NOTE

GAMBLING WITH OUR FUTURE: A CALL FOR NEEDED WTO DISPUTE RESOLUTION REFORM AS ILLUSTRATED BY THE U.S.-ANTIGUA CONFLICT OVER ONLINE GAMBLING

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I. INTRODUCTION

In 2000, global online gambling was a $2.13 billion industry.[1] Antigua and Barbuda (Antigua), a Caribbean island nation with a combined size approximately that of Washington, D.C.,[2] accounted for an estimated 61 percent of this market.[3] In 2006, global online gambling grew to a $14.62 billion industry.[4] With the online gambling industry growing nearly 700 percent overall and steadily rising during each of these six years,[5] one would expect Antigua to have economically thrived over this time period. Instead, from 2000 to 2006 Antigua's online gambling market presence decreased each year, ultimately falling to just 7 percent in 2006.[6] This astounding change in market presence can most readily be attributed to intervention by the United States.

Internet gambling is illegal in all fifty states.[7] More important for the purposes of this discussion, though, are a number of federal measures the United States has undertaken to limit online gambling. Specifically, the United States has attacked online gam-

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1. *Antigua Economic and Gambling Data,* THE ANTIGUA-US WTO DISPUTE OVER INTERNET GAMBLING [hereinafter *Antigua Economic and Gambling Data*], http://www.antiguawto.com/WTO_Economic_gambling_data.html (last visited Mar. 20, 2011) (citing GLOBAL BETTING & GAMING CONSULTANTS, QUARTERLY EGAMING STATISTICS REPORT: MAY 2007 (2007)).

2. *The World Factbook: Antigua and Barbuda,* CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ac.html (last updated Mar. 16, 2011).

3. *Antigua Economic and Gambling Data, supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Ronald J. Rychlak, *Legal Problems with Online Gambling,* ENGAGE, May 2005, at 36, 36.

bling through a variety of legislative, executive, and judicial responses. In terms of legislation, the United States prohibits online gambling via the Wire Act,[8] the Illegal Gambling Business Act,[9] and the Travel Act,[10] among others. Furthermore, the United States recently prosecuted financial institutions for facilitating online gambling by allowing the transfer of funds to online gambling websites.[11] Finally, the United States took on an Antigua-based gambling website in *United States v. Cohen*, a case in which the United States Court of Appeals for the Second Circuit ultimately ruled against the defendant website owner.[12] Because the majority of internet gamblers reside in the United States,[13] this continued intervention by the United States has had a substantial effect on the online gambling market. As such, the effect on the economy of Antigua has been detrimental despite Antigua's proper reliance on international agreements to which the United States is a party.

In an attempt to resolve this situation, Antigua looked to the international community. Antigua and the United States are members of the World Trade Organization (WTO). One WTO agreement, the General Agreement on Trade in Services (GATS), is binding over all WTO members, including the United States.[14] Antigua filed a claim against the United States alleging U.S. violations of the GATS through online gambling restrictions. Under the WTO dispute resolution system, a dispute resolution panel found in favor of Antigua and the WTO Appellate Body affirmed the panel's ultimate conclusion that the United States was in violation of the GATS.[15] In an attempt to compensate Antigua, the WTO's Dispute Settlement Body (DSB) authorized Antigua to impose sanctions against the United States, including permission to suspend Antigua's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[16]

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8. The Wire Act is codified at 18 U.S.C. § 1084 (2006).

9. The Illegal Gambling Business Act is codified at 18 U.S.C. § 1955 (2006).

10. The Travel Act is codified at 18 U.S.C. § 1952 (2006).

11. *See* Rychlak, *supra* note 7, at 38 (explaining how the New York Attorney General sued Citibank and PayPal in 2002 for their part in facilitating online gambling).

12. *See* United States v. Cohen, 260 F.3d 68, 71, 78 (2d Cir. 2001).

13. Rychlak, *supra* note 7, at 36.

14. General Agreement on Trade in Services art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S 183 [hereinafter GATS].

15. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 373, WT/DS285/AB/R (Apr. 7, 2005).

16. IQsensato, *US-Antigua Gambling Dispute Highlights Defect in the WTO Dispute Settlement System*, IN FOCUS, Feb. 5, 2008, at 1, 1.

From an observational standpoint, though, the authorization to impose sanctions on the United States is useless to Antigua.[17] Permitting an island nation to sanction its most significant trading partner[18] is in effect no remedy at all. As a result, the United States has essentially violated a major international agreement without penalty. Despite the WTO's binding ruling against the United States, Antigua has had no significant recourse. As such, this seemingly small conflict exposes a major flaw in the current WTO dispute resolution system, namely that the current policies favor larger countries over smaller ones. Under the current system, the WTO is unable to create mandatory accountability for larger countries that violate WTO agreements. This lack of disciplinary power has ramifications outside of this single WTO conflict and represents an inherent unfairness in the WTO's current policies. The WTO should replace its current dispute resolution remedies of retaliatory sanctions and optional compensation with mandatory compensation in the form of compulsory tariff reductions on violating members, which will induce compliance with WTO decisions and thus actually provide relief to wronged members.

This Note uses the U.S.-Antigua online gambling dispute to demonstrate the need to reform the WTO dispute resolution system. In Part II, the Note provides a summary of relevant background information on the WTO, the GATS, the WTO dispute resolution system, and the U.S.-Antigua dispute. In Part III, the Note presents analysis of the current dispute resolution system, possible alternative dispute resolution enforcement solutions, and ultimately some proposed changes to the current system. In Part IV, the Note concludes with a brief analysis of the feasibility of implementing these suggested modifications as well as a broader look at the significance of the proposed changes.

II. BACKGROUND

A. *World Trade Organization Overview*

The World Trade Organization is generally considered the foundation of the international trading system.[19] The WTO evolved from and replaced the General Agreement on Tariffs and Trade (GATT), which had existed since 1947.[20] While there are many

17. *Id.* at 1–2.

