INTERNET GAMING TRADE COMMITMENTS: THE EXAGGERATED FEARS OF U.S. VULNERABILITY UNDER MULTIPLE TRADE AGREEMENTS

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I. INTRODUCTION

Imagine you are a governor, congressman, or even a concerned citizen of one of the fifty states in the United States of America, maybe even from the state of Hawaii or Utah where all forms of gambling are illegal.[1] Since gambling in the United States has historically been regulated by the individual states,[2] you feel secure in your state's moral and legal choice remaining intact. Subsequently, the federal government enters into a free trade agreement with a group of other nations and, intentionally or not, makes commitments to those nations granting open access in the area of gambling and gambling services. Because the Supremacy Clause of the U.S. Constitution dictates that treaties trump inconsistent state law,[3] your once gambling free state is infiltrated by foreign Internet gambling firms, such as the one Jay Cohen established as described below.

In 1996, Jay Cohen and some friends moved to Antigua to start an online casino, World Sports Exchange (WSE).[4] Although completely and legally operated within Antigua, "WSE's sole business involved bookmaking on American sports events."[5] Customers in the United States were targeted with direct advertisements by radio, newspaper and television and would then place bets with WSE using either the telephone or the Internet.[6] The amount of winning wagers would be credited to the customer's account and the amount of losing wagers would be subtracted along with a ten percent commission or

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1. Frank Vandall, *Why We Are Outraged: An Economic Analysis of Internet Gambling*, 7 RICH. J. GLOBAL L. & BUS. 291 (2008).
2. Beau Thompson, *Internet Gambling*, 2 N.C.J.L. & TECH. 81, 90 (2001).
3. U.S. CONST. art. VI, cl. 2 (stating "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").
4. United States v. Cohen, 260 F.3d 68, 70 (2d Cir. 2001).
5. *Id*.
6. *Id*.

"vig."[7] Cohen's business prospered along with Antigua's Internet gaming industry as a whole.[8] In fact, after tourism, the Internet gaming industry became Antigua's second largest employer.[9]

Unfortunately for Cohen, concerns of the U.S. Congress and others about the link between Internet gaming and underage gambling, compulsive gambling, and money laundering prompted the United States Department of Justice to take action against providers of Internet gambling services doing business with U.S. citizens.[10] In March of 1998, federal prosecutors brought charges against Cohen under the federal Wire Act.[11] After voluntarily returning to the United States to clear his name, Cohen was arrested, prosecuted and convicted.[12] Subsequently sentenced to twenty-one months,[13] Cohen, while in a Nevada prison, learned that the United States' restrictions on Internet gambling might violate international trade agreements.[14]

Cohen, as a private person, cannot bring a claim under the World Trade Organization's (WTO) dispute settlement system. However, Antigua, in an effort to protect its workers, brought a claim under the WTO against the United States with respect to the Internet gambling dispute.[15] As discussed in more detail in section III, Antigua claimed that various state and federal laws of the United States were inconsistent with U.S. trade commitments regarding gambling services.[16] The WTO Appellate Body dismissed the claims against the state laws for procedural reasons.[17] Although the Appellate Body determined the federal laws to be inconsistent, all but the Horse Racing Act were found to be enacted to protect public morals and were therefore exempt from dismissal.[18]

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7. *Id*. ("vig" or "vigorish" is the commission taken by the house when a bet is made. Usually, it is ten percent and only paid on losing wagers).
8. Paul Blustein, *Against All Odds: Antigua Besting U.S. in Internet Gambling Case at WTO*, WASH. POST, Aug. 4, 2006, at D1.
9. *Id*.
10. *Id*.
11. 18 U.S.C. § 1084(a) (1994) (the Wire Act criminalizes the use of "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 . . . .").
12. *Id*.
13. *Cohen*, 260 F.3d at 71.
14. Blustein, *supra* note 8, at D1.
15. Panel Report, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).
16. Appellate Body Report, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1, WT/DS285/AB/R (Apr. 7, 2005).
17. *Id*. at ¶ 149.
18. *Id*. at ¶ 373(D)(vi)(a) (The Horse Racing Act does not fit within the public morals exception because the United States condones off track betting on horses as evidenced by the many Off Track Betting parlors throughout the United States).

The WTO's Appellate Body determinations in this Internet gaming dispute have several U.S. leaders and interest groups worried that, under a regional trade agreement such as the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR),[19] U.S. state and federal gaming laws can be successfully challenged.[20] Gambling in the United States is mostly regulated by state governments because it is considered part of the police power granted by the Tenth Amendment to the Constitution.[21] For morality reasons, states[22] such as Utah and Hawaii have completely banned all forms of gambling. These and other states fear challenges of their laws through free trade agreements will result in a threat to state regulation of gambling and billions of dollars in trade concessions.[23] This is because an international dispute settlement body, in finding a State's domestic laws are inconsistent with that country's trade agreement commitments, can compel that country to change those laws by allowing the injured State to suspend equivalent commitments.[24] These current fears are substantially based on an important distinction between the WTO and CAFTA-DR. Unlike the WTO Agreements, Chapter 10 of CAFTA-DR allows private investors to bring a claim against a State, and any inconsistencies between domestic laws and trade commitments under Chapter 10 are not subject to a public morals exception.[25]

Since 1994, international trade has largely been governed by the WTO as well as other regional trade agreements. Multilateral trade agreements usually contain a dispute settlement system where binding resolutions to conflicts are given.[26] Although members of the WTO are countries, most

