



“Do As I Say, Not As I Do”



**HOW THE WTO, ANTIGUA & A CANADIAN
OVERCAME AMERICAN HYPOCRISY ON FREE TRADE**

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EXECUTIVE SUMMARY

This report finds that monies were expropriated, civil liberties infringed upon, and reputations threatened under the guise of enforcing American anti-gambling laws – a cautionary tale for America’s trading partners, foreign businesses, and multilateral economic institutions. It documents America’s discriminatory trade practices against Antigua and Barbuda, which services a global customer base with responsible, regulated online gambling, *and* the US federal government’s highly irregular, ill-advised, and unsuccessful prosecution of Canadian Calvin Ayre, the global online gambling entrepreneur.

These mistakes result from the American government’s logic-defying campaign to prevent American consumers from betting in cyberspace. Policy ‘success’ required that America consciously and relentlessly threaten the livelihood of Antigua’s thriving, legal online gambling industry.

America has disrespected the WTO throughout the protracted dispute. As the role model for all WTO members, America

spent the past 14 years acting, at least with regard to Antigua, as if the trading world’s rules do not apply to her. Throughout, America repeatedly chose myopic self-interest over American values, such as the freedom to trade and the rule of law.

It was legally incorrect and politically unwise for America to initiate this dispute with Antigua. The signals sent by American foot-dragging on the WTO case, and her subsequent, blinkered, over-the-top prosecutions of Ayre and other Canadians (rendered *de facto* innocent by earlier WTO decisions) reveal such disregard for the WTO’s authority that a dangerous precedent has been set by the very same institution’s most influential member.

America simultaneously employed dubious legal and financial instruments designed to limit, and ideally eliminate, both the financial freedom of American consumers to wager voluntarily online and the personal freedom of Canadians operating businesses that legally cater to those customers.

INTRODUCTION

As trade liberalization's paramount exponent, America spent the past 70 years leading, coaxing, and, at times, dragging much of the rest of the world into mutually beneficial trade agreements. Respective American governments can take considerable pride from the respective bilateral and multilateral trading relationships that have improved living standards, underpinned economic growth, heightened consumer satisfaction, and reduced poverty in a great many countries, not least the United States, herself.¹

America champions a global trading system that inhibits protectionism, operates according to well-established rules, and imposes proportionate sanctions applicable to each and every trading partner. Such a leading role places particular emphasis upon America's willingness to ensure that international agreements are interpreted and applied consistently by member-states – and to behave, herself, in accordance with

the principles and good-practices that are the intellectual and instrumental architecture of the modern trading system.

On those occasions when American practice falls short of principled behavior, it is especially important that her sub-par behavior is noted and corrected in order to prevent damage to her essential leadership, political and moral, of the global trading order. This report focuses upon one such, recent occasion when American leadership has fallen far short of what she rightly demands of her trading partners and what, most importantly, she traditionally expects of herself.

Specifically, this report is a case study of America's mistaken campaign to bully, figuratively speaking, a tiny fellow member of the World Trade Organization (WTO), and to persecute and prosecute foreign businessmen, in order to ensure the successful application of ill-conceived domestic legislation.

¹ See, for example, James K Glassman, "The Blessings of Free Trade," *Trade Briefing Paper No 1*, Cato

Institute, 1 May 1998.

As a largely American creation at a time when the American economy was clearly pre-eminent, the WTO's mission is to liberalize trade by lowering tariffs, and to establish the ground rules of international trade among its 164 member-states through trade negotiations and the interpretation and adjudication of trade agreements.

As such, this report may serve as a cautionary tale to America's trading partners. The latter may wish to maintain a "watching brief" given America's willingness to throw her proverbial weight around in the global trading arena, regardless of international sanction and the costs to the other affected parties, as documented throughout this report.

The remainder of this report is divided into respective legal, economic, and political sections that flesh out this case study's overarching theme of an underwhelming and grossly ill-advised American performance in the trade arena.

The largely legal section establishes the political environment and legislative

context that is the basis for the subsequent analysis of America's lengthy WTO-centered duel with the small Caribbean island nation of Antigua and Barbuda (Antigua), and the American government's subsequent legal prosecution and *de facto* economic persecution of several Canadian businessmen, most notably Calvin Ayre, the highly successful entrepreneur and prominent dual Canadian-Antiguan citizen.

Cognizant of America's pivotal role in the WTO's formation and success, the subsequent economic section analyzes America's occasional lapse, as in this case, into selfish, arguably short-sighted, action rather than principled policymaking; the economic costs suffered by Antigua and Calvin Ayre, respectively, as a result of American intransigence; as well as the online gambling industry's direct and indirect socioeconomic contributions to Antigua.

Next, the political section suggests that, at least in this case, America has acted as a poor global citizen. In no small measure, this is due to the unwarranted public persecution of individuals whose civil

liberties were compromised and who, in at least one individual's case, was subject to the most extreme threats to his person as a direct, albeit unintended, consequence of America's legal action against him. This section also explores the dysfunctional system that enables such politicized prosecutions, which clearly entail disquieting tactics.

DAVID v GOLIATH: ANTIGUA'S TRADE DISPUTE WITH AMERICA

Context

Antigua's trade dispute with the US has been ongoing for more than 14 years. It centers around the thorny issue, at least for American policymakers, of enthusiastic American consumers gambling online with operators based in Antigua and in other offshore

centers. By 2005, the global online gambling industry had annual revenues of US\$10 billion, and half of all online gambling customers were American.²

The Americans' principal 'solution' was to prohibit the supply of this service, that is, the websites, themselves. Since the late 1990s, American authorities had been indicting and prosecuting individuals operating out of Antigua who allegedly were in violation of respective US federal and state laws prohibiting the use of telephones or wire communications to make wagers.³ At the dawn of this century, online gambling was rapidly gaining upon tourism for the status of Antigua's largest industry.

By 2003, online gambling had surpassed tourism in terms of its economic contribution to Antigua. Eager to protect its new economic engine, in March of that year Antigua initiated the WTO's dispute settlement process to challenge the American prohibition on cross-border

² Cited in *Economist*, "Jokers wild: Online gambling," 14 April 2005.

³ In 1961, congressional passage of *The Wire Wager Act* (commonly known as *The Wire Act*) made it

illegal to use "a wire communication facility for the transmission of interstate or foreign commerce of bets or wagers...on any sporting event or contest."

gambling services offered by Antiguan operators.⁴

According to *The Economist*, “The WTO is as important as ever when monitoring agreements or settling disputes.”⁵ Furthermore, the Center for Strategic and International Studies’ Scott Kennedy explains that:

Although Geneva is playing a far less central role in negotiating reductions in trade barriers than in the past, the WTO’s dispute settlement system is still quite active. Since 1995, members have lodged 514 cases accusing others of violating their commitments, which are embodied in the WTO’s basic agreements and members’ respective accession protocols. A key factor motivating members to bring cases and for those targeted to respond is that the dispute settlement process is mandatory and binding. Cases move forward regardless of whether those accused respond, and if an accused member loses a case, they are required to change their offending laws and regulations or face the prospect of WTO-approved penalties from the member who brought the case. Moreover, the cases are heard by impartial panels selected by the WTO’s secretariat, and any appeals go before the WTO’s Appellate

Body, also composed of eminent experts in international trade law.⁶

As Antigua had drawn the conclusion, which America implicitly conceded, that the US government had banned cross-border gambling services, Antigua’s argument before the WTO was that respective pieces of American legislation violated the latter government’s commitments to the General Agreement on Trade in Services (GATS), an international agreement that became American law on 1 December 1994, because these laws discriminated against foreign gambling and betting services offered to American citizens.⁷ As Mark Mendel, then-lead legal counsel for Antigua, wrote in *The Economist*, “There is nothing about the provision of services on the internet versus other methods of delivery that should affect a country’s obligation to permit free trade in accordance with its WTO commitments.”⁸

⁴ The official name of the US/Antigua gambling services case is *US Measures Affecting Cross-Border Supply of Gambling and Betting Services* (WT/DS285), (the “Gambling Services Case”).

