

# No More Bets: The United States Rolls the Dice One More Time Regarding International Relations and Foreign Internet Gambling Services

Noe Hamra Carbajales\*

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## I. INTRODUCTION

In June 2009, the European Commission (EC) issued a thorough and critical report regarding trade in remote Internet gambling and betting services, a controversial issue not only in the European Union (EU) but also in the United States and the international community as a whole.<sup>1</sup> The EC found that U.S. laws denying access to, and discrimi-

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\* © 2010 Noe Hamra Carbajales. J.D. candidate 2011, Tulane University Law School; M.A. 2006 Universidad Carlos III de Madrid; B.A. 2004, London South Bank University. The author would like to thank his family and friends for their extraordinary support in all his endeavors.

1. European Comm'n, Report to the Trade Barriers Regulation Committee: Examination Procedure Concerning an Obstacle to Trade, Within the Meaning of Council Regulation (EC)

nating against, foreign suppliers of Internet gambling and betting services constituted a barrier to trade. The EC concluded that these laws and their effects on foreign suppliers were inconsistent with U.S. commitments to the World Trade Organization (WTO).<sup>2</sup> In an era of globalization and technological advancement, Internet gambling has become the focus of disputes among members of the international community.<sup>3</sup> These disputes are the consequence of an explosive growth in the availability of online gambling sites since the introduction of the World Wide Web in the early 1990s and the incapability, and in some instances, the undesirability, of nations to approach this matter in a responsible manner.<sup>4</sup>

This Comment explores the legal issues regarding U.S. Internet gambling laws in light of the recent WTO Appellate Body decision entitled *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*,<sup>5</sup> widely known as the *US-Gambling* case, in conjunction with the implications of the EC's report threatening to commence proceedings against the United States in the WTO for infringement of the General Agreement on Trade in Services (GATS).<sup>6</sup> Part II describes the emergence of Internet gambling and its repercussions on global business and financial markets. Part III follows and presents a succinct overview of U.S. and EU gambling laws and their relation to international law. Part IV examines the recent WTO decision regarding the restriction of foreign suppliers of gambling and betting

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No 3286/94, Consisting of Measures Adopted by the United States of America Affecting Trade in Remote Gambling Services (June 10, 2009) (Commission Staff Working Paper) [hereinafter Commission's Report], available at [http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc\\_143405.pdf](http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143405.pdf).

2. See *id.* at 8. The WTO is an international organization that deals with the rules of trade between member states. *What Is the World Trade Organization?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited July 24, 2010). The organization is a place where member governments try to sort out the trade problems they face with each other. *Id.* It was created by the Uruguay Round negotiations on January 1, 1995. *Id.*

3. See generally Commission's Report, *supra* note 1; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

4. See Michael D. Schmitt, Note, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC. L.J. 381, 383-84 (2008); I. NELSON ROSE & MARTIN D. OWENS, JR., INTERNET GAMING LAW 166-67, 176-78 (2d ed. 2009).

5. Appellate Body Report, *supra* note 3, ¶ 373(D)(vi)(a) (finding that U.S. prohibitions towards suppliers of remote betting services for horse racing are only applied to foreign and not domestic suppliers).

6. Commission's Report, *supra* note 1, at 8 ("The investigation has revealed that US laws prohibiting the cross-border supply of remote gambling and betting services as well as their enforcement against Community companies are in violation of [a]rticles XVI and XVII of the GATS.").

services to national markets, and, in particular, the United States' noncompliance with its commitments under the GATS. Part V discusses how the WTO decision and the U.S. approach to it affects the European market. Finally, Part VI concludes that a new era has arrived for the United States to come to terms with its commitments to the international community.

## II. THE MODERN ERA OF INTERNET GAMBLING

The Internet has revolutionized the world and is “the most rapidly spreading medium in history” with approximately 1.8 billion users worldwide in 2009.<sup>7</sup> A recent press release from the International Telecommunication Union, a U.N. agency, estimated that the number of Internet users worldwide “will surpass the two billion mark in 2010.”<sup>8</sup> Today, the Internet allows users access to instantaneous communication through the ability to place videoconference calls and send e-mails or text messages at the touch of a button. Users can watch television, listen to the radio, read newspapers, and shop at stores in locations around the globe all from the comfort of their homes. Technological advancement is one primary reason why gambling operators look to the Internet as a potential and promising new market for their services.<sup>9</sup> Players would be able to gamble from their homes without having to go to brick-and-mortar establishments, while operators of online casinos would be able to offer their services through online sites, thus saving costs and increasing profits.<sup>10</sup> As a result of these promising advantages, in 1995, the first Internet gambling site opened in Antigua and Barbuda (Antigua).<sup>11</sup> Within a few years, online gambling sites increased in popularity and the World Wide Web was flooded with these types of sites offering an assortment of games.<sup>12</sup> Statistics show that in the United States alone, “2,500 Internet gambling Web sites generated revenues of an estimated \$10.9 billion” in 2005.<sup>13</sup>

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7. See JOHN LYMAN MASON & MICHAEL NELSON, *GOVERNING GAMBLING* 80 (2001); see also *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited July 24, 2010).

8. Press Release, Int'l Comm'n Union, ITU Estimates Two Billion People Online by End 2010 (Oct. 19, 2010), [http://www.itu.int/net/pressoffice/press\\_releases/2010/39.aspx](http://www.itu.int/net/pressoffice/press_releases/2010/39.aspx).

9. See Andrea L. Marconi & Brian M. McQuaid, *Betting and Buying: The Legality of Facilitating Financial Payments for Internet Gambling*, 124 *BANKING L.J.* 483, 484 (2007).

10. See Mattia V. Corsiglia Murawski, *The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet Gambling Enforcement Act of 2006*, 48 *SANTA CLARA L. REV.* 441, 442 (2008).

11. *Id.*

12. See generally *id.*

13. Marconi & McQuaid, *supra* note 9, at 484.

However, the increase in popularity of online gambling sites, together with the fast growth of the Internet as a new channel of communication and means to conduct business, created several new legal issues with which existing legislation was unable to cope.<sup>14</sup> In the United States, although online gambling providers were able to adapt themselves to the new technology, “policymakers and the law have been slow to develop mechanisms for enforcing antigambling laws.”<sup>15</sup> As a result of Congress’s unwillingness or inability to enact laws specially tailored to regulate the multifaceted issues that Internet gambling has created, courts and prosecutors are left with an outdated legal framework.<sup>16</sup> The ambiguity regarding Internet gambling laws in the United States has far-reaching international consequences. The situation is causing an inevitable clash between countries that regulate Internet gambling and countries, such as the United States, that have banned Internet gambling altogether.

