

LOADED DICE: DO NATIONAL INTERNET GAMING STATUTES VIOLATE WORLD TRADE ORGANIZATION FAIR TRADE ACCESS STANDARDS?

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I. INTRODUCTION

In 1999, U.S. gamblers wagered over \$630 billion on state-sanctioned gambling operations,¹ earning operators a gross profit of over \$50 billion.² This number excludes non-sanctioned sports betting, in which U.S. gamblers wagered an estimated \$380 billion.³ Three years later, Canadian gamblers bet over C\$11.3 billion on legal, government-reported gambling activities.⁴ The reported gross profit for all Canadian gambling markets totaled \$6 billion.⁵ While this amount seems small compared to U.S. markets, it averages \$447 per person over 18 in 2001.⁶

International vendors are eager to tap into these numbers.⁷ In 1996, industry experts estimated that there were forty Internet gambling sites, of which fifteen accepted cash wagers.⁸ By 2002, the number of sites allowing wagers had grown to over 1,800.⁹ By 2006, eighty-eight governments had sanctioned some form of online gambling activity.¹⁰ While the traditional model required access to a local bookkeeper or gambling outlet, the Internet has made it possible to gamble anytime, anywhere—even from the convenience of home.¹¹ Operators collected over \$12 billion of online gambling revenue in 2005.¹² Christiansen Capital Advisors

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1. George Will, Op-Ed., *Gambler Nation*, WASH. POST, June 27, 1999, at B7.

2. *Id.*

3. Nat'l Gambling Impact Study Comm'n, Final Report at 2-14 (1999) [hereinafter NGISC Final Report].

4. *Key Labour and Income Facts: Fact-sheet on gambling*, 4 PERSPECTIVES ON LABOUR AND INCOME: THE ONLINE EDITION, Mar. 2003, at 1, http://www.statcan.ca/english/studies/75-001/01203/fs-fi_200312_01_a_e.pdf. All Canadian amounts are reported in Canadian dollars.

5. *Id.*

6. *Id.*

7. See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 180-181 (William R. Eadington ed., 2005) [hereinafter CUTTING THE WIRE].

8. *Id.* at 184.

9. *Id.*

10. *Introduction*, in INTERNET GAMBLING REPORT IX 1 (Mark Balestra & Anthony Cabot, eds., 9th ed. 2006).

11. Anthony Cabot, *Traditional Versus Internet Gambling*, INTERNET GAMBLING REPORT IX, *supra* note 10, at 32.

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

estimates that gross gambling revenues will exceed twenty-four billion dollars in 2010.¹³

This Note discusses current regulations affecting Internet gambling in the major English-speaking markets, identifies World Trade Organization (WTO) requirements barring special treatment for local businesses over foreign corporations, and argues that the present Internet gambling regulatory system violates international competition requirements. Part II provides a sampling of current regulatory system models that either permit or ban online gaming, as enacted by Australia, Canada, the United Kingdom, and the United States. This section includes a historical overview of the development of Internet gambling law through both existing national and provincial-level legislation, and analysis of newly-enacted U.S. legislation¹⁴ that attempts to address the WTO concerns.

Part III examines WTO international competition requirements, and analyzes the regulatory framework of each country in light of these requirements. In doing so, it focuses on the concerns that the WTO Appellate Body raised in its *U.S.—International Gambling* report.¹⁵ In the report, the appeals board expressed concern that the U.S. regulatory system violated Article XVI of the General Agreement on Trade in Services (GATS),¹⁶ which requires Members to treat any other Member “no less favourabl[y]” under the terms specified.¹⁷ This part then applies the key trade concerns, as identified by the WTO board, to other countries’ regulatory systems. Finally, it discusses areas of concern for more permissive systems, such as those that allow Internet gambling but give preference to local businesses and those that ban most forms of Internet gambling but permit exceptions (such as bets on horse racing or other sports).

Part IV suggests modifications that Members can make to their current regulatory systems to comply with the WTO GATS requirements. This part also asks if large countries would be willing to open their gambling markets to international competition in light of the WTO’s lack of strong enforcement powers.¹⁸

Getting Beat in Online Gambling, TIME, Nov. 20, 2005, at A1 (special section), available at <http://www.time.com/time/magazine/article/0,9171,1132818,00.html>).

13. Christiansen Capital Advisors, LLC, Internet Gambling Estimates, June 6, 2004, http://grossannualwager.com/Primary%20Navigation/Online%20Data%20Store/internet_gambling_data.htm. Christiansen Capital Advisors are leading analysts in gaming industry analysis.

14. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006).

15. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter WTO Appellate Report].

16. *Id.* ¶¶ 370-72.

17. General Agreement on Trade in Services, GATS XVI:1 [hereinafter GATS].

18. “Any sanctions in the form of additional duties on U.S. imports would likely be detrimental to Antigua, given the small amount of trade between the two countries.” Daniel Pruzin, *Antigua Preparing to Impose WTO Sanctions Against U.S. in Internet Gambling Dispute*, WTO REPORTER (Feb. 22, 2006).

II. OVERVIEW OF THE LEGAL AREA

A. What Is Internet Gambling?

Humans have been betting on games of chance from the earliest stages of history.¹⁹ While potential gambling opportunities are limited only by the imagination, gambling activities can be divided into three basic groups: lotteries, wagering, and gaming.²⁰ These three groups are regulated separately, as discussed below.

A lottery is “[a] method of raising revenues . . . by selling tickets and giving prizes . . . to those who hold tickets with winning numbers that are drawn at random.”²¹ Generally, U.S. state-owned lotteries²² have a mutual understanding that they will sell tickets only within their individual states.²³ Some foreign lotteries explicitly prohibit non-residents from participating in online sales,²⁴ while others rely on language barriers to prevent non-nationals from purchasing tickets.²⁵ Some

19. See generally DAVID G. SCHWARTZ, *ROLL THE BONES 5* (Gotham Books, 2006). Gambling in the form of “knuckle-bones” and divination ceremonies is recorded in prehistoric cave paintings; early references to wagering appear in the Bible (Roman soldiers casting lots for Christ’s clothing) and sacred Hindu writings. *Id.* at 5-40.

20. I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 28 (Mary Ann Liebert, Inc. Publ’ns 2005).

21. BLACK’S LAW DICTIONARY 966 (8th ed. 2004).

22. As of 2006, state-owned lotteries are offered in forty-one states and the District of Columbia. ROSE & OWENS, JR. *supra* note 20, at 28.

23. *Id.* at 33. Some states have merged their lotteries to operate across state lines (Maine, New Hampshire, and Vermont jointly operate the Tri-State lottery), while other states (Powerball members) share multi-state data but do not accept interstate bets. *Id.* California, Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas, Virginia, and Washington all participate in the Mega Millions Lottery, as well as operate separate lottery games limited to state residents. Compare Mega Millions, <http://www.megamillions.com/> (last visited March 12, 2007) (lists states that participate in the Mega Millions Lottery) with New York Lottery, <http://www.nylottery.org/> (last visited March 12, 2007) (lists lottery games available to New York state residents).

24. For example, the French national lottery (La Française des Jeux) restricts online play to residents of France by placing cookies on their computers. Christophe Blanchard-Dignac, La Française des Jeux, *REGLEMENT GENERAL DES JEUX DE LA FRANÇAISE DES JEUX OFFERTS PAR INTERNET*, June 11, 2007, <http://www.fdjeux.com/files/reglementgeneral.pdf>.

25. The website to purchase online tickets for Veikkaus Oy, Finland’s national lottery, is entirely in Finnish. Veikkaus, <http://www.veikkaus.fi/info/index.html> (last visited Nov. 1, 2006).

countries permit any interested party to purchase lottery tickets.²⁶ However, these online transactions may be prohibited by the laws of the purchaser's location.²⁷

Wagering is defined as "staking money on the outcome of a given event."²⁸ This area primarily covers sports betting, such as horse racing, professional sports, and college games.²⁹ However, wagering extends to any scheduled event: odds makers have run books on election results,³⁰ television plots,³¹ and even award shows.³²

In the United States, horse racing was the sole outlet for legal gambling (outside of Nevada and Atlantic City) from the Depression until the mid-1960s.³³ As a result of this predominance, a special set of state and federal regulations limit interstate bets on the horse-racing industry.³⁴ Australia, Canada, and the United Kingdom all permit cross-border gambling on horse races.³⁵

Gaming is defined as playing any casino-style, fixed-range, random number generation game.³⁶ Play can be banked³⁷ or non-banked.³⁸ Non-banked games require an extra level of caution, as the game may be deemed illegal if any of the players are in a jurisdiction that bars Internet gambling.³⁹ However, the majority of

26. Liechtenstein permits any person over 18, with certain exceptions, to purchase tickets. Plus Lotto, <http://www.pluslotto.com/> (click Rules and Regulations) (last visited Nov. 1, 2006). South Africa permits sales to any person over 18. National Lottery, <http://www.nationallottery.co.za> (last visited Nov. 1, 2006).

27. Liechtenstein will not accept transactions from Swiss or Dutch servers, and cautions U.S. visitors to check their local laws before using credit cards to purchase tickets. Plus Lotto, <http://www.pluslotto.com> (click Rules and Regulations: Ineligible Parties) (last visited Nov. 1, 2006).

28. ROSE & OWENS, JR., *supra* note 20, at 39.

29. *See, e.g., id.* at 39-46.

30. *See, e.g.,* Donald Luskin, *The Bet's on Bush*, NATIONAL REVIEW ONLINE, Oct. 8, 2004, http://www.nationalreview.com/nrof_luskin/luskin200410080821.asp; 2008 US Presidential Election Betting, <http://www.sportbet.com/Lines.asp?IdLeague=315&IdSport=TNT> (last visited Jan. 9, 2008).

31. Gambling 911 runs weekly pools on plot developments for popular shows. Gambling 911, Betting on Television Shows, <http://www.gambling911.com/betting-on-television-shows.html>, (last visited Sept. 5, 2007).

32. BoDog Sportsbook is taking wagers on the 2008 Grammy Award results. Television & Film Betting, <http://www.bodoglife.com/sports-betting/tv-film-movie-props.jsp> (last visited Jan. 14, 2008).

33. ROSE & OWENS, JR., *supra* note 20, at 39.

34. These laws include the Interstate Horseracing Act 15 U.S.C. §§ 3001-3007 (2000), the Wire Wager Act 18 U.S.C. § 1084 (2007) (prohibiting the use of wire communications for placing bets), and state laws. *See* discussion *infra* Part III.A.2; Pamela M. Prah, States Struggle for Gambling Jackpot, <http://www.stateline.org/live/printable/story?contentId=239294> (last visited Jan. 8, 2008).

