WORLD TRADE ORGANIZATION

WT/DS285/18
7 July 2006

(06-3316)

Original: English

UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

Recourse to Article 21.5 of the DSU by Antigua and Barbuda

Request for the Establishment of a Panel

The following communication, dated 6 July 2006, from the delegation of Antigua and Barbuda to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Antigua and Barbuda is pleased to submit this request for the establishment of a panel to the Chairman of the Dispute Settlement Body and to the United States of America pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* of the WorId Trade Organisation with respect to the dispute known as *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285).

Background

On 21 July 2003, the Dispute Settlement Body (the "DSB") of the WorId Trade Organization (the "WTO") established a panel at the request of Antigua and Barbuda in this dispute ("DS285"). Both the panel and the Appellate Body in DS285 found certain measures of the United States to be inconsistent with certain of the obligations of the United States under the WTO's *General Agreement on Trade in Services* (the "GATS"). On 20 April 2005, the DSB adopted the report of the panel, as modified by the report of the Appellate Body. The resulting DSB recommendations and rulings include, *inter alia*, the recommendation that the United States bring the measures found to be inconsistent with the GATS into conformity with its obligations under that agreement.[1]

On 6 June 2005, Antigua and Barbuda communicated a request to the DSB that the determination of a reasonable period of time for compliance by the United States with the recommendations and rulings of the DSB be the subject of binding arbitration, in accordance with Article 21.3(c) of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). On 30 June 2005, an arbitrator was appointed by the Director-General of the WTO.

During the course of the proceedings before the arbitrator, the United States argued that "both the legal form of implementation and the technical complexity of the contemplated measures require a

[1] WT/DS285/AB/R, para. 374.

reasonable period of time of no less than 15 months".[2] The United States took the position during the arbitration that it intended to seek compliance with the DSB recommendations and rulings through legislation.[3]

On 19 August 2005, the award of the arbitrator determined that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in DS285 was 11 months and two weeks from 20 April 2005. This period of time expired on 3 April 2006 without any measure being adopted by the United States.

On 10 April 2006 the United States submitted a status report to the DSB regarding implementation of the DSB recommendations and rulings.[4] The United States informed the DSB that, in its opinion, it was in compliance with the recommendations and rulings of the DSB based on the following statement (the "DOJ Statement") made by a representative of the United States Department of Justice to a subcommittee of the United States House of Representatives on 5 April 2006:

> "The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes.
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> In view of these circumstances, the United States is in compliance with the recommendations and rulings of the DSB in this dispute."

At a meeting of the DSB on 21 April 2006, the United States informed the DSB that in light of the DOJ Statement, it was in compliance with the recommendations and rulings of the DSB. At the same meeting, Antigua and Barbuda expressed its disagreement with the United States' assertion of compliance, noting that the DOJ Statement was in fact a restatement of one of the arguments made by the United States to the panel and the Appellate Body during the course of the proceedings.

On 23 May 2006, Antigua and Barbuda and the United States concluded an "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding Applicable to the WTO Dispute *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285)" (the "Agreed Procedures").

On 8 June 2006, Antigua and Barbuda initiated proceedings under Article 21.5 of the DSU, requesting consultations with the United States. These consultations were held in Washington, D.C. on 26 June 2006, but did not result in a settlement of the dispute. Consequently, there is a disagreement between the parties as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB in DS285, within the meaning of Article 21.5 of the DSU.

The United States Has Failed to Comply with the Recommendations and Rulings of the DSB

Antigua and Barbuda disagrees that the United States has complied with the recommendations and rulings of the DSB in DS285 and believes that the United States remains out of compliance with the United States' obligations under the GATS with respect to the provision of

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[2] *US – Gambling*, Arbitration under Article 21.3(c) of the DSU, Submission of the United States of America, para. 9.

[3] *Id.*

[4] WT/DS285/15/Add.1.

cross-border gambling and betting services from Antigua and Barbuda to consumers in the United States.