### III. THE CURRENT STATUS OF INTERNET GAMBLING LAWS

#### A. *The United States’ Legal Framework*

Gambling, no matter the method used to regulate it, is an activity that has been imbued with social, religious, and moral implications in the United States. Throughout the nation’s history, gambling has been treated differently depending on the social and governmental tolerance of the time.<sup>17</sup> According to one commentator, “American law, as it relates to gambling, is ruled by our democratic system, and is thus subject to the ‘periodic fits of morality’—or permissiveness—that seize the public fancy.”<sup>18</sup> Thus, waves of criminalization and prohibition of gambling activities have been followed by waves of tolerance and regulation.<sup>19</sup> As a general rule, gambling is traditionally an area of state regulation justified by the states’ police power.<sup>20</sup> Therefore, states are free to regulate or prohibit gambling to protect the public welfare and its citizens from the social ills associated with gambling.<sup>21</sup> However, the federal government

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14. Murawski, *supra* note 10, at 442-43.

15. *Id.* at 442.

16. *Id.*

17. ROSE & OWENS, *supra* note 4, at 74-80.

18. *Id.* at 72.

19. *See id.* at 82-83.

20. This is consistent with 15 U.S.C. § 3001(a)(1), which states that “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.” 15 U.S.C. § 3001(a)(1) (2006).

21. The most widely known problems related to gambling are gambling disorders and crime, such as money laundering and fraud. *See* MASON & NELSON, *supra* note 7, at 83.

also has the power to regulate any matter that affects interstate commerce pursuant to the Commerce Clause of the United States Constitution.<sup>22</sup> Today, forty-eight of the fifty states allow some type of commercial gambling.<sup>23</sup>

Throughout the years, Congress's concern in regard to gambling law has been focused on legal and illegal lotteries, activities where there is a threat of organized crime, gaming on Indian reservation land, and "parimutuel betting among race tracks in different states."<sup>24</sup> Although the mere act of gambling is not federally prohibited, the federal government has enacted a set of statutes that are intended to apply once there has been a violation of certain state gambling laws.<sup>25</sup> The only federal law that regulates gambling activities, without relying on the infringement of a state law, is the Wire Act of 1961.<sup>26</sup> Section 1084(a) of the Wire Act states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>27</sup>

According to the Department of Justice (DOJ), "[T]he Wire Act 'prohibits gambling over the internet' . . . and covers jurisdictions both 'where the bettor is located and the state or foreign country where the

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22. See U.S. CONST. art. I, § 8, cl. 3; see also ROSE & OWENS, *supra* note 4, at 78. After the Civil War, certain states in the South turned to lotteries to generate revenues to rebuild their cities. See ROSE & OWENS, *supra* note 4, at 76. The Louisiana Lottery was the most notable in the country, and it survived until the 1890s. *Id.* at 76-77. Pursuant to allegations of fraud and corruption, and in an attempt to bring down the state lotteries that had proliferated after the Civil War, Congress enacted 18 U.S.C. § 1302 (2006), prohibiting the movement of lottery tickets across state lines by any method. ROSE & OWENS, *supra* note 4, at 76-79. The Act was challenged in the Supreme Court of the United States, which upheld the Act recognizing the federal government's powers over interstate commerce. *Id.* at 78-79. This was the commencement of the federal government's intervention in the gambling area. See *id.*

23. See ROSE & OWENS, *supra* note 4, at 82.

24. *Id.* at 113-14.

25. *Id.*

26. 18 U.S.C. §§ 1081-1084.

27. *Id.* § 1084(a). "Wire communication facility" is defined in § 1081 as meaning "all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission." *Id.* § 1081.

gambling business is located,' as opposed to applying only where bets are received.<sup>28</sup>

However, the language of the statute seems to be more restrictive in scope than that used in the DOJ's interpretation. U.S. courts have given different interpretations on the language of this statute. For example, the United States Court of Appeals for the Fifth Circuit has held that the Wire Act only concerns gambling on sporting events or contests, and thus, other types of gambling are not prohibited under the Act.<sup>29</sup> The court of appeals agreed with the district court that "a plain reading of the statutory language . . . clearly requires that the object of the gambling be a sporting event or contest."<sup>30</sup> Furthermore, other courts have found that interstate gambling does not violate the Wire Act if gambling is legal in both the state where the bet originates and the state where it is received.<sup>31</sup> For example, in *United States v. Kaczowski*, the court found that a plain reading of the statute would lead to an interpretation that placing bets at sporting events or contests through interstate communication would be a violation if the conduct was considered illegal in either the state or country in which the bet was placed or accepted. "In other words, to escape prosecution under [the Wire Act], the betting activity at issue must be legal in *both* jurisdictions."<sup>32</sup> Implicit in these two decisions is the proposition that Internet gambling outside sporting events and within states, or within a state and a foreign country that both allow Internet gambling, is not prohibited by the Wire Act. The controversy regarding the scope and application of the Wire Act has yet to be addressed by either Congress or the Supreme Court of the United States. Until then, it is fair to conclude that the Wire Act is ambiguous in regard to its application to Internet gambling.

To complicate things further, in 1978, Congress passed the Interstate Horseracing Act (IHA). This Act "allows the electronic transmission of interstate [off-track] wagers on state-licensed horse races, so long as the relevant racing commissions and associations approve the transaction."<sup>33</sup> Congress amended the IHA in 2000 to expand the definition of "interstate off-track wager" to include wagers through the

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28. Issac Wohl, *The Antigua-United States Online Gambling Dispute*, J. INT'L COM. & ECON., Sept. 2009, at 127, 130, available at [http://www.usitc.gov/publications/332/journals/entire\\_journal\\_2009.pdf](http://www.usitc.gov/publications/332/journals/entire_journal_2009.pdf).

29. See *In re MasterCard Int'l Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002).

30. *Id.* at 262 n.20 (quoting *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001)).

31. See, e.g., *United States v. Kaczowski*, 114 F. Supp. 2d 143, 153 (W.D.N.Y. 1999).

32. *Id.*

33. Wohl, *supra* note 28, at 131; see also 15 U.S.C. § 3004 (2006).

telephone and other electronic media, allowing wagers to be placed over the Internet.<sup>34</sup> This final version of the IHA defines “interstate off-track wagers” as

a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State . . . , where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State.<sup>35</sup>

Despite the clear and unambiguous language of the IHA, the DOJ still maintains that Internet bets on horseracing violate the Wire Act.<sup>36</sup> However, “the DOJ has never brought a case against a state-licensed entity offering online wagering on horse races.”<sup>37</sup> Therefore, the IHA seems to carve out an exception for domestic suppliers of gambling and betting services to the exclusion of foreign suppliers.

