

Clash in the Caribbean: Antigua and U. S. Dispute Internet Gambling and GATS

An interview with Joseph M. Kelly

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Background

Antigua, a small island and former British colony, attracted international business as a haven for legitimate, licensed Internet gambling. Antigua is also part of the World Trade Organization (WTO), a 149-member body encouraging trade and to which the U. S. is also a party. GATS stands for General Agreements on Trade in Services, a treaty of sorts where the WTO members encourage trade in things other than tangible products. Considering Internet gambling to be a service, Antigua claimed the U. S. ban on Internet gambling violated GATS. The WTO was asked to settle the dispute. A resource note follows this interview with Dr. Kelly.

GRRJ (Gaming Research & Review Journal): *Welcome, Joe. What charges did Antigua bring against the U. S.?*

JK (Joe Kelly): Antigua alleged that U. S. prohibition of cross-border gambling and its anti-Internet-gambling policies prevented credit card companies and banks from honoring Antigua's online gaming transactions, a definite roadblock to a supposedly free-trade service activity.

GRRJ: *This sounds like David and Goliath, this little island standing up to our powerful country. How badly was Antigua suffering from the U. S. anti-Internet gambling policy?*

JK: Over 50% of the Antigua market consisted of U. S. customers. Scared off by the prospects of indictments and possible civil forfeiture actions in U. S. courts, Antigua gambling operators, formerly numbering 119 were reduced to only 28. Online employees declined from around 3,000 to 500. In a famous case of *United States v. Jay Cohen*, the U. S. made good on its threats by indicting 21 persons, including Cohen a U.S. citizen operating in Antigua. Cohen was convicted and sentenced to 21 months in prison. Rarely, however, has the U.S. Justice Department taken criminal action against offshore operators subsequent to the Cohen conviction. Also, the decline of Antiguan operators, however, was partly due to a 3 percent tax enacted at the time of the 2001 regulations. However, the Antigua government has announced that 10 new online gambling operators will commence operations in 2006.

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GRRJ: *What is the rationale for the U. S. being able to punish Internet gambling that is legal in the land of the corporate gambling operator?*

JK: The United States insists that any interactive wagering must be legal in both the jurisdiction of the bettor and the jurisdiction of the operator. In fact, the Justice Department has warned government authorities in both North Dakota and the U.S. Virgin Islands that interstate interactive gambling would be in violation of federal law. Most countries, such as the U.K, Alderney and the Isle of Man, would say that the bets were accepted at the location of the operator – Antigua, and thus beyond U.S. reach.

GRRJ: *Was there more than one level of deliberation and findings?*

JK: Presently there are three WTO decisions. First, the decision of the three person Panel appointed by the WTO director general. It published its decision on November 10, 2004, “United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,” *Report of the WTO Panel, WT/DS285R*. Second, the decision of the Panel was appealed to the Appellate Body of the WTO which rendered its decision on April 7, 2005. (“United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,” *Report of the Appellate Body, adopted April 20, 2005.*) Third, the decision of the WTO Arbitrator on how to implement the Appellate Body Report which was issued on August 19, 2005. (“United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,” *WT/DS285/13, “Award.”*)

GRRJ: *How did the WTO rule in the Antigua case?*

JK: The first decision – that of the Panel was a great victory for Antigua. First, the Panel concluded GATS had jurisdiction since the U.S. failed to exclude gambling from its GATS commitments. Secondly, the Panel concluded three U.S. federal laws and those of four states totally prohibited remote gambling and were inconsistent with the U.S. GATS obligations. Third, the Panel concluded that the U.S. could have defended its prohibition based on public order/public policy defense based on fraud, special health risks, underage gambling problems, and money laundering. The Panel, however, concluded that the public policy defense could not be used because the U.S. failed to negotiate in good faith with Antigua.

The second decision - that of the Appellate Body upheld most Panel conclusions, but often for different reasons. It concluded the Panel incorrectly examined U.S. state laws. More importantly, it found that the U.S. did not have to engage in good faith negotiations with Antigua and therefore the U.S. could justify discrimination based on public policy with one exception – interstate interactive horseracing.

The third decision – that of the Arbitrator gave the U.S until April 3, 2006 to either prohibit all interactive interstate horseracing or allow interstate interactive horseracing access to GATS members.

GRRJ: *Is gambling specifically mentioned in GATS making violations easy to spot?*

JK: The closest to gambling is the word “sporting”. The U. S. did exclude sporting from GATS compliance but it may be a stretch to automatically assume that gambling also comes under that rubric. Incidentally, the U. S. could have prevented this dispute by excluding gambling before signing. Canada and about ten other countries specifically excluded gambling from coverage under GATS.

GRRJ: *The Wire Act seems to be the federal law relied on most to prosecute offenders. What basically does this law say and did it surface in the Antigua case?*

JK: The Wire Act was passed by Congress in 1961 to target organized crime in the betting industry. The Justice Department went after Jay Cohen and 20 other offshore individuals who were in the business of sports betting. As a result of the Cohen decision, most experts would opine that the Wire Act prohibits offshore sports betting. In *In Re: Mastercard*, the United States Court of Appeals for the Fifth Circuit concluded in 2002 that the Wire Act applied only to sports betting and not offshore casino gaming. The U.S. Justice Department disagrees with that interpretation.