18. *See id.* at 2.

19. DAVID N. PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 13 (2d ed. 2004).

20. *Id.* at 3.

differences between the WTO and the GATT that may prove relevant to this discussion, the most significant difference is that, unlike the GATT, the WTO is an organization rather than just an agreement.[21] As discussed below, the WTO was created after the international community recognized the need for an international institution with more general powers than the GATT provided.

The WTO was established during the Uruguay Round negotiations by the Marrakesh Agreement Establishing the World Trade Organization.[22] The WTO officially succeeded the GATT and entered into effect on January 1, 1995.[23] The primary purpose of the WTO is to help liberalize trade so it can flow as freely as possible in order to promote economic development.[24] There are currently 153 member states of the WTO, including most of the world's powers, such as China, Japan, Israel, Canada, Brazil, the United Kingdom, France, Germany, Spain, and most relevant to this discussion, the United States and Antigua.[25]

The WTO's multilateral trading system is founded upon a series of WTO agreements.[26] According to the WTO, these agreements are essentially binding contracts, signed by member states and approved by their legislatures, which regulate the flow of goods in the international community.[27] The binding effect of these agreements is supported by Article 18 of the Vienna Convention on the Law of Treaties, an agreement that ensures all treaties are binding upon their signatories.[28] The Vienna Convention on the Law of Treaties governs the interpretation and effect of treaties,[29] and the WTO Appellate Body has held that the Vienna Convention applies to WTO agreements.[30] Thus, under WTO jurisprudence and by international agreement, all WTO treaties are binding upon each signatory member state.

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21. *Id.* at 13.

22. *Id.*

23. *Id.*

24. *Understanding the WTO: The Basics*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Mar. 20, 2011).

25. *Understanding the WTO: Members and Observers*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated July 23, 2008).

26. *The WTO in Brief*, WTO, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Mar. 20, 2011).

27. *Id.*

28. MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 617 (2d ed. 2006).

29. *Id.* at 27.

30. *See id.* (citing Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996)).

B. *General Agreement on Trade in Services Overview*

During the Uruguay Round of negotiations in which the WTO was created, the world's first significant multilateral trade in services agreement was enacted.[31] The GATS was placed on the Uruguay Round agenda and ultimately agreed upon due to the strong support of the United States.[32] When dealing with trade in services, the primary barriers to trade are regulatory.[33] To clarify, the major barriers to a free market predominantly consist of regulations created by individual countries, such as state monopolies, licenses, and rate-setting regulations.[34] The GATS negotiators knew that they would essentially be called upon to manage diverse regulations often aimed at pursuing social goals.[35] The GATS was created to help prevent member states from creating such regulations that prevent the free flow of trade in services.

The GATS is a complicated agreement.[36] Parts I and II of the GATS provide the general framework and rules to liberalize trade in services.[37] For the purposes of this Note, the most significant aspects of the GATS are Parts III and IV, which deal with the specific commitments that bind each individual member, as well as Part V, which contains language about dispute settlement under the GATS.[38] The GATS binds all current members of the WTO,[39] and applies to four different modes of supply; the relevant mode here, cross-border supply, is defined as services flowing from one member to another member.[40] The GATS contains two categories of obligations: general obligations and specific commitments.[41] General obligations apply to all members of the WTO, while specific commitments are those obligations to which each member individually agrees to adhere.[42] General obligations are binding even if a member has made no specific commitments.[43] Article

31. *Id.* at 604.

32. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 356 (3d ed. 2005).

33. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 604.

34. TREBILCOCK & HOWSE, *supra* note 32, at 357.

35. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 605.

36. TREBILCOCK & HOWSE, *supra* note 32, at 358.

37. *Id.*

38. *Id.* at 359.

39. *The GATS: Objectives, Coverage, and Disciplines*, WTO, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Mar. 20, 2011).

40. *Id.* The other modes of supply are consumption abroad, commercial presence, and presence of natural persons. *Id.*

41. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 606.

42. *Id.*

43. *Id.*

XXI permits a member to permanently withdraw from a specific commitment at any time after three years have passed from the time the agreement was put into place.[44] If a country withdraws from a specific commitment, it is required to enter into negotiations to compensate any affected members, and should negotiations fail, the country wishing to withdraw from its commitments must participate in binding arbitration and compensate the affected members.[45]

Part V of the GATS makes clear that the normal WTO dispute resolution procedures, outlined below, apply to the GATS.[46] There are two differences with respect to dispute resolution under the GATS. First, "the . . . DSB may only authorize suspension of concessions where it 'considers the circumstances are serious enough to justify such action.'"[47] Second, only concessions under the GATS may be suspended; thus, the DSB is not to authorize the suspension of concessions under another WTO agreement for purposes of retaliation.[48]

The question of whether the GATT/WTO agreement can overlap with the GATS, and thus both apply to a single dispute, was answered in *EC – Bananas*.[49] In that case, the Appellate Body of the DSB found that under the GATT (now the WTO), the focus of any inquiry is on how the measure or regulation affects the goods involved, while under the GATS, the focus is on how the measure or regulation affects the supply of the services or the service suppliers involved.[50] Thus, even in a complex case where a measure seemingly affects the trade of both goods and services, the analysis takes place under only one of either the GATT/WTO or the GATS.[51] In the U.S.-Antigua conflict, the focus is not on actual gambling or goods involved in the market for gambling; rather, it is the supply of the service and the service supplier involved, namely Antigua, which is of concern. Thus, the GATS, not the general WTO Agreement, appears to govern this dispute.

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44. TREBILCOCK & HOWSE, *supra* note 32, at 367.

45. *Id.*

46. *Id.* at 368.

47. *Id.* (quoting GATS, *supra* note 14, art. XXIII(2)).

48. *Id.*

49. *See* MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 610 (citing Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC-Bananas*]).

