

THE TRADE OF CROSS-BORDER GAMBLING AND BETTING: THE WTO DISPUTE BETWEEN ANTIGUA AND THE UNITED STATES

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ABSTRACT

The first ecommerce dispute to come before the World Trade Organization (“WTO”) was billed to be one of David and Goliath proportion. The tiny twin-island nation-state of Antigua and Barbuda challenged the United States’ ban on cross-border Internet gambling and betting. As a result of the dispute, the WTO issued a private final report against the United States finding that the ban violates the United States’ commitments under the WTO. Shortly before the public release of the final report, both parties petitioned the WTO to indefinitely postpone its release so that the parties could engage in private negotiations. The final report is said to uphold the Panel’s interim report that found against the United States by, among other things, rejecting the United States’ claim that its ban on cross-border Internet gambling and betting does not violate its WTO obligations because the ban protects public morals. On October 28, 2004, the United States announced that the negotiations had broken down, and that it planned to appeal the Panel’s decision to the WTO Appellate Body. This iBrief sets forth the basic background of the dispute and argues that the Appellate Body will have to make at least three controversial findings to uphold the Panel’s ruling.

INTRODUCTION

¶1 On March 27, 2003, Antigua and Barbuda (“Antigua”), one of the world’s smallest nation-states,² requested formal consultations with the United States and the World Trade Organization (“WTO”) concerning the

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² CIA World Factbook, *Antigua and Barbuda*, at <http://www.cia.gov/cia/publications/factbook/geos/ac.html> (noting that Antigua comprises a landmass of roughly 2.5 times that of Washington, D.C.) (last visited Nov. 1, 2004).

United States' ban on cross-border gambling and betting services.³ The request came in the wake of an economic downturn in Antigua's gambling and betting services industry. Antigua contended that the economic downturn was the direct result of at least three factors: 1) the United States Internet Gambling Enforcement Act;⁴ 2) the self-regulation of the United States' credit card industry; and 3) the recent decision of the United States Court of Appeals for the Second Circuit against former Antiguan resident and bookmaker Jay Cohen.⁵ In addition, Antigua claimed that United States law prohibited all cross-border gambling and betting services, and that this ban violated international trade law.⁶

¶2 To the United States' surprise, on March 24, 2004, the WTO Dispute Settlement Body Panel ("Panel") established to hear the dispute, issued a private interim report in favor of Antigua.⁷ The interim report was never made public, but it has been reported that the Panel found that the United States ban against cross-border Internet gambling and betting violates the United States' commitments under the WTO.⁸ Also, since the Panel ruled in Antigua's favor, it must have either side-stepped or rejected the United States position that its ban is allowed because it protects public morals. Then on April 30, 2004, the Panel issued a private final report said to uphold the key holdings of the interim report.⁹ Shortly before the Panel was to make its final report public, both parties asked the Panel to indefinitely delay releasing its findings.¹⁰ The parties expressed the desire to negotiate a settlement.¹¹ The Panel initially gave the parties until August

³ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/1, S/L/110, *Request for Consultations by Antigua and Barbuda*, (Mar. 27, 2003) (noting that the request was made specifically to the Permanent Mission of the United States at the WTO and to the Chairman of the Dispute Settlement Body of the WTO.).

⁴ H.R. 556, 107th Cong. (2002).

⁵ See *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001) (affirming the district court's judgment after a jury convicted Cohen of conspiracy and substantive violations under the Wire Act for facilitating cross-border sports betting over the Internet).

⁶ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285, *First Submission of Antigua and Barbuda*, at 1 (Oct. 1, 2003).

⁷ Richard Waddington, *Antigua claims win over U.S. in gaming dispute: WTO interim report says U.S. can't ban cross-border Net bets*, REUTERS, Mar. 24, 2004.

⁸ Daniel Pruzin, *WTO Issues Final Ruling Backing Complaint Against U.S. Online Gambling Restrictions*, 21 ITR 787 (May 6, 2004).

⁹ *Id.*

¹⁰ Daniel Pruzin, *U.S., Antigua in Talks to Resolve WTO Dispute Over Internet Gambling*, 21 ITA 1155 (July 8, 2004).

¹¹ *Id.*

23, 2004, to negotiate a settlement.¹² At the request of the parties, the Panel extended the deadline for the negotiations three times.¹³ However, on October 28, 2004, the United States announced that its talks with Antigua had broken down, and that it planned to appeal the Panel's decision.¹⁴

¶3 This iBrief looks at the development of cross-border gambling and betting services in Antigua, the applicable international trade laws, Antigua's and the United States' arguments to the Panel, and the legality of Internet gambling in the United States. It concludes that the Appellate Body will have to make three controversial findings to uphold the Panel's ruling.

