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## Small Island Places Legal Wager

Marcia Coyle / Staff reporter  
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WASHINGTON — In a multibillion-dollar trade dispute with the United States over Internet gambling, the twin island nation of Antigua and Barbuda has defied the odds makers and pushed the envelope of international trade law. But is it time to play the board?

This ongoing trade dispute, waged under the auspices of the World Trade Organization (WTO), has had the flavor of a David versus Goliath encounter for the past five years, with David (Antigua) seemingly on the side of the angels.

The economic stakes for Antigua, where online gambling is the second-largest industry after tourism, are obviously high, while the political and legal ramifications of the ultimate resolution could affect significantly the United States' negotiating position in future trade disputes.

The dispute initially was not extraordinary; in fact, it was a rather simple one, said Naotaka Matsukata, senior policy adviser in the Washington office of Atlanta's Alston & Bird and a former U.S. trade official.

In March 2003, the Caribbean nation initiated a WTO complaint against the United States alleging that the dozen federal laws and nearly 200 state laws barring foreign participation in U.S. Internet gambling markets violate commitments made by the United States on the cross-border supply of gambling and betting services — commitments contained in the WTO General Agreement on Trade in Services (GATS).

"It was a dispute by a country that felt the U.S. was not applying its laws equally — a form of national treatment discrimination," Matsukata said. "But it has become much more than that."

Matsukata and others believe that the various twists and turns taken by the dispute since 2003 — some occurring just in the past few weeks — could make this one of the most significant trade disputes in the history of the WTO.

"There have been disputes as complex in other ways," said former WTO appeals lawyer Simon Lester of Washington. "But this has involved issues brand new and never tested under the [WTO] rules."

### Playing by the rules

Born of negotiations in 1995, the WTO is the only international body dealing with the rules of trade among nations. At its heart are the WTO agreements, negotiated and signed by most of the world's trading nations. These binding agreements — essentially contracts — provide the legal ground rules for international commerce.

WTO agreements include a dispute-settlement process — a neutral procedure to resolve differences under the agreements.

Antigua's complaint in 2003 triggered that legal process, but the roots of this dispute reportedly began with an American.

Jay Cohen, a former California options trader, moved to Antigua, where he set up a sports book that took online bets from around the world. He was charged by federal prosecutors with operating an illegal enterprise. After returning to the United States to fight the charges, Cohen was convicted and served 17 months in prison. He later went back to Antigua where he and the gambling industry persuaded the government to file a WTO complaint against the United States.

At the WTO, Antigua argued that U.S. enforcement of four laws — the Wire Act, the Travel Act, the Illegal Gambling Business Act and the Interstate Horseracing Act — threatened the viability of its online betting services industry. U.S. policy, according to Antigua, violated U.S. obligations under GATS to open its market in "recreational, cultural and sporting services."

But the United States argued that its policy was intended to protect "public morals and public order," an exception to the WTO rules. That exception may be invoked only if the WTO member acts in a nondiscriminatory way: If a member wants to prevent certain goods or services from entering its market, then the restrictions must apply to domestic as well as foreign suppliers.

"There has always been a very small slice of legal Internet gambling in the United States — horseracing, then only on thoroughbred horseracing, and then on certain bets in states allowing it," said international trade lawyer John Magnus, of counsel to Washington's Miller & Chevalier.

Federal law carves out that "small slice" from liability under the Wire Act, he said, adding it is the only lawful Internet gambling that can occur and it exists because of the clout of the horseracing industry.

"That little slice, it turns out, is what got us in trouble," said Magnus.

In November 2004, a WTO dispute settlement panel concluded — and the WTO appellate body subsequently affirmed — that the United States had made commitments on gambling and betting services under GATS, and that the federal and state laws discriminated against Antigua. The appellate body did agree that U.S. laws were necessary "to protect public morals or maintain public order," but found they were not applied equally to domestic and foreign service providers. It gave the United States a deadline for compliance.

"It was found we would qualify for the exception but for the fact we didn't apply it consistently because we had this little sliver of horseracing," said Magnus. "It cost us in the end."

After the United States failed to come into compliance, the WTO held that Antigua could suspend its own WTO obligations to the United States in an amount up to \$21 million annually — far less than the \$3.44 billion sought by the island nation. Far more damaging to the United States, the arbitrator also found that Antigua could

retaliate by suspending its commitments with respect to U.S. intellectual property rights by lifting copyrights and other protections on U.S. products.

