MOVING ALL-IN WITH THE WORLD TRADE ORGANIZATION: IGNORING ADVERSE RULINGS AND GAMBLING WITH THE FUTURE OF THE WTO

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I. INTRODUCTION

In 2005, Antigua and Barbuda (Antigua) became the smallest World Trade Organization (WTO) member state to win a case against the United States, one of the WTO’s largest and most powerful members.1 In United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, the dispute settlement system’s appellate body found that U.S. law restricting internet gambling violated U.S. obligations committed to under the General Agreement on Trade in Services (GATS),2 which the country signed in 1994. After years of working its way through the WTO dispute settlement system’s lengthy appeals process, the case has made Antigua a big winner, and has placed the United States in a tough position.3

As a result of the United States dragging its feet in complying with the ruling of the Dispute Settlement Body (DSB), Antigua came forward with a new and unusual “cross-sector” proposal: On June 22, 2007, Antigua requested authorization to infringe on U.S. intellectual property rights through suspension of its obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).4 An arbitrator eventually granted this authorization up to the amount of $21 million annually,5 though it remains unclear if the remedy is satisfactory. Thus, while the United States appears to be resisting any attempt by the WTO or other members to induce its compliance, Antigua has raised the stakes, and the United States is now trying to buy its way out of its commitments.6

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2 Appellate Body Report, Measures Affecting Gambling and Betting Services, ¶ 373(c)(ii), WT/DS285/AB/R.
4 Recourse by Antigua and Barbuda to Article 22.2 of the DSU, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22 (June 22, 2007).
5 Decision by the Arbitrator, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶¶ 3.188, 3.189, 4.7, WT/DS285/ARB (Dec. 21, 2007).
6 See Daniel Pruzin, U.S. Alters Services Schedule to Avoid Ruling on Gambling, Refuses Antigua Compensation, INT’L TRADE DAILY, May 7, 2007, at D8 (noting that although a member that modifies its commitments must make “compensatory adjustment,” U.S. officials said there was very little chance of offering compensation because “no WTO member either bargained for or reasonably could have expected [a U.S.] commitment on gambling”). See also Daniel Pruzin,
Part II and III of this Note examine the WTO’s dispute settlement system and presents a background of this case. Part IV discusses retaliation within the WTO framework and the use of cross-sector retaliation as proposed by Antigua, and analyzes its likely effect based on other similar, although rare, requests. This Note argues that the suspension of TRIPS obligations may be the best option available to Antigua because other more traditional countermeasures will have no effect on the United States. Part V of this Note analyzes the withdrawal of concessions that the United States opted for instead of complying with the ruling and the effects any action taken in this case will have on the efficacy of the WTO dispute mechanisms. The recent adverse ruling against the United States presents a difficult test for the young WTO. Thus, this Note argues that in order to solidify its future status as a relevant factor in international trade, the WTO must stand up to the United States and deliver a fair and effective remedy, as well as stand beside Antigua in the attempt to avoid a U.S. withdrawal from its obligations.

II. THE DISPUTE SETTLEMENT SYSTEM

When the WTO was formed, the dispute settlement system received particular praise as the “crown jewel[ ]” of the organization, and this expectation is now being tested. According to the WTO’s first Director General, the dispute settlement system is “in many ways the central pillar of the multilateral trading system. . . . [I]t is also an important guarantee of fair trade for less powerful countries.” The United States was one of the driving

U.S. Holds First Round of Talks with Nations Requesting Compensation for Gambling Ban, INT’L TRADE DAILY, July 17, 2007, at D4 (noting that the United States held “talks with countries seeking compensation for the U.S. decision to alter its [WTO] services schedule in order to maintain a ban on cross-border Internet gambling”).

7 See Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by Brazil, United States—Subsidies on Upland Cotton, WT/DS267/26 (Oct. 7, 2005) (seeking authorization to suspend TRIPS and GATS obligations in response to subsidies to goods producers); Recourse by Ecuador to Article 22.2 of DSU, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/52 (Nov. 9, 1999) (seeking authorization to suspend TRIPS and GATS obligations in response to tariff preferences on goods).


forces in the establishment of the dispute settlement system,\(^\text{10}\) recognizing that "an effective dispute settlement system advantages the United States not only through the ability to secure the benefits negotiated under the agreements, but also by encouraging the rule of law among nations."\(^\text{11}\) The then-United States Trade Representative stated that "it is in the U.S. interest to have a [strong] WTO . . . because the United States has the most open economy in the world and will benefit the most from seeing free trade rules strictly enforced."\(^\text{12}\)

When a country wins a case, the preferred result is for the losing country to adjust its trade practices to comply with its commitments.\(^\text{13}\) This enables the aggrieved country's industries to continue operation. But "the WTO dispute settlement system cannot order a country to change its laws."\(^\text{14}\) While full compliance is the ideal outcome, the best outcome that is realistic is for the countries to reach a mutually satisfactory settlement. If these negotiations fail, the winning country is authorized to impose countermeasures, which are otherwise illegal trade sanctions that seek to punish the violating country and attempt to induce compliance.\(^\text{15}\)

The WTO agreements are enforced through a dispute settlement system, the rules and procedures of which are set out in Annex 2 of the WTO agreement, known as the DSU.\(^\text{16}\) When a country wins a dispute and is authorized to suspend concessions to another WTO member, "the general principle is that


\(^{11}\) Id.


\(^{15}\) See DSU art. 22.2 (explaining circumstances under which "any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations").

\(^{16}\) Id. art. 1.1.
the complaining party [will] first seek to" retaliate within the same sector as
that in which the violation occurred. If this is not "practicable or effective,"
the complaining party can seek to suspend concessions or other obligations in
other sectors under the same agreement. If that also is not practicable or
effective, it may retaliate by suspending "concessions or other obligations
under another covered agreement."

III. BACKGROUND: ANTIGUA WINS THE CASE

A. History of the Dispute

In 1999, the tiny island nation of Antigua and Barbuda hosted over one
hundred internet gambling companies, which made up around ten percent of
the island’s gross domestic product and employed roughly 3,000 people. In
the last few years, the Antiguan online gambling industry has been reduced by
about eighty-five percent. The country has blamed the United States for
becoming increasingly aggressive in blocking these operations.

