UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:06CR00337CEJ (MLM)
	)	
GARY STEPHEN KAPLAN,	)	
	)	
Defendant.	)	

DEFENDANT GARY KAPLAN'S MOTION TO DISMISS BASED ON TREATY OBLIGATIONS AND RELATED PRINCIPLES OF DOMESTIC AND INTERNATIONAL LAW AND INCORPORATED MEMORANDUM OF LAW

Defendant Gary Stephen Kaplan moves, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure,[1] to dismiss the charges against him based upon treaty obligations and related principles of domestic and international law. The treaty obligations are those the United States has assumed under the General Agreement on Trade in Services ("GATS") and the Dispute Settlement Understanding ("DSU") which applies to the GATS. These obligations, recognized by both the authoritative dispute resolution bodies of the World Trade Organization ("WTO") and by U.S. law, foreclose this prosecution, requiring dismissal not only of the Wire Act charges, but of every count that seeks to penalize Kaplan for activities related to the

[1] Rule 12(b) of the Federal Rules of Criminal Procedure provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." *See, e.g.*, *United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005).

provision of cross-border remote gambling services, that is to say, all of the charges in the Superceding Indictment.

BACKGROUND

In November 2004, in a case brought by Antigua against the United States, the Wire Act, 18 U.S.C. § 1084, the Travel Act, 18 U.S.C. § 1952, and the Illegal Gambling Business Act ("IGBA"), 18 U.S.C. § 1955, were found by an authoritative WTO Panel to be inconsistent with the United States' international legal obligations, specifically the General Agreement on Trade in Services.[2] The United States, which is a founding and prominent member of the WTO, and which itself makes frequent use of the system to ensure compliance by other member States with their WTO obligations towards the United States, appealed the decision to the Appellate Body of the WTO.

In April 2005, the Appellate Body, the supreme judicial body of the WTO, confirmed the decision of the Panel and held that the American laws conflicted with an obligation, freely entered into by the United States, to allow access to the vast and legal American domestic gambling market, including remote betting, to providers, such as the defendant, operating from the territories of other WTO members.[3]

The United States was given almost a year to bring its laws into compliance with its

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[2] Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005, modified by Appellate Body Report, WT/DS285/AB/R.

[3] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, *available at* http://www.worldtradelaw.net/reprots/wtoab/us-gambling.ab.doc.

international legal obligations,[4] at the end of which period the U.S. claimed to have done so. In March 2007, at the end of yet another legal process, a WTO "Compliance Panel" rejected this claim and found the United States to have persisted in its violation of its international legal obligations.[5]

As discussed below in Points I, II and III, in light of these determinations—and pursuant to the independent obligations the United States has assumed under GATS and its implementing legislation—the defendant may not be prosecuted for violations of the Wire Act, nor for a RICO conspiracy which charges predicate acts under the Wire Act, the Travel Act, and the IGBA, and those charges must be dismissed. For many of the same reasons, and as set forth in Point IV, the remaining charges are subject to dismissal also.

I. THIS PROSECUTION IS VIOLATIVE OF U.S. OBLIGATIONS UNDER THE GATS AND THE WTO RULINGS.

The Superceding Indictment alleges that in about 1996-1997—after the entry into force of the U.S. international commitments under the GATS—Kaplan relocated the gambling operations to Antigua, and then to Costa Rica, leaving certain aspects of the financial operations in Antigua, and then seeks to portray his subsequent activities as violations of various federal criminal laws. In fact, the persistent illegality in the case has been committed by the United States which, in egregious violation of its international commitment and in total disregard of binding dispute

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[4] Award of the Arbitrator, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU, WT/DS285/13, 19 August 2005.

[5] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU* by Antigua and Barbuda, WT/DS285R/RW, adopted 22 May 2007 (hereinafter "Compliance Panel Report").

settlement to which it submitted, is seeking to prosecute the defendant for activities which are protected by those international commitments.

A. The United States Has Assumed Binding Legal Obligations Under The GATS.

The United States has assumed two types of legal obligations by entering into the GATS, substantive obligations and commitments to legally binding dispute settlement, which this prosecution violates. With respect to the Wire Act, the Travel Act, and the IGBA in particular, to the extent that the United States continues to interpret and apply the legislation so as to criminalize internet gambling, it is in violation both of its obligations under the GATS as well as its obligations under the DSU to accept adopted dispute rulings as a binding and final settlement of the dispute and to bring itself into compliance with these rulings.

1. *The substantive U.S. legal obligation.*

The General Agreement on Trade in Services is one of the main treaties negotiated in the Uruguay Round of multilateral trade negotiations. The GATS constitutes part of the so-called WTO Single Undertaking, a core group of treaties adhesion to which constitutes a condition for membership in the WTO.

The Uruguay Round agreements are not, under U.S. law, self-executing treaties. Therefore, implementation of U.S. obligations under these agreements in U.S. law has been undertaken through the Uruguay Round Agreements Act ("URAA").[6] This Act expresses the intent of Congress that U.S. laws and regulations be fully consistent with the obligations in

[6] PUB. L. NO. 103-465, 108 Stat. 4809 (1994) (codified in scattered sections of 15, 17, 19, and 35 U.S.C.).

question.[7]

The GATS consists of a series of obligations with respect to government measures that affect the supply of services from one WTO member state to another, through any of four modes of delivery.[8] The first mode—*transboundary delivery of the service*—applies to internet-based service transactions.[9] Some of these obligations apply to all service sectors in which trade between WTO members occurs; others apply only to sectors in which a WTO member has listed a particular service or service sector in its Schedule of Commitments, thereby allowing access to outside service providers, subject to certain protections and qualifications

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[7] In addition to approving the Uruguay Round Agreements and incorporating them as a whole into U.S. law, the Act contains what the House Report describes as "all amendments to existing Federal statutes or provision of new authorities, including authority for Federal agencies to issue regulations, known to be necessary or appropriate to enable full implementation of, and compliance with, U.S. obligations under the agreements." H.R. 103-826(I), 25.

[8] The four modes are: "(a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, though commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." GATS Article I:2.

Costa Rica has been a member of the WTO since January 1, 1995. Article II(1) of the GATS requires that every WTO member extend to every other member the most favorable treatment that it provides to like services and service providers of any country, whether a WTO member or not. Thus, the commitments under the GATS that were the subject of the U.S.—Gambling case would apply equally to services and service providers of Costa Rica.