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19. Central American-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, 119 Stat. 462, *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/Section_Index.html (last visited Jan. 5, 2009) [hereinafter CAFTA-DR].
20. *See, e.g.*, Statement by Senator Orrin Hatch: Free Trade Must Maintain State Sovereignty, June 30, 2005 ("I am aware that many in Utah are concerned that CAFTA could usurp our State's right to regulate gambling. That is a concern I shared as well.") (on file with author); DesertNews.com, Internet Gambling Thrives in Costa Rica, ("The online casinos that prompted the dispute between the United States and . . . Antigua in the WTO case could be trying to sneak in through Costa Rica.") *available at* http://www.therx.com/blog_internet-gambling-thrives-in-costa-rica.php (last visited Jan. 5, 2009).
21. U.S. CONST. amend. X.
22. This comment uses "state(s)" to refer to individual states within a federal government and "State(s)" to refer to nations.
23. Public Citizen, Damage Report to Track Results of Misguided CAFTA Votes, (Sept. 16, 2005) (CAFTA gives foreign firms a new right to "provide gambling services within the United States.") *available at* http://www.citizen.org/pressroom/release.cfm?ID=2050 (last visited Jan. 5, 2009).
24. WORLD TRADE ORG., A HANDBOOK ON THE GATS AGREEMENT 2 (2005) [hereinafter GATS HANDBOOK].
25. CAFTA-DR, *supra* note 19, ch. 10.
26. *Id*.

international trade is conducted by private parties.[27] As Cohen's situation exemplifies, "these market participants need stability and predictability in the governing laws, rules and regulations applying to their commercial activity."[28] This comment seeks to dispel the fears of a threat to state sovereignty by distinguishing the dispute settlement processes of the WTO and CAFTA-DR in terms of remedies available to private market participants. This analysis will show that, at least with respect to Internet gaming, a market participant offering services internationally from one country, Antigua, would not have a significantly different remedy than a market participant from another country, like Costa Rica,[29] under a separate trade agreement. Because an enterprise like Jay Cohen's WSE would still not have a remedy under CAFTA-DR, the fears that regional trade agreements threaten the U.S. in terms of federalism and trade concessions are greatly exaggerated.

Section II introduces the reader to the WTO and the General Agreement on Trade in Services (GATS), Member obligations under the doctrines of Market Access and National Treatment, and the "public morals exception" to these doctrines. This background is followed by a detailed summary of the WTO dispute settlement process and the dispute between Antigua and the United States concerning Internet gambling. Section III details the Antigua-U.S. dispute concerning the cross-border supply of gambling and gambling services. Next, in Section IV, the State-to-State and the Investor-to-State dispute settlement processes of CAFTA-DR are introduced. Section V contains an analysis by comparison of claims brought under the WTO and CAFTA-DR demonstrating a relatively same outcome for a similarly situated Internet casino based out of Costa Rica as compared to Antigua. Finally, Section VI concludes that even though there is an Investor-to-State dispute mechanism under CAFTA-DR, an investor in Jay Cohen's position would most likely not have standing to bring the claim. Therefore, the individual states in the U.S. should not be overly concerned about losing their authority to regulate gaming within their borders.

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27. WORLD TRADE ORG., A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 2 (2004) [hereinafter WTO HANDBOOK].

28. *Id*.

29. Costa Rica has been hypothetically chosen because it has a substantial Internet gaming industry, is a WTO member, and while it has not yet ratified CAFTA-DR at the time of this writing, trade experts predict it will soon. This analysis, however, would apply to any CAFTA-DR member.

II. THE WORLD TRADE ORGANIZATION AND THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

This section provides a brief history of the WTO including its basic scope, functions and structure. Because Internet gaming is a service and thus governed by GATS, one of the WTO agreements, the organization of GATS and its general doctrines are given. This is followed by an outline of the GATS dispute settlement mechanism.

A. History of the WTO

The idea of a multinational trade agreement creating an international organization to facilitate international trade has been around at least since 1944.[30] During the trade negotiations of 1947 in Geneva, Switzerland, the countries met with the purpose of establishing the International Trade Organization (ITO), preparing schedules of tariff reductions and a multilateral treaty containing general principles of trade.[31] Although the ITO charter was never established, mainly due to the United States' failure to adopt it, the work on the treaty, the General Agreement on Tariffs and Trade (GATT), was completed and provisionally adopted on January 1, 1948, so it could immediately take effect while the ITO charter was negotiated.[32] However, without support of the ITO as an international organization, GATT's evolvement into its own international organization contained many weaknesses including "ambiguity and confusion about the GATT's authority, decision-making ability and legal status."[33]

GATT negotiations, as well as WTO negotiations, take place in "rounds" and from 1947 to 1994 the GATT framework provided the basis for eight rounds of multilateral trade negotiations.[34] The first rounds sought to reduce tariffs while the last round, the Uruguay Round, sought to reduce non-tariff barriers. The Uruguay Round, so named because it took place in Punta Del Este, Uruguay, extended from 1986 until 1994 and created the first texts of the WTO agreements.[35] The Final Act of the the Uruguay Round "transformed the GATT into a new, fully fledged international organization called the

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30. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 1 (2003).
31. *Id*. at 2.
32. *Id*.
33. *Id*. at 3.
34. *Id*. at 5–6.
35. *Id*. at 6.