35. ROSE & OWENS, JR., *supra* note 20, at 41.

36. Such as poker, blackjack, slots, and other traditional table games. *See, e.g., id.* at 35.

37. *Id.* Players play against the house, "usually in the person of the dealer." For casino games, the house has a built-in percentage advantage over the other players. *Id.*

38. *Id.* Players play each other and no one player has a continuous advantage. *Id.*

39. ROSE & OWENS, JR., *supra* note 20, at 37.

states that bar gambling activities offer a “private game exception” that protects games between private parties.⁴⁰

Fantasy football leagues are not covered under general gaming or wagering guidelines.⁴¹ Wagering refers to a specific event, while fantasy leagues are made up of players from multiple teams and are based on statistics drawn from several real-life events.⁴² Several state attorneys-general have declared these leagues illegal.⁴³ However, academic commentators doubt that any prosecution will occur.⁴⁴ As a sign of future intent, four recently proposed federal online gambling bills exempt all fantasy leagues from being classified as gambling activities.⁴⁵

Hybrid systems have been made possible by advances in technology.⁴⁶ For example, although most lotteries require users to purchase tickets within a specified geographic area, the website TheLotter.com allows users to place “bets” on lotteries by entering lotto numbers and having registered agents purchase the tickets locally.⁴⁷

40. *Id.* at 39.

41. *Id.* at 44-45.

42. “The statistics these players generate in their real games are collected, and fantasy points are awarded based on these numbers -- the better a player performs, the more fantasy points he accrues for a fantasy team.” ESPN, Fantasy Football: Rules: Introduction, <http://games.espn.go.com/content/ffl/2004/rules?page=intro> (last visited Nov. 3, 2006).

43. As a result of these decisions, Arizona, Connecticut, Florida, Louisiana, Montana, and Vermont residents are prohibited from receiving any prizes for participating in ESPN fantasy leagues. ESPN, Fantasy Football: Rules: Legal, <http://games.espn.go.com/content/ffl/2004/rules?page=legal> (last visited Nov. 3, 2006).

44. See ROSE & OWENS, JR., *supra* note 20, at 44-45; Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 8-9 (2002). See generally Nicole Davidson, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201 (2002) (providing a general discussion of the legality of fantasy leagues).

45. See S. 627, 108th Cong. § 5361(1)(E)(viii) (2003):

Bet or wager [excludes] any participation in a simulation sports game, an educational game, or a contest, that (I) is not dependent solely on the outcome of any single sporting event or nonparticipant's singular individual performance in any single sporting event; (II) has an outcome that reflects the relative knowledge and skill of the participants, with such outcome determined predominantly by accumulated statistical results of sporting events; and (III) offers a prize or award to a participant that is established in advance of the game or contest and is not determined by the number of participants or the amount of any fees paid by those participants.

Id. See also H.R. 21, 108th Cong. § 3(b)(1)(E)(viii) (2003); H.R. 2143, 108th Cong. § 4(2)(E)(viii) (2003); S. 692, 106th Cong. § 1085(a)(1)(D) (1999).

46. “Inventions redefine experience, old distinctions are dissolved or fogged over—they create new units and new boundaries. Modern technology has played havoc with traditional legal categories.” ROSE & OWENS, JR., *supra* note 20, at 69.

47. See TheLotter, <http://www.thelotter.com/> (click “Play On-line” and select a lottery) (last visited Nov. 1, 2006).

In return for a service fee, TheLoter holds the lottery tickets in the name of the user.⁴⁸ This author interprets this plan as a hybrid system, combining a “lottery” (as TheLoter participates directly in a traditional lottery scheme)⁴⁹ with “wagering” (as the users place bets with TheLoter that their lottery numbers will be selected by the preferred lottery, in consideration for the prize amount offered by the preferred lottery).⁵⁰ The users never directly control their lottery tickets,⁵¹ and all prize money is channeled through their TheLoter accounts.⁵² While courts have not addressed such hybrid systems, any legal action will likely be segmented into multiple parts based on the applicable classifications, and the existing statutes will be applied.⁵³ In the example above, a suit between a national lottery and TheLoter would be governed by lottery statutes, while a suit between TheLoter and a purchaser would be governed by both lottery and wagering statutes.

B. Nations Prohibiting Internet Gambling

1. Australia: Interactive Gambling Act of 2001⁵⁴

Australia was one of the first countries to legislate Internet gambling activities.⁵⁵ Initial regulation occurred at the territorial level, with the passage of legislation permitting companies with existing Australian gambling licenses to offer online services.⁵⁶ Australian territory officials require new online gambling operators to meet the same standards as traditional “brick-and-mortar” casinos or betting halls.⁵⁷ The first Australian online gambling license was issued by the Northern Territory to Lasseters Online Casino in April 1999.⁵⁸ In 2000, following complaints about unbalanced regulation between the territories, the federal government passed a one-year moratorium on issuing new online gambling licenses.⁵⁹

On June 28, 2001, the Australian government passed the Interactive Gambling Act (IGA) of 2001.⁶⁰ The IGA is aimed at service providers and does not create any civil or criminal sanctions for Australian citizens participating in Internet

48. *Id.* (click FAQ: Participation).

49. *See supra* Part II.A for definition of lottery.

50. *See supra* Part II.A for definition of wagering.

51. TheLoter, *supra* note 47.

52. *Id.*

53. ROSE & OWENS, JR., *supra* note 20, at 70-85.

54. Interactive Gambling Act (2001) (Austl.), available at <http://scaleplus.law.gov.au/cgi-bin/download.pl?/scale/data/pasteact/3/3465>.

55. ROSE & OWENS, JR., *supra* note 20, at 198.

56. CUTTING THE WIRE, *supra* note 7, at 197.

57. *Id.*

58. *See id.* *See also* Peter Bridge, About Online Casino – Lasseters, http://www.lasseters.com.au/about_us/about_us.jsp (last visited Oct. 10, 2006).

59. ROSE & OWENS, JR., *supra* note 20, at 198.

60. Interactive Gambling Act, *supra* note 54.

gambling.⁶¹ The IGA bars state-licensed operators from providing online gambling services to Australian citizens⁶² or citizens of foreign nations that (a) have legislation mirroring § 15 of the IGA, and (b) have received “designated country status” from the Australian government, which can only happen if the country has legislation mirroring § 15.⁶³ However, under the IGA, interactive gambling services that would otherwise be barred are permitted if provided in a public location, such as a gambling hall or casino.⁶⁴ Additionally, it is a criminal offense for any operator, state-licensed or foreign, to intentionally provide Internet gambling services with physical links to Australian customers.⁶⁵ Under the IGA, an operator has an Australian link if any customers are physically present in Australia.⁶⁶ The Act provides a safe harbor if the operators, after performing due diligence (such as requesting personal data or performing Internet Service Provider (ISP) lookups),⁶⁷ could not have determined that the service was being provided to a person physically present in Australia.⁶⁸ The IGA bars the knowing or reckless advertisement of any Internet gambling service to an Australian market, including websites aimed at Australian audiences.⁶⁹

Furthermore, the IGA draws a distinction between games of chance and games of skill.⁷⁰ Interactive versions of games of chance—such as cards, slots, or table games—are banned.⁷¹ However, this prohibition is selectively applied to games of mixed chance and skill.⁷² Excluded “wagering services” under the Act include sporting events, such as horse racing, and “instant” lotteries like scratch lotteries.⁷³

61. Frequently Asked Questions – Department of Communications, Information Technology and the Arts, http://www.dcita.gov.au/broad/online_content_and_gambling_regulation/online_gambling/frequently_asked_questions#faq2 (last visited Oct. 10, 2006) [hereinafter FAQ – Department of Communication, Information Technology and the Arts].

62. Interactive Gambling Act, *supra* note 54, at pt. 1, §§ 3, 14.

63. *Id.* §9A. As of September 15, 2005, no country has achieved designated nation status. FAQ – Department of Communication, Information Technology and the Arts, *supra* note 60.

64. Interactive Gambling Act, *supra* note 54, at pt. 1, § 8.

65. *Id.* at pt.2, § 15(1).

66. *Id.* pt. 1, § 8.

67. Jamie Nettleton, *Australia*, in INTERNET GAMBLING REPORT IX, *supra* note 10, at 527.

68. Interactive Gambling Act, *supra* note 54, at pt. 2, § 15(3).

69. *Id.* at pt. 7A, § 61DA.

70. *Id.* at pt. 1, § 4, Definitions: gambling (e)(ii).

71. *Id.* at pt. 1, § 3.

72. *Id.* at pt. 1 § 4, Definitions: gambling (e)(ii).

73. *Id.* at pt. 1, § 8A.

2. United States of America

In 1998, Americans made up 52% of Internet users⁷⁴ with \$1.4 million in online gambling revenues.⁷⁵ Any governmental attempt to monitor all U.S. Internet gambling transactions would face massive technological challenges, and would raise serious privacy concerns.⁷⁶ In light of these difficulties, federal statutes are intended to regulate online gambling providers rather than criminalize the acts of individual bettors.⁷⁷

a. Unlawful Internet Gambling Enforcement Act (UIGEA)⁷⁸

The UIGEA was formally adopted on October 13, 2006.⁷⁹ The Act has two prongs: It prohibits operators of online gambling sites from accepting funds from bettors,⁸⁰ and establishes a regulatory framework for financial institutions to block the flow of funds to operators of online gambling sites.⁸¹

Section 5663 prohibits operators who are: (1) engaged in the business of betting or wagering from (2) knowingly accepting (3) proceeds from credit cards, electronic fund transfers, or checks (4) in connection with the participation of a bettor (5) in unlawful Internet gambling.⁸² This ban, and the resulting criminal liability for accepting such proceeds,⁸³ came into effect on October 13, 2006.⁸⁴ The prohibition only applies if the gambling activity was illegal under a federal or state statute in the place where the bet was made or received.⁸⁵ This requirement protects any online bets made solely within a state if permitted under the state statutes, and any online bets made solely within tribal grounds if permitted by the code of the

74. CHRISTIANSEN CAPITAL ADVISORS, INC. & RIVER CITY GROUP, LLC, E-GAMBLING: WAGERING ON THE INTERNET 55 (S.I., River City Group 1999).

75. *Id.* at 108.

76. ROSE & OWENS, JR., *supra* note 20, at 72-73.

77. The only federal statute addressing individual online gamblers, the Internet Gambling Prohibition Act of 1999 (S. 692, 106th Cong. (1999)), would have required Internet Service Providers to block access from subscribers who gambled online. It did not pass the House. ROSE & OWENS, JR., *supra* note 20, at n.220.

78. Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”), Pub. L. No. 109-347, 120 Stat. 1884 (to be codified at 31 U.S.C. §§ 5361-67).

79. *Id.*

80. *Id.* § 5363.

81. *Id.* § 5364.

82. *Id.* § 5363.

83. *Id.* § 5366.

84. *See generally* 31 U.S.C. §§ 5361-67.

85. *Id.* § 5362(10)(A).