[9] "The definition [of mode 1] in the GATS does not contain any indication as to the means that can be used to supply services cross-border. This indicated, in our view, that the GATS does not limit the various technologically possible means of delivery that can be used to supply services cross-border. This indicated, in our view, that the GATS does not limit the various technologically possible means of delivery under mode 1." Panel Report, *supra* n.2, ¶ 6.281. See also *Work Programme on Electronic Commerce-Progress Report to the General Council*, adopted by the General Council for Trade in Services on 19 July 1999, S/L/74, 27 July 1999, para.4 (cited by the panel): "It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between different

under the GATS.

A member such as the U.S. lists a service when it believes it is in its interest to do so. Listing a service may benefit both consumers and American service providers for whom market access is granted in other countries. Substantial reliance is placed on such binding obligations of access to the market both by other countries, whose economies may be affected heavily, and by individual businesses which gear their investments and activities based on the promise of access.[10]

The dispute at hand is the result of the United States giving a legally binding commitment in respect of "Recreational, Culture and Sporting Services," which have been held to include gambling and betting services. These schedules form an integral part of the GATS as a legal instrument.

2. *The commitment to legally binding dispute settlement.*

The GATS, as part of the WTO system, also entails a legal obligation on the part of WTO members to accept binding dispute settlement in the WTO, including enforcement through authorization of trade sanctions against a non-complying member. Dispute settlement and enforcement obligations are contained in a separate WTO agreement, the Dispute

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technological means through which a service may be supplied."

[10] After hurricanes devastated Antigua's tourism industry in the 1990's, Antiguan authorities turned to financial services and internet gambling to diversify their economy. At one point, 3000 people were employed in the sector, accounting for ten percent of the country's GDP in 1999. *See* Panel Report, *supra* n.2, ¶ 3.5. License fees provided the government with $90 million in revenue. *Id.*

Antigua's proceeding against the United States was a response to efforts of the United States Department of Justice to prevent Antiguan companies from providing remote gambling and betting services to consumers in the United States. *See* http://www.miamiherald.com/103/v-print/story/177693.html. The United States crackdown dealt a blow to the industry from which Antigua has yet to recover.

Settlement Understanding, the provisions of which apply to the GATS. Under the DSU, once adopted by the Dispute Settlement Body, a ruling of a WTO dispute Panel or of the Appellate Body, if there has been a successful appeal, constitutes a legally binding settlement as between the parties to the dispute.[11] A failure of the defending party to modify its laws or its conduct in order to comply with the adopted ruling entitles the party that has prevailed in the dispute to impose sanctions on the defending party.[12] If there is a dispute over the question of compliance, a "Compliance Panel" may be appointed to adjudicate such a dispute.[13] Its decisions, too, are appealable to the Appellate Body.

The obligation of a WTO member to comply with an adopted dispute ruling is additional to the obligation to observe the underlying treaty obligations themselves. This distinguishes the

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[11] Article 17.14 of the DSU provides: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members." Article 21.1 of the DSU provides in turn: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

[12] Article 22.1 of the DSU provides: "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of recommendations to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements."

Article 2.15 of the DSU provides: "Where there is disagreement as to the existence of consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

WTO legal system from many other international treaty regimes, where there is an obligation to conform to the treaty norms but no compulsory dispute settlement, so that a party's compliance with its obligations under the treaty may be largely or entirely self-judging.

The binding nature of the WTO dispute settlement system, and the fact that non-compliance with a ruling may trigger sanctions, were the subject of considerable deliberation in Congress when the URAA was under consideration. URAA provisions reflect the importance Congress attached to the implementation, not only of Uruguay Round treaty obligations in general, but also to the obligation to comply with adopted dispute settlement rulings.[14] The United States has made frequent use of the Dispute Settlement Understanding both as Plaintiff and Defendant and has never challenged the authority of DSU organs or the obligation to comply with their rulings.[15]

The URAA sets out procedures to be followed in order for U.S. regulations and practices to be modified or amended in order to bring the U.S. in compliance with adverse dispute settlement rulings. 19 U.S.C. § 3533(g).

[15] It has availed itself of the sanction mechanisms against States that did not comply with such rulings. *See* Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – a Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/D27/ARB, 9 April 1999, DSR 1999: II, 725; Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones). Original complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105.

On other occasions, it has modified its own laws or ceased certain actions in order to comply with decisions against it. *See, e.g., United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/; *United States –Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS248/AB/R/, WT/DS249/AB/R, WT/DS259/AB/R; *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS/108/AB/R; *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R. In all these instances, the measures the U.S. was required to modify were politically sensitive, suggesting the seriousness with which the United States has taken its obligation to comply with WTO dispute settlement rulings.

B. The WTO Has Issued Rulings In The Gambling Dispute.

1. *Nature of the claims and the course of the proceedings.*

In the U.S.-Gambling dispute, Antigua challenged under the GATS a number of provisions of United States federal and state law that, Antigua maintained, amounted to an effective ban, or blanket prohibition, on internet gambling transactions between Antiguan service providers and American consumers. Among the laws Antigua challenged was the Wire Act, 18 U.S.C. § 1084, under which Kaplan has been charged.[16] The resulting dispute rulings, both of the Panel (as modified by the Appellate Body) and of the Appellate Body itself, were adopted by the Dispute Settlement Body and found the United States in violation of its obligations under the GATS with respect to gambling and betting services.[17]

Under the DSU, the United States had a reasonable period of time to comply with the rulings adopted by the DSB; an arbitrator set this period at 11 months and two weeks.[18] Subsequently, on July 6, 2006, Antigua brought a further action, referring to a "Compliance Panel" a claim that the United States had not brought itself in compliance with the rulings.[19] That panel too held that the United States had not taken measures to bring itself into

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[16] Antigua also challenged the Travel Act and the IGBA, both of which, together with the Wire Act, are predicates for the RICO conspiracy charge against Kaplan. *See* Superseding Indictment, Count 1, ¶ 23. Antigua also challenged a range of state laws.

[17] *Supra* n.2.

[18] Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator Claus-Dieter Ehlermann, WT/DS285/13, 19 August 2005; provided to the Chairman of the DSB, WT/DS285/14, 23 August 2005.

