New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 239—NO. 24 TUESDAY, FEBRUARY 5, 2008 ALM

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Impact of U.S. Prosecutions on Foreign Affairs

The growing global economy and expanding technologies allow companies to engage in international business without restrictions traditionally imposed by geographic boundaries. Such international relationships increasingly have come under scrutiny by the U.S. government. In seeking to punish what they perceive as wrongdoing abroad or wrongdoing in the United States by companies or individuals located abroad, prosecutors have employed creative and sometimes controversial interpretations of federal criminal statutes. The reach of computers has complicated legal analyzers and put into issue the jurisdictional reach of law enforcement.

A recent case brought against Gary Kaplan, the founder of BETonSPORTS.com, focuses on wrongdoing alleged to have occurred within the United States by an individual or corporation utilizing Internet facilities from abroad. This case demonstrates that U.S. prosecutions can have a strong impact on foreign affairs and, in certain instances, damage the United States' image abroad.

'United States v. Kaplan'

Gary Kaplan, the founder of BETonSPORTS.COM, was arrested by the FBI in the summer of 2007 on charges of racketeering, conspiracy, and fraud in connection with the company's Web site gambling operations. The case was filed in the U.S. District Court for the Eastern District of Missouri. Mr. Kaplan has moved to dismiss the charges against him pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure based upon certain treaty obligations of the United States and related principles of domestic and international law.

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Specifically, Mr. Kaplan has argued that United States' treaty obligations prevent the government from prosecuting him for activities related to the provision of cross-border remote gambling services. Mr. Kaplan asserts that, to the extent the United States continues to interpret its laws to criminalize Internet gambling, it is in violation of its international obligations.

World Trade Organization and GATS

To support his claim, Mr. Kaplan has relied on decisions made by the World Trade Organization (WTO), an organization which regulates trade and tariffs worldwide and offers a forum for member nations to settle trade disputes. The United States is a founding member of the WTO, and, as such, has agreed to be legally bound by the dispute settlement process of the WTO, the Dispute Settlement Understanding (DSU). "The obligation of a WTO member to comply with an adopted dispute ruling is additional to the obligation to observe the underlying treaty obligations themselves."[1]

The General Agreement on Trade in Services (GATS) is one of a number of treaties negotiated by and between 123 countries during the Uruguay Round discussions in 1986. WTO members agree, as part of their membership, to adhere to the GATS. Focusing specifically on the supply of services between the signatory countries, GATS was intended to: "create a credible and reliable system of international trade rules; ensure fair and equitable treatment of all participants; stimulate economic activity through guaranteed policy bindings; and promote trade and development through progressive liberalization."[2]

Under GATS, signatory countries have general obligations regarding all service sectors in which trade between WTO members occur, as well as specific commitments concerning market access and national treatment in specifically designated sectors.[3] At issue in the *Kaplan* case are the United States' obligations under its Schedule of Commitments with respect to the sector entitled "Recreational, Culture and Sporting Services," which has been determined to include gambling and betting services.[4]

The United States' obligations under the Uruguay Round discussions, including the GATS, were given the effect of law when Congress enacted the Uruguay Round Agreements Act (URAA).[5] The URAA specifically states that America's obligations under the GATS are to be interpreted as fully consistent with the laws and regulations of the United States.

In November 2004, Antigua brought a WTO case against the United States alleging that certain of its federal laws were inconsistent with the United States' legal obligations under GATS. An authoritative panel of the WTO ruled in favor of Antigua, finding that the Wire Act,[6] the Travel Act,[7] and the Illegal Gambling Business Act[8] contradicted GATS. The United States appealed the decision. The WTO's

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supreme judicial body, the Appellate Body, confirmed the decision of the WTO Panel, holding that "the American laws conflicted with an obligation, freely entered into by the United States, to allow access to the vast and legal American domestic gambling market, including remote betting, to providers operating from territories of other WTO members."[9]