The WTO dispute began after an American citizen, Jay Cohen, was arrested
and imprisoned for taking bets through his internet gambling site, World
Sports Exchange Ltd., that he and some friends ran out of Antigua. Cohen
was charged and convicted in U.S. federal court of taking bets transmitted over
wire in violation of a 1961 U.S. law commonly known as the Wire Wager

17 Id. art. 22.3(a).
18 Id. art. 22.3(b).
19 Id. art. 22.3(c).
20 See First Submission of Antigua and Barbuda, United States—Measures Affecting the
Cross-Border Supply of Gambling and Betting Services, ¶ 7, WT/DS285 (Oct. 8, 2003),
xecutivesummary.pdf. For a thorough summary of Antigua’s gambling industry, including
information about its WTO case and relevant U.S. legislation, see Antigua Online Gaming
21 Burke Hansen, Antigua Calls for Pirates to Return to Caribbean, REGISTER,
22 See, e.g., First Submission of Antigua and Barbuda, Measures Affecting Gambling and
Betting Services, ¶ 37, WT/DS285 (claiming that U.S. restrictions violate its GATS obligations).
23 Paul Blustein, Against All Odds: Antigua Besting U.S. in Internet Gambling Case at WTO,
While he was in prison, Cohen learned that the United States was vulnerable to a trade complaint, and he urged Antigua to bring the case.24

B. Antigua’s Claim and the United States’ Defense

In 2003, Antigua requested a WTO panel, claiming that U.S. law illegally restricted the offshore supply of gambling and betting services in violation of its commitments under the GATS.26 The basic argument was that if the United States allowed any internet gambling at all, then its WTO commitments required that it not impose any barriers to foreign companies seeking access to its market.27 While U.S. federal law contains no explicit prohibition of internet gambling, it has several laws that aim to restrict its operation.28 In addition to four state laws, Antigua’s claimed several U.S. laws were illegal under the GATS,29 including the Wire Act,30 the Travel Act,31 and the Illegal Gambling

24 David B. McGinty, The Near-Regulation of Online Sports Wagering by United States v. Cohen, 7 GAMING L. REV. 205, 207 (2003) (citing United States v. Cohen, 260 F.3d 68, 70–71 (2d Cir. 2001)). See 18 U.S.C. § 1084(a) (2000) (“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.”).

25 See Blustein, supra note 23 (stating that Cohen “alerted the Antiguans,” who eventually filed a complaint when the “gambling industry . . . agreed to foot the bill”).


27 See id. (contending that the United States’ “total prohibition of gambling and betting services offered from outside of the United States appears to conflict with the United States’ obligations under GATS” and pointing out that “[U.S.] authorities allow numerous operators of United States origin to offer all types of gambling and betting services [within U.S. borders]”); see also Henry Lanman, Rolling the Dice: The United States’ Big Legal Gamble with Internet Gaming, SLATE, Nov. 15, 2006, http://www.slate.com/id/2153352/ (noting that the Wire Act does not prohibit bets taken within a single state or “interstate [bets made] on horse racing”).

28 McGinty, supra note 24, at 206.


31 The Travel Act, 18 U.S.C. § 1952(a)–(b) (2000) (carrying fines and maximum imprisonment for “[w]hoever travels in interstate commerce or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of
Business Act. The Panel found that all of these laws violated the United States’ obligations under the GATS.

The United States did not sit by idly, and it asserted several defenses. One was a “public morals” defense based on GATS section XIV, claiming that the legislation was necessary to promote public morals and the public order by preventing minors from gambling and by preventing the laundering of organized crime proceeds through internet gambling sites. The defense failed because the United States could not show that it completely prohibited all forms of internet gambling, due to the existence of several online gambling operations, such as Xpressbet.com, which allow internet wagering on horse racing. The United States appealed the ruling, and the case was ultimately decided by the appellate body, which found that U.S. gambling laws were unlawful violations of its GATS obligations. To determine the amount of time the United States had to comply with the decision, a WTO DSB arbitrator gave the United States a “reasonable period of time” to comply with its ruling, presumably by either changing its domestic laws or by opening access to the online-gambling market. This time period expired on April 3, 2006, and one week later, the United States submitted a report to the DSB stating that the “Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races”... In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute.”

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any unlawful activity ...” and defining “unlawful activity” as “any business enterprise involving gambling ...”).

33 Panel Report, Measures Affecting Gambling and Betting Services, ¶7.2(b), WT/DS285/R (discussing the violation of the United States GATS schedule, section 10-D).
34 Id. ¶ 6.444. See GATs, supra note 3, art. XIV (allowing an exception for adoption of measures necessary to protect public morals or to maintain public order).
37 Arbitration Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶68, WT/DS285/13 (Aug. 19, 2005) (determining that the reasonable period of time was “[eleven] months and [two] weeks from April 20, 2005, which was the date the DSB adopted the Panel and Appellate Body Reports”).
On June 8, 2006, Antigua requested consultations under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), in which the parties unsuccessfully attempted to reach a settlement of the dispute. The March 2007 report of the Article 21.5 Panel concluded that the United States had still not complied with the recommendations and rulings of the DSB.

C. Withdrawal of Commitments and Retaliation

In May 2007, the United States announced that it was proposing to modify its GATS schedule—which it claims included a drafting oversight—to enable it to legally restrict offshore online gambling operations. Under GATS, a country can modify or withdraw from any commitment in its schedule after three years have elapsed from when the commitment took force. Any member withdrawing commitments must pay appropriate compensation to any affected member in order “to maintain a general level of mutually advantageous commitments no[ ] less favourable than” those which existed prior to the negotiations. According to the Deputy United States Trade Representative John K. Veroneau, when the United States drafted its international commitments to open its market to recreation services in the early 1990s, it failed to make clear that these commitments “did not extend to gambling” even though that was its intent. The United States made the unprecedented offer to modify its GATS schedule “in order to bring the United States into compliance and to resolve the dispute permanently.”

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39 Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Request for Consultations, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/17 (June 12, 2006) (outlining Antigua’s request for consultations and the insistence of United States’ Department of Justice that the United States is in compliance with the DSB rulings). See DSU, art. 21.5 (detailing appropriate procedures when disagreement arises over compliance with rulings).


42 GATS, supra note 3, art. XXI, ¶ 1(a).

43 Id. ¶ 2(a).

44 Palmer, supra note 41.

States claimed, "This modification will ensure . . . the original U.S. intent of excluding gambling from the scope of U.S. commitments." Antigua expressed shock that the United States would drag this case on for so long, only to withdraw at the last minute. It also dismissed U.S. claims of a drafting oversight. Soon afterwards, Antigua responded formally.

On June 21, 2007, Antigua requested authorization from the DSB, pursuant to Article 22.2 of the DSU, "to suspend the application to the United States of concessions and related obligations under the [GATS and the TRIPS]." Specifically, Antigua intended to suspend its obligations under Sections I, II, IV, V, and VII, of the TRIPS agreements, covering copyrights, trademarks, industrial designs, patents, and protection of undisclosed information. In total, Antigua requested suspensions worth over $3.4 billion. The small nation stated that this large amount matched the impairment or nullification of benefits it would have accrued since the end of the compliance period on April 3, 2006, when the United failed to comply with the rulings of the DSB.

The United States responded that Antigua should only receive $500,000 in compensation, and certainly no more than $3 million. The United States argued that the “figure should be based only on the potential market in the United States for online horserace betting.” The United States insisted the lower figure was an appropriate amount of compensation because the WTO panel based its holding on the fact that U.S. law allows remote gambling domestically, thus discriminating against foreign companies in this narrow category.