[19] Recourse to Article 21.5 of the DSU by Antigua and Barbuda, Request for the Establishment of a Panel, WT/DS285/18 7 July 2006.

compliance.[20]

2. *The WTO findings and rulings, and their rationale.*

First, the panel held, and the Appellate Body affirmed on somewhat narrower grounds, that the United States had made commitments with respect to gambling and betting services in its Schedule of Commitments.[21]

Second, the panel held and the Appellate Body affirmed, with somewhat different reasoning, the Wire Act, the Travel Act, and the IGBA, to the extent that they criminalize internet gambling transactions between service providers of other WTO members and U.S.

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[20] Compliance Panel Report, *supra* n.5.

[21] The panel so ruled on account of the inclusion in the U.S.'s schedule under the heading "Recreational, Culture and Sporting Services" of "other recreational services (except sporting)." Panel Report, *supra* n.2, ¶¶ 6.41-6.138. The Appellate Body came to this conclusion based on an exhaustive examination of the negotiating history of the Schedules under GATS, the guidelines for scheduling developed by the Secretariat of the WTO and the general scheduling practice of WTO Members, including the United States itself. Appellate Body Report, *supra* n.3, ¶¶ 158-213. In considering these various. interpretative sources, the Appellate Body followed closely the rules of treaty interpretation in the Vienna Convention on the Law of Treaties, which are generally viewed as well as customary international law obligations, binding *inter alia* on the United States.

consumers, constitute a violation of Article XVI(2) of the GATS.[22]

The panel reasoned that, by prohibiting entirely certain internet gambling transactions, the Wire Act, the Travel Act, and the IGBA imposed a "zero quota" on these transactions.[23] The Appellate Body upheld this interpretation, rejecting the U.S. argument on appeal that a measure, in order to violate XVI(2), must be expressed explicitly in quantitative terms.[24] This interpretation addressed the concern that, if a member could avoid its market access obligations under Article XVI(2) of the GATS by expressing the most absolute type of market access limitation—a complete ban—in non-quantitative terms, the purpose and effectiveness of Article XVI(2) would be seriously undermined.

Third, partly reversing the panel, the Appellate Body held that the Wire Act, the Travel Act, and the IGBA, although in violation of Article XVI(2) to the extent they prohibit internet gambling transactions between U.S. consumers and service providers of other WTO members, were not shown to be justified under the Article XIV exception for measures necessary for the

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[22] Panel Report, *supra* n.2, ¶¶ 6.360 – 6.365 (Wire Act); 6.366 – 6.373 (Travel Act); 6.374 – 6.380 (IGBA). Appellate Body Report, *supra* n.3, ¶ 264-65. Article XVI(2) provides, in relevant part:

> In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
> . . .
> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.)

[23] Panel Report, *supra* n. 2, ¶ 6.355.

[24] Appellate Body Report, *supra* n.3, ¶¶ 222-65.

protection of public morals and public order.[25]

Significantly, in the WTO, Antigua was able to adduce considerable evidence, both *statutory* (notably the Interstate Horseracing Act) and *empirical* (relating to prosecutorial practices in the United States),[26] which strongly suggested that the very type of conduct which

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[25] Appellate Body Report, *supra* n.3, ¶ 372.

Under WTO/GATS, because members retain vast regulatory sovereignty, the United States is entitled to regulate the manner of gambling through measures such as the Wire Act if those measures are necessary to protect public morals or maintain public order. However, measures such as the Wire Act may not be applied in a manner which constitutes arbitrary or unjustified discrimination in favor of domestic suppliers of competing products or services.

It is not unusual for States to put in place regulatory regimes which on their face have the purpose of protecting the health or safety or other interests of the public, but which are applied in such a manner as to give a commercial advantage to domestic competitors. It would, for example, be difficult for a State to justify a measure which in the interest of protecting, say, public morals, prohibited the importation of certain types of pornography, if it were found that identical or similar type of pornography domestically produced could lawfully circulate within that very State.

The WTO legal regime negotiated by the United States attempts in this way to safeguard the regulatory sovereignty of members while ensuring that such sovereignty is not exercised in a discriminatory or abusive manner.

Thus, the *chapeau*, or preambular paragraph, of Article XIV imposes conditions that must be met in the application of a measure, in order for it to be justifiable under an Article XIV exception. These include a requirement that the measure be applied so as not to constitute "arbitrary" or "unjustified" discrimination. The Appellate Body found that the United States had not met these conditions insofar as it had failed to show that the application of the Interstate Horseracing Act (IHA), 15 U.S.C. §§ 3001–07, in relation to the Wire Act, *inter alia*, did not constitute "arbitrary" or "unjustified" discrimination. Antigua had argued that a provision of the IHA could be read as providing an exception, applicable only to domestic U.S. service providers, to the criminalization of internet gambling under, *inter alia*, the Wire Act. The Appellate Body found that the United States, which bore the burden of proof under Article XIV, had not shown that the IHA was incapable of having this discriminatory effect; thus, the United States had not shown that the measure was applied without "arbitrary" or "unjustified" discrimination. Appellate Body Report, *supra* n.3, ¶ 369. In consequence, the United States could not rely on Article XIV to justify the Wire Act, the Travel Act, and the IGBA.

was considered illegal, indeed criminal, when practiced by a service provider such as the defendant operating from outside the United States could be practiced legally by domestic competitors within the United States.[27]

In the face of this overwhelming legal and factual evidence, before both the original panel and the Appellate Body, the United States failed in its legal duty to prove that the Wire Act, the Travel Act, and the IGBA did not in fact constitute arbitrary or unjustified discrimination in favor of domestic providers of remote betting.

This is not an abstract or technical point. Rather, it rests on – and has huge implications for – the American betting market place. The most recent decision of the WTO "Compliance Panel" in this case established, *inter alia*, the existence of:

> . . . substantial and even prominent businesses with, collectively, thousands of employees and apparently tens of thousands of clients, paying taxes or generating revenue for government owners, having traded openly for up to 30 years and in some cases even operating television channels . . . . The evidence regarding the suppliers demonstrates the existence of a flourishing remote account wagering industry on horse racing in the United States operating in ostensible legality.[28]

Following the decision of the Appellate Body and its adoption by the WTO's authoritative Dispute Settlement Body (of which the United States is by definition a member),

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[26] Compliance Panel Report, *supra* n.5, ¶ 6.126.