50. *Id.*

51. *Id.*

To determine if a measure truly affects trade in services, and thus falls under the GATS rather than the GATT/WTO, one must apply a two-pronged test. To satisfy the test, there must be a measure that directly affects trade in services and there also must be an actual effect on trade in services.[52] Applying this test to the U.S.-Antigua conflict, the DSB Panel held that the United States limited gambling through the Wire Act, the Travel Act, and the Illegal Gambling Business Act, which satisfied the first prong of the test because these measures affect trade in gambling services.[53] Furthermore, the panel found that the complete prohibition against online gambling that the measures collectively create has an effect on trade in services, thus satisfying the second prong of the test.[54] Therefore, both prongs of the test are satisfied, and the GATS is the applicable WTO statute for a discussion of the U.S.-Antigua conflict.

Finally, the GATS has five general exceptions in Article XIV that permit a country to create a regulation that would otherwise violate the GATS.[55] Among these, the most relevant for this discussion is an exception that permits a country to violate the GATS for the "protection of public morals or public order."[56] This exception will be discussed in more detail below.[57]

C. *World Trade Organization Dispute Resolution System Overview*

1. Dispute Resolution Procedures

Unlike the WTO dispute settlement system, dispute settlement under the GATT was ineffective because each contracting party had to approve any decision reached by the panel.[58] This meant that a country facing a negative ruling by the WTO could simply block the adoption of a report.[59] When the WTO replaced the GATT, the system was reinvented to shore up this problem.

There are four annexes attached to the WTO Agreement.[60] Annex 2 to the WTO Agreement details the Understanding on Rules and Procedures Governing the Settlement of Disputes

52. *See id.* at 615.
53. *Id.*
54. *Id.*
55. *Id.* at 635.
56. GATS, *supra* note 14, art. XIV(1)(a).
57. *See infra* Part II.D.
58. PALMETER & MAVROIDIS, *supra* note 19, at 9.
59. *Id.*
60. *Id.* at 13.

(DSU).[61] The WTO Agreement created a new body to deal with dispute settlement called the Dispute Settlement Body (DSB).[62] The DSU explains as follows:

> The DSB has the authority to establish dispute settlement panels, to adopt panel and Appellate Body reports, to maintain surveillance of the implementation of the rulings and recommendations it adopts, and to authorize the suspension of concessions and other obligations under the covered WTO agreements, if its rulings and recommendations are not acted upon by Members in a timely fashion.[63]

The DSU term "covered WTO agreements" is comprised of all multilateral WTO agreements listed in Appendix 1 to the DSU, including the GATS.[64] Furthermore, under the DSU, panels and reports are formed and adopted automatically unless all parties agree otherwise.[65] Thus, a party no longer has the power to block the formation of a panel or the adoption of a report. It is also important to note that the DSU created the unusual concept of granting compulsory jurisdiction to the DSB for resolving disputes between WTO members,[66] meaning that the jurisdiction of the DSB to hear a dispute cannot be challenged.

Dispute settlement under the DSU includes a number of stages. First, the countries in dispute have sixty days for consultations during which a country cannot request that a panel be formed.[67] Next, if consultations fail, a party may request the formation of a panel, which is formed within forty-five days and has up to six months to make its final ruling.[68] Technically, the panel is a tool that helps the DSB make its final ruling; however, the panel's decision can only be rejected by a consensus in the DSB, so in practice the panel reports are extremely difficult to overturn.[69]

Any party may appeal the panel's ruling to the Appellate Body, but all appeals must be based on legal interpretation rather than evidence presented to a panel.[70] The Appellate Body consists of seven members from a variety of countries.[71] Each member has no

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61. *Id.* at 14.
62. *Id.* at 14–15.
63. *Id.* at 15.
64. *Id.* at 51.
65. *Id.* at 15.
66. *Id.* at 16.
67. *Understanding the WTO: Settling Disputes*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Mar. 20, 2011).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

significant affiliation with any specific government and is a scholar in international law.[72] Upon hearing an appeal, three of the seven members govern over the appeal and issue an ultimate ruling.[73] The Appellate Body has the power to affirm, modify, or overrule the legal findings and conclusions drawn by the panel.[74] The appeals process may last no longer than ninety days, and the DSB must then accept the Appellate Body's ruling unless it rejects it with a full consensus.[75]

2. Dispute Resolution Remedies

After the Appellate Body makes its final ruling, the member against whom the Appellate Body has ruled must comply with the Appellate Body recommendations within a reasonable period of time.[76] If the winning member so requests, the losing member is obligated to enter into negotiations, aimed at compensation, to help resolve the dispute prior to the expiration of the reasonable time period.[77] If no agreement is reached within twenty days after the reasonable time period has elapsed, the complaining member may then request that the DSB permit that member to suspend concessions with respect to the violating member.[78]

Suspension of concessions is the WTO remedy in place to compensate a wronged member. Suspension of concessions generally means that tariffs or other trade barriers will be applied by the wronged member against the violating member.[79] The DSB expects violated members to first seek suspension of concessions or other obligations with respect to the same sector in which the violation occurred.[80] If the complaining party does not find this practical, it may instead seek to suspend concessions in different sectors, but under the same WTO agreement.[81] Finally, if the member does not believe this is practical, and the situation is deemed seri-

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* PALMETER & MAVROIDIS, *supra* note 19, at 265.

77. *Id.* (citing Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S 401 [hereinafter DSU]).

78. *Id.* at 266.

79. *Id.* at 265.

80. *Id.* at 275 (citing DSU, *supra* note 77, art. 22(3)(a)).