Last December, the Office of U.S. Trade Representative warned, "It would establish a harmful precedent for a WTO Member to affirmatively authorize what would otherwise be considered acts of piracy, counterfeiting, or other forms of IPR infringement."

Antigua's counsel, Mark E. Mendel, a partner at Mendel Blumenfeld in El Paso, Texas, said that "Antigua is free to retaliate whenever it determines to do so."

But for now, he added, "Antigua is willing to be somewhat patient, I think," not just on the issue of retaliation but on another major and expensive twist in the dispute.

In May 2007, the United States announced it was invoking Article XXI of GATS, which allows a country to modify its commitments. But instead of modifying, the United States said it was withdrawing completely from its commitments on gambling services. That action immediately expanded the dispute beyond Antigua.

Under WTO rules, the decision to withdraw automatically entitles any WTO member country to request compensation for the benefits lost by the action. The European Union, Japan, Macau, Costa Rica, India, Australia and Canada joined Antigua in requesting compensation.

The U.S. trade representative confirmed it had reached agreements with the European Union, Japan and Canada. But in another twist in the gambling saga, Public Citizen in late May filed a federal lawsuit on behalf of a journalist seeking the details of those agreements; details that the trade office contends are secret for national security reasons.

"Americans have a right to know what kinds of trade concessions the U.S. government is granting other countries, especially when those deals have a significant impact on domestic policy and may be worth billions of dollars," said Bonnie I. Robin-Vergeer, a Public Citizen attorney.

And, earlier this year, the European Union, acting on a complaint by the Remote Gaming Association in England, opened a formal investigation into whether U.S. prosecution of foreign online gambling operators is discriminatory.

### **Uncharted territory**

In every other WTO dispute that the United States has lost, it has gone to Congress to bring America into compliance, and Congress has always responded, said Alston & Bird's Matsukata.

"There already was a bill in play which would have created a regulated environment for online gaming and eliminated the discriminatory treatment," he recalled. "But the U.S. chose not to even explore that option."

The United States didn't pursue that solution because it never thought it had a commitment with respect to Internet gambling in the GATS, Miller & Chevalier's Magnus said.

"There never was a smidgen of a chance this would result in the U.S. liberalizing Internet gambling," said Magnus. "We are deeply attached to that prohibition and, in fact, we have done some things to make the prohibition stronger recently."

But Matsukata and many other trade law experts believe the United States' withdrawal of its commitments in this area is what has made the Antigua dispute so significant.

"The United States' negotiating ability is greatly undermined by this," said Matsukata. "Whether it's climate change or anything else, there will be a question of whether the U.S. is fully behind its commitments. We're talking about a congressionally ratified treaty here."

Second, he said, the United States relies heavily on the WTO to enforce the rule of law in international commerce, but it is the United States that is beginning to "unravel" this system.

"What happens if in a few years the U.S. takes China to the WTO and China says, 'We remember when you guys said you never intended to make that gambling commitment, well . . . .' It's a precedent that could come back to haunt us," said Matsukata.

Trade attorney Lester, president of WorldTradeLaw.net, agreed that the WTO is being pushed into new territory by the gambling dispute. Authority to suspend intellectual property rights as retaliation was authorized one other time, he said, but never used.

"How it would work and whether it would be effective no one knows," he said. And, he added, a nation's withdrawal of commitments under a trade and services agreement as a response to an adverse ruling is within the WTO rules, but has never been done that way.

"And then there is gambling with its moral component. So the substance of the legal issue is new: trade and public morals," he said.

"When you combine all of these new legal issues, it's one of the most interesting cases out there."

For now, negotiations continue between the United States and Antigua over compensation for the GATS withdrawal.

Lester said, "It's hard for me to see how they're going to resolve it. They've been talking forever."

If an impasse is declared, Antigua's Mendel said, "Antigua could seek immediate retaliation and could also proceed to arbitration on the GATS Article XXI issue."

Antigua has misplayed its hand, according to Magnus. "The big, big point about this case is it's the first time the United States just said no," he said.

"Antigua should have said, 'OK, we got the legal victory,' and then intelligently asked for something that helped it instead of relentlessly sticking with this 'You've got to open your gambling market,' which was completely unrealistic."

But Antigua is "holding out," said Matsukata. "We'll have to see where they go."

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