



Aiding And A “Betting”: How The US Horse Racing Industry UnWittingly Assisted Antigua In The Piracy of US Intellectual Property

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A. History of Internet Gaming in Antigua

Antigua and its twin island, Barbuda (collectively, “Antigua”) is a nation located in the Caribbean. It is a former British colony that became fully independent in 1981. Antigua and Barbuda has a population of approximately 70,000 people. It is an English-speaking country and is a popular tourist destination.

Beginning in 1994, Antigua began providing a framework for Internet gaming as part of its economic development and diversification strategy. By the late 1990s, Antigua enacted a regulatory scheme for companies operating in Internet gaming. Antigua provides for two kinds of gambling and betting licenses; (1) interactive gaming (casino-style gaming) and, (2) interactive wagering (sports betting).

Of the many Internet gaming operators in Antigua, the most infamous in the eyes of the US Justice Department was Jay Cohen. Mr. Cohen, through his

company, World Sports Exchange (“WSEX”), began operating in Antigua in January 1997, by taking wagers from US citizens over the telephone and Internet on professional and college sporting events. In March 1998, the US Justice Department charged Cohen and 20 other US citizens with violations of the Wire Act. Although most of Cohen's co-defendants remained in Antigua and did not subject themselves to the court's jurisdiction, Cohen voluntarily returned to the US to fight the charges, claiming US statutes did not apply to his Internet business licensed in Antigua. A jury disagreed and found Cohen guilty of violating the Wire Act. On July 31, 2001, the United States Court of Appeals, Second Circuit upheld the conviction.¹ Cohen served seventeen months and in May 2004, began serving two years of probation. To date, Jay Cohen is the only person to actually stand trial in the US for conducting Internet gaming.

B. The Trade Dispute

In 2003, citing the Cohen prosecution and other legal measures enacted by the US to halt Internet gaming, Antigua sought relief with the World Trade Organization (“WTO”) by requesting that the United

States grant access to its markets for Internet gaming.² The basis of the dispute stemmed from the trade agreement between the US and Antigua known as the General Agreement on Trade in Services ("GATS"). Antigua alleged that the US made a commitment to provide full market access for Internet gaming with the GATS.³

When negotiations failed to resolve the dispute, Antigua requested that the WTO convene a panel known as the Dispute Settlement Body ("DSB").⁴ On November 10, 2004, the DSB determined that the US committed to provide open market access for Internet gaming and that the Wire Act⁵, the Travel Act⁶, the Illegal Gambling Business Act⁷ and four state statutes breached that commitment and thus, violated GATS⁸. While GATS permits exceptions for trade barriers where such laws are "necessary to protect public morals or to maintain public order," the DSB also found that these laws were not permitted exceptions given that the US failed to negotiate with Antigua on the gambling restrictions⁹. Both the US and Antigua appealed the DSB decision¹⁰.

In April, 2005, the Appellate Body of the WTO found that only the three federal laws (Wire Act, Travel Act and Illegal Gambling Business Act) and not the four state laws violated the GATS commitment¹¹ but that these laws *were* "necessary to protect public morals or to maintain public order."¹²

However, when such a "necessity" is found, the GATS required further analysis under what is called a "chapeau". A chapeau analysis seeks to determine whether the laws restricting trade are "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."

To defeat the chapeau analysis, Antigua relied upon the Interstate Horseracing Act¹³ ("IHA"), which permits the combining of wagers placed "on-track" on racing events occurring at a horse racing facility in the US with "off-track" wagers placed at a wagering facility located within the US for the same racing event.¹⁴ This form of betting is commonly known as pari-mutuel wagering, where the participants are wagering with each other and not against the racetrack or the "off-track" operator.¹⁵ Further, the IHA also permits that such "off-track"

wagers can be made in person, telephonically and over the Internet.¹⁶ The IHA, however, applies only to US based race tracks and "off-track" wagering operators.¹⁷

Antigua argued and the Appellate Body agreed that the existence of the IHA with its permissible telephonic and Internet wagering, is an arbitrarily contradiction to the three federal laws in that the IHA does not provide for inclusion of international race tracks or "off-track" wagering operators.¹⁸ This contradiction violated the chapeau of GATS, and consequently, the Appellate Body found in favor of Antigua and against the US.¹⁹

C. Compliance with the WTO Decision

With this narrow finding by the Appellate Body, the US could have brought itself into compliance with the WTO by modifying the IHA to specifically permit international participation. Ironically, the US Horse Racing industry already engages in this international activity without interference from the US Justice Department. Canadian, Dubai, French, Hong Kong and Caribbean tracks and "off-track" pari-mutuel operators send and receive live simulcasts for both US and international racing events and comingle their respective pari-mutuel wagers for such events. Rather than codifying this common and albeit, accepted practice, the US failed to make any changes to the IHA.

