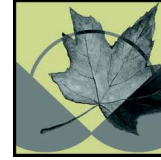


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## The GATS US-Gambling Decision A Wakeup Call for WTO Members

By Ellen Gould

*"Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired."*

—From the "US-Gambling" WTO report

The WTO panel decision, "United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services"<sup>1</sup>, has significant ramifications not only for the US but for all WTO members. In November 2004, the panel released its decision in favour of Antigua's claim that a number of US federal and state regulations prohibiting Internet gambling are inconsistent with US obligations under the General Agreement on Trade in Services (GATS). Employment in Antigua's remote access gaming sector has dropped from a high of 3000 down to 500 over the past four years, and Antigua argued that increased US efforts to prosecute Internet gambling was one reason for this decline.

The case is especially significant because it is one of only two that have been decided exclusively on the GATS.<sup>2</sup> The agreement is acknowledged to be full of ambiguities, yet rather than negotiating to make its text clear, governments have abandoned that task to WTO panels. The two governments that lost GATS cases – Mexico and the US – now have reason to regret this approach. When the interim

decision came down in the gambling case, the US actually warned the panel that its ruling might be seen as "supporting the criticisms leveled by numerous groups against the GATS as being overreaching and an unjustified intrusion into the sovereign ability of Members to regulate in the area of services"<sup>3</sup>.

Media reports are presenting this case as a David versus Goliath contest<sup>4</sup>, proof that the WTO dispute settlement process can work for small countries. Instead it could be viewed as a win for the extremely powerful international gaming industry including its most dominant players in the US. US transnational gambling firms that have tried to get the American ban on Internet gambling lifted saw their stock prices rise after the panel decision was leaked. If the US is forced by the WTO to allow foreign operators to supply Internet gambling services, investors are assuming it will not be able to keep this market closed to domestic companies. A spokesperson for the giant US gambling conglomerate, MGM Mirage, told the Wall Street Journal, "I'm going to send Antigua a thank you note."<sup>5</sup> Antigua had an international legal team that included the American firm Mendel Blumenfeld, which lists an Internet gambling firm based in Antigua as one of its clients. Herbert Smith, the European law firm that also represented Antigua, promotes itself as a lobbyist in the European gaming industry and employs former EU Trade Commissioner Leon Brittan as a consultant.

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The panel definitely will have offended regional sensibilities in the US with its decision. For example, one part of its ruling was that the legislative ban on gambling in the deeply religious state of Utah<sup>6</sup> cannot continue because it is inconsistent with US GATS commitments. Such controversy, though, is not new to the WTO. The US – Gambling case is just one in a series of trade challenges over highly sensitive issues, such as the case taken by the US against Thailand over its cigarette import ban, no less than three cases taken by the US and the European Union to force countries to liberalize alcohol imports, and current US and European demands that Algeria – a majority Muslim nation - open its borders to alcohol imports as a condition of joining the WTO<sup>7</sup>.

### Key Consequences of the Decision

The US is asking the WTO Appellate Body to overturn the panel's decision. Among the significant consequences if the Appellate Body upholds the panel decision would be:

1. **The negative impacts on the authority of subfederal governments:** Three federal and four state laws were found to violate US GATS gambling commitments. To comply with the panel ruling, the US federal government would not only have to change its own laws, but also override state authority to regulate gambling, an area that is constitutionally within the jurisdiction of state governments.

The panel also made the very worrisome statement that in assessing whether the US ban on Internet gambling could be justified, consideration had to be given to "the tolerant attitude displayed *in some parts of the United States* to the non-remote supply of such services. [emphasis added]"<sup>8</sup> What the panel seems to be saying is that if an activity is loosely regulated in some parts of a country, then strict prohibitions in other parts of the country cannot be justified when they are barriers to trade. This interpreta-

tion could effectively mean a "lowest common denominator" requirement for regulations at the subfederal level.