⁵ *Economist*, “The other conclave: Can the WTO save itself from irrelevance?” 16 March 2013.

⁶ Scott Kennedy, “The WTO in Wonderland: China’s Awkward 15th Anniversary,” Center for Strategic and International Studies, 11 December 2016, [https://www.csis.org/analysis/wto-wonderland-](https://www.csis.org/analysis/wto-wonderland-chinas-awkward-15th-anniversary)

[chinas-awkward-15th-anniversary](https://www.csis.org/analysis/wto-wonderland-chinas-awkward-15th-anniversary).

⁷ Sarita Jackson, *Small States and compliance bargaining in the WTO: an analysis of the Antigua-US Gambling Services Case*, 25 *Cambridge Review of International Affairs* 25 (2012): 375, *supra* note 5,

<http://www.tandfonline.com/doi/abs/10.1080/0957571.2012.710588>.

⁸ Mark Mendel, “Online winning,” *Letters, Economist*, 2 December 2004.

The US Congress passed implementing legislation approving the US' GATS Schedule as an annex to the General Agreement on Tariffs and Trade (GATT).⁹ Since 1947, GATT had existed to minimize trade barriers and had grown from 23 to 123 member-states, who met in Geneva, Switzerland, to agree on trade rules that all member countries had to observe. Accordingly, GATS is enshrined in federal law and constitutes the "supreme Law of the Land" under the so-called "Supremacy Clause" of the US Constitution.¹⁰ As such, GATS is placed on equal footing with all other federal acts of Congress.¹¹

Under Article XVI(1) of GATS, each signatory commits to "accord services and service suppliers of any other member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."¹² In addition to setting out which services are covered, the US' GATS Schedule identifies those restrictions, if any, America specifically carved-out from its general

commitment under GATS Article XVI to provide open and non-discriminatory market access for the covered services to all providers of such services from all member nations. The plain text indicates that America committed herself to completely open market access with respect to the covered recreational services, and reserved absolutely *no* right to limit market access for cross-border supply of those recreational services covered by the enactment.

In summary, Antigua presented a four-pronged argument to the WTO: (1) Under GATS, the US had made a full commitment to allow the cross-border provision of gambling and betting services to American consumers; (2) The US adopted measures and took actions that effectively prohibited the cross-border supply of these services; (3) These American measures violated GATS; and (4) The measures could not be justified under the "public morals defence" provisions of the General Exceptions Article XIV contained in GATS.¹³

⁹ Approval and Entry into Force of the Uruguay Round Agreements, 19 U.S.C. § 3511(d) (14).

¹⁰ See US Constitution, Article VI, Clause 2.

¹¹ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹² General Agreement on Trade in Services, Part III,

Article XVI:1,

https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

¹³ WTO, *Report of the Panel, United States – Measures Affecting the Cross-Border Supply of*

Antigua challenged a number of provisions of US law, notably *The Wire Act* (1961), *The Travel Act* (1952), and *The Illegal Gambling Business Act* (1955). According to Antigua, these laws amounted to an effective ban on internet gambling.¹⁴ Antigua further argued that these laws effectively shut out Antiguan service providers in a sector in which America had, in its Schedule, given a commitment to provide access to its market, namely “recreational, cultural, and sporting services”, and thereby was in violation of Article XVI of GATS.¹⁵ Fundamentally, writes Mendel, “a country that has made commitments to its trading partners under the WTO is charged with the responsibility to deal fairly with them in allowing market access.”¹⁶

America asserted that it did not discriminate between domestic and foreign service providers in enforcing the prohibition on internet gambling. She

reasoned that “remote” gambling presented “special risks” not present in “non-remote” gambling and that, accordingly, she prohibited all forms of remote gambling.¹⁷

Shortly after Antigua initiated the WTO’s dispute settlement mechanism, America sought to ban the provision of cross-border internet gambling services to American consumers. As a result, American credit card companies began to block online gambling transactions.¹⁸

Case Becomes a Marathon

The negotiations between Antigua and America did not lead to a resolution. Consequently, in June 2003 Antigua formally requested that the WTO establish a panel to consider the dispute. WTO panels are quasi-judicial

Gambling and Betting Services, 10 November 2004, WT/DS285/4, at 16, 31, 38-39, 51, 54, 99 & 113.

¹⁴ WTO, *Report of the Panel, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 10 November 2004, WT/DS285/4, at 16, 31, 38-39, 51, 54, 99 & 113.

¹⁵ WTO, *Report of the Panel, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 10 November 2004, WT/DS285/4, at 16, 31, 38-39, 51, 54, 99 & 113.

¹⁶ Mark Mendel, “Online winning,” *Letters, Economist*, 2 December 2004.

¹⁷ WTO, *Report of the Panel, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 10 November 2004, WT/DS285/4, at 21, 51-52, 74-75, 101 & 108-10.

¹⁸ Ted Madger, *Gambling, the WTO and Public Morals*, *Sage Journals* 52 (2006): 56 *supra* note 5, <http://journals.sagepub.com/doi/abs/10.1177/1527476405282107>.

bodies of legal and trade experts who examine the case and make legally-binding recommendations.

On 25 August 2003, the WTO's director general empowered the requested panel. The WTO Panel Report was issued to Antigua and America on 30 April 2004. On 10 November 2004, the WTO dispute panel published its decision: American laws prohibiting gambling over wires that cross state lines *violate* global trade rules for the services sector.¹⁹ In a nutshell, Antigua won the case by demonstrating to the WTO that American law interfered with the Caribbean island's freedom to trade.

The WTO Panel ruled that: (1) America had made a full commitment to allow remote gambling services; (2) Three American laws [*The Wire Act*, *The Travel Act*, and *The Illegal Gaming Business Act*] were contrary to GATS; and (3) The US had not been able to demonstrate that the three federal laws were entitled to the "morals defence." The

Panel Report held that to maintain the "morals defence," America had to prove both that the otherwise GATS-inconsistent laws were 'necessary' to protect the public morals and health, and that the defence was not actually a disguised restriction on trade.²⁰

In January 2005, America appealed the Panel Report to the WTO's Appellate Body. Antigua argued that American laws prohibiting foreign operators from providing remote gambling services in the US violated GATS because domestic land-based gambling operators could operate legally in most states.²¹ More specifically, Antigua argued America committed not to block foreign operators from providing online gambling services to Americans in their specific commitments to the GATS, known as, "The United States of America Schedule of Specific Commitments," to the GATS (the "United States GATS Schedule").²² Further, Antigua argued that the domestic laws (or measures) in place to

¹⁹ See, for example, *Economist*, "House of cards: The WTO and online gambling," 18 November 2004.

²⁰ WTO, *Report of the Panel, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 10 November 2004, WT/DS285/4, at 226-30, 254-55, 258, 267 & 270-71.

²¹ Ted Madger, *Gambling, the WTO and Public Morals*, *Sage Journals* 52 (2006): 57, *supra* note 5, at 57,

<http://journals.sagepub.com/doi/abs/10.1177/152476405282107>.