World Trade Organization."[36] The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) was signed in Marrakesh, Morocco, on April 15, 1994, and entered into force on January 1, 1995.[37]

B. Scope, Functions, and Structure of the WTO

The WTO Agreement was a "package deal," annexing multiple trade agreements to the document. Acting as an umbrella agreement, all signatories to the WTO Agreement are bound by all annexed agreements[38] except the Plurilateral Trade Agreements which are binding for only those Members that have accepted them.[39] Annex 1, which is binding on all signatories, includes, among other agreements, the new GATT, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and more relevant to this comment, the General Agreement on Trade in Services (GATS).[40]

The five functions of the WTO are set out in Article III of the WTO Agreement.[41] First, the WTO "shall facilitate the implementation, administration and operation, and further the objectives" of the WTO agreements.[42] Second, the WTO is to "provide the forum for negotiations among its members as to the current agreements and any future negotiations."[43] Third, the WTO shall administer the Dispute Settlement Understanding.[44] The fourth function of the WTO is to administer the Trade Policy Review Mechanism.[45] Finally, the WTO is to cooperate with the International Monetary Fund and the World Bank.[46]

The stucture of the WTO is provided in Article IV of the WTO Agreement.[47] The Ministerial Conference and the General Council comprise the two governing bodies of the WTO.[48] While the Ministerial Conference carries out the functions of the WTO, the General Council, composed of

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36. *Id*.
37. *Id*.
38. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Results of the Uruguay Round of the Multilateral Trade Negotiations–The Legal Texts 21 (1994), 33 I.L.M. 1125, 1144 [hereinafter WTO Agreement].
39. *Id*. art. II.3.
40. General Agreement on Trade in Services, Apr. 15, 1994, Marrekesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].
41. WTO Agreement, *supra* note 38, art. III.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*. art. IV.
48. *Id*.

representatives of all the Members, discharges the responsibilities of the Dispute Settlement Body.[49]

C. General Agreement on Trades in Services (GATS)

Until the inception of the General Agreement on Trades in Services (GATS), there has never been a multilateral trade agreement to cover trade in services.[50] As stated above, GATS is annexed to the WTO Agreement and binding on all signatories. Historically, service industries were mainly limited to domestic activities except for international finance and maritime transport.[51] However, deregulation and other loosening of governmental constraints on service industries such as rail transport, telecommunications, education, and insurance, increased the necessity for a trade agreement on services.[52] Likewise, the growth of the Internet has opened traditional domestic services to the international market which is particularly useful to suppliers and users in remote locations.[53]

The interests of suppliers and users in remote locations as well as developing countries are an important consideration of GATS.[54] As stated in its preamble, a basic purpose of the agreement is to promote "the economic growth of all trading partners and the development of developing countries."[55] The preamble further states the desire to "facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports . . . ."[56]

The scope of GATS is provided in Art. I which states that the "agreement applies to measures by Members affecting trade in services."[57] Trade in services is defined by the territorial relationship of the supplier and the consumer and applies in four different scenarios.[58] The scenario relevant to Jay Cohen is cross-border supply.[59] Cross-border supply relates to a service supplied "from the territory of one Member into the territory on any other

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49. *Id*.
50. GATS HANDBOOK, *supra* note 24, at 2.
51. *Id*. at 2.
52. *Id*.
53. *Id*.
54. General Agreement on Trades in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B,, 1869 U.N.T.S. 183 (1994) [hereinafter GATS].
55. *Id*.
56. *Id*.
57. *Id*. art. I.1.
58. *Id*. art. I.2.
59. Panel Report, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

Member."[60] Another covered scenario under GATS is commercial presence, which relates to services supplied "by a service supplier of one Member, through commercial presence, in the territory of any other member."[61] GATS also applies to consumption abroad, such as when a person travels to another country and consumes services,[62] and to movement of natural persons, where a supplier travels to another country as a service supplier.[63]

GATS works by having each Member set out a schedule of specific commitments it decides to undertake.[64] This schedule must specify such things as terms, limitations and conditions on market access, conditions and qualifications on national treatment,[65] and the date of entry into force.[66] The doctrine of market access provides that each Member must treat all other services and service suppliers of Members no less favorably than as provided in its schedule.[67] The principle of national treatment obligates Members to treat all other services and service suppliers of other Members no less favorably than it treats its own like services and service suppliers with respect to the sectors within its schedule.[68]

It is important to note that Members may limit the principles of market access and national treatment to account for any inconsistent measures they wish to employ.[69] These limitations or restrictions may include discriminatory subsidies, tax measures, and residency requirements.[70] If a Member takes a restrictive approach, it must be provided for in its schedule of commitments.[71] Members are also allowed general exceptions as outlined in Article XIV of GATS which allows, *inter alia*, a Member to adopt or enforce measures "necessary to protect public morals or to maintain public order."[72] Therefore, a Member may make laws or other restrictions that are inconsistent with its schedule if this public morals exception applies. However, "the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[73]

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60. GATS, *supra* note 54, art. I.2(a).
61. *Id*. art. I.2.(c).
62. *Id*. art. I.2.(b).
63. *Id*. art. I.2.(d).
64. *Id*. art. XX.1.
65. *Id*. art. XVI.1 (The doctrine of national treatment is described in more detail in section II(C) of this comment).
66. *Id*. art. XX.1.(e).
67. *Id*. art. XVI.1.
68. *Id*. art. XVII.1.
69. *Id*. art. XVI, XVII.
70. GATS HANDBOOK, *supra* note 24, at 9.
71. GATS, *supra* note 54, art. XVI, XVII.
72. *Id*. art. XIV.
73. GATS HANDBOOK, *supra* note 24, at 70 n.5.