National Indian Gaming Commission.⁸⁶ The Act also provides explicit exceptions for horse-racing and fantasy sports league gambling activities.⁸⁷

There are two schools of thought about how to interpret the UIGEA requirements.⁸⁸ The majority believes that the UIGEA bans all foreign online gambling, because the “simultaneous transaction” language means that the operators would be considered to be doing business in the state, and the general anti-gambling laws of every state criminalize unlicensed commercial gambling operations.⁸⁹ The minority argues that UIGEA only applies to the eight states that have explicitly banned online gambling, so it is permitted in the other forty-two states.⁹⁰ If the majority is correct, the UIGEA will substantially lift the burden of obtaining jurisdiction over foreign operators for prosecution at the state level.⁹¹

The UIGEA also prohibits any financial transaction provider⁹² from transferring funds related to an unlawful bet or wager. The Board of Governors of the Federal Reserve, in conjunction with the Secretary of the Treasury and the U.S. Attorney General, have 270 days to develop a minimally restrictive system for identifying online gambling transactions.⁹³ Once the procedures for identifying restricted transactions are established, a financial institution that fails to follow them will be subject to both civil and criminal sanctions.⁹⁴ However, if a financial institution blocks a legitimate transaction, which it reasonably believes to be restricted, it incurs no liability for damages.⁹⁵

Several credit card companies had previously adopted similar voluntary standards. American Express, Discover, Diners Club, and JCB do not permit their

86. *Id.* § 5362(10)(B)-(C).

87. *Id.* § 5362(1)(E)(ix), (10)(D).

88. *See generally* Nolan Dalla, Unlawful Internet Gambling Enforcement Act: An Insider’s View, *Gambling Law U.S.*, Oct. 1, 2006, <http://www.gambling-law-us.com/Articles-Notes/dalla.htm>; Chuck Humphrey, Internet Gambling Funding Ban, *Gambling Law U.S.*, Oct. 13, 2006, <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm>; Bob Ciaffone, What the New U.S. Gambling Bill Means for You, *Gambling Law U.S.*, Oct. 20, 2006, <http://www.gambling-law-us.com/Articles-Notes/Ciaffone-UIGEA.htm>.

89. *See, e.g.*, Humphrey, *supra* note 88.

90. *See, e.g.*, Ciaffone, *supra* note 88.

91. *See discussion infra* II.B.2.c.

92. The UIGEA defines “financial transaction provider” as:

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.

UIGEA § 5362(4).

93. *Id.* § 5264(a).

94. *See id.* §§ 5365-66.

95. *Id.* § 5364(d)(3).

cards to be used for Internet gambling.⁹⁶ Visa and MasterCard providers have refused to honor transactions identified by code number 7995, which indicates gambling transactions.⁹⁷ However, under the voluntary system, the credit card providers still faced possible liability for not monitoring online gambling transfers.⁹⁸ In 1998, New York Attorney General Eliot Spitzer charged PayPal with violating New York's anti-gambling statutes because it did not monitor customers' account use.⁹⁹ The charge escalated into a federal investigation under the USA PATRIOT Act¹⁰⁰ for suborning illegal activity by promoting Internet gambling, and was only settled after eBay purchased PayPal and agreed to pay a \$10 million settlement, turn over user records, and ensure that their New York customers could not use their accounts for gambling services.¹⁰¹

b. Current Applicable Federal Statutes

Gambling has historically been a creature of state regulation governed by the powers reserved to the states under the Tenth Amendment of the United States Constitution.¹⁰² From the colonial era through Reconstruction, Congress consistently took a hands-off approach toward gambling.¹⁰³ In 1961, Congress entered the gaming arena by enacting a series of statutes that were aimed at fighting organized crime.¹⁰⁴ In 1970, Congress strengthened these statutes by passing the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁰⁵ In each instance, Congress

96. Charles Crawford & Melody Wigdahl, Internet Payment Solutions, in INTERNET GAMBLING REPORT V 85 (Mark Balestra & Anthony Cabot eds., 5th ed. 2002).

97. Sebastian Sinclair, Some Bumps in the E-Gambling Road, in INTERNET GAMBLING REPORT, *supra* note 96, at 68.

98. See Shannon Dorey, Gambling Online: Is It Legal?, The Surf's Up, <http://www.the-surfs-up.com/news/gamblingonlinenews.html> (June 2003); Press Release, Office of the New York State Attorney General, Leading Credit Card Issuer Agrees to Block Key Internet Transactions, http://www.oag.state.ny.us/press/2002/jun/jun14a_02.html (Jun. 14, 2002).

99. Radley Balko, *eBay Invites Internet Regulation, Backs Online Gambling Ban*, CATO INSTITUTE, June 11, 2006; *PayPal Reaches Agreement with New York Attorney*, CARDLINE, Aug. 23, 2002, at 1. See also Radley Balko, *Who Killed PayPal? 'Consumer advocates' can make life miserable for consumers*, REASON, Aug. – Sept. 2005, at 60.

100. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 18 U.S.C. and 31 U.S.C.).

101. Balko, *supra* note 99.

102. See U.S. Const. Amend. X; see also Beau Thompson, *Internet Gambling*, 2 N.C.J.L. & TECH. 81, 90 (2001).

103. See *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987).

104. See *Wire Wager Act*, Pub.L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491, (1961) (current version at 18 U.S.C. § 1084 (2006))

105. RICO, Pub.L. 91-452, Title IX, § 901(a), 84 Stat. 941 (1970) (current version at 18 U.S.C. § 1961 (2006)).

exercised its powers to regulate interstate commerce by passing legislation that expanded the federal government's power to investigate foreign parties.¹⁰⁶

A states' rights position was still evident in the late 1970's with the passage of the Interstate Horseracing Act of 1978,¹⁰⁷ which regulates pari-mutuel wagering on horse racing.¹⁰⁸ Congress specifically found that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."¹⁰⁹ However, state law jurisdiction is limited to the state borders.¹¹⁰ The Internet is inherently an instrument of interstate commerce.¹¹¹ As one author wrote, "[b]ecause of the national and international scope of the Internet, state regulation may not be constitutional under the Dormant Commerce Clause."¹¹² Since 1995, Congress has proposed a flurry of bills that seek to govern interstate gambling activities under the auspices of the Commerce Clause.¹¹³

106. See ROSE & OWENS, JR., *supra* note 20, at 159.

107. 15 U.S.C. §§ 3001-3007.

108. *Id.* § 3002(3).

109. Interstate Horse Racing Act of 1978, Pub. L. No. 95-515, § 2(a)(1), 92 Stat. 1811 (current version at 15 U.S.C. §§ 3001-3007) (2000).

110. ROSE & OWENS, JR., *supra* note 20, at 108.

111. See Ari Lanin, Note, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423, 1424 (2000).

112. Scott Olson, *Betting No End to Internet Gambling*, 4 J. TECH. L. & POL'Y 2, 28 (1999).

113. See Internet Gambling Prohibition Act, H.R. 4777, 109th Cong. (2006); Internet Gambling Prohibition and Enforcement Act, H.R. 4411, 109th Cong. (2006); Internet Gambling Funding Prohibition Act, S. 627, 108th Cong. (2003); Unlawful Internet Gambling Funding Prohibition Act, H.R. 2143, 108th Cong. (2003); Unlawful Internet Gambling Funding Prohibition Act, H.R. 21, 108th Cong. (2003); Comprehensive Internet Gambling Prohibition Act, S.3006, 107th Cong. (2002); To Create a Commission on Internet Gambling Licensing and Regulation, H.R. 5760, 107th Cong. (2002); Combating Illegal Gambling Reform and Modernization Act, H.R. 3215, 107th Cong. (2002); Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong. (later incorporated in the USA PATRIOT Act); Internet Gambling Payments Prohibition Act, H.R. 2579, 107th Cong. (2001); Unlawful Internet Gambling Funding Prohibition Act, H.R. 556, 107th Cong. (2001); Comprehensive Internet Gambling Prohibition Act of 2000, H.R. 5020, 106th Cong.; Unlawful Internet Gambling Funding Prohibition Act of 2000, H.R. 4419, 106th Cong.; Internet Gambling Prohibition Act of 2000, H.R. 3125, 106th Cong.; Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong.; Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1998); Crime Prevention Act of 1995, S. 1495, 104th Cong.

c. State Statutes

While the UIGEA was under consideration, there was a powerful debate as to the proper role of state governments in regulating Internet gambling activities.¹¹⁴ In July 1999, the U.S. Congress released the National Gambling Impact Study (NGIS) Final Report.¹¹⁵ The first formal recommendation of the study was that “states are best equipped to regulate gambling within their own borders with two exceptions: tribal and *Internet* gambling.”¹¹⁶ The NGIS urged that federal regulation was necessary due to the size of the problem, “[b]ecause it crosses state lines, it is difficult for states to adequately monitor and regulate such gambling.”¹¹⁷

To govern online gambling activities effectively, a state must be able to claim personal jurisdiction over the contracting parties.¹¹⁸ In civil liability cases, a state has personal jurisdiction over an Internet gambling website if the company is operating out of the state or is incorporated in the state.¹¹⁹ Out-of-state operators must be served through the state’s long-arm statute and have sufficient minimum contacts.¹²⁰

It is slightly easier for state courts to assert jurisdiction in criminal cases.¹²¹ A state can establish subject matter jurisdiction over a crime if that state is (1) the residence of the perpetrator, (2) the residence of the victim, or (3) where the act was committed.¹²² Alternatively, the constructive presence doctrine allows a court to constructively place a defendant within the state whose laws the defendant allegedly violated if it serves the interests of justice.¹²³ If an operator is present in at least one state where the act is illegal, extradition is “routine” under the Uniform Criminal Extradition Act.¹²⁴ Problems arise, however, if the act is illegal in the state seeking extradition, but legal in all states where the operator is present.¹²⁵

Under the “constructive” presence doctrine, the state may personally serve process on any company officer traveling through a state where customers reside.¹²⁶ The first major example of state action against gaming company officials was the arrest of Sportingbet PLC’s chairman, Peter Dicks.¹²⁷ Dicks was arrested on September 6, 2006, at Kennedy Airport in New York on a Louisiana warrant for illegal Internet gambling activities.¹²⁸ After being held for three weeks, Dicks was released on October 2, 2006, when the governor of New York refused to extradite him to Louisiana.¹²⁹ Some commentators have suggested that his release “signals that the U.S. clampdown on Internet gambling, which is highly popular in the

114. *See, e.g.*, NGISC Final Report, *supra* note 3. This Commission was created through the enactment of the National Gambling Impact Study Commission Act, Pub. L. No.104-169, 110 Stat.1482 (1996)).

115. NGISC Final Report, *supra* note 3.

116. *Id.* at Recommendation 3-1 (emphasis added).

117. *Id.* at Recommendation 5-1.

country but still illegal, may not be as harsh as some had feared.”¹³⁰ Others have viewed the refusal to extradite as a sign of the need for stronger federal legislation.¹³¹

Every state has enacted statutes to regulate gambling.¹³² Many statutes include provisions making the transmittal of gambling information a crime.¹³³ The flow of gambling information through the state may violate state laws even if both parties are located elsewhere.¹³⁴ Because the communications move as signals through wires, states may not even be aware that violations are occurring.¹³⁵

In addition to passing general legislation governing the transmittal of information, by 2004, five states—Illinois, Louisiana, Oregon, Nevada, and South Dakota—had passed laws explicitly prohibiting certain online activities.¹³⁶ Illinois

118. ROSE & OWENS, JR., *supra* note 20, at 101.

119. *Id.*

120. *Id.* at 102. The nuances of what constitutes minimum contacts over the Internet are too lengthy for the purposes of this Note. See generally *id.* at 104-12; Danielle K. Citron, *Minimum Contacts in a Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481 (2006) (a detailed analysis of different Internet minimum contacts rules, and potential future developments).

