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November-20-2007,

The Future of Many U.S. Industries is at Stake in the WTO Dispute...By Hartley Henderson

The deadline is fast approaching for the United States to come to trade concession agreements with the countries who submitted claims in the Antigua WTO dispute. The U.S. came to a settlement with Japan, but the other countries don't seem as eager to settle. The European Union has not specified an amount it will be seeking from trade concessions, although rumours have the amount in the vicinity of \$100 billion. The U.S. has scoffed at that amount calling it "highly exaggerated". There has been no word regarding compensation claims by the other countries, although a source close to the WTO informed me that Canada has stopped negotiating with the U.S., implying that either a settlement has been reached or that Canada will wait for arbitration. Either way, Canada is participating as an interested party, ensuring the U.S. acts fairly towards all countries in the dispute. Michael O'Shaughnessy, a spokesperson for Canada Foreign Affairs and International Trade replied to my question of how much Canada will request with the following:

"Canada and the United States are in discussions over the issue of internet gambling services. As these negotiations are confidential, we are unable to share the details of the discussions. The United States made trade commitments for gambling activities under GATS / WTO rules and they are now bound to follow WTO procedures if they wish to withdraw such commitments. Canada is participating in this process to ensure that the US abides by WTO procedures for this process, specifically that compensation is obtained for the withdrawal of US commitments covering Canadian investments in specific areas of the U.S. market. Unfortunately I am unable to provide you with specifics or amounts."

Numerous emails and calls to representatives from India, Australia, Macau and Costa Rica went unanswered, but I was able to ascertain some key information from a couple of sources close to the WTO. The sources agreed to provide the statements with the proviso that I don't quote either of them directly or use their names in my article. My first question to one of the sources had to do with the purpose of section XXI of GATS which allows countries to withdraw its commitments. It seems clear from WTO submissions and statements provided to media outlets by Mark Mendel representing Antigua and Peter Mandolsen representing the EU that they really don't want the trade concessions. What each representative clearly would prefer is that the United States simply live up to their commitment to provide remote gambling services offshore. So the question running through my mind was why the WTO put "the out clause" in GATS in the first place. In no other contract in law is there an opportunity for one side to unilaterally get out of a contract. Both sides must agree to break that contract.

The source responded that section XXI of GATS, along with a similar one in Article XXVIII of GATT, was included in case a country was forced to withdraw for unforeseen circumstances. At the same time, the countries affected by the withdrawal are to be compensated by an amount comparable to what they would have received if the withdrawing country had lived up to the agreement. This apparently makes things fair. What the source didn't mention, however, but is obvious to any observer, is that this section was included for extreme circumstances that could pose a danger to the country if they lived up to the commitment. It was never intended to be used as an excuse to avoid implementing a bad decision. For example, in the House Judiciary Committee Meeting held on Wednesday, after being chided about the United State's decision to rewrite the commitments, a U.S. Department of Justice spokeswoman asked whether the United States should be forced to allow countries to export cocaine or assault rifles into the United States if U.S. trade representatives inadvertently agreed to allow those to be exported in a WTO agreement. Others at the hearing responded that of course they shouldn't, but that cocaine or assault rifles clearly are against the public good and are illegal products in the United States. Remote gambling is not illegal, and in fact occurs every day in the United States with horse racing and fantasy sports. That, of course, is the key. Article XIV of GATS allows a country to withdraw from a commitment if it is clearly a violation of public morals in its country. In fact if a country can prove that the commitment is against public morals, they can withdraw the commitment without penalty. But gambling is not immoral and occurs legally in 48 states. The reason the U.S. has decided to withdraw its commitment is strictly for protectionist reasons which the drafters of Article XXI never envisioned as a reason for a country to back out of an agreement.

Asked whether any other country ever tried to rewrite its commitments, the same source replied that the only other instance was when the European Union was created and ten member states became one. In that instance the EU had to rewrite some of the commitments to make them

uniform. Never, however, has a country tried to opt out on "moral" grounds. More often when adjustments to schedules are made it is because countries have chosen to rewrite some tariff schedules, but never to simply renege. For instance, a while back Brazil and Thailand initiated a dispute when the EU decided to classify salted frozen chicken cuts as frozen chicken cuts which are subject to higher duties. The panel found that the EU was in violation of Article II of GATT and the findings of the panel were upheld by the Appellate body. Consequently, the EU circulated an Article XXVIII GATT renegotiation request indicating their wish to replace the concession in 0210.90.10 by a tariff rate quota. So the United States' decision to opt out on moral grounds is ground breaking and dangerous. Since morality is subjective, if the United States is able to get away with the rewriting of its commitments on those grounds it opens the door for any country to simply opt out of agreements on moral grounds if it decides the agreement as it stands isn't in their best interest. And that of course undermines the whole WTO process.

Regardless, the U.S. government views the rewriting of the commitment as the right option in the short run, and really isn't concerned about the long term repercussions, although they should be. The United States has brought on eighty-eight dispute cases since the WTO was founded in 1995 and won most of them. And in all but one case, the country that lost the case to the U.S. implemented the WTO recommendations shortly afterwards. That of course is the natural course of dispute settlement. Both sides present their cases before a judicial body which rules for one side based on the evidence. Once the ruling is handed down and all appeal avenues are exhausted, the losing party accepts the decision and abides by the decision. In the future, without question, losing countries in disputes will look back on this choice by the U.S. government and will simply renege on deals that don't suit them. In particular this could be very concerning when dealing with countries which do not have close diplomatic ties with the United States. For example, the United States has practically begged China to open up more of its markets to U.S. goods and services, but China has been somewhat reluctant to do so. This decision, however, could provide China with a prime opportunity to open its markets with the belief that if that decision doesn't turn out to be in their best interests in the long run they will simply opt out on moral grounds. And what possible defence could the United States use to force China to live up to the agreement? After all, the U.S. is setting a precedent that a deal is not necessarily a deal if it doesn't benefit you in the long term. As the other source said to me "the United States is making a mockery of a system that has benefited them more than anyone else. How a country can be willing to slay the golden goose for one egg is troubling and incomprehensible."