A Member may withdraw a commitment in its schedule after three years have passed since it entered into force.[74] Notice of withdrawal must be given to the Council for Trade in Services.[75] A withdrawal of a commitment will usually affect other Members who may request negotiations with the withdrawing member to reach an agreement and any necessary compensatory adjustment.[76] Compensatory adjustments usually take the form of additional commitments in other service sectors.

Inevitably, there will be disagreements between the Parties. Article XXIII of GATS provides that "if any member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the Dispute Settlement Understanding."[77] The Dispute Settlement Mechanism is outlined in the following section.

D. Dispute Settlement Procedures under the WTO.

"The best international agreement is not worth very much if its obligations cannot be enforced when one of the signatories fails to comply with such obligations."[78] An important limitation on the WTO Dispute Settlement System is that only Member States may bring a claim.[79] Although private market participants may be adversely affected by violations of the WTO Agreement, they do not have direct access to the dispute settlement process.[80] Private individuals and companies are limited to pressuring their respective government to bring a claim on their behalf.[81] The rules and procedures governing the settlement of disputes are set out in Annex 2 of the WTO Agreement.[82] The dispute settlement process can be broken down into five steps:

Step One: Consultations: When a Member determines that another Member has breached its obligations or has otherwise impaired benefits under the GATS, the first step is to request

74. GATS, *supra* note 54, art. XXI.1.(a).
75. *Id*.
76. *Id*. art. XXI.2.(a).
77. *Id*. art. XXIII.
78. WTO HANDBOOK, *supra* note 27, at 1.
79. *Id*. at 9.
80. *Id*.
81. *Id*.
82. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

consultations with the breaching Member in an effort to negotiate a solution.[83]

Step Two: Panel Report: If the consultations fail to resolve the dispute, the complaining Member may request the establishment of a Panel to examine the complaint. The Panel is composed of three independent experts who, after considering the Members' arguments, issue a report with binding recommendations to be adopted by the Dispute Settlement Board (DSB).[84]

Step Three: Appeal: Either party to the dispute may appeal the findings of the Panel. The Appellate Board will make any necessary changes and then submit their report to the DSB for adoption. The DSB will adopt the Appellate Boards findings unless there is a consensus not to adopt. No further appeal is permitted.[85]

Step Four: Time to Comply: The breaching Member is given a particular time frame in which to comply with the adopted recommendations.[86]

Step Five: Failure to Comply: If the breaching Member does not comply within the time given, the parties must try to negotiate just compensation. If no agreement is reached on compensation the complaining Member may request retaliation from the DSB. Retaliation, though not preferred to compliance, is the suspension of equivalent commitments with respect to the breaching Member.[87]

The last step deals with remedies for noncompliance. The compensation, which is voluntary, as well as suspension of concessions, are intended to be temporary measures taken while the violating member takes steps to bring its obligations into full compliance with the panel's recommendation.[88] For example, if Country *X* has passed a law contrary to a particular commitment in its Schedule to the detriment of Country *Y* and negotiations between the two countries have failed to resolve the dispute, the DSB may allow Country *Y* to

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83. *Id*. art. 4.
84. *Id*. art. 12.
85. *Id*. art. 17.
86. *Id*. art. 21.
87. *Id*. art. 22.
88. *Id*. art. 22.1.

suspend an equivalent commitment until Country *X* brings that particular law into compliance with its Schedule.

Where the two countries engage in a large amount of trade with one another, the suspension of commitments can have significant economic impact and provide real incentives for compliance. By contrast, the suspension of commitments of a smaller developing country is not as significant to the larger country. This is because the smaller, developing country's market is usually a very small portion of the larger country's total market. Conversely, the larger country represents a large portion of the smaller country's market.

The combination of the WTO's goal to encourage growth of developing countries with the fact that the WTO has annexed multiple trade agreements allows the DSB to prescribe the suspension of concessions under more than one annexed agreement.[89] Although full compliance of obligations is the favored result[90] and would benefit the private market participant by reopening the service sector, suspension of commitments or a renegotiation to increase obligations in other service sectors would leave private individuals and companies without a remedy. For example, if a foreign company provided a particular service to citizens of the United States, and the United States decides, through a new law, that service cannot be provided by foreign companies, granting additional concessions in a different sector will not remedy the companies in the original services sector or investors in those companies but might balance trade between the nations as a whole.

Finally, as noted above, the WTO Agreement obligates its members to participate in ongoing negotiations concerning trade in general.[91] These ongoing negotiations can serve as an incentive to follow DSB decisions.[92] If a Member fails or refuses to follow the DSB, other Members will be less inclined to deal with that Member in the future negotiations.[93]

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89. *Id*. art. 22 (For example, suppose Party *Y* is a developing country and is allowed to suspend an equivalent services commitment to Party *X*. Party *Y* services to Party *X* do not amount to the detriment of Party *Y*'s inconsistency. Because other trade agreements are annexed to the WTO, such as GATT (which deals with goods) and TRIPS (which deals with trademark protections), the DSB allows Party Y to suspend commitments under these other agreements to be equitable).

90. WTO HANDBOOK, *supra* note 27, at 1.

91. GATS, *supra* note 54, art. XIX.

92. Claire Hervey, *The Byrd Amendment Battle: American Trade Politics at the WTO*, 27 Hastings Int'l & Comp. L. Rev. 131, 133 (Fall 2003).