81. *Id.* (citing DSU, *supra* note 77, art. 22(3)(b)).

ous enough by the DSB, the member may suspend concessions under any other WTO agreement.[82]

In the unusual case where a country attempts to modify its commitment schedule, as the United States did during its conflict with Antigua, the modifying country must compensate all WTO members affected by its decision.[83] If there is a disagreement about the amount of compensation, the matter is automatically referred to arbitration.[84] The results of the arbitration are binding, and the WTO member seeking to modify its schedule of commitments may not do so until it adheres to the arbitration decision.[85]

For the purposes of this Note, it is important to understand the relationship between WTO law and U.S. law. Under the U.S. Constitution, self-executing treaties have a direct effect on U.S. law, while non-self-executing treaties do not.[86] Because the United States has held that WTO law requires implementing legislation, a viewpoint with which scholars concur, the GATT and WTO agreements are considered non-self-executing, and thus not binding upon the United States.[87] As such, decisions by the WTO Dispute Resolution Body have no direct effect on U.S. law, and it is up to the U.S. Congress and the President of the United States to ensure compliance with WTO rulings.[88]

D. *U.S.-Antigua Online Gambling Conflict Overview*

The U.S.-Antigua conflict demonstrates that there is a significant need for WTO dispute resolution reform. The conflict officially began when Antigua, one of the WTO's smallest nations, filed a claim in March 2003 with the DSB against the country with the world's largest economy, the United States.[89] Antigua argued that it had created an internet-based gaming industry that comprised approximately 10 percent of its gross domestic product.[90] Antigua alleged that, due to the United States' imposition of regulations aimed at excluding Antigua's online gambling services market,

82. *Id.* (citing DSU, *supra* note 77, art. 22(3)(c)).

83. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 674; *see also* GATS, *supra* note 14, art. XXI.

84. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 674.

85. *Id.*

86. *See id.* at 92; *see also* U.S. CONST. art. VI, § 2.

87. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 93.

88. *Id.* at 93–94.

89. Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11 J. INT'L ECON. L. 313, 316 (2008).

90. *Id.*

Antigua lost its large share of the market, suffered a substantial decrease in the number of online gambling licenses issued, and saw a decrease in the number of workers employed in the sector.[91]

Antigua's claim centered on the United States' GATS schedule on market access commitments for "other recreational services."[92] Under this category, Antigua claimed that the United States had violated the GATS through a variety of legislative measures,[93] including the Wire Act, the Travel Act, and the Illegal Gambling Business Act.[94] The United States responded that it did not specifically list gambling as a commitment, maintained that gambling is not included in "other recreational services," and argued that, even assuming that it had inadvertently committed to such a sector, gambling nevertheless falls into the "protection of public morals or public order" exception to the GATS.[95]

For many months, Antigua and the United States negotiated to resolve the situation. After negotiations ultimately failed, Antigua requested that the WTO DSB form a panel to hear its claim.[96] On March 24, 2004, the panel issued a confidential ruling in favor of Antigua.[97] This granted the United States and Antigua an opportunity to negotiate in private prior to a public ruling.[98] Again negotiations were unsuccessful, with the United States refusing to adhere to the WTO's ruling.[99] The panel released its ruling to the public on November 10, 2004,[100] setting forth its finding that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are inconsistent with the WTO.[101]

The United States appealed to the Appellate Body.[102] The Appellate Body heard oral arguments on February 21, 2005, and issued its ultimate ruling on April 7, 2005.[103] The Appellate Body made three significant findings to resolve the conflict. First, the

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91. *Id.*
92. *Id.*
93. *Id.*
94. *Case Summary: WTO Internet Gambling Case*, PUB. CITIZEN, 1 (Mar. 2007), http://www.citizen.org/documents/Gamblingsummary2007.pdf.
95. *See id.* at 3.
96. *Summary of the Antigua-United States WTO Internet Gambling Case*, THE ANTIGUA-US WTO DISPUTE OVER INTERNET GAMBLING [hereinafter *Antigua-U.S. WTO Dispute Summary*], http://www.antiguawto.com/WTODispPg.html (last visited Mar. 20, 2011).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 28, at 652.
102. *See id.*
103. *Antigua-U.S. WTO Dispute Summary*, *supra* note 96.

Appellate Body found that the United States had inadvertently committed itself to an open market for online gambling,[104] basing its finding on the United Nations services classifications system, which lists "gambling and betting services" as one of the subcategories under "other recreational services."[105] The U.S. commitment to the category of "other recreational services," combined with the Appellate Body's reasoning that the majority of WTO members look to the United Nations services classifications system for interpretations of commitment categories, led the Appellate Body to determine that the United States had committed itself to an open market for online gambling.[106]

Second, the Appellate Body found that the United States was in violation of the GATS.[107] The Appellate Body upheld the panel's finding that the Wire Act, the Travel Act, and the Illegal Gambling Business Act were measures that interfered with the United States' obligation to provide an open market for online gambling.[108] The United States argued that a ban on a certain type of behavior should not be covered by the GATS, but the Appellate Body ruled that such a prohibition is in effect a violation of the GATS Article XVI requirement that no member with a commitment to a given market sector create a numerical quota limiting access to that market.[109]

Finally, the Appellate Body turned to the United States' contention that, despite its possible commitment to gambling, and even assuming a violation of the GATS, the U.S. measures in question were enacted to protect public morals, and thus fall under an exception to the GATS.[110] The United States argued that internet gambling is a unique form of gambling in that it is more susceptible to creating an addiction, more difficult to block from minors, and more likely to create a market for fraud.[111] The Appellate Body agreed with the United States and overturned part of the panel's ruling on this issue.[112] The Appellate Body concluded that the three aforementioned U.S. statutes fall under this exception; however, the Appellate Body also found another statute, the Inter-

104. *Case Summary: WTO Internet Gambling Case, supra* note 94, at 3.
105. *Id.*
106. *Id.*
107. *Antigua-U.S. WTO Dispute Summary, supra* note 96.
108. *Id.*
109. *Case Summary: WTO Internet Gambling Case, supra* note 94, at 3.
110. *Id.*
111. *Id.*
112. *Id.*

state Horseracing Act,[113] was discriminatory in that it permitted the interstate placement of bets within the United States but excluded foreign gaming companies from the U.S. market.[114] In essence, the Appellate Body gave the United States two options: repeal or redraft the Interstate Horseracing Act, or permit an open international market for online gambling to reach U.S. customers.[115]

