Free Trade in a Regulated World: the United States

Measures affecting the cross-border supply of gambling and betting services in the WTO dispute settlement.

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On December 17, the European Union ("EU") announced its agreement with the United States ("US") on a compensation package offered by the US in response to its withdrawal in WTO of GATS commitments on gambling and betting services, including on-line gambling. This bilateral agreement provides EU service suppliers with new trade opportunities in the US postal and courier, research and development, storage and warehouse sectors. The US also made concessions in the testing and analysis services sector. Other WTO members, like Canada, Australia, Japan and India had previously settled with the US. Countries like Macau and some Caribbean nations have more difficulties to come to an agreement with the US as the US withdrawal of its GATS commitments has a more immediate impact on their economies. Eventually, we expect that there will be agreements with them as well. The US needs to accept the international trade consequences of the fact that there are nations in the world who have a different view on regulating gambling services, and that this will remain a source of likely trade conflict as long as no international solutions on this and other similar activities are available

The GATS allows members to modify or withdraw commitments, provided that they negotiate offsetting compensation. However, the overall level of its market access must remain the same.

Following the ruling in the art. 21.5 DSU Panel (the "compliance Panel") dated 30 March 2007, the US had to make a choice. It could comply with the DSB rulings and recommendations, thereby partially opening up its market for cross-border supply of certain gambling and betting services (i.e., those connected to horse race and other sport betting). Alternatively, it could commence appropriate WTO procedures for withdrawing its commitments on gambling and betting and compensating for the so-called loss of market access. Regardless which option the US chose, it had to respect both the WTO procedures and the general principles (e.g., the non-discrimination principle) set forth in the Marrakech Agreements setting up the WTO,

The European Commission mentioned this requirement explicitly in its press statement "While the US is free to decide how to best respond to legitimate public policy concerns relating to internet gambling, discrimination against EU or other foreign companies should be avoided" said Peter Power, EU Spokesman for Trade. Free trade does indeed not equal a free ride!

In the context of this specific trade dispute, the US had argued that even if it had included "gambling services" in its GATS commitment, it was a mistake or oversight. That being said the US sought to avoid the WTO consequences of this oversight by arguing that it had the right to limit the impact of GATS commitments if such commitment would undermine the public order of the concerned WTO member. In the current case on gambling services, the US committed under the heading "Other recreational services" unintentionally also "gambling and betting services."

Confronted with the demand from Antigua and Barbuda, the US invoked among others art. XIV GATS to avoid that the cross-border supply of gambling services into the territory of the United States would undermine the Federal and State policies on gambling. While the original Panel expressed doubts about the right of the US to invoke art. XIV GATS, the Appellate Body reversed the Panel findings and admitted that the United States measures

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were "necessary" to protect public morals or to maintain public order. However, the Appellate Body found, upholding albeit on a narrower ground the Panel findings, that the United States had failed to show that the 3 Federal Acts involved, and especially the IHRA did satisfy the conditions of the criteria of art. XIV GATS. As a result the United States was obliged to take the necessary steps to comply with these rulings. According to the art. 21.5 DSU Panel ruling (the compliance Panel) it was not enough for the US to clarify its policy and to explain this to the Panel since it is not the purpose of a compliance Panel to reassess the same matter.

In a last attempt to pressure the United States to open up its market for cross-border gambling services, instead of withdrawing its commitment, Antigua and Barbuda initiated a further procedure. Art. 22 DSU provides for the right to request compensation or the temporary suspension of concessions until the Member concerned brings the measure found to be inconsistent into compliance or otherwise complies with the rulings and recommendations. Being rather small states, Antigua and Barbuda did not have much leverage to retaliate. Therefore, Antigua asked for the right to retaliate under TRIPS as it was previously done by Ecuador in the case European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration by the European Communities under Article 22.6 (WT/DS27/ARB/ECU).

On December 21, 2007, the Arbitration decision was publicly released. It is interesting to note while Antigua was claiming the right to retaliate for an annual amount of US$ 3.443 billion, the Arbitrators awarded Antigua the right to do so for an amount not exceeding US$ 21 million! The Arbitrators admitted that the circumstances were serious enough to allow Antigua to request the DSB to suspend concessions or obligations under the TRIPS Agreement.

Although the Arbitration decision is a very extensive document which requires an in-depth analysis, it is already worth to mention here a few elements of the decision.

The Arbitrators stated that " while Article 3.7of the DSU does provide that the objective of dispute settlement proceedings is usually the withdrawal of the inconsistent measures, we do not read this provision to mean that this is in all cases the only possible outcome (...)". This confirms that the Arbitration decision does by no means affect the choice made by the United States to withdraw its commitment and to offer appropriate compensation. Art. 22 DSU does explicitly mention that the concerned Member can "otherwise comply with the rulings and recommendations of the DSB". That is precisely what the United States are doing. In the end of the day, the message of the United States is very clear: gambling services are too sui generis to be subject to unconditional free trade rules.

A second aspect of major interest is the statement of the Arbitrators that, given the particular circumstances of this dispute, Antigua was not entitled to "ignore" the failed US defence under art. XIV of the GATS (public order) in order to claim that the US was assumed to comply with the rulings by providing unrestricted access to all sectors of its remote gambling market.

Most of the discussion took place about the data to be used to calculate the annual level of nullification or impairment of benefits accruing to Antigua. Clearly all data produced by Antigua were unreliable and out of proportion. The Arbitrators deplored that Antigua did decline to provide explanations on how it proposes to apply such suspension. The Arbitrators added that the US may have recourse to the dispute settlement procedures if the level of concessions or other obligation suspended by Antigua exceeds the level of nullification determined for the purposes of the Arbitration award.

On the same day the USTR issued an extended statement reaffirming the U.S. government's expectation that this matter would be resolved amicably and consistent with WTO obligations. However, in the interim, USTR warned other trading partners not to seek to complicate resolution of this dispute by seeking to broaden the suspension of concessions beyond the GATS to include IPR. ◆