[27] On its face, the Wire Act prohibits remote wagering from jurisdictions outside the United States, but does not prohibit remote wagering within the United States to the extent that it is not in interstate or foreign commerce. In the Compliance Proceedings it was shown that there are at least 18 State laws that expressly authorize wagering by wire within the United States, including on a wholly intrastate basis. Compliance Panel Report, *supra* n.5, ¶ 6.121.

[28] Compliance Panel Report, *supra* n.5, ¶¶ 6.115 - 6.116.

the losing Member is *required* under the relevant rules[29] "unconditionally" to accept the decision and is under a *duty* to bring its laws into compliance. Initially the United States indicated that legislation would be required in order to comply with its duty to bring its various statutes into compliance. A period of 11 months and 2 weeks from April 2005 was granted.[30] Subsequently, the U.S. changed its legal posture and sought to argue that since the Appellate Body of the WTO had in its view framed its decision simply as a failure to *prove* the non-discriminatory nature of the various statutes, all it needed to do to bring its law into compliance was to *prove* what it had already failed twice to prove, namely that its laws were neither in fact nor in law discriminatory.

Antigua brought the matter, yet again, to dispute settlement, this time before a WTO Compliance Panel which confirmed in March 2007 that the United States continued to be in violation of its WTO obligations. Indeed, this Compliance Panel had before it and relied upon additional evidence of the discriminatory nature of the regime resulting from the ambiguous legislative and factual matrix that the U.S. had failed to refute.[31]

C. This Prosecution Is In Violation Of Obligations Binding On The United States.

The indictment pending against Kaplan thus does not entail a violation of some arcane technicality of international law. Rather, the prosecution violates a fundamental norm of the WTO which prohibits restrictions on foreign trade through measures which, under the guise of protecting the public, in fact protect domestic suppliers of similar goods and services.

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29 DSU 17.14.

30 Award of the Arbitrator, *supra* n.4.

31 Compliance Panel Report, *supra* n.5, ¶¶ 6.124-6.135.

Consequently, the prosecution of the defendant under the Wire Act, or for a RICO conspiracy predicated upon Wire Act, Travel Act, or IGBA violations, itself constitutes "discrimination" within the meaning of the *chapeau* of Article XIV of the GATS. This prosecution also places the United States further in violation of its WTO obligations – not only the obligations under Article XVI(2) of the GATS, but also the obligation to implement fully the adopted dispute rulings in the U.S.-Gambling dispute.

Lately, the United States has finally accepted that its views have been rejected in three international proceedings under the WTO,[32] and has decided not to appeal the decision of the Compliance Panel; in consequence the Report of the Compliance Panel has been adopted by the Dispute Settlement Body of the WTO on May 22, 2007. The United States has taken steps to withdraw its GATS commitment in this area. Doing so would permit prosecutions in the future for conduct that post-dates the withdrawal of the commitment, but only serves to confirm that the United States cannot properly prosecute conduct that occurred while the commitment was in force.[33] This indeed is the only case in which the United States has not appealed the findings of a Compliance Panel that were adverse to the United States. The acquiescence in the adoption without appeal of the Compliance Panel implies an extraordinary admission of the United States that the Wire Act, Travel Act and IGBA are in violation of U.S. obligations under the GATS. Given that the United States did not use its right to appeal the Compliance Panel Report, the view expressed in that Report that the United States is not in compliance with its obligations cannot plausibly now be opposed by the United States in these proceedings.

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[32] In this case, the composition of the Compliance Panel was different from the original panel.

[33] Any decision in this case will thus have limited effect on future prosecutions.

Yet the United States persists in this prosecution, now relying, it would seem, on the contention that its actions are shielded by the Uruguay Round Agreements Act, and particularly 19 U.S.C. § 3512(a), which provides, among other things, that "[n]o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect."[34]

For the reasons discussed below, the government's reliance on § 3512(a) is misplaced. That provision, properly understood, does not foreclose Kaplan from reliance on the

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[34] That statute provides, in pertinent part:

Relationship of agreements to United States law.
(1) United states law to prevail in conflict. No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.
. . .
Relationship of agreements to State law . . .
2) Legal challenge.
(A) In general. No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.
. . .
(c) Effect of agreement with respect to private remedies.
(1) Limitations. No person other than the United States –
(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.
(2) Intent of Congress. It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements –
(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

international obligations the United States has assumed.

For several other reasons as well, also discussed below – the *Charming Betsy* canon, the principle of comity, and the self-executing nature of dispute resolution decisions – it is plain that the government cannot properly pursue this prosecution.

II. THE WIRE ACT COUNTS, COUNTS 3-12, MUST BE DISMISSED.

A. Incorporation Of The WTO Law And WTO Rulings Into Domestic Legal Order.

As already noted, the GATS Treaty was part of the Uruguay Round Agreements that established the WTO—agreements that were approved by Congress through the URAA. Normally, incorporation of a treaty into domestic law by statute would enable an individual to rely on such a statute, much as an individual may rely on domestic legislation. In addition, because the URAA, which essentially incorporates the provisions of the GATS, was enacted after the Wire Act, if there is a conflict the provisions of the URAA would control. *See, e.g.*, *Cook v. United States*, 288 U.S. 102, 120 (1933).

In this regard, however, the provisions of 19 U.S.C. § 3512(a), set forth *supra* at note 34, must be considered, since the United States reads them as requiring, in the event of a conflict between domestic law and the treaty, that the former be considered as controlling. As explained below, the government misunderstands the law. Section 3512 does not shield the Wire Act from scrutiny, nor permit this prosecution to proceed.

We advance three independent grounds—the *Charming Betsy* doctrine, the principle of international comity, and the self-executing nature of WTO decisions—why this prosecution cannot go forward. As shown below, § 3512 neither requires nor permits a different result.

(B) on any other basis.

1. *The Charming Betsy Doctrine and the Wire Act.*

More than two hundred years ago, Chief Justice John Marshall announced the principle that "an act of [C]ongress ought never to be construed to violate the laws of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).[35] The *Charming Betsy* principle is a simple one: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of the Foreign Relations of the United States, § 114 (1987). Or, as the Restatement (Second) put it: "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law." Restatement (Second) of Foreign Relations Law of the United States § 3(3) (1965). Charming Betsy is not a precept of international law; rather it is a precept of domestic U.S. statutory interpretation, albeit one that is guided by considerations of international law.