With regard to Internet gambling, the enactment of the Unlawful Internet Gambling Enforcement Act (UIGEA) merely added to the confusion. In October 2006, President Bush signed into law the Security and Accountability for Every Port Act with the purpose of improving maritime and cargo security, which included in its Title VIII a completely unrelated act: the UIGEA.<sup>38</sup> Leaving aside the literal meaning of the Act’s title and the controversy<sup>39</sup> that surrounded the enactment of the UIGEA, the Act “does nothing to address the legality of online gaming or describe what constitutes ‘unlawful Internet gambling.’”<sup>40</sup> In essence, the UIGEA is intended to prohibit financial intermediaries from receiving payments from illegal Internet gambling sites.<sup>41</sup> Without clearly understanding what activities constitute unlawful Internet gambling, some commentators argue that financial providers “will be less likely to guard against or block gambling-related transactions.”<sup>42</sup>

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34. See 15 U.S.C. § 3002(3).

35. *Id.*

36. See Wohl, *supra* note 28, at 131.

37. *Id.*

38. 31 U.S.C. §§ 5361-5367 (2006).

39. See ROSE & OWENS, *supra* note 4, at 124-26 (explaining the history of how the UIGEA was proposed and adopted).

40. Schmitt, *supra* note 4, at 381-82.

41. See Michael Grunfeld, Survey, *Don’t Bet on the United States’s Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 460. Section 5363 reads in part: “No person engaged in the business of betting or wagering may knowingly accept [payment] in connection with the participation of another person in unlawful Internet gambling.” 31 U.S.C. § 5363.

42. Mark Aubuchon, Comment, *The Unlawful Internet Gambling Enforcement Act 2006: A Parlay of Ambiguities and Uncertainties Surrounding the Laws of the Internet Gambling Industry*, 7 APPALACHIAN J.L. 305, 309 (2008).

Furthermore, because the UIGEA is only an enforcement statute, it does not criminalize online gambling.<sup>43</sup> This means that the UIGEA depends on the infringement of other federal or state laws for its enforcement.<sup>44</sup> The controversial aspect of the UIGEA is that the Act carves out an exception for intrastate gambling that once again excludes foreign suppliers.<sup>45</sup> The Act states that “[t]he term ‘unlawful Internet gambling’ does not include placing, receiving, or otherwise transmitting a bet or wager where . . . the bet or wager is initiated and received or otherwise made exclusively within a single State.”<sup>46</sup> After complaints were raised by major financial institutions and gambling providers that the Act is too ambiguous, the Federal Reserve System and the Department of the Treasury decided to extend until June 1, 2010, the compliance date for the regulations issued pursuant to the UIGEA.<sup>47</sup> Therefore, it is still unknown how the UIGEA will be used to prosecute unlawful Internet gambling.

Last, there are other federal laws that apply to Internet gambling, including the Illegal Gambling Business Act (IGBA), which prohibits the operation of any illegal gambling business;<sup>48</sup> the Travel Act, which prohibits the use of any facility in interstate or foreign travel in relation to gambling by an enterprise in violation of federal or state laws;<sup>49</sup> and the Racketeer Influenced and Corrupt Organizations Act (RICO), which makes it a crime for “*a person* [to engage in] *a pattern of racketeering activity* . . . connected to the acquisition, establishment, conduct, or control of an *enterprise*.”<sup>50</sup> Unlike the Wire Act, which does not rely on violations of state law, the IGBA, the Travel Act, and RICO are all dependent on an underlying violation of state gambling law.<sup>51</sup> Thus, the trend has been for the DOJ to prosecute Internet gambling pursuant to the Wire Act. In any case, recent case law limiting the scope of the Wire

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43. Schmitt, *supra* note 4, at 382.

44. *See id.* As a rule of construction, Congress stated, “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.” 31 U.S.C. § 5361(b).

45. 31 U.S.C. § 5362(10)(B).

46. *Id.* § 5362(10)(B)(i).

47. Associated Press, *U.S. Delays Internet Gambling Ban*, BALTIMORE SUN, Nov. 28 2009, <http://www.baltimoresun.com/business/bal-bz.gambling28nov28,0,4111612.story>.

48. 18 U.S.C. § 1955 (2006).

49. *Id.* § 1952.

50. *See In re MasterCard Int'l, Inc.*, 313 F.3d 257, 261 (5th Cir. 2002); *see also* 18 U.S.C. §§ 1961–1968.

51. *See* Schmitt, *supra* note 4, at 387.



Act may force the DOJ to change its strategy and start prosecuting future violators pursuant to the Travel Act, the IGBA, or RICO.<sup>52</sup>

### B. Internet Gambling Laws in the European Union

The EU has taken a noninterventionist approach, leaving the difficult task of dealing with gambling laws to its Member States.<sup>53</sup> This approach was laid out in December of 1992 during the EU summit in Edinburgh, when the European Council decided that the EC “will not . . . be going ahead with . . . the regulation of gambling,” reasoning that this task was better regulated at the national level.<sup>54</sup> Consequently, the European Parliament and the Council of the European Union (Council) excluded gambling activities from the European internal market in its Directive “on certain legal aspects of information society services, in particular electronic commerce.”<sup>55</sup> Thus, EU Member States are free to prohibit or restrict cross-border provisions of gambling services offered from other EU jurisdictions, as long as these prohibitions or restrictions are not discriminatory by favoring only native industries.<sup>56</sup>

The Treaty Establishing the European Community (EC Treaty) sets forth the principles with which Member States must comply.<sup>57</sup> Article 43 of the EC Treaty states in part that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.”<sup>58</sup> Additionally, article 49 states that “restrictions on freedom to provide services within the Community shall

52. See generally *In re MasterCard*, 313 F.3d 257; *United States v. Kaczowski*, 114 F. Supp. 2d 143 (W.D.N.Y. 1999).

53. See Philippe Vlaemminck & Pieter de Wael, *The European Union Regulatory Approach of Online Gambling and Its Impact on the Global Gaming Industry*, 7 GAMING L. REV. 177, 177 (2003).

54. Presidency Conclusions, Edinburgh European Council, Annex 2, pt. A (Dec. 11-12, 1992), available at [http://www.europarl.europa.eu/summits/edinburgh/a2\\_en.pdf](http://www.europarl.europa.eu/summits/edinburgh/a2_en.pdf); see also Vlaemminck & de Wael, *supra* note 53, at 177.

