DON'T BET ON THE UNITED STATES'S INTERNET GAMBLING LAWS: THE TENSION BETWEEN INTERNET GAMBLING LEGISLATION AND WORLD TRADE ORGANIZATION COMMITMENTS

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I. INTRODUCTION

In recent years, Internet gambling has grown in popularity amongst United States citizens to the point where millions of Americans now bet billions of dollars online.[1] The legal status of Internet gambling in the United States has been uncertain since Internet gambling sites began emerging over the last two decades. Different gambling activities receive different treatment under current federal and state statutes. For example, sports betting over the Internet is much more clearly illegal than is Internet poker.[2]

The recent ruling of the Appellate Body (AB) of the World Trade Organization (WTO) in a case filed by Antigua-Barbuda (Antigua) against the United States (*U.S. – Gambling*) also complicates the matter. The AB ruled that a small part of current U.S. federal law regarding Internet gambling violates the United States's commitments under existing free trade agreements.[3] The essence of this ruling is that there are legitimate justifications for the United States to restrict Internet gambling, but that it may not do so in a way that unjustifiably discriminates against other signatories to the General Agreement on Trade in Services (GATS).[4]

On September 30, 2006, Congress passed, and on October 13, 2006, President Bush signed into law the Unlawful Internet Gambling Enforcement Act (UIGEA).[5] Essentially, the UIGEA prohibits financial intermediaries from making payments to "unlawful Internet gambling" sites. The law is

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[1] George F. Will, *Prohibition II: Good Grief*, NEWSWEEK, Oct. 23, 2006, *available at* http://www.msnbc.msn.com/id/15265338/site/newsweek/.

[2] I. NELSON ROSE & MARTIN D. OWENS, INTERNET GAMING LAW 147-48 (2005).

[3] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 369, WT/DS285/AB/R (Apr. 7, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm [hereinafter *U.S. – Gambling* Appellate Body Report].

[4] *Id.* ¶¶ 327, 368. This dispute will be discussed in further detail in Part IV.

[5] 31 U.S.C. § 5362 (2006).

far more complex, however.[6] This new law has had an immediate and severe impact on the Internet gambling industry. Within a few days of this legislation being passed by Congress, publicly traded Internet gambling websites on the England-based London Stock Exchange, where Internet gambling is legal and regulated, lost $8 billion in market value. Further, a number of sites announced that if the bill were to be signed into law, they would stop taking bets from within the United States.[7]

Yet despite this extreme reaction to the new law, even this most recent legislation does not make clear exactly which gambling activities are illegal under U.S. federal law. As its title announces, and as commentators point out, the UIGEA is merely an *enforcement* provision; it does not change the status of otherwise legal gambling activities.[8] In this sense, the law also does its best to remain neutral as to the *U.S. – Gambling* decision. However, in specifying what it does and does not cover with regard to state autonomy over intrastate activities, the UIGEA still could raise free trade problems in light of the WTO's recent ruling. These problems are also not isolated to the area of Internet gambling. There is an inherent tension at play between international free trade commitments that must be undertaken on behalf of the entire nation and values of federalism whereby certain matters are within the purview of individual states to govern those issues for themselves.

Because of the ambiguity of current federal law, the nature of this potential conflict is not entirely clear. Though the WTO's decision sets out clear standards that U.S. laws must meet in order to comply with the GATS, these standards still cannot be clearly applied to U.S. law until it is known what gambling activities the U.S. laws in question do and do not cover. The crucial law in question is the 1961

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[6] *See infra* Part II.B.1.

[7] Will, *supra* note 1.

[8] Allyn J. Shulman, *Legal Landscape of Online Gaming Has Not Changed*, CARDPLAYER.COM, Oct. 5, 2006, http://www.cardplayer.com/poker_law/article/1446 [hereinafter *Legal Landscape*].

Wire Act, which prohibits using a "wire communication" for interstate bets or wagers on "any sporting event or contest."[9]

According to the Department of Justice (DOJ), which represented the United States in the WTO dispute, the Wire Act covers Internet gambling broadly, beyond merely betting on sporting events.[10] If this is the case, then the UIGEA's allowance for purely intrastate Internet gambling would significantly violate the standards set out in the WTO's ruling. However, if the Wire Act does not in fact cover Internet gambling broadly, then the UIGEA would be far less problematic. Other U.S. laws are also affected by the WTO's ruling, but the Wire Act is both the most relevant and the most ambiguous U.S. law at issue.

If Congress seeks to address this ambiguity, as well as possible conflicts with the *U.S. – Gambling* decision, it is important for it to realize the ramifications of its policies. To the extent that Congress wants to make Internet gambling across the board illegal, it will avoid WTO problems. Yet to the extent that Congress wants to allow states to make limited exceptions to generally prohibitive laws, there will be significant free trade issues to confront. The current trend, based on the UIGEA as well as other preexisting laws, comes closer to the latter of these two options. This course of action is highly problematic in light of the WTO's ruling, and the federal government has yet to acknowledge this conflict.

The United States government therefore stands at a critical juncture in this matter, at which it can either choose to recognize, take a stance, and act accordingly on these issues, or to continue its current course of avoiding the problem. But even if it chooses the latter, it is important to realize that given the blatant problems with the current position, maintaining the status quo also represents a specific policy choice to ignore these problems. Analyzing the motivations underlying the measures that led to the WTO decision reveals what is at stake in taking a stance one way or the other on this issue. Uncovering these motivations and

[9] 18 U.S.C. § 1084(a) (2006).

[10] *See infra* pp. 449-50.

why they lead to the current situation will also show that the underlying conflict here is not isolated to the specific area of Internet gambling law, but rather is rooted in a fundamental tension between international treaty agreements on the one hand and federalism on the other.

A point should also be made at the outset about the nature of intrastate Internet gambling, since this topic will play a major role throughout the paper. This activity might sound like a contradiction in terms, since the Internet transcends geographical boundaries. However, the UIGEA, the law that most explicitly refers to this type of Internet gambling, specifies that a state authorizing such gambling within its borders must have a location verification system in place.[11] It thus seems that the category of intrastate Internet gambling actually has practical meaning. Furthermore, the free trade objection to intrastate authorization of Internet gambling is that these grants of authority discriminate against foreign service *providers*, regardless of whether or not a site that is legal in one state is also accessible to *customers* in another state.

In order to fully understand the implications of the United States's dispute with Antigua in the WTO, it is essential to first understand the current state of U.S. law on the matter and the intricacies of the WTO's decision. Part II will survey current U.S. law as it relates to this dispute, in order to see where in this body of law the problems arise. Part III will then address the possible motivations behind the current trend in U.S. law with regard to Internet gambling, rejecting protectionist and paternalistic explanations in favor of traditional values of federalism underlying the portions of U.S. law that are relevant to the WTO dispute. The *U.S. – Gambling* case can then be analyzed while keeping in mind the principles that are influencing the United States in relation to the problematic issues. Part IV will analyze the WTO dispute in order to reach a comprehensive understanding of the standards by which U.S. laws are to be judged under the United States's GATS commitments.

[11] 31 U.S.C. § 5362 (10)(B)(ii)(I) (2006).

Then, Part V will apply these standards from the WTO's decision to current U.S. laws and show that, to the extent that current U.S. law allows individual states to set their own Internet gambling policies on an intrastate level (particularly in light of the recent UIGEA), even more aspects of current laws are likely in violation of the United States's GATS commitments. Part VI will then close by explaining that, in light of the motivations revealed in Part III, the United States faces a critical decision in terms of where it stands not only with respect to how its Internet gambling laws relate to its free trade commitments, but also possibly more generally with respect to how the United States might be forced in some situations to choose between its international commitments and federalism concerns that it holds dear.

II. THE CURRENT STATUS OF INTERNET GAMBLING UNDER U.S. LAW

Currently there are a number federal laws that apply to Internet gambling (either specifically or through general references to all gambling that include Internet gambling), but many of these laws depend upon state legislation. Gambling has traditionally been an area of state regulation, and even as it expands to the Internet, this tradition is still followed. The United States Code sets out, "[T]he States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."[12] Yet the federal government does have the constitutional authority to regulate most gambling activities, and will do so when it sees a need for federal legislation.[13]

In order to ascertain the status of Internet gambling in an organized manner, we will first look at federal laws that cover specific gambling activities. Then, those federal laws

[12] 15 U.S.C. § 3001(a)(1) (2006).

[13] *Id.* § 3001(a)(3); ROSE & OWENS, *supra* note 2, at 62-63 (explaining that gambling is considered "economic activity" and therefore subject to federal regulation under the Commerce Clause, provided that the other requirements of the Commerce Clause are also met).

that are contingent upon the activity in question already being illegal under other federal or state laws will be analyzed. Finally, the role that state laws play will be explained. As these laws are analyzed, it is important to keep in mind the room that the federal laws leave for individual states to decide matters for themselves, either between states that agree on a common plan, or on a purely intrastate level.[14]

A. Laws Directly Affecting Gambling Activity

1. The Wire Act of 1961

The most significant, but also most controversial, federal law pertaining directly to the legal status of certain gambling activities is the Wire Act of 1961.[15] This law was passed years before the Internet was even a remote possibility, but it still plays a key role in the current dispute over Internet gambling. The Wire Act was enacted as an "anti-bookie" statute, in order to enable the states to combat illegal betting on sporting events that were conducted over the phone.[16] Subsection (a) of the Act reads as follows:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money

[14] There should also not be any concern regarding jurisdiction under the Commerce Clause to regulate even intrastate gambling activities. Even though recent cases have taken a stricter view than in the past towards what Congress can regulate under the Commerce Clause, a critical distinction is still drawn between economic and non-economic activities. Since purely intrastate economic activity that affects interstate commerce is allowed to be regulated under the Commerce Clause, Congress should not have a problem regulating this economic activity on which so much money is spent. United States v. Morrison, 529 U.S. 598, 613 (2000).

[15] 18 U.S.C. § 1084 (2006).

[16] ROSE & OWENS, *supra* note 2, at 147.

> or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[17]

It is important to realize that the law covers those who are "engaged in the business of betting or wagering," but not isolated players.[18] The statute also explicitly mentions transmissions made in "foreign" commerce, and so even foreign-based websites are covered by the statute.[19]

There have been attempts to modify the Wire Act to make it explicitly apply to all forms of Internet gambling, but those attempts have been unsuccessful.[20] As the statute currently stands, it is ambiguous as to what types of gambling it

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[17] 18 U.S.C. § 1084(a) (2006). The Act exempts the transmission "of information for use in news reporting of sporting events or contests, or for the [purposes of] assisting in the placing of bets or wagers on a sporting event or contest from a [place] where betting on that . . . event . . . is legal into a [place] in which such betting is legal." *Id.* § 1084(b). However, even this latter exemption only covers information that assists betting, but does not exempt the transmission of bets themselves. ROSE & OWENS, *supra* note 2, at 172.

[18] ROSE & OWENS, *supra* note 2, at 148.

[19] *Id.* at 242-43.

[20] Senator John Kyl has supported numerous versions of the Internet Gambling Prohibition Act (IGPA), ranging in severity, through numerous sessions of Congress. While this legislation did pass some initial steps of the legislative process, it was never passed by both houses of Congress. *See* S. 474, 105th Cong. (1997) and S. 692, 106th Congress (1999); *In re* MasterCard Int'l Inc. Internet Gambling Litigation, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) (holding that the Wire Act only covers sports betting), *aff'd*, 313 F.3d 257 (5th Cir. 2002) ("Recent legislative attempts have sought to amend the Wire Act to encompass 'contest[s] of chance or a future contingent event not under the control or influence of [the bettor]' while exempting from the reach of the statute data transmitted 'for use in the new reporting of any activity, event or contest upon which bets or wagers are based.' *See* S. 474, 105th Congress (1997). Similar legislation was introduced [in] the 106th Congress in the form of the 'Internet Gambling Prohibition Act of 1999.' *See,* S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon 'a contest of others, a sporting event, or a game of chance . . .' *Id.*").

covers, and also as to whether or not it applies to Internet gambling.

a. The Wire Act's Applicability to the Internet

Though the statute obviously does not mention the not yet existent Internet, the definitions section of the chapter of the U.S. Code in which the Wire Act is found gives a very broad definition for "wire communication facilities" that could very well be read to include the Internet.[21] The Second Circuit Court of Appeals has held that the Wire Act does apply to the Internet, and no courts have disputed this holding.[22]

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[21] 18 U.S.C. § 1081. The law states:

> The term "wire communication facility" means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

Id. Rose and Owens explain, "This section was clearly designed to make federal jurisdiction over sports wagers as broad and far reaching as reason would allow." ROSE & OWENS, *supra* note 2, at 148. The WTO's Dispute Panel also cites other evidence offered by Antigua that demonstrates the Wire Act's applicability to the Internet. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.362, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S. – Gambling* Panel Report].