93. *Id*.

III. RECENT DEVELOPMENTS

Since 1981, Antigua has been an independent state within the British Commonwealth of Nations,[94] and joined the WTO on January 1, 1995.[95] Antigua is a Caribbean nation with a significant stake in Internet gaming, being home to 27% of the world's Internet gambling sites.[96]

In March of 2003, Antigua requested consultations with the United States to discuss U.S. laws, both federal and state, that "affected the cross-border supply of gambling and betting services."[97] These consultations were held on April 30, 2003, but did not resolve the dispute. Antigua then requested the Dispute Settlement Board (DSB) to establish a Panel to address its concerns that the U.S. laws prohibiting the cross-border supply of gambling and betting services and criminalizing international money transfers and payments relating to gambling and betting services were inconsistent with the United States' Schedule of specific commitments under the GATS.[98]

On November 10, 2004, the Panel issued its Report and concluded, among other things, that: 1) the United States' Schedule under the GATS includes specific commitments on gambling and betting services; and 2) certain Federal laws, the Wire Act,[99] the Travel Act (when read together with the relevant state laws),[100] and the Illegal Gambling Business Act (when read together with the relevant state laws),[101] are contrary to the United States' specific market access commitments for gambling and betting services for cross-border trade.[102] Because of these inconsistencies, the Panel

94. Central Intelligence Agency (CIA), World Factbook *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ac.html (last visited Jan. 5, 2009).
95. World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 5, 2009).
96. Forum on Democracy & Trade, Gambling (May 10, 2006) http://www.forumdemocracy.net/trade_topics/gambling/wto_gambling1.html (last visited Jan. 5, 2009).
97. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1.1, WT/DS285/R (Nov. 10, 2004). (Consultations were held pursuant to Art. 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII of the General Agreement on Trade in Services (GATS)).
98. *Id*. at ¶ 1.2.
99. 18 U.S.C. § 1084 (2006).
100. *Id*. § 1952.
101. *Id*. § 1955.
102. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* ¶ 7.2, WT/DS285/R (Nov. 10, 2004).

recommended that the DSB request the United States to bring the relevant laws "into conformity with its obligations under the GATS."[103]

The United States filed notice of appeal on January 7, 2005, contesting certain issues of law and legal interpretations by the Panel.[104] The Appellate Body, in its April 7, 2005 Report, reversed and/or modified several panel findings.[105] Most notably, the Appellate Body found that: 1) the United States' Schedule includes a commitment to grant full market access in gambling and betting services; 2) Antigua did not establish a prima facie case of inconsistency with GATS regarding the contested state laws of the United States and therefore the Panel should not have ruled on these claims; and 3) although Antigua did establish a prima facie case that the Wire Act, the Travel Act, and the Illegal Gambling Business Act were inconsistent with GATS, these federal laws are justified under Article XIV(a) of the GATS as measures "necessary to protect the public morals or to maintain public order" contrary to the Panel's finding that they were not.[106]

Before the DSB made their findings, U.S. trade officials publicly announced that if the DSB in fact determined that the United States made commitments with respect to gambling and gambling services the United States would withdraw those commitments from its Schedule.[107] As a result of the DSB's findings, the United States must now negotiate with all affected members to compensate for the withdrawal. Currently, the United States has reached deals with the European Community, China, and France but still not with Antigua.[108] While Antigua seems to have won the dispute, the U.S. withdrawal of commitments concerning gambling and gambling services leaves owners of Internet gambling companies, like Jay Cohen, without any remedy under the WTO because their service market in the U.S. remains inaccessible.

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103. *Id*. at ¶ 7.5.

104. Appellate Body Report, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 7, WT/DS285/AB/R (Apr. 7, 2005).

105. *Id*. at ¶ 148, 149, and 213.

106. *Id*.

107. Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI (May 4, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_of_Deputy_ United _States _Trade_Representative_John_K_Veroneau_Regarding_US_ Actions_ under_GATS_Article_XXI.html.

108. Statement by USTR Spokeswoman Gretchen Hamel on Gambling (Dec. 17, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/December/Statement_by_USTR_Spokeswoman_Gretchen_Hamel_on_Gambling.html.

IV. INTRODUCTION TO CAFTA-DR

While most political leaders and multilaterists agree that "the global economy will be best served through a WTO-sponsored framework of trade treaties,"[109] which are multilateral in nature, free trade agreements (FTAs) on a bilateral or regional level offer many benefits.[110] The benefits of FTAs include less complex negotiations[111] and more control in securing a desired outcome through the negotiations.[112] Furthermore, there are some issues national governments are not willing to discuss in a multilateral trade environment but are more willing to negotiate these issues bilaterally or regionally.[113] Bilateral and regional FTAs are entered into every year and account for "nearly 40 percent of total global trade."[114]

According to the Office of the United States Trade Representative, the United States is a party to 21 bilateral and regional FTAs, including NAFTA and CAFTA-DR.[115] CAFTA-DR extends free trade to Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic,[116] and was signed by President Bush on August 5, 2004.[117] By entering CAFTA-DR, the U.S hopes to strengthen economic and political ties with the other signatories, promote security and stability in the region, as well as promote freedom, democracy and economic reform.[118]

The relevant chapters of CAFTA-DR are discussed next. When there is a trade dispute under CAFTA-DR, there are two ways to challenge the inconsistency: 1) State-to-State under Chapter11 which incorporates Chapter