2. **Interpretations of key clauses of the GATS:** The US appeal in the gambling case means the WTO Appellate Body will soon (perhaps by February 2005) give interpretations on key ambiguous clauses in the GATS that have long been subject of debate. These interpretations probably will include the meaning of market access and what requirements have to be met to justify a regulation as "necessary". If the Appellate Body upholds the panel decision, governments could soon learn that the GATS is a far more powerful constraint on their authority than they realized.
3. **Impacts on the US at the WTO:** Should it lose on appeal, the US will face two equally bad options:
  - a) It could ignore the decision. The US would have to hope, though, that all WTO other members will agree to ignore the decision as well. As a small country of only 68,000 people, Antigua may not have the clout to make the US comply. If the US did not open up its cross-border gambling market however any WTO member could successfully challenge the US. And in the current round of GATS negotiations, the US would appear hypocritical in pressuring other WTO members to expand their commitments while refusing to abide by its own.
  - b) It could try to withdraw its gambling commitments under the provisions of GATS Article XXI – "Modification of Schedules". But any WTO member whose service suppliers were potentially affected could then ask for new US service commitments in compensation for the withdrawal of gambling. In negotiating these substitute commitments, Article XXI requires that countries "shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior

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to such negotiations.”<sup>9</sup> So the US would have to come up with a substitute concession equivalent to gambling. The global online gambling market is estimated to grow to about \$14.5 billion by 2006<sup>10</sup>, and US customers already make up about sixty percent of the market even with the existing US restrictions<sup>11</sup>. Unrestricted access to the US Internet gambling market would have to be worth billions to foreign gambling firms, which is the value of the substitute commitments the US would be obligated to provide in order to maintain the “general level of mutually advantageous commitments...” If other WTO members are not satisfied with what the US offers, they can launch a formal dispute that might result in the WTO imposing trade sanctions on the US.

The US faces an even greater problem in withdrawing its commitments. Something media reports on the case have totally missed is that the US has also made “commercial presence” commitments of gambling. That means a wide variety of US restrictions on “bricks and mortar” gambling operations established within US borders appear to violate the GATS: state monopolies on lotteries, exclusive rights granted native tribes to operate casinos, and local bans on certain forms of gambling like slot machines. US state lottery monopolies alone were worth \$44.9 billion in 2003.<sup>12</sup> As the largest gambling market in the world, the value of the US commercial presence commitments in this sector is so large it is hard to imagine what substitute concessions the US could make to compensate other WTO members.

4. **Impacts on the right to regulate for all WTO members:** As the panel did in the Mexico – Telecoms case, the US – Gambling panel concluded that a total prohibition on a service is a violation of GATS market access commitments because it is equivalent to a “zero quota”. The US tried to argue the limits it placed on remote

gambling were based on the particular character of the recreational services being supplied, so they did not fit any of the quantitative limits prohibited by full GATS market access commitments. The panel rejected this argument. It said that full market access commitments were violated when any sub-category of a committed service or any form of delivery under a committed “mode” of trade was prohibited. Many WTO members have made full commitments in sectors where they continue to ban particular activities. With the panel’s decision, they are now very much exposed to challenges over these bans. The kind of challenges that might emerge as a result of the US-Gambling decision are discussed below.

### How the US “Inadvertently” Committed Gambling

The first step in the panel’s evaluation of the case was to determine whether the US had in fact made a commitment in the GATS under gambling services, because the US claimed it had not. Countries are allowed under the GATS to decide:

- 1) Whether or not they want to commit a service to the agreement’s most forceful provisions (market access and national treatment);
- 2) Which of the different kinds of trade covered by the GATS the commitment should apply to; and
- 3) What, if any, limitations they want to place on the commitment.

A country’s list of commitments make up what is called a GATS “schedule”, and the panel ruled that schedules are as much a part of the GATS as the articles of the agreement itself.

Determining whether a country has committed a particular service in its schedule is usually fairly straightforward. In listing their commitments, most WTO members used the categories drawn up by the WTO Secretariat<sup>13</sup> supplemented with references to more specific United Nations classifications<sup>14</sup>. But the

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US said it was using its own categories and classification system, and tried to convince the panel that as part of the bargaining process leading up to the GATS other countries were responsible for nailing down exactly what the US commitments meant.

