



WTO Reporter
Highlights
(C) 2005 The Bureau of National Affairs, Inc.

April 2, 2007

SERVICES: U.S. AMBIVALENT ON APPEAL AGAINST WTO RULING ON GAMBLING COMPLIANCE

GENEVA--The United States refused to say March 30 whether it will appeal a World Trade Organization panel ruling which found that Washington failed to comply with an earlier panel decision against U.S. restrictions on Internet gambling.

The compliance panel ruling, made public the same day, found that the United States failed to take any measures to bring it in line with the original panel ruling issued in April 2005. The compliance ruling was issued to the two parties in the dispute--the United States and Antigua and Barbuda--on Feb. 15 (32 WTO, 02/16/07).

If the United States does not appeal the ruling, Antigua will be free to request WTO authorization to impose trade sanctions on U.S. imports if Washington fails to bring the measures in line with the WTO's findings. The United States now has 60 days to announce whether it will appeal.

Antigua Hails 'Decisive Victory.'

Gretchen Hamel, spokeswoman for the Office of the U.S. Trade Representative, admitted that the compliance panel "did not agree with the United States that we had taken the necessary steps to comply" with original ruling, adding that the panel faulted Washington on "one narrow aspect of U.S. gambling laws" involving remote gambling on horse racing.

Hamel declined to say whether the United States would file an appeal. "We are currently reviewing our options," she declared.

The tiny island-nation of Antigua, with a population of some 70,000, hailed the compliance panel ruling as a "decisive victory."

"This is a smashing success for Antigua in every possible way," declared Antigua's WTO ambassador John Ashe. "The report will sweep away any lingering doubt that Antigua has obtained a clear and convincing win over the United States in this matter. It is now time for the United States to meet its international trade obligations to Antigua and work with us in a constructive manner to resolve this dispute."

Mark Mendel, the Texas-based lawyer who headed Antigua's legal team, said he believed the chances of the United States reversing the compliance panel's findings were remote.

"The panel's logic is impeccable and the law and facts are just as much in our favour as they could possibly be," Mendel declared. "The United States on one hand prohibits competition in remote gambling from Antigua while on the other promoting and protecting a massive domestic industry."

According to the Antigua Online Gaming Association, 32 online casinos are currently licensed to operate in the country, employing around 1,000 people and bringing in annual revenue of \$130 million. This is way down from the 120 operators and \$1 billion in revenue which the industry brought in 2000, a decline attributed to tougher restrictions on Internet gambling instituted in

the United States, the country's principle market.

Some of Antigua's operators are owned by British gambling interests, who have paid most of the legal fees of the case. Mendel, however, said the Antiguan government itself has borne "all of its own, considerable, costs directly."

The original panel concluded that U.S. restrictions on Internet gambling restrictions violated the United States' scheduled commitments under the WTO's General Agreement on Trade in Services (GATS). In specific, the panel agreed with Antigua that U.S. market access commitments under Section 10.D of its GATS schedule covering "other recreational services" do include gambling services, rejecting Washington's claim that it never intended to allow the cross-border supply of such services. The panel also maintained that the U.S. commitment to allow unrestricted market access on recreational services applies to all means of delivery, including the Internet.

The panel agreed with the United States that its restrictions could nevertheless be justified under Article XIV of the WTO's General Agreement on Trade in Services (GATS), which allows an exception from WTO services commitments for trade-restrictive measures deemed "necessary to protect public morals or to maintain public order."

However, the panel said the United States could not rely on the Article XIV defense because its restrictions were applied in a discriminatory manner. In specific, the WTO said one federal statute--the Interstate Horseracing Act (IHA)--permits interstate wagers to be accepted by an off-track betting system via telephone or other modes of electronic communication (including the Internet).

Allowing the possibility of online gambling on horse racing while banning the remote supply of gambling services from overseas suppliers violates the "chapeau" of Article XIV requiring that any measure taken under the provision must not constitute "arbitrary or unjustifiable discrimination" between countries or a "disguised restriction" on trade in services.

No U.S. Compliance Measures.

In its ruling, the compliance panel agreed with Antigua that the United States had failed to take any measure to implement the panel's findings. It also ruled that the United States could not effectively seek to "retry" its case before the compliance panel by presenting claims that had been rejected by the WTO's Appellate Body when reviewing the U.S. appeal against the original panel ruling.

The United States told the compliance panel that the measures it had taken to comply with the ruling were the same measures at issue in the original dispute--the 1961 Wire Act, the 1961 Travel Act, and the 1970 Illegal Gambling Business Act--because those measures were consistent with WTO rules. The United States added that it now had new evidence and arguments showing that the measures were indeed nondiscriminatory and qualified for the exception to WTO rules under Article XIV of the GATS, and that it was entitled to present these arguments and evidence before the compliance panel.

The United States added that the IHA also qualified for the Article XIV exception because the measure does not discriminate between countries on their face, and because the "plain text" of the IHA does not provide an exemption from the Wire Act, the Travel Act, and the Illegal Gambling Business Act.

The compliance panel said the U.S. position "can be characterized as an acceptance of the original ruling on condition that it retains the right to seek a more favorable conclusion in a further proceeding...the Panel cannot

accede to the United States' request to reach a conclusion different from that reached by the original Panel as upheld by the Appellate Body...without any change relevant to the measures at issue."

State Gambling.

The compliance panel also indicated that, even if it were to agree to allow the United States to present new arguments and evidence, it could have additional grounds to rule against the United States by virtue of new evidence presented by Antigua showing that Internet gambling is allowed within a number of U.S. states, thus undermining U.S. claims that the gambling restrictions were necessary to protect "public morals."

The compliance panel also declared that two developments which occurred after the original panel issued its ruling and raised by Antigua confirm that the panel's findings were correct: the U.S. Justice Department's prosecution of gambling businesses outside the United States (including the Antigua-based BetOnSports.com, whose chief executive officer was arrested last July while transiting through the United States) and the adoption of the Unlawful Internet Gambling Enforcement Act (UIGEA), which was signed into law last October (191 WTO, 10/3/06).

The compliance panel said the prosecutions showed that the original panel was correct in stating that U.S. authorities tolerated U.S. gambling firms operating in accordance with the IHA, even if it was not explicitly authorized under federal law.

"It is striking that the Department of Justice has not, apparently, ever initiated a criminal prosecution under the measures at issue of a pari-mutuel wagering supplier in the United States who transmits bets and wagers in violation of the Wire Act but who, at the same time, has obtained consent from the horse racing associations and shares its revenue with the racetracks in accordance with the IHA," the compliance panel declared.

The compliance panel also noted that the United States had the opportunity to end the ambiguity between the IHA and the three other federal provisions banning Internet gambling when adopting the UIGEA. Instead, rather than take that opportunity, the United States enacted legislation that confirmed that the ambiguity at the heart of this dispute remains and, therefore, that the United States has not complied," the compliance panel declared.

The UIGEA in fact imposed tougher restrictions on Internet gambling by increasing criminal penalties for gambling businesses that accept payment through credit cards, checks, or fund transfers.

By Daniel Pruzin