

Costa Rica and Antigua file for WTO arbitration

The international Internet gambling dispute continues. Costa Rica and Antigua separately filed for World Trade Organization arbitration, seeking compensation from the United States as a result of the US withdrawal of its commitment on cross-border gambling services.

The new arbitration requests could potentially derail the settlement for compensation agreed to late last year by the US and the EU. The arbitration filing makes it possible for the EU to reconsider its settlement with the U.S. and join the arbitration proceeding, opening up a new phase in the Internet gambling trade dispute.

„The decision by Antigua and Costa Rica to take the United States to arbitration will test the limits of the WTO process and squarely challenge the U.S. resolve to withdraw its GATS commitments,“ said Nao Matsukata, formerly Director of Policy Planning for USTR Robert Zoellick and now a Senior Advisor for Alston and Bird LLP.

„If the U.S. finds the decision of the WTO arbitrator unacceptable, under procedures outlined in the GATS, it could unilaterally withdraw, creating an unprecedented crisis of confidence in the global trading system. The best solution remains for Congress to pass legislation that would create a legal and regulated framework for online gaming in the United States and for the United States to remain in the GATs schedule to provide all providers legal protection under the WTO.“

U.S. withdrawal from GATS following this new arbitration carries the risk of expensive new sanctions levied against U.S. exports and intellectual property. „If the U.S. withdraws

following another adverse arbitral decision, the country would face potential retaliation from all WTO Members affected by the arbitration, a pool of countries including the EU, Canada, and Japan," added Matsukata.

„Inviting sanctions at a time when both the US Administration and Congress are both striving to stimulate an economy on the edge of recession seems foolhardy at best, especially when draft domestic legislation already exists that would create a renewed flow of both business and tax revenues throughout the nation's gaming sectors.“

Lode Van Den Hende, a WTO expert and trade attorney with Herbert Smith in Brussels said, „There is a real possibility that the arbitration body will find that unless the U.S. provides commercially meaningful compensation to Costa Rica and Antigua, it cannot withdraw its commitment on gambling, without risking trade sanctions from the affected parties.“

Costa Rica's action raises questions about what India and Macao might do as the other nations that have yet to come to terms with the U.S. over the withdrawal of the Article XXI commitment related to cross-border gambling services.

Under the WTO's GATS Article XXI rules, any country withdrawing its market access must provide compensation to affected countries that maintains a general level of mutually advantageous commitments not less favorable to trade than that provided for in schedules of specific commitments prior to the negotiations. The U.S. negotiated settlements with four of the eight nations seeking compensation – the E.U., Japan, Canada, and Australia, providing compensation, in the form of markets access to U.S. domestic postal services, warehousing, R & D, and technical testing sectors.

Costa Rica, Macao, India and Antigua did not reach an agreement with the U.S. over the withdrawal of its gambling commitment, as the above market sectors offered by the U.S.

were of no commercial interest to those countries.

After the WTO ruled that the U.S. had violated trade rules in barring Antiguan online gaming operators from the U.S. market, the U.S. withdrew its WTO obligations with regard to free trade in the gambling area. The U.S. decision to withdraw its market commitments, in order to comply with the WTO, is the first instance of such an action by a WTO member. The action by the U.S. sets a precedent that other WTO members could copy in order to back out of their own commitments once they consider them inconvenient. In turn, the Costa Rican and Antiguan arbitration requests are the first ever in response to a withdrawal of commitments.

It is possible that these arbitration requests will impact the way in which Antigua decides to implement the USD 21 million per year in trade sanctions it received as compensation for U.S. noncompliance with WTO rulings in the gambling dispute. An option available is for the country to take the compensation in the form of intellectual property waivers.

„It is time for the U.S. to end its hypocritical practices that discriminate against foreign online gambling operators, while allowing U.S. gambling operators to accept bets for certain forms of gambling,“ said Jeffrey Sandman, spokesperson for the Safe and Secure Internet Gambling Initiative. „Regulation of Internet gambling should be supported as a means to resolve this trade dispute.“