121. ROSE & OWENS, JR., *supra* note 20, at 112 (noting that states have personal jurisdiction over someone who causes harm in the state).

122. See *U.S. v. Johnston*, 227 F.2d 745 (3r Cir. 1955), *aff'd*, 351 U.S. 315 (1956), cited in INTERNET GAMING LAW, *supra* note 19, at 112 n.375.

123. See *Strassheim v. Daily*, 221 U.S. 280, 284-85, 31 S.Ct. 558, 560 (1911) cited in ROSE & OWENS, JR., *supra* note 20, at 112 n.376.

124. ROSE & OWENS, JR. *supra* note 20, at 112; UNIF. CRIMINAL EXTRADITION ACT, U.L.A. § 107 (1936) (superseded by Uniform Extradition and Rendition Act in 1982).

125. ROSE & OWENS, JR. *supra* note 20, at 112-13 (citing *Neilsen v. Or.*, 212 U.S. 315 (1909)).

126. *Id.* at 112.

127. Matt Richtel & Thomas Crampton, *Arrest of Second Major Online Gambling Figure Is a First for State Officials*, N.Y. TIMES, Sept. 8, 2006, at C3.

128. *Business Brief – Sportingbet PLC: Operations Will Continue In Wake of Official’s Arrest*, WALL ST. J., Sept. 9, 2006, at A6.

129. *Gambling Brief – Sportingbet PLC: Ex-Chairman Dicks is Released, Free to Return Home to U.K.*, WALL ST. J., Oct. 2, 2006, at A8.

130. *Id.*

131. See, e.g., Rebecca Mowbray, *Online Gambling Law Put to Test: State Sets Sights on British Executive*, TIMES-PICAYUNE (New Orleans), Sept. 28, 2006, at Money 1.

132. CHARLES DOYLE, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW, 25-26 (Novinka Books 2006) (listing the applicable state statutes).

133. Laura Dietz, Theresa Leming, & Jeanne Philbin, *Statutory Prohibitions of Transmission of Gambling Information*, 38 AM. JUR. 2D Gambling § 143 (2006).

134. U.S. GEN. ACCOUNTING OFFICE, INTERIM REPORT ON INTERNET GAMBLING, GAO No. 02-1101R, at 3 (2002), available at <http://www.gao.gov/new.items/d021101r.pdf> [hereinafter GAO GAMBLING REPORT].

135. *Id.*

136. *Id.* at 4 n.1.

targeted online gambling providers by establishing escalating criminal penalties¹³⁷ for anyone who “[k]nowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money . . . or to make a wager . . . by means of the Internet.”¹³⁸ Louisiana’s online gambling statute is also focused on gambling service providers,¹³⁹ but it creates substantial secondary liability for computer programmers and Internet Service Providers by expanding the reach of the statute to “[w]hoever designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server.”¹⁴⁰ Oregon does not directly legislate gambling activities, but instead prohibits online gambling businesses from accepting financial transfers from clients.¹⁴¹ The language of Oregon’s statute implies that Oregon residents are still entitled to gamble online for points¹⁴² or non-monetary prizes, so long as no financial institution acts as an intermediary.¹⁴³ Nevada presently prohibits using computer technology to exchange financial information for the purpose of making a bet or wager.¹⁴⁴ However, there is an exemption for race books and sports pools that use approved technology.¹⁴⁵ South Dakota has created the strictest prohibition, barring the act of gambling online for financial remuneration,¹⁴⁶ any gambling-related financial transactions that originate or terminate in the state,¹⁴⁷ and the establishment of any location for gambling online.¹⁴⁸ However, South Dakota does provide exemptions for the state lottery.¹⁴⁹

In contrast, only two U.S. jurisdictions—Nevada and the Virgin Islands—have taken action to encourage Internet gambling businesses.¹⁵⁰ In 2001, the same year in which it banned transferring financial information over computer networks, Nevada established licensing fees for Internet gambling operators, pending the development of regulations by the Nevada Gaming Control Board.¹⁵¹ The same year,

137. 720 ILL. COMP. STAT. 5/28-1(c) (2007).

138. *Id.* at 5/28-1(a)(12).

139. LA. REV. STAT. ANN. § 14:90.3 (2007).

140. *Id.* § 14:90.3(E) (2007).

141. OR. REV. STAT. § 167.109 (2007).

142. *Id.* § 117(7)(b). *See also* Gone Gambling membership website, <http://www.gonegambling.com>, as of Jan. 10, 2007. Gambling for points is similar to gambling for money, but instead of sending money directly to the operator, the player pays a subscription fee to play “free” games that allow the player to accumulate points which can be redeemed for specified items, access to additional games, or even cash from the subscription company. *Id.*

143. OR. REV. STAT. § 167.109(1)(d).

144. NEV. REV. STAT. § 463.750 (2007); American Gaming Association: Industry Issues Detail, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17 (last visited Jan. 16, 2008).

145. *Id.* § 463.016425(1).

146. S.D. CODIFIED LAWS § 22-25A-7 (2007).

147. *Id.* § 22-25A-9.

148. *Id.* § 22-25A-8.

149. *Id.* § 22-25A-15; 42-7-58; 42-7B-3.

150. ROSE & OWENS, JR. *supra* note 20, at 76-81.

151. 2001 Nev. Stat. 3079 (currently NEV. REV. STAT. § 463.770 (2007)).

the Virgin Islands permitted St. Croix to host online gambling sites.¹⁵² As a result, USVI Host Inc. became the first licensed U.S.-based gambling operator in 2003.¹⁵³ The divergent actions taken by different states, however, has lead to fears of a “patchwork” of regulation, spurring calls for federal standardization.¹⁵⁴

C. Nations Permitting Internet Gaming

1. Canada

a. Federal Criminal Liability

In Canada, legal authority to regulate gambling activities is split between the federal and provincial governments.¹⁵⁵ Under the Constitution Act, legislation of criminal matters is the sole jurisdiction of the Canadian government.¹⁵⁶ Government-regulated gambling was first permitted by a 1969 amendment to the Criminal Code of Canada.¹⁵⁷ At the time, the drafters of the provisions did not contemplate electronic forms of gambling.¹⁵⁸ In 1985, the Criminal Code was amended to address electronic forms of gambling.¹⁵⁹ Under the amended code, differing levels of sanctions apply to gambling service operators and players.¹⁶⁰ An operator “who sells, barter, exchanges or otherwise disposes of . . . any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever” faces a two-year prison sentence.¹⁶¹ A player who “buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.”¹⁶²

While these statutes appear to bar all Internet gambling activities, providers are able to operate in Canada under the provincial government exception.¹⁶³ If a gambling activity “operated on or through a computer, video device or slot

152. Virgin Islands Internet Gaming and Internet Gambling Act, 2001 V.I. Sess. Laws 6419 § 645(4)(a).

153. *Maiden Over for Virgin Island*, ONLINE CASINO NEWS, Oct. 17, 2003, <http://www.casinomeister.com/news/oct2003.html>.

154. See GAO GAMBLING REPORT, *supra* note 134, at 5.

155. Howard Yegendorf, *Canada*, in INTERNET GAMBLING REPORT IX, *supra* note 10, at 274.

156. Constitution Act, 1867 (U.K.), 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5, app. II, sec. 91 (1985).

157. Fred R. Fenwick, *First Nations Gaming*, LAWNOW, June-July 2001, at 42. See also Criminal Code, R.S.C. ch. C-46 (1985).

158. See Yegendorf, *supra* note 10, at 274 (“The existing legislation . . . was enacted decades before the advent of the Internet.”).

159. Criminal Code, R.S.C. ch. C-46, sec. 202.

160. *Id.* § 206.

161. *Id.* § 206(1)(b).

162. *Id.* § 206(4).

163. *Id.* § 207(1).

machine¹⁶⁴ is conducted and managed¹⁶⁵ by a provincial government, then the provincial government has sole control over any criminal liability relating to the enterprise.¹⁶⁶

b. Provincial Statutes Allowing Gaming

Once the constraints of the national Criminal Code are satisfied, the provincial government exercises primary control over the regulation and licensing of all gambling activities, including Internet gambling.¹⁶⁷ Because the Criminal Code requires that the provincial government control and manage any electronic gambling enterprise, any offered service is subject to the limits of the provincial government's jurisdiction.¹⁶⁸ An Internet gambling service would have to be (a) operated by the provincial government, and (b) restricted to the residents of the province offering the service.¹⁶⁹ In 2003, the Supreme Court of Canada held that an Internet lottery site operated by the Province of Prince Edward Island was in violation of the Criminal Code.¹⁷⁰ Even though the server and all transactions related to the lottery were located in the province, the lottery violated the Criminal Code by offering gambling to non-Canadian residents.¹⁷¹

After *Earth Future Lottery*,¹⁷² although provincial governments became more reluctant to experiment with Internet gambling services, the ruling did not end Internet gambling in Canada.¹⁷³ A consortium of First Nations casino operators, led by the Saskatchewan Indian Gaming Authority, still offer Internet gambling under claims of tribal sovereignty.¹⁷⁴ The Attorney General of Quebec has declared the operation illegal, but the tribes are in negotiations with the provincial government, and the Internet casino remains open.¹⁷⁵

164. *Id.* § 207(4).

165. R.S.C. § 207(1)(a).

166. CUTTING THE WIRE, *supra* note 7, at 210.

167. GAMING PROJECT WORKING GROUP, REPORT ON GAMBLING LEGISLATION AND REGULATION IN BRITISH COLUMBIA, Part I: White Paper on Gambling in British Columbia, 40 (Siobhan H. Sams, Ladner Downs, ed., 1999), available at https://dspace.ucalgary.ca/bitstream/1880/118/1/aa6_sm.pdf [hereinafter B.C. White Paper]; R. v. Furtney, [1991] 3 S.C.R.89 (Can.).

168. B.C. White Paper, *supra* note 168, at 241.

169. *See, e.g., id.* at 40-43.

170. Reference re Earth Future Lottery, [2003] 1 S.C.R. 123, 2003 SCC 10.

171. Reference re Earth Future Lottery, [2002] PESCAD 8, ¶ 15 (where the Supreme Court of Prince Edward Island held that the lottery violated the Canadian Criminal Code).

172. *Id.*

173. Yegendorf, *supra* note 10, at 281-83.

174. I. Nelson Rose, *Article #68: Indian Nations and Internet Gambling*, GAMBLING AND THE LAW, March 2006, http://www.gamblingandthelaw.com/columns/68_Tribes_Internet.htm.