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109. Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. INT'L ECON. L. 487, 488 (2006).
110. *Id*. at 498.
111. *See id*. (particular WTO negotiations have had 148 different negotiating parties who each send multiple official negotiators contrasted to bilateral or regional FTAs which only have two or few negotiating parties).
112. *Id*.
113. *Id*. at 500 (stating that government procurement is one such issue).
114. *Id*. at 488.
115. Office of the United States Trade Representative, *available at* http://www.ustr.gov/Trade_Agreements/Regional/Section_Index.html (last visited Jan. 5, 2009).
116. USTR, Summary of the Dominican Republic-Central America-United States Free Trade Agreement, at 12, *available at* http:// www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Transmittal/ asset_upload_ file888_7818.pdf (last visited Jan. 5, 2008) [hereinafter USTR Summary].
117. USTR, Final Text of the Dominican Republic-Central America-United States Free Trade Agreement *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/ Section_Index.html (last visited Jan. 5, 2009) [hereinafter USTR Final Text].
118. David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement,* 30 B.C. INT'L & COMP. L. REV. 331, 337 (2007).

20's dispute resolution mechanism, and 2) Investor-to-State under Chapter 10. In section A below, Chapters 11 and 20 are first introduced, demonstrating their similarities to GATS with an emphasis on similar consequences. Then, in section B, Chapter 10 is explained highlighting the CAFTA-DR Investor-to-State dispute mechanism which allows a private citizen standing to bring a claim, which is not found in the GATS.

A. CAFTA-DR Chapters 11 and 20–Cross Border Trade in Services and Dispute Resolution

Chapter 11 of CAFTA-DR governs "measures adopted or maintained by a Party affecting cross-border trade in services by service suppliers of another party."[119] Additionally, this chapter applies across virtually all services sectors except financial services and air transportation.[120] The provisions of this chapter are mainly based on the services provisions of NAFTA and GATS.[121] Like GATS, cross-border trade in services covers supply of a service: 1) from the territory of one Party into the territory of another Party,[122] 2) in the territory of a Party by a person of that Party to a person of another Party, and 3) by a national of a Party in the territory of another Party.[123] Also like GATS, as discussed above, the principles of market access and national treatment apply and Parties may account for non-conforming measures to these principles or remove particular sectors in the appropriate annexes.[124] GATS Article XIV, which includes the public morals exception, is incorporated into Chapter 11.[125]

When there is a dispute over compliance with Chapter 11 obligations, Chapter 20 sets out the procedures for dispute settlement.[126] If both disputing Parties are also Parties to the WTO, the complaining party may select the forum, either CAFTA-DR or the WTO, in which to settle the dispute.[127] The CAFTA-DR dispute settlement process with respect to cross-border trade in services can be broken down into five steps:

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119. CAFTA-DR, *supra* note 19, art. 11.1.
120. *Id*.
121. USTR Summary, *supra* note 116, at 13.
122. CAFTA-DR, *supra* note 19, art. 11.14 (this is the mode of supply relevant to Jay Cohen).
123. *Id*.
124. *Id*. art. 11.6 (in the case of GATS, removal of particular service sectors would be set out in a Member's schedule of commitments.).
125. *Id*. art. 21.1 (GATS Article XIV also applies to CAFTA-DR Chapters 13 and 14).
126. *Id*. ch. 20.
127. *Id*. art. 20.3.

Step One: Consultations. Any Party may request in writing consultations with any other Party regarding any matter which it considers to be inconsistent with the Agreement.[128] This step must last a minimum of 60 days.[129]

Step Two: Free Trade Commission (FTC). If the Parties cannot resolve the matter through consultations, any consulting Party may refer the matter to the FTC to help resolve the dispute.[130]

Step Three: Panel Procedures. If after 30 days the FTC has not resolved the matter, any consulting Party may refer the matter to a panel comprising independent experts that the Parties select. After issuing its final report, the Parties shall meet to conform to the panel's finding and determinations.[131]

Step Four: Non-Implementation. If a Party fails to conform to the panel's determinations, the complaining party may suspend benefits of equal effect although notice must be provided and the level of suspended benefits may be reviewed and tempered by the panel at the request of the Party complained against.[132]

Step Five: Compliance Review Mechanism. If the Party complained against believes it has removed the inconsistencies, that Party may refer the matter to the panel at any time. If the panel agrees, the dispute ends and any suspension of benefits must be withdrawn.[133]

B. CAFTA-DR Chapter 10–Investment

Chapter 10 of CAFTA-DR establishes rules to protect investors of a Party against unfair or discriminatory government actions when a party makes or attempts to make investments in another Party's territory. "Investor[s] of a Party" is defined to include a national of a Party or a firm, including its branches, established in the territory of one of the Parties.[134] "Investment" is

128. *Id*. art. 20.4.
129. *Id*. art. 20.5.
130. *Id*. art. 20.5.
131. *Id*. art. 20.6 - .15.
132. *Id*. art. 20.16.
133. *Id*. art 20.18.
134. *Id*. art. 10.28.

defined as "every asset that an investor owns or controls, directly or indirectly, that has the characteristic of an investment, including such characteristics as the commitment of capital or other resources, the expectation of profit, or the assumption of risk."[135]

As with GATS, investors of a Party are protected by the doctrines of market access and national treatment.[136] However, unlike GATS, if a dispute arises between an investor of a Party and a State that cannot be settled by consultation and negotiation, Section B of CAFTA-DR's Chapter 10 allows the claimant (the private investor), on its own behalf, to submit the claim to arbitration.[137] Furthermore, unlike GATS, the protections reserved to investors of a Party under CAFTA-DR are not subject to the public morals exception.