[22] United States v. Cohen, 260 F.3d 68, 76 (2d Cir. 2001) (applying Wire Act to convict President of the World Sports Exchange, an Antigua-based Internet gambling site devoted to betting on American sporting events). This case is also significant for other reasons with regard to Internet gambling. For example, Rose and Owens explain that "[t]he most important ruling coming out of the Cohen case is the holding that it is irrelevant under the Wire Act that Internet gambling is illegal in Antigua. Unless the bet is also permitted in the state where the bettor is located, a foreign on-line gaming operator is violating the Wire Act by taking a bet from someone in the U.S." ROSE & OWENS, *supra* note 2, at 181.

b. Types of Gambling to Which the Wire Act Applies

Whether the Wire Act applies only to sports betting, or to all types of gambling, however, is much more ambiguous. Though the statute could be read either way, it makes more sense to read it as applying only to sports betting.[23]

The Clinton and Bush administrations have maintained that all Internet gambling is illegal under the Wire Act.[24] The DOJ has also stated that the Act covers Internet gambling generally.[25] Nevada passed a law authorizing Internet gambling, but required the Nevada Gaming Commission to set out regulations before the law would take effect. The Commission in turn sought advice from the DOJ, which responded that all forms of interstate Internet

[23] On the one hand, section (a) of the law, which sets out the prohibited activity, specifically refers to "bets or wagers on any sporting event or contest." 18 U.S.C. § 1084(a) (2006). On the other hand, section (d) of the law, which deals with the FCC's enforcement with regard to common carriers, refers to "gambling information," rather than sports betting. *Id.* § 1084(d); ROSE & OWENS, *supra* note 2, at 147. In fact, even within section (a), the first mention of betting refers to bets "on any sporting event or contest," but (as in section (d)) the subsequent two references only refer to "bets or wagers." This minor variation in language is not significant, however. There is no reason why Congress would make the first part of section (a) (which refers to using a wire communication "for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers") apply only to sports betting, but would make the rest of the section (which refers to "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers") apply to all types of betting. It therefore makes the most sense to interpret the entirety of section (a) as referring only to sports betting. Once it is clear that parts of section (a) only refer to sports betting, even though they do not make that specification explicit, it then becomes all the more reasonable to explain section (d) as similarly only referring to sports betting, but again, as in section (a), simply using an abbreviated and more general phrase for this reference.

[24] Allyn J. Shulman, *President of AGA Talks about Online Gambling Ban*, CARDPLAYER.COM, Dec. 13, 2006, http://www.cardplayer.com/poker_law/article/1700 [hereinafter *Online Gambling Ban*].

[25] ROSE & OWENS, *supra* note 2, at 79.

gambling are in violation of the Wire Act.[26] Similarly, in its dispute with Antigua in the WTO, the United States explained that "[s]ection 1084 prohibits a person in the business of betting or wagering from knowingly using a wire communication facility to transmit in interstate or foreign commerce bets or wagers or information assisting in the placing of bets or wagers."[27] Here, too, as with the DOJ's general stance, the Wire Act was interpreted as not being limited to sports betting.

Members of Congress disagree on this issue. For example, Senator Frist recently declared that "for me as majority leader, the bottom line is simple: Internet gambling is illegal."[28] No federal statute explicitly makes all Internet gambling illegal, but since the Wire Act has been interpreted as creating such a sweeping prohibition, it is the most likely source for such a broad statement. On the other hand, Representative Goodlatte, author of an online gambling bill that was recently in the House as a precursor to the UIGEA, acknowledges the limitations of the Wire Act: "We need to modernize the Wire Act, which is 45 years old, and does not apply to all forms of gambling. It clearly applies to sports betting."[29]

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[26] *Id.* Rose and Owens note that this "letter was widely excoriated, however, for its *ipse dixit* style, being more of a decree than an opinion. It not only failed to cite any supporting case, statute or other legal authority for this sweeping conclusion, but contradicted the findings of at least one federal court." *Id.* at 79 n.250. A similar situation has arisen regarding the U.S. Virgin Islands' attempts to authorize Internet gambling. *Id.* at 81; *see also* Allyn J. Shulman, *As I Predicted*, CARDPLAYER.COM, http://www.cardplayer.com/magazine/article/13604 (last visited Mar. 3, 2007).

[27] Second Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 78, WT/DS285 (Jan. 9, 2004) [hereinafter *U.S. – Gambling* Second Written Submission], *available at* http://www.antiguawto.com/wto/21_US_2nd_written_submission_9jan04.pdf.

[28] Shulman, *Legal Landscape*, *supra* note 8.

[29] Catherine Holahan, *Online Gambling Still in the Cards?*, BUS. WK. ONLINE, Oct. 3, 2006, http://www.businessweek.com/technology/content/oct2006/tc20061002_295924.htm?chan=technology_technology%20index%20page_today's%20top%20stories.

The U.S. case most on point has explicitly held that not all Internet gambling is illegal under the Wire Act, and no other cases have disputed this holding. In *In re Mastercard*, a class action in which the plaintiffs were attempting to get out of credit card debt that resulted from Internet gambling losses, the plaintiffs claimed that the credit card companies aided and abetted illegal Internet gambling and thereby violated the Racketeer Influenced and Corrupt Organizations (RICO) Act.[30] The Fifth Circuit Court of Appeals disagreed and upheld the District Court's finding that the Wire Act only covers betting on sporting events, but not gambling as a whole:

> The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in Internet sports gambling. We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense here.[31]

Though other parties have interpreted the Wire Act differently than the Fifth Circuit, the courts are the authoritative source for the interpretation of U.S. law. Other Circuits or the Supreme Court may at some point disagree with the Fifth Circuit, but unless this happens, this holding remains the only current judicial interpretation of the types of activities to which the Wire Act applies. Congress might also amend the Wire Act, but numerous attempts to do so have failed.[32]

It is possible that, for political reasons, various members of the government who might otherwise like to take a clearer stance against Internet gambling are willing to allow this

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[30] *In re* MasterCard Int'l Inc. Internet Gambling Litigation, 313 F.3d 257 (5th Cir. 2002)

[31] *Id.* at 262-63.

[32] *See supra* note 20 and accompanying text. The recent UIGEA specifically does not modify pre-existing substantive law regarding the legal status of gambling activities. 31 U.S.C. § 5361(b) (2006).

ambiguity in the Wire Act to remain. As I. Nelson Rose and Martin Owens explain the DOJ's stance against Internet gambling with regard to the U.S. Virgin Islands' attempts to legalize Internet gambling (even though the Virgin Islands have declared an intent to not accept bets from within the United States), "the resultant chilling effect has been everything the opponents of on-line gambling could have hoped for."[33]

c. The Wire Act's Applicability to Purely Intrastate Wire Transmissions

Though the wording of the statute is ambiguous, as will be explained below, the UIGEA makes clear that the Wire Act most likely does not apply to purely intrastate Internet gambling.[34]

d. Jurisdictional Reach of the Wire Act

Enforcement of the Wire Act against a website based abroad is very difficult, if not impossible. It occurred in *United States v. Cohen* only because Jay Cohen, the President of an Antigua-based Internet gambling site, was apprehended when he had voluntarily come back to the United States; but such events are exceptions and do not, by themselves, provide for a comprehensive enforcement strategy.[35] Extradition is also not a viable option because of the doctrine of "dual criminality," whereby if the crime in question is not also illegal in the country in which the accused is taking refuge, then that country may refuse to have the person extradited from their land.[36] In such a

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[33] ROSE & OWENS, *supra* note 2, at 81.

[34] *See infra* Part II.B.1.c.

[35] United States v. Cohen, 260 F.3d 68, 76 (2d Cir. 2001). The United States has also recently arrested David Carruthers, the CEO of BetOnSports.com, but he was also arrested while changing flights in the United States. *Betting Site Dumps Arrested CEO*, REUTERS, July 25, 2006, http://news.com.com/Betting+site+dumps+arrested+CEO/2100-1030_3-6098401.html.

[36] ROSE & OWENS, *supra* note 2, at 187.

situation, punishing the crime in question is no longer in the "common interest" of both nations.[37] This is the case with Internet gambling because most, if not all, of the sites are based in countries (such as Antigua and England) in which Internet gambling is legal.

2. The Interstate Horseracing Act

The other law that most directly covers the legal status of specific Internet gambling activities is the Interstate Horseracing Act (IHA). After a long and rigorous analysis of U.S. law under WTO free trade standards, this law ended up being the determinative issue in the *U.S. – Gambling* case. The IHA was originally passed in 1978 to regulate the off-track betting industry. The law enumerates the conditions under which an "interstate off-track wager may be accepted by an off-track betting system."[38] These conditions specify the various approvals that a system must obtain in order to be allowed to operate.

The "Definitions" section of the Act requires that the off-track betting system accepting the bets be located in a State, territory, or commonwealth of the United States, or in the District of Columbia.[39] It also requires that this type of betting be legal in each state involved.[40] Particularly noteworthy is that the definition of an "interstate off-track wager" in the IHA was amended in 2000 to include "pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone *or other electronic media* and accepted by an off-track betting

[37] *Id.* The government may also seek to prosecute based on RICO charges, with underlying claims such as smuggling or money laundering. *See infra* Part II.B.2 for a brief discussion of such charges. See ROSE & OWENS, *supra* note 2, at 187-88 regarding the problems with extraditing based on these charges.

[38] 15 U.S.C. § 3004(a) (2006).

[39] *Id.* §§ 3002(2)-(3).

[40] *Id.* § 3002(3).

system in the same or another State, as well as the combination of any pari-mutuel wagering pools."[41]

This specific inclusion of "other electronic media" would seem to include the Internet within the purview of this statute. Furthermore, the legislative history of the statute indicates this result. Congressman Frank R. Wolf (R-Va.) was concerned that this amendment would legalize placing off-track bets over the Internet, which was illegal under the original version of the statute.[42]

Even so, the DOJ (which opposed this amendment to the law before its passage) maintains that the IHA does not repeal or amend "existing criminal statutes that may be applicable to such activity, in particular, Sections 1084 [the Wire Act], 1952 [the Travel Act] and 1955 [the Illegal Gambling Business Act] of Title 18, United States Code."[43] President Clinton also issued a statement subsequent to the passage of the amendment to the IHA stating that the intent of the IHA was not to legalize interstate betting "via

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[41] *Id. amended by* DC Appropriations, Pub. L. No. 106-553, § 629, 114 Stat. 2762A-108 (2000) (emphasis added). A "pari-mutuel wager" is "any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator." *Id.* § 3002(13).

[42] Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 429-30 (2002).

[43] 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) [hereinafter *U.S. - Gambling* Status Report], *available at* http://www.antiguawto.com/wto/58_USStatusReport Compliance_11Ap06.doc. *See also* Rodefer, *supra* note 42, at 30. The DOJ's position is summarized in the WTO dispute as follows: "[T]he IHA—a civil statute—cannot 'repeal' the Wire Act, the Travel Act, or the IGBA—which are criminal statutes—*by implication*, that is, merely by virtue of the IHA's adoption *subsequent* to that of the Wire Act, the Travel Act, and the IGBA. Rather, under principles of statutory interpretation in the United States, such a repeal could be effective only if done *explicitly*, which was not the case with the IHA." *U.S. - Gambling* Appellate Body Report, *supra* note 3, ¶ 362.

telephone or other electronic media."[44] Since the DOJ also maintains that all types of Internet gambling are illegal under the Wire Act, it follows from its view that the IHA would not legalize any interstate Internet betting on horseracing.[45]

The DOJ also took this position in the *U.S. – Gambling* case. But the DOJ's interpretation of a law is not binding authority. If a court is persuaded that the law means otherwise, it is free to interpret it differently. Despite the DOJ's stance, it 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 (provided that all the other requirements of the Act are met). As Rose explains, the DOJ is arguing that the IHA "does not do exactly what it says it does."[46] Though certainly not binding on U.S. law, it is also helpful to note that the WTO agreed with Antigua that "the revised statute does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states."[47] Given the current ambiguity, precisely how the IHA interacts with preexisting criminal statutes needs to be decided by the courts or clarified by Congress.

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[44] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.597 (quoting statement by President Bill Clinton upon signing H.R. 4942 (Dec. 21, 2000)).

[45] The DOJ's stance also relates to the IHA's effect on the Travel Act and the Illegal Gambling Business Act. *See infra* Part II.B.2. But since these other two laws only take effect subject to applicable state laws and the IHA only allows bets if those bets are also allowed in each state involved, there is less potential conflict between the IHA and these other two laws.

[46] I. Nelson Rose, *The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, GAMBLING & THE LAW, *available at* http://www.gambling andthelaw.com/columns/2006_act.htm (last visited Mar. 26, 2007).

[47] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.599; *see also U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 364 (upholding the Panel's determination).

3. General Gambling Laws Applicable to Internet Gambling

Some federal laws regarding various types of gambling do not specify the method by which the bet is placed. Even though these laws do not specify Internet gambling, they still directly pertain to betting over the Internet inasmuch as the method of Internet gambling is subsumed under the general category of gambling. Since there are no cases specifying to what extent these more general laws apply to Internet gambling, the best that can be done is to speculate as to how these laws apply to the Internet based on careful readings of the statutes in question.