175. *Id.*

2. United Kingdom: Gambling Act 2005¹⁷⁶

The U.K. Gambling Act 2005 established a new unified regulator, the Gaming Commission, and two types of gambling licenses: a general Gambling License for traditional “brick-and-mortar” gambling operations,¹⁷⁷ and a Remote Gambling License governing “gambling in which persons participate by the use of remote communication” or “any other kind of electronic or other technology for facilitating communication.”¹⁷⁸ These two licenses are separate and distinct—if an operator wishes to provide both physical and online gambling activities, he must obtain both licenses.¹⁷⁹ For the purposes of this Note, any discussion of the Gambling Act or U.K. Gambling Licenses refers only to the Remote Gambling License. Any remote license may be restricted to designated forms of remote communication, at the discretion of the Gaming Commission.¹⁸⁰

Unlike the Australian IGA, the U.K. Gambling Act 2005 makes no attempt to control foreign Internet gambling providers.¹⁸¹ The Gambling Act explicitly states that, unless a piece of remote gambling equipment (for registration, taking payment, presenting a virtual game, or determining a result) is present in Great Britain, the Act does not apply.¹⁸²

As with the IGA, countries have the right to opt out of allowing citizens to conduct Internet gambling with British providers.¹⁸³ If a person in Great Britain uses remote gambling equipment for the purpose of “inviting or enabling a person in a prohibited territory to participate in remote gambling,” that person is guilty of a criminal offense.¹⁸⁴ The Act grants the Secretary of State the power to designate which countries or places are prohibited territories.¹⁸⁵ Unlike the IGA, the region does not have to adopt a mirroring statute to be designated a prohibited territory.¹⁸⁶

Although players are not barred from using foreign Internet gambling services, the Gambling Act does ban advertisements for remote gambling that is

176. Gambling Act, 2005, c. 19 (U.K.).

177. *Id.* § 65.

178. *Id.* § 67.

179. *Id.* (“An operating licence must state whether it is a remote operating licence or not.”).

180. *Id.* § 4(3).

181. Compare Tony Coles, *The United Kingdom*, in INTERNET GAMBLING REPORT IX, *supra* note 10, at 354 (foreign remote gambling service provider is exempt from U.K. licensing requirements so long as there is no remote gambling equipment within the United Kingdom) with Nettleton, *supra* note 10, at 521 (Australia’s concentration on foreign-based gambling service providers and Internet Service Providers).

182. Coles, *supra* note 10, at 354.

183. Gambling Act 2005 § 44 (U.K.).

184. *Id.* § 44(1).

185. *Id.* § 44(2).

186. *See, e.g., id.* (makes the Secretary of State’s order the ultimate authority).

hosted in non-European Economic Area countries.¹⁸⁷ Online lottery sales are permitted to U.K. residents.¹⁸⁸

Prior to the Gambling Act, Internet gambling services were restricted to forms of gambling that could be conducted over the telephone. Bookmakers were thus permitted to accept bets over the phone, through an Internet website, or by email.¹⁸⁹ Casino, bingo, and machine games were only permitted on licensed premises, with the players present at the time the game was played.¹⁹⁰ Although lottery tickets could be sold over the phone, they could not be sold by machine because the Gaming Board barred Internet lottery transactions.¹⁹¹ These barriers greatly restricted the number of potential clients for online gambling providers.¹⁹²

III. ANALYSIS

A. WTO Requirements for Compliance with the General Agreement on Trade in Services.

1. Complaints Brought by Antigua Against the United States

On March 27, 2003, the nation of Antigua and Barbuda (Antigua) requested consultation with the United States to discuss the cross-border supply of gambling and betting services under the General Agreement on Trade in Services.¹⁹³ These early meetings were unsuccessful.¹⁹⁴ Consequently, on June 13, 2003, Antigua requested that the WTO Dispute Settlement Body establish a panel to settle the dispute.¹⁹⁵

In its submission to the Panel, Antigua stated that:

[T]he basis of Antigua's claim in this case is simple. In its Schedule of Specific Commitments adopted under the GATS the

187. *Id.* § 331.

188. *Id.* § 34.

189. GAMING BOARD FOR GREAT BRITAIN, REPORT, (2004-2005), available at <http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/reportGamingBoard.pdf>.

190. *See, e.g., id.* ¶ 1.18.

191. *Id.*

192. *Id.*

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

194. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1.2, WT/DS285/R (Nov. 10, 2004) [hereinafter WTO Panel Report].

195. Request for the Establishment of a Panel by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/2 (Jun. 13, 2003).

United States has made a full commitment to market access and national treatment for gambling and betting services supplied on a cross-border basis. The United States allows numerous operators of domestic origin to offer such services through its territory. Simultaneously, it prohibits all cross-border supply of gambling and betting services. In doing so it violates its obligations under the GATS.¹⁹⁶

Antigua further submitted that it had an extensive regulatory framework, sufficient to dispel any legitimate concerns about the security of overseas gambling operations or potential money-laundering activities.¹⁹⁷ Among other qualifications, Antiguan operators are required to obtain a license from the Gaming Directorate,¹⁹⁸ perform identity checks on new players,¹⁹⁹ prohibit receiving payments in cash,²⁰⁰ and accept funds only from verified accounts in regulated financial institutions.²⁰¹ Antigua requested that the Panel review federal, state, and local gambling laws in the United States, believing the Panel would find that the U.S. laws were inconsistent with both the United States' Schedule of Specific Commitments and several articles of the GATS.²⁰²

The U.S. government raised three defenses against the claims brought by Antigua. It asserted that (1) Antigua failed to make a *prima facie* case, (2) the United States had no specific commitment to gambling services under the GATS, and (3) the United States had an obligation to protect public morals.²⁰³ In support of its first defense, that Antigua had failed to establish a *prima facie* case,²⁰⁴ the United States asserted that Antigua needed to describe how individual acts of U.S. legislation affect services to which the United States specifically committed in the U.S. Schedule to the GATS.²⁰⁵ Antigua challenged "every piece of US legislation that could be construed as forming a part of the United States' total prohibition on the cross-border supply of gambling and betting services,"²⁰⁶ but did not identify

196. First Written Submission of Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Oct. 1, 2003), available at http://www.antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf.

197. WTO Panel Report, *supra* note 195, ¶¶ 3.4-3.6.

198. *Id.* ¶ 3.5.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* ¶ 2.1.

203. Philippe Vlaemminck & Steven Verhuist, *International Law*, in INTERNET GAMBLING REPORT IX, *supra* note 10, at 155.

204. WTO Panel Report, *supra* note 195, ¶ 3.40.

205. *Id.*

206. Vlaemminck & Verhuist, *supra* note 10, at 155.

specific acts as violating the GATS provisions, so the U.S. was unable to evaluate whether cross-border gambling services were impacted.²⁰⁷

Secondly, the United States asserted that it had not agreed to protect gambling services in the U.S. Schedule to the GATS.²⁰⁸ Antigua had asked the Panel to interpret the U.S. Schedule in light of the WTO W/120 classification codes and the corresponding United Nations Provisional Central Product Classification (CPC) codes.²⁰⁹ Under the W/120 codes, gambling activities are included in either sub-sector 10.A “entertainment” or sub-sector 10.D “recreational” services.²¹⁰ The United States sought a less formalistic interpretation.²¹¹ U.S. attorneys argued that several countries did not apply the W/120 and CPC codes when drafting their GATS schedules,²¹² and that W/120 was “never meant to bind Members to the CPC definitions, nor to any other ‘specific nomenclature.’”²¹³ In support of this position, the United States showed that WTO Members who had adopted formal gambling restrictions under the GATS had varied when declaring to which sector gambling activities belonged.²¹⁴ Instead, the United States asked the Panel to use the dictionary definitions of “recreation,” “entertainment,” and “sporting” to determine that gambling activities were included in either the unadopted sub-sector 10.E or the exception of sporting activities from the GATS Schedule.²¹⁵

The third defense was that even if the United States had entered into specific obligations for gambling services under the GATS, the United States had a blanket defense against fulfilling those obligations because criminalizing offshore gambling businesses was necessary to uphold public morals and safety concerns.²¹⁶ Specifically, the United States sought to combat organized crime and lower the risks of money laundering, fraud, compulsive gambling, and underage gambling.²¹⁷ The United States had to rely upon a public morals defense because, unlike several other countries,²¹⁸ it had not elected to bar gambling services when adopting a Schedule of

207. WTO Panel Report, *supra* note 195, ¶ 3.40.

208. *Id.* ¶ 3.44.

209. *Id.* ¶ 3.41.

210. *Id.* ¶ 3.45.

211. *Id.* ¶ 3.114.

212. *See, e.g., id.* ¶ 3.42.

213. WTO Panel Report, *supra* note 195, ¶ 3.41 n.117 (citing Note on the Meeting of 27 May to 6 June 1991, MTN.GNS/42, paras.18-19 (June 24, 1991)).

214. *Id.* ¶ 3.46. Member nations addressed gambling activities in sub-sectors 10.A (entertainment), 10.D (recreation), 10.E (other), or tourism services. *Id.*

215. *Id.* ¶ 3.45.

216. *See, e.g., id.* ¶¶ 3.15-3.18.

217. *Id.*

218. *See, e.g.,* Schedule of Specific Commitments for Austria, General Agreement on Trade in Services, Sector 10(d), (specifying Austria’s commitments to the WTO), *available at* http://tsdb.wto.org/wto/public.nsf/FSetReportPredifinedAffich?OpenFrameSet&Frame=F_PredifinedReport&Src=_d5trn8rpfelqm4r39ccn6ssr65so2ud9o65j3aopk70rjiopm6go6apb364p3adaj6cdgjo1mclijcopj7t2m8qbk8hnm6tbdcln780_.

Specific Commitments under the GATS.²¹⁹ The United States requested that the Panel deny all complaints filed by Antigua.²²⁰

2. Report of the Dispute Settlement Body Panel: *United States Measures – Affecting the Cross-Border Supply of Gambling and Betting Services* (Nov. 10, 2004)

The Panel held that gambling activities were not a subset of sporting activities,²²¹ which the United States had exempted from cross-border trade agreements.²²² Instead, gambling would fall under the “recreational activities” classification of Subsector 10.D, to which the United States had granted full cross-border trade protections under the GATS.²²³ The Panel rejected Antigua’s total legislation claim,²²⁴ restricting its consideration of U.S. laws to those properly requested and discussed by Antigua.²²⁵ The Panel reviewed the federal Wire Act,²²⁶ Travel Act,²²⁷ and Illegal Gambling Business Act,²²⁸ as well as the state laws of Colorado,²²⁹ Louisiana,²³⁰ Massachusetts,²³¹ Minnesota,²³² New Jersey,²³³ New York,²³⁴ South Dakota,²³⁵ and Utah.²³⁶ In oral arguments, the United States admitted that federal and state laws were applied to prohibit gambling through foreign suppliers.²³⁷ Separate analyses were performed to determine if each of the

219. Nelson Rose, *U.S. Ignores Deadline in WTO Fight with Antigua*, 10 GAMING L. REV. 225, 225 (Jun. 2006) (“[T]he U.S. agreed to let in every recreational service, ‘except sporting.’”).

220. WTO Panel Report, *supra* note 195, ¶ 2.2.

221. *See, e.g., id.* ¶ 6.67.

222. Schedule of Specific Commitments for the United States, General Agreement on Trade in Services, Sector 10(d), *available at* http://tsdb.wto.org/wto/public.nsf/FSetReportPredifinedAffich?OpenFrameSet&Frame=F_PredefinedReport&Src=_s5trn8rpfelqm4r39ccn6ssr65so2udpl6so3ie1h69i38d1i64r30cr364p3adj6cdgjc1nc4s3ee317t2m8qbk8hnm6t6bdcln780.

