



The Centre for International Governance Innovation

# THE CARIBBEAN PAPERS

A Project on Caribbean Economic Governance

## “Remote” in the Eastern Caribbean: The Antigua–US WTO Internet Gambling Case

ANDREW F. COOPER



Caribbean Paper No.4

April 2008

An electronic version of this paper is available for download at:  
[www.cigionline.org](http://www.cigionline.org)

## Abstract

The structure of the multilateral trading system is widely assumed to contain bias towards big actors, unevenly distributing access to the key processes of the system. Small countries, including Caribbean states, have long focused their attention on physical merchandise, while the US has taken on the role of disciplinarian, confronting countries that they perceive to be in violation of the General Agreement on Trade in Services (GATS).

Brought to the WTO by Antigua, the Internet remote gambling case has challenged standard assumptions about the workings of the international trading system in the WTO context. A small country appearing to take the US on by itself, Antigua claimed the American government failed to live up to its commitment under GATS regarding "recreational services." While Antigua argued for fairness in the WTO system, the US adopted a prohibitionist attitude to Internet remote gambling, citing domestic moral standards.

Underwritten by the highly globalized Internet remote gambling industry, this case exemplifies what a small state can do to respond to dynamic changes imposed by globalization, confirming that small countries can sometimes punch above their weight in international relations.

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ISSN 1915-6413 (Print)

ISSN 1915-6421 (Online)

## Letter from the Executive Director

It is my pleasure to introduce *The Caribbean Papers*, a product of our major research project on Caribbean Economic Governance. CIGI is an independent, nonpartisan think tank that addresses international governance challenges. Led by a group of experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debates, builds capacity, and generates ideas for multilateral governance improvements.

This project convenes researchers and leaders within the private and public sectors to examine and provide substantive answers and policy prescription to current economic governance challenges facing the Caribbean region. The papers were initially presented at CIGI workshops, where their authors benefited from extensive comments and discussion on their work. Through this series, we hope to present and discuss policy issues pertaining to trade, investment, human capital, the fiscal outlook, and public sector management practices, among other issues relevant to the Caribbean region's economic future.

We encourage your commentary on these papers and welcome your thoughts. Please visit us online at [www.cigionline.org](http://www.cigionline.org) to learn more about the Caribbean Economic Governance Project and CIGI's research programme.

Thank you,

**John English**  
Executive Director



## Introduction

It is commonly assumed that the structure of the multi-lateral trading system contains a bias toward big actors. Access to the key processes of the system – most notably through the institutionalized workings of the World Trade Organization (WTO) – is considered to be unevenly distributed. The large actors, from both the traditionally dominant North and the emergent South (which includes countries such as China, India, and Brazil), are viewed as overriding players that make the rules while the smaller players are forced to accept outcomes often inimical to their interests.<sup>1</sup>

The only way to counteract this problem is for the smaller countries to group together in coalitions. This collective approach has been deployed in some cases through the formation of mixed coalitions, notably the Cairns group, where middle and smaller-size countries combine forces (Cooper, 1998). But for the most part, this type of coalition features countries that are members of the G77, ranging from the G20 agricultural group to the group of “small and vulnerable economies” (Narlikar, 2003).

Even within this constellation of developing countries, however, new signs of tension have surfaced between those ascendant countries drawn to the inside of the WTO rule-making (Brazil and India in the so-called G4 with the United States and the European Union) and those smaller countries that remain very much on the outside. These doubly marginalized constituents have cast the G4 as a new exclusionary forum complete with special privileges (Deverakonda, 2007).

In terms of the substantive agenda, the smaller countries have long focused their attention on physical merchandise, whether primary commodities or goods such as textiles and apparel. The main aim has been to achieve equitable treatment for their exports, albeit, as witnessed by the activities of alternative coalitions such as the Food Importers Group, there is also concern about their status as importers.

The original *demandeur* for the entry of the General Agreement on Trade in Services (GATS) into the international trade system came from the United States. Pushed by multinational companies such as American Express, the US insisted from the time of the Uruguay Round that the WTO must include rules governing services (Spero and Hart, 1997).<sup>2</sup> Moreover, as with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the US continued to act as the disciplinarian of the system. In just one of several examples of this adopted role, the US confronted the small Eastern Caribbean state of Antigua and Barbuda (henceforth, simply Antigua) when that country refused to give AT&T a license for the sale of mobile telephones – a decision that, in the American perspective, was in violation of GATS.

A recent case on Internet “remote” gambling (or in alternative parlance, gaming) centred on these same two countries, the US and Antigua. Unlike the brief skirmish on

<sup>1</sup> A forceful analysis of the “asymmetries of economic opportunity” within the WTO is presented by Rorden Wilkinson (2006).

<sup>2</sup> For one case study, see Linda Schmid (2005).

## Author Biography

Andrew F. Cooper is the Associate Director and Distinguished Fellow at The Centre for International Governance Innovation and is Professor of Political Science, University of Waterloo. Holding a DPhil from Oxford University, he writes, lectures, and comments on International Political Economy, Comparative and Canadian Foreign Policy, and Global Governance and the Practice of Diplomacy. He has authored or edited numerous books including *Celebrity Diplomacy* (Paradigm, 2007); *Governing Global Health: Challenge, Response, Innovation* (Ashgate, 2007); *Intervention without Intervening: The OAS Defense and Promotion of Democracy in the Americas* (Palgrave, 2006); *Canada Among Nations 2006: Minorities and Priorities* (MQUP, 2006); *Reforming from the Top: A Leaders’ Twenty Summit* (UNUP, 2005); and, *Test of Global Governance: Canadian Diplomacy and United Nations World Conferences* (UNUP 2004).