The canon has been justified on at least three grounds, the first involving congressional intent. At the heart of *Charming Betsy* is the general conception that "Congress does not intend

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[35] The case in which the principle emerged was an early 19th century prize law case, with points in common with the case at bar. The issue was whether a nonresident U.S. citizen was liable for trading with a French colony in violation of the Non-intercourse Act of 1800, an act which created a trade embargo against France.

Specifically, Chief Justice Marshall queried whether a U.S. citizen, Jarred Shattuck, the owner of the Charming Betsy, was exempt from the Non-intercourse Act because he had become a Danish citizen and was therefore no longer a U.S. resident as required by the statute. In his opinion for the court, Chief Justice Marshall agreed with Shattuck, finding that applying the act to him would violate principles of neutral commerce under customary international law, and interpreting the Act so as to avoid a conflict.

to repudiate an international obligation of the United States." Restatement (Third) of the Foreign Relations of the United States, § 115 cmt. a (1987). Under this view, *Charming Betsy* derives its power from the suggestion that because "international law is part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), Congress ordinarily will not wish to violate it. A second conception of Charming Betsy places it among the clear-statement rules that require Congress to speak unambiguously to an issue before reaching an undesirable interpretation. A third conception of the Charming Betsy canon is as a normative principle that serves not institutional goals but substantive judicial value judgments. The canon serves public values by presuming compliance with international norms. *See* Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987).

Whatever the rationales for its existence, the doctrine is well established and widely and generously applied. It requires courts to construe domestic statutes so as to avoid violating not only customary international law, but also executive agreements and treaties to which the United States is a party. *See, e.g.*, *Chew Heong v. United States*, 112 U.S. 536, 539 – 40 (1884) (interpreting statute in harmony with previous treaty affecting resident Chinese aliens right to reenter United States). It has been applied by the Supreme Court in cases involving maritime law,[36] employment discrimination law,[37] and refugee law,[38] among other areas. It has been

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[36] *See, e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (construing Jones Act in harmony with maritime law).

[37] *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (refusing to apply employment discrimination statute to naval bases in foreign countries that were the subject of executive agreements with the host governments); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (construing National Labor Relations Act so as to avoid foreign policy consequences); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988) (Anti-Terrorism Act of 1987).

applied by the Federal Circuit in connection with the United States' WTO obligations.[39]

The issue in the instant case arises on account of the apparent conflict between domestic criminal laws and provisions of the GATS. The Superceding Indictment charges Kaplan with violations of federal law arising out of his alleged internet gambling activities. The indictment itself alleges in its opening paragraph, that "[i]n about 1996 – 1997, GARY KAPLAN relocated the gambling operations to Antigua, and then to Costa Rica, leaving certain aspects of the financial operations in Antigua." Superseding Indictment, Doc. 404, p. 2, ¶ 1. And it charges him with violations of the Wire Act. *Id.*, Counts 3–12.

However, as established by the rulings summarized above in the U.S.-Antigua Dispute, the Uruguay Round Agreements recognize an obligation on the part of the United States to provide market access to foreign based suppliers of gambling services, giving rise to an apparent conflict between the treaty and U.S. criminal law under which Kaplan is charged.

The *Charming Betsy* principle resolves the apparent conflict. If such a reading is possible, federal laws, including criminal statutes, *must* be read so as not to conflict with the international obligation, and the Wire Act can be so construed.

a) The Wire Act May and Must Be Construed So As Not To Have Extraterritorial Reach.

First, the Wire Act may be read so as not to have an extraterritorial application, at least where extraterritorial reach would run afoul of U.S. treaty obligations.[40] There is no reason

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[38] *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (construing statute in light of United Nations Convention Relating to Status of Refugees).

See Federal-Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

[40] The government has argued, in a somewhat different context, that this prosecution does *not* involve extraterritorial activities, but rather offenses committed within the United States,

why the Wire Act cannot be so construed. Indeed, there is a strong *presumption* that statutes, including criminal statutes, do *not* operate extraterritorially. *See, e.g., Foley Bros., Inc. v. Filardo,* 336 U.S. 281, 285 (1949) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . ."); *E.E.O.C. v. Arabian Am. Oil Co. ("Aramco"),* 499 U.S. 244, 248 (1991).

The Supreme Court has re-emphasized this longstanding presumption in uncompromising terms. Laws are deemed to only apply within the territorial jurisdiction of the United States unless Congress provides "affirmative evidence" to the contrary. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993). Such evidence must be "clearly expressed." *Aramco*, 499 U.S. at 248. While this principle has roots in part in the recognition that Congress "is primarily concerned with domestic conditions," *id.*, it also reflects "the desire to avoid conflict with the laws of other nations." *Sale*, 509 U.S. at 174. If a statute reasonably permits the reading that it applies only territorially, the court should not read it to apply abroad, even if doing so might be "the more natural reading of the statutory language." *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 174 (2004). *See also Smith v. United States*, 507 U.S. 197, 203–04 (1993).

There is nothing in the Wire Act, 18 U.S.C. § 1084 (or, as argued in Point IV, any of the

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from outside the country, "by remote control." *See* Government's Response to Defendant Gary Kaplan's Motion to Revoke the Magistrate's Detention Order, Dkt. # 418, at 9, n.10. This argument is a semantic one, irrelevant to the resolution of this motion. This prosecution, at heart, challenges the provision of gambling services, via internet, from Antigua and Costa Rica. Since the late 1990s Kaplan has done whatever he has done from abroad.

For *present* purposes, the attempted application of the federal statutes to reach Kaplan's internet gambling operation is an extraterritorial application, even if the operation solicited business in the United States, had customers in the United States, and had effects within the country's borders, and even if, for *other* purposes, such application might not be considered

other statutes under which Kaplan stands charged) that shows a clearly expressed Congressional intention to reach conduct such as cross-border internet gambling conducted from outside the United States.[41] On the contrary, the Wire Act was enacted in 1961 as part of a series of *anti-racketeering* laws.