²² General Agreement on Trade in Services, the

block gambling violated Article XVI of the GATS, which prohibited such measures in all areas where members had made specific commitments.

America argued that the public morals exception pursuant to Article XIV of the GATS permitted the United States to prohibit online gambling services from its GATS commitments.²³ America stated that online gambling raised specific problems for public policy, such as money laundering, underage gambling, fraud, and health concerns. The Antiguans unnecessarily conceded that reasoning; however, they argued that because the US permitted domestic gambling, its laws were inconsistent and therefore a restriction on trade in disguise.²⁴

In short, Antigua argued that while the United States banned internet gambling and betting services from foreign providers on the basis of moral protection, it continued to allow domestic gambling service providers to operate.²⁵ Antigua argued that the United States could not claim that internet gambling was a genuine and sufficiently serious threat to one of the fundamental interests of American society since bricks-and-mortar gambling was thriving across America at the state and local levels.²⁶ In fact, in 2003, America boasted the world's largest legal gambling market, one worth US\$73 billion.²⁷

A year later, on 7 April 2005, the WTO's Appellate Body ruled in Antigua's favor.²⁸ The Appellate Body Report upheld the Dispute Panel's Final Report, albeit on slightly different and narrower grounds.

United States of America Schedule of Specific Commitments, 15 April 1994, GATS/SC/90 (entered into force on 1 January 1995).

²³ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285: para 322.

²⁴ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285: para 288.

²⁵ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply*

of Gambling and Betting Services, WT/DS285: para 59.

²⁶ The case for the positive economic and social contributions of both traditional and online gambling is comprehensively presented in Patrick Basham and John Luik, *Gambling: A Healthy Bet*, Democracy Institute: London, 2011.

²⁷ Cited in Mark Mendel, "Online winning," *Letters, Economist*, 2 December 2004.

²⁸ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285: para 46.

The Appellate Body Report found that: (1) America had made a commitment to free trade in betting and gambling services in its schedule of commitments to GATS;²⁹ (2) America had adopted “measures” that interfered with its obligation to provide free trade in betting and gambling services with Antigua;³⁰ (3) The “measures” established by Antigua, that is, the three America laws, violated Article XVI of GATS;³¹ and (4) America could not invoke a “morals defense” to its violation of the GATS.

America was given until 3 April 2006 to comply with the Appellate Body Report.³² Nevertheless, during the compliance period America *did not* adopt any new laws that would have implemented the rulings. As *The Economist* commented at the time, “It

[Antigua] may be a small country, but it has played its cards well. On March 30th Antigua and Barbuda won a second round at the WTO in its struggle to get America to open up its market to foreign firms offering online gambling.”³³ The WTO’s Compliance Panel found that America had failed to comply with the Appellate Body Report.

Therefore, the Compliance Panel found that the US was still in violation of its GATS commitments.³⁴ Furthermore, the Compliance Panel noted, pointedly, that In light of recent American prosecutions of foreign operators,³⁵ combined with a clear lack of prosecutions of domestic operators, remote, interstate wagering under *The Interstate Horseracing Act (1978)* was “tolerated, even if not authorized under

²⁹ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285: para 373(B)(i).

³⁰ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285: para 373(C)(ii).

³¹ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285: para 373(C)(ii).

³² WTO, *Arbitration Report on United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 19 August 2005,

WT/DS285/13, ARB-2005-2/19: para 68.

³³ *Economist*, “Antigua claims the pot: Online gambling,” 12 April 2007. See, too, Paul Blustein, “Against all odds: Antigua besting US in internet gambling case at WTO,” *Washington Post*, 4 August 2006.

³⁴ WTO Panel Report, *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*, 30 March 2007, WT/DS285/RW: paras 6.11 & 6.85.

³⁵ Only days earlier, for example, American authorities had arrested Stephen Kaplan, the founder of BetonSports, a British online gambling website.

federal law”³⁶; and, with *The Unlawful Internet Gambling Enforcement Act (2006)*, which made online gambling illegal, the US Congress nevertheless recognized that regulation of remote gambling is actually quite feasible.³⁷

The Cato Institute’s Sallie James, a trade policy expert, explained that, “In response to the adverse ruling, the president of the United States signed the *Unlawful Internet Gambling Enforcement Act* in October 2006. That act, attached to a law on port security, expands the 1961 Wire Act’s prohibition on gambling entities’ use of wire-based communications for transmitting bets to include the Internet. The act also forces financial institutions to identify and block gambling-related transactions transmitted through their payment systems.”³⁸ At the time, James insightfully documented:

[S]everal things wrong with the U.S. response so far. First, it reeks of hypocrisy. Is online gambling any more or less immoral if the server is located abroad? Allowing state and tribal entities to engage in online gambling (not to mention lotteries and horseracing) but prohibiting foreign operators from running essentially identical operations on “moral” grounds is dubious to say the least. Second, allowing financial institutions to examine and block transactions that are related to gambling seems a gross trespass on citizens’ privacy. To the extent that some aspects of gambling are a government concern at all, surely allowing companies to set up legal sites in the United States, under proper supervision and regulation to prevent, say, children, from accessing sites, is a less blunt way of limiting the “social ills” that politicians insist come from gambling...Third, the ban on Internet gambling and the electronic transfer of funds to finance it provides protection from import competition for the domestic gaming industry at the expense of consumers. Offshore online gambling operations would seem, from the domestic industry’s point of view, to cut into their market share.³⁹

CSIS’ Kennedy recently recalled that, “The United States has a mixed record of compliance; it took over a decade to remove cotton subsidies deemed illegal in a

³⁶ WTO Panel Report, *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*, 30 March 2007, WT/DS285/RW: paras 6.126, 6.128 & 6.129.

³⁷ WTO Panel Report, *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*, 30 March 2007, WT/DS285/RW: paras 6.132 & 6.135.

³⁸ Sallie James, “US response to gambling dispute

reveals weak hand,” *Free Trade Bulletin* No 24, Cato Institute, 6 November 2006, <https://www.cato.org/publications/free-trade-bulletin/us-response-gambling-dispute-reveals-weak-hand>.

³⁹ Sallie James, “US response to gambling dispute reveals weak hand,” *Free Trade Bulletin* No 24, Cato Institute, 6 November 2006, <https://www.cato.org/publications/free-trade-bulletin/us-response-gambling-dispute-reveals-weak-hand>.

case brought by Brazil in 2002,”⁴⁰ before her non-compliance with the WTO’s instruction to liberalize her online gambling regulations.

On 25 May 2007, the WTO’s Dispute Settlement Board (DSB) adopted the Compliance Panel Report. Consequently, Antigua was entitled to pursue trade retaliation under Article 22 of the WTO’s Dispute Settlement Understanding (DSU) Article 22. In practice, this meant that Antigua could seek authorization from the DSB for trade sanctions against America to “encourage” the US to comply with the previous WTO rulings and to meet its international trade obligations to Antigua. Almost six years later, on 28 January 2013, a DSB ruling authorized Antigua to impose retaliatory sanctions, up to US\$21 million annually, upon America.

After the DSB’s adoption of the Compliance Panel Report, America announced that she was going to withdraw the original commitment in its Schedule to GATS allowing cross-border provision of gambling and betting services that had resulted in the adverse rulings against her in the first place. Under Article XXI of GATS, a member country may withdraw specific commitments but must negotiate with “affected members” over “compensation” for the withdrawn commitments. Antigua requested compensation by the mid-2007 deadline to notify America that the former’s interests were affected by the latter’s Schedule modification.⁴¹

Since America did not agree on compensation with Antigua, the latter had a right to request that compensation be arbitrated, provided that she made her request by 28 January 2008.⁴² On that date, Antigua requested arbitration with the US

⁴⁰ Scott Kennedy, “The WTO in Wonderland: China’s Awkward 15th Anniversary,” Center for Strategic and International Studies, 11 December 2016, <https://www.csis.org/analysis/wto-wonderland-chinas-awkward-15th-anniversary>.