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telephones, the Internet remote-gambling case has been a protracted affair, extending from March 2003 to the final arbitrator panel report in December 2007. Given the imbalance of power between the two countries, this timeline is in itself highly significant. Contesting this issue in bureaucratic/legal terms did not over-stretch the massive power resources of the United States. Antigua, at least in terms of state capacity, was at the other end of the spectrum. With a population of roughly 68,000 people, and an economy approximately 0.007 per cent the size of that of the US, the case has all the flavour of what Robert Keohane has termed a struggle between Gulliver and a Lilliputian (Keohane, 1969). To give just one illustration of the extent to which its resources are outmatched, Antigua's ambassador at the WTO at the start of this case (Sir Ronald Sanders) also served as the High Commissioner to the United Kingdom (Beattie and Williams, 2005).<sup>3</sup> In contrast, the US could bring to the negotiations a strong team from the United States Trade Representative, the Justice Department, and the Department of State.

As the case went on, Antigua picked up some support from other members of the WTO, including a number of larger actors that adopted the status of "third parties" in the case. On a formal state-to-state basis, nonetheless, Antigua from the outset took on the United States by itself. Unlike in other protracted and high profile Caribbean-related WTO cases, in particular the long and bitter "banana war," CARICOM (the Caribbean Community and Common Market), the Organization of Eastern Caribbean States (OECS), and the Eastern Caribbean Central Bank have not played major mobilizing roles in drumming up support for Antigua's position, although the OECS's technical mission to the WTO offered limited help.

Not only does the case challenge many of the standard assumptions about the workings of the international trading system in the WTO context, it also involves an industry very different from the stereotype associated with the Caribbean regional economy, that is to say a primary commodity such as bananas or sugar. At the core of the case for Antigua was whether a US ban on online gambling violated a "specific commitment" by the US to liberalize trade in a component of "recreational services." That is to say, the case rested on the issue of whether or not the US has a legally binding agreement under GATS to which it must live up.

Not only was Antigua trying to defend its interests in a services area, it was doing so in a new sophisticated subset of the area that had considerable potential to "leapfrog" over the established bricks and mortar component of the gambling industry. Antigua had not built up a physical replica of the Las Vegas or Atlantic City casino model – nor even an equivalent of a Mississippi steamboat floating gambling site. The Antigua gambling industry was a virtual one, located in cyberspace. If a still-rare example of a challenge under GATS, it was more remarkable in its position as the first WTO dispute revolving around Internet sites.

Given these innovative features, the salience of the case goes well beyond the technical/legal modalities and is further reinforced by the distinctive nature of the Internet gambling industry. As witnessed by its presence in Antigua, much of this industry has gone "remote" or offshore, and some parallels with offshore financial centres can be drawn, including a certain stigma of association with illegal activity. Although they share some characteristics, the Internet gambling industry has some unique features that must be distinguished from these so-called tax havens. Whereas tax havens have traditionally been a means of avoiding regulation, the Internet remote-gambling industry has shown some willingness to embrace regulation. Although the Internet gambling industry shares some of the proclivity for discretion associated with offshore financial centres (OFCs) or tax havens, it is also an industry that thrives on publicity as a means of generating business.

Furthermore, the nature of the industry clearly informs the manner in which both the United States and Antigua have animated their official responses. Framed through a strictly economic (taxation) lens, the US became increasingly ambivalent to the international campaign to clean up OFCs. In contrast, however, the US adopted a prohibitionist attitude to the Internet remote-gambling industry, a position that exposed the contradictions in its negotiation stance during the case. As the case went forward, the divergence between the US support for some models of gambling at home and the projection of a strong impulse to ban other models of gambling offshore became thoroughly exposed.

For Antigua, it is still not clear if and how well the Internet remote-gambling industry meshes with an overall economic development strategy. In declaratory terms, the argument occupying pride of place was that this industry

<sup>3</sup> Subsequently Dr. John Ashe became Antigua's ambassador to the WTO.

provided a new economic pillar for a country with few other choices (besides tourism, an industry that was hit hard by a number of adverse forces, including several devastating hurricanes and shifts toward high-end ecotourism). Yet, in operational terms, this argument has to be examined more closely. How sustainable are employment opportunities made available in Antigua through the expansion of the Internet remote-gambling industry? And just as importantly, in what sort of political environment is this economic development embedded? The legacy of a problematic political culture in terms of a lack of governance accountability largely associated with one family (the Birds) has to be explored in some depth, both as a lure and a constraint vis-à-vis the Internet remote-gambling industry. The more general issue of rent-seeking also has to be factored in.

Another puzzling aspect of the case deserving more in-depth analysis is the disjunction between the formal power capabilities of the United States and Antigua and their ability to negotiate effectively at the WTO. On the one side, the US negotiating performance featured a combination of disengagement and aggressiveness. The US skill set was diminished by its failure to take its original specific commitments under the GATS as seriously as it should have. Moreover, when the US became more engaged in the case, it did so in a manner that put coercive and unilateral tactics ahead of negotiation skills. On the other side, a puzzle arises about how Antigua was able to negotiate so effectively when its resources were so strained. The answer lies in the false assumption that it was the Antiguan state that did all the running on this case! At the formal level, Antiguan officials presented themselves in a skillful manner. This was not only true of Sir Ronald Sanders but also of Ambassador John Ashe, Sanders' successor, and Errol Cort, Antigua's Minister of Finance and the Economy, who were active on the case. However, underpinning and underwriting the case for Antigua, was the highly globalized Internet and remote-gambling industry.

At one level this case serves as an excellent example of what a small state can do practically to respond to the dynamic changes imposed by globalization. Amid sharply weakened capabilities in other areas, the Internet remote-gambling business has been seized upon as a panacea in a high-stakes game of international political economy. Countries in the position of Antigua must constantly seek new ways to reposition themselves within the new division of labour (for context see Payne and Sutton, 2007).

At another level, the case teases out some features of US exceptionalism that reveal the gaps between many of the values of the US political system/culture and its commitments to the international trading system. Instead of dealing with the Internet remote-gambling case as strictly an economic issue, an intense (but inconsistent) form of morality was injected into the case. While Antigua pushed for fairness within the WTO system (by the elimination of an unfair trade restriction), the US contended that cross-border Internet gambling contravened its own domestic morals and public order. On top of its practical implication, therefore, the case hinged on a highly divergent and sensitive normative standard.