I. DEVELOPMENT OF INTERNET GAMBLING IN ANTIGUA

¶4 Until the 1960s, Antigua's economy was based on the exportation of sugar cane.¹⁵ Among other things, a devastating decline in the world price of sugar led Antigua to shift its focus from the exportation of sugar cane to the importation of tourism.¹⁶ In the past ten years, Antigua attempted to diversify its economy yet again, and developed an infrastructure that supported gambling and betting services, operating primarily over the Internet.¹⁷ By 1997, there were over twenty Internet gambling and betting businesses operating in Antigua.¹⁸ By 1999, following a government-licensing program, employment in Antigua's gambling and betting industry reached 3,000.¹⁹ At this time, there were 119 licensed Internet gambling and betting operations in Antigua.²⁰ Also by 1999, the Antiguan government was receiving over \$7.4 million dollars annually in licensing fees, accounting for over ten percent of the nation's gross domestic product.²¹

¶5 However, with the prosperity of Internet gambling and betting operations in Antigua came an increase in money laundering activity and organized crime. In fact, in 1999, the United States and the United

¹² *Id.*

¹³ Daniel Pruzin, *U.S., Antigua Announce Further Delay in WTO Decision on Internet Gambling*, 21 ITR 1687 (Oct. 14, 2004).

¹⁴ *US, Antigua Break Off Talks on Internet Gambling*, REUTERS, Oct. 28, 2004, available at <http://www.reuters.com/newsArticle.jhtml?type=internetNews&storyID=6648164>.

¹⁵ *First Submission of Antigua and Barbuda*, *supra* note 6, at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ *Id.*

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ *Id.*

Kingdom advised investors to be cautious of transactions involving financial institutions in Antigua.²² To appease the United States and the United Kingdom, Antigua increased regulation of its gambling and betting industry.²³

¶6 Much to Antigua's dismay, when the dust settled from the increased regulation, so did the economic boom from the gambling and betting industry. From 1999 until today, at least thirty-five banks licensed in Antigua have closed; it is estimated that by 2003 the number of licensed gambling and betting operations decreased over 710%; the number of people employed in the industry decreased 750%, along with a decrease in government licensing fees of over 410%.²⁴

II. APPLICABLE LAWS

¶7 The General Agreement on Trade and Services ("GATS") governs trade in services among WTO members, and sets forth general principles that regulate specific commitments entered into by each member. The GATS requires its members to establish "schedules of specific commitments" to be annexed to the GATS.²⁵ The relevant provisions of the United States' commitments require full GATS compliance for the cross-border supply of services classified as "[o]ther recreational services (except sporting)."²⁶ There are two significant principles under the GATS that each member must abide by within the context of its individual schedule: (1) market access and (2) national treatment. Market access applies to all members and means that, with regard to market access, each member will treat other members no less favorable than what is provided for under its schedule.²⁷ Under the market access doctrine, the GATS mandates that, according to a country's specific commitments, a country cannot use specific types of trade restraints, such as numerical limits.²⁸ National treatment also applies to all members, and means that each member will treat all other members no less favorable than how it treats its own suppliers of like services.²⁹

¶8 The GATS provides for exceptions to the doctrines of national treatment and market access. For example, members are allowed to adopt measures that are necessary to protect public morals, human life or health,

²² *Id.* at 3.

²³ *See id.* at 9.

²⁴ *See id.* at 9-12.

²⁵ WTO General Agreement on Trade in Service (hereinafter "GATS"), art. XX:1 (1994).

²⁶ *First Submission of Antigua and Barbuda*, *supra* note 6, at 51.

²⁷ GATS at art. XVI.

²⁸ *Id.*

²⁹ *Id.* at art. XVII.

and fraudulent practices.³⁰ The public morals exception to the GATS and other WTO agreements gives rise to at least two fundamental questions.³¹ First, what behavior indicates public morals?³² Second, whose morals are to be protected?³³ It is generally accepted that a government can protect the morals of its own population.³⁴ The WTO Secretariat has indicated that the public morals exception could conceivably be used to excuse a violation of national treatment or market access in relation to gambling: “Measures to curb obscenity or to prohibit Internet gambling might well be justified on these grounds.”³⁵ However, this exception has never been adjudicated before the WTO.³⁶ Similar exceptions to protect public morals found in other WTO agreements “remain uncharted in trade jurisprudence” as well.³⁷