The United States and Antigua engaged in negotiations, which


Id.

U.S. Alters Services Schedule, supra note 6.

Id. Antigua’s attorney, Mark Mendel, stated that “‘[o]ver 100 countries were able to exclude gambling from their commitments, a number of them — including the [European Union] — by expressly excluding gambling from their schedules . . . It cannot be possible that it was overlooked by the United States.’” Id.

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

Id.

Id.

Id.


Id.

Id. Since at the peak of Antigua’s gambling industry, its total services exports totaled $47 million, and horse racing accounts for seven percent of total domestic gambling, “the ‘highest
were extended past the original deadline and failed to result in an agreeable solution. On December 21, 2007, the arbitrator announced its decision that Antigua may request authorization from the DSB to suspend the obligations under the TRIPS Agreement at a level not exceeding $21 million annually. Thus, such differing views on the appropriate outcome of this case, as well as the imbalance in power of the parties, have made this situation difficult for the WTO system to resolve.

IV. U.S. COMPLIANCE AND CROSS-SECTOR RETALIATION

When the United States joined the WTO, there was much debate about whether it was giving up too much sovereignty in return for an enforced rule of law in international trade. The United States had "given up its ability to enact legislation inconsistent with the WTO rules without violating its international obligations [, and] the United States is also subject to WTO dispute settlement complaints by other members." Recognizing that any treaty necessarily requires giving up some degree of national sovereignty, the United States accepted the possibility that another member might successfully challenge a U.S. law, and it would be compelled to comply with such an adverse ruling. This case has turned that possibility into a reality, as the United States is being held to strict enforcement of the rules. However, instead

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56 Daniel Pruzin, U.S. Forwards Offers for Compensation in Gambling Dispute, Sets New Talks Deadline, INT'L TRADE DAILY, Sept. 25, 2007, at D1 (reporting that deadline has been extended to Oct. 22, 2007); Daniel Pruzin, U.S. Extends WTO Talks on Compensating EU, Other for Internet Gambling Exclusion, INT'L TRADE DAILY, Oct. 23, 2007, at D3 (reporting that deadline has been extended to December 14, 2007).

57 Decision by the Arbitrator, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶¶ 3.188, 3.189, WT/DS258/ARB (Dec. 31, 2007).


59 Schaefer, supra note 58, at 330.

60 Id.
of honoring its previous call for strict enforcement, the United States is trying to evade it.

In cases such as this, where a small and weak member is faced with noncompliance by a disproportionately stronger member, one-sided negotiations may "make compliance very hard to achieve."\(^{61}\) This difficulty highlights the inequality between members inherent in the WTO dispute settlement system.\(^{62}\) If no settlement is reached, the winning member can request arbitration, although arbitration had never been requested because of unsuccessful compensation negotiations.\(^{63}\) In this event, the winning member requests compensation, which in some cases may come in the form of cross-sector retaliation.

"Compensation" in the context of the WTO has a very different meaning than its ordinary use in international law.\(^{64}\) Normally, compensation is a retrospective remedy designed to compel damages from a person who has caused injury to the injured person in order to make the injured person whole.\(^{65}\) In the WTO, this remedy does not compensate for past harm, but rather grants a forward-looking trade benefit to the "prevailing party in order to prospectively compensate for the nullification or impairment" caused by the violation.\(^{66}\) Compensation is only a temporary measure, available in case the "recommendations and rulings are not implemented in a reasonable period of time."\(^{67}\) Moreover, compensation must be agreed to by both parties, and the party collecting compensation must secure the cooperation of the violating party.\(^{68}\)


\(^{62}\) Id.

\(^{63}\) The only time in WTO history where modification of schedules has been dealt with was when the EU modified its schedule to account for its enlargement in 1995 and 2004, and "[t]hose negotiations ended successfully with compensation agreements between the EU and affected WTO members." U.S. Alters Services Schedule, supra note 6.


\(^{65}\) BLACK'S LAW DICTIONARY 301 (8th ed. 2004).

\(^{66}\) Vázquez & Jackson, supra note 64, at 530; Meier-Kaienburg, supra note 64, at 232.

\(^{67}\) DSU art. 22.1.

\(^{68}\) Id. art. 22.2; see also Meier-Kaienburg, supra note 64, at 232–34, 243–47 (noting the limits of the WTO system in the area of compensation and calling for a rule change, but pointing out that most members would prefer to maintain flexibility in deciding whether to offer
This idea of compensation reveals a severe shortcoming of the current dispute settlement system in cases where a large and a small country are negotiating. A member such as the United States, which holds considerable bargaining power in compensation negotiations, will seek to extend the “reasonable period of time” as long as it can.69 The prospective nature of the remedy gives an advantage to violating countries that drag their feet in implementing a ruling, and adequate compensation for Antigua during this time will be reduced as time passes, until the ruling is implemented.70 If no agreement is reached, then suspensions of trade concessions may be granted, but unlike traditional compensation, this remedy does not compensate for past losses; it only “rebalances the playing field” for the future trading relationship.71

Prospective application, of course, introduces a situation wherein a violator may be “better off having broken the rules than complying with them” because it is not liable for past damages.72 The United States could violate its agreements on gambling for years, work though the WTO appeals system for several more years, and then agree to comply with the ruling, and owe nothing. This is essentially what the United States has done, but instead of complying, it is attempting to withdraw its obligations and give forward-looking compensation to Antigua in another area of trade. It began negotiations over compensation terms with Antigua and other members who joined the dispute. The only advantage Antigua has is the ability to withhold its agreement to the compensation offer and to go back to the DSB to request authorization for suspension of concessions.

As noted above, under general international law, a state in breach of an obligation is required to cease the violation and to restore the situation that previously existed, compensating the injured party for its loss.73 In keeping with this principle, the DSB should make every effort to get the United States

69 See Meier-Kaienburg, supra note 64, at 225–27 (discussing the “reasonable period of time” provision and how nations such as the United States may ignore rulings).
70 Id. at 233 (describing the rules that create “a premium to noncomplying countries that drag their feet”).
71 Vázquez & Jackson, supra note 64, at 650.
72 Meier-Kaienburg, supra note 64, at 233.
73 See supra notes 64–68 and accompanying text; see also Vázquez & Jackson, supra note 64, at 560 (stating that a “member’s responsibility for breaching an obligation under the WTO agreements appears to be more limited than a state’s responsibility under general international law for a breach of an obligation under international law”).
to fully comply with its obligations. The DSB should make withdrawal of concessions prohibitively expensive so that it will no longer be the best course of action for the United States.

