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Tiny Antigua Roils U.S. IP

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With a decision likely just weeks away in a multiyear Internet gambling dispute between the United States and the Caribbean island nation of Antigua and Barbuda, lobbyists who are keeping a close eye on the case are putting their cards on the table.

The international dispute, brought by Antigua at the World Trade Organization in 2003 over a U.S. ban on offshore gambling, could impact several industries — not just gaming.

That's because Antigua, which has won its final appeals at the WTO, has moved on to the punishment phase and has asked for retaliation of a most unusual kind: the right to violate WTO rules on intellectual property. In technical jargon, Antigua is waiting for the WTO to say whether the country can suspend its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, known as

TRIPS. Antigua is calling for \$3.4 billion in sanctions.

Groups like the Motion Picture Association of America and the Recording Industry Association of America, which represent sectors that rely heavily on intellectual property rights, are keeping a close watch on the case and making their voices heard on Capitol Hill and with the administration. Sources said in some cases the groups are leaning on the United States trade representative to settle the matter directly with Antigua before their copyrights could come into jeopardy.

Perhaps no lobbyists in town are watching it more closely than the team at Black Swan LLC, a new lobbying enterprise that represents the Antigua Online Gaming Association, a group that first encouraged its government to bring the case to the WTO and the industry that could profit the most from the case.

Black Swan's three partners — all former lawyers at Mayer Brown — James Jochum, Andrew Shore and Marguerite Trossevin — have spent the better part of a year briefing Members and staff, administration officials and fellow lobbyists about the issue.

"The first phase was to educate policy makers on the Hill about the case," said Shore, a former chief of staff for the House Republican Conference. "Outside of the

trade committees, Congress doesn't take a lot of interest in disputes until they actually hit the sanctions phase. We wanted to get ahead of the curve on that."

The government of Antigua began the dispute resolution case at the WTO to challenge a U.S. ban on cross-border gambling services offered by Antiguan companies such as World Sports Exchange. The WTO ruled that because the United States allows some remote gambling — in the case of horse racing wagers — the United States could not discriminate against foreign companies from offering similar services in any types of gambling. The United States appealed, but Antigua's argument prevailed.

The Antigua Online Gaming Association reached out to the Black Swan lobbyists, then at Mayer Brown, hoping to get some results after the victories. "The industry was frustrated, they had won the case, the appeal, and they couldn't seem to get any form of relief or even negotiations going with the U.S. trade rep," Shore said.

Shore said he and his colleagues have worked to raise awareness of the issue among entertainment and high-tech groups. "We don't really want anyone to be surprised by anything that may happen," he said.

But the lobbyists have a clear goal: Get the case resolved for Antigua. "We don't want there to be any misperceptions about Antigua's intent here," Jochum said. "Once you bring up IP, that gets people excited. Our interest is resolving the case."

It gets people riled up, not surprisingly, because if the WTO approves Antigua's request, "it could mean they would not have to recognize the copyright protections they would normally have to recognize," Trossevin said. "That could lead to production of goods in Antigua that would not honor the copyright or patent protections of US companies."

That's a scary prospect for companies in the entertainment sector.

RIAA spokeswoman Liz Kennedy e-mailed a statement saying her group opposes such a form of sanctions.

"If Antigua were to 'withdraw' its TRIPS commitments, it would simultaneously be violating other aspects of its international obligations — including under the Berne Convention," she said, referring to the 19th century international convention on copyright law. "Moreover, it would presumably be permitting conduct that would violate its own internal domestic legislation, including its criminal law. Does it make sense for a country to expressly allow criminal conduct? We believe that it most certainly does not."

The MPAA declined comment, but did send a five-page letter on the matter earlier this year to the USTR. "The real and resulting economic harm would vastly exceed any amount the [WTO] might approve," wrote Greg Frazier, MPAA's executive vice president for worldwide government policy. "While we cannot provide a reliable estimate of the damage Antigua's proposal would cause the US, we do know that MPAA members lost \$6.1 billion to piracy in 2005, eighty percent of which came from piracy overseas. Piracy also cost the US approximately 120,000 jobs in 2005."

A USTR official said the TRIPS suspension would be highly unusual but not entirely unprecedented because it is difficult for a nation the size of Antigua — with a population under 90,000 people — to make a ripple with sanctions against the United States. “We’ve made clear that because the only point where they’ve found any discrimination was on horse racing, then any kind of retaliation should be limited to the amount bet on horse racing, not on all gambling,” the USTR official said.

The WTO panel didn’t accept an argument by the United States that the ban was in place on morality grounds because remote gaming for horse racing and other types of gaming is permitted in the United States. “The panel said you allow remote gaming for horse racing and interstate lotteries, so you are engaged in protectionism,” Shore said. “The panel said we’re not going to distinguish between forms, if you let one, you have to let them all.”

The USTR official added that this spring after the U.S. lost its appeal, USTR filed under Article 21 of the General Agreement on Trade and Services a notification that the U.S. intends to clarify its services schedule not to include gambling. “We asked WTO for permission to clarify,” the official said.

That move, though, has sparked its own international brouhaha, with the European Union and several other countries asking for potentially costly “offsets” related to those changes. The USTR also is negotiating with the EU and Antigua, and the current deadline for those talks is Dec. 14.

The Poker Players Alliance, which opposes a recently enacted online gambling ban, said it has used the Antigua case in its own lobbying arguments. “The remedy that Antigua is seeking is really troublesome,” said the group’s lobbyist, John Pappas. “It’s remarkable that the U.S. has let it get so far down the road.”

PPA supports a bill sponsored by House Financial Services Chairman Barney Frank (D-Mass.), the Internet Gambling Regulation and Enforcement Act, which would regulate Internet gambling, inasmuch as it allows for licensed and regulated Internet poker.

“We believe the Antigua case could be the driving force to passing a Barney Frank-style bill,” Pappas said. “Certainly we don’t want the U.S. to suffer any trade sanctions. If the [Frank] bill passed, they would remove their request for sanctions.” The Frank bill also has champions from the GOP side including Rep. Ron Paul (R-Texas).

Pappas said the Antigua case is part of the Poker Players Alliance’s “standard talking points” when meeting with Members. “It’s eye-opening for some Members. There are Republicans and Democrats alike who are pro-free-trade, who never realized that our stance on Internet gaming has gotten us into an international bind.”

Shore called the Frank bill “a tremendous first step” and added that the lobbyists are working with Frank’s and Paul’s staffs on the details. “We appreciate everything Chairman Frank and Congressman Paul have done to advance this issue,” he added.