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CROSS-RETALIATION IN THE WTO: ANTIGUA AND BARBUDA'S PROPOSED REMEDY AGAINST THE UNITED STATES IN AN ONLINE GAMBLING DISPUTE

*Clint Bodien**

I. INTRODUCTION

IN 2003, the small country of Antigua and Barbuda staked its claim in the only World Trade Organization (WTO) case instituted by a Caribbean nation, a case called “United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services.”¹ The laws regarding the legality of online gambling were so unclear in the United States that the online casinos moved offshore to welcoming destinations such as Antigua and Barbuda.² The small country filed its claim with the WTO because it felt that U.S. laws threatened free flow of online gambling services to the United States.³

II. PROCEDURAL HISTORY OF THE CASE

In March 2003, the Caribbean nation of Antigua and Barbuda (Antigua) requested consultations from the United States, claiming that U.S. federal, state, and local measures on gambling violate U.S. specific commitments under the General Agreement on Trade of Services (GATS) and several GATS articles.⁴ Antigua claimed the violation occurred because of laws that prevented operators of online gambling casinos from offering their services in the United States.⁵ The United States defended the claim by arguing that online gambling did not fall within the specific

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1. Lillian Crawford-Abbenetts et al., *The Caribbean*, 41 INT'L LAW. 765, 770-72 (2006).

2. Michael Grunfeld, *Don't Bet on the United States' Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 480 (2007).

3. *Id.* at 480-81.

4. Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 4, WT/DS285/1 - S/L/110 (Mar. 27, 2003).

5. *Id.* ¶ 3.

GATS commitment and that even if it did, the ban on online gambling was justified under article XIV of the GATS, which provided an exception to the commitment.⁶ Upon Antigua's request, the World Trade Organization (WTO) convened a panel to investigate the matter in 2003, and the panel issued a panel report in November 2004.⁷

The panel report concluded that the U.S. GATS schedule included specific commitments on gambling and betting services within the scope of "other recreational services (except sporting)."⁸ The report further concluded that the United States, via three federal acts, violated article XVI (Market Access) of the GATS by prohibiting cross-border supply where specific commitments had been undertaken.⁹ Market access requires that all countries accord treatment to all other member countries no less favorable than what is specified in its schedule, and if cross-border movement of capital is an essential part of the service, it must be allowed.¹⁰ Regarding the U.S. defense, the Panel ruled that the U.S. laws were not justified under the GATS article XIV exception allowing a country to adopt measures when "necessary to protect public morals and/or public order."¹¹ While the Panel did find that the U.S. measures were designed "to protect public morals and/or to maintain public order" within the meaning of the article XIV(a) exception of the GATS, the Panel further found that the measures in question had a significant impact on trade and thus concluded that consultations and negotiations with Antigua were reasonable alternatives, which forbade the laws from qualifying as "necessary."¹² Even if the U.S. federal laws were reasonably considered "indispensable" by the United States, the United States did not show that the laws fell within the article XIV public morals exception because they did not show that the laws were "necessary" because the United States was obliged to explore alternatives before taking a WTO-inconsistent measure.¹³ Taking the multifaceted decision as a whole, the ruling came down in favor of Antigua on their complaint that U.S. laws violated trade provisions.

The United States appealed the panel report in January 2005, followed shortly by Antigua's appeals of certain issues, and the WTO's Appellate Body (AB) issued a report in April 2005.¹⁴ The AB upheld the Panel's finding that the United States did not exclude gambling and betting ser-

6. Gary Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges*, 10 J. INT'L ECON. L. 605, 616 (2007).

7. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 1.2, 1.12, WT/DS285/R (Nov. 10, 2004).

8. *Id.* ¶ 6.134.

9. *Id.* ¶ 6.421.

10. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, art. 16, Apr. 15, 1994, 33 I.L.M. 1125 at 1168, 1179 (1994) [hereinafter Final Act].

11. Panel Report, *supra* note 7, ¶ 6.535.

12. *Id.* ¶¶ 6.487, 6.528, 6.533.

13. *Id.* ¶¶ 6.534–535.

14. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 1, 7, WT/DS285/AB/R (Apr. 7, 2005).

vices from its GATS specific commitments.¹⁵ Further, the AB upheld the finding of the Panel that the United States violated article XVI of the GATS (Market Access).¹⁶ The AB agreed with the Panel to interpret the three U.S. federal laws at issue, the Wire Act, the Travel Act, and the Illegal Gambling Business Act (IGBA), to prohibit the cross-border supply of internet gambling services, thereby creating a zero quota that was prohibited by the Market Access article.¹⁷ But, Antigua failed to make out a prima facie case on similar state laws that Antigua had claimed also violated the article.¹⁸

While upholding the Panel's finding that the U.S. laws were enacted to regulate public morals, the AB diverted from the Panel in holding that the United States did in fact make out a prima facie case that the laws were also necessary and that Antigua failed to show reasonable alternatives which would render the laws unnecessary.¹⁹ But, because article XIV of the GATS also specifies that the chapeau of the article does not cover measures that constitute "arbitrary or unjustifiable discrimination between countries," in light of a fourth federal law called the Interstate Horseracing Act (IHA), the United States did not show that its measures applied equally to both foreign and domestic suppliers of remote gambling services.²⁰ As passed, the IHA allowed domestic suppliers to take bids on certain events, while forbidding foreign suppliers to do the same.²¹ The Act may have constituted arbitrary and unjustifiable discrimination, and the AB asserted that the United States failed to establish that the IHA did not change the scope of the three previously mentioned statutes.²²

The United States was given approximately one year for implementation of the measures by the Dispute Settlement Body (DSB), which adopted the AB and Panel reports in April 2005.²³ In April 2006, the United States promulgated an implementation status report in which it claimed that it was in compliance with the WTO rulings because the IHA did not amend the existing criminal statutes which prohibited the interstate transmission of bets or wagers, and therefore the U.S. law did not arbitrarily discriminate against foreign online casinos.²⁴ Antigua thought otherwise and in June 2006 sought a compliance consultation with the

15. *Id.* ¶ 213.

16. *Id.* ¶ 265.

17. *Id.* ¶ 264.

18. *Id.* ¶ 155.

19. Appellate Body Report, *supra* note 14, ¶ 326.

20. *Id.* ¶ 372; Final Act, *supra* note 10, at 1177.

21. Interstate Horseracing Act § 3004, 15 U.S.C.A. § 3004 (West 2007).

22. Appellate Body Report, *supra* note 14, ¶ 372.

23. Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 68, WT/DS285/13 (Aug. 19, 2005).

24. Status Report by the United States: Addendum, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3-4, WT/DS285/15/Add.1 (Apr. 11, 2006).

United States.²⁵ One month later, in July 2006, Antigua sought a compliance panel under article 21.5 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, or DSU).²⁶

In March 2007, the Article 21.5 panel promulgated a report finding that the United States was not in compliance with the earlier WTO proceedings.²⁷ This finding led to the proposed remedy that is potentially groundbreaking in this case. Antigua asked the DSB to suspend the application to the United States of concessions or obligations under the GATS and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements in the annual amount of \$3.443 billion, an enforcement countermeasure under article 22.2.²⁸ If granted the remedy it seeks, Antigua would violate U.S. intellectual property rights in an unprecedented enforcement of a trade remedy designed to put small countries on a more equal footing with large countries.

In December 2007, the WTO issued an arbitration report on the matter in which it made findings on two distinct challenges by the United States: the level of suspension that Antigua sought (\$3.443 billion) and the choice of proposed sectors in which Antigua would carry out the cross retaliation.²⁹ The arbitration report found that the United States could have complied with the WTO rulings by opening foreign access to remote gambling on horseracing alone.³⁰ In light of the lost profits from gambling solely on horseracing, the arbitration found that Antigua's measure of damages was not \$3.443 billion, but rather only \$21 million.³¹ But, the arbitration report did sanction Antigua's determination that it would not be practicable or effective to suspend obligations solely under GATS, and that Antigua therefore may seek authorization from the DSB to cross-retaliate.³² While the arbitration award drastically reduced the amount of damages, it was another step towards Antigua being awarded the use of the remedy of cross-retaliation.

25. Recourse to Article 21.5 of the DSU by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1, WT/DS285/17 (June 12, 2006).

26. *Id.*

27. Recourse to Article 21.5 of the DSU by Antigua and Barbuda: Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ¶ 7.1, WT/DS285/RW (Mar. 30, 2007).

28. Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 3-4, WT/DS285/22 (June 22, 2007).