For any retaliatory measure to be effective, it must do two things: inflict loss on the targeted party and benefit the country using the measure. However, same-sector retaliation in this case will have the exact opposite effect. Since the TRIPS commitments undertaken by developing countries are designed to benefit producers in developed countries, as most developing countries do not have significant intellectual property rights, it can be a useful tool for developing countries to use against developed countries. Antigua’s retaliation against U.S. intellectual property rights will likely hurt the United States more than same-sector retaliation would, but at an amount of $21 million, it is unlikely to be very effective against the large American economy as a whole. Additionally, while it will make Antigua better off than it would be without the authorization, it does not make the country better off than it would have been if the United States had agreed to comply with the decision. Thus, the effectiveness of Antigua’s award will likely depend on the degree to which American intellectual property holders will put pressure on the administration and Congress to avoid retaliation by complying with the DSB’s decision.

In this case, cross-sector retaliation using intellectual property rights under TRIPS seems to be the only available remedy that will level the playing field. The preferred option of same-sector retaliation is clearly not an option for Antigua. It cannot seriously be argued that a country of Antigua’s size could impose normal trade sanctions on an economy as large as the United States. The damage felt by the United States could be little more than a ‘pin prick.’ Furthermore, action against the United States could quite possibly hurt Antigua more than it would help.

74 See Arvind Subramanian & Jayashree Watal, Can TRIPS Serve As An Enforcement Device for Developing Countries in the WTO?, 3 J. INT’L ECON. L. 403 (2000) (proposing that developing countries use TRIPS obligations as a retaliatory weapon against developed countries where more traditional counter measures are ineffective).

75 See id. at 404 (describing the dynamic between developing and developed countries in terms of TRIPS commitments).


77 Id.

78 Retaliation is even more counterproductive for developing countries, as they may “cut themselves off from access to foreign goods or make those goods more expensive for their domestic customers.” Marco Bronckers & Naboth van den Broek, Financial Compensation in
The United States had reason to worry, however, because the right to infringe on intellectual property rights, which Antigua asked the DSB to authorize, had been granted before. In the landmark case of European Communities - Regime for the Importation, Sale, and Distribution of Bananas (Bananas), between the European Union and Ecuador, the WTO authorized retaliatory measures by a developing country on another member, cross-sector retaliation, and trade retaliation that threatened intellectual property rights under the TRIPS agreement. All three authorizations were firsts for the DSB.

When Ecuador sought this remedy in its case against the European Community (EC), it exhibited many of the same characteristics as Antigua: It was a disproportionately small developing country challenging one of the world’s largest trading entities. Ecuador withstood pressure from the United States at that time, which was also involved in the case, to join them in settlement talks. Instead, Ecuador allowed time for negotiations with the EC, stood tough, and made its cross-sector retaliation requests. It was an important step for developing countries around the world, and it may have inspired Antigua’s course of action in this case. Like Ecuador, Antigua must stand strong, as it has thus far, and seek continued support from the world trade community to ensure that its rights are protected.

Given the David-and-Goliath nature of this case, a nontraditional countermeasure appears to be the only weapon that could be effective against a country like the United States. In fact, based on the economic disparity

\textit{the WTO: Improving the Remedies of WTO Dispute Settlement}, 8 J. INT’L ECON. L. 101, 104 (2005) (noting that many developing countries have markets that are “too small to exercise retaliatory pressure on non-complying WTO Members”). These countries retaliate “at the peril of their own development and position in world markets.” \textit{Id.}

\textit{Id.} ¶ 171, 173(d), WT/DS27/ARB/ECU (Mar. 24, 2000) (allowing Ecuador to suspend obligations under TRIPS).

\textit{Id.} ¶ 176–177.


\textit{Id.} at 268–69 (explaining Ecuador’s request to “suspend the application of intellectual property rights under . . . TRIPS”).

\textit{See} Recourse by Antigua and Barbuda to Article 22.2 of the DSU, United
between the two countries, traditional countermeasures are likely to hurt Antigua rather than help. DSU Article 22.3 recognizes this reality, and it authorizes cross-sector retaliation where it is not “practicable or effective” to impose sanctions in the same sector where the violation has occurred. Because of the negligible effect that traditional countermeasures are likely to have, it is reasonable that cross-sector retaliation was authorized. Despite the relatively small amount of the arbitrator’s award, the United States still expressed concern regarding the nature of the award. United States Trade Representative Spokesman Sean Spicer, in a statement following the award announcement, stated that authorization to suspend intellectual property obligations

would establish a harmful precedent for a WTO Member to affirmatively authorize what would otherwise be considered acts of piracy, counterfeiting, or other forms of [intellectual property right] infringement. Furthermore, to do so would undermine Antigua’s claimed intentions of becoming a leader in legitimate electronic commerce, and would severely discourage foreign investment in the Antiguan economy.

Despite this criticism, the arbitrator seemed to recognize the necessity for cross-sector retaliation in order to ensure fairness of awards, but at the same

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States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22 (June 22, 2007) (“[C]easing all trade whatsoever with the United States (approximately US$180 million annually, or less than [two] per cent of all exports from the United States) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.”). Cf. Pruzin, supra note 53 (describing “the vast differences between the economies of the United States and Antigua and Barbuda”).

85 See Recourse by Antigua and Barbuda to Article 22.2 of the DSU, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22 (June 22, 2007) (“Given the vast difference between the economies of the United States and Antigua and Barbuda, additional duties or restrictions on imports of goods and services from the United States would have a much greater negative impact on Antigua and Barbuda than it would on the United States.”).

86 DSU art. 22.3.

time, the $21 million authorized is not high enough to prevent large and wealthy countries from buying the right to violate their WTO obligations.

While the amount may be inadequate to deter the United States, Antigua can still use the concessions as leverage against the United States. It is important to note that while Ecuador never actually suspended any concessions in the intellectual property rights sectors, it wielded the authorization to use cross-sector retaliation to achieve better results than any of the complainants in the previous *Bananas* disputes. Ecuador's powerful new rights led EC officials to "acknowledge that it may be necessary for the EU to offer concessions to Ecuador." Ecuador and the EC eventually settled, and it showed that the new WTO system would enable low-power states to seek retaliation against high-power states.

It is possible that even though Antigua received the authorization to infringe on U.S.-based intellectual property, it might never actually act under that authorization. Antigua would likely benefit more from American corporate lobbyists who would, facing the possibility that Antigua might act, likely pressure the U.S. government to change its domestic policy. Thus, Antigua's greatest tool in this case is not its own power at all, but rather it is the opportunity to mobilize American corporations. Even though the award amount is low, it is doubtful that American companies would feel comfortable with small countries like Antigua developing the means to pirate their products with the capabilities to continue production even after the awarded value has been reached.

Cross-sector retaliation, with respect to the TRIPS agreement, can give developing countries what has been described as "meaningful hostages" in their trade relations with larger and more developed WTO members. Many

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90 See Dunne, supra note 88, at 289 (citing instances in which low-power states have "won judgments against high-power states").

