

WTO PANEL RULES AGAINST UNITED STATES IN INTERNET GAMBLING CASE – WHAT DOES IT MEAN?

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Late this month (March 2004), a WTO Dispute Resolution Panel (the “Panel”) released a confidential report to WTO Member State Parties in the WTO dispute United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services, WT/DS285. . The confidential decision reportedly finds that the United States is violating its commitments under the General Agreement on Trade in Services (GATS) by not providing market access and/or national treatment under GATS to Internet gambling services provided by operators licensed by the Government of Antigua and Barbuda.

Antigua and Barbuda asserted that the United States has made a GATS commitment in relation to gambling and betting services on its schedule of specific commitments and thus, the claimed total prohibition on gambling and betting services provided from outside the United States violates various U.S. obligations under GATS; Although the final version will not be released to the public until late May at the earliest, the United States has already announced its intention to appeal the adverse ruling to the WTO Appellate Body.

Potential Implications for U.S. Laws and Enforcement Policies with Respect to Internet Gambling

The ramifications of the panel report cannot be fully appreciated until it is publicly released. However, Internet gambling service providers should not be lulled into believing the WTO Panel Report has changed U.S. laws or policies, or that the Department of Justice will halt its ongoing investigations into potentially illegal on-line activities. The WTO report is not final and will be appealed.

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Moreover, even if the Appellate Body ultimately agrees with the Panel's decision, such a decision does not affect U.S. law. Only Congress and the President can amend U.S. law, and we have witnessed years of efforts of the U.S. Congress to amend tax laws to comply with the WTO Subsidies and Countervailing Measures Agreement. Here the stakes are tiny in comparison, and the U.S. Government may prefer to allow Antigua and Barbuda to impose trade sanctions (which will also harm that country) or pay compensation rather than amend its laws.

Potential Implications for Internet Gambling and Internet Services

If upheld by the Appellate Body, this decision could have long term implications for internet gambling. Although the United States may prefer to allow Antigua & Barbuda to impose trade sanctions rather than change its law, a decision by the Appellate Body (and indeed even this decision) would open the doors to future WTO dispute settlement cases in the internet gambling area. Other WTO members with active internet gaming industries (for example, England) and more economic clout vis-à-vis the United States may follow Antigua's lead. If so, the United States may need to take another look at its laws and policies on Internet gambling.

In addition, the Panel may have found that the United States treated internet gambling services and services suppliers less favorable than land-based (e.g. casino) gambling services and service suppliers. To find a GATS violation, here, the Panel would have needed to find internet and land-based gambling services to be "like services." If the Panel made such a finding, and it is upheld by the Appellate Body, the ruling could be a significant for internet service suppliers, who could use it to attack other restrictions imposed by WTO Members on internet services only. Thus, depending on its precise findings, this panel report could have broad implications for many types of internet-based services which have become substitutes for conventional services.

Potential Implications for the EC Internet Gaming Policy Developments.

The EC Commission intervened in this case. In the Commission's view, the case provides a unique opportunity to clarify whether the US GATS schedule had to be interpreted in accordance with the standards used by the EC and most of the WTO Members (the CPC). At the same time the Commission considered that taking the side of Antigua and Barbuda was without further risk as the European Community has made no commitment regarding gambling services.

As such the outcome of the WTO case can have no impact on the current EC debate on gambling. Both the review of the e-commerce directive and the discussion about the Services directive are only addressing Internal market questions whereby the Commission intends to study whether there is a clear benefit to regulate gambling (and on-line gambling) at European level.

Considering the recent policy developments regarding remote gambling in the UK, it will be interesting to see what the UK position will be in relation to this WTO case. The DCMS position paper on “The future regulation of remote gambling” from April 2003 is highly interesting in this regard. It expresses “*the Government’s desire to see Britain become a world leader in the field of online gambling and yet, at the same time, be sensitive to any reservations that there may be in other jurisdictions*” Does this mean that the UK shall take any opportunity to press the EC Commission to continue the WTO process to get access to the US gambling market for European, understand British, online gambling service suppliers or shall the UK Government be sensitive to the US reservations? The answer to this question could result in the emergence of a new transatlantic trade dispute.