

# iGAMING BUSINESS NORTH AMERICA

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## THE SILICON STATE MOVES ONLINE

ASSEMBLYMAN JOHN BURZICHELLI ON THE  
PASSAGE OF NEW JERSEY'S IGAMING BILL

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# WTO: TEN YEARS OF DAVID VS GOLIATH

The tenth anniversary (2003-2013) of the Antigua (David) Vs US (Goliath) WTO gambling dispute, by **Professor Joseph Kelly**.

A specter is haunting the United States; the specter of Antigua and Barbuda (Antigua) suspending US intellectual property rights up to \$21 million per annum pursuant to a 2007 final World Trade Organization (WTO) arbitration judgment involving gambling services. Antigua has not received compensation and consequently, with WTO/General Agreement on Trade in Services (GATS) approval, has threatened to “suspend” US intellectual property rights much to the disapproval of Hollywood and other media interests. What this means is that Antigua could allow the annual sale of up to \$21 million of US copyright protected items at bargain basement prices without the usual share to the owner of the intellectual property.

This potential bizarre resolution of the trade dispute has led to equally bizarre US federal reactions. In late 2012, during the lame duck session of the 112th Congress, Senators Harry Reid and Jon Kyl circulated “The Internet Gambling Prohibition, Poker Consumer Protection and Strengthening UIGEA Act” which would have only allowed federally supervised online peer-to-peer poker, banned almost all state-licensed online gambling and would have withdrawn gambling from GATS coverage pursuant to Sec. 403 of the bill:

“Sec.403. Resolution of International Dispute over Internet Gambling.

(a) Negotiation of Withdrawal. – Not later than 180 days after the date of the enactment of this Act, the United States Trade Representative shall take such

action as may be necessary to conclude the process of withdrawing the commitment of the United States with respect to the remote or Internet gambling under the General Agreement on Trade in Services in accordance with the provisions of Article XXI of that Agreement.”

Fortunately, this bill was never introduced, but its provisions would have “also damaged international trade” by its blatant disregard of international obligations.<sup>1</sup> An earlier unsuccessful attempt to ignore the GATS decision was made in 2006, when Senator Max Baucus introduced S2317 which stated a “sense of Congress resolution against the World Trade Organization ruling that US and state laws should not be overridden by promises in trade agreements”.<sup>2</sup>

The bill specifically mentioned the Antigua-US gambling dispute. The dispute between Antigua and the United States before the World Trade Organization commenced in 2003 and resulted in an arbitration award that has still not been resolved. The basic issue is whether Antigua had a legitimate GATS complaint because the US allegedly allowed domestic online gambling but excluded Antiguan licensed gaming operators from the US market. The initial complaint was filed on March 13, 2003, when Antigua alleged US activity in prosecuting operators such as Jay Cohen resulted in an economic crisis that included an operator reduction of about 75 percent and a job reduction of about 85 percent of its online gaming employees. A 287 page

WTO Panel report<sup>3</sup> granted Antigua a great victory. The Panel concluded three US laws (the Wire Act, the Travel Act and the Illegal Gambling Business Act) were in violation of GATS. The Panel also concluded the US could have justified prohibitory restrictions based on a public order rationale such as prevention of underage gambling and money laundering, but failed to do so because it did not first consult with Antigua prior to taking action against online Antiguan gaming operators. The Panel also found that eight state laws, including Utah, violated GATS and that the US, unlike Canada and other countries, failed to exclude gambling from GATS coverage. The US had excluded sports under “recreational services”, but the Panel, after exhaustive analysis, concluded that “sporting” exclusion did not include “gambling,” which was a subset of recreational services.

Both the US and Antigua appealed the Panel’s decision. On April 7, 2005, the Appellate Body Report<sup>4</sup> affirmed the Panel’s decision concerning inclusion of US gambling services, but reversed the panel’s finding of a GATS violation by the eight states, and the determination that the US had to first consult with Antigua before applying federal criminal statutes to offshore Antiguan operators. Antigua’s only remaining victory was the Appellate Body’s conclusion that the Interstate Horseracing Act amendment of December 2000 and the laws of 18 states, allowed domestic online inter-state horserace wagering, while excluding Antiguan operators.

This determination was especially interesting since the US Justice Department claimed that all inter-state horserace

<sup>1</sup> “Harry Reid’s Online Poker Folds on Freedom”, Competitive Enterprise Institute, November 18, 2012.

<sup>2</sup> Trade Competitiveness Act of 2006, S. 2317, 109th Cong. § 7 (2006).

<sup>3</sup> Nov.10, 2004 (WT/DS285/R.