After the Appellate Body issued its final ruling, the United States was given a reasonable time to come into compliance.[116] Antigua and the United States requested an arbitrator to determine this time frame.[117] The arbitrator gave the United States just under one year to comply.[118] The compliance deadline passed on April 3, 2006, without the United States altering any of its laws and still maintaining that it was in compliance.[119] In July 2006, Antigua requested a Compliance Panel, which ultimately held on March 30, 2007, that the United States had not complied with the WTO Appellate Body ruling.[120] On June 21, 2007, Antigua requested authorization to suspend its obligations under the TRIPS agreement with respect to the United States[121] and Antigua asked permission to impose $3.4 billion in annual retaliatory sanctions, while the United States argued that Antigua was only entitled to $500,000. The arbitrators ruled on December 21, 2007, that Antigua was entitled to annual retaliatory sanctions under the TRIPS Agreement in the amount of $21 million.[122]

The U.S. response prior to this ultimate judgment proves most significant to this Note because it demonstrates the lack of remedial power in the current system. In essence, rather than coming into compliance, the United States made the unprecedented move of withdrawing its GATS commitments.[123] As such, the United States was required to compensate all affected members that subsequently filed a claim, such as China, Japan, and the European Communities, among others.[124] The United States' response, despite Antigua ultimately being granted permission to suspend

113. The Interstate Horseracing Act is codified at 15 U.S.C. §§ 3001–07 (2006).
114. *Case Summary: WTO Internet Gambling Case*, *supra* note 94, at 4.
115. *Id.*
116. *Antigua-U.S. WTO Dispute Summary*, *supra* note 96.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*; Ruse-Khan, *supra* note 89, at 317.
121. Ruse-Khan, *supra* note 89, at 318.
122. *Id.*
123. *See id.* at 319.
124. *Id.* at 320.

concessions under TRIPS, demonstrates the inherent problems with the WTO dispute resolution system.

Essentially, the United States was able to violate a significant international agreement without a real penalty. Instead of bringing the United States into compliance, the United States simply ignored the WTO ruling without consequence. While the United States may ultimately face the approved Antiguan TRIPS violations and/or be forced to compensate other members, the basic premise remains: the WTO's current dispute resolution enforcement powers are too insignificant to truly mandate that a powerful country like the United States come into compliance. That the United States was able to violate the WTO GATS for years without penalty has left Antigua without a true remedy. The opportunity to violate U.S. intellectual property rights under TRIPS is barely any compensation at all. It would hardly be in Antigua's best interest to sanction the United States, which provides Antigua with over 20 percent of its total imports.[125]

As such, "[s]ome commentators believe the inability of Antigua to obtain a remedy and the withdrawal of [the United States'] commitment to cross-border gaming services has the potential for causing systemic damage to the WTO process."[126] It is time for a change in WTO dispute resolution powers. Below, this Note explores the realm of possible changes the WTO can undergo to create a dispute resolution system that is actually capable of providing a remedy to WTO members who have been legally wronged by another member, no matter the size, economic power, or world influence of the violating member.

III. Analysis

A. *A Call to Change the WTO Dispute Resolution System*

In many ways, the current WTO dispute resolution system is a substantial upgrade from the system under the GATT. Whereas under the GATT every step in the dispute resolution process required consensus approval by all WTO members, the current system inverted this procedure by permitting the process to move forward absent a consensus of disapproval.[127] At least one author has

125. *Antigua and Barbuda*, U.S. Com. Service, http://www.buyusa.gov/caribbean/en/othercontact_antigua_barbuda.html (last visited Mar. 20, 2011).

126. Bruce Zagaris, *Ethical Issues in Offshore Planning*, A.L.I.-A.B.A. Continuing Legal Educ., July–Aug. 2008, pt. VII.D.

127. Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 Am. J. Int'l L. 335, 336 (2000).

noted that this drastic change has allowed more politically sensitive cases to move forward and has helped protect weaker WTO members that may have had trouble or been intimidated by the prospect of attempting to reach a consensus under the former system.[128] While the current WTO dispute resolution system is undoubtedly more effective, it is far from perfect.

The primary goal of the WTO dispute resolution system is compliance.[129] While the WTO is in part concerned with compensating a country for its monetary losses and rebalancing the economic scales, the overarching purpose of the system is to bring all WTO members into compliance with WTO norms and thus increase open markets for trade.[130] The current system does not meet this goal. Under the DSU as it applies today, a violating member has a reasonable time to bring itself into compliance, which essentially means changing its laws to conform to a panel or Appellate Body ruling.[131] Should the violating country choose to ignore the DSB's ruling, the DSU provides two ineffective remedies. The defaulting member may offer compensation, which takes the form of lower trade barriers offered to all WTO members,[132] or the prosecuting member may suspend concessions or other obligations, meaning taking retaliatory measures against the violating member in the form of increased trade barriers.[133]

Should a prosecuting country seek compensation, it will ultimately be disheartened by the DSU's interpretation of the term. The idea of lowering trade barriers by way of removal of tariffs may sound like a great option to help induce compliance; compensation under the DSU, however, is subject to the agreement of the violating member.[134] To understand how useless this compensation option is, consider the U.S.-Antigua conflict. If Antigua had chosen to seek compensation by requesting that the United States reduce trade barriers with respect to Antigua, the United States could simply decline. It is almost incomprehensible how this option of compensation is considered a remedy. As previously stated, the purported goal of the DSU is to induce compliance. Granting veto power to the violating country seems completely at odds with this stated objective.

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128. *Id.*
129. *See id.* at 341.
130. *See id.*
131. *See id.* at 336–37.
132. *Id.* at 337.
133. *Id.*
134. *Id.* at 345.