## Contextual Features of the Online Gambling Industry

### Structural similarities with offshore financial centres

At first glance it is the parallels and not the differences between OFCs and the Internet remote-gambling industry that stand out. The sheer scope of both sets of activities is compelling. Although well below the scale of the billions of dollars amassed in OFCs, the figures attributed to the online gambling industry are still staggering: the business of Internet gambling was estimated to be worth some US\$12 billion dollars in 2006, with estimates gauging a rise to US\$18 billion by 2008/9 (Christiansen Capital Advisors, 2007).

With this high volume comes a global reach in terms of client base. One leading company, Sportingbet, claimed in a profile of its activities in 2005 that it had built up a base of one million customers in 100 countries, operating in 11 languages (Bence, 2005). By 2006, some 2,300 Internet gambling sites existed, up from 30 offshore web sites in 1996 (Batt, 2006).

A second characteristic of note is the intensity of competition among both OFCs and Internet gambling sites. This is certainly true among some OFCs. Although some centres have carved out particular areas of specialization, including the Bahamas (offshore banking, mutual funds, co-management), and Bermuda (private banking, fund administration, and maritime registry), competition continues to be fierce and volatile (Vlcek, 2007). The same is the case with the online gambling industry. Besides Antigua, Costa Rica, Curacao, Gibraltar, Isle of Man, and Alderney

are all major players. This list also demonstrates the overlap between some of the established offshore tax havens and Internet gambling sites. One recent report estimated that Antigua, although under serious strain, still leads in terms of the number of offshore Internet sites (536 in 2005) operating within its borders (Dresdner Kleiner Research Report on Internet Poker, cited in Stewart, 2006).

The third and most controversial parallel is the negative stigma attached to the two industries. The negative brand of both OFCs and Internet remote gambling is that they are inextricably linked to tax evasion and money laundering.

Well before the WTO case, Antigua came under close scrutiny for irregularities in both industries. A 2000 US Congressional committee investigated the use of Antigua by a number of crime groups as a destination to launder "dirty" money. The picture painted in this case of the effort to track the dealings of the Swiss American Bank (founded by the mysterious figure of Bruce Rappaport) is not pleasing to any legal-oriented eye:

... when I visited Antigua and met with the prime minister there, we had questions about Swiss American because Swiss American had been used by a drug trafficker whose assets had been seized by the United States government, and the United States wanted the assets, and the assets disappeared. And we asked the prime minister for access to records on the assets. We previously asked him before – this was the Department of Justice and State working very closely with the Department of the Treasury. The prime minister said to me and to a senior Justice official, "We can't get you the records; they were destroyed in the hurricane." (Winer, 2000)

In a similar vein, the nascent Internet gambling industry drew critical attention from the Financial Action Task Force (FATF). A joint US/UK team that visited Antigua in 2000 portrayed the industry as being a high risk for penetration by organized crime:

One area of particular concern that did emerge from the visit was in the offshore gaming sector. Although there are controls on those who wish to run these businesses, in discussions it became clear that in some cases it would be possible to use the gaming industry for the purposes of laundering through players' accounts held with the gaming industry. (Johnson, 2000)<sup>4</sup>

The stigmatization of these intersecting industries – and Antigua as a prime site for irregularities – was at the forefront of two legal cases directed against specific individuals considered to have contravened American money-laundering laws. In the first, indictments were made against two individuals from the US (William Scott and Jessica Davis Dyett) who were accused of channelling some US\$250 million of wagers from World Wide Tele Sports. A second, with far greater ramifications, involved charges under the 1961 Wire Act (the main form of discipline on cross border gambling) against Jay Cohen, who, with another US partner, had established a major Internet gambling company in Antigua (World Sports Exchange), to the amount of between US\$100 and US\$200 million a year.

### The Gambling Industry's Unique Characteristics

One distinctive feature in the online gambling industry's unique character is their declaratory preference for a regulatory model. One of the primary motivations for the ascendancy of OFCs has been to escape rules and standards. The more state authorities from industrialized countries raised the bar of regulation and taxation, the more exit strategies were used. However, the motivations to go remote in the case of the gambling industry appear to be more splintered. As in the case of OFCs, one pull was the escape from high taxes, especially from the UK. Added to this motivation, however, was the desire to escape what was considered the prohibitionist regime enforced in the United States. From this perspective, regulatory practices were the lesser of two evils.

Internet remote-gambling companies paid license fees in return for the right to operate out of Antigua's sovereign jurisdiction. The general attractiveness of this tradeoff (with legitimacy exchanged for the collection of rents) can be gauged by the fact that by the end of 1999 Antigua had become the operating site for 119 licensed Internet remote-gambling operations, providing the government with more than US\$7.4 million revenue and accounting for more than 10 per cent of Antigua's gross domestic product (GDP). The companies received a bona fides status in return for accepting some forms of organization. At odds with the external stigmatization of the industry, the regulatory authority in Antigua (Department of Gaming in the

<sup>4</sup> On the FATF approach see the Financial Action Task Force (2001).

Financial Services Regulatory Commission) showcased a high-end mode of regulation. As one state official described the regime: "For us in the Division of Gaming, it's not about having a multitude of licencees in the jurisdiction. We're looking for premium operators...that will operate within our laws and regulations and best practices and good corporate governance" (Campbell, 2007a).

A second distinguishing mark of the Internet remote-gambling industry vis-à-vis tax havens relates to matters of transparency. The basic rationale of the OFCs is to provide corporations and rich individuals with anonymity. The culture of the industry is therefore one of considerable secrecy. The Internet remote-gambling industry has some of the same attributes, especially with regard to technological innovation and in some cases revenues. However, by necessity, Internet remote gambling is not characterized by its secrecy. It requires public relations and advertisement to attract clients. Indeed, many Internet remote-gambling entrepreneurs drew attention to themselves by appearing at public events. Jay Cohen was even interviewed on CBS's *60 Minutes*. Most made appearances at trade shows. One of the primary aims of the WTO case was to allow for advertising as part of a legitimizing process, whereby major Internet search engines as well as traditional media would allow advertisement of sites, such as those located in Antigua.