Mr. Kaplan has asserted that the United States has not complied with this dispute ruling, as required by the DSU, and continues to ignore its obligations by prosecuting him for activities specifically allowed under the GATS. Mr. Kaplan also has argued that "the prosecution violates a fundamental norm of the WTO which prohibits restrictions on foreign trade through measures which, under the guise of protecting the public, in fact protect domestic suppliers of similar goods and services."[10]

Because the United States has taken steps to withdraw its GATS commitment in the area of "Recreational, Culture, and Sporting Services," Mr. Kaplan contends that these actions serve as an admission by the United States that the Wire Act, Travel Act, and the Illegal Gambling Business Act (IGBA) are in violation of the GATS. Further, Mr. Kaplan has averred that the United States' withdrawal of these commitments "would permit prosecutions in the future for conduct that post-dates the withdrawal of the commitment, [which] only serves to confirm that the United States cannot properly prosecute conduct, [such as that alleged against him,] that occurred while the commitment was in force."[11]

WTO Cases as a Defense

• ***Whether Kaplan Properly Can Assert the WTO Cases as a Defense.*** The federal prosecutors have contended that because the GATS is not self-executing, the defendants have no standing to raise alleged violations of the GATS as a defense to criminal prosecution.[12] They rely on specific language in the URAA, passed by Congress to execute the Uruguay Round Agreements, to support their contention that "no person…may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement."[13]

Section 3512(e)(1)(B) of the statute also provides that "[i]t is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof…."[14]

Rejecting the defendant's interpretation that this statute applies only to actions raised against states or their political subdivisions, the government has argued that it is clear that Congress intended to "occupy the field" with respect to any issues related to the Uruguay Round Agreement. "Therefore, the defendants have no standing to raise any matter associated with the WTO or the GATS as a defense to this criminal prosecution. The Court should not consider any argument that relies on any provision of the GATS or any ruling from any body of the WTO."[15]

The case against Gary Kaplan, the founder of BETonSPORTS.com, focuses on wrongdoing alleged to have occurred within the United States by utilizing Internet facilities from abroad. The case shows that U.S. prosecutions strongly impact foreign affairs.

Mr. Kaplan disputes the government's position by noting that the GATS Treaty has the force and effect of domestic law since it was enacted by Congress through the URAA. Accordingly, he believes he properly may rely on the GATS just as he would be able to rely on any domestic legislation in defending the criminal charges against him.[16]

WTO Decisions, 'Kaplan' Case

The government also has argued that even if Mr. Kaplan properly can contest the United States' supposed violation of the GATS Treaty, the WTO decisions have no binding effect on the district court in the *Kaplan* case. Once again, the prosecutors point to specific language in the URAA to support their position. Section 3512(a) provides "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."[17]

Mr. Kaplan has argued that the government is incorrect in reading §3512 as requiring, in the event of a conflict between domestic law and a treaty, that the domestic law be considered as controlling. Instead, Mr. Kaplan believes the domestic laws at issue, both the penal statute and the URAA, can and must be read so as not to conflict with the GATS. To make this point, Mr. Kaplan relies on the *Charming Betsy* doctrine which derives from the 1804 Supreme Court case *Murray v. The Schooner Charming Betsy*.[18]

In that case, Chief Justice John Marshall wrote that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Under this doctrine, Mr. Kaplan has asserted that the district court is required to construe domestic statutes, the criminal statues criminalizing certain conduct, so as to avoid violating international treaties, such as the GATS, to which the United States is a party. Accordingly, Mr. Kaplan concludes, the court must construe the Wire Act narrowly and dismiss the Wire Act charges against him in order to avoid any conflict with the GATS.[19]

