II.REGULATING TRADE IN SERVICES: ANTIGUA CHALLENGES A U.S. BAN ON INTERNET GAMBLING

For many decades, the GATT/WTO system focused on trade in goods, and largely ignored services. In part, this focus reflected widespread understandings that many types of service industries, from hotels and restaurants to haircuts and other personal services, were domestic activities outside the scope of international trade policy. In addition, many service sectors, such as rail transport and telecommunications, were viewed as subject to substantial government control, given their infrastructural importance and the existence, in some cases, of natural monopolies. Moreover, in many states, certain service sectors, such as education, health and certain insurance services, were considered governmental responsibilities that should not be controlled by commercial considerations.

However, by the mid-1970s, an increase in cross-border transactions in telecommunications, finance, management consulting, construction, and other sectors gave rise to new thinking about the economic importance of cross-border service transactions. A 1972 OECD report introduced the term “trade in services” and argued that “from the point of view of international economic relations, this sector poses problems similar in nature to those met with in merchandise trade.” The term was soon embraced by many U.S.- based multinational entities, as it highlighted their common problems and provided a potent vocabulary to attack restrictive foreign policies as “protectionist.”

In the early 1980s, the United States introduced the idea of developing international rules on trade in services. This initiative was driven largely by U.S. multinationals that were market leaders in high-tech sectors and sought increased access to overseas markets. Many developing states were initially skeptical of the U.S. proposal, fearful that industrialized states’ dominance in services would overwhelm their economies, and that international rules in this area could undermine their ability to pursue domestic policy objectives. However, the fall of the Berlin Wall and the debt crisis of the 1990s prompted many developing states to view deregulation and privatization as essential to promoting economic development.

In 1995, trading nations adopted a General Agreement on Trade in Services (GATS) as part of the Uruguay Round Agreements. The GATS was the first comprehensive set of multilateral rules on trade in services. Thereafter, service rules quickly spread through a growing network of regional trade agreements, and today approximately 50 regional agreements address trade in services. These rules are of enormous practical importance, as the production and consumption of services are a principal economic activity in virtually all states and now represent the fastest growing sector of the global economy. 635Today, services account for two-thirds of global output, one-third of global employment, and some 20 to 25 percent of world trade. In 2018, world commercial services trade exceeded $5.63 trillion.

The inclusion of services, and other new areas such as intellectual property, which is addressed in Chapter 14, transformed the multilateral trade regime. In particular, the system is no longer focused primarily on border barriers, such as tariffs, but now also aims to discipline WTO

members' institutional infrastructure, prominently including domestic regulatory systems. As we shall see, this shift raises questions regarding whether the creation of trade rules that address "behind the border" measures unduly constrict national regulatory authority.

We examine the GATS through a study of a dispute over domestic efforts to regulate internet gambling. Beyond providing an introduction to GATS rules, the problem involves an intricate discussion of the Vienna Convention on the Law of Treaties, judicial consideration of WTO members' leeway to restrict trade for the protection of public morals, and lessons regarding the efficacy of WTO dispute settlement in disputes involving states marked by a huge disparity in political and economic power.

The principal goals of this Problem are:

•to explore the underlying purposes and basic rules of the GATS;

•to assess how international rules affect the services trade and domestic policy space; and

•to understand debates over whether the rules on trade in services, concluded in the 1990s, are well-designed for a digital economy shaped by rapid commercial and technological change.

A. The Problem

Gambling is big business; internet gaming alone is estimated to generate over $100 billion annually, a figure that could rise dramatically with the advent of cryptocurrencies. Online gambling has also given rise to a complex WTO dispute that pits one of the WTO's smallest economies against the largest.

Antigua and Barbuda ("Antigua") is a Caribbean island nation of just under 443 square miles and has an economy approximately 0.0007 percent the size of the U.S. economy. Since the 1990s, it has relied on tourism for revenue. In 1995 a hurricane destroyed hotels and beaches, and devastated the tourist trade. Shortly thereafter, Antigua took steps to build up an internet-based, "remote access" gaming industry. By 1999, Antigua had 119 licensed operators, employing around 3,000 people and generating 10 percent of gross domestic product.