No Federal Legislation

First, Antigua and Barbuda considers that the United States has taken *no* measures to comply with the recommendations and rulings of the DSB. In DS285, Antigua and Barbuda established the existence of three federal statutes which serve to prohibit companies from Antigua and Barbuda from providing cross-border gambling and betting services to consumers located in the United States in violation of the United States' obligations under the GATS. These three federal statutes are (i) the Wire Act of 1961,18 US.C. §1084 (the "Wire Act"); (ii) the Travel Act, 18 US.C. §1952 (the "Travel Act"); and (iii) the Illegal Gaming Business Act, 18 US.C. §1955 (the "IGBA"). The DSB recommended that the United States bring these three measures in conformity with its obligations under the GATS.

Neither during the reasonable period of time nor to date has the United States introduced, much less passed, any legislation that would amend or effect the Wire Act, the Travel Act or the IGBA in such a manner as to make those statutes WTO-consistent. Furthermore, two bills which have been introduced in the current United States' Congress – H.R. 4777 and H.R. 4411 – are expressly contrary to the recommendations and rulings of the DSB in DS285, as each would further institutionalise the discriminatory effect of the three United States statutes. The United States has therefore failed to bring these federal statutes into conformity with its obligations to Antigua and Barbuda under the GATS and each statute remains contrary to Article XVI of the GATS without meeting the requirements of Article XIV of the GATS.

DOJ Statement not a "Measure" for Purposes of the DSU

Second, despite having insisted to the Article 21.3(c) arbitrator that the United States would pursue a legislative remedy to bring itself into conformity with the recommendations and rulings of the DSB in DS285, the United States asserted it was in compliance on 10 April 2006 by reference to the DOJ Statement. However, the DOJ Statement does not constitute a "measure" for purposes of the DSU. The DOJ Statement is nothing but an utterance of a government official without any independent legal effect under United States law or under the GATS, the DSU or any other WTO agreement.

Not a "Measure Taken to Comply"

Third, the DOJ Statement is nothing more that a restatement of the position taken by the United States during the course ofDS285 that was ultimately found unpersuasive by both the panel and the Appellate Body. Assuming, *arguendo,* that an utterance by a government employee can constitute a "measure" for purposes of the DSU, Antigua and Barbuda does not believe that a simple restatement of a legal position taken by a party to a dispute during its regular course can be considered a "measure *taken to comply* with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU

The United States Remains Out of Compliance with its GATS Obligations

Fourth, regardless of whether the DOJ Statement constitutes a "measure" for purposes of the DSU or whether it can be considered a "measure taken to comply" within the meaning of Article 21.5 of the DSU, the DOJ Statement does not bring the United States into compliance with the recommendations and rulings of the DSB in DS285. In this regard Antigua and Barbuda notes that, *inter alia:*

(1) As Antigua and Barbuda had observed to both the panel and the Appellate Body, there are a number of reasonable alternative measures available to the United States other than prohibition to address the concerns of the United States with respect to the provision of remote gambling and betting services. Since the adoption of the panel and Appellate Body reports by the DSB, even more alternatives have become available. Ironically, as further discussed below each of the two bills pending in the United States Congress explicitly recognise that it is possible to address risks of remote gambling with extant technology, fundamentally undermining the United States' defence under Article XIV of the GATS.

(2) Since the adoption of the recommendations and rulings of the DSB in DS285, not only have there been no prosecutions of or enforcement actions brought against domestic remote gambling and betting service providers operating pursuant to the Interstate Horse Racing Act (the "IHA"), but in fact there has been significant growth in and expansion of domestic remote gambling and betting services generally in the United States.

(3) The position of the United States as reflected in the DOJ Statement is not supported by the bulk of United States legal authority.

(4) Assuming the accuracy of the portion of the DOJ Statement in which it is said that "[t]he Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity" the reference to a *civil* investigation is evidence of the discriminatory application of its laws by the United States, as licensed, regulated providers of cross-border gambling and betting services from Antigua and Barbuda to the United States remain subject to *criminal* prosecution by United States authorities[5], contrary to the obligations of the United States under the GATS.

Pending Legislation in the United States Congress Would Violate the GATS

As noted above, two bills are currently pending in the United States Congress which expressly address the provision of remote gambling and betting services. One bill was introduced into the United States Congress on 16 February 2006 as H.R. 4777 and is entitled the "Internet Gambling Prohibition Act" (the "Goodlatte Bill"), and another was introduced on 18 November 2005 as H.R. 4411 and is cited as the "Unlawful Internet Gambling Enforcement Act of2005" (the "Leach Bill" and, collectively with the Goodlatte Bill, the "Bills"). Each of the Bills is in key respects expressly contrary to the recommendations and rulings of the DSB.