⁴¹ See *Request for Public Comment on the Negotiations for Compensatory Adjustments to U.S. Schedule of Services Commitments Under WTO General Agreement on Trade in Services (GATS) in Response to Notice of the United States of Intent to*

Modify Its Schedule Under Article XXI of the GATS, 72 Federal Register 38846, 16 July 2007; WTO Council on Trade in Services, *Procedures for the Implementation of Article XII of the General Agreement on Trade in Services (GATS)*, 29 October 1999: para 3 S/L/80.

⁴² *Costa Rica Drops Gambling Arbitration Claim in WTO Against US After Compensation Deal*, 25 *International Trade Report* 25 (2008): 355.

pursuant to GATS Article XXI:3(a) in relation to the amount of permanent compensation.

At the time of writing, America and Antigua still have not reached any agreement for compensation for the latter. To that end, in the US Trade Representative's *2017 Trade Policy Agenda and 2016 Annual Report*, America speciously acknowledges that Antigua and the US continue to seek a mutually agreeable resolution.⁴³ A decade ago, *The Economist* presciently stated that, "America's most likely response is to do nothing. After all, two tiny islets less than three times the size of Washington, DC have little chance of forcing it to yield. Antigua is hoping that right will trump might and that America will submit to the ruling to protect the integrity of the WTO."⁴⁴

Antigua's attempts at moral suasion have yet to materially affect American behavior. Similarly, it has yet to be shown that protecting the WTO's integrity is an American government priority.

⁴³ Office of the US Trade Representative, *2017 Trade Policy Agenda and 2016 Annual Report 73* (March 2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20II%20-WTO.pdf>.

Exhibit A: Prosecuting Calvin Ayre

Several years ago, in a series of bewildering legal moves, American authorities continued to pursue enforcement of those American laws that repeatedly had been deemed inconsistent and incompatible with her WTO obligations. For example, 15 April 2011 saw a widespread US federal government crackdown on allegedly "American" online gambling operations.

Most prominently, the American government decided to prosecute entrepreneur Calvin Ayre and Bodog Entertainment Group (BEG). In 1994, Ayre had founded the globally successful Bodog brand. Incorporated in Costa Rica, and headquartered there until 2006, when it became inactive, BEG was one component of Bodog.

[017/AnnualReport/Chapter%20II%20-WTO.pdf](https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20II%20-WTO.pdf).

⁴⁴ *Economist*, "Antigua claims the pot: Online gambling," 12 April 2007.

In September 2007, Ayre licensed the Bodog brand to Morris Mohawk Gaming Group, a company based in Quebec, Canada, for purposes of North American gaming.⁴⁵ That licensing agreement came to an end in December 2011.⁴⁶ While Ayre transferred licensure of Bodog (in North America) to the Morris Mohawk Group in 2007, Ayre remained involved with the broader Bodog brand, separate and apart from Bodog North America.

In February 2012, over four years *after* Ayre licensed Bodog North America to Morris Mohawk Group, the US Attorney for Maryland filed an indictment against BEG and four individual defendants: Ayre and three fellow Canadians, James Philip, David Ferguson, and Derrick Maloney, on charges of illegal gambling.⁴⁷ The indictment alleged that from 9 June 2005 through 6 January 2012 the defendants participated in an illegal gambling business involving online

sports betting and engaged in an international money laundering conspiracy.⁴⁸ The Government also seized over \$66 million of assets belonging to Bodog's online customers.⁴⁹

The Bodog trademark registration was issued in 2005. Six year later, the Bodog trademark registration was assigned to Sanctum IP Holdings. The assignment from Bodog IP Holdings to Sanctum IP Holdings was recorded with the US Patent & Trademark Office in October 2011, but the assignment was made effective 1 January 2011.

Among the many puzzling oddities exhibited by the American case against Ayre, therefore, is the fact that, for the majority of the time period covered by his indictment, Bodog's only US-facing company was not owned by Ayre, but by the Morris Mohawk Group. And, Bodog left the American market in 2011. So, the

⁴⁵ Sarah Polson, "Bodog Signs with Morris Mohawk Gaming Group," www.PokerListings.com, 9 September 2007, <http://www.pokerlistings.com/bodog-signs-with-morris-mohawk-gaming-group-18519>; Bodog, "Morris Mohawk Gaming Group Sign Deal," *Casino City Times*, 10 September 2007, <http://www.casinocitytimes.com/news/article/bodog-morris-mohawk-gaming-group-sign-deal-168506>.

⁴⁶ www.CalvinAyre.com, "Morris Mohawk Gaming Group shuts down operations," 1 October 2015, <https://calvinayre.com/2015/10/01/business/morris-mohawk-gaming-group-shuts-down-operations/>.

⁴⁷ *United States v. Bodog Entertainment Group SA, et al.*, No. 1:12-cr-00087-CCB, Doc 1.

⁴⁸ *United States v. Ayre*, No. 1:17-cr-00372-CCB, Doc. 1-2.

⁴⁹ *United States v. Ayre*, No. 1:17-cr-00372-CCB, Doc. 9: 5 & Exhibit 1.

American government shut down a Bodog company that *was not* actually in operation. The existing Bodog operation performs its activities on an Antiguan license. In 2012, the www.bodog.com domain seized by the American government was owned not by an American individual or company, but by Sanctum IP Holdings, an Antiguan company; importantly, the same company held an *American* trademark for online gambling. The trademark registration continued to be valid, even though the US government seized the domain name.

The bottom-line is that the American authorities chose to indict a company that did not exist rather than indict an Antiguan company that did exist. Given America's embarrassing series of WTO defeats preceding the indictments of Ayre et al., the US government sought to avoid any direct connections between the indictments and Antigua, herself. Clearly, American prosecutors wanted to pretend, at least publicly, that the Antiguan angle – the

(legal) elephant in the room – did not exist. By both ignoring the Antiguan corporate angle and America's Antiguan treaty obligations, American authorities attempted to erase, figuratively, Antigua from the global online gambling scene.

Ayre's subsequent conviction in US federal court ran afoul of the WTO's ruling as to America's GATS obligations. As detailed earlier, the WTO's Appellate Body Report found America undertook a commitment to provide open and nondiscriminatory market access for recreational services, "including online gambling services."⁵⁰ Critically, it found that *The Illegal Gambling Business Act*, which made it illegal for anyone to conduct a gambling business, was explicitly in conflict with America's commitment under subsection 10D.⁵¹ Hence, the Appellate Body Report concluded that America was in violation of its obligations under its GATS Schedule by maintaining and enforcing these laws.⁵²

⁵⁰ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*: para 373.

⁵¹ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply*

of Gambling and Betting Services: para 373.

⁵² WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*: para 373.

Nevertheless, the American government decided to pursue the prosecution of Ayre, a foreign citizen, for alleging committing ‘crimes’ based upon domestic laws that respective WTO courts had clearly and repeatedly determined were in violation of America’s treaty obligations, for the plain text of America’s GATS Schedule commits her to providing open cross-border access to gambling service providers.