Not satisfied with the inaction of the US to open its Internet markets, Antigua brought a compliance proceeding before the WTO on July 6, 2006.²⁰ On March 30, 2007, the WTO found that the US failed to comply with the DSB²¹ which gave

Antigua the opportunity to pursue trade retaliation against the US. Further, Antigua sought WTO permission to retaliate against the US in the amount of \$3.4 billion²², an amount that is more than 3 times the size of Antigua's entire economy²³. Antigua based this amount on an economic estimate of lost Internet gaming revenues resulting from the US ban²⁴. Antigua also requested the ability to "cross-retaliate" by offsetting their damages against other trade agreements.²⁵

The US countered Antigua's damage arguments by stating that the WTO should focus the retaliation damage on estimated lost revenues from just the horse racing sector. Based upon accepted WTO gaming market data and the horse racing's percentage of the total gaming market, the US



argued that Antigua would only be entitled to at most, \$3.3 million annually.²⁶

The WTO panel ultimately determined that Antigua could suspend their obligations, up to \$21 million annually, in another trade agreement made with the US known as the Agreement on Trade-Related Aspects of Intellectual Property Rights commonly known as the TRIPS Agreement.²⁷ In essence, the WTO granted Antigua the right to retaliate against the US by suspending Antigua's obligation to protect US intellectual property rights, thereby making Antigua, the modern day "Pirates of the Caribbean."²⁸ Although they have been granted the "right of piracy", Antigua has not sought WTO permission to actually retaliate against US intellectual property. Even still, as the Office of the US Trade Representative stated, seeking permission "would undermine Antigua's claimed intentions of becoming a leader in legitimate electronic commerce, and would severely discourage foreign investment in the Antiguan economy."²⁹

The Office of the US Trade Representative also stated that it never was the intention of the US when they drafted the GATS schedule in 1994 to make a commitment covering Internet gaming.³⁰ The same sentiment probably holds true for the US

horse racing industry that it never intended that their lobbying efforts in enacting the IHA would one day permit its fellow citizens in the music, film, publishing and software industries to be subjected to counterfeiting and piracy of their valuable intellectual property. Special interests make strange bed fellows indeed.

D. Latest WTO Developments

The US sought on May 7, 2007 to modify their GATS schedules by withdrawing gaming services from the US commitment on open trade markets. To withdraw its commitment on gaming services, the US is required to negotiate a settlement with each GATS member affected by the withdrawal. As of December 21, 2007, the US had settled with three of the eight affected members, Canada, the EU and Japan.³¹ Not surprising, the US and Antigua have not reached settlement, and on January 28, 2008, Antigua and Costa Rica requested arbitration on this issue.³²

Unfortunately, the US has not seen the last of its WTO proceedings as they relate to Internet gaming. On December 20, 2007, the Remote Gambling Association, an organization based in London, England and comprised of "dozens" of European Internet gaming companies, filed a complaint with the European Commission alleging that the US



violated the GATS by selectively enforcing laws against EU Internet gaming companies. If the European Commission finds such a breach through their investigation, another settlement dispute case can be brought against the US before the WTO.³³ Yet, given that the WTO cannot impose fines, monetary penalties or legislative changes, the European Internet gaming operators will soon realize that any victory gained in their WTO quest will be hollow at best.

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¹United States v. Jay Cohen, 260 F.3d 68 (2d Cir. 2001).

²Request of Consultations by Antigua and Barbuda, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/1 (March 27, 2003).

³Report of the Panel, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 3.30, WT/DS285/R (Nov. 10, 2004)[hereinafter Panel Report].

⁴Id. ¶ 1.2.

⁵18 U.S.C. § 1084

⁶18 U.S.C. § 1952

⁷18 U.S.C. § 1955

⁸Panel Report, ¶ 6.421.

⁹Id. ¶ 6.535.

¹⁰Report of the Appellate Body, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 7, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Report].

¹¹Id. ¶ 373.

¹²Id. ¶ 326, 373.

¹³15 U.S.C. § 3001 et seq.

¹⁴15 U.S.C. § 3002 (3).

¹⁵15 U.S.C. § 3002 (13).

¹⁶15 U.S.C. § 3002 (3).

¹⁷15 U.S.C. § 3002 (2).

¹⁸Appellate Report, ¶ 373.

¹⁹Id.

²⁰Report of the Panel, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 1.7, WT/DS285/RW (Mar. 30, 2007).

²¹Id. ¶ 7.1.

²²Decision by the Arbitrator, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 1.5, WT/DS285/ARB (Dec. 21, 2007) [hereinafter Arbitration Decision].

²³See USTR Press Release, Statement on Internet Gaming, December 21, 2007, available at <http://www.ustr.gov>.

²⁴Id. ¶ 3.76.

²⁵Id., ¶ 1.5.

²⁶Id. ¶ 3.148.

²⁷Id. ¶ 6.1.

²⁸Lester, Simon, The WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of its GATS Commitments, ASIL Insight, International Economic Law Edition, April 8, 2008, Vol. 12, Issue 5, available at <http://www.asil.org/insights/2008/04/insightso80408.html>.

²⁹See USTR Press Release, Statement on Internet Gaming, December 21, 2007, available at <http://www.ustr.gov>.

³⁰Id.

³¹Id.

³²Reuters, Antigua Seeks WTO Arbitration In U.S. Gambling Dispute, January 31, 2008, available at <http://www.reuters.com/article/internetNews/idUSL3174965820080131>.

³³See RGA Press Release, EU Online Gaming Industry Challenges US With Charge Of Prosecutorial Discrimination, December 20, 2007, available at <http://www.rga.eu.com/shopping/images/Press%20Release%20RGA%2071220.pdf>.