29. Recourse to Arbitration by the United States under Article 22.6 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 2.2, WT/DS285/ARB (Dec. 21, 2007).

30. *Id.* ¶ 3.58.

31. *Id.* ¶ 3.189.

32. *Id.* ¶ 6.1.

III. THE REMEDY: CROSS-RETALIATION

A. HISTORY OF THE REMEDY AND PRIOR IMPLICATIONS: ECUADOR

Article 22.2 of the DSU allows for suspension of obligations to another country in limited circumstances.³³ The remedy of cross-retaliation under article 22.2 of the DSU has only been granted one time in the WTO's history, but has never been exercised.³⁴ In the EU-Ecuador bananas case, Ecuador was granted the remedy of violating intellectual property rights, but never employed the measure, settling the case instead.³⁵

B. MECHANICS OF THE REMEDY: DSU PROVISIONS

Article 22.4 of the DSU requires that the level of suspension of obligations authorized must be equivalent to the level of impairment by the infracting country, i.e. that the retribution must be proportionate to the initial harm.³⁶ Important to note is that the essence of the remedy is the goal of forcing the offending country to suspend its illicit act.³⁷ A country that is out of compliance with the WTO agreement has the obligation to come into compliance prospectively without having to remedy retroactively the harm already perpetrated—here, the United States would be obliged to come into compliance with the WTO agreement but would not be obliged to repay Antigua for past harm.³⁸

Multilateral trade agreements are categorized into three distinct parts of Annex 1 to the WTO Agreement.³⁹ Essentially, these three parts can be understood as: 1) the General Agreement on Tariffs and Trade (GATT 1994) and agreements on trade in goods, 2) the GATS agreement on trade in services, and 3) the TRIPS agreement on intellectual property rights.⁴⁰ The agreements are then further subdivided into sectors within each agreement.⁴¹ Under article 22.3 of the DSU, the complaining party should first seek to suspend obligations within the same sector as the violating party.⁴² Thus, in the case at hand, Antigua would first look toward suspending obligations to the United States within the same agreement, GATS, and within the same sector as the schedule commitment, "other

33. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.2, Apr. 15, 1994, 33 I.L.M. 1226, 1239 (1994) [hereinafter DSU].

34. Gary Rivlin, *Gambling Dispute With a Tiny Country Puts U.S. in a Bind*, N.Y. TIMES, Aug. 23, 2007, at C1.

35. Gary Hufbauer & Sherry Stephenson, *supra* note 6, at 617.

36. DSU art. 22.4, *supra* note 33, at 1240.

37. Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153, 169 (2007).

38. *Id.*

39. Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT'L L.J. 337, 341 (2007).

40. *Id.* at 382.

41. *Id.*

42. DSU art. 22.3(a), *supra* note 33, at 1239.

recreational services (except sporting),” is classified.⁴³ If the complaining country finds it “not practicable or effective” to impose sanctions within the same trade sector in which the violation occurred, then the country may suspend obligations in a different sector within the same agreement. Thus, Antigua would next look to suspending different obligations toward the United States that are still within the GATS agreement, but within a different sector than that in which the gambling violation occurred.⁴⁴ But, the level of suspension of obligations here still must be equivalent to the level of impairment by the United States even though in a different sector.⁴⁵

Finally, if the complainant again finds it “not practicable or effective” to impose sanctions, even within a different sector of the same agreement, the country may suspend obligations in a different agreement.⁴⁶ Antigua’s proposed remedy falls within this final category. Even though the violation occurred under the GATS agreement for trade in goods, Antigua has proposed to suspend obligations to the United States under the TRIPS agreement by violating U.S. intellectual property rights.⁴⁷ This remedy is commonly known as “cross-retaliation.”⁴⁸

C. BASIS FOR THE REMEDY

The WTO provides three main justifications for allowing cross-retaliation as a remedy for an aggrieved party under the agreements.⁴⁹ First, developing countries do not always import goods and services in sufficient quantities to justify suspension of obligations within the same sector as the sector in which the violation took place, so the complainant may have no equivalent level of recourse within the same sector or agreement that the violation took place.⁵⁰ In this case, Antigua may not import services within the sector to the same extent that they are claiming the United States has prohibited importation of their recreational services.⁵¹ As such, were Antigua to suspend obligations to the United States in the same sector, the country would probably not achieve a level of recourse equivalent to the level of harm done.⁵²

The second justification given by the WTO for allowing cross-retaliation is that some bilateral trade relationships may be asymmetrical, so that the good or service is relatively important to the complainant while

43. Panel Report, *supra* note 7, ¶ 6.134.

44. DSU art. 22.3(b), *supra* note 33, at 1239.

45. DSU art. 22.4, *supra* note 33, at 1240.

46. DSU art. 22.3(c), *supra* note 33, at 1239.

47. Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *supra* note 28, ¶ 3.