In 1996, Jay Cohen, an American citizen, left his job as a derivatives trader in San Francisco and moved to Antigua. He started the firm World Sports Exchange (WSE), whose sole business was bookmaking on American sports events. The firm collected millions of dollars from U.S.- based bettors. Following an FBI investigation, Cohen was arrested in March 1998 and charged with violating the Interstate Wire Act. This law criminalizes the knowing use of "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest. . . ." Cohen was convicted in February 2000, and sentenced to 21 months in prison. Cohen's downfall parallels that of Antigua's online gaming industry. By 2003, the number of operators had fallen to 28, employing fewer than 500 people.

Antigua attributes the decline largely to increasingly aggressive efforts by the United States to halt online gaming.

636

Following his conviction, Cohen and his lawyers heavily lobbied Antigua to file a WTO complaint against the United States. Antigua was initially hesitant to initiate a dispute, in part because it did not want to antagonize the United States, and in part because with an annual government budget of $145 million, it could not fund an expensive WTO litigation. After further prodding by Cohen — and after the gambling industry agreed to absorb Antigua's costs of litigation — Antigua initiated, in March 2003, WTO dispute proceedings against the United States. It claimed that a complex mix of state and federal laws, including the Interstate Wire Act, the Illegal Gambling Business Act, and the Interstate Horseracing Act, constituted a total ban on internet gambling, in violation of U.S. obligations under the GATS.

B.The General Agreement on Trade in Services: An Overview

As stated in its Preamble, the GATS is intended to contribute to trade expansion "under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries." In principle, the Agreement applies to measures affecting trade in all services, other than those supplied in the exercise of governmental authority. Given the wide array of service activities — including transportation, shipping, banking, advertising, education, construction, and lawyering — it proved difficult to define the treaty's scope of application. GATS negotiators sidestepped this issue and defined trade in services to include four different ways such trade can occur, or four different "modes of supply," as follows:

Cross border: service trade can occur when services are supplied from the territory of one state to a consumer in another. For example, banking or architectural services can be transmitted via telecommunications or email to a customer abroad. For GATS purposes, this is supply "Mode 1."

Consumption abroad: a service consumer can travel to another state to obtain a service, such as when a medical patient travels abroad for medical services, or a tourist uses hotel services while traveling abroad. This is "Mode 2."

Commercial presence: a service supplier from one state establishes an affiliate, subsidiary, or professional presence in the territory of another state to provide a service, such as when a hotel or insurance firm based in one state opens a branch in another state. This is "Mode 3."

Presence of natural persons: individuals from one state enter the territory of another to provide a service, such as when an accountant or medical doctor travels to another state to provide services. This is "Mode 4."

The inclusion of Modes 2, 3, and 4 acknowledges that, notwithstanding the communications revolution, the supply of many services requires the simultaneous presence of both producer and consumer.

With respect to measures affecting trade in services, GATS parties assume two broad types of obligations. The first consists of a set of "general obligations," including a most-favored-nation provision which requires states to extend to services and services providers of all other WTO members "treatment no less favorable than that accorded to like services and service suppliers of any other country." The MFN obligation is applicable to any measure that affects trade in services in any sector falling under the 637Agreement, and is similar to the MFN obligation found in the GATT concerning trade in goods. However, in other ways, the structure and details of the GATS departs from those of the GATT.

For example, whereas the GATT provides for market access for all goods, WTO members were not prepared to go so far with respect to services. Thus, members have the option to accept "specific commitments" in particular service sectors such as law or insurance. Notably, there is no obligation to make any specific commitments, and specific commitments may be qualified with respect to any, or all, of the modes of supply. Thus, for example, a state is free to decide not to open its banking sector to foreign service suppliers. If a state decides to allow foreign banks to operate in its domestic market, it has made a market-access commitment. Commitments to open specific sectors are typically the product of negotiations with other members, and are set out in individual country "schedules."