As America did not specify any restrictive measures in its schedule that it wished to reserve the right to enact, no exceptions to these prohibitions are provided by her GATS Schedule of commitments. Mendel correctly observes that, “It is important to realize that America did not expressly exclude gambling services even though they were aware that doing so was an option that other countries were choosing to take.”⁵³

Given that America did not reserve the right to prohibit any recreational services under Subsection 10D, if “recreational services” were properly read to include gambling and

betting services, the text plainly precludes America from prohibiting gambling service operators from providing such services within its borders. Revealingly, America did not argue before the WTO that “recreational services” did not encompass gambling services.

Both the WTO panel and the WTO’s Appellate Body concluded that America had not demonstrated that its laws were “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries.” The WTO Appellate Body’s conclusion was that America’s GATS commitment for “other recreational services” included a commitment to provide an open and non-discriminatory market for gambling and betting services, because they were not exempted as “sporting services.”

The WTO Appellate Body found that two specific pieces of American legislation were at odds with the US’ GATS obligations.⁵⁴ Calvin Ayre and BEG were charged with *The Illegal Gambling Business Act*, which

⁵³ Mark Mendel, “Online winning,” Letters, *Economist*, 2 December 2004.

⁵⁴ WTO, *Report of the Appellate Body on United*

States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services: para 373(A)(ii)(c), (C)(i), (ii).

prohibits the “conduct[ing], financ[ing], manage[ment], supervis[ion], direct[ing] or own[ership] [of] all or part of an illegal gambling business,” defined as a gambling business that is in “violation of the law of a State or political subdivision in which it is conducted.”

Yet, the WTO Appellate Body specifically held that *The Illegal Gambling Business Act* cannot be squared with America’s GATS obligations.⁵⁵ Nor can the Wire Act be squared with America’s GATS commitment, as the Wire Act bans the supply of gambling and betting services over the internet. As such, the Wire Act impermissibly “limit[s]...the total number of service operations or...service output” available within America.⁵⁶

In the American system, when an Act of Congress and a duly enacted international agreement or treaty are inconsistent with each other, and cannot be reconciled, as is

clearly the situation in this case, the most recent treaty or piece of legislation takes precedence. *The Illegal Gambling Business Act* was enacted in 1970, and America’s commitment under GATS was passed and enacted in 1994; therefore, America’s treaty obligations were preeminent in law.

Devoid of legal standing, the American government belatedly moved to dismiss the indictments against Philip, Ferguson, and Maloney, which was granted by the US District Court on 7 April 2017.⁵⁷ In early July, the American government agreed to transfer the www.bodog.com domain name to Calvin Ayre in exchange for \$100,000.⁵⁸

Subsequently, on 13 July 2017, the American government filed a new indictment against only Ayre, charging him only with the misdemeanor offense of accessory after the fact to transmission of wagering information.⁵⁹ Ayre pled guilty to

⁵⁵ WTO, *Report of the Appellate Body on United States-Measure Affecting the Cross-Border Supply of Gambling and Betting Services*: para 373(A)(ii)(c), (C)(i), (ii).

⁵⁶ General Agreement on Trade in Services, Part II, Article XIV, https://www.wto.org/english/docs_e/legal_e/26-

[gats.pdf](#).

⁵⁷ *United States v. Ayre*, No. 1:12-cr-00087-CCB, Docs. 18 & 19.

⁵⁸ *United States v. Ayre*, No. 1:17-cr-00372-CCB, Doc. 9: 6.

⁵⁹ *United States v. Ayre*, No. 1:17-cr-00372-CCB, Doc. 1.

this offense on 14 July 2017.⁶⁰ He was sentenced the same day to a year of unsupervised probation and a US\$500,000 fine.⁶¹ All felony charges dating from his original indictment five years earlier were dropped.

In US District Court for the State of Maryland, the American authorities performed a reputational about-face and reliably informed the Court that:

A non-custodial sentence is also appropriate in light of Mr. Ayre's integrity and generosity. Finally, the agreed upon sentence is sufficient but not greater than necessary in light of "the nature and circumstances of the offense" and Mr. Ayre's personal "history and characteristics." Mr. Ayre, a dual citizen of Canada and Antigua, is a highly successful 56-year old entrepreneur with no criminal record. He has lived under the ever-present cloud of this indictment for over five years now, which has impaired his business interests, marred his reputation, crippled his freedom of travel, and forced him to live under a cloud of anxiety and uncertainty. During this time period, societal views toward online gaming in the United States have evolved to the point of increasing social and moral acceptance. Indeed, following the lead of many other countries in Europe, Asia and elsewhere, multiple states have legalized online gaming, including New Jersey, Delaware, and Nevada, and legislation on this subject remains pending in Pennsylvania, New York,

⁶⁰ *United States v. Ayre*, No. 1:17-cr-00372-CCB, Doc. 7.

⁶¹ *United States v. Ayre*, No. 1:17-cr-00372-CCB, Doc. 7: 1-2 & 4.

and elsewhere. In sum, the conduct of which Mr. Ayre has been accused no longer carries the same kind of opprobrium in the United States that existed at the time of his indictment.⁶²

While this probably constituted a tolerable outcome for Ayre et al., who understandably would have desired a return to normalcy, professionally and personally, it is essential to remind oneself of the timeless legal maxim, attributed to British statesman William Gladstone, that, "Justice delayed is justice denied." That is, if legal redress is available for a party that has suffered injury, but redress is not forthcoming in a timely manner, it is the same as having no redress at all.

Myopic Self-Interest Trumps Principle

Throughout eight years of negotiations, America served as both the diplomatic and economic catalyst behind the formation of the Geneva-based WTO on 1 January 1995. Critically, America also shaped the WTO

⁶² *United State v Calvin Ayre*, No. 1:12-cr-00087-CCB, "Joint Memorandum of Law in Support of Plea Agreement and Proposed Sentence," US District Court for the District of Maryland.

rules that hold the international trading system together. Given this impressive contribution to trade liberalization, America should not put herself in a position whereby she is vulnerable to accusations of legal hypocrisy or myopic economic self-interest. As *The Economist* gently cautioned 13 years ago, “America's attitude...reveals a slight double standard.”⁶³ Yet, the American government found itself in this position because of ill-conceived actions and relentless intransigence regarding the country’s longstanding trade dispute with Antigua over the online gambling issue.

Those who have long advocated trade liberalization, and those who have always viewed the American role in spreading free markets and free trade arrangements as both essential and benign, may be forced to acknowledge that, in this case at least, America’s behavior has been unnecessary, underwhelming, and arguably unacceptable. Most strikingly, and perhaps most dismaying, is the documented fact that America chose not to play by her own trade rules. To rub salt in these diplomatic

and legal wounds, America continues to aggressively complain about her grievances with the respective trade policies of China, the European Union, etc. American hypocrisy has been on display in this regard since at least 2007, when America appealed to the WTO over a piracy dispute with the Chinese government.

As the role model for all WTO members, America has nevertheless spent the past decade and a half acting, at least with regard to Antigua, as if the trading world’s rules simply do not apply to her. In doing so, and with all due respect to Antigua, she has disrespected a far more consequential actor, that is, the WTO.

It was legally incorrect and politically unwise for America to initiate this dispute with Antigua. The signals sent by American foot-dragging on the WTO case, in concert with her blinkered prosecution of Canadian businessmen (who had been rendered *de facto* innocent by earlier WTO decisions), reveals such disregard for the WTO’s authority that a very dangerous precedent

⁶³ *Economist*, “House of cards: The WTO and online gambling,” 18 November 2004.

has been set by the very same institution's still-most influential founding member.