55. See generally European Parliament and Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC). However, the EU is rethinking this noninterventionist position, and lately, it has been “engaged in a fierce debate over the place of gambling in the single market.” Jim Brunsten, *Battle over Games of Chance Continues*, EUROPEAN VOICE, Sept. 30, 2010, <http://www.europeanvoice.com/folder/gambling/164.aspx?artid=69042>.

56. Case C-243/01, *Gambelli*, 2003 E.C.R. I-13031, ¶ 65 (holding that a Member State can restrict cross-border provisions of gambling services when “the restrictions [are] justified by imperative requirements in the general interest, [are] for achieving the objective which they pursue and [do] not go beyond what is necessary in order to attain it,” and the restrictions or prohibitions are applied without discrimination).

57. See Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 1 [hereinafter EC Treaty].

58. *Id.* art. 43.

be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”<sup>59</sup> In dealing with the issue of whether a Member State is free to exclude gaming companies based in another Member State from participating in its own national gaming market, the European Court of Justice (ECJ) has held that “[a]rticles 43 EC and 49 EC must . . . be interpreted as precluding national legislation [from excluding operators from other EU jurisdictions to participate in the] betting and gaming sector [of another EU Member State].”<sup>60</sup> Notwithstanding the ECJ’s stance on the issue of the cross-border supply of gambling and betting services, which includes Internet gambling, EU Member States have developed a variety of approaches to regulate gambling. These approaches range “from national Prohibition to national monopoly to national licensing of private” companies, some of which conflict with EU legislation.<sup>61</sup>

On one side, there are countries, such as Italy and France, that have taken the approach of maintaining national monopolies and issuing government licenses to native establishments to the exclusion of foreign service providers.<sup>62</sup> Although France is gradually changing its approach to a more lenient policy that complies with EU legislation, Italy continues to challenge articles 43 and 49 EC by justifying “its restrictive policies on the grounds of social protection.”<sup>63</sup> On the other side, there are countries, such as the United Kingdom and Malta, that have embraced a policy of licensing operators and service providers regardless of their location.<sup>64</sup> A report prepared by the Council described and summarized the Member States’ rules on gambling and betting services as follows:

In all the Member States, the various forms of gambling and betting are permitted to varying degrees and are submitted to specific regulation rules. Underlying the legislation of half of the Member States . . . is the principle that gambling is illegal unless authorised, whereas in other Member States gambling and betting is more open, though regulated. Casino games, slot machines and betting on events other than sporting contests and horse racing are the most frequently restricted forms. The rules on access to online gambling and betting are frequently more restrictive: six Member

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59. *Id.* art. 49.

60. *See* Joined Cases C-338/04, C-359/04 & C-360/04, *Placanica*, 2007 E.C.R. I-1891, ¶ 64.

61. ROSE & OWENS, *supra* note 4, at 166.

62. *See id.* at 172-76.

63. *Id.* at 174, 176.

64. *See id.* at 166-69, 177-78.

States ban it entirely . . . ; others, while not going as far as banning it, apply additional restrictions on online gambling, particularly regarding casinos. Another group of member States have introduced open, though regulated, systems.<sup>65</sup>

Therefore, gambling laws in the EU, and specifically those related to online gambling, are completely formulated by each Member State, each one having the freedom to restrict or completely prohibit gambling and bound only by the responsibility to act pursuant to the spirit of the EU treaties.

### C. *Internet Gambling Under International Law*

The principle that a sovereign state has the inherent power to exclude all foreign goods and services from its markets, including Internet gambling, is well-established under international law.<sup>66</sup> However, a sovereign state can give up this power by signing a treaty or agreement with other countries, which makes these agreements binding among all signatory countries.<sup>67</sup> The international community has created international organizations that provide a legal and institutional framework for the implementation and monitoring of these agreements. One of these organizations is the WTO, which is charged with “deal[ing] with the rules of trade between nations.”<sup>68</sup> In 1995, after the Uruguay Round negotiations, all members of the WTO signed the GATS, which extends the multilateral trading system to the service sector.<sup>69</sup> Under the GATS, a sovereign state remains free to choose what services it will allow to enter and which ones it will not.<sup>70</sup> If a sovereign state chooses to allow certain goods or services into its market, the state retains the power to exclude these accepted commitments justified by a good reason, as long as that reason does not arbitrarily discriminate against foreign suppliers of goods and services.<sup>71</sup>

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65. *Presidency Progress Report on Gambling and Betting: Legal Framework and Policies in the Member States of the European Union*, at 3 (Nov. 27, 2008), available at <http://register.consilium.europa.eu/pdf/en/08/st16/st16022.en08.pdf>.

66. ROSE & OWENS, *supra* note 4, at 231.

67. *Id.*

68. *See generally What Is the World Trade Organization?*, *supra* note 2.

69. *See The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited July 24, 2010).

70. *See* ROSE & OWENS, *supra* note 4, at 232.

71. *See id.* Reasonable justifications to exclude certain goods or services into a state’s market include measures necessary to protect public morals or to maintain public order. *See* General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, art. xiv(a),

Although this is a basic principle set forth by the GATS, a controversy arose out of the definition and scope of the word “services.”<sup>72</sup> It would have been difficult for a sovereign state to envision that the agreement would encompass Internet gambling, especially considering that the first Internet gambling site opened in 1995, the same year that the GATS was signed. However, at the time the GATS was signed, some countries expressly stated they would not allow foreign gambling; the United States made no such declaration.<sup>73</sup> The result of the United States’ failure to reject gambling expressly as part of its commitment under the GATS has a considerable impact on U.S. laws pertaining to Internet gambling.

#### IV. UNITED STATES—MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

##### A. *Background*

The ambiguity inherent in the U.S. Internet gambling laws has resulted in many foreign online service providers basing their businesses offshore.<sup>74</sup> Among the countries that welcomed the establishment of online casinos was the small island nation of Antigua, located on the eastern boundary of the Caribbean Sea.<sup>75</sup> Antigua felt that its flourishing businesses were in jeopardy due to a U.S. policy of “cracking down on foreign-based internet betting parlors” in the late 1990s.<sup>76</sup> The prosecution of foreign service providers resulted as a consequence of the United States’ complete prohibition on cross-border supply of online gambling services.<sup>77</sup> Thus, Antigua filed suit against the United States, alleging WTO violations and in March 2003 requested the establishment of a Dispute Panel (Panel). Antigua argued that several U.S. state and federal laws amounted to a complete ban on the cross-border supply of gambling services.<sup>78</sup> Consequently, Antigua claimed that this violated the United

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33 I.L.M. 1168 (1994) [hereinafter GATS]. However, protecting domestic suppliers of goods or services to the exclusion of foreign suppliers is not a good reason. *See id.* art. XIV.