To take advantage of these investor protections, the investor of a Party must have standing to bring a claim. To have standing, the investor of a Party must have direct investment into the territory of the other Party.[138] Also, the investor must be an investor of another Party which means, for example, that a U.S. citizen operating an enterprise in another CAFTA-DR nation cannot bring an investor claim against the United States.[139] Although the investor protections extend to those attempting to invest in another Party, Chapter 10 "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [the] Agreement."[140]

V. COMPARISON OF CLAIMS UNDER THE WTO AND CAFTA-DR

Fears of billion dollar concessions by the U.S. and threats to U.S. state sovereignty are greatly exaggerated as a result of Jay Cohen and Antigua's WTO claim against the United States. While it is true that CAFTA-DR offers two dispute settlement mechanisms, the State-to-State mechanism and the Investor-to-State mechanism, a Costa Rican in Jay Cohen's position would either not be entitled to a different remedy as that provided by GATS or he would not be entitled to any remedy at all under the Chapter 10 investment dispute mechanism due to lack of standing.

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135. *Id*.
136. These doctrines are discussed above in section II(C).
137. CAFTA-DR, *supra* note 19, art. 10.15 and 10.16.
138. *Id*. art. 10.28 (defining investor of a Party).
139. *Id*. art. 10.1.
140. *Id*. art. 10.1.3.

A. CAFTA-DR Chapter 11–Cross-Border Trade in Services

Unlike Chapter 10, a private market participant in Costa Rica could not bring a claim on his own behalf under Chapter 11. Like GATS, the private party must convince his country to bring a claim on his behalf or convince his country that bringing a claim would be necessary to protect its national interests. This is the process Antigua followed in the Antigua-U.S. WTO dispute. Like Antigua, Costa Rica has a large Internet gaming industry and, for reasons of protecting those employed, might be persuaded to risk the cost of bringing a claim. For reasons discussed next, the remedy for the private market participant would most likely be the same as what happened to Jay Cohen under the WTO dispute settlement mechanism.

Chapter 11 of CAFTA-DR incorporates the public morals exception of GATS.[141] This means that the panel under CAFTA-DR would most likely find that, with the exception of horse racing, Internet gambling is barred in the United States to protect the public from gambling addiction, organized crime, and money laundering. Therefore, even if gambling is not excluded in an annex, there will not be an inconsistency in U.S. service obligations. Even if an inconsistency were to be found, such as in the WTO dispute where the Horseracing Act would have to be changed to claim the public morals exception, the U.S. could still withdraw its gambling commitments and offer other concessions in different sectors as a settlement. While this remedies the international law violation, this result has no benefit to the private market participant because his particular market has just evaporated. Finally, the U.S. trading partners under CAFTA-DR do not constitute much of a market to the United States. As a result, the United States could choose not to follow an arbitral award and merely accept the suspension of reciprocal benefits since those reciprocal benefits mean much less to the U.S. than it would to one of the six developing countries who are members of CAFTA-DR.

To summarize, under Chapter 11, a private market participant cannot bring a claim on his own. Also, the public morals exception of the GATS is incorporated into CAFTA-DR so the U.S. Internet gaming prohibitions are not inconsistent with the U.S. Schedule of commitments. Finally, even if an inconsistency were to be found, the imposition of a reciprocal suspension of commitments by a developing nation would not greatly harm the U.S. Therefore, fears of an erosion of state sovereignty or billion dollar trade

141. *Id*. art. 21.1.

concessions to remedy a claimed CAFTA-DR violation under Chapter 11 are minimal at best.

B. CAFTA-DR Chapter 10–Investment

While Chapter 10 does allow private investor claims, the investor-state dispute mechanism under Chapter 10 of CAFTA-DR would not help Jay Cohen if his business were set up in Costa Rica rather than Antigua. As explained in more detail below, this result is mainly due to lack of standing to bring an investor claim, both because there is no foreign direct investment in the United States and because the private market participant is an American citizen. The lack of a remedy under Chapter 10 also has to do with the illegality of the business in the United States and the fact that the U.S. prohibition on Internet gambling is non-discriminatory as it applies to everyone.

Although, with respect to FTAs, this comment deals specifically with CAFTA-DR, CAFTA-DR "[is] extensively patterned after NAFTA."[142] This is important to CAFTA-DR Investor-to-State dispute analysis because, even though arbitrations under FTAs are not binding on subsequent arbitrations, future parties to a dispute "will likely refer the tribunals to prior NAFTA decisions and to any other arbitral decisions that involve the interpretation of similar treaty provisions."[143]

As mentioned above, in order to bring an investor claim under Chapter 10 of CAFTA-DR, there must be direct investment in the territory of the Party complained of.[144] The issue of investment in the territory of the other party as a condition precedent to bringing a NAFTA[145] Investor-to-State dispute has recently been exemplified in *Bayview Irrigation District v. United Mexican States*.[146] In *Bayview*, the Arbitral Tribunal determined that, while the claimants had substantial investments in the form of businesses and infrastructure for the distribution of water, their investments and any water rights were all located in Texas and therefore they could not be considered

142. David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement,* 30 B.C. INT'L & COMP. L. REV. 331, 337 (2007).

143. *Id*. at 351.

