

**Volume 7 Issue 3 March 2008**

**Comment: EU's investigation into US restrictions on gambling**

On 10 March, the European Union launched an investigation into whether the United States' prosecution of foreign online gambling operators - while allowing US operators to offer online horse betting - amounts to discrimination, violating an international trade agreement to allow access to the market. Nao Matsukata, formerly Director of Policy Planning for US Trade Representative Robert Zoellick and now a Senior Advisor for Alston & Bird LLP, comments that historically, the US has resorted to legislative solutions to World Trade Organization disputes and that this approach may again present the solution.

One of the most intriguing trade disputes since the establishment of the World Trade Organization (WTO) took a new turn on 10 March 2008, when the European Union (EU) announced the opening of a formal investigation of discriminatory prosecution of foreign suppliers of online gambling by the United States Department of Justice (DoJ). The EU's decision followed a new development in the United States (US) only a week earlier. Congressman Peter DeFazio (DOregon) authored a letter demanding the US Trade Representative (USTR) brief him on the contents of a classified agreement between the US and EU that was negotiated as a compensation arrangement for the US' withdrawal of WTO commitments regarding the US market for online gambling.

Both these developments are the newest twists in what could prove to be one of the most significant trade disputes in the history of the WTO. That assertion might seem a bit strong, but the scope of the issue, in terms of the economic implications, far outpaces any past dispute settled under the WTO mechanisms. Well worth evaluating, beyond the commercial sanctions now facing the US in this case, are the policy implications of the Bush Administration's strategy and methods in both the legal and diplomatic phases of the dispute process. It may yet fall to the Congress to restore US respect for, not to mention within, the multilateral trade system before this dispute may be resolved.

In March of 2003, the Caribbean nation of Antigua and Barbuda initiated WTO dispute proceedings against US federal and state laws that prohibited foreign participation in US internet gambling markets.

The WTO ruled, in a November 2004 dispute panel report and an April 2005 appellate body decision, that the combination of four US federal criminal laws, the Wire Act, the Travel Act, the Illegal Gambling Business Act and the Interstate Horseracing Act, effectively prohibited the cross-border supply of gambling services to the American marketplace. This constituted a violation of commitments made by the US in the WTO General Agreement on Trade in Services (GATS).

The parties have continued to pursue the dispute since 2005. The US failed, in 2006, to comply with the WTO ruling that it correct the domestic statutes to abide by the WTO GATS. Frustrated by its inability to win a respite from the WTO, in 2007 the Administration took the extraordinary measure of announcing its intention to revoke its commitments on gambling services under that agreement, ratified by Congress in 1994.

This development immediately expanded the impact of the dispute beyond the US and Antigua; under WTO rules, the Administration's decision to withdraw GATS commitments automatically entitled any fellow WTO member country to request compensation for the benefits lost by the action. Subsequently, the EU, Japan, Macau, Costa Rica, India, Australia and Canada joined original disputant Antigua in requesting economic compensation from the US for the withdrawn trade commitments.

In December of 2007, the US and the EU announced a settlement that appeared to have codified some existing practices between the US and Europe. Within weeks, the WTO ruled to limit financial damages owed Antigua. Countries minimally impacted by the decision - Canada, Australia and Japan - informally settled with the US Trade Representative (USTR). It is likely that for Canada and Australia, some form of protection was afforded through their respective free trade agreements with the US. As for the remaining countries, the US leveraged its compensation deal with the EU to limit the hemorrhaging, and attempted to finally put the longrunning dispute to pasture.

At each step of the process, the Administration chose brinkmanship rather than stewardship of the trade system that has been so painstakingly constructed over the past six decades. In certain circumstances, this might not be bad trade diplomacy. In this case, however, it is likely to have potentially disastrous policy implications. Few WTO members will be pleased with this new protectionist precedent, established by none other than the US. It is certain that some countries, however, will be watching the US response to an

adverse ruling with great care. China, for instance, continues to complain that its WTO accession commitments have placed a heavy burden on the country, and would clearly welcome a proven method at reducing its obligations in key areas such as agricultural and services trade. Russia, which is now negotiating entry into the WTO, is likely to be highly receptive to a precedent which would allow Moscow the ability to unilaterally carve back the 'commitments' it is now pledging to make to join the club. One should ask whether or not US actions to withdraw its GATS commitments will facilitate similar actions on the part of other trading partners, and, perhaps more importantly, will this action limit US ability to mount an effective response to foreign protectionism. A global trading order doesn't fall all at once, but one rule at a time.

### A legislative solution

Fortunately, the legislative branch still retains Constitutional authority over trade and commerce. And it is clear that, over the course of the past year, the Congress has successfully reasserted a significant degree of oversight on trade. Legislative solutions to WTO compliance issues are not uncommon remedies. Congress passed a tax bill in 2006 that repealed corporate tax breaks deemed by the WTO to be illegal export subsidies; this led the EU to suspend retaliatory trade sanctions. Similarly, in 2005, the Deficit Reduction Omnibus Reconciliation Act addressed WTO concerns over US trade remedy laws.

The historical record clearly demonstrates that, in past instances where the US has lost in WTO disputes, the executive branch has not hesitated to turn to the Congress; and that the legislature has, in fact, proven to be the definitive authority for ultimately resolving conflict between US domestic regulation and international law. The apparent unwillingness of the USTR to consult with Congress toward a legislative solution on this matter is unusual, unexplained, and deserving of appropriate scrutiny. Why has the USTR pursued a risky legal and negotiating strategy in this instance, and is it fully aware of the potential costs of failure?

The agency still appears disinterested in Congressional involvement - and yet it is here in the Congress that a solution is already at hand. House Financial Services Committee Chairman Barney Frank developed legislation that would license US and foreign companies to provide online gaming services, but would allow non-discriminatory regulation at the state level. The Internet Gambling Regulation and Enforcement Act (HR 2046) would provide a regulatory approach consistent with WTO rules regarding discrimination and market

access, but would honor the sovereignty of the States with respect to the types of gaming allowed in the jurisdictions.

Furthermore, the Frank bill would subject foreign and domestic gaming operators alike to a fair barrier to market entry that will ensure competition among responsible service providers. A proper licensing regime is a source of consumer protection, law enforcement and taxation that would remain consistent with treaty obligations ratified by the US in its accession to the WTO. There is little need for the US to create precedents that will allow others the latitude to undo the bipartisan, sixty-year effort to build a durable, rules-based global trading system.

The EU's recent decision to pursue a new investigation of US prosecutorial practices linked to online gambling demonstrates the depths of foreign dissatisfaction with Washington's trade policy. More importantly, Brussels' apparent willingness to push this case toward another lengthy battle through WTO litigation illustrates that US trading partners are concerned not that online gaming is a 'one off' issue, but rather that the US is engaged in a pattern of behavior that is discriminatory, protectionist, and that is likely to spread virally to other areas of transatlantic commerce. Washington should prepare for other countries to join the fray. If American citizens and businesses faced discriminatory system at the hands of foreign law enforcement agencies, certainly the US Government would come to their defense. It should come as no surprise, then, when US trading partners demand only equal treatment under the law.

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