The transparency of the industry opened up further through the technical processes associated with Internet remote gambling. Many of the major banks (those based in Switzerland and Liechtenstein, to name some of the best-known illustrations) make a point about selling tax avoidance services and thus reinforce the culture of secrecy. Because of their very different client base, the top-tier banks have little appetite for facilitating the gambling industry. Much of the activity is thus turned over to other mechanisms, whether traditional (Western Union and MoneyGram) or non-traditional (Neteller and other Internet devices). All leave some sort of trail.

The issue of client confidentiality is also considerably different. Departures from the culture of secrecy are rare in OFCs. With Internet remote gambling the possibilities of compromised security are far greater. Although the regulatory regime included the establishment of The Antiguan Directorate of Offshore Gaming, the mandate of which included customer complaints, some problems spilled over beyond this body. A case in point was the failure of the company Aladdin's Gold, the legacy of which (with a mass

of unpaid clients) was another stain on the reputation of Antigua in the gambling industry.

A third and, from a developmental perspective, arguably the most important feature deals with the issue of the structural opportunities connected to the two industries. In some cases the creation of OFCs has brought about fundamental shifts in economic fortune. To give just one high-profile example, the Cayman Islands rose on the back of this industry to become, by some estimates, the fifth-leading global banking centre. In employment terms, nonetheless, there were always some basic limitations put on the industry. One lingering issue has been the proclivity of some OFCs to offer tax concessions without the need for a physical presence. This issue in turn relates to the contentious issue of "ring fencing," where non-residents benefit from tax advantages not made available to residents.

Internet remote gambling is highly mobile, but there are opportunities for a physical presence, and some local employment, through its activities. At its peak in 1999, it is estimated that the Internet remote-gambling business employed 3,000 people in Antigua (Antigua and Barbuda, 2003). Through the course of the WTO case the employment factor remained at the core of Antigua's argument. Not only did the Internet remote-gambling industry present a viable source of employment vis-à-vis other traditional choices, including tourism, it maintained what the government considered a more development-friendly option over other possibilities. As one state official stated: "The industry provides much needed employment to thousands of our bright and computer-literate young people. It has provided them with a means of livelihood without which they have been forced to turn to unlawful activity, such as the vibrant drug trade that now plagues the Caribbean region" (Ackman, 2004).

The reference to computer literacy references the last major point of divergence between the two industries. The OFCs – in a similar fashion to the bricks and mortar casino form of gambling – exist as a "mature" industry, the origin of which goes back to the 19th century, with most of the late comers in place by the 1960s. The Internet remote-gambling industry, in complete contrast, emerged only in the mid-1990s. Irrespective of the temporary nature of many of the jobs in online gambling, either because of periodic shakeups in the industry, or because of the need for more staff at peak moments in the year (particularly with respect to offshore sports betting), there was a need for people with a basic information technology background.

In the words of Sir Richard Sanders, Antigua's approach was not an eccentric one but one that tried to follow the guidelines from the heartland of economic development: "We encouraged electronic commerce as an industry, we invested in the telecommunications infrastructure and introduced extensive computer training, both in schools and in adult-education classes, It's fair to say that we were very much following the advice of the United States which preaches that to prosper Caribbean nations must develop alternative industries" (Heller, 2004).

## Dual Images of the Protagonists

### The United States: Gambling at Home, Prohibition Abroad

The manner by which the United States endorses (and even celebrates) gambling at home while asserting a prohibition regime abroad is crucial for understanding the WTO case. On the one side, gambling is deeply embedded in the American economy and psyche. The bricks and mortar casino industry in Las Vegas has developed in tandem with a number of well-known brands, notably MGM, Caesar's Entertainment and Harrah's. The entrepreneur icon Donald Trump has his name attached to a series of casinos. And – as an extension of the individualistic/frontier mentality – stud poker has attracted huge amounts of players and live and TV audiences though the presentation of the World Series of Poker and other activities.

A number of other traits of American life reinforce the strength of the gambling culture. The first is that the bricks and mortar component of the gambling industry is entrenched as a preserve of the states. Nevada, New Jersey, and the other states set their own standards of what is permissible as long as these activities don't contravene Congressional authority over inter-state commerce.

A second trait is the emergent connection between gambling and Native American tribes. Among the largest casinos are those that are situated on reservations, including the massive casino at Kahnawake on the US-Canada border. To give just an indication of the nexus between this element of the gambling industry and US power politics, the now-jailed lobbyist Jack Abramoff gained much of his notoriety because of his work defending the interests of the Native gambling industry.

The third trait, underscoring the power of the horse racing industry, is the one that most complicated the US position on the WTO case. To help a domestic industry that was under stress, Congress passed the Interstate Horseracing Act in the 1970s. Under the provision related to horseracing betting operations, no prohibition was placed on any activities including Internet gambling. Once accorded this legal exceptionalism, the industry hung on to it with firm tenacity. Indeed, lobbyists for groups such as the National Thoroughbred Racing Association went to great pains to differentiate the unique status of their industry.

This entrenched recognition of the US domestic gambling industry ran up against a number of forces that advocated a prohibitionist regime. One might think that, on material grounds, opposition might come from the core domestic industry: the bricks and mortar casinos. After all, given its mature condition, this industry was increasingly in a position where it was losing business to the Internet and remote industry. Even opponents to online gambling on moral grounds pointed to the economic loss occurring to offshore competition, with a subsidiary argument for the extension of a prohibition ban to prevent some of the annual US\$6 billion in online bets made by US residents "from getting sucked out of our economy."<sup>5</sup>

Instead of adopting an oppositionist stance, however, the casino industry maintained a "wait and see" attitude. The big brand names in the industry all had the capabilities to adjust not only in terms of expanding their geographic reach (to Macau, to give just one notable illustration) but with innovative techniques via the Internet as well. What they did not want to do was to make this latter move if it would accentuate a negative stigma of the industry. Having moved beyond its original association with organized crime – and money laundering – the industry did not want to revert back to this outlaw status.