Nevertheless, this seems to be the route the United States is proceeding with and it has no intention of backing down. So what are the next steps? If the United States is unable to come up with agreements from all countries by December 15th, the case will go to a WTO arbitrator (although that deadline could be extended again). Thus far a mediator has never been required in any WTO cases, so how the arbitration would work will be new. But by WTO rules, the mediator will listen to both sides and hear their justification for the amounts they are seeking (or in the case of the U.S., the justification for why they shouldn't be required to pay that amount in concessions). The arbitrator will then try and determine a balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favorable to trade than that provided for in the US Schedule of specific commitments prior to the negotiations. So in better words, the arbitrator will examine the value that offshore gambling provided to the countries of Antigua, the EU and any other countries that file for arbitration. This includes both revenues obtained by the countries prior to the withdrawal of services, future revenues and any ancillary revenues that are generated as a result of having offshore gambling provided to U.S. citizens. And given the justification provided so far by Mark Mendel it seems likely that \$3.4 billion will be ruled as a realistic figure for Antigua. Don't forget, the amount must be at least as favourable as what the revenues would have been had the U.S. lived up to the commitment, so the arbitrator will likely err on the high side. At that point the United States has no option but to accept the arbitrator's decision and allow the winning countries to adjust their schedules in other areas that provides compensation equal to the arbitrator's decision. Suggestions are that the EU is looking for the U.S. to open sectors in insurance and possibly agriculture as compensation, something which the USTR has argued often it needs to keep closed for the good of the U.S. economy.

As well, since Antigua is the affected country and has already won the case against the United States, it can seek retaliatory measures against the U.S. to try and force compliance. Normally this would include concessions in similar industries, but there is no other option available in gambling and recreational sports industries. And since Antigua's economy is so small, the country really has no other services which would provide similar revenues. Plus, imposing tariffs on U.S. imports would hurt the Antiguan economy. Thus, in a submission to the WTO in October, Antigua asked for the suspension of concessions and obligations under Part II of TRIPS. Antigua also asked for concessions in the area of communication services as retaliatory measures. The TRIPS concessions would waive any U.S. protections in the area of copyrights and similar rights, trademarks, industrial designs and patents. Antigua acknowledged that these concessions would not equal what they are losing as a result of the U.S. cutting off gambling services from the island, but it is hoped it would raise the eyebrows of U.S. industries that rely on those protections to sell their products. Clearly if citizens of the United States could purchase perfectly legal copies of software, music, DVDs, iPods, prescription drugs and the like from Antigua it would force companies like Microsoft, Apple and Pfizer to demand that the United States change their policy. And given the importance of these companies to the U.S. economy, not to mention the fact this is an election year, Antigua hopes the U.S. will finally back down from its stance. As Antigua's council stated in the submission:

"In a familiar vernacular, the (concession of) TRIPS might be a long shot for Antigua, but it is the only shot Antigua has."

The European Union, Canada, Macao, India and Australia likely have ideas of what industries they want concessions in, but thus far have those countries have not made those clear. One thing for certain is that the concessions are not in the area of gambling, so innocent industries in the United States will be hurt.

What happens after that is unclear. If the arbitrator rules in favor of all the complaining countries, and the U.S. is on the hook to open up markets totalling at least \$100 billion in trade concessions, the U.S. has no option but to oblige, and that of course will hurt an already ailing U.S. economy. Plus, if the arbitrator's decision comes immediately regarding Antigua's retaliation request (although it likely won't) Americans may see fully legal and licensed \$15 iPods or \$10 copies of Microsoft Office in time for Christmas.

But the question that has to be asked by all Americans, including the politicians that will be running for President is, "why"? If this was about cocaine, heroin, assault rifles, bombs or items that were a threat to the country then the resolve of the US government would be understandable. But it's not. It is about gambling, which occurs legally in 48 of 50 states. So why is the United States government so adamant that American Adults can't play poker online? Why is the US government so unwilling to look at regulatory frameworks for online gambling that are being used in Europe and Antigua? Why is the United States so eager to flaunt the WTO system which has benefited them more than any other country? Why is the United States government apparently willing to allow the suspension of copyright, patents and trademark protections from innocent sectors? And most importantly why is the United States willing to slay the golden goose in an effort to save one egg? If anyone could answer those questions then maybe the U.S. course would make some sense. But from the viewpoint of most outside of the decision makers, the route the USTR is taking is inexplicable. In fact, just today several House members, including Barney Frank, John Conyers and six other lawmakers, criticized the path the USTR is taking, calling it a "drastic step which could have significant consequences for the whole WTO system." 2008 is an election year and a new President will be elected. Perhaps the topic of online gambling should be made an election issue. The Poker Player's Alliance has stepped up to the plate and is providing a powerful lobby to legalize online poker, so the opportunity is there for all areas of online gambling to join in. After all, the USDOJ has stated many times that as far as they are concerned there is no difference whatsoever between any forms of online gambling. So by their own definition, if poker, casinos or sports betting are ever legalized online then all areas must be legalized.

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