72. Article I(3)(b) of the GATS states that “‘services’ includes any service in any sector except services supplied in the exercise of governmental authority.” GATS art. I(3)(b).

73. ROSE & OWENS, *supra* note 4, at 232. Article XX of the GATS mandates that “[e]ach Member shall set out in a schedule the specific commitments it undertakes.” GATS art. XX.

74. *See* Grunfeld, *supra* note 41, at 480.

75. *Id.*

76. *See* Wohl, *supra* note 28, at 131.

77. *See id.* at 132.

78. *See United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm) (last visited July 24, 2010).

States' commitments under the GATS.<sup>79</sup> Specifically, Antigua alleged that certain "measures" adopted by the United States make it unlawful for suppliers located outside of the United States to supply gambling and betting services to consumers within the United States.<sup>80</sup> The Panel ruled in favor of Antigua, concluding that several federal laws, including the Wire Act, contravened the United States' commitment to free trade in online gambling under the GATS.<sup>81</sup> The Panel stated that when "a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that come within that sector or sub-sector [and thus, if the] Member does not respect its GATS market access obligations [then, it is in violation of its commitments]."<sup>82</sup> In January 2005, the United States and Antigua appealed to the WTO's Appellate Body certain issues of law and legal interpretation developed by the Panel.

### B. *The Appellate Body's Decision*

In April 2005, the Appellate Body issued its report regarding the United States' and Antigua's appeal.<sup>83</sup> The issues raised on appeal<sup>84</sup> included the following: (1) "whether the Panel erred in finding that the 'total prohibition on the cross-border supply of gambling and betting services' alleged by Antigua was . . . capable of constituting an autonomous measure that can be challenged in and of itself";<sup>85</sup> (2) "whether the Panel erred in finding that subsector 10.D of the United States' GATS Schedule includes specific commitments with respect to gambling and betting services" with respect to article XVI of the GATS;<sup>86</sup> (3) "whether the Panel erred in finding that the United States did

79. *See id.*

80. *See* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1.1, WT/DS285/R (Nov. 10, 2004) [hereinafter Panel Report].

81. *Id.* ¶¶ 7.1-2.

82. *Id.* ¶ 6.335.

83. Appellate Body Report, *supra* note 3.

84. *Id.* ¶ 114.

85. *Id.* ¶ 114(A)(i). Article I of the GATS specifically states, "This Agreement applies to measures by Members affecting trade in services." GATS art. I (emphasis added).

86. Appellate Body Report, *supra* note 3, ¶ 114(B)(i). Article XVI:1 of the GATS states in part that "each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." GATS art. XVI:1. Article XVI:2 states:

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic

not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or to maintain public order within the meaning of Article XIV(a);<sup>87</sup> and lastly, (4) “whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA satisfy the requirements of the chapeau of Article XIV.”<sup>88</sup>

The Appellate Body began by addressing the issue of whether the complete prohibition “on the cross-border supply of gambling and betting services constitute[d] a measure that [could] be challenged under the GATS.”<sup>89</sup> In finding that the total prohibition does not constitute a measure, the Appellate Body stated that the alleged prohibition “describes the alleged effect of an imprecisely defined list of legislative provisions and other instruments and cannot constitute a single and autonomous ‘measure’ that can be challenged in and of itself.”<sup>90</sup> Once the total prohibition was ruled out as a measure that could be challenged, the Appellate Body moved to interpret the specific commitments made by the United States in its GATS schedule.<sup>91</sup> The United States argued that the meaning of “sporting” within the phrase “[o]ther recreational services (except sporting)” includes gambling and betting services, and therefore, these activities are excluded from its commitments under the GATS.<sup>92</sup> However, after a careful analysis of the meaning of the word “sporting,” the context provided by the structure of the GATS itself, and the interpretation of subsector 10.D in accordance with article 32 of the Vienna Convention, the Appellate Body concluded that the United States, by expressly excluding sporting from subsector 10.D but not gambling

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needs test; . . . (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test.

*Id.* art. XVI:2.

87. Appellate Body Report, *supra* note 3, ¶ 114(D)(iii). Article XIV of the GATS states in part that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order.” GATS art. XIV.

88. Appellate Body Report, *supra* note 3, ¶ 114(D)(v). The exception found in article XIV is limited by the “chapeau” of the same article. It requires that any measure justified by Article XIV may not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.” GATS art. XIV.

89. Appellate Body Report, *supra* note 3, ¶ 120.

90. *Id.* ¶ 126.

91. *Id.* ¶¶ 158-213.

92. *Id.* ¶ 158.

and betting services, failed to exclude gambling and betting services from its commitments under the GATS.<sup>93</sup>

Although the Appellate Body found that the United States made specific commitments regarding gambling and betting services, it nevertheless concluded that federal laws were necessary to protect public morals and to maintain public order, and thus such laws conform with article XIV of the GATS.<sup>94</sup> To this end, the Appellate Body agreed with the Panel's finding that "the interests and values protected by [the Wire Act, the Travel Act, and the IGBA] serve very important societal interests that can be characterized as 'vital and important in the highest degree,'" even though the Panel ultimately concluded that these measures did not meet the necessity requirement of article XIV. The Appellate Body found, however, only one area in which U.S. federal laws were not in compliance with the chapeau of article XIV, and that is the IHA.<sup>96</sup> The Appellate Body stated that the "IHA exempts only *domestic* suppliers of remote betting services for horse racing" to the exclusion of foreign suppliers, which is inconsistent with the chapeau.<sup>97</sup> Specifically, certain states in the United States have licensed Internet providers to take horse bets online; those providers were also allowed to participate in foreign markets such as in Antigua or the EU.<sup>98</sup> The Appellate Body concluded that Antigua's right to take horse bets online was violated by U.S. federal laws and should be redressed.<sup>99</sup>

### C. Analysis

The Appellate Body in *US-Gambling* paved the way for larger countries, or supranational organizations such as the EU, "to pursue a fair trade case against the US over online gambling."<sup>100</sup> The Appellate Body's conclusion that the United States failed to establish the requirements of

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93. See *id.* ¶ 213. Under the category "Recreational, Cultural & Sporting Services," some WTO member states agreed to open their markets of goods and services to all other member states. I. Nelson Rose, *Internet Gaming: U.S. Beats Antigua in WTO*, CASINO CITY TIMES, May 22, 2005, <http://rose.casinocitytimes.com/article/internet-gaming-u-s-beats-antigua-in-wto-19020>. Some countries "expressly stated that they were not agreeing to open their doors to foreign gambling operations," but the United States did not make such a statement. *Id.*

94. Appellate Body Report, *supra* note 3, ¶ 373(D)(vi)(a).

95. *Id.* ¶ 301. The Appellate Body recognized that these laws address concerns "pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling." *Id.*

96. *Id.* ¶ 373(D)(vi)(a).