Addressing the government's reliance on §3512 of the URAA as giving precedence to domestic law over the international agreement, Mr. Kaplan has contended that none of the limitations on the application of WTO law within the domestic legal order "dictates that the Wire Act can be used to prosecute gambling activities that WTO law and rulings bar the U.S. from prohibiting." Mr. Kaplan further reasons that "it is not necessary to construe the URAA in such a way as to bar the defendant from asserting the invalidity, as applied to him, of the penal laws under which he is being prosecuted. The *Charming Betsy* doctrine thus requires that not only the Wire Act, but §3512 itself be construed so as to avoid a violation of the United States' international law obligations under the WTO."[20] In addition, Mr. Kaplan reasons that because all the other charges in the indictment arise from, and relate to, the providing of cross-border Internet services, that conduct also is protected under the WTO/GATS and also must be dismissed even though they were not specifically addressed by the WTO in its decisions.[21]

The government has disagreed with Mr. Kaplan's interpretation of the *Charming Betsy* doctrine, however, observing that "it has never, ever been applied to absolutely override a clear statement of Congressional intent." Rather, the government has argued that *Charming Betsy* comes into play only where Congressional intent is ambiguous. Because Congress made its intent "crystal clear" in the statute implementing the

GATS, finding ineffectual any provision of the URAA which is inconsistent with the laws of the United States, the government has concluded that Mr. Kaplan properly can be prosecuted for activities related to Internet gambling.

Mr. Kaplan is not alone in his reading of *Charming Bets*y and its application to the U.S. government's attempts to prosecute Internet gambling under federal laws such as the Wire Act. During congressional hearings on Internet gambling before the House's Judiciary Committee in November 2007, Professor Joseph H.H. Weiler, the director of the Jean Monnet Center for International and Regional Economic Law & Justice at New York University, similarly testified that the *Charming Bets*y doctrine mandates that "all congressional acts should, if at all possible, be interpreted and applied in such a way as to respect international obligations undertaken by this Country."[22]

Professor Weiler, whose area of expertise is the law of the WTO, also said:

> Some language in the Uruguay Round Agreement Act notwithstanding, I think there are weighty legal arguments that individuals should not be denied, in defending themselves, the ability to argue that Congress did not intend in approving U.S. participation in the WTO, that prosecutorial discretion should be exercised in a manner which would bring the United States in violation of its international legal obligations…. It is possible to interpret both the URAA…and the Statutes under which the Executive Branch is seeking to ban remote betting from service suppliers located in our WTO partners, in a manner which would respect American international legal obligation and commitment to the rule of law. The Executive Branch is doing no service to the U.S. by violating these obligations, and laying the responsibility at the feet of Congress. Congress should not allow such.[23]

Finally, Professor Weiler found America's reaction to the WTO determination that it was in violation of the GATS with respect to Internet gambling to be "curious." He noted that, despite the WTO's decision in the case brought by Antigua, the United States continues to prosecute individuals for Internet gambling activities and has announced its intention to withdraw from its GATS commitments. Mr. Weiler says that these actions are "damaging" to the United States and that the American government is setting a poor example. Indeed, he believes that the United States would regret its actions if other WTO members followed its lead in so reacting to WTO rulings with which they do not agree.[24] The impact of the District Court's ruling in *Kaplan* may well extend beyond the parties to the case and affect the foreign affairs of the United States and its perceived role in international relations.

Other Cases

The international considerations at play in *Kaplan* exist in other cases as well, but from a different perspective. In the well-publicized "Oil for Food" case, *United States v. Chalmers*, and in *United States v. Giffen*, the United States indicted individuals for actions taken abroad, which the government claimed to be in violation of federal criminal law. In *Chalmers*,[25] the government charged violations of the wire fraud statutes, alleging that the defendants paid secret and illegal surcharges to the government of Iraq in exchange for the right to receive allocations for Iraqi oil under the United Nations Office of the Iraq Programme, Oil-for-Food. The defendants' motion for dismissal of the wire fraud charges was denied when Judge Denny Chin of the U.S. District Court for the Southern District of New York found that the Iraqi people (some of who are attempting to kill our soldiers) properly could be victims under the wire fraud statute and that they had a valid property interest in the funds allegedly diverted from the Oil-for-Food program.[26]