As seeking compensation will rarely if ever induce compliance, prosecuting members are left with the sole remedy of retaliatory suspension of concessions with respect to the violating member. Should the DSB authorize such retaliatory measures, it will often serve as an ineffective remedy, as evidenced by the *EC-Bananas*[135] and *EC- Hormones*[136] cases. In both cases, the DSB authorized the United States to retaliate against the European Communities (EC), yet even sanctions by an economic powerhouse the size of the United States could not force the EC into compliance.[137] This begs the question as to how a country with an economy the size of Antigua could ever realistically expect to induce the compliance of a powerful economy like the United States.

Sanctions favor countries with larger economies, and such countries have a much greater ability to use this retaliatory scheme.[138] Countries with smaller economies face a bleak reality. When any country is faced with sanctioning a violating member, the prosecuting country's economy is harmed at least somewhat.[139] When a country with a smaller economy considers imposing such sanctions against a country with a much larger economy, the implications of such an action may even deter the prosecuting country from acting.[140] This is what happened to Ecuador, the original complainant in the *EC-Bananas*[141] case, and as a result it was essentially left without remedy.[142]

At least one author has suggested that should a smaller country impose such sanctions, the larger economy may in turn respond with counter-retaliation outside of the WTO system in fields such as development aid.[143] In addition, political ramifications may arise in response to such economic sanctions.[144] More directly, an

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135. *EC-Bananas, supra* note 49.

136. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC-Hormones*].

137. *See* James C. Hecht, *Operation of WTO Dispute Settlement Panels: Assessing Proposals for Reform*, 31 LAW & POL'Y INT'L BUS. 657, 659 (2000); Gary Horlick & Judith Coleman, *The Compliance Problems of the WTO*, 24 ARIZ. J. INT'L & COMP. L. 141, 142 (2007).

138. Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, 1 WORLD TRADE REV. 123, 129 (2002); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 816 (2001).

139. Anderson, *supra* note 138, at 129.

140. *Id.*

141. *EC-Bananas, supra* note 49.

142. Anderson, *supra* note 138, at 129–30.

143. *See* Pauwelyn, *supra* note 127, at 338.

144. David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 472–73 (2000).

import-dependant country cannot realistically cut off its market from a major world economy because it would be more likely to harm its own economy than to induce compliance by the larger economy.[145] One author explains this phenomenon succinctly, stating: "The biggest problem with WTO sanctions is that the teeth bite the country imposing the sanction."[146] As such, the import dependency of a country has a direct effect on the ability of that country to impose sanctions.[147] As discussed previously, Antigua depends on the United States for approximately 20 percent of its total imports, leaving Antigua wondering if the bark of its sanctions will be worth the bite.

Using the U.S.-Antigua conflict as a guide,[148] it becomes evident that the current WTO dispute resolution system creates a "David vs. Goliath" situation. Antigua and countries in a similar situation face a lose-lose situation. Should Antigua seek compensation, the United States can simply decline, and if Antigua chooses to pursue sanctions, not only can it expect them to have little-to-no effect on a giant like the U.S. economy, but it could create a devastating effect on its own economy. The alleged DSU goal of inducing compliance is nearly impossible to accomplish for a country like Antigua. This inherent inequality in the WTO system demands change. The remainder of this Note explores some potential changes and ultimately sets forth a proposed solution.

B. *Examining Various Potential Solutions for a More Effective WTO Dispute Resolution System*

There exist a number of possible changes the WTO dispute resolution system could undergo to address the disparity in power facing a smaller economy under the current dispute resolution system. In addressing each potential solution, this Note analyzes the pros and cons of each proposal in the U.S.-Antigua conflict framework. As discussed above, the WTO currently provides remedies in the form of sanctions and compensation. The first three

145. Pauwelyn, *supra* note 127, at 338.

146. Charnovitz, *supra* note 138, at 814.

147. *Id.* at 816–17.

148. The U.S.-Antigua conflict was chosen because it is perhaps the best example demonstrating the inherent inequalities in the WTO dispute resolution system. While the morality defense exception argument explained previously may be persuasive in the context of the U.S.-Antigua conflict, it does not present any significant rebuttal to the position that the dispute resolution system of the WTO, as a whole, is in need of reform. As such, the morality defense exception is ignored for the remainder of this Note.

options for changing the current system involve strengthening the sanctioning procedures.

One option is to permit collective sanctions: "There are currently no *collective* remedies or sanctions by the WTO membership as a whole."[149] As such, under the current system, a country is essentially left to fend for itself, including bearing all of the costs associated with pursuing a claim and other costs, both economic and political, of imposing sanctions.[150] There are many forms that a collective sanctioning remedy could take. The DSU could permit any affected member to enforce a decision already reached. Another option would be for the DSU to require all affected members to pursue a claim and enforce sanctions together. Finally, the DSU could issue sanctions directly on behalf of the entire WTO. Each of these options carries similar pros and cons. It is helpful to return to the U.S.-Antigua conflict to highlight some of the benefits and detriments of a collective sanctioning remedy.

If the DSU permitted any affected member to enforce a decision already reached, rather than require each country to litigate each claim individually, it seems that Antigua would be in a better situation. Antigua seemingly would be able to decrease its own costs by essentially allowing another country to do all of the litigation work and then, afterward, attempting to enforce any favorable decision.[151] This would also appear to decrease the inequality between smaller countries and larger ones. In reality, this system merely disguises the inequality inherent in the system by forcing smaller countries to become reliant on larger ones. While this proposal may help reduce costs, it does not actually change anything. First, this proposal assumes another country is willing and able to bear the costs of litigation, which does not appear to be the case in the U.S.-Antigua conflict. Second, even if another country was willing, Antigua could not afford to wait for another country to do all of the work; with its economy collapsing, Antigua needed to take action immediately. Under this proposed system, Antigua's situation would be no different than it currently stands.

