Op-Ed/Editorials – Internet Gambling: Antigua v. United States—Another Perspective

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Mark E. Mendel, Esq. Mendel Blumenfeld, LLP

There has been much debate over the meaning and impact of the recent ruling of the World Trade Organisation in the dispute United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services. This state of affairs is well illustrated by the Op-Ed piece by I. Nelson Rose that ran in the 14 September 2005 issue of BASIS. To be fair, many gambling law specialists have made the same interpretative mistakes as Professor Rose, mainly due to the reality that WTO and International trade law do not fit nicely over traditional United States legal concepts. The truth is that far from winning the case, the United States lost, and lost big.

The WTO Decision

The final WTO decision followed an appeal by the United States of the decision of the WTO panel that had considered the dispute initially. In the first report, the panel had found that a number of federal and state laws violated the United States' commitments to Antigua under the WTO's General Agreement on Trade in Services (the "GATS"). The panel recommended that the WTO request the United States to bring the applicable laws into compliance with its obligations under GATS, in basic terms requiring the United States to provide Antiguan gambling service providers with market access to consumers in the United States.

The final decision upholds the initial panel, although on slightly different and narrower grounds. In the final ruling, the WTO made four key rulings:

(1) The United States Made Commitments for Gambling Services

Key obligations of the GATS only apply to the extent that a WTO member has made "specific commitments" for the service sector at issue. The WTO ruled that the United States had made commitments to provide "market access" to other WTO members for gambling and betting services in its schedule of specific commitments to the GATS.

(2) Antigua Established Offending Measures

The WTO ruled that the United States had adopted laws, or "measures," contrary to its obligation to provide market access to Antiguan gambling service operators. Specifically, the WTO ruled that Antigua established the existence of three federal laws which prohibited Antigua's gambling services (i) the Wire Act of 1961, 18 U.S.C. §1084 (the "Wire Act"); (ii) the Travel Act, 18 U.S.C. §1952 (the "Travel Act"); and the Illegal Gambling Business Act, 18 U.S.C. §1955 (the "IGBA").

(3) Antigua Established That the Measures Violate the GATS

The WTO found that the three federal statutes violated the GATS. Articles XVI:2(a) and (c) of the GATS concern "market access" for services and prohibit a WTO member from maintaining "numerical quotas" and other limitations on service suppliers or service operations of another member. The WTO agreed with Antigua that a law prohibiting the supply of a service or prohibiting the use of one or more means of delivery (such as the Internet) violates Articles XVI:2(a) and (c). On that basis, the WTO found that the three federal laws limited the number of service providers from Antigua in such a way as to violate the "market access" obligations of the United States under Article XVI.

This finding is crucial, for if a law prohibiting the provision of cross-border gambling services violates Article XVI of the GATS, then clearly all United States laws that have this effect breach the GATS.

(4) The WTO Rejected the United States' Moral Defence

The WTO found that the United States did not establish a "moral defence" to nullify its GATS violations. Article XIV(a) of the GATS provides an exemption allowing a WTO member to maintain measures that otherwise violate the GATS for reasons related to public morals and public order. To establish the exemption,

the United States was required to meet both prongs of a two-part test. First, a measure must be "necessary" to protect public morals and public order. Second, a measure must satisfy the requirements of the so-called "chapeau" of Article XIV; that is the measure must not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination." The WTO determined that the United States had provisionally met the first prong, but it further ruled that the United States had not established compliance with the "chapeau" and thus failed to establish its Article XIV defence.

The defence having failed, the United States lost the case.

Correcting the Misconceptions

Professor Rose's piece contains some common misconceptions of the WTO decision that are important to clear up. First, although it is true the WTO decided not to rule on any of the dozens of state laws that were before it, the basis for the decision was purely procedural, hyper-technical and easy to correct. The WTO simply said that Antigua had not presented the specifics of the state laws in sufficient detail to allow a ruling on those laws. We believe this ruling incorrect—but regardless, the exact proof that the WTO requires to establish a "measure" is now set in concrete, and should this issue come before the WTO again it will be easy to meet the established standard. And, crucially, we now know that once a "prohibition measure" is sufficiently proven it will per se be contrary to the GATS.

While not exactly a misconception, an aspect of the ruling that has proven hard to explain is the finding with respect to the United States' commitments. Given the historical antipathy of the United States government to gambling it is difficult for many to believe that the United States could have made a commitment to the provision of gambling services. Perhaps, the reasoning goes, the United States mistakenly allowed the commitment or could not have foreseen the delivery of gambling services via the Internet. Or maybe the WTO just got it wrong. The latter is certainly not true—of all the sections of the WTO decision, from a purely legal and logical approach the decision on the commitment is the most unassailable. As to whether the United States erred in making the commitment, it is important to note that all 148 WTO members have schedules of commitments under the GATS. These schedules were exchanged, revised, circulated and finalised among all members in a deliberative process that took months. And

during this process, many WTO members specifically excluded gambling services from their schedules—a fact the United States could not possibly have missed. Among the members that excluded gambling services in one form or another are the European Union, Finland, Sweden, Bulgaria, Senegal, Lithuania, Jordan, Egypt. Why the United States failed to do so as well must for now remain a mystery.