97. *Id.* ¶ 369.

98. See ROSE & OWENS, *supra* note 4, at 261.

99. Appellate Body Report, *supra* note 3, ¶¶ 371-372.

100. Daniel Pimlott, *WTO Rules Against US in Internet Gambling Case*, FIN. TIMES, Jan. 26, 2007, [http://www.aoga.ag/docs/FinancialTimes\\_WTO\\_Rules\\_against\\_US\\_26jan07.pdf](http://www.aoga.ag/docs/FinancialTimes_WTO_Rules_against_US_26jan07.pdf).

the chapeau is an unprecedented victory for service suppliers of remote betting services, at least with respect to horse racing. The United States' discrimination against foreign suppliers of online gambling services will have to be redressed. Thus, the United States will either have to allow foreign suppliers to take bets on horse races from U.S. citizens or completely and effectively ban the activity. While this conclusion is by far the most significant aspect of the case, there are other areas of the Appellate Body's decision that are of equal relevance and importance because they highlight the steps that other claimants will need to take to bring a successful case against the United States.

First, the Appellate Body, in discussing what constitutes a measure that might be challenged under the GATS, stated, "To the extent that a Member's complaint centres on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the *measure* that is the source of the alleged effects."<sup>101</sup> In concluding that the total prohibition alleged by Antigua was not a measure that could be challenged under the GATS because this prohibition is only the effect "of the operation of several state and federal laws of the United States,"<sup>102</sup> the Appellate Body closed the door on further proceedings against the United States based on the total prohibition on the cross-border supply of gambling and betting services. However, the door remains open for those claimants that wish to challenge federal or state law singularly instead of challenging the effect of the laws in combination.<sup>103</sup>

Second, the Appellate Body correctly decided that the U.S. schedule under the GATS included specific commitments to gambling and betting services.<sup>104</sup> Although the United States argued that it did not intend at any time to include online gambling services in its commitments under the GATS, the Panel stated in its report that "there are no provisions in the WTO Agreement that would allow a Member's intentions to be probed and determined, except as reflected in the treaty language."<sup>105</sup> This finding highlights the fact that "trade commitments can have unpredictable consequences";<sup>106</sup> technological advances may bring upon a signatory Member State certain commitments that were not initially considered or contemplated. Although safeguards can be found within

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101. Appellate Body Report, *supra* note 3, ¶ 123.

102. *Id.* ¶¶ 124, 126.

103. See Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, ¶ 81, WT/DS244/AB/R (Dec. 15, 2003).

104. Appellate Body Report, *supra* note 3, ¶ 213.

105. Panel Report, *supra* note 80, ¶ 6.137.

106. Wohl, *supra* note 28, at 135.



the GATS, these measures can be expensive to implement should a country decide to renegotiate or withdraw its commitments.<sup>107</sup> Consequently, “countries [will be] less likely to make commitments in the first place if it is too costly to deal with unanticipated . . . developments [later].”<sup>108</sup> Future consequences aside, the extremely costly and difficult process of modifying any existent commitment under the GATS has put the United States in a difficult situation. Although Antigua may not pose a threat to the U.S. economy, other countries or supranational organizations such as the EU could sue, and if successful, the repercussion costs could be dramatic.<sup>109</sup> Whatever action the United States ultimately decides to take, it will have a tremendous effect not only on itself, but also on foreign states.

Lastly, the Appellate Body correctly held that even though U.S. statutes are necessary to protect public morals, at least with respect to the IHA, it has not met the requirement of the chapeau of article XIV of the GATS.<sup>110</sup> As a preliminary matter, the Appellate Body addressed the necessity of state and federal laws prohibiting the cross-border supply of gambling and betting services. In regard to state laws, the Appellate Body stated that Antigua failed to identify any “reasonably available alternative,” and thus the United States has made a *prima facie* case.<sup>111</sup> This holding implies that subsequent challenging countries could be successful in challenging U.S. state laws by identifying reasonably available WTO alternatives.<sup>112</sup> In regard to federal law, however, the Appellate Body found that “Antigua established [a] *prima facie* case of inconsistency with Article XVI [of the GATS], only as to the Wire Act, the Travel Act, and the IGBA.”<sup>113</sup> After careful consideration and analysis

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107. *See id.* at 136. Article XXI of the GATS deals with the modification of schedules should a member have to modify its commitments. GATS art. XXI. However, any modification will allow other countries to request compensation for any loss due to a modification. This makes the process potentially costly for countries choosing that route. Wohl, *supra* note 28, at 136.

108. Wohl, *supra* note 28, at 137.

109. *See* ROSE & OWENS, *supra* note 4, at 270. Pursuant to U.S. intentions to change its GATS commitments unilaterally, the EU filed a claim for \$100 billion. *Id.* Although the United States and the EU reached an agreement, it was challenged by European companies who requested that the EC commence an investigation pursuant to the Trade Barrier Regulation (TBR). *See id.*

110. Appellate Body Report, *supra* note 3, ¶ 373(D)(vi)(a). As the Appellate Body pointed out, article XIV of the GATS requires a two-tier analysis. *Id.* ¶ 292. The first question to address is whether the measure is necessary to achieve the relevant objectives, and the second question is whether it meets the requirements of the chapeau. *Id.*

111. *Id.* ¶ 326.

112. *See id.* The Appellate Body recognized U.S. concerns regarding remote suppliers of gambling and betting services because these services raise specific concerns regarding “money laundering, fraud, compulsive gambling, and underage gambling.” *Id.* ¶¶ 313, 346-347.

113. *Id.* ¶ 153.

of the necessity of these federal laws, the Appellate Body found that the IHA permits Internet betting on horse racing and agreed with the Panel that the IHA on its face “exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA.”<sup>114</sup> Therefore, the necessity of federal statutes prohibiting the cross-border supply of gambling and betting services, at least with respect to horse racing, are called into question when an exception for domestic suppliers of Internet gambling and betting services under the IHA is actually in force. The arbitrators in the *US-Gambling* case stated in their Opinion that “it is not clear how the United States proposes to reconcile the protection of public morals or public order with the opening of one segment of the market (horseracing).”<sup>115</sup> This finding of discrimination against foreign suppliers by the United States has led the WTO to open Pandora’s box and allow, if not encourage, other countries to bring proceedings against the United States.