States have great flexibility to adjust the conditions of market entry and participation to its sector-specific commitments. Thus, if a state wishes to open its banking sector to foreign competition, but limit the number of foreign banks, or the number of branches that a foreign bank can open, it can impose such market-access limits. In general, it can impose limits with respect to any mode of supply; these limits can be discriminatory or non-discriminatory, and will be included in a state's schedule.

Significantly, GATS Article XVI identifies six types of restrictions that states may not maintain unless they are indicated on that state's schedule. These restrictions relate to (a) the number of service suppliers; (b) the value of service transactions or assets; (c) the number of operations or quantity of output; (d) the number of natural persons supplying a service; (e) the type of legal entity or joint venture; and (f) the participation of foreign capital. Similarly, states should extend national treatment to (i.e., not discriminate against) foreign services and service providers unless they have included limitations on national treatment in their schedules.

Commitments contained in state schedules are considered "bound," that is, they can be withdrawn or modified only pursuant to certain procedures, and states which may be affected by modifications can request the modifying state to negotiate compensatory adjustments. Moreover, the GATS contains an exceptions clause that permits states to introduce or maintain measures otherwise in contravention of their GATS obligations, under certain specified circumstances.

Thus, the GATS is considerably more complex than the GATT. Among other differences, it introduces the four “modes of supply,” and two negotiable parameters (market access and national treatment) that determine the conditions of market entry and participation. This complexity is designed to permit states to accommodate sector- or mode-specific limitations and maximize flexibility. However, this complexity can also create formidable negotiating and interpretive challenges.

C.The Appellate Body Report

In November 2004, a WTO panel found that U.S. laws prohibiting internet gambling violated U.S. obligations under the GATS. The United States appealed and, in April 2005, in its most extensive interpretation of the GATS to date, the Appellate Body issued its report in the Gambling dispute. The Appellate Body first addressed whether the United States had made specific commitments to liberalize trade in gambling 638services in its GATS schedule. The United States had made commitments in “recreational services” but had not made commitments in “sporting” services. Does “sporting” services include “gambling,” as the U.S. claimed? If not, did the ban on internet gambling violate any other U.S. commitments? And, if it did violate a U.S. commitment, could it nevertheless be justified under a GATS exception, in particular the exception for measures to protect “public morality”?

United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services

WT/DS285/AB/R (2005)

162. According to the United States, the ordinary meaning of “sporting” includes gambling and betting and the Panel erred in finding otherwise. . . . The relevant part of the United States’ Schedule provides:
Sector or subsector Limitations on market access

10. RECREATIONAL, CULTURAL, & SPORTING SERVICES

A.ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)

(1)None

(2)None

(3)None

(4)Unbound, except as indicated in the horizontal section

B.NEWS AGENCY SERVICES

(1)None

(2)None

(3)None

(4)Unbound, except as indicated in the horizontal section

C.LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES

(1)None

(2)None

(3)None

(4)Unbound, except as indicated in the horizontal section

D.OTHER RECREATIONAL SERVICES (except sporting)

(1)None

(2)None

(3)The number of concessions available for commercial operations in federal, state and local facilities is limited

(4)Unbound, except as indicated in the horizontal section

639

[The column on the left identifies the sector in which the United States made specific commitments. The column on the right identifies limitations on the various modes of supply. Note that for mode 1 (cross-border supply), the United States listed no limitations. For mode 4 (the movement of natural persons) the U.S. schedule states “unbound,” meaning that it made no commitments relevant to this dispute.]

163 . . . The Panel examined the term “Other recreational services (except sporting)” in subsector 10.D, as well as the term “Entertainment services” in subsector 10.A. . . .