These statutes include the federal laws related to lotteries, which prohibit interstate transmission regarding purchasing lottery tickets, as well as certain advertising restrictions.[48] But these laws also have exceptions for states and countries in which the lotteries are conducted by the state.[49] The law covers one who, "being engaged in the business of procuring for a person in 1 State [a share in a lottery] conducted by another state . . . , knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share or interest."[50] This general applicability to "transmitting" would seem to cover Internet transmissions as well.[51] However, it is not clear that Internet transmissions would fall under the exemption for lotteries conducted by a state. The exemption states that it applies "to the transportation or mailing to addresses within a State of . . . material concerning a lottery which is conducted by that State acting under the authority of State law."[52] Whether the exemption covers the Internet seems to depend on whether or not Internet

[48] 18 U.S.C. §§ 1301-07 (2000).

[49] *Id.* § 1307.

[50] *Id.* § 1301.

[51] *Id.* It is unclear from the language just quoted whether the statute would cover actual procurement from a transmission in addition to transmissions containing information to be used for procuring.

[52] *Id.* § 1307(b)(1).

transmissions are considered "transportation" under the statute.

There is also a law banning all modes of sports betting.[53] The Professional and Amateur Sports Protection Act (PASPA) makes it illegal for a person or governmental entity to run or promote a betting scheme based on "games in which amateur or professional athletes participate."[54] This statute applies to intrastate as well as interstate betting schemes. Inasmuch as one conducts such bets over the Internet, those actions seem to be covered by the statute just as much as if conducted by more traditional means.[55] However, the statute contains various exemptions for grandfathering certain arrangements, whereby states that had certain sports betting arrangements in place at certain dates are allowed to continue with such plans.[56]

A separate body of law applies to gambling activities on Indian Reservations. The National Indian Gaming Regulatory Act (IGRA) divides gambling activities into three classes and allows games on tribal lands with varying degrees of state cooperation required, depending on the type of game at issue.[57] These laws do not specifically mention the Internet, and there have not yet been any cases on the matter, but Rose and Owens explain that the argument could be made that "an Indian tribe would have the same rights regarding Internet gambling as any U.S. state or territory: that it could license facilities to receive bets . . . from within the land it

[53] The Wire Act, on the other hand, is specific to "wire communication." *Id.* § 1084(a).

[54] 28 U.S.C. § 3702 (2006).

[55] ROSE & OWENS, *supra* note 2, at 242-43.

[56] 38 U.S.C. § 3704 (2006). Rose and Owens point out that, unlike the Wire Act, the PASPA does not reach beyond U.S. territoriality, which would likely affect the reach of the statute against foreign-based gambling entities. ROSE & OWENS, *supra* note 2, at 242-43. However, since even under the Wire Act prosecuting someone associated with a foreign-based gambling website is the exception rather than the rule, this feature of the statute is likely not of much practical significance. *See supra* Part II.A.1.d.

[57] 25 U.S.C. §§ 2701-21 (2006) and 18 U.S.C. §§ 1166-68 (2006). *See* ROSE & OWENS, *supra* note 2, at 164-65.

controls, and from outside, provided that the outside bettor bets from a place where such gaming is legal."[58]

The Gambling Devices Transportation Act makes it "unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession."[59] However, this law exempts such transportation where the state or subdivision into which the item is being transported has "enacted a law providing for the exemption of such State from the provisions of this section," or if "the transported gambling device is specifically enumerated as lawful in a statute of that State."[60] Inasmuch as the gambling device being transported is a device for Internet gambling, this law applies to Internet gambling as well as to live gambling.

B. Laws Depending on Other Laws

1. The Unlawful Internet Gambling Enforcement Act (UIGEA)

The UIGEA is Title VIII of the SAFE Port Act, which was signed into law on October 13, 2006 after about ten years of numerous unsuccessful attempts to pass anti-gambling legislation.[61] But the bill's severity diminished significantly over the course of its eventual passage. When Senator John Kyl first introduced anti-Internet gambling legislation in 1995, he sought to make it illegal for anyone to even place a

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[58] ROSE & OWENS, *supra* note 2, at 172-73. This is dealt with in greater detail in the following discussion of the Unlawful Internet Gambling Enforcement Act (UIGEA). *See infra* Part II.B.1. In the part of the quote omitted here, Rose explains that the Wire Act still applies, and therefore Indian tribes would not be able to accept race and sports bets even from within the land they control. However, continuing with Rose's analogy of intratribal betting to intrastate betting, at least as the UIGEA explains the situation, it is not clear that the Wire Act would limit purely intratribal Internet betting. *See infra* Part II.B.1.c.i.

[59] 15 U.S.C. § 1172(a) (2006).

[60] *Id.* The term "gambling device" includes slot machines, as well as other machines, or parts of machines, "designed and manufactured primarily for use in connection with gambling." *Id.* §§ 1171(a)(1)-(3).

[61] *See* Will, *supra* note 1.

bet online, but the Senate Judiciary Committee quashed the idea as it was not interested in enforcing such legislation against the common bettor.[62] Moreover, the DOJ "stated publicly that it did not want to go after $5 bettors. So, today, no one is even proposing making it a federal crime to merely place a bet on the Internet."[63] States can choose to deal with casual bettors differently. However, even where state laws do clearly cover the placing of bets on the Internet, in practice, individual bettors are not prosecuted.[64]

Though prior attempts at anti-gambling legislation failed, one result of prior discussions was the National Gambling Impact Study Commission Report of 1999.[65] That commission recommended targeting the financial intermediaries that make payments to Internet gambling sites. The UIGEA adopted this idea as its primary goal, noting the Commission's findings at the legislation's outset.[66]

This current provision was a last minute addition to the SAFE Port bill, which passed just before the close of the final congressional session before the 2006 elections.[67] Former

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[62] *See* Shulman, *Online Gambling Ban*, *supra* note 24.

[63] ROSE & OWENS, *supra* note 2, at 4.

[64] *Id.*

[65] NATIONAL COALITION AGAINST LEGALIZED GAMBLING, UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 – FACT SHEET iii-1, http://www.ncalg.org/Library/internet/IG%20law%20booklet.pdf [hereinafter FACT SHEET].

[66] 31 U.S.C. § 5361(a)(2) (2006).

[67] The politics of this new law are interesting. Its supporters see it as an important measure aimed at curbing online gambling, but there is also strong popular disapproval of the law. Those opposed to it see it as protectionist and as ill-fated as the Prohibition. *See* Will, *supra* note 1; Charles Murray, Op-Ed., *The G.O.P.'s Bad Bet*, N.Y. TIMES, Oct. 19, 2006, *available at* http://www.nytimes.com/2006/10/19/opinion/19murray.html?ex=1318910400&en=de573e4ecde1b577&ei=5090. Some also suggest that voters upset by the passage of this law may have made a difference in the 2006 mid-term elections. *Internet Gambling Bill Could Pose Problems For GOP on Nov. 7*, ASSOCIATED PRESS, Nov. 3, 2006, *available at* http://www.foxnews.com/story/0,2933,227337,00.html; *see also* W. David Gardner, *Online Gamblers Worked To Defeat Sponsor Of Anti-Gambling Legislation*, INFORMATION WK., Nov. 9, 2006, *available at* http://www.

Senate Majority Leader Bill Frist, who attached this law to the Safe Port Act, explained that "[g]ambling is a serious addiction that undermines the family, dashes dreams, and frays the fabric of society."[68] The basic function of this law is to prohibit financial intermediaries from making payments to illegal Internet gambling sites.

It is still unclear what effect this law will have on the Internet gambling industry. Commentators who specialize in gambling law explain that the law does not make placing bets on the Internet illegal.[69] Yet, immediately after the bill's passage, gambling websites traded publicly on the London Stock Exchange lost billions of dollars in stock value.[70] Some sites have even closed business to U.S. customers. However, other sites "are functioning as usual and are confident that they can continue to do so. They are not in the United States, and it is absurdly easy to devise ways of transferring money from U.S. bank accounts to institutions abroad and hence to gambling sites."[71] In fact, even though the legislation prohibits financial intermediaries from making payments to these sites, "most banks and credit card companies already refuse to send money to offshore sites. Therefore, there are already offshore third-party companies in place that are more than happy to handle

informationweek.com/news/showArticle.jhtml?articleID=193700297&subSection=Breaking+News.

[68] Aaron Todd, *Congress Passes Unlawful Internet Gambling Enforcement Act*, CASINO CITY TIMES, Oct. 2, 2006, *available at* http://casinocitytimes.com/article.cfm?ContentAndContributorID=30109.

[69] Rose, *supra* note 46; Shulman, *Legal Landscape*, *supra* note 8.

[70] Will, *supra* note 1.

[71] Murray, *supra* note 67. The sites that have stopped accepting bets from the United States are some of the better established, publicly traded companies. One suggestion is that "all that the legislation is doing is hurting legitimate public companies overseas and pushing further underground the industry that will meet the demand of the U.S. consumer." Bradley Vallerius, *PartyPoker Leads Exodus of Public Companies Out of U.S.*, RGT ONLINE, Oct. 3, 2006, http://www.rgtonline.com/Article.cfm?ArticleId=67868&CategoryName=Featured&SubCategoryName=.

[American bettors'] financial transactions."[72] While the practical future impact of the law is still unclear, the legislation certainly does significantly impact the overall legal landscape of online gambling in the United States.

a. The Basics of the UIGEA

The basics of the UIGEA are fairly straightforward. The law makes it illegal for "any person engaged in the business of betting or wagering" to accept payment from another person in connection with their participating in "unlawful Internet gambling."[73] As the law's title suggests, it is merely an enforcement mechanism and does not change the status of any specific gambling activities. The law does not cover "any activity that is allowed under the Interstate Horseracing Act."[74] It also "shall not change which activities related to horse racing may or may not be allowed under Federal Law," nor is it "intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes."[75] More generally, a rule of construction for the statute as a whole is that no part of this law "shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."[76]

It is also significant that, like the Wire Act, this law only targets those engaged "in the *business* of betting or wagering," and not mere casual players.[77] The law gives a fairly standard definition of "bet or wager," as the "risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to

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[72] Allyn J. Shulman, *What's NOT Included in Anti-Gaming Legislation*, CARDPLAYER.COM, Oct. 4, 2006, http://www.cardplayer.com/poker_news/article/3251.

[73] 31 U.S.C. § 5363 (2006).

[74] *Id.* §5362(10)(D)(i).

[75] *Id.* §5362(10)(D)(iii).

[76] *Id.* §5361(b).

[77] *Id.* § 5363. *See also* Rose, *supra* note 46 (emphasis added).

chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome."[78] It specifically exempts all activities "governed by the securities laws" and certain other financial transactions.[79]

b. The Main Functions of the UIGEA

Since the operators of online casinos are offshore and are therefore very difficult to prosecute, the heart of the UIGEA comes in the next section, entitled "Policies and procedures to identify and prevent restricted transactions."[80] This section requires that payment systems "identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures" in accordance with regulations prescribed by the Secretary and Board of Governors of the Federal Reserve System within 270 days of the enactment of this part of the bill.[81] These regulations exempt designated payment systems from having to block transactions "that it is not reasonably practical to identify and block, or otherwise prevent or prohibit the acceptance of."[82] Whereas Internet gambling sites are based in foreign

[78] 31 U.S.C. § 5362(1)(A).

[79] *Id.* § 5362(1)(E).

[80] *Id.* § 5364(a) (2006). *See supra* Part II.A.1.d regarding the possibility of prosecuting those associated with Internet gambling companies based abroad.

[81] 31 U.S.C. § 5364(a). A "Designated Payment System" is defined as "any system utilized by a financial transaction provider that the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, jointly determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction." *Id.* § 5362(3). A "Financial Transaction Provider" is defined as "a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system." *Id.* § 5362(4).

[82] *Id.* § 5364(b)(3).

countries, the financial institutions that United States citizens primarily use are based in the United States and therefore are subject to this new regulation.

The law also mandates relief against "interactive computer service[s]" (also known as Internet service providers, or ISPs), but only in the form of an order to the ISP to remove a site from its service. While the ISP has no obligation to monitor its sites, it can be forced to remove sites after given notice and the opportunity for a hearing.[83]

c. "Unlawful Internet Gambling"

The statute itself does not make any forms of gambling illegal, but rather focuses its enforcement mechanisms on those activities that are already considered "unlawful Internet gambling." Therefore, determining what is and is not considered to be unlawful Internet gambling is essential for a proper understanding of the statute. The statute elaborates that the term refers generally to being involved in betting, at least partly through the Internet, where that bet "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."[84] However, as we have seen, it is very unclear what types of Internet gambling are actually unlawful under federal law. As will be explained shortly, many state laws on the matter are clearer, so the requirements of this law will in turn be easier to understand in such states.[85]

Even though the UIGEA does not itself affect the legal status of any types of Internet gambling, in explaining the current legal landscape, it does address some otherwise ambiguous points.

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[83] *Id.* §§ 5365(c)(1)(A)-(C); *see also* Rose, *supra* note 46.