91 Lanman, supra note 27 (suggesting that "Antigua's frank calculation here, of course, is that while the administration might be comfortable stifling the Antiguan trade representative, it would probably take notice if, say, an irate Microsoft or Disney started insisting that it get this problem solved").

countries have moved towards open participation in the multilateral trade system since the late 1980s. However, “most of these countries . . . are unable to exert much negotiating leverage through an ability to withdraw trade concessions.” This is the problem that Ecuador faced in its dispute with the EC, and it is very much a problem in this case for Antigua. It has been suggested that developing countries have utilized the DSB less often than developed countries, due to a lack of legal capacity and retaliatory power.

On the other hand, there is evidence that developing countries have recognized the importance of using retaliatory threats as leverage to induce compliance and have changed the way they initiate disputes to better take advantage of the instances in which they have this leverage. The WTO rightly gave Ecuador such leverage in the Bananas case, and it must help Antigua stand on equal ground with the United States. TRIPS is exactly the kind of tool developing countries should use to best exercise their rights whenever challenging a more powerful developed country like the United States, and the DSB must be willing to level the playing field.

When the DSB decides to grant Antigua’s request for authorization to retaliate by suspending TRIPS rights, it should make a decision whether to widen the authorization’s geographic scope. In Bananas, the authorization allowed Ecuadorian companies that had legally pirated foreign products to sell only in the local Ecuadorian market. The arbitrators that granted the right to violate European intellectual property rights recognized because Ecuador was a small developing nation, it was very possible that it would not be able to implement the full amount authorized. Whereas Ecuador’s population at the

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93 Ethier, supra note 92, at 456.
94 Id.
95 See Horn, supra note 9, at 13 (noting a “pattern whereby larger and richer countries tend to bring more complaints, and smaller and poorer countries less complaints, than expected” and proposing that “[o]ne reason could be that developing countries . . . lack legal resources to bring complaints to the WTO”). But see Chad P. Bown, Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes, 27 THE WORLD ECONOMY 59, 67–68 (documenting evidence that the capacity for plaintiffs to make credible retaliatory threats and the guilty determinations by GATT/WTO panels have led to more success for developing countries under the WTO than under GATT).
96 Bown, supra note 95, at 78.
97 See discussion supra notes 79–83 and accompanying text.
99 Id. ¶ 177.
time of the decision was approximately 13 million\(^{100}\) and therefore was probably unable to consume and produce all of the products it was able to produce as a result of the authorization, Antigua has an even better argument: its population is less than one-hundred thousand and likely has similar production and consumption concerns.\(^{101}\) Therefore, concerns about the ineffectiveness of suspending TRIPS obligations for the Ecuadorian domestic market are even stronger here. In order to put actual pressure on the United States to comply with the WTO rulings, the authorizations should allow Antiguan companies to produce and sell products outside their own domestic market, up to the specified dollar amount that is determined to be sufficient. This broader authorization would give Antigua the appropriate leverage to pressure the United States into complying.

The United States, of course, sees this differently and views such retaliation as a dangerous precedent. Furthermore, the United States expected that the award would be limited to Antigua and that no other member would benefit from the authorization.\(^{102}\) The Office of the United States Trade Representative has stated that "[a]ny authorization pursuant to the award would be strictly limited to Antigua; every other WTO Member remains obliged to protect U.S. [intellectual property rights] under WTO rules, including enforcement against any goods [that infringe upon intellectual property rights]."\(^{103}\) If this is indeed the case, the limited Antiguan economy may reduce the impact it might have and make this a hard award to pay off.

V. ANALYSIS OF THE U.S. RESPONSE

An important aspect of the dispute between Ecuador and the EC was that throughout the dispute and negotiations the parties appeared to be willing to compromise.\(^{104}\) "The [European Community] made an effort to maintain an appearance of compliance with its WTO obligations and of a willingness to comply with adverse judgments, all of which demonstrate that the WTO affects the behavior and perceptions of states."\(^{105}\) The EC showed a


\(^{102}\) Statement of Internet Gambling, supra note 87.

\(^{103}\) Id.

\(^{104}\) Dunne, supra note 88, at 314.

\(^{105}\) Id.
willingness to cooperate with the system, even when it was working against them. Even if the EC was threatening Ecuador behind the closed doors of the negotiation room, it at least lent a cooperative appearance to boost the reputation and the progress of the dispute settlement system. The United States, on the other hand, has repeatedly and uncharacteristically appeared resistant to the ruling against it and threatens to undermine the efficacy of the dispute settlement system.

Indeed, the power of a state should not be measured in a vacuum, and any appraisal of power must take into account behavior, values, attitudes, objectives, and expectations. The United States might be viewed as less likely to make the effort to appear cooperative because it may feel no real need to cooperate. Even though it can be important even for powerful states to act in legitimate ways, some have noted the tendency of the United States to ignore international law whenever it wishes. While it is both expected and appropriate for the United States to oppose an adverse ruling and the extraordinarily high damages that Antigua has asked for, the DSB should ensure that the United States does not flout the system by withdrawing its commitments without affording a proper remedy to the injured parties. This is very important in order for the WTO to maintain its purpose as a system that establishes a "level playing field" for every member, regardless of size and power. With the growing amount of compensation that will be required with the requests of the additional members that have joined the dispute, the likelihood of a settlement may decrease, and it will be even more important for the WTO to arrive at an appropriate decision that will be enforceable.

The U.S. response throughout this case has, not surprisingly, angered some WTO members. The original denial of any violation revealed hypocrisy in light of the United States' recent demands for other states to comply with their own obligations. As one international lawyer tracking the case has stated, "One day they're out there saying how scandalous it is that China doesn't respect W.T.O. decisions, [b]ut then the next day there's a dispute that doesn't go their way and their attitude is: The decision is completely wrong . . . [;] why

107 See John B. Bellinger, Legal Advisor, U.S. Dep't of State, The United States and International Law (June 6, 2007), http://www.state.gov/s/ls/tls/86123.htm ("Our critics sometimes paint the United States as a country willing to duck or shrug off international obligations when they prove constraining or inconvenient.").
should we comply?" The WTO and each of its members have an overwhelming interest in making sure that the United States complies so that the WTO may maintain its legitimacy by securing international cooperation.