III. THE LEGALITY OF INTERNET GAMBLING IN THE UNITED STATES

¶9 The answer to the question of the hour, “Is online gambling legal in the United States?” is: it depends.³⁸ “It depends mostly on where you live. It depends also on how the game is being run. And, in the real world, it depends on whether anyone is going to do anything about it.”³⁹

¶10 Generally, in the United States “[g]ambling is illegal unless regulated by an individual state.”⁴⁰ Therefore, if gambling is not regulated by a state, it is illegal in that state. Traditionally, state law has regulated gambling under the scope of the Tenth Amendment.⁴¹ Today, at least nine states have introduced laws prohibiting Internet gambling, or have made statements that their existing laws prohibit it.⁴² For many of the other forty-one states, there is considerable debate whether Internet gambling is legal.

³⁰ *Id.* at art. XIV.

³¹ Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 694 (Spring, 1998).

³² *Id.*

³³ *Id.*

³⁴ *See id.* at 694-99.

³⁵ WTO Secretariat, *The Work Programme on Electronic Commerce* (Nov. 16, 1998).

³⁶ *See* Charnovitz, *supra* note 31, at 690.

³⁷ *Id.*

³⁸ I. Nelson Rose, *Is It A Crime To Play Poker On-line*, #159, 2003, at http://www.gamblingandthelaw.com/columns/159_internet_poker_long.htm.

³⁹ *Id.*

⁴⁰ Michael P. Kailus, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L. REV. 1045, 1047.

⁴¹ *See* U.S. Const. Amend. X. *See also* Jeffery R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393 (2002).

⁴² Scott Olson, *Betting No End to Internet Gambling*, 4 J. TECH. L. & POL’Y 2, 13 (Spring, 1999).

The federal government's interest in regulating gambling has long been concerned with the prevention of organized crime and with assisting the states to enforce their own laws.⁴³ As a rule of thumb, the federal government is concerned with the operators of gambling operations rather than the gamblers.⁴⁴ However, the United States Department of Justice has a long-standing position that under the Wire Act of 1961:⁴⁵ "betting and wagering businesses that transmit bets or wagers on sporting events or contests over the Internet" are breaking the law.⁴⁶ They have not, however, always enforced this policy.⁴⁷ Furthermore, it is unclear whether the Wire Act prohibits all forms of interstate betting and gambling. The Justice department itself has acknowledged that there is confusion as to whether the Wire Act only applies to sports betting, and that Congress should, therefore, amend the law to explicitly cover all forms of betting and gambling.⁴⁸

IV. ANTIGUA'S ALLEGATIONS

¶11 In presenting its argument to the Panel, Antigua first highlighted the extreme size of the United States' demand for gambling and betting services, and Antigua's desire to supply this demand. It stated, "The United States is the world's largest consumer of gambling and betting services To assist in the improvement of its small and developing economy, Antigua has sought to provide gambling and betting services to the United States."⁴⁹ Antigua then claimed that the United States had taken an "unequivocal" position against "state-to-state" cross-border gambling that made the supply of cross-border gambling and betting services from Antigua to the United States "illegal in all instances under United States Law."⁵⁰

¶12 Antigua further alleged that the United States' prohibition violated the United States Schedule of Specific Commitments under the GATS. Antigua argued that although the United States did not specifically mention betting and gambling services in its commitments, it implicitly provided for

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ 18 U.S.C. § 1084 (2000).

⁴⁶ Testimony of Kevin V. Di Gregory, Deputy Assistant Attorney General, Addressing Internet Gambling Before the Subcommittee on Crime, of the House Committee on the Judiciary (Mar. 9, 2000), *available at* <http://www.cybercrime.gov/kvd0309.htm>; *see also* Waddington, *supra* note 7.

⁴⁷ I. Nelson Rose, *Gambling and the Law: The Future Legal Landscape for Internet Gambling* (Nov. 3, 2000), *at* <http://www.gamblingandthelaw.com/antigua.html> (noting that the Department of Justice has never prosecuted state-authorized off-track betting operations in Pennsylvania that accept wagers across state lines over the Internet).

⁴⁸ Di Gregory, *supra* note 46.

⁴⁹ *First Submission of Antigua and Barbuda*, *supra* note 6, at 1.