[84] 31 U.S.C. § 5362(10)(A).

[85] *See infra* Part V.C.

i. Intrastate Internet Gambling

The UIGEA is most informative when it comes to the status of intrastate and intratribal online gambling. Though the law is generally vague about what constitutes illegal Internet gambling, it does explicitly state that "unlawful Internet gambling" does not cover betting when "the bet or wager is initiated and received or otherwise made exclusively within a single state," the bet comports with that state's laws, which include age and location verifications (and security for age), and the bet does not violate certain other laws that might be applicable.[86] The next provision contains a similar definition for "Intratribal Transactions."[87]

These definitional provisions spell out that purely intrastate gambling transactions are not within the category of "unlawful Internet gambling," as long as such transactions do not violate the four provisions listed (the IHA, the PASPA, the Gambling Devices Transportation Act, and the IGRA).[88] It is interesting that the law does not even mention the Wire Act, since that is the provision on which those claiming that Internet gambling is generally prohibited depend on the most. The glaring omission of the Wire Act from the list of statutes with which intrastate gambling must comport indicates that the Wire Act cannot even potentially come into conflict with an otherwise legal intrastate Internet gambling arrangement. Since the Wire Act makes illegal some forms of Internet gambling, if there are no potential conflicts between intrastate Internet gambling and the Wire Act, it therefore must be the case that the Wire Act does not in fact cover purely intrastate gambling.[89]

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[86] 31 U.S.C. §§ 5362(10)(B)(i), (ii)(I)-(II), (iii)(I)-(IV) (2006).

[87] *Id.* § 5362(10)(C).

[88] For an explanation of the IHA, *see supra* Part II.A.2. For an explanation of the PASPA, the Gambling Devices Transportation Act, and the IGRA, *see supra* Part II.A.3.

[89] But see ROSE & OWENS, *supra* note 2, at 172-73, 173 n.654, where they indicate that the Wire Act would cover intrastate transmissions, as long as they are made over interstate means of communication. However,

One might contend that the Wire Act does cover intrastate gambling, but there is an exception when an individual state sanctions the activity in question. However, this is not a plausible explanation because such an exception to the Wire Act is not explicitly stated anywhere, and cuts too deeply at the heart of the law to be simply implied from other statutes. Other laws mandating general prohibitions, with exceptions for when states approve of the activity, contain such an exemption explicitly in the statute.[90] Furthermore, the only statute that even implies such a possible exception is the UIGEA, but the UIGEA cannot be a source for this exception because it establishes from the outset that it does not change the preexisting legal status of any gambling activities.[91] Since the UIGEA states, without even mentioning the Wire Act, that intrastate Internet gambling may be authorized by individual states, and there is no exception to the Wire Act for when an individual state allows intrastate Internet gambling, it therefore must be the case that the Wire Act simply does not cover purely intrastate Internet gambling.

Given the overarching rule of construction that the UIGEA does not alter any already existing laws, the definition given for unlawful Internet gambling might not be able to be construed as creating an exemption for intrastate Internet gambling that was previously illegal.[92] However, what Congress takes as a given in this definition sheds light on what types of Internet gambling were and were not previously legal under existing federal law.[93] Essentially,

this interpretation is not convincing in light of the arguments explained in the text here. The language of the Wire Act ("uses a wire communication facility for the transmission in interstate or foreign commerce") is inconclusive as to whether or not it covers purely intrastate transmissions made over interstate communication facilities. 18 U.S.C. § 1084(a) (2006).

[90] *See supra* Part II.A.3.

[91] 31 U.S.C. § 5361(b) (2006).

[92] *Id.*

[93] There is no worry here of Congress usurping the courts' job of interpreting the laws, because that concern only arises when Congress addresses a law that applies to a case currently pending before the court. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

the UIGEA notes that as long as a state adheres to the listed applicable laws, purely intrastate Internet gambling is legal under existing federal law.

ii. The Interstate Horseracing Act

With regard to the IHA, the UIGEA states that it does "not include any activity that is allowed under the Interstate Horseracing Act of 1978."[94] But the law also acknowledges the ambiguity regarding the IHA's application to the Internet.[95] The UIGEA specifically shies away from clarifying this ambiguity; rather, it states, "This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes."[96] The UIGEA provisions relating to the IHA appear acutely aware of the importance of the IHA's interpretation, and thus carefully set those issues outside the scope of this law.

2. Laws Relating to Gambling More Generally

As with laws pertaining to substantive gambling activities, some laws that pertain to whatever activities are otherwise illegal also apply to gambling in general, as opposed to Internet gambling specifically. These laws would also apply to Internet gambling inasmuch as Internet gambling fits into their general descriptions of gambling activities. These laws are the Travel Act, the Illegal Gambling Business Act (IGBA) (both of which were under consideration in the WTO dispute), the Racketeer Influenced and Corrupt Organizations (RICO) Act, and Money Laundering statutes.

The Travel Act prohibits "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to" take actions

[94] 31 U.S.C. § 5362(10)(D)(i) (2006).

[95] *See supra* Part II.A.2.

[96] 31 U.S.C. § 5362(10)(D)(iii).

related to or in furtherance of "any unlawful activity."[97] "Unlawful activity" is defined in part as "any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States."[98] This law makes interstate travel related to gambling illegal, but is dependent on gambling being illegal in the state where the activity in question is intended to be committed. Inasmuch as the state-prohibited gambling activity in question would involve Internet gambling, this Act applies to Internet gambling as well as to live gambling.

The IGBA penalizes "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business."[99] In addition to being in "violation of the law of a State or political subdivision in which it is conducted," an "illegal gambling business" for the purposes of this law must also involve at least five people, and be "in substantially continuous operation for a period in excess of thirty days or [have] a gross revenue of $2,000 in any single day."[100] This law makes running a substantial gambling business involving five or more people that is illegal under state law a federal crime. Since nothing prevents an Internet gambling business from qualifying as an "illegal gambling business" under this law, it applies to Internet gambling in addition to live gambling.

Gambling can also be a predicate offense to the RICO Act. Under the RICO Act, it is illegal to use "a pattern of racketeering activity," or the proceeds thereof, to control an

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[97] 18 U.S.C. §§ 1952(a)(1)-(3) (2006).

[98] *Id.* § 1952(b)(i)(1). "The term 'State' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States." *Id.* § 1952(b)(ii).

[99] *Id.* § 1955(a).

[100] *Id.* §§ 1955(b)(1)(i)-(iii). As with the Travel Act, "State" here "means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States." *Id.* § 1955(b)(3). The Act also exempts from its coverage games that are run by tax exempt organizations that do not profit from running such games. *Id.* § 1955(e).

enterprise that is part of interstate or foreign commerce.[101] Racketeering activity includes "gambling . . . which is chargeable under State law and punishable by imprisonment for more than one year [and] any act which is indictable under" the Wire Act.[102]

There is also a concern that Internet gambling will be used to facilitate money laundering. Money laundering entails engaging in a financial transaction in which the defendant knows that the property involved "represents the proceeds of some form of unlawful activity."[103]

C. State Laws

Many of the laws already explained refer to the possibility of gambling activities being illegal under state law. In fact, within the space that federal law allows for individual states to enact their own gambling regulations, the legal status of gambling varies widely from state to state. Some states have banned Internet gambling and/or banned financial intermediaries from making payments to gambling sites, others implicitly include Internet gambling in more general anti-gambling statutes, and a few have actually taken steps to legalize some form of Internet gambling.[104]

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[101] *Id.* §§ 1962(a)-(b). A "pattern of racketeering activity" requires at least two acts of racketeering activity committed within ten years of one another. *Id.* § 1961(5).

[102] *Id.* §§ 1961(1)(A)-(B).

[103] ROSE & OWENS, *supra* note 2, at 154; 18 U.S.C. § 1956(a)(1) (2006). Rose and Owens note that "[d]espite the fact that no conviction, proof, or even substantive allegation of actual money laundering has surfaced to date, it nevertheless remains an article of faith in American law enforcement circles that Internet gambling sites located offshore" are a possible conduit for money laundering schemes. ROSE & OWENS, *supra* note 2, at 154.

[104] At one extreme, Nevada, North Dakota, and the Virgin Islands have all taken steps towards legalizing some forms of Internet gambling. *See* ROSE & OWENS, *supra* note 2, at 78-81; Tom Rafferty, *Making Their Wagers*, BISMARCK TRIB., Mar. 9, 2005, *available at* http://www.bismarcktribune.com/articles/2005/03/09/news/topnews/top01.txt. At the other extreme, various state provisions ban Internet gambling, either specifically

However, it should be pointed out that the fact that U.S. law allows for different regulatory schemes in each state does not mean that this area of law discriminates between the United States and foreign countries. In determining the basis for discriminatory laws, which is the crucial issue in the WTO dispute, simply having a federal default rule of illegality, within which there are a number of different state regulatory schemes, is not the same as having discriminatory laws. As long as a state's laws do not arbitrarily discriminate between U.S. and foreign suppliers, then that state's having its own set of regulations is not discriminatory. A state may choose to enact discriminatory laws, which in turn will make the federal law granting such authority discriminatory as applied to that state's problematic laws,

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or as part of a general ban on gambling. *See, e.g.*, LA. REV. STAT. ANN. § 14:90.3 (2006). This statute bans:

> Whoever designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server providing a Home Page, Web Site, or any other product accessing the Internet, World Wide Web, or any part thereof offering to any client for the primary purpose of the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

Id. *See also* COLO. REV. STAT. § 18-10-103(2) (2006) ("A person who engages in professional gambling commits a class 1 misdemeanor. If he is a repeating gambling offender, it is a class 5 felony.").

The preceding examples are instances of state laws that target the status of gambling activities. State laws can also employ enforcement mechanisms like those in the UIGEA. For example, then New York Attorney General Eliot Spitzer, backed by the threat of litigation, compelled major American credit card companies, PayPal, and various banks to stop making payments to Internet gambling sites. Press Release, Office of New York State Attorney General Eliot Spitzer, Ten Banks End Online Gambling With Credit Cards (Feb. 11, 2003), *available at* http://www.oag.state.ny.us/press/2003/feb/feb11b_03.html; *see also* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 82 (2006).

There is also a certain amount of eccentricity on the matter of each state's gambling regulations. For example, Nevada, generally one of the more permissive states, does not allow lotteries. ROSE & OWENS, *supra* note 2, 245-46.

but this is not a necessary consequence of state discretion to make either discriminatory or balanced laws. On the other hand, discrimination does necessarily arise when states are allowed to authorize certain activities that federal law expressly prohibits foreign service providers from engaging in, but this discrimination is the result of the underlying federal law setting a different standard for foreign service providers than it does for states of the United States.

Some of the federal laws that have been surveyed here fall into each category. Some simply call for individual state regulation whereby an individual state may choose to enact a discriminatory law, but the federal scheme by no means requires such a result. Others actually do impose regulations that discriminate between foreign and domestic service providers.

D. Summarizing Current Law

As can be seen from the survey of current law just given, because of the number of laws that must be scoured and the ambiguous and contingent nature of some of these statutes, it is difficult to concisely summarize the current legal status of Internet gambling. However, based on the best explanations from the available material, some conclusions can be drawn from the amalgam of current laws. Various members of the federal government are of the opinion that interstate Internet gambling is generally illegal under U.S. federal law, but at best support these contentions with vague allusions to the Wire Act.[105] A similar situation arose in the WTO dispute with Antigua. There, too, the DOJ maintained that Internet gambling was generally illegal under federal law, but was very vague with regard to what exactly federal law prohibits.[106] As the Dispute Panel of the WTO explained,

[105] *See* Shulman, *Online Gambling Ban, supra* note 24; Rodefer, *supra* note 42, at 30.

[106] The DOJ took an expansive view of the Wire Act, but as the Dispute Panel noted, this view did not encompass their entire stance with regard to Internet gambling. *U.S. – Gambling* Second Written Submission, *supra* note 27; *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.210.

"We recall that the United States has admitted the existence of a prohibition of the remote supply of certain gambling and betting services. However, the United States has not indicated pursuant to which laws and according to which provisions of those laws the prohibition is imposed."[107]

It is certain that the Wire Act applies to transmissions over the Internet regarding bets on sporting events. Although the DOJ, Presidential administrations, and members of Congress have claimed that the Wire Act also applies to gambling more generally, this position lacks authority and is contradicted by the Fifth Circuit's opinion in *In re Mastercard*.[108] The Wire Act itself is not clear regarding whether or not it applies to purely intrastate wire transmissions, but the UIGEA clarifies the matter and supports the explanation that the law does not extend to such betting. The UIGEA makes this clear in its explanation that purely intrastate and intratribal Internet gambling is legal as long as it does not violate certain other federal statutes; however, it does not list the Wire Act as one of these potentially limiting statutes.[109]

The UIGEA's statements about intrastate and intratribal Internet gambling are part of a general trend in Internet gambling legislation of providing exemptions for states that choose to legalize otherwise prohibited activities. For example, the Gambling Devices Transportation Act generally prohibits the interstate transportation of gambling devices, but makes an exception for when the state into which the device is being transported chooses to exempt itself from the prohibition.[110] The PASPA makes sports betting generally

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[107] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.210; *see also* First Written Submission of the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 31, WT/DS285 (Nov. 7, 2003) [hereinafter *U.S. – Gambling* First Written Submission], *available at* http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html ("In light of U.S. restrictions on remote supply of gambling, this is hardly surprising.").