223. *Id.*

224. WTO Panel Report, *supra* note 195, ¶¶ 6.216-6.217.

225. *Id.* ¶ 6.219.

226. *Id.* ¶ 6.220 (citing 18 U.S.C. § 1084).

227. *Id.* ¶ 6.220 (citing 18 U.S.C. § 1952).

228. *Id.* ¶ 6.220 (citing 18 U.S.C. § 1955).

229. *Id.* ¶¶ 6.224-6.226.

230. WTO Panel Report, *supra* note 195, ¶¶ 6.227-6.229.

231. *Id.* ¶¶ 6.230-6.232.

232. *Id.* ¶¶ 6.233-6.235.

233. *Id.* ¶¶ 6.236-6.239.

234. *Id.* ¶¶ 6.240-6.242.

235. *Id.* ¶¶ 6.243-6.245.

236. WTO Panel Report, *supra* note 195, ¶¶ 6.246-6.248.

237. *Id.* ¶ 6.349.

abovementioned laws were “measures . . . affecting trade in services” as defined in Article I²³⁸ of the GATS.²³⁹

The Panel found that the Wire Act²⁴⁰ was inconsistent with the GATS because it created a “ban on the use of one, several, or all means of delivery” of services to an elected sector by barring gambling communications through wired technologies.²⁴¹ Similarly, the Travel Act²⁴² and Illegal Gambling Business Act,²⁴³ read in conjunction with state laws prohibiting gambling, barred foreign gambling service providers from using the mail and other forms of delivery.²⁴⁴

When considering the state laws, the Panel drew a distinction between laws which directly impacted the gambler and those that impacted the gambling supplier.²⁴⁵ The Panel held that the GATS was only concerned with legislation that would create inequalities between local and foreign service suppliers.²⁴⁶ As a result, the state laws of Colorado, Minnesota, New Jersey, and New York (all of which related to criminal sanctions for the act of gambling) did not fall under the GATS provisions.²⁴⁷ However, Louisiana, Massachusetts, South Dakota, and Utah were deemed in violation for creating the same ban on means of delivery as was present in the federal statutes.²⁴⁸

In response to the United States’ defense that the prohibitions were necessary to protect public morals or to maintain public order, the Panel acknowledged that the United States had a legitimate interest in protecting its citizens.²⁴⁹ However, to meet the requirements of a public morals claim, the United States must also show that: (1) they have identified specific threats to public morals, (2) the statutes are necessary to combat those threats, and (3) no WTO-consistent method exists that could be used instead.²⁵⁰ In its briefing, the United States identified four major threats caused by online gambling: money laundering, fraud, compulsive gambling, and underage gambling.²⁵¹

The Panel agreed that the statutes were enacted to combat the identified threats.²⁵² However, the Panel noted that Antigua had enacted a regulatory system

238. “For the purposes of this agreement, trade in services is defined as the supply of a service “from the territory of one Member into the territory of any other Member” Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

239. WTO Panel Report, *supra* note 195, ¶ 6.250.

240. 18 U.S.C. § 1084.

241. WTO Panel Report, *supra* note 195, ¶ 6.363.

242. 18 U.S.C. § 1952.

243. 18 U.S.C. § 1955.

244. WTO Panel Report, *supra* note 195, ¶¶ 6.369, 6.378.

245. *Id.* ¶ 6.382.

246. *Id.* ¶ 6.383.

247. *Id.* ¶¶ 6.381-383, 6.396-406.

248. *Id.* ¶¶ 6.419-420.

249. *Id.* ¶ 6.521.

250. WTO Panel Report, *supra* note 195, ¶¶ 6.488-522.

251. *Id.* ¶¶ 3.15-3.19.

252. *Id.* ¶¶ 6.504, 6.511, 6.516, 6.520.

that would be sufficient to address U.S. concerns.²⁵³ Because the U.S. officials did not engage in consultations with Antigua when requested,²⁵⁴ the United States failed to show that it had exhausted all WTO-compliant methods of protection.²⁵⁵ The Panel held that the federal laws, and the state laws related to the Travel Act²⁵⁶ and Illegal Gambling Business Act,²⁵⁷ were inconsistent with the GATS requirements.²⁵⁸ The Panel concluded that Antigua suffered damages from the Interstate Horseracing Act (IHA),²⁵⁹ which permitted pari-mutuel wagering through electronic communications between the states.²⁶⁰ As a result, the U.S. government would need to alter the language of the IHA so that it does not constitute “arbitrary and unjustifiable discrimination between countries” and/or a “disguised restriction on trade.”²⁶¹ The Panel also recommended that the U.S. government modify all inconsistent laws discriminating against foreign service providers to be in compliance with the GATS requirements.²⁶²

3. Report of the Appellate Body: *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Apr. 7, 2005)

Both parties appealed the WTO Panel Report.²⁶³ On January 7, 2005, the United States filed a Notice of Appeal with the Dispute Settlement Board.²⁶⁴ In the notice, the United States presented five claims of error in the Panel Report: (1) Antigua’s failure to show a prima facie case;²⁶⁵ (2) the determination that gambling belonged to sub-sector 10.D;²⁶⁶ (3) the conversion of prohibitions on specific forms of market access limitations under Article XVI to general prohibitions on any limitations;²⁶⁷ (4) the Wire Act, Travel Act, and Illegal Gambling Business Act’s

253. *Id.* ¶ 6.522.

254. *Id.* ¶ 6.523.

255. *Id.* ¶ 6.531.

256. 18 U.S.C. § 1952.

257. *Id.* § 1955.

258. WTO Panel Report, *supra* note 195, ¶¶ 6.535-539.

259. 15 U.S.C. § 3001-07.

260. WTO Panel Report, *supra* note 195, ¶ 6.600.

261. *Id.* at 270.

262. *Id.* ¶ 7.5.

263. WTO Appellate Report, *supra* note 15, ¶ 1.

264. Notification of an Appeal by the United States, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/6, (Jan. 13, 2005), available at <http://www.sice.oas.org/dispute/wto/ds285/AnnexIe.asp>.

265. WTO Appellate Report, *supra* note 15, ¶ 9.

266. *Id.* ¶ 14.

267. *Id.* ¶ 21.

lack of justification or inconsistency with Article XVI,²⁶⁸ and (5) the treatment of government practice as an autonomous measure that can be challenged.²⁶⁹

On January 19, 2005, Antigua notified the Dispute Settlement Board that it appealed several of the Panel's legal interpretations.²⁷⁰ Antigua sought review of the following interpretations of law for error: that Antigua's case should be considered on the basis of total prohibition, rather than the identified statutes;²⁷¹ that Article XVI:2 does not exhaustively define the measures that are inconsistent with Article XVI:1;²⁷² and that measures preventing consumers from using services supplied by a provider in another WTO Member are contained in Article XVI:2.²⁷³

The appellate body rejected the Panel's consideration of state laws on the grounds that Antigua did not show both how the laws operated and how they were relevant to the claim in its written submissions to the Panel.²⁷⁴ The appellate body confirmed that the United States' schedule to the GATS includes specific commitments on gambling and betting services.²⁷⁵ It upheld the Panel's findings that the U.S. prohibition on the remote supply of gambling and betting services is inconsistent with its market access obligations under the GATS.²⁷⁶ According to the appellate body, the U.S. prohibition constitutes an unlawful limitation on the number of gambling service suppliers.²⁷⁷ The appellate body confirmed that remote gambling is a distribution method of gambling under Mode 1 (cross-border supply), which is different from Mode 2 (consumption abroad).²⁷⁸ Mode 1 is the cross-border supply of services in which the service is supplied from the territory of one Member into the territory of another Member.²⁷⁹ The appellate body also confirmed that Internet gambling is supplied from Antigua into the U.S. territory, instead of supplied in Antigua to a U.S. consumer.²⁸⁰

However, the appellate body substantially altered the Panel's findings on the United States' public morals defense.²⁸¹ In explaining its reasoning, the appellate body noted that although the Panel rightly identified a "significant restricted trade

268. *Id.* ¶ 28.

269. *Id.* ¶ 40.

270. Notification of Other Appeal by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/7, (Feb. 16, 2005), available at <http://www.sice.oas.org/dispute/wto/ds285/AnexIIe.asp>. See also Notification of Other Appeal by Antigua and Barbuda, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/7/Corr.1, (Feb. 17, 2005), available at http://www.sice.oas.org/dispute/wto/ds285/AnexIIa_e.asp.

271. WTO Appellate Report, *supra* note 15, ¶ 62.

272. *Id.* ¶ 66.

273. *Id.* ¶ 67.

274. *Id.* ¶ 154.

275. *Id.* ¶ 213 (noting that it upheld it for different reasons).

276. *Id.* ¶ 265.

277. WTO Appellate Report, *supra* note 15, ¶ 373(C)(i).

278. Vlaeminck & Verhuist, *supra* note 10, at 162.

279. See, e.g., WTO Appellate Report, *supra* note 15, ¶ 220 n.262.

280. Vlaeminck & Verhuist, *supra* note 10, at 162.

281. WTO Appellate Report, *supra* note 15, ¶ 373(D)(vi)(a).

impact,”²⁸² this impact was expressly tempered by a detailed explanation of certain characteristics of, and concerns specific to, the remote supply of gambling. This includes “the volume, speed, and international reach of remote gambling transactions;”²⁸³ “the virtual anonymity of such transactions;”²⁸⁴ the “low barriers to entry in the context of the remote supply of gambling services;”²⁸⁵ and the “isolated and anonymous environment in which such gambling takes place.”²⁸⁶

Additionally, the appellate body reversed the Panel’s finding that the United States could not rely upon Article XIV because the United States did not enter into consultations with Antigua.²⁸⁷ The appellate body also dismissed the Panel’s finding that the United States cannot invoke Article XIV because the United States had failed to enforce the prohibition against three U.S.-based companies.²⁸⁸

The appellate body held that the United States had demonstrated that the Wire Act,²⁸⁹ the Travel Act,²⁹⁰ and the Illegal Gambling Business Act²⁹¹ are necessary to protect public morals or maintain public order.²⁹² However, the appellate body ruled that the United States had not sufficiently demonstrated, in light of the Interstate Horseracing Act,²⁹³ that the prohibition is applied to both foreign and domestic service suppliers of remote betting services for horse racing.²⁹⁴ The United States, therefore had not established that the prohibition satisfies the requirements of the Article XIV chapeau.²⁹⁵

4. Report of the Compliance Proceeding Panel: *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Mar. 30, 2007)*

After the Appellate Body Report was released, the U.S. Trade Representative (USTR) announced that the United States will only need “to clarify one narrow issue concerning Internet gambling on horse racing” to satisfy the WTO requirements.²⁹⁶ The USTR stated that it will explore possible avenues for

282. WTO Panel Report, *supra* note 195, ¶ 6.495.

283. *Id.* ¶ 6.505.

284. *Id.*

285. *Id.* ¶ 6.507.

286. *Id.* ¶ 6.514.

287. WTO Appellate Report, *supra* note 15, ¶ 373(D)(iv)(a).

288. *Id.* ¶ 357.