⁵⁰ *Id.*

them under subsector 10.D (entitled “Other recreational services (except sporting)”) of its commitments.⁵¹ Antigua claimed that the definition of “[o]ther recreational services (except sporting)” is found in a United Nations’ document the United States used as a template for its commitments, the Central Product Classification (“CPC”).⁵² The CPC includes gambling and betting services under “other recreational services.”⁵³ The remainder of Antigua’s argument rested chiefly on the notions of market access and national treatment.⁵⁴ Specifically, it claimed that United States laws that allow numerous domestic operations to supply Internet gambling and betting services throughout the United States, but that do not allow cross-border suppliers from providing like services, violate the GATS doctrines of market access and national treatment according to United States commitments.⁵⁵

V. THE UNITED STATES’ RESPONSE

¶13 In responding to Antigua’s claims, the United States argued that Antigua failed to meet two procedural burdens of proof.⁵⁶ First, that Antigua failed to make a *prima facie* case that “any specific U.S. measure is inconsistent with WTO obligations.”⁵⁷ The United States argued that Antigua did not provide any analysis of specific United States laws as they relate to gambling, but it rather asked the Panel to accept its assertion that a list of relevant United States laws represent a “total prohibition” on cross-border gambling.⁵⁸ Second, the United States argued that Antigua’s reading of the United States commitments violated customary rules of interpretation of public international law.⁵⁹ The United States contended that Antigua’s reliance on the United Nations’ Central Product Classification (“CPC”) was misplaced because WTO Members have acknowledged that the CPC does

⁵¹ *Id.* at 51.

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1.

⁵⁵ *First Submission of Antigua and Barbuda*, *supra* note 6, at 1.

⁵⁶ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285, *Executive Summary of the First Written Submission of the United States*, at 1 (Nov. 14, 2003), at http://ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file509_5581.pdf.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ *Id.*

not “define commitments made in a schedule that does not refer to the CPC.”⁶⁰

¶14 The United States alternatively argued that even if Antigua had met its burden of proof, the United States had not violated its obligations under the GATS.⁶¹ According to the United States, Antigua failed to show that the United States adopted any measures specifically prohibited by either the market access or national treatment doctrines of the GATS.⁶² The United States summarized this argument in the following way: “Antigua fails in any event to make out claims as to the existence of relevant commitments or the inconsistency of specific U.S. measures with particular provisions of the GATS.”⁶³ That is, Antigua merely listed the alleged controlling GATS provisions and conflicting United States laws without connecting the dots, in essence, asking the Panel to take Antigua’s word for it.⁶⁴ In addition, the United States argued that, as required for national treatment obligations to apply, Antigua failed to show that its remote gambling services and suppliers are “like” the non-remote gambling services and suppliers of the United States.⁶⁵

¶15 Finally, the United States claimed the GATS provides for an exception to WTO obligations regarding market access and national treatment for cross-border Internet gambling and betting. It explained that even if the United States allowed Internet gambling and betting domestically, and probably even if it was in its commitments, the GATS allows for countries “to have laws to protect public morals.”⁶⁶ Although the United States argued that the Panel did not need to reach the public morals question, it provided significant evidence that a ban on cross-border gambling protects public morals and is, therefore, exempt from WTO obligations.⁶⁷ In fact, in response to the Panel’s interim report, the United States Trade Representative, Robert Zoellick, said, in speaking of the GATS exception to protect public morals, “If this isn’t an exception that they should meet, I don’t know what is.”⁶⁸

⁶⁰ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285, *Second Written Submission of the United States*, at 3-4 (Jan. 9, 2004).

⁶¹ *Id.* at 5.

⁶² *Id.* at 5-7.

⁶³ *Id.* at 1.

⁶⁴ *See id.*

⁶⁵ *Executive Summary of the First Written Submission of the United States*, *supra* note 56, at 9.

⁶⁶ GATS, art. XIV (1994).

⁶⁷ *Second Written Submission of the United States*, *supra* note 60 at 24-39.

⁶⁸ *WTO gambling decision “deeply flawed” – Zoellick*, REUTERS, March 25, 2004.

VI. THE UNITED STATES' APPEAL

¶16 Contrary to what the United States expected, the Panel issued a final report on April 30, 2004, in favor of Antigua.⁶⁹ Negotiations between the United States and Antigua subsequently failed, and the United States has indicated that it will appeal the Panel's final decision to the WTO Appellate Body. For the Appellate Body to uphold the Panel's ruling against the United States, it will have to make three controversial findings.