[108] *See supra* Part II.A.1.b.

[109] *See supra* Part II.B.1.c.i.

[110] 15 U.S.C. § 1172(a) (2006).

illegal, but then excepts such schemes that were already in place around the time of the passage of the Act.[111] The federal lottery laws also make extensive prohibitions, but then exempt the states and foreign countries in which lotteries are authorized.[112]

The other federal laws covered earlier (the Travel Act, the IGBA, and the RICO Act) only address the legal status of specific gambling related activities (traveling interstate, conducting an illegal gambling business, and a pattern of illegal activity) to the extent that those activities are related to gambling activities that were already illegal under state or federal law.[113] This is very different from the Gambling Devices Transportation Act, the PASPA, and the lottery laws, which actually prohibit certain activities but allow for states to make exceptions. Where states can make exceptions to federal law, federal law still provides default legal status of proscribed behavior; however, where the legal status derives from other illegal activity, the federal default remains legality, and some positive action by the state (i.e., some other law) is required to change that default. All of these federal laws leave room for individual states to authorize or prohibit certain activities. Regulatory schemes in place throughout the United States cover much of the spectrum of schemes permissible under federal law.

Whether the laws in question discriminate between domestic and foreign service providers is the key issue in the *U.S. – Gambling* case. But before analyzing the WTO dispute, it is important to consider the United States's motivation in enacting laws that might conflict with its free trade commitments by leaving room for states to decide certain matters for themselves.

[111] 28 U.S.C. § 3702 (2006).

[112] 18 U.S.C. §§ 1301-1307 (2006).

[113] *See supra* Part II.B.2.

III. THE UNITED STATES'S UNDERLYING MOTIVATION FOR DISCRIMINATORY LAWS

As explained at the outset, the issue in the *U.S. – Gambling* case is whether current U.S. gambling laws unjustifiably discriminate against Antiguan gambling service providers. This note will later describe the exact nature of the WTO's standard so that it can be properly applied to other U.S. laws, but the immediate goal is to understand why the United States might enact discriminatory laws.[114] At this point, it is sufficient to know that a conflict arises when the United States enacts a law discriminating against foreign service providers in favor of domestic ones. From the survey of U.S. Internet gambling laws just described, it is apparent how U.S. law discriminates against foreign Internet gambling service suppliers. To the extent that any activities are generally prohibited under current U.S. law, but are allowed to be provided only by domestic suppliers, the laws in question favor domestic suppliers at the expense of foreign ones.

A. Protectionist and Paternalist Explanations are Insufficient

Critics of the United States's current inconsistent stance on the GATS suggest two explanations: first, that the United States is advancing protectionist policies in favor of its domestic gambling industry and second, that it is enacting paternalistic laws to regulate what it views as immoral or dangerous behavior. [115] Protectionism, after all, is the main value at odds with the value of free trade at stake in the WTO dispute. Antigua accused the United States of being motivated by protectionist concerns in

[114] *See infra* Parts IV.A-C.

[115] *See, e.g.* Will, *supra* note 1; Allyn J. Shulman, *The UK, the World Trade Organization, and the USA*, CARDPLAYER.COM, Nov. 2, 2006, http://www.cardplayer.com/poker_law/article/1566; Sir Ronald Sanders, *US Bill on Internet Gambling: Morality or Protectionism?*, CARIBBEAN NET NEWS, Oct. 5, 2006, http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000035/003577.htm.

enacting the measures at issue in their dispute.[116] However, both the argument about protectionism and the argument about paternalism miss key facets of the situation.[117]

Within the protectionist explanation, there are two types of protectionism that might be at play here. One is protection of the U.S. live gaming industry, which might be threatened by the proliferation of Internet alternatives that send profits to foreign companies. The other type of protectionism is that, within the realm of Internet gambling, the United States favors domestic Internet gambling websites over foreign ones.

The first type of protectionism is not relevant here because in the context of the WTO dispute, Internet gambling regulations are in a separate category from live gambling regulations. Therefore, even if current laws treat Internet gambling more restrictively than live gambling, such discrepancies are irrelevant to the discrimination issue that proved so important to the WTO. In *U.S. – Gambling,* the WTO, whose main purpose is to combat protectionism through the promotion of free trade, acknowledged the United States's argument that concerns unique to Internet gambling merit more restrictive laws than do live gambling activities.[118] In particular, remote access to gambling increases the difficulty of verifying the age of the participant and increases the possibility of fraud.[119] Since discrepancies between how U.S. law treats live versus Internet gambling were not in violation of the United States's GATS commitments, they are not at issue here.

As for the second type of protectionist claims, if the goal of current U.S. Internet gambling policy were to favor U.S. Internet gambling companies over foreign ones, the current U.S. laws are failing to achieve this result. Various members of the federal government claim Internet gambling is

[116] *U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 3.200, 3.283.

[117] The United States cites concerns that these websites will be a front for money laundering. However, it is unclear how legitimate these concerns actually are. ROSE & OWENS, *supra* note 2, at 154.

[118] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 347.

[119] *Id.* ¶ 313.

generally illegal. Comments from the DOJ and members of Congress adamantly insist that the Wire Act covers all types of gambling. These comments also extend beyond mere words. States and territories that have tried to authorize Internet gambling have been rebuffed by the DOJ.[120] In fact, the legal status of Internet gambling companies in the United States is so precarious that none of them are based in the United States out of fear of prosecution under U.S. law. Internet gambling is only legal in very limited circumstances in the United States. Even if, within these limited circumstances, the United States happens to discriminate against foreign companies, the pervasive climate against Internet gambling in the federal government makes protection of the U.S. Internet gambling industry a poor explanation for the disparate treatment.

The general nature of this conflict also tends to exclude a protectionist explanation. The whole point of signing on to a free trade agreement is to disavow protectionist aims in favor of free trade. If the United States is motivated by protectionist aims here, then it is basically reneging on its initial agreement, without more. It is true that a country might sign a free trade agreement only to reap the benefits of being a signatory, and then cheat on its obligations. However, there is little reason for the United States to want to protect domestic gambling websites from foreign competition any more than it might want to protect any other good or service for which the United States has kept its free trade commitments. Furthermore, even if the United States did not realize that Internet gambling services were included in the free trade commitments at issue here (as was at issue in the WTO dispute), the circumstances in which even domestic Internet gambling is allowed under U.S. law are very limited.[121] The permissible area is either ambiguous or consists of exceptions to broad rules of illegality.[122] Since it seems that the United States does not have a strong

[120] *See supra* note 26 and accompanying text.

[121] *U.S. – Gambling* First Written Submission, *supra* note 107, ¶¶ 59-76.

[122] *See supra* Part II.D.

interest in promoting Internet gambling generally, it seems unlikely that it would engage in an international trade dispute in this area for protectionist reasons.

Some of the policies behind restrictions on Internet gambling might very well be "paternalistic" in that the government is trying to protect people from certain harms that they might risk causing to themselves. However, paternalism is tangential to the conflict between U.S. law and its free trade agreements. The whole conflict arises in those conscribed areas in which the United States is *allowing* Internet gambling to some extent domestically, but restricting its access through foreign service providers. Therefore, even if there is some amount of paternalism behind current restrictions on Internet gambling, the WTO problems arise precisely where some other concern overrides this paternalism in favor of allowing Internet gambling in the United States.

B. Federalism

We have already seen that protectionism is a weak choice for a full explanation of these overriding concerns. A better explanation for the United States's discrimination against foreign Internet gambling service providers is that traditional federalism concerns are at play here. Where the federal government leaves open the possibility of gambling being legal, such legality can only occur if it is authorized by individual states, as we saw with a number of the laws described in the previous section.[123] This shows the importance of letting the states determine their own gambling policy whenever possible. The U.S. Code also explains that states should have the authority over regulating intrastate gambling.[124] Furthermore, the recent UIGEA does not affirmatively permit intrastate Internet gambling, but merely explains that states have had this authority all along

[123] *See supra* Part II.D.

[124] 15 U.S.C. § 3001(a)(1) (2006).

because the reach of current federal laws do not go so far as to totally prohibit intrastate Internet gambling.[125]

Of course, different members of the government could have different motivations in regulating Internet gambling, but arguments about protectionism and paternalism to explain discriminatory laws simply do not stand up to analysis. Most of the evidence available suggests that the underlying concern is for states' rights rather than an attempt to favor the U.S. economy over foreign economies.

The IHA does in fact authorize some form of Internet gambling on the interstate level. However, even this law does not undermine the argument that there is a federalism concern motivating the federal laws in this area. In fact, the policy statement proclaiming that "[s]tates should have the primary responsibility for determining what forms of gambling may legally take place within their borders" comes from the opening of the IHA itself.[126] Interstate horseracing just happens to be an exceptional area in which "there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers."[127] Even the substance of the IHA reveals the preference for state control because interstate horseracing can only be legal "where lawful in each State involved."[128] The federal government does not necessarily have a policy in favor of interstate horseracing; rather, it is in favor of letting each state choose for itself where it stands on the issue.

One might argue that if the federal government were to truly leave the decision up to the individual states, it should even let the states decide whether or not to authorize foreign service providers. But perhaps the federal government does not allow the states to legalize international suppliers because such suppliers present too much risk to the public. Even though there is also some amount of risk on the

[125] 31 U.S.C. §§ 5362(10)(B)(i)-(ii), (C)(i)(I)-(II), (ii) (2006); *see supra* Part II.B.1.c.

[126] 15 U.S.C. § 3001(a)(1) (2006).

[127] *Id.* § 3001(a)(3).

[128] *Id.* § 3002(3).

intrastate level, since the activity only takes place within the individual state, the federalism concern trumps the reason for prohibiting the activity. Essentially, all else being equal, the federal government has a reason for prohibiting Internet gambling, but because of its high regard for federalism, it makes room for certain intrastate allowances.

Some decry that:

> Unfortunately, the WTO does not recognize the federalist structure of the United States—nor the will of the people expressed through the legislatures—to be adequate justification. Thus, the WTO's position is fundamentally incompatible with the historic right of States to formulate their own gambling policies without having to justify those policies to the Federal government, courts, or other outside arbiters.[129]

It is true that the WTO does not recognize the right of individual states to make their own policy where such policies are in violation of the United States's free trade commitments. However, this lack of international recognition for the United States's particular federalism concerns is not necessarily "unfortunate."

It might be true that barring states, even at the purely intrastate level, from authorizing an activity that has traditionally been a matter of state control goes against the United States's federalist tradition in that area. However, allowing such authorization might also contradict some of the United States's more recent, but not necessarily any less important, free trade commitments in the WTO. After all, the very same statute that explains that gambling is traditionally an area of state control goes on to explain that "the Federal Government . . . should act to protect identifiable national interests."[130] If the United States enters into free trade agreements by which it guarantees equal treatment with regard to certain sectors of the economy, then it makes sense that the federal government cannot

[129] FACT SHEET, *supra* note 65, at ii-5.

[130] 15 U.S.C. § 3001(a)(2) (2006).

prohibit access to other WTO members while allowing states to limit access to U.S. citizens at the intrastate level. Such an arrangement blatantly accords unequal treatment. This is not to say that either concern—states' rights versus free trade—is necessarily more important. The aim here is to show how these two values come into conflict, but not to address the policy question of how to resolve that conflict. Such a resolution depends on how one balances the two competing values relative to one another.

It is also not surprising that federalism concerns and free trade commitments would come into conflict here because there is an inherent tension between these values. International free trade commitments, and treaty commitments more broadly, are made between nations as a whole. The nature of these agreements is for the signatories to make certain commitments on behalf of their whole country. On the other hand, the very nature of federalism is to leave certain areas of control up to individual states to decide for themselves. Therefore, on any given issue, by signing a treaty on behalf of the whole country, the federal government is necessarily taking that issue out of the control of individual states. There are some areas that individual states have a constitutional right to control and thus there would be a constitutional problem with the federal government signing a treaty on behalf of all the states in such an area. The regulation of Internet gambling, however, is not such an area. As explained earlier, even though gambling regulation is traditionally a matter of state control, the federal government has the constitutional authority to regulate most gambling activities, and will do so when it sees a need for federal legislation.[131] Therefore, the issue here is a policy matter of whether the federal government would prefer to leave the issue up to individual states to decide for themselves, or would rather make a decision on behalf of the entire nation as part of its GATS commitments.

Understanding the United States's underlying concern as one of federalism gives a much more satisfying explanation

[131] *See supra* p. 445 and notes 13-14.

for the conflict than do the protectionist or paternalist arguments. This way, in the laws that conflict with the United States's GATS commitments, the United States can be seen as taking a default position against gambling, while at the same time—out of concern for states' rights—states can choose to exempt themselves on a limited basis. This ultimately leads to treating foreign suppliers under the default of illegality, but leaving room for states to make the conduct legal on an internal basis, yielding the problematic discrimination between how the conduct is treated within individual states and how it is treated on the international level.