Economic Costs to Antigua

In 1999, there were 120 licensed operators running internet gambling businesses in Antigua that employed 3,000 people and generated nearly US\$13 million in wages. By 2006, revenue from Antigua's internet gambling industry reached US\$546 million. In addition, internet gambling in Antigua surpassed tourism as the country's largest industry, and it accounted for 52 percent of the worldwide online gambling market.⁶⁴

Unsurprisingly, therefore, the American ban on online gambling has been an economically crippling blow to the Antiguan economy. In 2004, one in 20 Antiguans was employed in the online gambling sector. A dozen years later, a mere fraction of that number remains in the sector. Antigua lost US\$3.44 billion of

online gambling revenue over the first decade following the American action. Hence, at the WTO, Antigua sought damages of US\$3.4 billion. To place the economic loss in perspective, consider that Antigua's Gross Domestic Product is a mere US\$1 billion, yet she has lost over US\$250 million in trade revenue due to the ban.

Throughout this legal saga, a large economic cloud, that is, the nation's fragile yet essential economic relationship with the American marketplace, hung over the Antiguan government. In 2007, for example, when the WTO's financial judgment was first rendered, the office of the US Trade Representative, holding all of the economic aces, fired a significant shot over Antigua's bow by threatening economic punishment. Such punishment could take several forms. One such vulnerability is that, as a member of the Caribbean Basin Initiative, Antigua receives preferential access to the American economy courtesy of especially low tariff rates.⁶⁵

⁶⁴ Sarita Jackson, *Small States and compliance bargaining in the WTO: an analysis of the Antigua-US Gambling Services Case*, 25 *Cambridge Review of International Affairs* 25 (2012): 374, <http://www.tandfonline.com/doi/abs/10.1080/09557571.2012.710588>; see, also, Ted Madger,

Gambling, the WTO and Public Morals, Sage Journals 52 (2006): 55, <http://journals.sagepub.com/doi/abs/10.1177/1527476405282107>.

⁶⁵ See, for example, Office of the United States Trade Representative, *Sixth Report to Congress on*

Paying the American Piper

As noted earlier, when American prosecutors indicted Calvin Ayre and seized the Bodog domain, they took it upon themselves to seize US\$67 million in funds owed to winning players on the Bodog site. Held by third party processing companies, the funds were en route to respective customers when seized.

One striking irony is that the American government attacked Bodog for its treatment of its customers, yet it was actually the American government that took Bodog's customers winnings away from them. Revealingly, *before* his indictment, Ayre voluntarily chose to make all of his online customers "whole," that is, he paid all of the players all of their winnings.

What happened to the original US\$67 million once the American government absconded with Bodog's customers' winnings? The short answer is that the

American government simply kept the money. The US went to court in order to assert, apparently with a straight legal face, that no one had stepped forward to claim the funds that the American government alleged were the proceeds of crime, which was factually incorrect. It was therefore asserted the American government was entitled to keep the money. Eventually, the US\$67 million expropriated from consumers in 2012 was deposited into the federal government's "general revenue" fund.

Defending himself against the American indictment cost Ayre almost US\$4 million in legal fees in the Philippines, alone. He had to spend a further US\$3.1 million on Canadian lawyers, while also spending more than US\$1.1 million on American legal counsel.

While Bodog's American customers involuntarily contributed to the general revenues of the American government, Bodog nonetheless regularly and voluntarily contributes extraordinary sums

the Operation of the Caribbean Basin Economic Recovery Act, 31 December 2005: 16,
http://www.ustr.gov/assets/Trade_Development/

[Preference_Programs/CBI/asset_upload_file670_8672.pdf](#).

to the general revenues of the Antiguan government. For example, during 2015 and 2016, Bodog gifted US\$2 million to the Antiguan Treasury above and beyond the standard taxes paid by the company.

Between December 2013 and July 2017, Ayre's Antiguan businesses had an economic impact of more than \$US22.5 million, comprised of salaries and benefits, investments in fixed assets, and the construction of a new office building. To an outside observer, Bodog appears committed to responsible corporate citizenship. For example, while currently under construction, Bodog's new US\$25 million Antiguan headquarters will be a state of the art eco-friendly so-called "green" building. The new office complex is explicitly designed to promote a work-life balance among the staff. According to the American government, "Through his business enterprises, Mr. Ayre has contributed significantly to the economic development of, among other places, Antigua and Barbuda... Mr. Ayre has always maintained a high level of integrity in

operating his business enterprises."⁶⁶ At the Antiguan government's request, Ayre now serves as an economic ambassador for the island nation. In his new role, he is charged with strengthening existing, and fostering new, economic relationships with national governments and investors, especially regarding the online gambling and burgeoning Bitcoin industries.

In 2005, Ayre established the Calvin Ayre Foundation, which provides financial aid in a great many areas, including child welfare, education, social development, animal welfare, and emergency response. Between 2005 and June 2017, the foundation donated more than US\$9.6 million to worthy causes worldwide.⁶⁷ American government attorneys now speak of:

Mr. Ayre's life-long record of remarkable generosity. In 2005, Mr. Ayre founded the Calvin Ayre Foundation, of which Mr. Ayre serves as Chairman. The Foundation has supported a variety of important causes, including child welfare, animal welfare, environmental protection, education for disadvantaged youth, and disaster relief efforts, including in the wake of Haiti's devastating earthquake in 2010, the super typhoon in the Philippines in 2013, and damage

⁶⁶ *United States v Calvin Ayre*, No. 1:12-cr-00087-CCB, "Joint Memorandum of Law in Support of Plea Agreement and Proposed Sentence," US District

Court for the District of Maryland.

⁶⁷ Source: Calvin Ayre Foundation, www.calvinayrefoundation.org.

caused by multiple typhoons in the Philippines in 2016. The Foundation has also provided financial support to needy families, disadvantaged youth, veterans, elementary schools, and rehabilitation centers across the globe, including in the United States.⁶⁸

A DYSFUNCTIONAL MODEL?

Politicized Prosecutions

There are a number of inconvenient truths related to the unjustified prosecution of Ayre et al. One is that the American government's strategy emphasized the goal of observing the financial ruination of as many online gambling consumers as possible on unlicensed online gambling sites. If such a scenario had played out, the American response would have been to close down these sites, indict the owners, and wag a large, "We told you so!" finger in the direction of the online gamblers.

However, this strategy did not play out as the Americans had hoped. For example, most American online gamblers utilized US-facing online gambling sites both based and licensed in the United Kingdom.

Assessing the macro picture begs the question, what did America hope to gain from a crackdown on unregulated and allegedly unscrupulous online gambling sites? The Americans' policy goal was decidedly straightforward: the US wanted to ruin the nascent sector's reputation among consumers and policymakers⁶⁹ to ensure that the lifespan of the online gambling industry was, in Thomas Hobbes' infamous 17th century phraseology, "solitary, poor, nasty, brutish, and short."⁷⁰

Consequently, monies were expropriated, civil liberties infringed upon, and reputations threatened under the guise of enforcing American law, while the actual reason for America committing these legal, financial, and ethical sins was the cold-blooded calculation that, in Machiavellian

⁶⁸ *United States v Calvin Ayre*, No. 1:12-cr-00087-CCB, "Joint Memorandum of Law in Support of Plea Agreement and Proposed Sentence," US District Court for the District of Maryland.

⁶⁹ Telephone interviews with former US Justice

Department officials, New York City and Washington DC, July & August 2017.

⁷⁰ Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1651), Chapter 12.

fashion, the (arguably dubious) ends would justify the (possibly indefensible) means.

American Myth-Making

The prosecution's case seemingly was built upon the tactical premise that propagating a couple of myths about Ayre would bring the 'international criminal mastermind' to heel.⁷¹ Putting ethical considerations to one side, why would the American authorities believe this tactical approach would bear the desired fruit?