165. In this case, in examining definitions of "sporting", the Panel surveyed a variety of dictionaries. . . . All of the dictionary definitions cited by the Panel define "sporting" as being connected to — in the sense of "related to", "suitable for", "engaged in" or "disposed to" — sports activities. Some dictionaries also define "sporting" as being connected to gambling or betting, but others do not. Of those that do, several note that the word is mainly used in this sense in the phrase "a sporting man". . . . Based on this survey of dictionary definitions, as well as the fact that "gambling" does not fall within the meaning of the Spanish and French words that correspond to "sporting", namely "déportivos" and "sportifs", the Panel made its finding that "the ordinary meaning of 'sporting' does not include gambling."

166. We have three reservations about the way in which the Panel determined the ordinary meaning of the word "sporting" in the United States' Schedule. First, to the extent that the Panel's reasoning simply equates the "ordinary meaning" with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach. Secondly, the Panel failed to have due regard to the fact that its recourse to dictionaries revealed that gambling and betting can, at least in some contexts, be one of the meanings of the word "sporting". Thirdly, the Panel failed to explain the basis for its recourse to the meanings of the French and Spanish words "déportivos" and "sportifs" in the light of the fact that the United States' Schedule explicitly states, in a cover note, that it "is authentic in English only."

[The Appellate Body reviewed the panel's treatment of two documents from the Uruguay Round of trade negotiations, namely document "W/120" and the "1993 Scheduling Guidelines," as "relevant context" within the meaning of the Vienna Convention on the Law of Treaties.* Both documents were prepared by the GATT Secretariat, and circulated to all GATT parties in an effort to clarify how states should prepare their GATS schedules. The Appellate Body found that although many parties used these documents in the preparation of their schedules, the documents were not the subject of negotiation among GATT parties and the parties did not "accept[] them as agreements or instruments related to the treaty." Thus, the Appellate Body reversed the panel's use of these documents as "context." However, the Appellate Body did find that they could be used as "supplementary means of interpretation," pursuant to Article 32 of the VCLT.]

198. Turning to the question of how the subsector 10.D entry "Other recreational services (except sporting)" is to be interpreted in the light of W/120 and the Scheduling 640Guidelines, we consider it useful to set out the relevant parts of both documents. The relevant section of W/120 is as follows:

SECTORS AND SUB-SECTORS CORRESPONDING CPC
[. . .]
10. RECREATIONAL, CULTURAL AND SPORTING SERVICES
(other than audiovisual services)
A. Entertainment services (including theatre, live bands and circus services) 9619
B. News agency services 962
C. Libraries, archives, museums and other cultural services 963

D. Sporting and other recreational services 964
E. Other

[The CPC, or "Central Product Classification" is a detailed, multi-level classification of goods and services prepared by the UN. Five sections of the CPC primarily classify services, and all of the references in W/120 are to sub-categories of these five sections.]

201. In the CPC, Group 964, which corresponds to subsector 10.D of W/120 (Sporting and other recreational services), is broken down into the following Classes and Sub-classes:

964 Sporting and other recreational services

9641 Sporting services

96411 Sports event promotion services

96412 Sports event organization services

96413 Sports facility operation services

96419 Other sporting services

9649 Other recreational services

96491 Recreation park and beach services

96492 Gambling and betting services

96499 Other recreational services n.e.c.

Thus, the CPC Class that corresponds to "Sporting services" (9641) does not include gambling and betting services. Rather, the Sub-class for gambling and betting services (96492) falls under the Class "Other recreational services" (9649).

203. The Scheduling Guidelines . . . express a clear preference for parties to use W/120 and the CPC classifications in their Schedules. At the same time, the Guidelines make clear that parties wanting to use their own subsectoral classification or definitions — that is, to disaggregate in a way that diverges from W/120 and/or the CPC — were to do so in a "sufficiently detailed" way "to avoid any ambiguity as to the scope of the commitment." . . .

641

204. In our view, the requisite clarity as to the scope of a commitment could not have been achieved through mere omission of CPC codes, particularly where a specific sector of a

Member's Schedule, such as sector 10 of the United States' Schedule, follows the structure of W/120 in all other respects, and adopts precisely the same terminology as used in W/120. As discussed above, W/120 and the 1993 Scheduling Guidelines were prepared and circulated at the request of parties to the Uruguay Round negotiations for the express purpose of assisting those parties in the preparation of their offers. . . . They provided a common language and structure which, although not obligatory, was widely used and relied upon. In such circumstances . . . it is reasonable to assume that parties to the negotiations examining a sector of a Schedule that tracked so closely the language of the same sector in W/120 would — absent a clear indication to the contrary — have expected the sector to have the same coverage as the corresponding W/120 sector. . . .