Even some U.S. politicians recognize the danger of withdrawal. At a meeting with Antigua's Prime Minister, New York Representative Charles Rangel told reporters that he thinks his "country is wrong in trying to change the rules of the WTO."\footnote{Rivlin, \textit{supra} note 76, at C1 (quoting Lode Van Den Hende, an international trade lawyer with the firm Herbert Smith in Brussels).}

Furthermore, the announcement that the United States will maintain its ban on internet gambling services was unexpected and deeply disappointing to Antigua, as Antigua's Finance and Economy Minister called the decision "almost incomprehensible."\footnote{Associated Press, \textit{Antigua Prime Minister Hopes Talks with U.S. Lawmakers Will Ease Internet Gambling Dispute}, \textit{INT'L HERALD TRIB.}, Nov. 11, 2007.} Mark Mendel, lead counsel for Antigua, noted that "in the 25-plus cases it had expressly lost, it never once had refused to comply, much less try to withdraw its treaty obligations in the affected sector."\footnote{Palmer, \textit{supra} note 41.}

Under GATS, a country can modify or withdraw from any commitment in its schedule after three years have elapsed from when the commitment took force.\footnote{Burke Hansen, \textit{Antigua Attorney Speaks Out on Landmark WTO Case}, \textit{REGISTER}, July 16, 2007, http://www.theregister.com/2007/07/16/antiguawtomendel/} Therefore, if the United States wishes to rescind its commitment to allow internet gambling, it can—but at a significant cost, because appropriate compensation must accompany any withdrawal.\footnote{GATS, \textit{supra} note 3, art. XXI, \(\S\) 1(a).}

The island nation of roughly 70,000 garnered the support of the European Union, Japan, India, Canada, Australia, Costa Rica, and Macao, who all joined Antigua in requesting compensation from the United States for the change in its service schedule.\footnote{See id. \(\S\) 2(a) (stating that "the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment").} Australia has since dropped its claims, and Japan has settled.\footnote{Gary G. Yerkey, \textit{Compensation Talks in WTO Gambling Case Could Extend Beyond Sept. 22, U.S. Says}, \textit{INT'L TRADE DAILY}, Sept. 6, 2007, at D11.} The remaining countries, led by the European Union which includes the United Kingdom's multi-billion dollar online gambling industry, however, could subject the United States to tens of billions of dollars more in

\footnote{Daniel Pruzin, \textit{U.S., Japan Reach WTO Settlement on Internet Gambling Compensation Claim}, \textit{INT'L TRADE DAILY}, Sept. 28, 2007, at D18.}
compensation.\(^{116}\) Thus, the United States' decision to change the schedule opened the door to significantly more damages and new criticism.\(^{117}\)

In addition to these economic concerns, the United States should be careful that it does not severely damage its credibility. Being pegged as a rule violator has consequences for the United States, even without the pressure of retaliation by the other party.\(^{118}\) If the United States shirks its obligations and fails to lead by example in complying with WTO rulings, other members will similarly show a lack of respect for the rules of the dispute settlement system.\(^{119}\) Other countries watch how the United States acts in implementing the rules of its trade agreements and they often follow its example.\(^{120}\)

Rather than make such a drastic and expensive modification, the United States could simply change its laws and allow online gambling. In fact, U.S. Representative Barney Frank has introduced legislation that would lift the gambling ban.\(^{121}\) There are several compelling reasons for the United States to do so. The moral arguments put forth for the ban are inconsistent with the actual state of U.S. gambling: In almost every state in the country, it is lawful to gamble on either horse racing, dog racing, or state lotteries or in brick and mortar casinos.\(^{122}\) A commonly cited justification for the ban is the prevention of money laundering.\(^{123}\) But other forms of payment, such as "e-wallets,"\(^{124}\) Telebuy,\(^{125}\) and the prospect of online gamblers setting up offshore bank accounts, may make money laundering easier than with the regular use of


\(^{117}\) See Palmer, supra note 41 (quoting an Antiguan official as describing the United States' decision as "almost incomprehensible").

\(^{118}\) Schaefer, supra note 58, at 326.

\(^{119}\) Id.

\(^{120}\) Id.


\(^{122}\) Caroline Bissett, Comment, All Bets are Off(Line): Antigua’s Trouble in Virtual Paradise, 35 U. MIAMI INTER-AM. L. REV. 367, 369 (2004). See also McGinty, supra note 24, at 205 (“All but two states, Hawaii and Utah, have some form of legalized gambling.”).

\(^{123}\) See, e.g., Bisset, supra note 122, at 369 (stating that the United States points to “money laundering concerns as the . . . basis” for legislation that “effectively bans the supply of any offshore gambling and betting services to the United States”).

\(^{124}\) “E-wallet” is a term associated with the practice of “overseas companies creat[ing] identities online with debit accounts [which make] it harder to identify the true owner.” Id. at 376.

\(^{125}\) Telebuy “charges gambling transactions directly to the bettor’s phone bill.” Id. at 377.
credit cards on gambling sites. Further, internet gambling is legal and regulated in other countries and jurisdictions.

Lifting the ban against online gambling also has a financial incentive. State governments earned about $20 billion in taxes on legalized gambling in 2000, and it has been estimated that illegal sports wagering outside of Nevada is "upwards of $380 billion." U.S. Representative Jim McDermott introduced legislation that would allow for the taxation of licensed Internet gambling in the United States, which by his estimates could raise up to $42.8 billion over the first ten years.

In the absence of a legitimate moral argument against it, and with the huge tax potential, it seems unusual that the United States is apparently willing to withdraw from its obligations, or risk endangering another one of its industries, in order to protect its ban on internet gambling.

When the United States joined the WTO, there was much discussion about the effects that membership would have on U.S. sovereignty. Concerns were loud and clear that a world organization could in effect dictate to the United States what its trade law could entail. Many efforts were made to quiet these fears. United States Trade Representative Mickey Kantor stated to the Senate Committee on Commerce, Science, and Transportation that "no ruling by any dispute panel, under this new dispute settlement mechanism... can force us to change any federal, state or local law or regulation." Not the city council of Los Angeles, nor the Senate of the United States can be bound by these dispute settlement rulings. Kantor added that "[we] could be the subject of an adverse ruling... However, then we have a choice. We're not forced to change any law as a result. That's up to the Congress of the United States.

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126 Id. at 376–77.
128 Sports betting is legal in Nevada, but illegal in all other states. McGinty, supra note 24, at 205.
129 Id.
131 See supra notes 58–59 and accompanying text.
132 See supra notes 58–59 and accompanying text.
We’ve given up no sovereignty.” Kantor accurately stated that the United States has a choice of what to do following an adverse ruling. The DSB cannot force Congress to change U.S. law, but at the same time, it is charged with describing compliance measures, and the WTO is expected to facilitate compliance. 

Despite being powerless to force a law change, the WTO must nevertheless be able to authorize retaliatory measures significant enough to give Antigua a sufficient remedy if the United States elects to keep its law in place. Otherwise, the United States will maintain its current laws, and Antigua will have a mere favorable ruling without any justice.

It is important for Antigua to remember that it won the case and that it should have no reason to negotiate for anything less than its own terms. In the Bananas case, the EC announced its acceptance of the WTO verdict, but it “refused to disclose any details of its implementation plan [and] insisted on maintaining some trade preferences established in its banana regime.” The United States asserted that “it would settle for nothing less than full implementation of the WTO ruling and that compensation would not be acceptable,” declaring that “it would accept only a full dismantling of the EC banana regime.” Now, the United States has switched positions, and Antigua should emphasize U.S. hypocrisy as it attempts to secure an overhaul of U.S. online gambling law.