The second proposal, requiring all affected members to pursue and enforce a claim and resulting sanctions together, fails in similar fashion. Again, this helps reduce costs, which is significant for members like Antigua that cannot afford the economic and political consequences of challenging powerful members. While this is

149. Pauwelyn, *supra* note 127, at 338 (emphasis in original).
150. *Id.* at 345.
151. *See id.*

important, the inequality in the system remains. This system again creates a dependency on larger economies helping smaller ones rather than actually trying to level the playing field. This raises a number of problems.

First, it may not be feasible to require a country to impose sanctions. Some countries are so dependant on another country as a trading partner that such a system may actually deter WTO membership. If Antigua did not desire to pursue this claim, for example, it would be unfair to force Antigua to sanction the United States, which provides Antigua with over 20 percent of its total imports.[152] Additionally, dependency on larger countries is undesirable because a country will only invest its resources in a worthy cause. While many other countries in the world are affected by the U.S. ban of online gambling, each country is not affected equally. As such, Antigua may still find itself providing significant resources and bearing a majority of the political and economic backlash because Antigua's economy is more dependent on resolving this conflict favorably than many of the other countries that would be involved. Thus, those countries that have a lot at stake, regardless of size, will still bear the majority of the costs. This proposed system seems to create more problems than it solves.

A final collective sanctioning remedy would be for the DSU to issue sanctions on behalf of the entire WTO membership. For example, the DSU could suspend a WTO agreement in full or in part with respect to a country that refuses to come into compliance.[153] This proposal is the most extreme and also the most impractical. While this proposal would essentially force a given country, like the United States, to change its laws, it would do so at the expense of every country in the WTO. It would be unreasonable to force every other WTO member to sanction the United States because of its online gambling laws. Some countries are greatly affected by the U.S. online gambling laws, like Antigua, but many countries are surely indifferent to them. Forcing every country in the WTO to cut off at least part of its trading with the United States is unreasonable, and it is unlikely that many countries would support such a system. While this concept may give more power to the dispute resolution system, it may negatively affect the legitimacy of the WTO as a whole. As the legitimacy of the WTO is at the heart of this discussion, this proposal is the most dangerous thus far.

152. *Antigua and Barbuda*, *supra* note 125.
153. *See* Pauwelyn, *supra* note 127, at 345.

From viewing these three collective sanctioning options through the lens of the U.S.-Antigua conflict, it becomes evident that the proper solution does not appear to be an improved sanctioning remedy. As such, this Note argues in the following section that the best way to fundamentally correct the WTO dispute resolution system is to change its compensation procedures.

C. *Mandatory Compensation: Giving "David" a Fighting Chance against "Goliath"*

1. Mandatory Compensation Is the Best Solution Available to Correct the Inequalities in the Current WTO Dispute Resolution System

The current dispute resolution system is in need of change. As discussed above, that change cannot effectively come from a new sanctioning system. This leaves one to consider changing the other form of remedy provided by the DSU: compensation. Previously, this Note discussed the completely ineffective compensation scheme provided by DSU. Specifically, compensation is subject to the consent of the violating country. This essentially gives the agreement-breaking member veto power over the authorization of compensation. This almost always creates the situation in which Antigua was placed, where sanctions are the only remedy available. As this Note has indicated, sanctioning provides a remedy rife with inequality, as smaller countries are unable to effectively use sanctions. This Note's proposed solution to the inequality running rampant throughout the WTO dispute resolution system is to eliminate the ineffective remedies of optional compensation and sanctions and replace them with a true remedy: mandatory compensation.[154]

Mandatory compensation would function much like the current compensation scheme with two substantial changes. Compensation would continue to take the form of decreased trade barriers, which essentially means reduced tariffs on foreign goods. The first difference would be to change the compensation procedures to permit reparations. Currently, the system allows only prospective

154. In no way is this Note claiming to be the first, or only, scholarly work to suggest a mandatory compensation framework as an alternative remedy for the DSB. This Note's goal is simply to shed light on the inequality in the current system, as exemplified by the U.S.-Antigua conflict, and advocate for the best-available solution. Much of the inspiration for this Note's proposal is due to the combined works of Dirk De Bievre and Joost Pauwelyn.

relief.[155] Under the mandatory compensation system proposed here, compensation in the form of reduced tariffs would equal the total estimated damage that a country has suffered to date and will likely suffer in the future due to the defending country's actions, as determined by a panel. This differs from the current compensation system, which limits recovery to the damage the prosecuting country has suffered subsequent to the date of expiration of the reasonable time period the panel provides the violating country to come into compliance.[156] Thus, the proposed remedy would actually help a country recover an amount equal to the total harm it has suffered.

A second, more significant, change to the structure of compensation would be to make compensation mandatory. This would remove the veto power countries currently have over compensation requests. In doing so, the inequality in the system would almost entirely be removed. While a country like Antigua would still have to carry the costs of litigation in the DSB, there would actually be a true remedy available at the end of the fight. After the panel and, if applicable, Appellate Body determined the required amount of compensation, the violating member would then be required to reduce its tariffs in accordance with the panel or Appellate Body's determination as to the sectors and goods most likely to actually help compensate the prosecuting member.

2. Applying Mandatory Compensation to the U.S.-Antigua Conflict

To help demonstrate the effectiveness of this proposed system, mandatory compensation can be applied to the U.S.-Antigua conflict. As previously discussed, the DSB granted Antigua permission to impose $21 million annually in retaliatory sanctions against the United States. Under the new mandatory compensation structure proposed here, the DSB would instead first determine the amount of damage Antigua had already suffered as a result of U.S. law, and then decide the anticipated amount of damage Antigua would suffer annually in the future. The DSB would then total this amount and order the United States to reduce its tariffs accordingly in specific sectors to truly compensate Antigua within a DSB-determined reasonable time period.

155. Pauwelyn, *supra* note 127, at 346.

156. *See id.* at 338.