205. Accordingly, the . . . 1993 Scheduling Guidelines, together with the linguistic similarities between the two subsectors, provide strong support for interpreting subsector 10.D of the United States' Schedule as corresponding to subsector 10.D of W/120. . . . Subsector 10.D of W/120, in turn, corresponds to Class 964 of CPC, along with its sub-categories.

208. In our view, therefore, the relevant entry in the United States' Schedule, "Other recreational services (except sporting)," must be interpreted as excluding from the scope of its specific commitment services corresponding to CPC class 9641, "Sporting services." For the same reasons, the entry must be read as including within the scope of its commitment services corresponding to CPC 9649, "Other recreational services," including Sub-class 96492, "Gambling and betting services."

Having determined that the U.S. schedule included specific commitments on gambling and betting services under subsector 10.D, the Appellate Body determined that the U.S. ban on the cross-border supply of gambling and betting services violated these commitments. It also found that the prohibitions on internet gambling violated GATS Article XVI(a), which prohibits restrictions on the number of service suppliers, and Article XVI(c), which prohibits limitations on the number of operations or quantity of output (unless those restrictions are found in a party's schedule).

The Appellate Body then considered the U.S. argument, made in the alternative, that the prohibitions on internet gambling fell within the scope of GATS Article XIV, an "exceptions" clause. Article XIV provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order.1 . . .

The Gambling dispute provided the Appellate Body with its first opportunity to consider the "public morals" exception. The Appellate Body's analysis follows:

642

292. Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a "two-tier analysis" of a measure that a Member seeks to justify under that provision. A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. . . . Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV. . . .

296. In its analysis under Article XIV(a), the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation." The Panel further found that the definition of the term "order", read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law." The Panel then referred to Congressional reports and testimony establishing that "the government of the United States consider[s] [that the challenged laws] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling." On this basis, the Panel found that the [challenged laws] are "measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)." [The Appellate Body upheld this finding, and turned to whether the U.S. measures were "necessary."]

305. In Korea — Various Measures on Beef, the Appellate Body stated . . . that whether a measure is "necessary" should be determined through "a process of weighing and balancing a series of factors.". . .

306. The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure. . . . [A] panel should then turn to the other factors that are to be "weighed and balanced". The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the "necessity" of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.

307. A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or, alternatively, whether another, WTO-consistent measure is "reasonably available".

315. In its "necessity" analysis under Article XIV(a), the Panel appeared to [conclude that for a measure to be necessary,] the responding Member must have first "explored and exhausted"

all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure. This understanding led the Panel to conclude that . . . the United States had "an obligation to consult with Antigua before and while imposing its prohibition on the cross-border supply of gambling and betting services". Because the Panel found that the United States had not engaged in such consultations with Antigua, the Panel also found that the United States had not established that its measures are "necessary" and, therefore, provisionally justified under Article XIV(a).

317. In our view, the Panel's "necessity" analysis was flawed. . . . Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.

643

Having rejected the panel's conclusions regarding necessity, the Appellate Body undertook its own analysis. It noted that the panel had (i) determined that the challenged laws protect "very important societal interests"; (ii) observed that "strict controls may be needed to protect [such] interests"; and (iii) found that the challenged laws contribute to the realization of the ends that they pursue. Although the Panel recognized the "significant restrictive trade impact" of the challenged laws, it expressly tempered this recognition with a detailed explanation of certain characteristics of, and concerns specific to, the remote supply of gambling and betting services. These included: (i) "the volume, speed and international reach of remote gambling transactions"; (ii) the "virtual anonymity of such transactions"; (iii) "low barriers to entry in the context of the remote supply of gambling and betting services"; and (iv) the "isolated and anonymous environment in which such gambling takes place." On the basis of these findings, the Appellate Body concluded that the U.S. measures were "necessary" for purposes of Article XIV.