289. 18 U.S.C. § 1084.

290. *Id.* § 1952.

291. *Id.* § 1955.

292. WTO Appellate Report, *supra* note 15, ¶ 373(D)(iii)(c).

293. 15 U.S.C. § 3001-07.

294. WTO Appellate Report, *supra* note 15, ¶ 373(D)(vi)(a).

295. *Id.* ¶ 373(D)(v).

296. Vlaemminck & Verhuist, *supra* note 10, at 163.

addressing this finding.²⁹⁷ This could include amending the IHA to prohibit U.S. operators from offering remote betting on horse races.²⁹⁸ The USTR also declared that it will not ask Congress to weaken U.S. restrictions on Internet gambling.²⁹⁹

At a meeting of the Dispute Settlement Board on May 29, 2007, the United States stated its intention to implement the recommendations of the Board and indicated that it would need a reasonable period of time to do so.³⁰⁰ Antigua and the United States were unable to agree upon a reasonable period of time in accordance with Article 21.3(b) of the Dispute Settlement Understanding.³⁰¹ As Antigua and the United States failed to agree on a reasonable time period for implementation within forty-five days of the meeting,³⁰² Antigua requested on June 6, 2005 that the reasonable period of time be determined by binding arbitration.³⁰³ The appointed arbitrator, Dr. Claus-Dieter Ehlermann, determined that the reasonable period of time for implementation was eleven months and two weeks from the date of adoption, expiring on April 3, 2006.³⁰⁴

Antigua and the United States disagreed on the existence or sufficiency of measures taken by the United States to comply with the recommendations of the Dispute Settlement Board.³⁰⁵ Antigua requested the establishment of a panel to resolve the dispute on July 6, 2006.³⁰⁶ The Dispute Settlement Board referred the matter to the original panel, which convened on August 16, 2006.³⁰⁷ The DSU guidelines recommend that the Panel complete and circulate its report on the disputed measures within ninety days after the date of referral.³⁰⁸ On December 20, 2006, the Chairman of the Panel informed the Board that the report would not be issued within the ninety day period, due to scheduling constraints and time needed

297. *Id.*

298. *Id.*

299. *Id.*

300. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (Mar. 30, 2007) [hereinafter Compliance Report].

301. *Id.* Article 21.3(b) allows the parties to agree upon a specific time. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

302. DSU, *supra* note 301, art. 21.3(b).

303. Compliance Report, *supra* note 301, ¶ 1.3. If binding arbitration is requested, an arbitrator will determine a period of time within ninety days of the adoption of the recommendations. The guidelines recommend that the period not exceed fifteen months from the date of adoption, unless particular circumstances dictate otherwise. DSU *supra* note 301, art. 21.3(c).

304. Compliance Report, *supra* note 300, ¶ 1.4.

305. *Id.* ¶ 1.6. The U.S. “effectively did nothing more than provid[e] further clarification on the scope and implications of the US Interstate Horse Racing Act.” Vlaeminck & Verhuist, *supra* note 10, at 164.

306. Compliance Report, *supra* note 300, ¶ 1.7.

307. *Id.* ¶ 1.8 n.13.

308. DSU, *supra* note 301, art. 21.5.

for translations.³⁰⁹ An interim report, indicating that the actions taken by the United States were not sufficient to comply with the recommendations, was issued to the parties on January 25, 2007.³¹⁰ The full report was published on March 30, 2007.³¹¹

As of April 23, 2007, no bills to modify the Interstate Horseracing Act³¹² have been introduced in Congress.³¹³ As stated in the report, the United States' position is that it has been in compliance the entire time, and was merely unable at the time of the prior hearings to submit sufficient information to prove compliance.³¹⁴ The court rejects this argument as an attempt to relitigate the entire matter after a determination has been reached.³¹⁵ The Panel notes that, "in order to bring a measure that has been found 'inconsistent' with an agreement into 'conformity with' the same agreement, some change must come about."³¹⁶ As neither U.S. regulations nor U.S. responsibilities under the GATS have changed, the two cannot be said to be in conformity.³¹⁷

Once a WTO Member is deemed noncompliant after having been granted a reasonable period of time to comply with the GATS regulations, the next step is for the two governments to enter into negotiations to determine acceptable compensation.³¹⁸ If the negotiation period (normally twenty days) ends without an agreement, the complaining country can petition the Dispute Settlement Body (DSB) to apply trade sanctions against the other side.³¹⁹ The DSB must grant this

309. Communication from the Chairman, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda, WT/DS285/20, (Dec. 21, 2006).

310. Compliance Report, *supra* note 300, ¶ 5.1; *see also* Daniel Pimlott, WTO Rules Against US in Internet Gambling Case, FIN. TIMES, Jan. 26, 2007, *available at* http://www.globalgamingnews.com/news_igaming/antigua-wto.html.

311. Compliance Report, *supra* note 300.

312. 15 U.S.C. § 3001-07.

313. *See id.*

314. Compliance Report, *supra* note 300, ¶ 6.28.

315. *Id.* ¶¶ 6.45-6.51.

316. *Id.* ¶ 6.14.

317. *Id.* ¶ 6.11

318. WTO, Understanding the WTO - A unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Apr. 23, 2007) [hereinafter Understanding the WTO].

319. *Id.*

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

authorization within thirty days of the expiration of the reasonable period of time, unless there is a consensus of all WTO Members, including the complaining company, against the request.³²⁰

Numerous commentators have raised the possibility that the United States will ignore the WTO decisions.³²¹ For example, Vlaemminck wrote, “the U.S. may prefer to allow Antigua and Barbuda to impose trade sanctions rather than change its law.”³²² The Interactive Gaming Council commented in press releases that “[i]t could force the elephantine United States to reconsider laws prohibiting online wagering,”³²³ and “[t]his county can’t respect trade rules that benefit us and ignore those that don’t without undermining valuable free trade agreements.”³²⁴ And, as the former U.S. Deputy Assistant Secretary of State for International Law Enforcement stated, “[w]hat can they do that will affect the U.S. one iota? Nothing.”³²⁵

In December 2007, the WTO Arbitrator awarded Antigua \$21 million in annual sanctions against the US for failure to comply with the WTO decisions.³²⁶ While the Arbitrator did not make any judgment on what actions the US needed to perform to become compliant, the panel did note that the United States had taken no action since the Appellate Body report was released.³²⁷ Antigua’s request to apply the sanction amount to other TRIPS trade agreements³²⁸ was granted by the Arbitrator.³²⁹

5. Application of Ruling to Other WTO Member Nations

The WTO appellate body report does not have a direct impact on the European Union, because the European Union has explicitly excluded gambling and betting services in its Schedule of Commitments.³³⁰ A gambling operator cannot argue before a court that EU legislation is incompatible with certain WTO rules,

320. *Id.*

321. *See generally* Vlaemminck & Verhuist, *supra* note 10, at 163-164.

322. *Id.* at 163.

323. Interactive Gaming Council, Editorial: Time to Regulate Internet Gambling, Aug. 29, 2007, <http://www.igcouncil.org/press.php>, as reprinted at Offshore Gambling Association, US Regulation: Time to regulate Internet gambling, http://www.osga.com/artman/publish/article_5712.shtml.

324. *Id.*

325. Pimlott, *supra* note 310 (quoting Jonathan Winer, currently a partner at Alston & Bird LLP).

326. Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB ¶ 6.1 (Dec. 21, 2007) [hereinafter Arbitrator Decision].

327. *Id.* at Part I.

328. Specifically, to US copyrights, trademarks, industrial designs, patents, and undisclosed information. *Id.* ¶ 5.6.

329. *Id.* ¶ 6.1.

330. Vlaemminck & Verhuist, *supra* note 10, at 163.

even where a WTO decision has declared that legislation to be incompatible with those rules.³³¹ The Article XVI necessity test takes on some elements of the “proportionality test” as applied by the European Court of Justice in its gambling jurisprudence.³³² The outcome of the WTO appeal procedure could also have some limited repercussions on the way that European national courts and the European Court of Justice review the consistency of national gambling restrictions with the EC Treaty provisions.³³³

Antigua’s success at the WTO could pave the way for the European Union to bring a fair trade claim against the United States.³³⁴ However, the claim must be brought by the EU as a whole, not by an individual Member State.³³⁵ As the EU is the political body that agreed to the GATS Schedule, the power to request WTO dispute settlement in relation to Mode 1 (cross-border) services is the exclusive competence of the EU.³³⁶ To bring a claim before the WTO, the Member state must first gain the approval of a majority of the Article 133 Committee, and have the claim confirmed by the Council of Ministers. Once that is accomplished, the European Commission, the formal EU representative to the WTO, may present the claim before the WTO.³³⁷ This requirement lessens the possibility that “[o]ther WTO members with active Internet gambling industries (e.g., United Kingdom) and more economic clout vis-à-vis the United States may follow Antigua’s lead.”³³⁸

While the United States and Antigua have been struggling over compliance questions, there has been widespread speculation about other WTO nations entering the online gambling services market.³³⁹ Singapore, which has been a WTO Member since 1995,³⁴⁰ has specifically committed to other recreational activities in sub-sector 10.E of its GATS schedule.³⁴¹ Singapore has pledged to legalize both traditional and online gambling activities by 2009.³⁴² The U.S. Census Bureau reports that, in 2006, Singapore had over seventeen billion U.S. dollars in trade exports to the United

331. *Id.*

332. *Id.*

333. *Id.*

334. Pimlott, *supra* note 310.

335. Vlaeminck & Verhuist, *supra* note 10, at 163 n.313.

336. *Id.*

337. See European Commission – External Trade – Trade Issues, The EU and the WTO, http://ec.europa.eu/trade/issues/newround/index_en.htm (last visited Apr. 23, 2007).

338. Vlaeminck & Verhuist, *supra* note 10, at 163.

339. See Michael Kanellos, *Is Online Gambling Coming to Mainland China?*, CNET NEWS, Sept. 14, 2006, http://news.com.com/8301-10784_3-6115701-7.html.

340. WTO | Singapore – Member Information, http://www.wto.org/English/thewto_e/countries_e/singapore_e.htm (last visited Apr. 19, 2007).

341. Schedule of Specific Commitments for Singapore, General Agreement on Trade in Services, Sector 10(e), available at <http://tsdb.wto.org/wto/WTOHomepublic.htm> (follow “Pre-defined Reports” hyperlink; then follow “Each region all sectors” hyper link; then follow “Asia” hyperlink and download the spreadsheet).

342. Indrajit Basu, *US-barred Gambling Set to Roll in Asia*, ASIA TIMES, Oct. 31, 2006, available at http://atimes01.atimes.com/atimes/South_Asia/HJ31Df01.html.

States.³⁴³ That is more than 3,000 times the value of exports from Antigua to the United States during the same period.³⁴⁴

Additionally, on March 1, 2007, the Macao Gaming Inspection and Coordination Bureau (“DCIJ”) launched a six-month study to evaluate permitting online gambling activities in Macao.³⁴⁵ Macao has already surpassed Las Vegas as a ground-based gambling revenue producer.³⁴⁶ Although Macao as an individual entity exports less to the United States than does Singapore,³⁴⁷ Macao is a special district of China and is treated as part of China for WTO purposes.³⁴⁸ If Macao permitted online gambling activities and brought a fair trade suit against the United States, the WTO Panel could apply sanctions to all exports from China. As trade with China makes up 11.9% of U.S. trade revenues,³⁴⁹ WTO sanctions on all Chinese exports could seriously impact the U.S. economy.

