Antigua has taken a high-stakes roll of the dice, write Ramon Lobato and Darryl Woodford

Photo: imagineerz/ Flickr

THE tiny Caribbean island of Antigua doesn’t make the news very often. Located 1800 kilometres east of Miami, just north of Montserrat, it is best known as a holiday destination for well-heeled Europeans and celebrities with private yachts. Now it is in the headlines for an unexpected reason.

Last Thursday it emerged that the government of Antigua and Barbuda is planning to build its own “pirate” website from which internet users around the world will be able to download Hollywood movies, music and other copyrighted content. This is a remarkable development. While some famous copyright-infringing websites have been hosted in small island nations, a site operated and endorsed by a government is quite another matter.

Antigua’s move generated an angry response from copyright industry groups. The International Intellectual Property Alliance immediately warned of lost revenue, lost jobs and “state-sanctioned theft.” Certainly, the term “pirate site” brings to mind commercial operations like the notorious Russian business AllofMP3.com, or Kim Dotcom’s cyberlocker MegaUpload (recently reborn as Mega).

But this time there’s a twist: Antigua’s proposed pirate site is a diplomatic provocation, directed at the United States. Responding to a trade dispute with Washington, the Antiguan government has suspended US copyright in its territory, meaning that it is no longer obliged to enforce the intellectual property rights of American content producers. And it’s done so with the approval of the World Trade Organization, which authorised the new Antiguan policy on Monday.

What caused this confrontation between a tiny island of 80,000 people and the world's biggest economy? The answer has little to do with intellectual property. It is all about Antigua’s relations with another industry: online gambling.

ANTIGUA has long hosted offshore gambling companies targeting the United States, where most forms of online gambling are outlawed. A prominent example was the World Sports Exchange, or WSEX, a popular site for American football, basketball, baseball and racing bets launched by Jay Cohen in 1996. The United States views these offshore betting operations as illegally targeting US customers, however, and Cohen’s 2000 conviction for Federal Wire Act violations set the scene for the current dispute.

In 2003, Texan lawyer Mark E. Mendel, whose law partner was friends with Cohen, persuaded the Antiguan government to instigate a WTO trade complaint against the United States for barring offshore gambling services. Antigua’s action was subsequently joined by other WTO parties, including the European Union, Macau, Canada, Japan, Costa Rica, India and Australia. (Until the 2006 regulatory changes, 80 per cent of the earnings of Australian-based Lasseters Online Casino had come from the United States; it ceased trading in 2008, citing industry constraints.)

At its core, the WTO dispute revolved around the United States’s commitments under the General Agreement on Trades and Services, which required full compliance for the cross-border supply of “other recreational services (except sporting).” An additional exemption existed for “measures necessary to protect public morals,” which the United States argued applied in this case; the WTO panel rejected this argument and found the United States in
violation. Given the United States allowed gambling within its own borders – in Las Vegas and Atlantic City, at various racetracks and reservations, and via online providers such as YouBet – a moral objection to gambling was difficult to sustain.

The other countries negotiated settlements with the United States, gaining increased access to other sectors of the US economy, but Antigua fought on. While traditional WTO rulings would call for compensation in the form of trade barriers, this was not a viable option for the tiny island nation. It argued instead for permission to suspend intellectual property laws – a right that Ecuador was once afforded but never used, instead negotiating a resolution with the European Union. Antigua, however, appears to be planning to go ahead.

AUSTRALIA’s role in the complaint is also interesting, as a current statute (the Interactive Gambling Act) prohibits online casinos. A 2010 Productivity Commission report placed the figure for Australians using offshore bookmakers at $800 million and growing at a rate of up to 20 per cent per year; it also noted that nobody had been prosecuted under the Act since 2001. While it prohibits companies from providing online gambling services to customers located in Australia, the Act doesn’t prevent Australians from using online gambling services; in effect, it is toothless unless operators come under Australian jurisdiction. Interestingly, the law also expressly allows Australian companies to offer prohibited gambling services to non-Australian customers.

Most of the US prosecutions and asset confiscations have resulted from participants entering the United States (either voluntarily to face prosecution or as the result of sealed indictments), but the Australian government would find it much harder to target either individuals or offshore operations, who have little reason to land in Australia. Forced to abide by the restrictions of the Act, particularly a ban on live (or in-run) betting on events, licensed Australian operators often find themselves at a disadvantage, unable to compete in range or volume with their overseas counterparts. Some, like SportsAlive, have gone bust. Others have teamed up with European conglomerates (as in the merger of Sportsbet, IAS and Paddy Power).

These developments in the local industry, which have received little attention outside gaming circles, are one element of the regulatory drama now coming to a head in the Caribbean.

THIS complex story provides the clues needed to understand last week’s events. The Antiguan position is that the US crackdown on offshore gambling sites has decimated one of its few viable industries, ripping $3 billion annually from the Antiguan economy. Antigua’s finance minister, Harold Lovell, issued this statement:

The economy of Antigua and Barbuda has been devastated by the United States Government’s long campaign to prevent American consumers from gambling on-line with offshore gaming operators. These aggressive efforts to shut down the remote gaming industry in Antigua has resulted in the loss of thousands of good paying jobs and seizure by the Americans of billions of dollars belonging to gaming operators and their customers in financial institutions across the world.

The United States, while acknowledging a negative impact, puts the figure much lower, at $500,000 per year, and has offered this lesser sum in compensation. But Antigua is sticking to its guns. Its proposed pirate site will be the latest play in this long game.

It is unusual to see a small, vulnerable nation exploit the fears of the US content industries to achieve a parallel trade objective. One could view this as a David vs Goliath battle against the backdrop of the war on piracy – an interpretation offered by one prominent tech blogger. But the reality is more complex.

Nations, big and small, use intellectual property as a tool to achieve trade objectives. Moral questions about ownership, rights and free trade are a secondary consideration. A nation’s interest in copyright protection usually correlates directly to the value of its intellectual property, so it isn’t surprising that Antigua, with a rich cultural heritage but little intellectual property, takes an instrumental view of its position in the wider system.

What is surprising is to see a nation so publicly opt out of IP enforcement norms and the diplomatic and trade
structures that go along with them. Antigua appears confident in its high-stakes gamble, making its own wager that the return of the gambling operators will have a greater impact on its economy than anything Washington can mete out in retaliation. Most nations would not be willing or able to take this gamble.

Many people will be watching closely over the coming months to see how this confrontation is resolved, and whether Antigua’s pirate website is a serious proposition or an ambit claim. Until then the war of words will continue, with both nations using the same rhetoric: lost jobs, lost revenue and lost opportunities.