The need for this watchful stance was reinforced by the determination of select US authorities to go after the gambling industry if it looked as though links to organized crime – or criminal activities of any sort – were being revived. As witnessed by their concerted efforts to go after US citizens who had relocated in Antigua, the US Department of Justice exerted this authority in an extra-territorial manner using the power it derived mainly from

<sup>5</sup> Congressman Bob Goodlatte, Virginia Republican, quoted in Catherine Holahan (2006).

the 1961 Wire Act. Although dating from the telephone era, this law still had teeth. Voluntarily returning to the United States to face charges, Jay Cohen was convicted of violating the Wire Act and was given a two-year prison sentence for operating a gambling site that solicited clients over the Internet. Such a decision sent a chill across the industry.

On top of this federal action came state initiatives that were directed toward the same prohibitionist end. Eliot Spitzer, the former New York attorney general, and now former governor, was both assertive in style and comprehensive in approach. In a similar fashion to the US Justice Department he went after companies that were either operating Internet sites or supplying the means of business infrastructure. In the first category, he successfully prosecuted one New York-based firm (World Interactive Gaming Corporation) in 1999 for operating an interactive online gambling site in Antigua, because New Yorkers were able to access the site and place bets (Taylor, 1999). In the latter category, he warned off both financial intermediaries and potential advertisers.

At the societal level, the prohibitionist regime was supported by two very different but intertwined constituencies. The first of these came from the business of professional sports in the United States, wary that their business could again be contaminated by links to organized crime and match-fixing as they were in earlier scandals, most notably the one revolving around the Black Sox Scandal of 1919. One of the most consistent features of American professional sports is the taboo on gambling by participants, including players, coaches, referees, and so on.

The second and more widespread constituency opposed to gambling is based in American religious communities. Going back to the Puritan era, support of a prohibitionist regime against gambling has been one of the main tenets of Protestant America. As expressed consistently: "Religious leaders of all denominations and faiths are seeing gambling problems erode family values" (Holahan, 2006).

If the blocking power of this religious constituency had been eroded in terms of bricks and mortar casinos, the struggle against Internet gambling reinvigorated its organizational prowess. Viewing this emergent form of betting as a particular "scourge" – because of its relocation from casinos to the living rooms of the nation – the Christian right made banning Internet gambling one of the pillars of its political agenda.

This form of mobilization effectively moved the debate into a new environment concerning the question of how to deal with the emergent industry. After being stymied in a number of attempts to pass legislation prohibiting Internet gambling, the conservative/religious constituency made a breakthrough just before the congressional recess in September 2006, with the late night passage in the Senate (followed in short order by passage in the House of Representatives and presidential approval) of a ban on credit card and electronic payments for gambling wagers. The legislation was passed largely due to stealth, because then Senate Majority Leader Bill Frist attached the measure to the 2006 SAFE Port Act, the objective of which was to increase protection of American ports. Furthermore, the legislation maintained the exception for off-track betting parlours for race tracks. Although done awkwardly domestically, the legislation resulted in amplified global ramifications.

### Antigua: Orthodox Follower or Regional Eccentric?

Traditionally, Antigua can be categorized as an orthodox follower of the big players in world affairs. In particular, Antigua has demonstrated almost uniform support for US interests. In the 1980s, the US was allowed to install military and communication facilities near the international airport to keep the region under surveillance (Coram, 1993). When other members of the OECS visited Libya (amid promises from Colonel Moammar Ghaddafi that he would provide a substitute market for bananas), Antigua refused to do so.

Domestically, Antigua provided a putative bulwark against radicalism. Tim Hector, a former black-power leader, provided a robust challenge to the political status quo. But the cutting edge of his alternative approach was provided through his journalism via his weekly newspaper, *Outlet*. And even Hector appeared to mellow over time. Offside with the political establishment for most of his life (and jailed at one point under the Public Order Act), Hector moved to a more accommodating stance shortly before he died, taking on the position of an unpaid advisor on regional affairs.

The political order in Antigua took on an exaggerated form of stability. The hero of the trade-union movement in the sugar industry, Vere Bird, parlayed his charismatic personality into a long period of domination extending before and after independence in 1981 (with only a short spell out of power from 1971 to 1976), until he eventually

retired from politics in 1994. The ten-year struggle to succeed him as both party leader of the Antigua Labour Party and as prime minister was a fierce contest between two of his sons, Vere Jr. and Lester, with Lester Bird eventually triumphing.

Economically, Antigua took on many of the standard characteristics of what Payne and Sutton term "open dependent" development (2001). The Birds were willing to entertain various options in order to pursue growth, whether tax havens, export processing zones, a site for cruise ships, or Internet remote gambling. Quite mainstream by Caribbean standards, this approach provided considerable flexibility in development.

Underneath this surface sense of orthodoxy, however, was a political regime that labelled Antigua the regional eccentric. On repeated occasions the Bird family was implicated in notorious scandals, including shipments of Israeli arms to Colombian drug traffickers in 1990, which led to a public inquiry by the prominent British QC Louis Blom-Cooper.

At odds with the image of Antigua as a well-managed country in terms of its economic structure, "Birdism" (or "the Aviary" as the locals termed it) was criticized both externally and internally for its regulatory flaws. This problematic image has already been framed with respect to the perception of a lack of proper public accounts. Internally the criticism was directed at the opportunism and inefficiency of Birdism. Instead of any well-thought-out, sustained strategy after the demise of the sugar industry, the government went from economic option to option on an opportunistic basis.

This opportunism was wedded to a sense of arbitrary decision making. Even in the online gambling industry the treatment provided to different businesses was striking. The failure of Aladdin's Gold led to intense speculation that the disgraced proprietor (Eddie Hadeed) had found protection from the government because of his well-placed uncle (Aziz Hadeed), a senator and minister of state in the Bird government. Another gambling proprietor (the operator of Sportsoffshore) who complained about the government's mode of regulation in 2001 found himself bundled onto a plane in his underwear in the middle of the night, served with an extradition order to the US on tax-evasion charges.

The overall flavour attached to Birdism was that of a regime comfortable with the practices of corruption, will-

ing to do things such as facilitate the location of a toxic waste dump or sell off the sand of its twin island (Barbuda) without notice. As one analyst observed in the early 1990s: "Antigua has over two decades acquired the regrettable image of being the most corrupt society in the Commonwealth Caribbean" (Thorndike, 1993; see also Rohter, 1997). Having become a private fiefdom for the ruling family dynasty, and its courtiers, state power became the route to accumulate resources and dispense either largesse or punishment.