But even if those statutes could be read to operate extraterritorially and to reach conduct involving or affecting person within the United States, the *Charming Betsy* doctrine mandates that they *not* be so read, so long as an alternative reading is *possible*. This alternative reading is not only possible, but consistent with the operative presumption that statutes not have extraterritorial reach.

b) Similarly, under *Charming Betsy*, the Wire Act May and Must Be Construed So as Not to Apply to Internet Gambling.

Second, the Wire Act need not and should not be read to reach internet gambling. The internet did not even exist in the early 1960s when the Wire Act was enacted; it surely was not what Congress intended to address. As stated in *United States v. Corrar,* 2007 U.S. Dist. Lexis 4786, at *24 (N.D.Ga.):

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extraterritorial.

[41] Section 1084's reference to "foreign commerce" is not "affirmative evidence" "clearly expressed" that Congress intended that the statute have extraterritorial scope. The Supreme Court has repeatedly held that a statute's application to acts committed in foreign commerce does not in itself indicate a congressional design to give the statute extraterritorial reach. *See Aramco*, 499 U.S. at 250–53 (superseded by statute on issue of retroactive application), *citing New York Cent. R. Co. v. Chisholm*, 268 U.S. 29, (1925); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *United States v. Reeves*, 62 M.J. 88 (U.S. Armed Forces 2005) (applying presumption against extraterritoriality to a statute that prohibited conduct "in interstate or foreign commerce"); *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775, 810–11 (E.D.Pa. 2007) (holding that language in Child Online Protection Act prohibiting transmission of material harmful to minors in interstate or foreign commerce is legally *insufficient* to demonstrate Congress' clear intent that the act apply to web sites hosted or registered outside of the United States).

> [The] Government conceded, [that] there is a dearth of cases in which defendants have been convicted under the Wire Act as a result of internet gambling, notwithstanding the fact that internet gambling appears to be quite widespread in this country . . . . Although not dispositive, it appears that some members of Congress are likewise uncertain that existing law adequately proscribes internet gambling. Indeed, during this trial, this Court questioned the prudence of the prosecution, given [*inter alia*] the arguable uncertainty of the law . . . .

Though the *Corrar* court, and the Second Circuit in *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), held that the Wire Act did apply to internet gambling, in neither case did the court consider whether a different construction of the statute was required in light of our nation's international obligations and the *Charming Betsy* canon.[42]

c) Under the *Charming Betsy* Doctrine, the Wire Act May and Therefore Must Be Construed Narrowly, as Argued in Kaplan's Motion to Dismiss the Wire Act Counts (Counts 3 to 12) of the Superseding Indictment.

In a separate motion filed this date, Kaplan has moved for dismissal of the Wire Act counts on the ground that the Wire Act—as intended by Congress, by its terms, and under the rule of lenity—does not apply to all transmissions that have even a tangential relation to wagering. He has argued further that the transmissions as alleged in the Wire Act counts of the Superceding Indictment are not the kinds of transmissions that are covered by the Act. Among other things, the transmissions alleged are not bets or wagers on a sporting event or contest, information assisting in the placing of bets or wagers on a sporting event or contest, or transmissions entitling the recipient to money or credit that results from bets or wagers on a

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[42] Independent of the *Charming Betsy* canon, U.S. law requires that when two potentially conflicting statutes are applicable to a given case, courts should as a general matter strive to construe them as consistent with one another. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred, Intern., Inc.*, 534 U.S. 124, 143–44 (2001).

sporting event or contest within the meaning of the statute.

By construing and applying the Wire Act as urged in Kaplan's motion to dismiss those counts, a conflict between domestic law and international law is avoided. Accordingly, under the *Charming Betsy* canon, the construction of the Wire Act urged in Kaplan's motion to dismiss must be adopted, even if, in the absence of international obligations, the Wire Act might be construed more broadly.

d) Because the *Charming Betsy* Doctrine Applies to URAA's § 3512, that statute does not foreclose Kaplan's claims.

The Government has suggested that a provision of the URAA, 19 U.S.C. § 3512, rather than confirming U.S. treaty obligations, precludes Kaplan's reliance on them. But the government is wrong.

First, § 3512(a)(1) provides that United States law is to prevail in a conflict. However, given the *Charming Betsy* canon of construction, there is no conflict at all.

Second, the *Charming Betsy* doctrine is itself applicable *to the construction of the URAA.* That is to say, the URAA must be construed, if such construction is possible, not to conflict with international obligations. Once again, given the context and the language of the URAA, such a construction is clearly possible.[43]

When the U.S. signed and ratified the Uruguay Round Agreements, it represented both to the other WTO Members as well as, through the Statement of Administrative Action, to Congress that in its view the U.S. had brought its law into compliance with the Agreements.

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[43] As the Court of International Trade observed in *Tembec, Inc. v. United States*, 441 F. Supp. 2d 1302, 1326 (CIT 2006), Congress' constitutional authority over international trade and commerce counsels against judicial deference to the executive branch where matters of U.S. international trade obligations are concerned.

This prosecution contradicts that representation. It represents an administrative decision of the executive branch, which has opted to interpret the Wire Act and related statutes in a manner that produces a violation of international law. The application of the *Charming Betsy* canon to the URAA militates against allowing that result, if possible.

The language of the URAA supports interpreting the URAA in such a way as *not* to permit prosecution under a federal statute that runs afoul of U.S. obligations under WTO law. Through § 3512, Congress imposed three limitations on the application of WTO law within the domestic legal order. First, the statute provides that U.S. federal legislation shall prevail over any provision of the Uruguay Round Agreements with which that legislation may come into conflict. 19 U.S.C. § 3512 (a)(1). Second, the only circumstance under which a state law may be considered invalid on the ground of its inconsistency with the Uruguay Round Agreements is when a declaration to that effect is sought and obtained in an action brought by the United States government. 19 U.S.C. § 3512(b)(2)(A). Lastly, the implementing statute limits the extent to which private parties may place reliance on the Uruguay Agreements in the context of actions for private remedies in U.S. courts. 19 U.S.C. § 3512(c)(1).

None of these limitations dictates that the Wire Act can be used to prosecute gambling activities that WTO law and rulings bar the U.S. from prohibiting.