The US schedule<sup>15</sup> includes commitments of “D. Other Recreational Services”, under the broad heading of “Recreational, Cultural, & Sporting Services”. Antigua claimed this meant the US had committed gambling because under the UN classification system “other recreational services” include “Gambling and betting services”.<sup>16</sup> The panel agreed with Antigua. The US argument that the way it classified its commitments did not correspond to the WTO and UN classification systems was fatally weakened by a document published by the US International Trade Commission - an agency of the US government. This document detailed how the US classification system *did* correspond to those of the WTO and UN. The panel stated that if the US wanted to depart from the classifications commonly used by WTO members, it bore the responsibility of clearing up any ambiguities about what its commitments covered.

The US fallback position was that given its long history of regulating gambling and the sensitivity of the issue, it could not possibly have intended to make commitments in the sector. While the panel acknowledged the US may have inadvertently committed gambling, it ruled that a country's intentions did not matter:

“The United States has repeated several times in these proceedings that it did not intend to schedule a commitment for gambling and betting services. This may well be true, given that the legislation at issue in this dispute predates by decades, not only the GATS itself, but even the notion of ‘trade in services’ as embodied therein. We have, therefore, some sympathy with the United States’ point in this regard. However, the scope of a specific commitment cannot depend upon what a Member intended or did not intend to do at the time of the negotiations.”<sup>17</sup>

## Implications for the US

Antigua was seeking cross-border access to the US market so that its Internet gambling companies could flourish as they had before the US had prosecuted and jailed an American who operated one of these companies out of Antigua. It is ironic that the US has lost such an important case centred on use of the Internet given that it is the most aggressive advocate at the WTO of removing limitations on electronic commerce. The panel quoted a submission the US itself had made during the WTO negotiations on e-commerce: “there should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality.”<sup>18</sup>

In trying to defend the US in the gambling case, the US lawyers were less enthusiastic about the benefits of unrestricted e-commerce than its trade officials have been in the e-commerce negotiations. The US lawyers argued that Internet gambling created special risks since it was harder to prevent abuse when gamblers were not physically present in a gambling establishment. However the same could be said of other sectors, such as cross-border education services, where the US has been actively promoting e-commerce.

The implications of the panel's ruling for the US go much further than the issues raised by cross-border supply. This becomes clear by examining the US schedule. The US has not only committed “other recreation services” – which the panel determined includes gambling – for *cross-border* delivery. It has also undertaken commitments for gambling services under the “*commercial presence*” mode of services trade, meaning it is obligated to provide market access and national treatment for “bricks and mortar” gambling operations established on US soil. As a consequence, all of the following are vulnerable to a GATS challenge:

- **Any restriction on the number of gambling operation permits a state or local government grants.** Full GATS market access commitments require that “A Member shall not maintain or adopt either *on the basis of a regional subdivision* or on the basis of its entire territory...limitations on the number of service suppliers...[emphasis added]”;
- **Any outright prohibitions of particular gambling and betting services, such as sports betting or slot machines.** Full GATS market access commitments require the elimination of limits that take the form of “numerical quotas”. Two different WTO panels now have ruled that a total prohibition on a service means a quota has been imposed equivalent to zero, and this violates full market access commitments. The US – Gambling panel ruled that the US had made a commitment for every type of gambling service without exception because the US had not scheduled any bans on particular forms of gambling as limitations on its commitments.
- **Any US state monopoly on lottery services.** Full GATS market access commitments require the elimination of limits that take the form of monopolies.
- **Any requirement that gambling licenses only be granted to certain groups, such as Indian tribes or charities.** Full GATS market access commitments require the elimination of limits that take the form of “exclusive service suppliers”;
- **Any requirement that in order to offer a gambling service the supplier has to be a non-profit or a charity.** Full GATS market access commitments require the elimination of “measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service”;
- **Any requirement imposed on gambling operations that might tend to discriminate against foreign companies or make it more difficult for them to compete with American firms.** An example of such a requirement might

be that a casino has to be owned and operated by an American Indian tribe. Full GATS national treatment commitments require that “each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers...treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.”