The basic explanation of the WTO rule against discriminatory laws given up until this point has been sufficient for understanding the basic issues applicable to U.S. laws in this area. However, in order to fully understand precisely what the problem is in the current dispute and to ascertain whether or not there might be similar problems with other laws that were not considered by the WTO, a more detailed analysis of the WTO's standards on this matter is necessary.

IV. THE WTO DISPUTE

Since the legal status of Internet gambling is so unclear in the United States, the businesses are often based offshore. The small island nation of Antigua-Barbuda (Antigua) has become a hub for online casinos.[132] Many of these casinos have established reputations for honest dealing and are accepted as running their operations in good faith. Antigua welcomes this business and it is an important part of the small country's economy. Despite the general accessibility of these foreign-based sites to U.S. citizens in recent years, Antigua still felt that certain federal and state laws, as well

[132] "The weather, a favorable government, and good connections to the United States have made [Antigua] a favored destination . . . . At its height, the local Internet gambling industry had 119 online casinos that employed 5,000 people, or over 7 percent of the islands' population." GOLDSMITH & WU, *supra* note 104, at 172.

as specific actions, threatened the free exchange of business between its local gambling sites and U.S. citizens.[133]

In June of 2003, Antigua filed a complaint with the WTO, claiming that certain U.S. federal and state laws violated the United States's free trade commitments entered into under the GATS.[134] Antigua argued that "various U.S. actions against offshore online gambling amounted to 'an illegal barrier to trade in services.'"[135] In its Request for Consultation before the WTO, Antigua listed a plethora of federal and state statutes, as well as a number of individual federal and state actions, that it claimed infringe on the free trade of Internet gambling services guaranteed by the United States under the GATS.[136] In addition, Antigua claimed that the totality of the U.S. laws amounted to a "total ban" on the cross-border supply of Internet gambling.[137]

The analysis in *U.S. – Gambling* involved several complex steps. Simply stating the conclusions would ignore key facets of the dispute, which are important to understand if one is to fully comprehend the standards being applied to U.S. law. Therefore, in order to glean an understanding of the legal standards by which disputes in this area are

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

[134] The WTO was established in 1995 as a successor to the General Agreement on Tariffs and Trade (GATT), which was formed after World War II. The WTO deals with trade between countries and seeks to promote free trade. The WTO's policies were established during the Uruguay Round of Agreements, which were conducted from 1986 to 1994. "The General Agreement on Trade in Services, part of the Final Act of the Uruguay Round (also known as the Marrakesh Agreement), covers 'trade in services'" (as opposed to the more traditional trade in goods) between member nations. Both Antigua and the United States are founding members of the WTO. ROSE & OWENS, *supra* note 2, at 95.

[135] GOLDSMITH & WU, *supra* note 104, at 172 (quoting Warren Giles, *U.S. Online Internet Gambling Plan May Be Challenged By Antigua*, BLOOMBERG NEWS, Mar. 25, 2003).

[136] *U.S. – Gambling* Request for Consultations, *supra* note 133.

[137] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 3.90.

judged, this note will give a more detailed explanation of the WTO's reasoning.

The WTO's analysis focused on determining the nature of the United States's free trade commitments under Article XVI of the GATS, applying those commitments to the measures at issue, and then considering the United States's defense under the "public morals" exception of the free trade agreement.[138] The case was first presided over by the WTO's Dispute Panel (DP). Each side then appealed several issues from the DP's decision to the Appellate Body (AB), which judged each of these issues on appeal, overruling significant parts of the DP's decision.

A. The United States's Commitment to Gambling Services

The AB upheld (though on different grounds) the DP's conclusion that "the United States's Schedule under the GATS includes specific commitments on gambling and betting services."[139] The AB also agreed with the DP's conclusion that the substance of the United States's commitment in this area is "to provide full market access,

[138] Antigua also challenged U.S. measures under Articles VI, XI, and XVII of GATS, but the DP ruled (and the AB did not overturn) that because it found the United States to be in violation of Article XVI, there was no need for it to address the claims under Articles XI and XVII. *U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.426, 6.441. The DP did address Antigua's claim under Article VI, and held that Antigua did not make a prima facie case that the U.S. measures in question imposed unreasonable authorization requirements on Antigua-based Internet gambling sites. *Id.* ¶ 6.437.

[139] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 213 (citing *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 7.2(a)). The Appellate Body did not simply affirm the Dispute Panel's finding, but significantly criticized the Dispute Panel's interpretation of the treaty, and upheld its findings on different grounds. The relevant point for our purposes is that the body found that the United States did make a commitment to the free trade of gambling services. *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 212.

within the meaning of Article XVI."[140] The AB then affirmed the DP's ruling that limitations tantamount to a "zero quota" (in that they totally prevent market access) are covered by Article XVI:2's provisions prohibiting "limitations on the number of service suppliers [and] service operations or on the total quantity of service output."[141]

When a country agrees to grant market access to any sector of the economy, it is agreeing for the entire sector, and therefore is in violation of its commitments "if it does not allow market access to the whole or part of a scheduled

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[140] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 215; *see also U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.285, 7.2(b). Article XVI limits the type of treatment that a country may give to "services and service suppliers of any other Member." Uruguay Round Agreement: General Agreement on Trade in Services, Apr. 15, 1994, Art. XVI:1 [hereinafter GATS], *available at* http://www.wto.org/English/docs_e/legal_e/26-gats.pdf. These requirements depend upon what commitments a country has undertaken in its more general Schedule of commitments. Under Article XVI:1, a Member must "accord services and service suppliers of any other Member treatment no less favorable than that provided for" by their Schedule of commitments. GATS, Art. XVI:1. Then, if they have made a commitment to accord "market access," Article XVI:2 lists a number of specific measures that the Member in question cannot have towards any other Member. GATS, Art. XVI:2. The DP actually ruled that when a Member has committed to "market access," the scope of the general provision of XVI:1 is defined by the specific limitations of XVI:2. *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.318. However, because the AB agreed with the DP that the provisions of XVI:2 extend to limitations in the form of "zero quotas," and therefore covered the limitations in this case, the AB felt no need to address this issue of the relationship between XVI:1 and 2. *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 256.

[141] GATS, *supra* note 140, Art. XVI:2(a), (c); *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶¶ 238, 252. In affirming the DP here, the AB rejected the United States's claim that the relevant provisions of Article XVI:2 "only apply to limitations that are in form specified exactly and expressly in terms of numerical quotas." *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 256 (quoting Other Appellant Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3 n.3, WT/DS285 (Jan. 24, 2005), *available at* http://www.antiguawto.com/wto/42_AB_Other_Appellant_Submission_24Jan05.pdf).

sector or sub-sector."[142] Similarly, the types of commitments at issue here (mode 1) "allow services suppliers in other WTO Members for a committed sector to supply services cross-border via any means of delivery."[143] Based on the all-encompassing nature of these commitments, totally limiting even one means of delivery of even part of a scheduled sector or sub-sector will constitute a "zero quota" with respect to that means of delivery in that part of the scheduled sector or sub-sector. Therefore, even though gambling might be just part of a scheduled sector, and some U.S. laws may only limit certain means of delivering that service, even those laws will be problematic if the United States has made a market access commitment of the type that guarantees all modes of delivery. Essentially, under the GATS, the United States agreed to provide "market access" to all means of delivery of gambling services. The WTO therefore was not looking only at restrictions on Internet gambling, but rather at any restrictions on the free trade of gambling services with Antigua.

Because the United States's commitment is to have zero restrictions on the access to this service, it does not matter to what extent the restrictions are limited to Internet gambling, as opposed to all gambling services. However, later on in the analysis, the distinction between Internet and live gambling will become relevant when determining whether or not the United States applies its restrictions in a discriminatory manner.

B. Applying the United States's Commitments to the Measures at Issue

The next stage of the analysis was to determine what the United States's stance was towards these protected

[142] *U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.335, 6.352; *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 215.

[143] *U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.338, 6.335; *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 215.

services.[144] The United States admitted at a Dispute Settlement Body meeting "that a prohibition on the 'cross-border supply of gambling and betting services under [U.S.] laws' exists in the United States."[145] Furthermore, to a question regarding which services are prohibited, the United States responded that:

> The United States is referring principally to services involving the transmission of a bet or wager by a wire communication facility across state or U.S. borders, such as Internet and telephone betting. Other gambling services that are similarly restricted both domestically and cross-border include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events.[146]

However, the DP found that even with the United States's admissions, it was still unclear which specific provisions of U.S. law established these prohibitions on the remote supply of gambling services.[147]

The AB upheld the DP's decision that the Wire Act, the Travel Act, and the IGBA were in violation of the United States's commitments under Article XVI of the GATS, but

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[144] The WTO settlement of GATS disputes only focuses on "measures" that violate the treaty. The AB thus agreed with the DP that Antigua's claim of an abstract "total prohibition" on Internet gambling services, as a separate matter from individual laws that established this prohibition, did not constitute a "measure." As for specific federal and state actions against free trade, Antigua was not raising U.S. practices to challenge them in and of themselves, but rather only as evidence of problematic measures. Even so, the AB disagreed with the DP's characterization of prior AB decisions on this matter. The AB held that it had not decided, one way or the other, whether or not "practice" can be considered a "measure." *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 131 (citing *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.197).

[145] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.161.

[146] Answers of the United States to the Panel's Questions in Connection with the Second Substantive Meeting, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 14, WT/DS285 (Feb. 2, 2004) (quoted by *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.162).

[147] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.165.

overruled the DP's decision that several state provisions were also in violation because it found that Antigua had not made a prima facie case.[148] Inasmuch as each of these laws limits market access to "service suppliers," "services operation," and "service output," they constitute a "zero quota" and therefore violate Article XVI:1 and XVI:2(a) and (c) of the GATS.[149] However, the AB also found, unlike the DP, that these laws were provisionally justified by the "public morals" exception of Article XIV.

C. The Public Morals Exception and the Chapeau of Article XIV

The United States claimed that even if these laws do violate their free trade commitments under Article XVI, they are still allowed under the "public morals" exception of Article XIV. In order for a measure to be justified under this exception, it must be "necessary to protect public morals or to maintain public order."[150] However, this exception is also limited by the "chapeau" of Article XIV, which requires that measures justified under the article may not be "applied in a

[148] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶¶ 153-55, 257-65; *see also U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.363-65, 6.370-73, 6.375-80, 6.421. For an explanation of the Wire Act, *see supra* Part II.A.1. For an explanation of the Travel Act and the IGBA, *see supra* Part II.B.2.

[149] The explanations of the three federal statutes at issue are straightforward, except that with regard to the Wire Act, the DP noted that "some [U.S.] courts have interpreted the Wire Act to include communication by the Internet. Further, the United States has acknowledged that the Wire Act covers the remote transmission in interstate or foreign commerce of bets or wagers." *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.362. This is significant because as noted above, the U.S. case on point explains that the Wire Act does not in fact apply to "bets or wagers" generally, but rather only to sports betting. *See supra* p. 451. It is interesting, but beyond the scope of this analysis, to consider how an external panel, such as the DP of the WTO, should interpret U.S. law when there are conflicting U.S. sources as to the proper interpretation, and how much weight should be accorded the interpretation provided by United States's representative in the dispute (here the DOJ).

[150] GATS, *supra* note 140, Art. XIV: General Exceptions (a).

manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."[151]

The AB's decision under Article XIV, which significantly diverges from that of the DP, held that the United States did provisionally justify the laws in question as "necessary" for the protection of public morals and/or public order.[152] As for the chapeau, the AB overruled the DP, and held that the United States met its burden of showing that the provisions

[151] *Id.* Art. XIV: General Exceptions. The AB details a "two-tier analysis" for determining whether or not a measure qualifies as an Article XIV exception, whereby first a panel decides if the measure in question "falls within the scope of one of the paragraphs of Article XIV" and if it does, the panel then moves on to "consider whether that measure satisfies the requirements of the chapeau of Article XIV." *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 292.

[152] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 327. The DP concluded that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order' under Article XIV(a)," but that the United States had not provisionally justified that these measures "are necessary to protect public morals and/or public order within the meaning of Article XIV(a)." *U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.487, 6.535. In large part, according to the DP, the United States had not provisionally justified the necessity of these measures because it did not show that it had tried to work out the issue with Antigua bilaterally before taking the unilateral measures of enacting these laws. *Id.* ¶ 6.534. The AB, on the other hand, held that these laws did meet the "necessary" prong of the public morals exception. The DP also made a similar decision regarding the necessity of these laws under Article XIV(c), under which a law is justified if it is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.564. The AB also overruled the DP's conclusion that the laws were not "necessary" under XIV(c), but did not go on to actually conclude that they were in fact necessary. Since the AB had already concluded that the laws in question were justified under XIV(a), it was "*not necessary for us to determine* whether these measures are also justified under paragraph (c) of Article XIV." *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 337.

in question had not been applied arbitrarily.[153] The AB explained:

> Faced with the limited evidence the parties put before it with respect to enforcement, the Panel should rather have focused, as a matter of law, on the wording of the measures at issue. These measures, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services. We therefore *reverse* the Panel's finding.[154]

Since the three federal laws in question did not discriminate on their face, and there was not sufficient evidence to conclude that the United States was discriminating in its

[153] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 357; *see also U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.589. The DP's conclusion was based on its finding that the evidence with regard to the nature of United States's enforcement of the prohibition on Internet gambling was inconclusive, and the United States therefore failed to meet its burden of showing that the application of the laws was not arbitrary. Since the DP held the measures in question to not be justified as "necessary," there was no need for it to go on to the next stage of analysis under the chapeau, but "since important arguments have been made by the parties on key issues discussed below, [it] decided to address them so as to assist the parties in resolving the underlying dispute in this case." *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.566.