The first of these provisions—namely that, in the event of conflict, U.S. federal legislation shall prevail over any contrary provision of the Uruguay Round Agreements—does not dictate that the criminal statutes at issue be enforced in circumstances where their enforcement would violate binding WTO norms. It is perfectly reasonable to construe the Wire Act as prohibiting gambling conduct only to the extent consistent with the U.S.'s international

obligations under WTO law.

The second limitation in the Uruguay Round Agreements implementing legislation is plainly inapplicable; by its terms, it bars only challenges to state rather than federal legislation. The criminal statutes that the defendant is charged with having violated are federal laws.

The final limitation in the implementing legislation is to the effect that private parties shall have no cause of action or defense under the Uruguay Round Agreements or under Congress' approval of them, which appears under the statutory rubric, "Effect of agreement with respect to private remedies." It is by no means apparent that Congress intended through this provision, which expressly contemplates "private remedies," to bar private parties from raising the invalidity under WTO law of the criminal statutes in question in the course of criminal proceedings brought against them.[44]

In short, it is not necessary to construe the URAA in such a way as to bar the defendant from asserting the invalidity, as applied to him, of the penal laws under which he is being prosecuted. The *Charming Betsy* doctrine thus requires that not only the Wire Act, but § 3512 *itself* be construed so as to avoid a violation of the United States' international law obligations

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[44] To the contrary, the Statement of Administrative Action (SAA) which is an authoritative source of interpretation for the URAA explains that § 3512(c)(1) is concerned exclusively with private law suits and cases of action and it does not apply in criminal proceedings brought by the United States itself: "Section 102(c) of the implementing bill precludes any *private* right of action or remedy—including an action or remedy sought by a *foreign government*—against a federal, state, or local government, or against a private party, based on the provisions of the Uruguay Round agreements. This would include any such suit brought *against* a federal, state, or local agency or against an officer or employee of any such agency. A *private party* could not sue (or defend suit *against*) the United States, a state or a private party on grounds of consistency (or inconsistency) with those agreements," SAA 4054*, 4055* (emphasis added). Notably, none of the situations described is one where the U.S. government itself has initiated proceedings, much less criminal proceedings. Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), House Report No. 103-316, Dec. 8, 1994, 103d Con., 2d Sess. 1994, 1994 U.S.C.C.A.N. 4040, 1994 WL 16137731 (Leg. Hist.).

under the WTO.

2. *International comity*.

The *Charming Betsy* doctrine may be, and commonly is, thought of as an expression of a broader principle of international comity, which itself mandates dismissal of the Wire Act charges. Under that principle, U.S. courts should strive to the fullest extent possible in the application of domestic law to show due respect for the fundamental interests of other nations in matters of legitimate concern to them.[45] By virtue of international comity, U.S. courts avoid interpretations or applications of domestic law that do unnecessary violence to foreign countries' important interests. International comity may not override clear and unequivocal statutory language, but it does argue in favor of interpreting domestic law, where possible, so as not to collide with those interests.

International comity strongly counsels a showing of respect by U.S. courts for rulings of the WTO Appellate Body when construing national legislation, particularly where that legislation has been clearly and authoritatively condemned, at least as applied to situations governed by WTO law. Such is precisely our case.

In *Goss Int'l Corp. v. Tokoyo Kikai Seisakusho, Ltd.*, 2007 U.S. App. Lexis 14306 (8th Cir.), the Eighth Circuit recently underscored the link between international comity and respect

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[45] The classic statement of the international comity principle may be found in *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895):

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

for rulings in WTO adjudications. The Court vacated a preliminary anti-suit injunction a district court had issued enjoining the maintenance in Japan of an action under Japan's so-called "clawback statute." As authorized by the clawback statute, the action in Japan sought recovery in full, plus costs and attorneys fees, of a damages judgment that the U.S. district court had previously rendered against a Japanese company on the basis of a U.S. anti-dumping statute that had itself been condemned both by a WTO panel and the Appellate Body as WTO-incompatible. Although the Eighth Circuit rested its decision strictly on jurisdictional grounds, it was likely influenced by the fact that the Japanese clawback legislation was designed to vindicate the international law obligations to which all WTO members had subscribed and the view that the U.S. was violating these obligations by continuing to adjudicate claims arising under a statute that had been definitively condemned by a ruling of the WTO Appellate Body.

The international comity point is not an academic one. If the United States can today continue to enforce criminal legislation that is not only violative of binding international law norms but that has been definitely condemned by tribunals to whose rulings we have pledged to adhere, there is nothing to prevent other countries from following the same course when faced with WTO rulings favorable to the United States and unfavorable to them.

3. *Self executing nature of WTO dispute settlement rulings.*

Finally, given the completion of the dispute resolution proceedings, the WTO Dispute Settlement rulings in the gambling case are self-executing, and Kaplan may rely upon them. It is a commonplace that the substantive provisions of WTO Agreements are expressed as obligations addressed to States and do not as such create legally enforceable rights and obligations for individuals without implementing domestic legislation such as the URAA. Generally speaking, there are several reasons why treaty provisions are considered "non self-

executing." Sometimes it is because of the vague, imprecise and discretionary nature of treaty provisions which make them incapable of application by domestic courts without the intermediary of domestic implementing legislation. This is not the case in relation to the WTO/GATS. Their provisions are clear, precise, unconditional and easily applied by courts. Indeed, the URAA does little more than transpose the untouched language of the WTO Agreements into domestic law.

The principal reason why the substantive provisions of the WTO Agreement are not self-executing and do not give a direct cause of action to individuals before domestic courts is the existence of the elaborate WTO Dispute Settlement procedures. When a State is alleged to have violated its international legal obligations under the WTO is made, that State may contest both the facts and the interpretation and application of WTO law. It may take its case before a Panel. It may appeal an adverse position of the Panel to the Appellate Body. It may seek to persuade other members of the Dispute Settlement Body not to adopt the ruling of the Panel and Appellate Body. It may be given time to implement the adverse ruling. It may contest any challenge to its attempted implementation before a Compliance Panel and appeal any decision of such Panel to the Appellate Body.

It would be wrong for a domestic court to apply directly a substantive provision of the Agreement if in doing so such court would short-circuit the dispute settlement procedures with all the protections they give a member of the WTO. But here those procedures have been completed and all those protections have been enjoyed.