48. WTO.org, The Process – Stages in a Typical WTO Dispute Settlement Case: 6.10 Countermeasures by the Prevailing Member (Suspension of Obligations), ¶ 10, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Nov. 4, 2007).

49. *Id.* ¶ 11.

50. *Id.*

51. Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *supra* note 28, ¶ 11.

52. *Id.*

remaining relatively unimportant for the violating party.⁵³ Here again, online gambling is relatively important to the economy of Antigua.⁵⁴ Online gambling is the second largest income-producing industry for the country behind tourism.⁵⁵ But, Antigua argues that ceasing all trade with the United States, \$180 million annually, would have no impact on the U.S. economy.⁵⁶ Additionally, U.S. consumers make up a large part of the online gambling market, worth \$15.5 billion.⁵⁷ The relationship is obviously skewed such that the United States may easily absorb the blow sustained by GATS trade sanctions against it in Antigua, while Antigua suffered a major loss by the alleged violation committed by the United States. In order to put Antigua on a level playing field with more powerful countries like the United States, the idea is that the WTO must allow Antigua to suspend its obligations to the United States in a sector and agreement outside of that violated in order to inflict real sanctions on the United States in proportion to the harm done to Antigua.⁵⁸

Finally, the WTO posits that it may be “economically unaffordable” for the developing country to impose trade barriers against imports under the GATS or GATT 1994 because of a significantly reduced supply and increase of the price of the imports upon which the complainant’s inhabitants rely.⁵⁹ Here again, the WTO allows cross-retaliation in order to level the playing field between developing and economically powerful countries.⁶⁰ While the trade sanctions against foreign countries may not have hurt the United States, if Antigua likewise erected trade barriers under the GATS, the economy of the small country may suffer severely.

So, the WTO allows cross-retaliation in order to offer an alternative to self-destructive trade sanctions in certain sectors for small and developing countries. The idea for Antigua is that while a restriction on services in the same sector as online gambling may not even get the attention of decision-makers in Washington, if the country is allowed to violate U.S. intellectual property rights, then Hollywood and software companies may lobby politicians in Washington to make a change to the laws regarding the IHA, among others.⁶¹

53. WTO.org, *The Process – Stages in a Typical WTO Dispute Settlement Case*, *supra* note 48, ¶ 11.

54. *Recourse by Antigua and Barbuda to Article 22.2 of the DSU*, *supra* note 28, ¶ 11.

55. Sallie James, *U.S. Response to Gambling Dispute Reveals Weak Hand*, Center for Trade Policy Studies—Free Trade Bulletin No. 24, 2 (2006), available at <http://www.freetrade.org/pubs/FTBs/FTB-024.pdf>.

56. *Recourse by Antigua and Barbuda to Article 22.2 of the DSU*, *supra* note 28, ¶ 11.

57. James, *supra* note 54, at 2.

58. *Recourse by Antigua and Barbuda to Article 22.2 of the DSU*, *supra* note 28, ¶ 12.

59. WTO.org, *The Process – Stages in a Typical WTO Dispute Settlement Case*, *supra* note 47, ¶ 10.

60. *Id.*

61. James, *supra* note 54, at 2.

D. POTENTIAL PROBLEMS WITH THE REMEDY

As a negative reciprocal remedy scheme that was developed in the 1994 Uruguay round, cross-retaliation, like any scheme, is strewn with potential problems, and has elicited both proponents and critics. Some scholars dislike retaliation as the foundation for enforcement of free-trade agreements because it rewards the protectionist groups within the injured country that oppose free trade rather than rewarding the harmed exporters.⁶² Additionally, retaliation can hurt the injured state's economy, for instance, by increasing prices or hurting consumers within the injured country when trade barriers are erected.⁶³ For opponents of retaliatory remedies, one proposed solution is a monetary sanction against the injuring country.⁶⁴ The main problem with such sanctions is one of the reasons why the WTO adopted retaliatory measures in the first place: unenforceability.⁶⁵ In the case at hand, if the WTO sanction against the United States was purely a monetary penalty, the United States could simply refuse to comply. Without an escrow system for all member countries that would amount to a practical impossibility, the WTO would have no way of ensuring that the violating country would pay the monetary penalty.⁶⁶