#### V. RECENT U.S. DEVELOPMENTS AND THEIR IMPACT IN THE EUROPEAN UNION

##### A. *The U.S. Dilemma Between Compliance and Noncompliance*

The decision by the Appellate Body against the United States was issued in April 2005. Pursuant to the Appellate Body decision and subsequent WTO proceedings, the WTO awarded Antigua the right to suspend \$21 million annually in intellectual property rights held by U.S. firms.<sup>116</sup> Since that time, the United States has stubbornly held the position that its state and federal laws have always been in compliance with the WTO and the GATS.<sup>117</sup> Therefore, no laws needed to be changed. To support this stance, the DOJ maintains that the IHA does not create an exception from the existing ban on Internet gambling pursuant to the Wire Act. According to the DOJ, a civil statute such as

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114. See *id.* ¶ 369. The Appellate Body also specified that the chapeau requires that the discrimination must not be “arbitrary” or “unjustified.” *Id.* ¶ 350. The United States could have argued that the Wire Act, the Travel Act, and the IGBA do not rise to the level of “arbitrary” or “unjustifiable” discrimination. Instead the United States chose to justify the three federal statutes as applying equally to foreign suppliers of gambling and betting services as they do to domestic suppliers. *Id.*

115. See Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3.67, WT/DS285/ARB (Dec. 21, 2007).

116. See *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 78.

117. See ROSE & OWENS, *supra* note 4, at 265. This position is not surprising because it has been the same argument that the United States has made from the beginning.

the IHA cannot modify a criminal statute such as the Wire Act and, therefore, cross-border betting of all kind is completely outlawed.<sup>118</sup> However, this position is difficult to maintain because no case against any “state-licensed entity offering online wagering on horse races” has ever been filed.<sup>119</sup>

Notwithstanding the unexplained interpretation of the IHA, the United States complicated Internet gambling matters further with the enactment of the UIGEA in 2006. Although the UIGEA prohibits financial intermediaries from receiving payments from illegal Internet gambling sites, it also makes an exception for operators in states that have legalized gambling to be involved in intrastate gambling transactions.<sup>120</sup> This exception for intrastate gambling, which in essence discriminates against foreign operators, does nothing more than fuel the heated debate on U.S. noncompliance with WTO and GATS commitments. Furthermore, and as a direct consequence of the WTO decision in the *US-Gambling* case, the United States has expressed its intention to withdraw its WTO commitments on gambling and betting services without compensating any country for their future losses.<sup>121</sup> However, this last option would be seen by the international community as a complete disregard of international law and could be damaging to the credibility of the United States regarding its commitments to further international agreements or treaties. Even if the United States decides to modify its WTO commitments to exclude gambling and betting services, this move could be practically impossible due to the costs associated with it.

Although the United States has been ignoring Internet gambling law issues for years, recent congressional developments point towards a possible change. Since the enactment of the UIGEA, Congress has supported the idea of either amending or repealing the UIGEA.<sup>122</sup> This support has taken the form of a bill entitled the Internet Gambling Regulation, Consumer Protection, and Enforcement Act of 2009.<sup>123</sup> Proposed by Financial Services Committee Chairman Barney Frank, the

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118. *Id.*

119. Wohl, *supra* note 28, at 131. The American Horse Council, which represents the equine interests in the United States, has expressed its view that “Internet gambling on horse racing, including on an interstate basis, is indeed allowed.” See Commission’s Report, *supra* note 1, at 33.

120. 31 U.S.C. § 5362 (10) (B) (2006).

121. See ROSE & OWENS, *supra* note 4, at 270-72.

122. Schmitt, *supra* note 4, at 401.

123. H.R. 2267, 111th Cong. (2009), available at <http://govtrack.us/congress/billtext.xpd?bill=h111-2267>.

bill “would establish a federal regulatory and enforcement framework under which Internet gambling operators could obtain licenses authorizing them to accept bets and wagers from individuals in the United States, on the condition that they maintain effective protections against underage gambling, compulsive gambling, money laundering, and fraud.”<sup>124</sup> Representative Frank argues that “[t]he government should not interfere with people’s liberty unless there is a good reason,” while opponents argue that the bill only poses danger to youth by “encourag[ing] gambling addiction at a young age.”<sup>125</sup> Interest groups that commented on the bill have gone as far as to compare the ban on Internet gambling with the ban on alcohol during the Prohibition. They argue that a complete ban on Internet gambling will “drive[] the activity underground, forgo[] massive tax revenues and make[] criminals out of otherwise law-abiding citizens.”<sup>126</sup> Presently, it is unclear whether this bill will reach the House floor for a vote, but the debate is at least a sign of Congress’s willingness to deal with the controversial issue of Internet gambling.

Regardless of whether the UIGEA is ultimately amended or repealed, it will only be the first step toward the implementation of measures that bring the United States in line with its commitments to the WTO. The second step that Congress must take after dealing with the UIGEA is to amend the IHA so that foreign suppliers of gambling and betting services are able to take bets from U.S. citizens on horse races. While these steps might seem difficult to implement, they would certainly show that the United States respects its international commitments and does not support discriminatory laws.

### *B. The Impact of U.S. Decisions in the European Union*

In March 2008, the EC initiated an investigation into U.S. Internet gambling laws pursuant to a formal request of various European companies under the Trade Barriers Regulation (TBR).<sup>127</sup> Based on their formal request, the EC was required, pursuant to the TBR, to investigate

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124. Press Release, House Comm. on Fin. Servs., Frank Unveils Internet Gambling Legislation (May 6, 2009) (on file with author).

125. Mosheh Oinounou, *Lawmakers Bet on Internet Gambling Legislation*, FOX NEWS, May 6, 2009, <http://www.foxnews.com/politics/2009/05/06/lawmakers-bet-internet-gambling-legislation/>.

126. *Id.*

127. Commission Notice of Initiation of an Examination Procedure Concerning Obstacles to Trade Within the Meaning of Council Regulation (EC) No. 3286/94 Consisting of the US Ban on Foreign Internet Gambling and Its Enforcement, 2008 O.J. (C 65/5); *see also* Council Regulation (EC) No. 3286/94, 1994 O.J. (L 349) 71 (EC) [hereinafter Trade Barriers Regulation].

whether there was a trade obstacle that was incompatible with the WTO commitments of the alleged relevant country, whether it had a negative impact on European companies, and whether actions against these barriers would have been in the interest of the EU.<sup>128</sup> The EC finished its investigation with the issuance of a report in June 2009.<sup>129</sup> The report asserts that “[t]he EU has developed the world’s leading internet gaming business [with m]any of the world’s largest companies” now based among EU Member States.<sup>130</sup> Statistics show that “the EU gambling market generated Gross Gaming Revenues (operator winnings, less payment of prizes) of approximately €51,500 million in 2003.”<sup>131</sup> The same source establishes that American gaming industries generated Gross Gaming Revenues of €60,700 million for the same year.<sup>132</sup> These figures illustrate not only the large size of the gambling market in the EU but also provide insight into the supporting services that are needed to assist a gambling market as large as the one currently in the EU.