This case does not involve an allegation by an individual that the U.S. has violated a material provision of the WTO/GATS. In this case the international dispute settlement process has been exhausted—the United States has lost its case at every single stage of the WTO

proceedings. Its violation has been repeatedly proven and confirmed. A decision by a domestic court in a situation such as this would not compromise any rights or protections afforded the United States by WTO Dispute Settlement. Indeed, shutting out the individual in a case such as this, would render § 3512 (c)(1) a license for the government to harm individuals in violation of international legal obligations with impunity. Even eventual compensation to Antigua will not undo the injustice of an indictment and possible conviction of an individual based on an illegal interpretation of a domestic act. If at all possible, U.S. courts should not allow nor participate in this.

A WTO Panel decision in "United States – Sections 301 – 310 of the Trade Act of 1974" opened the door for domestic courts to just say no. In addressing the issue of self-execution—the analogous terminology in the WTO being "direct effect"—the Panel observed:

> Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.

WT/DS152/R (Dec. 22, 1999).[46] It added however that:

> [W]hether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, *in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute* . . . . The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue.

Id. (emphasis added).

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[46] http://www.worldtradelaw.net/reports/wtopanels/us-section301(panel).pdf.

This case presents the question which has been left open for decision by "national courts." There are sound grounds for this court to hold that once the WTO dispute settlement procedure is exhausted, the final rulings of such bodies should be seen as self-executing, at least in the sense binding domestic courts. Doing so is not foreclosed by the URAA, which merely declares that Uruguay Round Agreements themselves, as distinct from rulings of WTO panels or the WTO Appellate Body, lack direct effect. In fact, the international law of State Responsibility draws a clear distinction between primary obligations under international law (such as those expressed in the material provisions of the Uruguay Round Agreements) on the one hand, and the obligations to respect final adjudications of international law claims by international tribunals. When an international tribunal renders such a ruling, it creates a "new legal relationship . . . which arises upon the commission by a State of an internationally wrongful act."[47] Once such a violation is established, "international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act."[48]

Section 3512(c)(1) of the URAA which bars individual action based on the URAA or the Uruguay Agreements themselves should not be understood as a ploy of Congress to give it a free hand to violate its international legal obligations to the detriment of individuals and then cynically to shut out any judicial recourse to such individuals. The true rationale of § 3512(c)(1), consistent with U.S. international legal obligations, is to prevent domestic courts from making adverse findings *against the U.S.* thereby denying the United States the variety of

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[47] James Crawford, The International Law Commission's Articles on State Responsibility 191 (Cambridge Press, 2002).

[48] *Id.*

protections which the WTO Dispute Settlement Understanding grants it.

There has been not only a final ruling by the Appellate Body on the underlying merits, but a ruling on March 2007 by the Compliance Panel which established that the United States has failed to comply with this "new" obligation. In keeping with the international law of state responsibility, this new obligation is beyond any shield offered by § 3512(c)(1).

In sum, it would be flagrant violation of the United States' international legal obligations under the WTO/GATS to try the defendant for violation of the Wire Act, where that statute is not only defiant of binding WTO norms but has been definitively found by rulings at every adjudicative level of the WTO to be violative, as applied, of the WTO. The law does not compel such a result. The URAA, the doctrine of *Charming Betty*, binding notions of international comity, and the self-executing nature of the WTO decisions all require that the international obligation be acknowledged. Section 3512(a) stands as no bar.

Accordingly, the Wire Act counts of the indictment, Counts 3-12 of the Superseding Indictment, must be dismissed.

III. THE WIRE ACT, TRAVEL ACT, AND IGBA PREDICATES IN THE RICO CONSPIRACY COUNT, COUNT 1, MUST BE DISMISSED.

Among the predicate acts charged in the RICO conspiracy count, Count 1, are violations of the Wire Act, the Travel Act, and the IGBA. *See* Superseding Indictment ¶¶ 23, 27. For all the reasons stated above, those predicate acts may not be the basis for criminal charges and must be stricken from the Superceding Indictment.

IV. ALL OTHER COUNTS OF THE SUPERSEDING INDICTMENT MUST ALSO BE DISMISSED

The Superceding Indictment also charges Kaplan under provisions of the federal criminal law that were not considered in the WTO proceedings, to wit, racketeering conspiracy,

interstate transportation of gambling paraphernalia, tax evasion and interference with the administration of the internal revenue laws. Because the WTO dispute resolution bodies did not consider these statutes, Kaplan does not and cannot claim that the self-executing nature of WTO dispute settlement rulings mandate dismissal of these counts.

But with that single exception, every other argument made in this motion applies to the other counts of the indictment, and requires that those counts be dismissed. All of the charges in the Superceding Indictment arise from, and relate to, the providing of cross-border internet gambling services, that is to say, to the conduct that is protected under WTO/GATS. Specifically, as pled in the Superceding Indictment, the racketeering conspiracy count appears to rest in substantial part on the alleged conduct of an internet gambling business from Antigua and Costa Rica. Though not clear on their face, the counts charging interstate transportation of gambling paraphernalia appear to rest on conduct closely connected with the conduct of that alleged internet gambling business. The counts charging violations of Title 26 appear to involve alleged transfers of money from the United States abroad, again activity connected to the alleged internet gambling business.[49] Congress has expressed no clear intention that any of these criminal provisions extend to persons engaged in the provision of cross-border or internet gambling services that are the subject of the GATS and to conduct incident to the provision of such services. On the contrary, each of the statutes was enacted long before the internet existed. And each may be construed so as not to have extraterritorial scope. Thus, as is the case with the Wire Act, the Travel Act, and the IGBA, these criminal statutes can and therefore must be read so as not to reach conduct associated with, and integral to, the provision of cross-border

[49] These counts, as charged in the Superceding Indictment, are discussed in greater detail in Kaplan's separate motions filed this date to dismiss those counts on a variety of other

internet gambling services. So read, they do not reach the conduct charged here.

The government's attempted use of these statutes to prosecute Kaplan – and to send a signal to others engaged in the provision of internet gambling services from nations that are members of the WTO – represents a violation of obligations the United States has assumed under WTO/GATS. The prosecution violates U.S. treaty obligations, international principles of comity, and domestic law. The indictment in its entirety must be dismissed.

CONCLUSION

All counts of the Superceding Indictment must be dismissed.

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grounds.

Respectfully submitted,

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I certify that on August 13, 2007, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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