IV. IMPLICATIONS

A. Necessary Modifications to Australian & U.S. Federal Statutes to Satisfy WTO Requirements.

The WTO Appellate Body held that the United States could bar remote gambling services on the grounds of preserving public morals so long as the

343. U.S. Census Bureau, Foreign Trade Division, FTD – Statistics – Country Data – U.S. Trade Balance with Singapore, *available at* <http://www.census.gov/foreign-trade/balance/c5590.html#2006>. Total amount exported to the U.S. from Singapore was \$17,770 million for 2006. *Id.*

344. U.S. Census Bureau, Foreign Trade Division, FTD – Statistics – Country Data – U.S. Trade Balance with Antigua and Barbuda, *available at* <http://www.census.gov/foreign-trade/balance/c2484.html#2006>. Total amount exported to the U.S. from Antigua was \$5.8 million for 2006. *Id.*

345. Gaming Inspection and Control Bureau, <http://www.dicj.gov.mo/EN/index.htm> (last visited Apr. 19, 2007).

346. *Macao Tops Las Vegas as Gambling Center*, UNITED PRESS INTERNATIONAL, Jan. 23, 2007, http://www.upi.com/NewsTrack/Business/2007/01/23/macao_tops_las_vegas_as_gambling_center/1761/.

347. U.S. Census Bureau, Foreign Trade Division, FTD – Statistics – Country Data – U.S. Trade Balance with Macao, *available at* <http://www.census.gov/foreign-trade/balance/c5660.html#2006>. Total amount exported to the U.S. from Macao was \$1,230 million for 2006. *Id.*

348. *EU Confident About Macao's Future*, PEOPLE'S DAILY, Dec. 17, 1999, *available at* <http://english.people.com.cn/english/199912/17/eng19991217W191.html>.

349. U.S. Census Bureau, Foreign Trade Division, FTD – Statistics – Trade Highlights – Top Trading Partners, <http://www.census.gov/foreign-trade/statistics/highlights/top/top0612.html> (last visited April 14, 2007). China is the second-largest trade partner, making up 11.9% of all U.S. trade. The value of products imported from China during 2006 exceeded \$287 million. *Id.*

legislation did not distinguish between local and foreign service providers.³⁵⁰ The WTO Appellate Report ruled that the only U.S. statute not in compliance with WTO fair access requirements was the IHA,³⁵¹ which limits pari-mutuel race bets to states that permit betting.³⁵² Professor Rose suggested that the United States could return to full compliance by altering the IHA³⁵³ to allow foreigners to bet on races in the United States, and American citizens to bet on foreign races.³⁵⁴ In doing so, he related some anecdotal evidence that both forms of gambling are already practiced unofficially.³⁵⁵ This solution would not greatly change the face of gambling in the United States.³⁵⁶ The second option is to ban gambling on horseracing in the United States, both for American citizens and foreigners.³⁵⁷ This move is politically very unlikely, as the American horse racing industry paid more than three million dollars in political contributions since 2000 to be exempted from the Unlawful Internet Gambling Enforcement Act.³⁵⁸ The third option would be to repeal the 2000 changes to the IHA,³⁵⁹ which permits pari-mutuel wagers between states by telephone or other electronic media.³⁶⁰ This would return the system to its previous state, which required bettors to be physically present at a track or closed-circuit viewing room to bet on the race.³⁶¹ This solution is also politically unlikely; as of 2005, eleven states permitted betting on races through electronic media, including California, Florida, and New York.³⁶²

The Australian Interactive Gambling Act (IGA)³⁶³ does not violate the fair access requirements as expressed by the WTO. The IGA bars interactive gambling service providers from providing online gambling services to customers physically present in Australia.³⁶⁴ The legislation does not distinguish between foreign

350. I. Nelson Rose, *Internet Gaming: U.S. Beats Antigua in WTO*, CASINO CITY TIMES, May 22, 2005, available at <http://rose.casinocitytimes.com/articles/19020.html> [hereinafter Rose, *Internet Gaming*].

351. 15 U.S.C. § 3001-07.

352. Rose, *Internet Gaming*, *supra* note 350.

353. 15 U.S.C. § 3001-07.

354. Rose, *Internet Gaming*, *supra* note 350.

355. *Id.*

356. *Id.*

357. Roy Mark, *Antigua Claims Its Share of WTO Decision*, INTERNET NEWS, Apr. 8, 2005, <http://www.internetnews.com/ec-news/article.php/3496476>.

358. Stephen Foley, *How Horse Racing Avoided New US Internet Betting Law*, THE INDEPENDENT, Oct. 5, 2006, available at http://www.findarticles.com/p/articles/mi_qn4158/is_20061005/ai_n16760644.

359. 15 U.S.C.A. § 3001-07.

360. *Id.* § 3002.

361. *Id.* § 3002.

362. Mark, *supra* note 357.

363. Interactive Gambling Act, *supra* note 54.

364. *Id.* at pt. 1, § 6(1).

providers and state-licensed operators.³⁶⁵ So long as the IGA grants the same level of access to foreign and local providers, it satisfies the fair access requirement.³⁶⁶

Although the IGA meets the test as expressed by the WTO Appellate Body, the gambling services not governed by the IGA should also be evaluated. The IGA does not limit any state or territorial laws to the extent that they do not conflict with the IGA provisions.³⁶⁷ The IGA also grants explicit exemptions to telephone betting services, online race wagering, public gambling activities, interactive television promotions, and lotteries.³⁶⁸ As these gambling activities are not included in the IGA, they are governed by state and territorial legislation.³⁶⁹

The Appellate Body refused to consider the U.S. state laws only because they were not fully described and interpreted in Antigua's filings.³⁷⁰ The language of the ruling suggests that state or regional laws will be considered so long as the petition explicitly identifies each state law being challenged and describes how that law violates the fair access requirements for the cross-border supply of services. In this author's opinion, if a state were to attempt to explicitly limit an online gambling service to local providers (as three Australian states have done, naming Tattersall's³⁷¹ as their only lottery provider), then foreign suppliers would be barred from fair access and a WTO claim could be brought.

B. Potential Modifications to Canadian & U.K. Statutes to Satisfy Potential WTO Challenges.

Canada has no federal legislation that specifically addresses Internet-based gambling issues.³⁷² In *Earth Future Lottery*,³⁷³ the Supreme Court of Prince Edward Island held that the provinces were unable to issue licenses for Internet lottery schemes because the market extended beyond the province, exceeding the territorial limitation of the lottery exception to the Criminal Code.³⁷⁴ Under *Earth Future Lottery*, local providers are barred from offering Internet gambling services.³⁷⁵ So

365. *Id.* at pt. 2, § 15(5).

366. *See, e.g.*, WTO Appellate Report, *supra* note 15, ¶ 214.

367. Interactive Gambling Act, *supra* note 54, pt. 8, § 69.

368. *Id.* at pt. 1, § 5.

369. Nettleton, *supra* note 10, at 531.

370. WTO Appellate Report, *supra* note 15, ¶ 151.

371. Tattersall's is a privately-held gambling company that holds the only license to sell lottery products in Victoria, Tasmania, and the Northern Territory. *See* Dick McIlwain, Chief Executive, Presentation to Tattersall's Limited's 2007 Annual General Meeting, (Nov. 30, 2007) (transcript available at http://www.tattersalls.com.au/cms/company_announcements/images/lmediaRelease301107.pdf).

372. Yegendorf, *supra* note 10, at 274.

373. 1 S.C.R. 123, 2003 SCC 10.

374. Yegendorf, *supra* note 10, at 274, 281-82.

375. *Id.* at 282.

long as local and foreign service providers have the same level of access, there would be no grounds to bring a claim against Canada through the WTO.³⁷⁶

This limitation on local providers changed in 2004.³⁷⁷ The Atlantic Lottery Corporation began offering online lottery ticket sales to residents of Atlantic Canada.³⁷⁸ Shortly thereafter, the British Columbia Lottery Corporation began offering sales of sports-related lottery games over the Internet to residents of British Columbia.³⁷⁹ Local providers are permitted to supply gambling services to residents through electronic transactions, but the Criminal Code bars foreign service providers from offering the same services.³⁸⁰ These offerings appear to trigger the WTO fair access requirements.³⁸¹ In this author's opinion, this could be corrected by either permitting foreign lottery sales to Canadian residents,³⁸² or by barring the Canadian lottery programs from providing online sales.³⁸³

The U.K. Gambling Act 2005 sets higher regulatory standards for local service providers.³⁸⁴ To obtain a remote operating license, a local provider must satisfy all mandatory conditions imposed by governmental regulations, and any individual license conditions imposed by the Gambling Commission.³⁸⁵ In contrast, all a foreign service operator has to do to avoid regulatory requirements is not locate his remote gambling equipment³⁸⁶ within U.K.-controlled territory.³⁸⁷ There are no grounds upon which a foreign service provider would be able to show lack of fair market access in comparison to a local provider.

V. CONCLUSION

When determining if they are in compliance with the WTO requirements of fair-market access for foreign service providers, WTO Members should evaluate not

376. WTO Appellate Report, *supra* note 15, ¶ 214.

377. *See* Yegendorf, *supra* note 10, at 285-87.

378. *Id.* at 286.

379. *Id.* at 287.

380. Criminal Code, R.S.C. ch. C-46, secs. 207(1), 205(7) (1985).

381. WTO Appellate Report, *supra* note 15, ¶ 214.

382. Permitting foreign lottery sales to Canadian residents would allow foreign lottery service providers the same level of access to Canadian residents as a Canadian-based online lottery service, as required by the WTO fair access test. WTO Appellate Report, *supra* note 15, ¶ 241.

383. If tickets were only *available at* brick-and-mortar stores, the WTO fair access protections would not be triggered. *See, e.g.*, WTO Panel Report, *supra* note 195, ¶ 6.28.

384. *See* Coles, *supra* note 10, at 349-57.

385. *See id.* at 354-56.

386. Equipment that stores information about a person's gambling participation, such as servers or databases. *Id.* at 354.

387. Gambling Act, c. 19 (2005) (U.K.).

only their federal regulations, but any legislation passed by state or local authorities that impacts online gambling activities. Even if a Member plans to raise a defensive public morals claim under Article XVI, the Member must first show that equal market access was granted to all gambling service providers.

Countries that do not currently provide the same level of access to local and foreign online gambling service providers have several options when deciding how to achieve compliance. They can expand coverage to permit foreign providers to enter the market, restrict the market so that local providers can no longer provide services, or remove the market entirely by limiting gambling activities to non-Internet channels. Or, as shown by the United States' actions in the past year, they may elect to remain noncompliant and instead pay trade sanctions to the petitioner. While this may be economically feasible when the noncompliant country is significantly larger than the petitioner, the number of countries offering online gambling services suggests that this is not a viable long-term solution.