Following the enactment of the UIGEA in 2006, all the European suppliers of gambling and betting services in the United States withdrew from the market for fear of prosecution.<sup>133</sup> This withdrawal is also considered to be due to the alleged discriminatory enforcement of federal laws by the DOJ against foreign suppliers of gambling and betting services.<sup>134</sup> The exodus of European companies caused a considerable loss in revenue, with some companies losing up to €73 million (about \$98 million).<sup>135</sup> Furthermore, it is estimated that the stock market value of securities of European companies suffered considerable losses. Economists have estimated the losses on “more then [sic] 75% of their stock market value, exceeding . . . \$11 billion . . . in losses for [only]

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128. Trade Barriers Regulation, *supra* note 127, pmbl. art. 1. Article 2(1) of the Trade Barriers Regulation’s preamble defines “obstacles to trade” as “any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action.” Furthermore, article 2(4) defines “adverse trade effects” as

an obstacle to trade causes or threatens to cause, in respect of a product or service, to Community enterprises on the market of any third country, and which have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein.

*Id.* art. 2(4).

129. Commission’s Report, *supra* note 1.

130. *Id.* at 7.

131. SWISS INST. OF COMPARATIVE LAW, STUDY OF GAMBLING SERVICES IN THE INTERNAL MARKET OF THE EUROPEAN UNION, at xxxvi (2006), available at [http://ec.europa.eu/internal\\_market/services/docs/gambling/study1\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf).

132. *Id.* at xxxvii.

133. Commission’s Report, *supra* note 1, at 79.

134. *See id.*

135. *See id.* at 79-80.

three companies alone.”<sup>136</sup> The closure of the U.S. market also affected suppliers of supporting services to remote gambling and betting companies.<sup>137</sup> These supporting services, such as banks, legal firms, and payment processors, also suffered substantial losses in revenues and a decrease of activities with remote gambling operators.<sup>138</sup> Finally, EU Member States such as Malta and territories such as Gibraltar, which have “invested significantly in the development of a sound regulatory regime” for the gaming sector, will suffer a significant blow to their economies, and in some cases “companies’ investment and growth plans” will cease.<sup>139</sup>

As a result of these findings, the EC concluded in its recent report that U.S. measures constitute obstacles to trade as defined in article 2.1 of the TBR that “cause adverse trade effects . . . to EU enterprises . . . , which have a material impact on a sector of economic activity and on a region of the Community.”<sup>140</sup> However, the EC made it clear that any further action by the European Community will depend on the United States’ response.<sup>141</sup> In this respect, article 11 of the TBR offers the EC the discretion to terminate or suspend the procedures at any time as long as the measures taken by the offending country are considered satisfactory, and thus, no further action is needed.<sup>142</sup> This statement effectively put the ball in the hands of the United States. Whether the United States can play a fair game is a matter that remains to be seen.

## VI. CONCLUSION

An analysis of U.S. laws regarding Internet gambling demonstrates the past and future conflicts in this area of the law. The ambiguity of the laws and their interpretation by federal agencies caused the United States to be defeated in the WTO against Antigua. The WTO Appellate Body decision has opened the floodgates for future litigants, including major players such as the EU. Until now, the United States has utterly disregarded its GATS commitments regarding the cross-border supply of gambling and betting services, whether the United States admits this or

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136. *Id.* at 83.

137. *See id.* at 84-86.

138. *Id.*

139. *See id.* at 86-87 (“The government of Malta estimates that in 2007 Malta had a 12% share of the world online gambling market, which contributed to over 5% of Malta’s GDP and over 6% of the gross value added of the Maltese Economy. Moreover . . . the remote gambling and betting industry had 1,882 direct employees in Malta in 2008.”).

140. *Id.* at 89.

141. Commission’s Report, *supra* note 1, at 91-92.

142. Trade Barriers Regulation, *supra* note 127, art. 11.

not. An attitude of defiance and disregard for international law only fosters an environment of distrust, encouraging other member states to follow suit by refusing to comply with their own commitments. No one denies that the United States is a major, if not the biggest, player in the world economy and an essential pillar of the WTO. But with leadership also come responsibilities. Accordingly, the United States will have to reconcile the current situation by confronting the challenges ahead.

A few options are available to the United States when addressing the mess created by its inept Internet gambling laws. First, the United States should acknowledge the problem that it has created by carving out exceptions for domestic providers of Internet gambling and betting services in the IHA and the UIGEA. The United States could address it by either leveling the playing field for all foreign Internet service providers or by banning these providers altogether without taking any discriminatory measures.<sup>143</sup> Second, the United States could modify or withdraw its commitments pursuant to article XXI of the GATS. The viability of this option would depend on how many members exercise their right to claim benefits for any loss they may suffer as a consequence of U.S. actions. It is no secret that the EU is considering the option to commence proceedings against the United States in the WTO should the United States decide to withdraw its commitments. This means that the United States could be exposed to potentially substantial damages should the EU and/or any other countries decide to sue for any loss. As a last resort, the United States has the option of ignoring the issue and maintaining the position of the DOJ regarding its compliance with the WTO. However, even this option is starting to crumble. A possible suit by the EU would pin the United States to the ropes. To be successful, the EC must simply avoid the same mistakes committed by Antigua. Considering the weight of the EU in the world economy, the United States might want to think twice before addressing the issue of Internet gambling.

In today's modern society, it is almost unthinkable that a country could forbid the existence of a global Internet gambling market. Based on technology's role in the economy, it might be best to begin by regulating a future Internet gambling market rather than banning it outright. Past experiences with complete bans suggest that these measures only drive the targeted activity underground.<sup>144</sup> A policy of licensing and regulation, however, has proven to be a successful method

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143. See ROSE & OWENS, *supra* note 4, at 267-69.

144. Oinounou, *supra* note 125.

of dealing with the issue of Internet gambling.<sup>145</sup> There is no doubt that the Internet has revolutionized the world we live in. With this new revolution also come new challenges. The manner in which the United States deals with these challenges will dictate the place it will occupy in the future. But in a world moving towards globalization, a position advocating protectionism and isolationism has no place.

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145. See ROSE & OWENS, *supra* note 4, at 393-402.