Here, it is crucial that one appreciates the prosecutors' mind-set in this, and comparable, cases. The Americans counted upon indicted individuals *not* engaging in a legal fight with the American government in a US court setting. As in Ayre's case, a critical mass of prosecutors was well aware that their respective indictments were not built upon firm, let alone strong, legal

foundations. Therefore, they were deeply reluctant to engage the alleged criminals' own legal experts in a court of law.⁷²

As a result, the prosecutors deployed as many weapons within their arsenal as possible in order to apply extraordinary professional, financial, and personal pressure upon the accused. In this way, the prosecutors expected the indicted to rapidly seek to settle their respective cases in order to relieve the pressure brought to bear upon them.⁷³

In Ayre's case, the American authorities did not expect him to hold out at all, let alone for many years.⁷⁴ Whether by accident or by the design of astute legal counsel, Ayre's surprising stamina tested the Americans' resolve to the breaking point. The greatest irony, perhaps, of the Ayre case is that it concluded not with Ayre, himself, crying, "Uncle," but with "Uncle Sam" no longer able to tolerate the financial drain on the

⁷¹ In-person interviews with current and former US Justice Department officials, Baltimore and Washington DC, August 2017.

⁷² In-person and telephone interviews with current and former US Justice Department officials, Baltimore, Boston, New York City, and Washington DC, June-August 2017.

⁷³ In-person and telephone interviews with current and former US Justice Department officials, Baltimore and New York City, and Washington DC, July & August 2017.

⁷⁴ In-person interview with former US Justice Department official, Washington DC, August 2017.

US Treasury and the attendant professional and institutional embarrassment of their interminable quest for victory against, to paraphrase George Washington, a seriously out-gunned, out-manned, and out-planned opponent.⁷⁵

You're One of US!

The American government always claimed that Ayre et al. were American residents. In Calvin Ayre's case, at least, he has *never* been a US resident. He has not visited America since a brief trip to Los Angeles in June 2006. Nonetheless, throughout Ayre's profile on World Check, the private risk intelligence site utilized by governments and financial institutions to screen for so-called "heightened risk" individuals and entities globally, it is inaccurately stated that the United States is/was one of his countries of residence.

In May 2016, Canadian-born Ayre became an Antigua citizen, too. Unlike many wealthy expat citizens who were born,

⁷⁵ In-person interviews with former US Justice Department officials, New York City and

educated, and spent their careers abroad, Ayre did not receive his citizenship papers in exchange for investment in the Antiguan economy. Rather, he received his citizenship as a result of legal Antiguan residency since 2007.

"With (Terrorist) Friends

Like These..."

Central to their tactic of destroying Ayre, David Ferguson, and Derrick Maloney's professional and personal reputations, the American authorities attempted to connect non-existent dots between them and wanted terrorists. The American authorities placed a wanted terrorist's name on Ferguson and Maloney's respective World Check pages and then explicitly linked them directly, and Ayre indirectly, to him.

Given that no one has unearthed any evidence to suggest any sympathies or connections, let alone dealings, between Ayre et al. and any terrorists or terrorist

Washington DC, August 2017.

activities, the only logical explanation is that the American authorities were well aware of the dangerously misleading nature of this alleged connection.

Such a tactic was employed, one presumes, solely to apply pressure upon Ayre et al. to seek a settlement favorable to the American government. The latter may have counted upon the fact that very few individuals are able to withstand the logistical and reputational pressure that is applied once one's name is linked in legal and financial circles with some of the planet's most notorious and detested individuals and organizations.

Irregular Behavior

"We Can Protect You... ...from US"

Several years before the American government executed Ayre's indictment, American prosecutors covertly reached out to Ayre through respective third parties.⁷⁶ Did the US

⁷⁶ Telephone interview with former US Justice

authorities' indirect communications reflect the goal of informing Ayre's legal team of any impending indictment, or educating them of the remedial steps necessary to make legal amends for his alleged misdeeds?

On the contrary, the American authorities utilized intermediaries, including Ayre's known business associates and industry contacts, to "encourage" Ayre to make a US\$350 million payment to the US Treasury.

The first such financial "reach-out" to Ayre occurred in June 2006, almost six years before his eventual indictment. These messages, which included telephone calls, were sent to Ayre on several occasions. The communications conveyed an unambiguous message: a 'voluntary' payment was necessary to preempt an indictment in US federal court.

Between mid-2006 and early 2012, no doubt the American authorities held out hope that Ayre would accede to their financial demands. From their vantage point, it was a win-win situation. In doing

Department official, Los Angeles, August 2017.

so, Ayre would lose a great deal of money, but he would be spared years of legal fees and intense professional pressure and personal stress and, crucially, he would not risk imprisonment. The American government would gain a huge financial windfall and could claim a prominent scalp in its campaign to eradicate the alleged scourge of online gambling.

Whatever the decision-making calculus employed by Ayre while ignoring the Americans' highly irregular demand, the very fact that this tactic was employed by the American government is unnerving. There is no reason or evidence to suggest that individual prosecutors involved in the crackdown upon the online gambling industry performed their professional duties without integrity.

Nevertheless, the demand for payment to preempt a criminal indictment may strike the untrained legal eye as eerily analogous to the so-called "protection" money that Prohibition-era American gangsters demanded of businessmen to guarantee the latter's properties and products did not run afoul of the criminal element.

Surely, such an analogy is far-fetched? Yet, the fact that such an unambiguous demand carried with it such an unambiguously distasteful odor is no doubt disconcerting to readers of this report.

Political Correctness

Run Amok

The Morris Mohawk Gaming Group (MMGG) licensed by Ayre to operate Bodog North America between 2007 and 2011 is a business enterprise comprised exclusively of indigenous people native to Canada's francophone Quebec province. MMGG is licensed by the respective tribal council to operate an online gambling business.

It is quite curious that the American authorities indicted Ayre, but ignored MMGG's four-year ownership of Bodog's North American license. The logical explanation is that the American government did not wish to risk the probable, and probably highly negative, media reaction and cross-border political reverberations should a minority business

enterprise be perceived to be victimized by an overzealous American prosecutorial system. In this politically correct narrative, however, a wealthy, Caucasian male, such as Ayre, easily could be miscast as the archetypal corporate “Fat Cat” villain.

It is disappointing to discover that political correctness’ illiberal mantra may have seeped so deeply into the sinews of American public life that prosecutorial choices may be influenced, even a little, by the fear of an accusation of institutional or individual political *incorrectness*.

Unintended (Unimaginable) Consequences

It is something of an Iron Law of policymaking that each new initiative, no matter how large or how small, produces unintended consequences. These unintended consequences may be beneficial; however, more often than not they are negative, or at least mostly undesirable.

And, the fact that these consequences are unintended does not mean that, in each and every case, they are unforeseen. On many an occasion, policymakers dismiss counsellors’ warning of the probability of a negative unintended consequence. Policymakers do so because the intended policy outcome is a prize so valuable to their jurisdiction, or the policy action is so valuable to their career prospects, that even short-term, but especially medium- or long-term, negative unintended consequences are casually discounted.

The American government’s initiation of a criminal indictment against Calvin Ayre was an action that, as with all political, regulatory, and bureaucratic decisions, set off a number of ripples across respective legal, financial, political, and criminal ponds. Although they should have foreseen certain undesirable scenarios, these experienced, worldly American prosecutors apparently did not foresee that their criminal indictment of a non-American sitting atop a global business empire would incentivize myriad individuals and groups to target Ayre, both professionally and personally. These criminal elements would

seek to lay claim to portions of his personal fortune and corporate wealth, both of which, the American authorities had assured the world, were the fruits of an illicit tree.