Under this proposed system, the DSB has enough power to actually enforce its decisions. The DSB determines the harm, the time frame for compensation, and the specific goods or sectors for which compensation will apply in the form of reduced tariffs. Instead of giving the violating country veto power, the DSB makes all of the decisions. Rather than forcing a country to impose sanctions and cut itself off from a trading partner, it imposes reduced tariffs on the violating country, which actually will increase the amount of trade. Under the WTO's Most Favored Nation system,[157] which requires each WTO member to afford all countries equal trading benefits, these reduced tariffs will apply to all WTO members, giving the proposed system all of the benefits of a collective remedy.

No longer would smaller countries like Antigua need to fear "Goliath" countries like the United States, as the reduced tariffs would apply to every WTO member. This would substantially increase trade with the United States, and more importantly, internalize an external problem; instead of forcing Antigua to persuade the United States to change its laws, the U.S. political system would do all of the convincing. As tariffs fall, imports would increase, and U.S. companies would face drastically increased competition from abroad. Without the protection of tariffs, these companies would lose out on some portion of their domestic sales and would seek change through the political process. The end result is that U.S. citizens would force the United States to change its laws.

As the U.S.-Antigua situation makes evident, mandatory compensation eliminates the inequality and favoritism toward larger countries in the present WTO dispute resolution system. The amount of pressure on a defaulting country to come into compliance with WTO agreements would no longer depend on the size and power of the prosecuting country. This would create a system in which the DSB actually has the power to enforce its decisions through an effective remedy that promotes, rather than hinders, trade.

3. Evaluating the Perceived Problems with a Mandatory Compensation System

While mandatory compensation is the most effective method for correcting the WTO's dispute resolution system, some may argue otherwise. One such argument is that, because the decreased tar-

157. *See Understanding the WTO: Principles of the Trading System*, WTO, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm (last visited Mar. 20, 2011).

iffs apply to all countries, the prosecuting country would need some additional access to truly be compensated.[158] Another argument is that the political leadership in the violating country would suffer as a result of losing the protective barriers it put in place to protect its own industries.[159] These arguments both fail. First, simply because all countries gain the benefits of an open market with respect to the violating country does not reduce the compensation the prosecuting country receives. And second, as was mentioned above, affecting political leadership is precisely the goal in advocating for mandatory compensation. The entire purpose of the mandatory compensation scheme is to internalize the problem and force a country's own people to make that country change its laws.

A third argument against mandatory compensation is that it is too powerful of a remedy. This argument is likewise without merit. The WTO is a voluntary trade organization; no country is forced to join it. The WTO already has the power to issue binding rulings and permit countries to sanction one another. This new proposal simply turns an unfair, ineffective system into one that actually accomplishes what it purports to advocate. As the system currently stands, it allows large countries, like the United States, to force other countries into compliance through the imposition of sanctions. The proposed system just evens the scales by changing the remedy from a unilateral move to a concerted action. This forces all violators of WTO agreements to face the same consequences, no matter the size of their economies, thus allowing all countries to expect and receive adequate relief from a system that, currently, leaves many countries without remedy.

IV. Conclusion

As it currently stands, the WTO dispute resolution system is both ineffective and unfair. For members with smaller economies, the ability of a larger country to simply decline compensation makes it essentially a useless option. Likewise, a smaller country's limited ability to effectively sanction a larger trading partner creates an inherent inequality in the current procedures. Implementing a mandatory compensation scheme in place of these two current remedies would accomplish the primary goal of the dispute resolution system, bringing countries into compliance with the WTO agreements that they have signed.

158. Anderson, *supra* note 138, at 126.
159. *Id.*

Bringing about such a drastic change to the WTO will not be easy. It is unlikely that the world's more powerful economies would be willing to empower the WTO in such a way as proposed here. If these countries would consider the effects of implementing the changes proposed in this Note, however, the broader picture may appear much more appealing. One consideration is that the proposed mandatory compensation system would legitimize the WTO, thus benefitting all members. Rather than continuing with a system that is recognized as inherently unfair, the proposed system would remove such inequality and, in doing so, would give the WTO legitimacy as a powerful, yet fair, global trade organization. This may in turn increase membership in the WTO and promote more international trade.

Perhaps the most significant consideration for larger countries unwilling to approve a mandatory compensation scheme in fear of empowering smaller countries is the overall beneficial effect such a dispute resolution system would have for all countries, even those countries with large economies. While larger countries may be fully able to take advantage of the current dispute resolution system when in disputes with smaller economies, the *EC-Bananas*[160] and *EC-Hormones*[161] cases discussed above make it clear that when two large economies have a dispute, the current dispute resolution system may fail to create the desired result of compliance.

The proposed mandatory compensation system would correct this problem. Just as the proposed collective remedy of mandatory compensation in the form of reduced trade barriers would help smaller countries, mandatory compensation would aid larger countries as well. The size of a country's economy would be irrelevant under a mandatory compensation system. No matter the size of a violating member, mandatory reduced trade barriers would internalize the problem and force the violating member's own businesses and citizens to demand change. Thus, the benefits of the system would extend even to those large economies that one would expect to resist implementing such a system.

While it is true that a mandatory compensation system would increase the power smaller countries would have when prosecuting larger countries, the system would also increase the power larger countries would have when they are the ones doing the prosecuting. Therefore, if the larger members in the WTO are willing to give up some of the unfair advantage they currently have over

160. *EC-Bananas, supra* note 49.
161. *EC-Hormones, supra* note 136.

smaller members, by accepting a mandatory compensation framework, the actual effect would be to increase the power of all prosecuting countries, no matter their size, and create an effective dispute resolution system that actually accomplishes its goal of bringing violating members into compliance. If countries truly desire a stronger world economy and an effective and reliable international trade dispute resolution system, perhaps the concepts raised in this Note will eventually take hold and correct what is currently a system that favors "Goliath" and never gives "David" a fighting chance.