Most of the interpretive difficulties with the WTO decision come in its consideration of the United States' "moral defence" under GATS Article XIV. Admittedly, the WTO did itself no favour in its handling of this issue in the decision. The discussion is at once dense and obscure, contradictory in a number of ways, illogical and—worst of all—plain wrong in some respects. Yet despite the poor quality of the discussion, rules were established by the WTO that, if not always clear in the context of the case before it, nonetheless clarify how the defence is to be applied.

First, the WTO established how it will approach the "first prong" of the morals defence. The party raising the defence must first preliminarily establish that the laws are "necessary" to protect its citizens. After that finding, the other party has the burden to demonstrate that one or more reasonable, WTO-consistent alternatives to outright prohibition exist. Once alternatives are put forth, the burden shifts back to the defending party to demonstrate the inefficacy of the alternatives. While this methodology seems simple enough, in the US – Gambling dispute the WTO mangled its application to the facts before it. A careful reading of the materials reveals that the WTO accepted the United States' argument that the laws were "necessary" based solely on unilateral assertions of the United States, its elected officials and regulators. Although during the proceedings Antigua presented mounds of evidence of problems in the United States domestic gambling industry, no similar evidence was presented by the United States with respect to Internet gambling. It is questionable whether this low standard will stand when the issue comes before the WTO for consideration again.

Having decided that the United States had made its preliminary showing of "necessity" under the WTO methodology it was next for Antigua to establish regulatory or other alternatives to prohibition. Here, the WTO ruled that Antigua had not proposed any alternative measures for the WTO to evaluate and thus the United States had established the first prong—or the "necessity"—portion of the defence. This ruling is simply not true. Antigua presented a number of reasonable

alternatives to prohibition, including most specifically rigourous regulation and oversight among a number of others. But this evidence was simply ignored by the WTO. Certainly, if this issue comes before the WTO again the many alternatives raised by Antigua will be presented in such a way that it will be impossible for them to be ignored.

Professor Rose is correct in saying that the WTO, applying the second prong of the morals defence, held that the United States did not establish that it applied its laws in a non-discriminatory fashion. Where he steers off course is in what the United States can do to remedy its discrimination. For the United States did not base its defence on lack of regulation, on delivery of services via the Internet or the foreign nature of the services offered by Antigua. Nor did the United States distinguish between betting on poker, betting on sports contests, betting on horse racing or any other type of gambling activity as compared to another. Instead, it insisted that it needed to protect its citizens from the special evils of remote gambling as opposed to the (implicitly) lesser evils of non-remote gambling. At the end of the day this distinction was based solely upon whether the party taking the bet and the punter were in physical proximity—ostensibly so the operator could assess the age, competence and non-criminal status of the punter by observation.

The WTO decided that the United States had failed to show it applied its laws in a non-discriminatory fashion because from the evidence before it, the federal Interstate Horseracing Act (the "IHA") appeared to allow domestic remote gambling on horse racing. The WTO did not survey all United States remote betting opportunities and rule that the only discrimination was in fact in the IHA. What the WTO did do is rule that the United States could not prove non-discrimination in light of the IHA, and thus its defence failed.

Antigua concedes that the United States could comply with the WTO decision by either allowing Antigua market access or by banning all remote gambling in the United States. It is not a sports versus horses issue, nor a cards versus wheels issue. It is a remote versus non-remote issue, and the United States must not discriminate with respect to remote gambling if it is to comply with the WTO decision. What is so often missed is that the Wire Act, the Travel Act and the IGBA do not prohibit remote gambling at all. What they do seek to prohibit is cross-border gambling. While all cross-border gambling is arguably remote, not all remote gambling is cross-border. Ironically, under current United States law, every state in the Union could allow completely unregulated Internet gambling

solely within its borders and not violate any federal law.

Therein lies the real scope of US – Gambling. If the United States wants to comply with the WTO ruling without giving Antigua market access then it must prohibit all domestic remote gaming—which extends far beyond horse racing and grows inexorably day-by-day.

Professor I. Nelson Rose Responds:

Mark Mendel is a skilled advocate and he must be congratulated on his attempt to turn a losing case into a winner. But no matter how many times he says things like "we believe this ruling incorrect," "should this issue come before the WTO again it will be easy…," "it is questionable whether this low standard will stand when the issue comes before the WTO for consideration again," "this ruling is simply not true," and "certainly, if this issue comes before the WTO again…" he has to deal with this decision, not some hoped-for future reversal.

Mendel and Antigua's other lawyers did an excellent job before the WTO. But their problem is that the WTO ruled in favor of the U.S. on the issue of whether the U.S. could exclude remote gaming to protect its residents. Here are the Appellate Body's own words from its Findings and Conclusions:

> *"[The WTO] "finds that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are 'measures … necessary to protect public morals or to maintain public order…'"*

As I discussed in my column, the U.S. has to do something about the fact that it expressly allows one form of remote gaming, bets on horse races, with state-licensed but not with foreign operators. But as much as Antigua would like to believe that this somehow opens the door to all forms of gambling, the WTO was careful to limit its ruling to horseracing:

> *"[The WTO] finds… that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing …"*

What do you think? Comments on this article can be addressed to the BASIS.