Finally, the Appellate Body turned to Article XIV's chapeau, which prohibits "arbitrary and unjustifiable discrimination." The Appellate Body determined that one of the challenged statues — the federal Interstate Horseracing Act — appeared, on its face, to permit domestic service suppliers, but not foreign service suppliers, to offer internet betting services with respect to certain horse races, and therefore was inconsistent with Article XIV's chapeau.

Notes and Questions

1. Note that the Appellate Body found that the U.S. measures were "necessary to protect public morals," and that the United States lost on the narrower ground that its application of the challenged measures was inconsistent with Article XIV's chapeau. Given these findings, how can the United States come into compliance with its GATS obligations?

2. The Appellate Body report in Gambling is significant, in part, for the interpretive method it applied to the United States's GATS schedule. The panel conceded that the United States did not intend to make specific commitments with respect to gambling. Given this finding, what justification is there for concluding, as a legal matter, that the United States had made commitments in this area? Are you persuaded by the panel's statement that "it is not for the Panel to second-guess the intentions of the United States at the time the commitment was scheduled. Rather, our role is to interpret and apply the GATS in light of the facts and evidence before us"?

3. Does the Gambling report help states determine what products they can restrict to protect public morals? The next WTO dispute to consider the "public morals" exception involved Chinese restrictions on the importation and distribution of certain cultural products, including books and periodicals, DVDs for home use, and films for theatrical release. China permitted only certain state-owned enterprises to import these cultural products; it justified its restrictions on the ground that they were necessary to implement China's censorship system. The Appellate Body found that many of the restrictions violated China's GATS obligations. The panel and the Appellate Body assumed without deciding that "each of the types of prohibited content listed in China's measures could, if it were brought into China, have a negative impact on 'public morals' in China. . . ." However, both the panel and the Appellate Body found that the restriction on which parties could distribute cultural products was not "necessary" because China's objective of protecting public morals could be pursued by "less trade restrictive alternatives." In particular, the Chinese government could assume sole responsibility for conducting 644content review and then permit any commercial entity, including foreign-owned entities, to import and distribute these products. China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R (2009). Critics note that this result may facilitate the importation and distribution of materials that passes Chinese censorship but does not address China's substantive content review.

Do you notice any commonalities in the Appellate Body's application of the public morals exception in these two disputes? What are the benefits of this approach?

D.The Aftermath

The Appellate Body report did not end the Gambling dispute. Instead, it marked the start of a lengthy series of claims and responses, some of which continue to this day. Under the WTO's Dispute Settlement Understanding (DSU), absent an agreement, the parties to a dispute may submit to arbitration the issue of how long a losing party has to come into compliance. Since the United States and Antigua were unable to work out a compliance period on their own, they submitted the issue to a WTO arbitrator, who ruled that the United States had to comply with the Appellate Body report by April 2006. However, the United States made no effort to modify any of the laws at issue in this dispute. Under the DSU, a prevailing party may request the original panel to rule whether the losing party has complied with the report. A compliance panel found that the United States had not taken any measures to comply and that the

statutory ambiguity cited by the Appellate Body was unresolved. The United States did not appeal this report. Thereafter, the dispute over U.S. restrictions on internet gambling was addressed in two parallel WTO processes.

First, in May 2007, the United States announced that it intended to modify its GATS schedule, as permitted under GATS Article XXI, to exclude gambling and betting services from the U.S. schedule of commitments. Under Article XXI, any member whose GATS benefits may be affected by a proposed schedule change has the right to negotiate a compensation agreement with the member making the change. Antigua, the EU, and six other states requested consultations with United States. In December 2007, the United States and the EU agreed to provide EU service suppliers enhanced market access in a number of sectors, including postal and courier, warehouse, and technical testing services, in response to the United States's modification of its GATS schedule on gambling and betting services; similar agreements were reached with Canada and Japan.