A fundamental question that must be asked then is whether support for the Internet remote-gambling industry – and the vigour with which Antigua fought the WTO case – was a product of capture or adaptation. If capture, the initiative to take on the US in the WTO case can be viewed as a case of commercialization of sovereignty, with Antigua conceding some degree of negotiating authority to the business that had the biggest stake in the outcome: the Internet gambling industry. If adaptation, the determination to take on the US can be taken instead to be an act of desperation, an attempt to save an industry that had become a pillar of the local economy. Through this spectrum, the relationship between Antigua and the Internet remote-gambling industry was a loose and convenient alliance.

## Divergent Negotiating Strategies

### Antigua on the Offensive

In terms of its own negotiating capabilities via the WTO Antigua was at an absolute disadvantage to the United States. Unlike the US, Antigua had very little in-house expertise on the international trading system. Any initiative to take the US through (and, as it turned out, beyond) the dispute settlement mechanism process would be costly and time-consuming. As Errol Cort, Antigua's Minister of Finance and the Economy noted:

"there are direct costs to the government in terms of our participation. Ambassador Dr. John Ashe has been a key person in this whole equation...Dr. Ashe has been at most, if not all of the sessions in Geneva and part of the team meeting with the various other country delegations to lobby support...I've been to the WTO myself a couple of times, so its not an inexpensive venture." (Campbell, 2007b)

Moreover, many of the successful tactics used by small states in other struggles with dominant actors were diminished in the WTO case. The existence of solidarity in the domestic society of Antigua is striking, as it cut across the deep divide between Birdism and the divergent opposition forces that eventually triumphed under the leadership of Baldwin Spencer in March 2004. But this availability of solidarity continued to be less salient in this case than in others, such as that of the Panama Canal case or military bases. The WTO case was engaged at the technical and legal level with little public outlet. Unlike these other cases of asymmetrical struggle there was no space for marches, demonstrations, or protest rallies.

Antigua did engage in public diplomacy, but this approach was targeted at the wider, international public opinion. A sense of being a victim in the international arena was deeply ingrained. This attitude was in good part carried over from older struggles, especially the fight with the Organisation for Economic Co-operation and Development (OECD) and the Financial Action Task Force over the regulation of tax havens. What Antigua claimed as justice in that case was the establishment of a level playing field, in which both OECD and non-OECD countries played by the same rules with respect to such matters as the exchange of information on tax matters. Under acute pressure to comply with the OECD campaign on transparency, Antigua voiced its concern about equality. In the words of Sir Ronald Sanders: "It is patently and blatantly obvious that no level playing field exists and jurisdictions, such as Antigua and Barbuda, ... are being placed at a serious disadvantage" (BBC Monitoring International Reports, 2003).

The strength of this public diplomacy was embellished in the online gambling case by two factors. For one thing, state officials argued that the creation of an online gambling industry was a successful extension of "open" market strategies promoted for small countries such as Antigua by international institutions such as the World Bank. The barrier to consolidation of this still fragile market was the promotion of a prohibition regime by the United States, which caused a chill in the industry. Since the initiation of legal proceedings against certain promoters of the business in Antigua, especially the case against Jay Cohen under the Wire Act, the Antigua component of the industry had scaled back from 119 casino operations employing 3,000 people in 1999 to 28 operations and 500 workers in 2003 (albeit still retaining a high number of Internet sites; Cort, 2005: 12).

For another thing, Antigua appealed to its record of heightened regulation since the start of the offensive against OFCs. In terms of process, great emphasis was placed on Antigua's willingness to make concessions so long as these were made as part of a bona fides mode of consultation. As an advocate for Antigua phrased it: "We are trying to influence public opinion as much as we can as a small country. We're hoping our willingness to compromise will get us the right ear and a negotiated solution will come about" (Sparshott, 2006).

In terms of substance, considerable emphasis was placed on the great strides Antigua had made on establishing an orderly regulatory framework for the Internet gambling industry. Whereas on OFCs Antigua was always cast in the awkward situation of needing to convince others that it had cleaned up its act, on Internet remote gambling Antigua branded itself a confident leader of the business. The message from state officials throughout the case was that Antigua, notwithstanding the punishment meted out to Jay Cohen and other forms of legal action, had nothing to be embarrassed about: "It is more than just a little ironic that the United States Department of Justice has chosen to single out for prosecution a well-known gaming service provider from Antigua, a jurisdiction that has been leading global efforts to license, regulate, supervise and oversee a robust yet clean and safe gaming industry over the internet" (Ashe, 2006).

It was clear to Antigua that such public diplomacy by itself was not going to be enough to pursue a winning case. What was needed for success was good technical preparation and support. Given the enormous cost and sophistication of such an approach, some considerable offloading of responsibility for the case had to be given over to the online gambling industry itself.

There is some anecdotal evidence that the online gambling industry bankrolled the WTO case. In explaining how Antigua was able to take on the burden of such an onerous case, Finance Minister Cort revealed to a local reporter: "[We have been] able to muster the resources...with the help of the industry" (Campbell, 2007b).

An interview by Paul Bluestein with Jay Cohen, in prison outside of Las Vegas, confirms both the motivation and the extent of the involvement of the gambling industry as backers of the WTO case. In Bluestein's words: "[The Antigua government] hesitated to file a case, citing one of the biggest inequalities of the WTO system; a dearth of funds and

legal expenditure that often shuts out small countries. Antigua's budget is US\$145 million a year, and a trade case promised to cost at least US\$1 million. The gambling industry finally agreed to pay the bill" (Bluestein, 2006).

All of the major players in the industry, whether or not they operated sites out of Antigua, had a direct stake in the outcome given the importance of the US market. All supported what Andrew McIver, finance director of Sportingbet.com (which had its servers in Antigua and had built up close ties with the government of Antigua) called a campaign designed to impart "continual bits of pressure on the US" (New Media Age, 2005). These included well-known traditional brands such as Ladbrokes and William Hill in the UK and other firms, all of which would move to capitalize if Antigua won the case and the US shifted its position away from a prohibition regime. As a representative of Boyles Sports in Ireland stated at the time of the appellate ruling, "we would naturally target [the US] if the opportunities arose" (Dalby, 2004).