The US might have an even harder time defending its commercial presence regulations on gambling than it did in its failed attempt to justify its cross-border limitations. The US tried to prove that its regulations were necessary because operations that require the gambler to be physically present are less prone to abuse and criminal activity than Internet gambling. Having stated this in the Antigua case, how could the US turn around in a challenge to its restrictions on bricks and mortar gambling establishments and argue that these too are necessary? As well, the fact that state lottery monopolies so aggressively promote their sales would make it hard for the US to argue that monopolies were necessary to reduce the social harm of gambling.

The US is in an impossible situation. It cannot allow competition to state lottery monopolies because these are such significant sources of state revenues. It cannot undo legal agreements states have signed giving Indian tribes exclusive casino rights worth billions of dollars. Constitutionally, it cannot easily override the rights of state and local governments to regulate gambling consistent with local values. And ethically, it should not allow unrestricted gambling because of the social problems this would cause. In other words, the US cannot honour the GATS gambling commitments the panel determined it has made.

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## The Panel's Ruling On The Meaning of Market Access

Since the challenge to US restrictions on cross-border gambling is only the second WTO case based exclusively on the GATS agreement, the panel had to venture into unexplored territory in making its ruling. One key opinion it gave was on the meaning of the GATS market access article (Article XVI). Ambiguities in this article have caused negotiators problems, difficulties that have surfaced in the current round of negotiations to expand the GATS because countries disagree on whether they have to list certain regulations like municipal zoning as limitations on market access.

The problem lies with the wording of the market access article, which prohibits six specific kinds of quantitative limitations – e.g. monopolies and exclusive service suppliers - when full market access is granted. But what about qualitative limits that might restrict access to a market? The panel ruled these were not covered by market access obligations and therefore governments did not have to list them in their schedules to protect them from a challenge. The panel also sided with the US when it argued that market access bars quantitative limits on the numbers of service suppliers only when they take, to quote the agreement, “the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test...” According to the panel, limitations that do not take these forms are permitted.

However, while first apparently narrowing the scope of the market access obligation, the panel then opened the door wide for future market access challenges. They ruled that a regulation that either separately or in combination with other regulations results in a service being totally prohibited is a violation of market access because it effectively sets a quantitative limit of “zero”. Accordingly, the panel ruled that three US federal laws and four state laws that together prohibit Internet gambling are violations of the US GATS market access commitments.

For example, in ruling Utah's legal code violates US GATS commitments, the panel stated:

“We recall that a ban on the use of one, several or all means of delivery included in mode 1 [cross-border supply of a service] constitutes a ‘zero quota’ for, respectively, one, several or all of those means of delivery. Under § 76- 10-1102(b) of the Utah Code, service suppliers seeking to conduct a gambling business through all means included in mode 1 are prohibited from doing so. Further, services operations and service output involving a gambling business that uses any of the means included in mode 1 are also prohibited under § 76-10-1102(b) of the Utah Code. Accordingly, the Panel considers that § 76-10-1102(b) of the Utah Code contains a limitation ‘in the form of numerical quotas...’”<sup>19</sup>

So because Utah bans all forms of gambling including Internet gambling, it was considered to have set a quota of zero for the number of gambling service suppliers it permits. Under the GATS, all levels of government are covered by the commitments in a country's schedule, making Utah's ban a violation of US market access commitments.