144. CAFTA-DR, *supra* note 19, art. 10.28.

145. Like CAFTA-DR's Chapter 10, NAFTA's Chapter 11 deals with Investment and resolving those disputes.

146. Bayview Irrigation Dist. v. United Mexican States., Award, No. ARB(AF)/05/1, ¶ 112 (June 19, 2007), http://www.naftaclaims.com/Disputes/Mexico/Texas/Bayview_Jursdictional_Award_19–05–07.pdf.

investors in Mexico.[147] Because the Claimants did not have any investment within Mexico, the tribunal determined it lacked jurisdiction to hear the complaint.[148] Similarly, an enterprise such as Jay Cohen's WSE is totally operated within one Party's territory. Any licenses, buildings, and equipment are all within Antigua, or hypothetically in Costa Rica. Therefore, it is likely a panel would find that an Internet gambling company operating out of Costa Rica does not have the required standing to bring a claim under CAFTA-DR and challenge U.S. domestic laws or seek damages because there are no assets or investments in the U.S.

A foreign investor like Jay Cohen could try establishing a branch in the U.S. to create standing. As stated above, "investor" includes not only a firm but a branch of that firm as well. However, this distinction is unlikely to help an Internet casino similar to WSE operating in Costa Rica that did not already have a branch established.

S.D. Meyers, Inc (SDMI) v. Government of Canada, a NAFTA arbitral dispute, concerned a claim by an American company that Canada's governmental action was a violation of the investment provisions of NAFTA.[149] SDMI, an American corporation, established an affiliate in Canada to collect orders for the recycling and processing of particular hazardous materials.[150] Subsequently, Canada instituted an emergency measure which effectively closed the U.S.-Canadian border to the export of that particular hazardous waste material.[151] The prior establishment of the affiliate in Canada's territory gave SDMI standing to bring an investor-state claim.[152] As neither Jay Cohen's WSE nor any other Internet gambling firm has an affiliate or office in the U.S., neither could establish standing on this ground. But what if an Internet gambling firm from a CAFTA-DR nation tried to establish a presence in the United States today?

A CAFTA-DR Internet gaming enterprise could not satisfy the Chapter 10 standing requirements by establishing an affiliate in the U.S. today because Internet gaming is against U.S. law.[153] *International Thunderbird Gaming Corp. v. The United Mexican States* involved a NAFTA claim by a Canadian

147. *Id*. at ¶ 113.
148. *Id*. at ¶ 124.
149. S.D. Myers Inc. v. Gov't of Canada, Second Partial Award (Oct. 21, 2002), http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersAwardDamages.pdf.
150. *Id*. at ¶ 85.
151. *Id*. at ¶ 89.
152. *Id*. at ¶ 105.
153. CAFTA-DR, *supra* note 19, art. 10.1 (stating that Chapter 10 "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [the] Agreement").

Corporation trying to "place" gaming machines into Mexico.[154] Mexico has a law that forbids games of chance but allows games of skill.[155] The Canadian firm claimed that its games were based on skill and were therefore allowed by Mexican law.[156] After the firm placed the machines in Mexico, the Mexican government determined that the games were based on chance and therefore illegal.[157] The NAFTA tribunal agreed that the games were illegal under Mexican law and therefore the Canadian firm, with knowledge of this law, had no legitimate expectation in Mexico.[158] Furthermore, with respect to Thunderbird's damages claim that the closing of its facilities constituted a regulatory taking, the Tribunal held that "compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."[159]

Like *Thunderbird*, the particular service at issue (Internet gaming) is against domestic U.S. law. If an Internet gambling service provider tries to establish an affiliate or an office into the U.S., it would be deemed illegal with no legitimate expectation in the U.S. and therefore would not justify an Investor-to-State claim under CAFTA-DR.

VI. CONCLUSION

Jay Cohen served time in an American prison for his involvement with an Internet casino that was legally established under Antiguan law, but illegally operated in the U.S. Although Internet gaming was and is against the law in the United States, at the time of Cohen's arrest and sentence, the United States treatment of Internet gambling was a violation of its trade commitments under the WTO's General Agreement on Trade in Services. While the United States has since removed these gambling commitments from its GATS schedule of commitments, there remain some fears that private market participants, like Jay Cohen, may challenge U.S. federal and state laws against Internet gaming under other trade agreements and subject the U.S. government to direct monetary claims. While there is not a public morals exception to an investor-state dispute under Chapter 10 of CAFTA-DR, these fears are exaggerated with respect to a similar situation to Jay Cohen's enterprise in a

154. Int'l Thunderbird Gaming Corp. v. United Mexican States, (Jan. 26, 2006), http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Award.pdf.
155. *Id*. at ¶ 55.
156. *Id*. at ¶ 50.
157. *Id*. at ¶ 73.
158. *Id*. at ¶ 208.
159. *Id*.

CAFTA-DR nation. This is mainly due to lack of standing under Chapter 10 of CAFTA-DR because the requirement of direct foreign investment is lacking. If that foreign investment is not present before the government action, a company will not later be allowed to establish an affiliate, as it would then be in violation of current U.S. laws. Unfortunately for the Internet gaming operators seeking compensation for the closed U.S. market, a remedy for the private market participant neither exists under GATS nor CAFTA-DR if the U.S. maintains its position by withdrawing its gambling commitments. At least with respect to Internet gambling, U.S. statesmen and concerned citizens who are afraid of challenges to its regulatory schemes and multi-billion dollar trade concessions should not be as concerned.