[154] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 357. While the AB did not formally shift the burden of proof on the discrimination issue to the plaintiff, it essentially required a minimal showing from the defendant in order to satisfy its burden in a main group of cases that could arise. Under the AB's standard, when there is no evidence regarding the application or enforcement of a law, then a party trying to avail itself of the public morals exception no longer needs to present positive evidence to show that the law in question is applied neutrally. But if the accusing party does not provide evidence as to discriminatory application, then the WTO will not have such evidence. Therefore, in cases dealing with a facially neutral law, this decision essentially requires the plaintiff to show that the law is in fact applied discriminatorily before it requires the defendant to meet its burden of showing non-discrimination. This solution makes sense when dealing with facially neutral laws, but it is still noteworthy inasmuch as it shifts the burden.

application or enforcement of the laws, the laws were found to meet the public morals exception.[155]

The AB also explained that, with regard to discriminatory application, it is appropriate to only look at the application of the measures at issue to the remote supply of gambling services. Since the remote supply gives rise to specific concerns regarding "money laundering, fraud, compulsive gambling, and underage gambling," the DP correctly noted that it would be inappropriate "to compare the United States's treatment of concerns relating to the *remote* supply of gambling services, with its treatment of concerns relating to the *non*-remote supply of such services."[156]

A final point regarding the AB's analysis is that, in theory, simply applying laws inconsistently between foreign and domestic suppliers is not enough to violate the chapeau of Article XIV. According to the wording of the chapeau, the discrimination must be "arbitrary" or "unjustified." In this particular case, however, the DP was correct to analyze the application of the laws for mere consistency because this was the only argument that the United States brought in its defense to meet its burden of proof. [157] However, even though the "arbitrary" and "unjustifiable" prongs did not come into play, this analysis shows that they theoretically could make the difference between a measure that violates the chapeau of Article XIV and one which complies with it.

1. The Three Federal Laws as Applied to the IHA

Even though the AB disagreed with the DP's conclusions as to the general enforcement of the measures at issue, the AB agreed that with regard to the IHA, the three federal laws did not apply neutrally.[158] The IHA itself was not at issue here because the IHA does not prohibit gambling and therefore does not violate the GATS.[159] If anything, the IHA

[155] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶¶ 354, 357.

[156] *Id.* ¶¶ 313, 346-47.

[157] *Id.* ¶ 350.

[158] *Id.* ¶ 364. *See supra* Part II.A.2 for a fuller explanation of the IHA.

[159] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.218.

permits Internet betting on horseracing as an exception to the three federal laws. The issue here is whether the IHA carves out from those federal laws an area in which Internet gambling is not prohibited, regardless of whether that carve-out is done in a discriminatory manner.[160]

Although the DP did not give what it saw as a definitive interpretation of the IHA, it still explained that the statute does at least seem to allow interstate betting over the Internet.[161] The DP agreed with Antigua's argument that "the text of the revised statute does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states."[162]

The AB upheld the DP's decision that the United States did not show that the three measures in question met the requirements of the chapeau, but only with regard "to the possibility that the IHA exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA."[163]

D. Making Sense of the WTO's Standards

Based on the WTO decision, it is clear that if the United States restricts foreign gambling suppliers' market access into the U.S. economy, it is in violation of its obligations under Article XVI of the GATS. But these restrictions can also be justified under Article XIV. The AB's decision applies section (a) of Article XIV fairly permissively. The concerns that were seen as valid reasons for the restrictions here under XIV(a) (regarding "money laundering, fraud,

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[160] *Id.* ¶ 6.599.

[161] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 371.

[162] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.599. Though the DP did not conclude that the IHA definitively discriminates against foreign service providers, the body found that the United States failed to meet its burden of showing that the law does not in fact so discriminate.

[163] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 369.

compulsive gambling, and underage gambling") could underlie just about any restriction on gambling services, particularly on Internet gambling services.[164] Also, since the AB interpreted the Wire Act so expansively, and still saw the measures at stake here as "necessary," any foreseeable restrictions the United States might enact against Internet gambling would likely be viewed as equally necessary.[165]

However, the analysis under the chapeau of Article XIV, which was the determining factor in the decision against the United States with regard to the IHA, could also very easily arise again. Under this ruling, any measures that are applied discriminatorily against other countries in an arbitrary or unjustified manner do not meet the requirements of the chapeau. As the analysis showed, if there is not sufficient evidence regarding a law's application or enforcement and that measure is facially discriminatory, then it will also be found in violation of the chapeau.[166]

The fact that the United States only sought to prove that the restrictions here were not discriminatory, but did not attempt to show that they were justified, might be evidence of how difficult it would be to make a case that a discriminatory restriction is justifiable. Given the right set of circumstances, however, the United States could reasonably argue that based on the concerns that the WTO saw as justifying the restrictions here, discriminating

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[164] *Id.* ¶ 313.

[165] *U.S. – Gambling* Panel Report, *supra* note 21, ¶ 6.362. The AB does leave open the possibility that if Antigua had identified a "reasonably available alternative measure" that the United States could have taken, short of the restrictions imposed here, then these restrictions would not have qualified as necessary. *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 326. This leaves open the possibility of providing some alternative to future restrictions. However, since no such possibility is suggested here, and it is also presumptuous to suggest that a whole separate regulatory scheme that a country could have taken is a "reasonably alternative measure" (after all, the AB did not consider the possibility here of negotiating with Antigua to be a reasonable alternative), the concern that other measures will not be considered "necessary" is nothing more than mere speculation.

[166] *See supra* Part IV.C.

against foreign based Internet sites is in fact justifiable. For example, if the United States were to impose certain regulations on U.S. based websites that would help ensure that the concerns underlying the prohibitions here would be less likely to occur, a possible valid justification for discriminatory laws could be a concern that these regulations would not have any force on foreign based sites. However, since the WTO did not analyze what "arbitrary" and "unjustified" meant with regard to restrictions on Internet gambling in this case, all of this argumentation is merely speculative. What is clear is that any discriminatory measures, either in their application or on their face, will raise a high level of concern under the chapeau of Article XIV.

It is also important to realize that state laws could also be the subject of future WTO disputes. Even though the AB overruled the DP's consideration of state provisions in this case, that was only because it found that Antigua had failed to make a prima facie case as to how these laws were inconsistent with Article XVI of the GATS.[167] However, in the future, if a party were to make such a showing with regard to state provisions, the WTO would also conduct the same analysis of the justifiability of state laws.

E. Consequences of the AB's Decisions

Once the AB decided that the laws in question, as applied through the IHA, did not meet the public morals exception, it recommended "that the Dispute Settlement Body [DSB] request[] the United States to bring its measures, found . . . to be inconsistent with the [GATS], into conformity with its

[167] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶¶ 153-55; Memorandum from Mendel Blumenfeld, LLP to the Antiguan Government Upon Release of the Appellate Body Report, Updated for Recent Developments as of March 3, 2006, http://www.antiguawto.com/wto/Summary_WTO_Case_March06.pdf (aiming to summarize and explain the Appellate Body Report in the *U.S. – Gambling* case, from Mark E. Mendel, Lead Counsel to Antigua, to the Antiguan Government).

obligations under the GATS."[168] The United States then "informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter."[169] After the two parties were unable to agree upon a "reasonable time" for compliance, however, Antigua requested that the Director-General appoint an arbitrator to determine such a time. The arbitrator determined that the United States's reasonable time for compliance would expire on April 3, 2006.[170]

In response to this deadline, the United States claimed that, based on its position on the status of Internet gambling in horseracing, it is in compliance. The DOJ basically repeated the arguments it made in the original case about how the IHA is not a problem because it does not repeal previously existing laws that make the supply of Internet gambling illegal.[171] Antigua did not agree that the United States was in compliance and therefore filed a Compliance Assessment motion requesting that a Compliance Panel assess whether or not the United States is in fact in compliance.[172]

Though the official final ruling is not yet available, early reports are that the WTO has in fact ruled against the United States on the issue of compliance with the AB's ruling. "Gretchen Hamel, a spokesman for the U.S. Trade Representative's office, confirmed press reports that a WTO

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[168] *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 374; *see also U.S. – Gambling* Panel Report, *supra* note 21, ¶ 7.5.

[169] Status Report of the United States Regarding Implementation of the DSB Recommendations and Rulings, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/15/Add.1 (Apr. 11, 2006) [hereinafter *Status Report*].

[170] Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 1-3, 68, WT/DS285/13 (Aug. 19, 2005).

[171] *Status Report*, *supra* note 169.

[172] Recourse to Article 21.5 of the DSU by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/18 (July 7, 2006).

panel 'did not agree with the United States that we had taken the necessary steps to comply' with that ruling."[173]

This ruling makes sense because the United States does not appear to be in compliance. It simply has not taken any action to comply with the ruling. The only evidence that the United States cites is the DOJ's statement. However, the DOJ statement does not have any binding force as to the true nature of already established U.S. law and amounts to no more than a repeat of the argument that the United States already unsuccessfully attempted to argue on the merits of this case. The WTO already ruled, in the face of such a claim from the DOJ, that the United States failed to meet its burden of showing that the laws are not discriminatory. That the DOJ now claims to the contrary does not change the AB's prior rejection of this very same argument.

In response to this decision, the United States can still appeal to the AB.[174] If the final ruling is that the United States is not in compliance, then Antigua can request the imposition of countermeasures against the United States. Ultimately, even if Antigua chooses to pursue countermeasures, these countermeasures against the United States would have little effect on the U.S. economy.[175] However, the United States would face the indirect consequence of the reputational cost of not complying with its free trade commitments. But if this breach is seen as an insignificant exception to a general pattern of compliance, then it likely will not considerably affect the United States's overall reputation in this area.[176]

An even bigger concern for the United States, however, would be if larger countries seek to challenge the United

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[173] *WTO Rules Against U.S. in Internet Gambling Case*, FIN. TIMES, Jan. 26, 2007, http://www.antiguawto.com/wto/FinancialTimes_WTO_Rules_against_US_26jan07.pdf [hereinafter *WTO Rules Against U.S.*].

[174] *Id.*

[175] *Id.*

[176] Interview with Petros Mavroidis, Edwin B. Parker Professor of Foreign & Comparative Law, Columbia University School of Law, in New York, N.Y. (Oct. 27, 2006).

States's policy towards Internet gambling in the WTO. "A greater threat is that success at the WTO for Antigua could pave the way for the EU to pursue a fair trade case against the US over online gambling, which the US might have to take more seriously."[177] If the only area in which U.S. Internet gambling law unjustifiably discriminates against other countries is with regard to Internet horseracing, then this issue might not be of much interest to other countries (unless one wants to use it as a pretext for challenging U.S. gambling law as a whole). But if new laws that have a more substantial effect on the market arise, there might be more international interest in these issues. The UIGEA is just such a law.

V. APPLYING THE WTO'S STANDARDS TO LAWS OTHER THAN THE IHA

Now that we have arrived at a full understanding of the *U.S. – Gambling* decision, other U.S. laws can be analyzed for compliance with the United States's free trade commitments according to the same criteria used in the WTO dispute.

A. The UIGEA

Even though the UIGEA does not itself discriminate in establishing the legal status of Internet gambling service providers (because it does not change any laws on the matter), the way in which it defines "unlawful gambling activity" makes it clear that other federal laws do discriminate. The UIGEA explains that purely intrastate and intratribal Internet gambling can be authorized by individual states or tribes within the bounds of federal law (provided that they comply with other federal laws), but at least some types of international Internet gambling are prohibited under the Wire Act. To the extent that federal law allows Internet gambling within the United States, but prohibits such gambling through websites located offshore,

[177] *WTO Rules Against U.S.*, *supra* note 173.

U.S. federal law discriminates between domestic and foreign service providers.