Antigua should join with the other interested members and aim for a change in U.S. law. Particularly for a country as small as Antigua, it would take an extremely large amount of money or other concessions to make a settlement worth losing this industry, which has already drastically declined in the last decade. While the United States has appeared to foreclose the possibility of changing its gambling laws, Congress has once before revised a law in

134 Review of the Uruguay Round GATT Implications for Agricultural Trade: Hearings Before the Comm. on Agriculture, 104th Cong. 64 (1994) (statement of Mike Espy, Secretary of Agriculture).
137 Id.
138 Id. at n.160 (quoting Timothy M. Reif & Marjorie Florestal, Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding, 32 INT’L L. 755, 777 (1998)).
response to a WTO case. In its dispute with the EU over the so-called foreign sales corporations, the United States eventually changed the U.S. tax code significantly, although “after years of congressional debate.” This type of legislative amendment would be ideal for Antigua, which could then legally offer its gambling services to the millions of U.S. consumers who currently gamble online illegally and to many more who might begin to gamble online if it were made legal. For the United States to change its law, and thereby overturn its moral objection, the arbitrator would have to authorize retaliation “large enough to provide . . . a counterweight to the ‘anti-offshore gambling lobby.’” Antigua seems to have found a heavy enough counterweight in Hollywood and the software industry. Surely these intellectual property industries will not allow Congress to give away their intellectual property rights because of a “moral” argument that is irrelevant in light of already widespread online gambling, certain exceptions won by lobbies, and the obvious presence of brick and mortar gambling throughout the country.

From the perspective of the WTO, the situation is delicate because it must show its teeth to the most powerful country in the world while taking a risk that the United States, the country most responsible for its existence, will turn against it. One Harvard Law School professor has pointed out that “this fledgling organization dominated by [this] huge monster in the United States . . . must be scared out of [its] wits at the prospects of enforcing a ruling that would instantly galvanize public opinion in the United States against [it].” Scared or not, the WTO clearly must seize this opportunity to manifest its authority. If it backs down, its credibility to the world will be undermined. It must continue what it started in the Bananas case: protecting developing countries . . . : protecting developing countries by strictly applying the GATS rules and authorizing appropriate counter measures from the misuse of power in world trade.

The WTO already deserves much credit for enforcing the terms of the GATS schedule despite the United States’ position that it never intended to include online gambling in its GATS obligations. The United States argued

140 Yerkey, supra note 114.
141 Id. (quoting Sallie James, trade policy analyst at the Cato Institute).
142 Rivlin, supra note 76.
143 Id.
that it had expressly excluded "sporting" from its GATS commitment schedules, a term which, according to the United States, ordinarily includes gambling in its English interpretation.\textsuperscript{144} Therefore, the United States believed that the DSB panel misinterpreted the term. However, the panel recognized, and the appellate body affirmed, that gambling was included in the commitment with respect to "other recreational services," which the United States included in its schedule.\textsuperscript{145} United States Trade Representative Veroneau called it "nonsensical" for countries to read the agreement as opening the gambling market in light of the long-standing domestic ban on interstate gambling.\textsuperscript{146} This view is certainly plausible, and indeed, the panel recognized that the inclusion of gambling may have been unintentional.\textsuperscript{147} It noted in its report, that it had "some sympathy with the United States' point in this regard."\textsuperscript{148} However, the panel admirably stood fast in its strict application of the law and ruled that "the scope of a specific commitment cannot depend upon what a Member intended or did not intend to do at the time of the negotiations."\textsuperscript{149} The WTO is seeing through its promise that it will indeed level the playing field so a country such as Antigua can stand on equal footing as the United States.

As noted above, under the current GATS rules, any country may withdraw or modify its commitments as long as it is willing to pay for it.\textsuperscript{150} Such rules favor a large nation like the United States in a dispute with a small nation such as Antigua, even where other large members become involved, as did the EU in this case. While Antigua brought the claim against the United States, the EU took the opportunity to grab trade advantages in other areas, while Antigua was unable to reach an agreement with the United States.\textsuperscript{151} While allowing

\begin{itemize}
\item \textsuperscript{146} Palmer, \textit{supra} note 41.
\item \textsuperscript{147} Panel Report, \textit{Measures Affecting Gambling and Betting Services}, ¶ 6.136, WT/D238/R.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} See \textit{supra} note 42 and accompanying text.
\item \textsuperscript{151} See Daniel Pruzin, \textit{U.S. Reaches Agreement With EU at WTO On Compensation for Internet Gambling}, INT'L TRADE DAILY, Dec. 18, 2007, at D1 (stating that the EU "reached a deal with the United States [for] improved access to the US market for European services
the United States to establish an arguably dangerous precedent, these rules may threaten the entire trade regime.

The settlement reached between the United States and the European Union on compensation for the U.S. withdrawal of its obligations has changed Antigua's expectations once again. Antigua and several European gambling companies had hoped that the EU would stand alongside them and fight on their behalf for a change in U.S. policy. Instead, the EU opted for increased access in the postal, warehousing, and research services. Although Antigua still has the power to prevent the U.S. withdrawal until it receives compensation, its bargaining power seems to be severely weakened because of the low arbitral award coupled with the EU's exit from negotiations. While the EU's departure from this case removes a substantial obstacle in the United States' quest to withdraw, negotiations are still taking place with India, Costa Rica, and Macao, any of which can oppose the U.S. withdrawal.

The United States' response to this case establishes a risky precedent. Rather than leave it to the countries to carry out their obligations in good faith, the WTO should use this case to examine the rules regarding commitment withdrawal, and it should make an effort to avoid such withdrawal as a result. In a statement to the House Committee on the Judiciary, former United States Trade Representative Director of Policy Planning Naotaka Matsukata warned of the policy implications of a withdrawal. He noted that China has continually complained of the burden that its accession commitments have placed on the country, and would welcome the opportunity to reduce its obligations. He also commented that Russia, currently in negotiations to enter into the WTO, would welcome a precedent which would allow it to make commitments knowing that it can later scale them back to its liking. As Mr. suppliers).

153 Pruizin, supra note 151.
154 See Lynn, supra note 152 (discussing the EU's exit and the low award).
155 See id. (pointing out that negotiations with these states continue and that withdrawal requires the United States to "offer comparable access in other sectors").
156 Gambling Enforcement Hearings, supra note 130, at 111 (statement of Naokata Matsukata, Senior Policy Advisor, Alston & Bird, LLP).
157 Id.; see also, id. at 4 (statement of Rep. Shelley Berkley) ("This is the trade equivalent of taking our ball and going home, and sets a dangerous precedent for other nations. You can be sure that if China one day decides that it shouldn't have to comply with its WTO obligations, we will be the first to object.").
Matsukata put it, "A global trading order doesn't fall all at once, but one rule at a time."

