id.* § 1.

158. DEPT FOR CULTURE, MEDIA & SPORT, A SAFE BET FOR SUCCESS—MODERNISING BRITAIN'S GAMBLING LAWS, ¶¶ 1.2-3 (2002), <http://www.culture.gov.uk/NR/rdonlyres/E2667C96-B033-41B0-B027-8691B0232F5B/0/gamblingreportpgs.pdf>.

159. *See Rose, supra* note 6, at 227 ("Although Antigua is busily granting new licenses and will claim that it is losing billions of dollars, the payoff will be only in the tens of millions of dollars.").

160. *See* Jeremy Hutto, *What is Everybody Else Doing About It? A Foreign Jurisdictional Analysis of Internet Gaming Regulation*, 9 GAMING L. REV. 26 (2005).

161. Gambling Appellate Body Report, *supra* note 5, ¶¶ 149-55, 373(A)(iii).

CONCLUSION

GATS has the potential to be one of the most important agreements under the administration of the WTO. The international trade in services has been growing at a rate much faster than that of trade in goods over the past two decades.¹⁶² A strong, multilateral agreement in the services sector will increase security and predictability in trading, strengthen the ability of weaker nations to compete in the international services market, and also aid in the growth of member nations' economies along the lines of comparative advantage.¹⁶³ Yet, GATS is in danger, with the threat coming from one of its major proponents and signatories: the United States.

The U.S. response to the DSB recommendations jeopardizes the legitimacy of GATS as a mechanism for regulating services disputes. The United States has not lived up to its end of the bargain with regard to its GATS obligations, with this failure made weightier by the fact that the country was responsible in large part for the creation of the agreement in the first place. Although concerns about national sovereignty admittedly must accompany a multilateral agreement such as GATS, the agreement is structured in such a way that the United States could have protected its gambling laws if it so chose. Yet, it did not, and once a commitment is made to liberalize a particular sector, that commitment ought to be honored.

The United States could have fixed this problem early by simply amending or repealing the Interstate Horseracing Act. This Act was neither as difficult to change nor as fundamental as much of the other legislation that has been the subject of a WTO dispute. By failing to comply, the United States has made both itself and the agreement vulnerable as a legitimate mechanism for regulation of trade. An early precedent has been set for noncompliance under GATS, and, if the United States hopes to benefit from liberalization of the service trade in the future, this is indeed a dangerous precedent.

To avoid detrimental effects on such an important multilateral trade agreement, the United States should take the steps necessary

162. See Introduction to GATS, *supra* note 37, § 1.1.

163. See *supra* Part III.A.

to comply with the WTO recommendations in the gambling dispute. Compliance would not require major adjustments to any current federal gambling regulations, and, in reality, would likely have little effect on domestic gambling.¹⁶⁴ Yet, though the costs of compliance would be very little to the United States, the benefits are clearly great. To realize these benefits, the United States should do its part to protect the agreement that protects trade in services.

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164. See *supra* notes 151-54 and accompanying text.

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