GATS rules provide that if no compensation agreement is reached, affected states may seek WTO arbitration on the amount of compensation due. Antigua and Costa Rica filed arbitration requests; however, Costa Rica reached an agreement with the United States, leaving Antigua as the only state seeking compensation under Article XXI.

The second set of processes related to the original Gambling proceedings. Antigua sought DSB authorization to impose $3.4 billion in countermeasures — a figure more than three times the size of Antigua's entire economy — in response to U.S. noncompliance. Typically, countermeasures at the WTO consist of the imposition of tariff surcharges on products from the noncomplying state. However, Antigua argued that imposing tariffs on U.S. goods would have a "disproportionate adverse impact" on Antigua because any such fees would make U.S. goods and services "materially more expensive" to Antiguan citizens and have little or no impact on the United States. Thus, Antigua sought permission to suspend obligations under GATS and the WTO's intellectual property agreement. The United States objected to this request, and the issue was sent to arbitration. In a 645December 2007 ruling, a WTO arbitrator determined that Antigua could suspend concessions under the intellectual property agreement at a level up to $21 million annually.

After several years of negotiations between Antigua and the United States, in January 2013 Antigua received formal WTO authorization to proceed with plans to lift intellectual property protection for U.S. goods and services. Antiguan officials stated that they were considering the creation of a website where users from around the world could download copyrighted material such as music, movies, and software, without the consent of the U.S. right holders. U.S. copyright industries charged that this strategy would violate Antigua's obligations under intellectual property treaties, and U.S. officials declared that suspending intellectual property protection would constitute "theft" and "government-authorized piracy." Antiguan officials responded that "to accuse our country of somehow being an international outlier by doing what the rules provide we can do . . . pretty much beggars belief." In February 2014, Antigua stated that it was "close to completing" arrangements to take retaliatory action against U.S.

goods and services. However, as of early 2019, Antigua still had not imposed countermeasures against U.S. goods, and intermittent efforts by the two states to negotiate a solution have not been successful.

Notes and Questions

1. Many commentators portray the Gambling dispute as a "David versus Goliath" contest, and claim that that it demonstrates that WTO norms and processes level the playing field between large and small states. Do you agree?

2. Note that under WTO dispute rules, a losing party is obliged to bring its measures into compliance with WTO rules; if it fails to do so, the prevailing party may impose countermeasures against the losing party. But the losing state has no duty to compensate the winning state for any damages caused during the period that its WTO-inconsistent law was applied. WTO countermeasures are designed to compensate the prevailing state only prospectively, for injuries incurred after WTO dispute proceedings are complete. Compare this approach to damages to that discussed in the materials on state responsibility in Chapter 3. What incentives does the WTO approach to damages create for losing states?

3. The Gambling dispute illustrates shifts in the political economy of trade politics. In the past, many trade disputes involved an export-oriented firm, or coalition of firms in the same industry, lobbying its government to pressure another state to remove a trade restriction. In the Gambling dispute, in contrast, a U.S. citizen lobbied a foreign government to file a complaint against the United States, and helped underwrite that government's litigation expenses. Moreover, the U.S. gaming industry is itself deeply split on the issue of internet gambling. Sheldon Adelson, the owner of Las Vegas Sands and a prominent contributor to politically conservative causes, has pledged to spend "whatever it takes" to stop internet gambling, fearing that if online gambling is legalized, internet firms like Google or Facebook will dominate the market. Other industry leaders, including Caesars Entertainment and MGM Resorts, strongly support liberalizing laws on internet gaming, which they see as the future of the industry. Are such unconventional political alignments more likely in disputes involving internet-based activities? Do these alignments make disputes easier or harder to resolve?

4. Critics of the GATs agreement view it, and other efforts to liberalize trade in services, as reflecting an implicit deregulation and/or privatization agenda that threatens the domestic political autonomy of member states, particularly with respect to the provision of essential services. Does the Gambling dispute provide support to this argument?