The extent of the "deep pockets" with respect to this financial support can be gauged by the fact that Antigua was able to employ two very different types of lawyers. One component of its legal apparatus was handled by Mark Mendel, a self-styled maverick who was the public face of the case. Mendel (a partner of the firm Mendel Blumenfeld of El Paso Texas) was a friend of Jay Cohen's, and although he had no deep expertise in international trade law, he added a robust sense of emotional commitment to taking on the United States generally and the US Justice Department in particular. In contradistinction to Mendel's public enthusiasm, a top-flight legal team (with Craig Pouncey and Lode Van Den Hende as the principals) from Herbert Smith's trade and WTO practice in Brussels provided the deep expertise needed to battle the US. "Herbies" has been one of the world's leading firms for international litigation, with over a thousand lawyers. With its headquarters in London and other offices in Europe and Asia, it also has extensive experience working for the United States on other controversial cases such as those involving bananas or hormone treated beef (Rovnick, 2004).

### The United States: Disengaged but Aggressive

From the start of the WTO case in 2003, the US chose not to deal directly with Antigua. When Antigua first attempted to engage the Americans in consultations on the grounds that the US ban on Internet remote gambling violated its

commitments under GATS (which sought to create equal conditions of competition for domestic and foreign service suppliers), these requests were rebuffed. Subsequently, Antigua requested the establishment of a WTO Dispute Settlement Panel to adjudicate on the issue. In the same obstructionist tone, the United States refused to agree to the composition of a panel to hear this complaint. So finally, at the end of August 2003, the WTO autonomously established a dispute settlement body chaired by K. Zuthshi of India. Through this period of pre-negotiation the US failed to plan its defence in any coherent fashion. No attempt was made to look seriously at the structure of the US gambling industry or to engage officials who had detailed expertise at the local level. A Georgetown University professor labelled this deficiency "a mistake [in negotiating stance] that could have been avoided had there been effective consultation between US trade negotiators and the legions of state-level officials who regulate [the] industry on a day-to-day basis" (Stumberg, 2005).

This neglect indicated the severe underestimation by the United States of the Antiguan negotiating team's capability to expose the gaps and inconsistencies in the US defence. One major gap that was exposed focused on the narrow concern in the 1961 Wire Act. This legislation prohibited the placing or taking of sports bets across state boundaries using telephone lines or wires. No mention was made of the Internet, or for that matter of other forms of gambling such as casino games, poker, or lotteries.

This gap in turn magnified the blatant inconsistency between the prohibition regime promoted against the Internet remote-gambling industry and the current federal and state laws permitting both Internet betting on horse racing and Internet gambling operated by North American indigenous tribes both within individual states and across state borders.

This perception that it was the United States – not Antigua – that was woefully ill-prepared to take on this case was increased considerably when it became apparent that the American negotiators had little understanding of what the US had or had not signed up to in the original GATS as settled in 1995. Article 21 of the GATS agreement allowed a member country to file clarifications to their original schedule of commitments, as some countries chose to do. The US commitment to free trade in "recreational services," however, contained no such clarification. As a US trade negotiator accepted ruefully after the WTO Dispute Settlement Panel largely accepted the claim of Antigua

in March 2004: "It didn't occur to us that this could include gambling until Antigua brought this case in 2003...Clearly this was an oversight in the drafting" (quoted in Lever, 2007).

The response by the United States to this substantive setback ran on two tracks. At the operational level, the US moved to have the case moved beyond the dispute panel stage to the appellate body, where it hoped to correct the result. At the declaratory level, American negotiators decried the negative conclusion of the panel. Robert Zoellick, the then US trade representative, criticized the decision as "absolutely outrageous" given the vehemence with which the US has opposed offshore online gambling as a criminal offence: "I think this is a very deeply flawed panel decision...the implications are very bad. If this isn't an exception...I don't know what is" (quoted in Vallerius, 2004).

The appellate body did indeed temper much of the panel decision in favour of the US when it reported in November 2004. Most significantly, it provided legitimacy to the US argument that it was promoting the prohibition regime because of the requirement to "protect public morals or to maintain public order." Nonetheless, it maintained Antigua's fundamental point of contention that there was inconsistency between the US prohibition on Internet remote gambling (ostensibly on moral grounds) and the allowance of one type of gambling activities under the Interstate Horseracing Act.<sup>6</sup>

Initially, the US greeted this result with relief. American trade negotiators talked about the need for clarification that "should dispose of this matter."<sup>7</sup> The puzzle was what needed to be clarified. One option that was mooted – although this moved into uncharted legal territory – was that Washington would clarify (as it did later in 2006 through a formal revision) its GATS commitments, as the argument was made that the intention had been "to exclude gambling from US services commitments." The other option – far more difficult, because it came up against a powerful domestic lobby – was that a push would be made to rollback on the horseracing legislation.

Before entertaining how to proceed with these defensive choices, however, the United States shifted its approach to a far more aggressive stance. Reverting from its disen-

gaged form of activity in the multilateral sphere, the US took robust unilateral action to transform the chill on the Internet remote-gambling industry. The most decisive move in this new approach was the sudden arrest of David Carruthers, the chief executive of BETonSPORTS, one of the leading offshore online gambling companies, as he was travelling via the US to his main operational centre in Costa Rica. This move crashed the value of companies that had gone public, such as BETonSPORTS, wiping US\$7 billion off their share value. It also tightened the scrutiny on financial facilitators of the online gambling industry and cost jobs at their sites of operations. In the case of BETonSPORTS, the main casualties were located in Costa Rica, but there was spillover effect in Antigua (with 30 jobs gone and the possibilities of expansion gone with them; Campbell, 2006).

Such an aggressive strategy, although providing a short sharp shock, was counterproductive for the US on two different fronts. From one angle, these coercive tactics simply reinforced Antigua's desire to extract as much compensation as possible from the United States for their prohibition ban. The decisiveness of the unilateral action could be contrasted with the manner by which the US kept trying to prolong the WTO case "with every kind of dodge" in order not to comply (Bluestein, 2007).