¶17 First, the Appellate Body must find that the United States provided for cross-border gambling and betting services in its commitments. Since the United States did not explicitly provide for cross-border gambling and betting services in its commitments, the Appellate Body would have to find that the United States implicitly provided for these services in its commitments. As the United States argued in its submission to the Panel, WTO Members have acknowledged that the United Nations Central Product Classification ("CPC") does not provide definitions for commitments made in a schedule that does not refer to the CPC. Also, considering the policy concerns and strict regulation surrounding gambling and betting in the United States, it is unlikely the United States would knowingly agree to allow its people to circumvent domestic regulation by simply using cross-border gambling and betting services rather than domestic. Furthermore, considering the Department of State's long-standing position against interstate Internet betting and the confusion regarding whether any forms of interstate Internet gambling and betting are legal in the United States, it seems unlikely that the United States Trade Representative would knowingly acquiesce to the legality of Internet gambling and betting so long as, or only if, the server is sitting on foreign soil. In addition to the fact that such a commitment would be against United States law, the pressure that would come from domestic Internet gambling service providers operating under apparently more restrictive conditions would be overwhelming.

¶18 Second, the Appellate Body must determine that the remote Internet gambling and betting services provided by Antigua are "like" the non-remote services provided domestically in the United States. Finding likeness is a difficult burden for Antigua because of the different consumer and regulatory characteristics of gambling and betting services in the United States.⁷⁰ There are numerous forms of gambling and betting services in the United States that are regulated in different ways amongst its various jurisdictions. Because of the sheer complexity of the United States system, to argue that Antigua regulates its gambling and betting services in such a way to make them "like" United States services is a stretch. Furthermore,

⁶⁹ Daniel Pruzin, *Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, 21 ITR 514 (Mar. 25, 2004).

⁷⁰ *Second Written Submission of the United States*, *supra* note 60, at 9-11.

international trade classifications distinguish on-line gambling from other forms of gambling.⁷¹ Without a finding of “likeness,” there is possibly a tenable argument in favor of Antigua based on the doctrine of market access: For this, the Appellate Body must find that United States law prohibits market access of cross-border gambling and betting services through the use of precise types of limitations such as numerical limitations. However, this is unlikely because the United States does not explicitly use numerical limitations to restrict gambling and betting services.

¶19 Third, and perhaps most importantly, the Appellate Body must find that United States laws that currently regulate cross-border gambling and betting are not measures necessary to protect public morals. The WTO has never ruled on the requirements for the public morals exception. This is probably because countries do not often use the exception in a controversial manner. Or, if they do, it is simply too hard to disprove. Here, there is a good argument that the public morals exception does not apply because United States citizens gamble so much. The Appellate Body could reach this conclusion by concentrating on the reality and magnitude of not only domestic, but also cross-border Internet gambling and betting in the United States.

All of the evidence pointed towards a growing global market for online gambling where national boundaries had come to have little meaning. Nowhere is this better illustrated than in the USA where, despite the apparent illegality of cross-border gambling, more of its citizens gamble online than anywhere else in the world.⁷²

¶20 The Appellate Body could also look to the fact that some forms of Internet gambling are permitted within the fifty states. If the United States allows domestic businesses to supply interstate Internet gambling services, albeit on a regulated basis, but prohibits foreign businesses from supplying cross-border Internet gambling services, the United States would run afoul of the doctrine of national treatment. Furthermore, if gambling, let alone Internet gambling, is so prevalent in the United States, how can the United States claim an exception to its GATS obligations under the moral exception? In addition, there is the policy argument that since it is “impossible to prohibit [cross-border] online gambling from occurring,” the United States, and other countries, should seek to get what they can by regulating the industry instead of prohibiting it in vain.⁷³ The Appellate Body could find that if the United States legalizes cross-border Internet gambling and betting it could use its trade policy to influence the regulation

⁷¹ *Id.* at 20.

⁷² National Gambling Impact Study Commission Final Report (June 18, 1999).

⁷³ Cara Franklin, *Virtual Law Vegas: Regulate or Prohibit?*, 2001 DUKE L. & TECH. REV. 0021, ¶ 14-17.

of the industry. This likely brings us back to the very heart of the Panel's reports and the United States' current turmoil over Internet gambling and betting in general: Is the ban on cross-border Internet gambling and betting necessary to protect public morals in the United States? If it is necessary, it seems the United States could legally continue the ban. However, the Appellate Body would then also expect to see more than mere lip service to the United States' apparent ban on domestic interstate Internet gambling and betting.

CONCLUSION

¶21 Since negotiations between Antigua and the United States have broken down, both parties must now wait for the WTO Appellate Body to voice its opinion on the dispute. If the United States ultimately loses on appeal, the first e-commerce dispute to come before the WTO will have lived up to its biblical billing. However, this seems unlikely considering the controversial findings the Appellate Body would likely have to reach to uphold the Panel's decision: 1) the United States provided for cross-border gambling and betting services in its commitments; 2) the remote gambling and betting service provided by Antigua are like the non-remote services provided domestically in the United States; and 3) the current United States laws regulating cross-border gambling and betting are not necessary to protect public morals.