Each Bill is not only non-responsive to the recommendations and rulings of the DSB, rather each is in fact directly contrary to the recommendations and rulings in several key respects. The Goodlatte Bill is cast as an amendment to the Wire Act, designed to expand the coverage of the Wire Act to most types of gambling services offered over the Internet, whereas the Leach Bill does not expressly purport to prohibit any class of remote gambling and betting or further criminalise remote betting *per se*. Rather, the Leach Bill seeks to criminalise facilitation of or participation in certain financial transactions associated with what the legislation defines as "unlawful Internet gambling". The Goodlatte Bill also includes prohibitions on certain financial transactions similar to those contained in the Leach Bill in its proposed amendments to the Wire Act.

Although addressed in slightly different ways, both the Goodlatte Bill and the Leach Bill contain three significant exceptions from their coverage. *First*, both of the Bills exclude from their

[5] On 17 May 2006, an indictment was unsealed in which the United States Department of Justice indicted a number of companies and individuals, including the former holder of a gambling and betting license issued by Antigua and Barbuda, for various alleged violations of United States laws, including the Wire Act, simply by the provision of those services to consumers in the United States.

coverage transactions made in accordance with the IHA, effectively removing remote betting and gambling in accordance with the IHA from the scope of the legislation. *Second,* both of the Bills specifically exclude from their coverage transactions that the Leach Bill calls "intrastate transactions", effectively sanctioning remote gambling that occurs wholly within the borders of an American state. *Third,* both of the Bills exclude from their coverage remote gambling conducted by Native American tribes in accordance with existing federal legislation applicable to Native American gaming. Neither of the Bills provide gambling and betting service operators located in Antigua and Barbuda with any access to consumers in the United States or are in any way responsive to the recommendations and rulings of the DSB in DS285.

The defence of the United States in DS285 under Article XIV of the GATS was predicated on the notion that "remote" gambling-which the United States defined as gambling in which the bettor and the gambling service provider or an agent are not physically in the presence of each other when a wager is made-presents certain "risks" that are either not present or not present to a similar extent than when gambling is not "remote". Although gambling over the Internet can be remote it is not the exclusive mode of remote gambling. None of the federal laws that Antigua and Barbuda challenged prohibit remote gambling. What they prohibit are certain forms of *cross-border* gambling. It was never alleged by the United States nor was it found by the panel or the Appellate Body that *cross-border* gambling presents any special "risks" that could come within the scope of Article XIV of the GATS. Thus, while "cross-border" gambling may in most cases be "remote" it does not however hold true that all "remote" gambling is "cross-border". Although the Appellate Body decided that the United States had established the three federal statutes in question as "necessary" to protect against "risks" associated with remote gambling, the failure of the United States to meet its burden of proof under the chapeau of Article XIV resulted in the overall failure of the Article XIV defence. The three exceptions to the coverage of the Goodlatte Bill and the Leach Bill mentioned above only serve to highlight the chapeau failure and the discriminatory and trade restrictive application of the three federal laws by the United States government.

Request for Establishment of a Panel

Because there is a disagreement between the parties as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB in DS285, within the meaning of Article 21.5 of the DSU, Antigua and Barbuda requests the establishment of a panel under Article 21.5 of the DSU, and further requests that this matter be referred to the original panel in DS285 with the standard terms of reference under Article 7 of the DSU.

Antigua and Barbuda additionally respectfully requests that the panel:

(1) find that the United States has not taken measures to comply with the recommendations and rulings of the DSB in DS285;

(2) find that the Wire Act, the Travel Act and the IGBA remain in violation of the United States' obligations to Antigua and Barbuda under, *inter alia,* Article XVI of the GATS without meeting the requirements of Article XIV of the GATS; and

(3) recommend that the DSB request the United States to bring the Wire Act, the Travel Act and the IGBA into conformity with the obligations of the United States under the GATS.

Pursuant to the Agreed Procedures, the United States has agreed to accept the establishment of a panel at the first meeting at which this request for the establishment of a panel appears on the agenda.