What the United States is essentially doing is buying the right to break international law. As Professor Joseph Weiler explained before the Judiciary Committee of the House of Representatives:

When a member fails to comply with a decision of the WTO Appellate Body and Dispute Settlement Body, it opens itself to trade sanctions by the winning country in the form of withdrawal of concessions. This has been interpreted by some to suggest that as long as the US was willing to submit itself to such sanctions, it was discharging its obligations under the WTO system. This is an utter misconception of the system. The withdrawal of concessions is meant to be a sanction and incentive for a recalcitrant Member to fulfill its obligation, not an indulgence you buy to expiate your wrong doing. To argue otherwise would be the equivalent of a rich man claiming that as long [as] he was willing to pay the fine, he was under no legal obligation to move the car he parked in front of a fire hydrant.

Professor Weiler further stated that the United States' commitments withdrawal “might be regarded and is regarded by many as a cynical manipulation of the system—you lose the game, so you try and change the rules. It also charts a way and creates a political precedent which might harm US interests when other countries emulate such behavior.” It appears that if the WTO allows the United States to withdraw its obligations in return for paying compensation, other members will surely follow, and these so called “obligations” will be rendered meaningless and easily avoidable by any member willing to pay. The question is made difficult because of sovereignty concerns that arise when a country wants to change its domestic laws. On the other hand, a system of world trade rules may not be worth having if there is no respect for obligations and commitments.

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158 Id. at 111 (statement of Naokata Matsukata, Senior Policy Advisor, Alston & Bird, LLP).
159 Id. at 31 (statement of Joseph H.H. Weiler, Professor & Director, Jean Monnet Center for International and Regional Economic Law & Justice, New York University School of Law).
160 Id.
VI. CONCLUSION

When Antigua won its case against the United States, it was a remarkable victory by the WTO's smallest member against one of its largest. Reluctant to even bring the case, Antigua finally did so with the help of the gambling industry because of the importance of internet gambling to its tiny economy. While other nations have joined the cause and are seeking compensation from the United States, these nations, such as the EU, have countless other industries and sectors with which they can negotiate. Antigua, on the other hand, is left with a $21 million annual award which is supposed to offset the loss of access by a key industry to one of the world's largest markets. The WTO found that by acting in a manner counter to international law, the United States has harmed Antigua. It was sympathetic to Antigua's unusual situation where normal retaliatory measures are inadequate, and it gave a rare award which allows Antigua to infringe on U.S. intellectual property to a specified dollar amount. The authorization is meant to induce the United States to alter its trade laws in order to bring them into compliance with the obligations they made upon entrance to the WTO trade regime. However, in May of 2007 the United States announced that instead of complying with the DSB decision it would simply modify its GATS schedule to withdraw the commitment that was the subject of Antigua's challenge. The move was deeply disappointing to Antigua and also constituted a dangerous precedent that many believe will be followed by other countries, disrupting the order of the trade regime.  

161 Blustein, supra note 23.
162 See id. (quoting Sir Ronald Sanders, then the Antiguan ambassador to the WTO, as saying, "Did we not have a duty to our citizens to protect their jobs?" in reference to Antigua's filing a complaint).
166 See Palmer, supra note 41 (describing U.S. plans to modify its WTO service commitments in response to the ruling).
167 See Gambling Enforcement Hearings, supra note 130, at 111 (statement of Naotaka Matsukata, Senior Policy Advisor, Alston & Bird, LLP) (positing that if the United States withdraws from the GATS obligations, the policy implications could be dire).
There is a movement in Congress to change the U.S. response to the DSB’s ruling. In a letter to United States Trade Representative Susan Schwab, eight House democrats, including Judiciary Committee Chairman John Conyers and Representative Barney Frank, expressed concern about the way the White House and U.S. Trade Representative were handling this case, saying that the administration’s actions without Congressional input constituted a “drastic step . . . which could have significant consequences for the entire WTO system.”

But the WTO should not rely on the internal politics of the United States to develop a plan for forcing compliance with its rulings. The WTO members should take steps to make it as difficult as possible for a member to withdraw from its obligations. It is in the best interest of the United States and other members to reserve withdrawal or modification of obligations only for the most necessary of circumstances. A member should not be allowed to withdraw simply because it desires or because it committed an oversight in drafting its commitments. After all, other countries may adjust their economies in view of such commitments, and corporations and investors will gear their economic activities based on other members’ commitments and promises of access.

The can of worms that could be opened following a United States withdrawal would lead to a loss of trust, credibility, and predictability in the world trade regime. Such a precedent may bring irreversible damage to the WTO. The United States Representative to the WTO stated after the United States won its famous dispute with the European Union regarding the exportation of meat hormones: “It [is] important for the integrity and viability of the dispute settlement mechanism that Members compl[y] with the DSB’s recommendations.” It now seems that this argument only applies when the United States is on the winning side.

Antigua’s case shows a basic flaw with the WTO dispute settlement system when used to resolve a dispute between countries of such unequal size and power. The authorization to suspend intellectual property rights was for the

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171 Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/43 (Apr. 8, 1998).
amount of $21 million annually.\textsuperscript{172} This amount is not nearly significant enough to induce the United States to change its policies if the government feels strongly about keeping them. It can simply use this as a starting point to negotiate with Antigua for some other settlement, while Antigua continues to suffer from restricted access for its gambling industry. Nor did the other members who joined in the negotiations after the United States decided to withdraw its obligations seem to help Antigua. In fact, the European Union negotiated an agreement regarding postal, warehousing, and research services.\textsuperscript{173} The EU and European companies in those industries essentially won a free settlement out of the Antiguan case, while the Antiguan government and the affected gambling industries received nothing. The problem is that the arbitrator awarded the amount that it deemed appropriate given the losses to the Antiguan industry, but this amount is too low to give any negotiating power to such a small and relatively powerless complaining country. With negotiations anchored to such a low amount, the United States will likely be able to buy its way out of compliance and will thus be able to withdraw or modify its obligations.

Thus, it seems the best way to counter this problem is, in addition to authorizing cross-sector retaliation against U.S. intellectual property rights, the WTO should rework the withdrawal rules to address the concerns springing out of the United States’ action in this case. Only when a country is bound to trade rules that it voluntarily consented to can retaliation have any effect. This would give Antigua’s award real effect because the United States would only be able to stop the retaliation by bringing its laws into conformity with the WTO decision. For any particular amount that the DSB authorizes, the inequalities discussed above can best be leveled by authorizing cross-sector retaliation, although it is unclear if and how Antigua will use this award. It may not be worthwhile for Antigua to invest in production for products using U.S. intellectual property, and the award may be worthless. On the other hand, if Antigua finds an ally in lobbyists from the intellectual property industries in the United States, which can convince the U.S. government that a change in the gambling laws will be the least painful response to the case, then this may be a very powerful and valuable asset. Then, the gap in negotiating power may indeed be narrowed, and the DSB will be the guarantee of fair trade that it was supposed to be.

\textsuperscript{172} Decision by the Arbitrator, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶¶ 3.189, 3.189, WT/DS285/ARB (Dec. 31, 2007).
\textsuperscript{173} Pruzin, supra note 151.