In this way, the American government unwittingly and unknowingly set in motion a series of criminal behaviors by those who concluded that the allegedly corrupt Ayre and his ill-gotten business empire were now “fair game” for every manner of criminal approach. Most seriously, as a direct, albeit unintended, consequence of his indictment, in 2013 Ayre was subject to a kidnapping and extortion plot that, if completed successfully, almost certainly would have resulted in his death.

By the time of his indictment, Ayre was semi-resident in the Philippines, which had become a major corporate hub for his business operations. Among the deep policy challenges that continue to bedevil the Philippines is an endemic corruption that makes business operations a growing challenge for even the most resourceful of companies. The corruption culture is so pervasive that many Philipinos survive,

and hope to thrive, by exploiting unethical, even criminal, opportunities for their own financial gain.

Without question, Philippine criminal gangs were empowered by the American action to target Ayre. One such criminal gang, whose ringleader was Ayre’s then-assistant, successfully embezzled millions of dollars from the Bodog company. Most ominously for Ayre, himself, the gang’s greed literally knew no ethical or moral bounds.

Consequently, the gang plotted to capture Ayre, with the assistance of Ayre’s own driver, and hold him hostage while he was forced to transfer his wealth to their own accounts. It is highly probable that the would-be hostage-taking and extortion episodes would have ended with Ayre’s violent death. The gang made several kidnapping attempts but, fortuitously, Ayre got wind of his increasingly precarious security situation. He promptly altered his normally predictable routine and remained closeted in his Manila home until he was able to arrange for his escape from the Philippines.

The criminals who sought to kidnap Ayre remain beyond the law. It is understood that they evade the Philippine judicial system by spending a great deal of money persuading local officials to look the other way. The irony, of course, is that the large sums they spend dodging the authorities are literally cut from the funds they embezzled earlier from Ayre and the Bodog company.

The timing of Ayre's departure from the Philippines proved especially fortuitous for his civil liberties. On 6 November 2013, the Department of Homeland Security division of the American embassy in Manila wrote a letter to the Philippine government's Immigration Bureau. The letter implicitly suggested that Ayre be detained by the local authorities on America's behalf. The suggestion, however, was a redundant one. Ayre had already left the country.

Although frustrated not to "get their man" in the flesh, this particular American initiative was yet another signal sent to Ayre with the goal of convincing him the cost of continuing to do business in so many parts of the world was now so high that he

would be far better off to settle his case, even on terms highly favorable to the prosecution.

CONCLUSION

This report is a cautionary tale for America's trading partners, foreign businesses, and fellow members of multilateral economic institutions. The core of the tale is that, for almost 15 years, America has sought to damage, arguably destroy, the online gambling industry. Under respective presidential administrations, beginning with Republican George W Bush and continuing with Democrat Barack Obama, America simultaneously employed legal and financial instruments designed to limit, and ideally eliminate, the freedom of American consumers and taxpayers to wager voluntarily on online gambling sites operated by foreign companies. She also sought to curtail the civil liberties of the individual business owners operating those legal sites.

They comprehensively failed in their quest. By early 2017, the global online gambling

industry's annual revenue had climbed to US\$45.9 billion; annual revenue is projected to more than double by 2024.⁷⁷

There is no evidence that either Antigua or Ayre were targeted due to any particular institutional animus towards the former as a country or the latter as an individual. Instead, both Antigua and Ayre were most probably designated as the most suitable collateral damage in the US federal government's longstanding campaign against online gambling.

Antigua and Ayre served as convenient "straw men" for an American prosecutorial agency that sought to send an unequivocal message to gamblers, businesses, and multilateral institutions: when it comes to online gambling, America is, "Closed for business." The American government's judicial bureaucracy has held so tightly to this particular policy goal that American authorities, seemingly without hesitation or remorse, repeatedly defended their illegal actions before the WTO, the global

arbiter of trade relationships between member-states.

At every opportunity, respective WTO bodies sided with Antigua in her long-running online gambling dispute with America. The US government was found to not play by the rules of international trade, a system that she largely devised and whose evolution she has disproportionately influenced. For years, America has refused to provide Antigua with the financial compensation awarded by the WTO. *The Observer*, one of the eastern Caribbean's most respected media outlets, editorially criticizes such "bully-like behavior"⁷⁸ on America's part.

Crucially, America chose myopic self-interest over traditional American values, such as the freedom to trade and the rule of law. As James states, "[F]ailure to comply with WTO rulings that show US policies to be against the rules that the United States helped to design paints the United States as hypocritical and undermines faith in the

⁷⁷ Statistics cited in *2016 Global Gaming & Gambling Markets Overview*, 26 January 2017, <http://www.mobyaffiliates.com/blog/2016-global-gaming-gambling-markets-overview/>.

⁷⁸ *Observer*, "The friend of my enemy is...", editorial, 25 March 2015, <https://antiguaobserver.com/the-friend-of-my-enemy-is/>.

system – a system that depends on the perception that all players, rich and poor, big and small, have rights, as well as obligations and responsibilities.”⁷⁹

Such illogical choices have damaged America’s public prestige and international reputation in trade and legal circles. These mistakes were grossly compounded when, acting contrary to the letter and the spirit of respective WTO rulings, American authorities sought the imprisonment and impoverishment of Ayre and other successful Canadian businessmen who, it was stated unequivocally, were ‘guilty’ of providing consenting American adults with entertaining online recreational choices.

After a decidedly difficult decade for trade liberalization advocates and multilateral institutions, we have entered an especially delicate, perhaps pivotal, period for the WTO, itself, as it struggles to contain rising protectionist sentiment throughout many Western member-states, not least the

⁷⁹ Sallie James, “US response to gambling dispute reveals weak hand,” *Free Trade Bulletin* No 24, Cato Institute, 6 November 2006, <https://www.cato.org/publications/free-trade-bulletin/us-response-gambling-dispute-reveals-weak-hand>.

United States. Late last year, Kennedy noted that:

President-elect Donald Trump has roundly criticized the WTO, other existing regional trade agreements, and the Trans-Pacific Partnership (TPP). He has singled out China as a trade scofflaw, and the prospects of a trade war are higher than ever...There are widespread doubts that the WTO is strong enough to push China to liberalize sufficiently to achieve a more level playing field...the fear...in China is that the West is walking away from the WTO and the liberal international order it constructed.”⁸⁰

Should an American refusal to comply with an WTO ruling(s) be met with institutional and diplomatic silence, more member-states shall be incentivized to ignore other WTO rulings, which would threaten the continuity of global trade patterns to detriment of everyone, including the United States.

Throughout the 11 years that Ayre was threatened with and eventually subjected to criminal prosecution, the American prosecutors’ *modus operandi* may be characterized as unnerving to anyone, American or foreign, who respects the rule

⁸⁰ Scott Kennedy, “The WTO in Wonderland: China’s Awkward 15th Anniversary,” Center for Strategic and International Studies, 11 December 2016, <https://www.csis.org/analysis/wto-wonderland-chinas-awkward-15th-anniversary>.

of law, domestically and internationally. The American approach may equally unnerve those who appreciate their own, and respect others', constitutionally-enshrined civil liberties.

The larger cautionary tale, however, is for the US federal government. Future domestic American policymaking should not similarly spill over into international rule-breaking and mistaken, ill-advised prosecutions. Otherwise, America may be viewed increasingly, at least on the trade and legal fronts, as a poor global citizen.