Furthermore, once this new form of discrimination is discovered, the UIGEA itself will also now be recognized as discriminatory. Because the enforcement mechanism of prohibiting payments only applies to payments to "unlawful Internet gambling" sites, the UIGEA does not prohibit making payments to legal intrastate sites. The clarification of existing law that the UIGEA brings thus makes the UIGEA itself, as applied to intrastate versus foreign sites, discriminatory.[178] However, because the enforcement provision of the UIGEA only affects the market access of Internet gambling sites indirectly—inasmuch as it prevents them from being able to receive payments from financial intermediaries—even if it is found to be discriminatory, a full analysis of its GATS compatibility would require analyzing whether or not such a restriction is considered a limitation on market access.[179]

According to the conclusion that the Wire Act does not cover purely intrastate Internet gambling, whether the DOJ's interpretation of the Wire Act (as covering all types of Internet gambling) or the Fifth Circuit's interpretation of it (as only covering sports betting) is correct, makes a great difference in terms of the degree to which the permissibility of intrastate Internet gambling violates the United States's

[178] It is also clear that these restrictions imposed by the Wire Act on gambling services violate the United States's Article XVI commitments, since these are the same aspects of U.S. law that already arose in the dispute just discussed. In fact, this claim against U.S. law could have been addressed in that dispute, since the UIGEA is merely clarifying, rather than authorizing, the status of intrastate Internet gambling. However, the fact that this issue was not addressed there should not give us pause about whether or not this aspect of U.S. law is in fact discriminatory.

[179] *See supra* text accompanying note 162. The restriction on the financial intermediaries themselves would not be an issue, because it does not distinguish between foreign and domestic financial payment systems. 31 U.S.C. § 5362(4) (2006). In fact, if anything the law discriminates against domestic financial intermediaries because the United States will only be able to prosecute U.S.-based payments systems.

WTO commitments. The broader the Wire Act's coverage of gambling, the more it conflicts with the permissibility of that type of Internet gambling on a purely intrastate basis. Therefore, the DOJ's interpretation of the Wire Act creates a greater conflict than does the Fifth Circuit's interpretation.[180]

The Travel Act and the IGBA would also be implicated in this issue in the same way that they were in the *U.S. – Gambling* case. There will be discrimination between domestic and foreign service suppliers to the extent that these two laws make international Internet gambling illegal on the federal level (because they are illegal under state laws), but do not prohibit the same actions on a purely intrastate basis.

1. Possible Practical Consequences of the UIGEA

There are two reasons why the UIGEA might raise the chance of a new suit being filed against the United States, even though this law does not change the legal status of gambling activities. First, practically speaking, this law has already had an enormous impact on the Internet gambling market. With the effect this new law has already had on Internet gambling sites based abroad, particularly in England, there is a real possibility that other countries may get involved. The UIGEA vastly opens up the opportunity for enforcement of existing prohibitions against Internet gambling sites, and the industry has reacted accordingly. The United Kingdom recently backed a "code of principles" regarding Internet gambling in order to encourage worldwide regulation, rather than prohibition, of the industry.[181] In this matter, U.K. Culture Secretary Tessa Jowell criticized the United States for trying to ban Internet

[180] This is also true in the *U.S. – Gambling* case. There, the WTO agreed with the broader view of the Wire Act without looking too closely into the matter because the United States admitted this view of the Wire Act. *See supra* note 149.

[181] Kitty Donaldson, *U.K. Urges Nations to Back Principles on Web Gambling (Update2)*, Oct. 27, 2006, BLOOMBERG.COM, http://www.bloomberg.com/apps/news?pid=20601102&sid=aXmNZ41TTOJo&refer=uk.

gambling. She chastised, "America should have learned the lessons of prohibition."[182]

The second reason why the UIGEA might cause a new WTO suit is that, even though the law does not change the legal status of gambling activities, its clarification regarding the legality of intrastate gambling might have the same effect. Even if, technically, such arrangements were legal before the passage of the UIGEA, that situation was still not explicit in the U.S. Code. The fact that the Code now details that intrastate Internet gambling is not within the definition of "unlawful Internet gambling" illuminates an aspect of U.S. law that might previously have been ambiguous. The UIGEA thus brings to light a whole area of discriminatory law.

B. Other Federal Laws

Aside from the UIGEA, other federal laws not considered in the *U.S. – Gambling* case should also be scrutinized for compliance with the *U.S. – Gambling* decision. Even though the federal lottery laws make an exception to a general prohibition, these laws would still likely not be viewed as discriminatory. There is an exception to the general prohibition for lottery material transported "to addresses within a State . . . concerning a lottery which is conducted by that State acting under the authority of State law," but the next section of the law also makes an exception for lottery material transported "to an addressee within a foreign country . . . designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country."[183] Since this law contains parallel exceptions, thereby treating foreign and domestic suppliers alike, it would most likely not be seen as discriminatory.

Some of the other federal laws discussed above also make room for state exemptions; however these state exemptions do not discriminate between domestic and foreign suppliers

[182] *Id.*

[183] 18 U.S.C. § 1307(b)(2) (2007).

either.[184] As explained earlier, just because there is room for an individual state to legislate for itself on any given matter does not mean that it will legislate in a discriminatory manner.[185]

The IHA and the UIGEA allowance for intrastate gambling are different because these exemptions authorize only discriminatory state regulations, as opposed to the other federal laws in question which allow a state to enact non-discriminatory measures.[186] A state might choose to enact discriminatory measures; in doing so, the state might, in turn, make the federal law (under which the state had permission to do so) a part of the discriminatory scheme. But the mere fact that a state has room to enact either neutral or discriminatory laws does not make the federal law granting such room discriminatory. However, where the federal law (such as the IHA and the UIGEA) makes an exemption only for domestic, but not foreign, service providers, then the federal law itself discriminates. This, after all, is precisely why the IHA is so problematic.[187]

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[184] Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701-04 (2006); 18 U.S.C. § 1301-07 (2006) (dealing with lotteries); Gambling Devices Transportation Act, 15 U.S.C. § 1171-78 (2006). *See supra* Part II.A.3 for a discussion of these laws.

[185] *See supra* Part II.C.

[186] One might think that even the mere possibility of discriminatory state measures would be considered discriminatory, just as the mere possibility of state anti-gambling laws was enough to make the Travel Act and the IGBA violate Article XVI. *U.S. – Gambling* Panel Report, *supra* note 21, ¶¶ 6.367, 6.370, 6.377, 6.375 (upheld by the AB in *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 265). However, that analysis was under Article XVI and the current analysis is under the chapeau of Article XIV. The discussion under the chapeau with regard to the IHA implies that the IHA is problematic because of the possible interpretation that it "exempts only *domestic* suppliers." *U.S. – Gambling* Appellate Body Report, *supra* note 3, ¶ 369. These other laws, on the other hand, don't exempt "only" domestic suppliers, but rather exempt whoever the states choose to exempt.

[187] *See supra* Part IV.C.1.

C. State Laws

On a similar note, where states pass discriminatory laws, they too can be subjected to the same standards that have been enumerated. A state may pass a discriminatory law either as an active choice (where a federal statute on the matter at issue leaves room for either discriminatory or neutral laws), or as a matter of last resort (where the federal statute in question only allows for discriminatory laws). Either way, from the WTO's perspective, the state's law discriminates.

D. Summary of Applications of the WTO Dispute to Current U.S. Law

With the clarifications from the UIGEA, we see that under the standards enunciated by the WTO, the same federal laws that became problematic with the IHA's exemption for only domestic suppliers are equally problematic with the newly discovered (but pre-existing) exemption for intrastate Internet gambling. This exemption also, in turn, makes the UIGEA itself apply discriminatorily.[188] Other federal laws also leave open the possibility of discriminatory state laws that could lead to discriminatory application of the federal law in question.

It is noteworthy that the U.S. Congress passed the UIGEA after the WTO decision came out, and still enunciated that current U.S. federal law allows for purely intrastate Internet gambling, rather than changing current federal law to bring it into compliance with the WTO's ruling. The UIGEA does subtly acknowledge the WTO dispute in its pronouncement that it does not affect how the IHA interacts with other federal laws, which is the central issue in the WTO dispute.[189] Thus, Congress does seem to care about the WTO's ruling, but it is not clear exactly how

[188] It is not clear how the WTO would judge discrimination against foreign sites through the inability of financial intermediaries to make payments to them. *See supra* p. 496.

[189] 31 U.S.C. § 5362(10)(D)(3) (2006).

much. Considering how new and complex the WTO's decision is and also that the UIGEA was passed in a very rushed fashion, it is not clear just how much time Congress had to consider all of the free trade implications of this new law.[190] It therefore seems that we are currently at a crossroads whereby Congress must choose between the current Internet gambling regulatory scheme (which allows states to decide for themselves under principles of federalism) and the United States's free trade commitments undertaken on behalf of the country as a whole.

VI. CONCLUSION

Applying the WTO's standards to current U.S. law shows clear conflicts. An analysis of U.S. laws shows a concern for state autonomy in the area of gambling regulation. This concern is especially apparent in the UIGEA, which explains that intrastate and intratribal Internet gambling do not fall within the category of "unlawful Internet gambling." This unique status of intrastate Internet gambling is precisely what creates the most significant new WTO conflict. There is also a direct tension between the federalism concerns motivating the constriction of the otherwise ambiguous definition of "unlawful Internet gambling" on the one hand, and the free trade commitments that this exemption puts in jeopardy on the other. Given these two competing values, the conflict is not surprising. There is an inherent divergence of interests between federalism concerns of allowing individual states to decide certain matters for themselves, and treaty obligations under which a country takes on an obligation on behalf of the entire country without regard to the preferences of individual subdivisions. Such international agreements necessarily call for making certain decisions on behalf of the country as a whole, rather than having individual states deciding those matters for themselves.

The DOJ's very brief statement of compliance to the WTO—a statement that essentially only reiterates

[190] *See supra* p. 459.

arguments that were already rejected by the DP and AB—simply ignores the problem that the IHA likely makes the other federal laws in question violate the United States's GATS commitments. With the passage of the UIGEA and its clarifications of the allowance for purely intrastate Internet gambling, Congress also has not addressed the conflict. The possibility that other federal laws conflict with the United States's free trade commitments further enmeshes the tension in current U.S. law. The DOJ's expansive stance on the Wire Act, covering all types of gambling, only serves to increase the potential conflict to a broader array of issues. While the Fifth Circuit has announced a more narrow reading of the Wire Act, it did so based on reasons of judicial interpretation, rather than these free trade concerns. That court's reason notwithstanding, if the other branches of government want to comply (or at least have fewer areas of conflict) with the United States's free trade commitments, this more limited interpretation would be appropriate.

Recently, the federal government acknowledged that the WTO has ruled that the United States is not in compliance with the AB's ruling. The federal government has not yet taken any steps beyond this mere recognition to address the tension between its current laws and its free trade commitments, but this WTO decision is still very new. The United States therefore stands at a crucial moment in this dispute in terms of how it chooses to react to the WTO's latest ruling.

The Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations," but even so, recent development may be distorting the traditional breakdown in this area.[191] The combination of extending a trade commitment beyond goods, to services as well, and the effect of the Internet in opening up so many more avenues of trade, may be the cause for new tensions between areas traditionally reserved to state control and areas that are subject to uniform federal mandates. These two factors are not limited to Internet gambling and therefore could also lead to the

[191] U.S. CONST. art. I, § 8, cl. 3.

inherent tension between federalism values and free trade commitments arising in other areas. That this tension may go deeper than the isolated issue of Internet gambling is all the more reason for the federal government to move away from its current stance and towards a resolution of the matter.

If the federal government wishes to comply with the free trade commitments at issue here, it might not even be required to pass new legislation, rather being able to achieve this goal simply through "administrative or judicial action."[192] Or if the United States chooses in favor of the federalism concerns here, it might ultimately simply decide to remain in violation of a small part of its free trade commitments. After all, the United States might argue (as was a major issue in the recent dispute) that when it signed its GATS commitments, it did not even realize that these included a commitment to gambling services.[193]

If the dispute over the United States's Internet gambling legislation remains limited to being between the United States and Antigua, the direct ramifications of the United States's current stance might not be so significant. But even so, a relatively minor violation still hurts the United States's overall record on free trade. Also, given the effect that the UIGEA had in England and the current expansion of the Internet gambling industry around the globe, this issue could very well escalate into one of greater impact in and of itself.

The United States must make a choice between the free trade and federalism concerns at stake with regard to its current Internet gambling legislation. Disregarding the tension created by present inconsistencies, as it has done until now, is also an approach that the United States could continue to take. But this approach will be all the more difficult to maintain considering that the WTO has found the

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[192] Doug Palmer, *U.S. Confirms Loss in Internet Gambling Trade Case*, REUTERS, Jan. 25, 2007, http://www.antiguawto.com/wto/Reuters_USconfirms_loss_in_tradecase_25jan07.pdf.

[193] *See U.S. – Gambling* First Written Submission, *supra* note 107, ¶¶ 72, 75.

United States to not be in compliance with the AB's ruling in the *U.S. - Gambling* case. Moreover, the recent UIGEA presents new areas of conflict, making the United States's current stance with respect to the conflict even less tenable. It is also important to realize that in practice this evasive approach entails enacting discriminatory laws that leave room for individual state regulation at the expense of free trade commitments, and so it effectively is a decision in favor of federalism concerns. Whatever route the United States chooses to take from now on, it is important to realize the value choice that it makes in any given course of action.