<sup>4</sup> WT/DS285/AB/R.

wagering was illegal pursuant to the 1961 Wire Act, which it maintained could not be changed by the 2000 civil statute. No state-licensed entity was ever prosecuted by the Justice Department, which admitted in December 2011 that the Wire Act only applied to sports wagering and not to other forms of wagering or gambling.

The GATS encouraged the US to bring its online horseracing law into compliance with the GATS Appellate Panel decision. The GATS Panel Report<sup>5</sup> concluded that instead of compliance with the GATS decision, the Unlawful Internet Gambling Enforcement Act of 2006 engaged in what amounted to doublespeak in its horseracing provisions.

“This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.” (UIGEA)

The Panel stated:

“This provision (of UIGEA)... shows that since the original proceedings the United States had an opportunity to remove the ambiguity and thereby comply with the recommendations and rulings of the Dispute Settlement Body. Instead, rather than take that opportunity, the United States enacted legislation that confirmed that the ambiguity at the heart of this dispute remains and, therefore, that the United States has not complied.”

Since the US did not comply and since the US and Antigua could not reach an agreement as to the amount of an award, the next step was arbitration. Antigua had requested damages of \$3.443 billion per year which it said was the total cost of all online gambling losses from US action. The arbitration panel<sup>6</sup> allowed annual damages up to \$21 million which it determined was the amount of lost inter-state horseracing revenues to Antigua.

The US then proceeded to withdraw gambling services from the GATS. In order to do this, it reached a settlement agreement with jurisdictions such as Australia, the European Union, Canada and Japan. When the US failed to reach an agreement with Antigua, the GATS panel authorized Antigua to take measures such as the suspension of intellectual property rights up to \$21 million per year. The amount is not cumulative.

Pursuant to GATS, Antigua could have retaliated by taking action against US imports. Since Antigua does not import many services from the US, any retaliation would be meaningless. Instead, Antigua has attempted to engage in discussions with US trade representatives on over a dozen visits to the US, but claimed that the US response has been that only Congress can appropriate the \$21 million, which is a highly improbable possibility. Antigua has found the process frustrating:

“As recently as last month, on yet another trip to the United States, we were told to work the Congress ourselves, engage a lobbying firm and hope for the best... the USTR, we have been told time and time again, has no authority in these matters.

“We have spent the last five years searching, at great expense and considerable effort for our little country, for the person or persons, the agency or agencies, whoever has the authority and will to work with us to come to a reasonable, just and fair resolution of our dispute. Sadly, we have never found that person, that agency, that whomever.”<sup>7</sup>

Without any other recourse, Antigua threatened to suspend US intellectual property rights, which was approved formally by the WTO which granted Antigua “authorization to retaliate.”

Antigua has denied reports it will run a website that would sell movies, music and

software irrespective of copyright laws, but is frustrated because of what it claims is the US’ refusal to engage in meaningful discussion.<sup>8</sup> Instead, an Antiguan press release stressed that pressure on US media and software companies might be effective in getting the US trade representatives back to the negotiating table.

The US response to any copyright action was blunt. The US insisted it had resolved compensatory service concessions regarding a withdrawal of gambling commitments from GATS with every country but Antigua and that it was Antigua that refused to enter into meaningful discussions.

“Moreover, if Antigua actually proceeds with a plan for its government to authorize the *theft* of intellectual property, it would only serve to hurt Antigua’s own interests. *Government authorized piracy* would undermine chances for settlement that would provide real benefits to Antigua. It also would serve as a major impediment to foreign investment in the Antigua economy, particularly in high-tech industries.”<sup>9</sup> (Emphasis added.)

On December 13, 2012, Antigua received WTO authorization to renew its suspended attempts to obtain up to \$21 million per year against the US.<sup>10</sup> Other jurisdictions, such as the European Union, have had legal disputes over the issue of whether a country could exclude qualified foreign gaming operators, but unlike the US/WTO dispute, the losing party honored the decision. In ignoring the WTO result, the US seems to be following the “law of the stronger,” which was common in the then USSR.

Will this set a precedent for a WTO member who might not like a WTO award in favor of the US?

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<sup>5</sup> WT/285/RW (March 30, 2007)

<sup>6</sup> WT/DS285, Dec. 21, 2007.

<sup>7</sup> TWN Info Service on WTO and Trade Issues”, Third World Network, January 22, 2013.

<sup>8</sup> “Antigua Denies Plans to Set Up Website”, Cana News, January 29, 2013.

<sup>9</sup> “Statement by the United States at the December 17, 2012, DSB Meeting”, <http://geneva.usmission.gov/2012/12/18/dsb-meet>

<sup>10</sup> WTO/DS285/25.