In *Giffen*, the defendant, CEO and chairman of New York-based Mercator Corp., was charged with violations of the Foreign Corrupt Practices Act, mail and wire fraud, money laundering and various tax counts based on the alleged bribery of Kazakhstan officials (some of who are still in power and control the flow of oil from that country) for purposes of gaining business for Mercator. U.S. District Judge William H. Pauley III, sitting in the Southern District of New York, held that the mail and wire fraud statutes did not extend to the deprivation of foreign citizens of the honest services of their government, resulting from Mr. Giffen's alleged bribery of foreign officials. However, the court found that Mr. Giffen's conduct could have violated the Foreign Corrupt Practices Act. In so holding, the court rejected the defendant's argument that he was protected by the act of state doctrine, finding that Mr. Giffen's official title in the Kazakh government did not entitle him to make illegal payments to their government officials.[27]

Conclusion

The *Chalmers* and *Giffen* cases are interesting because the prosecution sought convictions based on injuries to citizens of other countries, the people of Iraq who were denied funds that would have been deposited into the Oil-for-Food Programme and the people of Kazakh who were denied the honest services of their government officials. The intermingling of foreign relations and law enforcement pursuits requires coordinated government activity. The aforesaid cases raise issues as to which of our country's sometimes conflicting interests will be paramount in our steadily increasing global activities.

1. *United States v. Kaplan*, 4:06CR00337CEJ, Defendant Gary Kaplan's Motion to Dismiss Based on Treaty Obligations and Related Principles of Domestic and International Law and Incorporated Memorandum of Law ("Kaplan's Memorandum) at p. 7.
2. World Trade Organization Web site, "What Is the Purpose of GATS?" (http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Jan. 18, 2008).
3. Id. "What Are the Basic Obligations Under the GATS?"
4. Kaplan's Memorandum at p. 6.
5. Pub. L. No. 103-465, 108 Stat. 4809 (1994).
6. 18 U.S.C. §1084.
7. 18 U.S.C. §1952.
8. 18 U.S.C. §1955.
9. Kaplan's Memorandum at p. 2.
10. Kaplan Memorandum at p. 14.
11. Id. at p. 15.
12. *United States v. Betonsports PLC, et al.*, No. 4:06CR00337CEJ, Consolidated Response to Motions by Defendants to Dismiss the Superseding Indictment for Alleged Violations of U.S. Treaty Obligations ("Government's Memorandum") at pp. 7-8.
13. 19 U.S.C. §1952(c)(1)(B).
14. 19 U.S.C. §1952(c)(2).
15. Government's Memorandum at p. 9.
16. Kaplan Memorandum at p. 17.
17. 19 U.S.C. §1952(a).
18. 6 U.S. (2 Cranch) 64, 118 (1804).
19. Kaplan Memorandum at pp. 18-24.
20. Id. at pp. 26-27. Mr. Kaplan also argues that the doctrine of international comity and the self-executing nature of the WTO dispute settlement rulings also prohibit the government from prosecuting him under the Wire Act. Id. at pp. 27-32.
21. Id. at p. 33.
22. Testimony of Joseph H.H. Weiler before the U.S. House of Representative's Committee on the Judiciary, "Hearing on Establishing Consistent Enforcement Policies in the Context of Online Wagers," (Nov. 15, 2007) (available at http://judiciary.house.gov/media/pdfs/Weiler071114.pdf).
23. Id.
24. Id.
25. *United States v. Chalmers, et al.*, No. S4 05 Cr. 59 (DC), 2006 WL 1062917 (May 15, 2006).
26. 474 F.Supp.2d 555 (S.D.N.Y. 2007). See also Robert G. Morvillo and Robert J. Anello, "Outer Limits of Federal Mail, Wire Fraud Prosecutions," New York Law Journal (April 3, 2007).
27. 326 F.Supp.2d 497 (S.D.N.Y. 2004).