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Gambling Panel Hints At Broader U.S. Compliance Problem

The latest World Trade Organization dispute settlement panel in the U.S.- Antigua gambling dispute rejected U.S. efforts to reargue the case that it had lost before the Appellate Body, saying that allowing the U.S. to do so would run afoul of dispute settlement rules.

The U.S. had tried to make the case that it was eligible for an exemption from its services trade obligations under Article 14 of the General Agreement on Trade in Services even though the Appellate Body had rejected that argument. With the exemption, the U.S. could justify its Internet gambling ban as a measure to protect public morals.

In rejecting the U.S. arguments, the panel ruled that the U.S. has not complied with the Appellate Body ruling because it has taken no action to prove that it does not apply its Internet gambling restrictions in a discriminatory manner. The Appellate Body had ruled the U.S. was discriminatory in its application of the Wire Act, U.S. Illegal Gambling Business Act, and the Travel Act, citing in particular the Interstate Horseracing Act, which the Appellate Body said appeared to allow some forms of Internet gambling in the U.S.

But the compliance panel did raise the possibility that if it had been able to reopen the case, it could have found that more than a clarification of the relationship between the IHA and the three federal laws was required from the United States in order to comply with its WTO obligations. Specifically, the panel implied that the Wire Act itself might have to be changed in order for the U.S. to be able to invoke the GATS exemption and therefore comply with those obligations.

According to Mark Mendel, Antigua's lead lawyer in the case, the Wire Act itself is discriminatory because it allows Internet gambling within a state, but not across state or international borders. The compliance panel said that any finding that the Wire Act does not on its face discriminate between countries would overlook the fact that its prohibition does not apply to remote wagering in the United States to the same extent as interstate or foreign commerce.

Similarly, the panel noted that the Unlawful Internet Gambling Enforcement Act, enacted in October 2006, does not include intrastate transactions in its definition of "unlawful Internet gambling."

According to Mendel, the panel statement makes clear that the Wire Act itself is discriminatory and, along with the UIGEA, would have to be changed for the U.S. to qualify for the Article 14 exemption. The U.S. argument under Article 14 was predicated on the idea that the U.S. does not permit Internet gambling, which the compliance panel shot down more conclusively, Mendel said.

The idea that the U.S. would have to change federal law in order to comply with its WTO obligations seems at odds with the apparent U.S. government view that the U.S. only needs to clarify the relationship between the IHA and U.S. federal laws in order to come into compliance with its WTO obligations.

Opponents of the WTO have long argued that the Appellate Body ruling opens the door to new challenges by other trading partners. A senior European Union official has stated in public that the European Commission may consider bringing a WTO case against U.S. gambling restrictions. But Mendel expressed doubts that the EU would

ever choose to bring its own case against gambling restrictions in the U.S., as member states do not have a unified policy on this issue.

The compliance panel based its argument that it could not reargue the underlying case on its reading of the Dispute Settlement Understanding Article 17.14, which states that an Appellate Body report shall be "unconditionally accepted by the parties to the dispute."

The WTO will adopt the compliance panel report by no later than May 30 unless the U.S. decides to appeal the decision. A USTR spokeswoman said that the U.S. is currently reviewing its options. If the U.S. decides to appeal, a decision could be reached by the end of the summer, according to Mendel.

Antigua has made several offers to the U.S. for an acceptable negotiated solution, but so far the U.S. has been unresponsive, according to Mendel. One idea would be to allow remote gambling services from Antigua for a three-year period and at the same time conduct an overall assessment of the gambling industry, including services provided by Antigua, to see whether and how the industry can be regulated, he said.

If the U.S. continues to ignore its WTO obligations, Antigua would most likely not choose to apply retaliatory tariffs, but would rather look to suspend the application of trademarks and copyrights in Antigua provided for by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Mendel said.

This is both because the applications of punitive tariffs would have little effect on the U.S. given the small volume of trade involved and because their application would hurt consumers in Antigua, Mendel said.

However, Mendel said he expected the U.S. to eventually comply with its WTO obligations, as the U.S. has never before refused to comply with the findings of the WTO, in part because it would undermine the rule of law in the WTO.