GRRJ: *What other U. S. laws did Antigua cite to prove U. S. prohibition on cross-border gambling?*

JK: Antigua listed 105 measures (federal and state), plus three judicial cases, as well as federal and state pressure on financial intermediaries and advertisers. Besides the Wire Act, the two most important federal laws are the Anti-Gambling Business Act, 18 U.S.C. §1955, and the Travel Act, 18 U.S.C. §1952.

GRRJ: *Suppose a state law prohibited Internet gambling. Might this cause the U. S. to be in violation of this international agreement?*

JK: Approximately, six states have passed legislation prohibiting interactive gambling. The Panel concluded laws of four states, Louisiana, Massachusetts, South Dakota and Utah, violated GATS. This finding was reversed by the Appellate Body. It is possible any state legislation concerning the Internet might be in violation of the dormant commerce clause.

GRRJ: *What about the argument that GATS allows gambling prohibition under Article XIV, a reference to protection of public morals or maintaining public order?*

JK: Public policy is almost impossible to determine. The Panel and Appellate Body concluded the U.S. could justify its prohibition on factors such as fraud, health, underage gambling and money laundering, but not on fear of organized crime. This is the finding that many experts conclude has little substantiation.

GRRJ: *Let's take another tack. Could Antigua assert U. S. approval of Internet gambling through the Interstate Horseracing Act of 1978?*

JK: This was the major Antiguan victory. The Appellate Body concluded the December 2000 amendment to the Interstate Horseracing Act might have allowed domestic operators to engage in legal interstate interactive horseracing. The U.S. Justice Department emphasizes that the December 2000 amendment did not legalize interstate interactive horseracing, but hardly any authority supports this position.

GRRJ: *Both Antigua and the U. S. claim victory. Can you add up the favorable points on each side?*

JK: Antigua won every major battle but lost the war – except for interstate interactive horseracing. Antigua did open the door for another challenger who might circumvent some of the very technical findings of the WTO.

GRRJ: *Where do we go from here? Is either side obligated to make legal and procedural changes?*

JK: The Arbitrator has given the United States until April 3, 2006 to either show evidence that the U.S. has prohibited interstate interactive horseracing or would allow foreign operators access to U.S. horseracing. Instead, the Leach Bill, HR 4411, has almost enshrined the domestic monopoly of the U.S. interstate interactive horseracing industry. While almost nobody expects the bill to be enacted into law, it shows the U.S. determination to ignore the WTO.

GRRJ: *Here's a riddle. The U. S. uses its laws to prohibit Internet gambling but objects to Antigua using those same laws to prove GATS violation of free trade in services. Can you comment on this?*

JK: Why is the WTO important? Certainly the WTO is not popular in the U.S. However, as the U.S. Chamber of Commerce explained in opposing a different Internet anti-gambling bill, if we ignore the WTO decisions against us, why should any country obey a WTO decision in favor of the U.S. and against them?

GRRJ: *Joe, could we say this is one more proof of the messy entanglement in the area of international law? Why does world jurisdiction still seem to escape us?*

JK: It can't be avoided. Conflict goes with the legal territory. But it would help if authorities in all countries could give an inch here and there to make realistic decisions on something as crucial as Internet gaming.

GRRJ: *Where can we look to read official or reliable documents associated with the Antigua case and other topics related to the legal questions of Internet gambling?*

JK: I prepared a Resource Note for those who want to follow up this brief chat.

Resource Note

Internet sources:

- The Antigua Position: www.AntiguaWTO.com/
- U. S. Position: www.ustr.gov (Office of the U.S. Trade Representative)
- Submissions & Reports from Antigua-U.S. dispute: [www.AntiguaWTO.com
WTOListPg.htm](http://www.AntiguaWTO.com/WTOListPg.htm).
- Dispute Panel Report: www.AntiguaWTO.com/
- Appellate Body Report: www.AntiguaWTO.com/
- U. S. Briefs: www.ustr.gov (Search the document library "Antigua briefs")

Federal Laws

- Illegal Gambling Business Act (18 U.S.C. 1955)
- The Travel Act (18 U.S.C. 1952)
- The Wire Act of 1961 (18 U.S.C. 1084)
- Interstate Horseracing Act of 1978 (15 U.S.C.3001 et seq.)

Cases

- U. S. v. Cohen*, 260 F.3d 68 (2nd Cir. 2001), cert. denied 536 U.S. 922 (2002).

U.S. v. Truesdale, 152 F.3d 443 (5th Cir. 1998), which reversed a conviction of a Texas bookmaker accepting wagers from Jamaica on a technicality but, in dicta, questioning whether any offshore licensed operator might be in violation of the Anti-Gambling Business Act, 18 U.S.C. §1955.

Vacco v. World Interactive Gaming Corp., 714 N.Y.S. 2d 844 (1999). A New York trial court decision which is basically a securities fraud case, but which upheld, in dicta, a gambling conviction pursuant to various federal and New York State laws.

In re: Mastercard Int'l Internet Gambling Litig., 313 F3d 257 (5th Cir. 2002).

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