From another angle, this action sparked signs of mobilization from the supporters of a regulation, rather than prohibition, regime. In the US this mobilization was led by congressman Barney Frank (Dem., MA), the Chair of the House Financial Services Committee, a long-time critic of the problematic moral fervour with which the US had pursued the ban on Internet gambling. In Europe, the mobilization was pushed by an increasingly influential public-private alliance centred in the UK. Having taken a wait-and-see attitude for the duration of the Antigua test case, voices on both sides of this alliance began to exert themselves on the grounds that the US case was based not on morality but on protectionism.

## Big Lessons from a Small (Caribbean) State

The WTO case on Internet remote gambling confirms the impression that in particular situations small states can punch above their weight in international relations. Antigua neutralized the massive asymmetrical divergence between itself and the United States in a number of ways. It gained relative, albeit not absolute control of the negotiations

<sup>6</sup> For a detailed analysis of the legal/technical issues see Jonathan Schwartz (2005).

<sup>7</sup> Deputy US Trade Representative John Veroneau, quoted in Rob Lever (2007).

by taking the case to the WTO where legal and technical arguments had predominance over the power distribution of the two protagonists. Antigua could also take advantage of the uneven approach the US adopted to the case, with its shift from disengagement to aggressiveness. Although this approach allowed the US to exert some control (by its coercive unilateral power directed at leaders of the offshore gambling industry), it also underscored the US ambivalence to the WTO process. By comparison, Antigua demonstrated the importance not of intrinsic but of contingent resources, (Habeeb, 1988) where a small state directs a disproportionate amount of its capabilities on a specific issue or area.

Moreover, as time passed, the United States backed itself into a corner on the offshore Internet gambling case with far more complications than potential exit strategies being revealed. The unilateral crack-down on offshore gambling opens up the possibility of Antigua and its supporters exploiting the tensions in the US political system on gambling, especially with the ascendance of the Democrats in Congress. It also opens up the possibility of a wider strategic alliance between the forces behind a global regulatory regime of Internet gambling against the champions of prohibition (Garrahan and Yee, 2005).

The US choice of unilateralism also exposed it to charges that it is a backslider on its WTO commitments. The US has continued to delay its final response on the case, neither moving to adapt its own domestic laws (on horse racing) in line with the WTO ruling or offering compensation to Antigua for its ban on offshore Internet gambling sites. Such stonewalling shows the problems small states have in extracting benefits from the WTO process, as any direct retaliatory measures against US goods or services would have detrimental cost effects for their own domestic populations.

To keep up the negotiating pressure on the US, Antigua filed for US\$3.44 billion in annual compensation from the compliance panel established by the WTO (a vast amount given the size of Antigua's economy). But when the US eventually announced in May 2007 that it would be non-compliant, by virtue of withdrawing its commitment on betting services under Article 21 of the GATS, it offered only \$500,000 in compensation for lost annual revenue.

Rather than highlighting the benefits for a small country in dealing through the WTO, the end game reinforced the impression of asymmetry within the international trading

system. When it came to crunch time the US, rather than negotiating with Antigua, chose to make separate deals with the European Union, Japan, and Canada as compensation for the "clarification" of its GATS commitments on betting services. Instead of the small country at the core of the case, it was other bigger countries and companies that gained tangible negotiating advantages (such as the Dutch mail carrier TNT, which won the right to compete with rivals such as FedEx within the US).

Moreover, the concessions Antigua did receive through the WTO's binding verdict as announced by the final Arbitrator panel report on 21 December 2007 proved a disappointment. Gaining the open-ended right to suspend copyright protections on US intellectual property to the sum of US\$21 million a year – without any form of financial compensation – was not the outcome Antigua had wanted. Instead of bringing Internet gambling into the mainstream as a respectable and responsible industry, Antigua was being nudged toward other trade areas that create new problems in terms of its reputation because of perceived piracy and counterfeiting.

All of this recasts the normative construct of the Internet gambling case. Among the many significant features of this case is that it legitimized the regulation of morality by the WTO. Indeed morality was at the heart of the US defence for shutting the Internet gambling industry out of its massive domestic market. But this sense of morality seems self-serving, because it projects a prohibitionist ethos on competitors without any targeting (as the WTO Appellate ruling called for) of domestic practices, most notably Internet gambling on horse racing. Judgments about morality need to be applied more comprehensively.

Antigua in its sustained challenge to the United States adopted techniques quite different from the standard diplomatic repertoire. Antigua used its formal *de jure* authority as a sovereignty state – and legitimate access to the WTO – to take up its claim. But once in train the case could not have been sustained without the *de facto* strength acquired through the material support of the industry, a process that in effect commercialized Antigua's sovereignty (Palan, 2002).

In the end, however, it is outcomes not processes that matter to smaller states. If the world trading system is going to privilege development in any credible fashion, never mind eradicating older images of the strong continuing to do what they want and the weak continuing to

suffer what they must (Neumann and Gstohl, 2006), it needs to deliver big results for this latter category of countries. As Errol Cort, the Antigua Minister of Finance and the Economy, told the WTO in the lead-up to the final arbitrator panel report, the protracted proceedings "may seem to prove...that the system only works to the benefit of the countries that are rich, large or powerful" (*Antigua Sun*, 2007).

The process followed in the Internet gambling case held considerable promise to deliver an outcome that would refute these views. And there is still some hope that an overtime settlement can be reached that would rescue some of Antigua's market access for gambling services into the US market. Notwithstanding the compensation deals made with big industrial powers, the United States needs to make other deals (with India, Costa Rica, Macau and Antigua itself) before it can withdraw its GATS commitments (Klapper, 2007). Ultimately, though, until a final deal is made that delivers tangible results, the WTO and the world trading system will still fall short of passing the test of fairness from a small state perspective.

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57 Erb Street West  
Waterloo, Ontario, Canada N2L 6C2  
tel +1.519.885.2444 fax +1.519.885.5450  
[www.cigionline.org](http://www.cigionline.org)