Without retaliation, injuring parties have low compliance incentives and high compliance costs with any trade sanctions granted against it.⁶⁷ One major benefit of retaliation is that it solves the enforceability problem with trade sanctions. Once an injured party is allowed to suspend obligations toward the injuring country, the enforcement of the penalty has been achieved. But, this is uncharted territory for the WTO in this case. If Antigua is granted suspension of obligations under TRIPS agreements in order to violate U.S. intellectual property rights, then Antigua's next move will surely be highly scrutinized by the entire world. If in fact the country does successfully enforce the trade sanction on the United States, a huge victory will be won for small countries in terms of trade negotiating power with larger countries.

Before Antigua moves forward with suspending its obligations under the TRIPS agreements, if granted permission by the WTO, the country must balance several countervailing consequences of its actions. Piracy of intellectual property such as computer software, music, and other media

62. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 228 (2005); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 815 (2002). (2001).

63. WTO.org, *The Process - Stages in a Typical WTO Dispute Settlement Case*, *supra* note 48, ¶ 10.

64. Nzelibe, *supra* note 62, at 228; Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 346 (2000).

65. Nzelibe, *supra* note 62, at 229.

66. *Id.*

67. *Id.* at 217.

may be accompanied by money laundering and terrorism.⁶⁸ Antigua certainly does not want to become a safe haven for money launderers and terrorists from around the world. And, an even more concrete consequence than the possibility of attracting criminal activity involves Antigua's participation in the Caribbean Basin Initiative (CBI). Under the terms of the CBI, the United States has granted preferential access, above what is given to other countries with Most Favored Nation (MFN) status, to several countries in the Caribbean upon several conditions, which includes the condition that the countries respect U.S. intellectual property rights.⁶⁹ Because the CBI is a voluntary association that can be disavowed by any participating country with regard to any other participating country at any time, the United States is free to withdraw CBI protection from Antigua if it seeks to suspend obligations under the TRIPS agreement.⁷⁰ The economic consequences of losing this preferential trade status with the United States surely will weigh heavily on Antigua's decision regarding whether or not to violate U.S. intellectual property rights, if granted the opportunity to do so.

IV. CONCLUSION

The WTO faces a type of remedy in the Antigua-U.S. gambling case that has widespread implications for the future of dispute settlement. Both the panel and the appellate body have passed down findings against the United States, and a compliance panel further found that the United States was out of compliance with the WTO rulings.⁷¹ An arbitration report further found that Antigua properly followed the principles and procedures of the DSU, and may continue seeking authorization to cross-retaliate.⁷² Thus, it would seem that some sanctions are due to the United States.

On the one hand, if the DSB does not allow Antigua to suspend its obligations under the TRIPS agreement, then Antigua may end up with a remedy that is more detrimental than helpful. Further, if the United States continues to be unresponsive to the WTO rulings, then enforcement may become the biggest issue. In order for small countries to be able to negotiate terms of trade with larger countries, and ensure that those terms are not broken, the WTO will be stuck trying to force the United States to comply. On the other hand, if the DSB does allow Antigua to engage in cross-retaliation and violate U.S. intellectual property rights in response to U.S. violations of the GATS agreement, then the small country will be forced with deciding how to best act upon the WTO

68. James, *supra* note 55, at 3.

69. *Id.*

70. *Id.*

71. Recourse to Article 21.5 of the DSU by Antigua and Barbuda: Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 7.1, WT/DS285/RW (Mar. 30, 2007).

72. Recourse to Arbitration by the United States under Article 22.6 of the DSU, *supra* note 29, ¶ 6.1.

decision. The best-case scenario may seem to be that Antigua settles the case with the United States, but if the United States remains recalcitrant, then Antigua will have to take some enforcement action, while trying not to hurt its own economy in the process. The whole world will be watching to see how a small country uses a remedy that has never before been employed.

Updates