## Implications for the Right to Regulate

The US tried to defend its Internet gambling prohibitions using the “right to regulate” clause in the preamble to the GATS, arguing that:

“Members cannot effectively exercise the ‘right to regulate’ services that are the subject of a commitment if they lack any power to prohibit services within a sector or sub-sector that do not conform to the Member's regulation. The right to regulate recognized in the GATS implies the power to set limitations on the scope of permissible activity, as the United States has done with gambling services.”<sup>20</sup>

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The US essentially said that because of the right to regulate, a country's commitments of a service should not be understood to cover services that are illegal. The US also claimed that the agreement should not provide greater rights to foreign companies by allowing them to provide services that are illegal for domestic companies to provide. The panel rejected both of these arguments, flatly stating that a WTO member's regulatory sovereignty ends "whenever rights of other Members under the GATS are impaired"<sup>21</sup>. It also said that market access means that foreign suppliers can be treated as favourably or *more* favourably than domestic suppliers.<sup>22</sup>

Other WTO members have no reason to be smug about the US loss. The European Commission, for example, has made unlimited commitments under commercial presence for solid and hazardous waste disposal services<sup>23</sup>. The UN classification system says this includes "transport services and disposal services by incineration or by other means" of waste "whether from households or from industrial and commercial establishments". Applying the panel's interpretation of market access to this commitment could mean that no European jurisdiction - be it local, regional, or national - can prohibit foreign-owned operations from disposing of hazardous waste by "incineration or other means", *even if these means are totally illegal for domestic firms under local laws*. The panel's statement that under GATS market access foreign suppliers can be treated as favourably, or more favourably, than domestic suppliers means it would be irrelevant that governments would be forced to allow foreign firms to do what was illegal for local firms. The only recourse the EC would have if its member states hazardous waste laws were challenged would be to try to justify them by using the exceptions clauses in the GATS - an almost impossible exercise if the US - Gambling ruling is any indication.

The US-Gambling decision also highlights the problem of trade treaties freezing a government's ability to regulate according to the prevailing condi-

tions when the treaties are negotiated. The possibility of Internet gambling would not have raised any alarm bells for the US government when it made its "other recreation" commitments in the GATS negotiations in the early 1990's. Technological change has made cross-border commitments far more significant than they were in 1993, yet governments are hamstrung by these commitments if unanticipated problems start to emerge.

In the current round of GATS negotiations, the US and the EC are pressuring countries to make unlimited commitments in sensitive sectors like financial, distribution and advertising services. Given the US - Gambling decision, this pressure should be resisted.

### **The Futility of Relying on Exceptions Provisions in the GATS**

While the US denied it had undertaken any gambling commitments under the GATS that it could have violated, it still made a back-up case for why a ban on Internet gambling could be justified according to the exceptions allowed by GATS Article XIV. This is the first time a government has tried to defend its regulations using GATS Article XIV exceptions. In theory, these exceptions can be used when governments want to claim their regulations are "necessary" even if a panel rules they violate aspects of the agreement. In practice, it has proven next to impossible for governments to use similar exceptions in the General Agreement on Tariffs and Trade (Article XX).<sup>24</sup> The panel's decision in US - Gambling indicates why WTO exceptions clauses offer next to nothing by way of protection for a government's right to regulate. This decision also should provide a wakeup call to governments that are pressing for the GATS to be amended to impose even more restrictions on domestic regulation.

The exceptions clauses in the GATS require governments to prove that their regulations are designed to meet particular listed objectives. The US said its regulations fit with the GATS exceptions for measures designed to protect public morals, to

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maintain public order and to enforce laws relating to the prevention of fraud and organized crime.

The panel accepted the US argument that this was what the contested US regulations on Internet gambling were designed to do. But convincing the panel that its regulations served legitimate objectives was just one part of the burden placed on the US. Drawing on previous GATT decisions, the panel said it would determine whether the US regulations were necessary by weighing all of the following:

- 1) Whether the values underlying the regulations were important – *in the panel's view*;
- 2) Whether the disputed regulations contributed significantly to meeting these values;
- 3) What the impact of the regulations were on trade. The greater the impact, the heavier the responsibility the US had to explore all “reasonably available WTO-consistent” alternatives to its regulations.

The panel accepted, with a few exceptions, that the US regulations being challenged served “very important societal interests”, contributed to meeting their underlying objectives, and that there were risks of harm specific to Internet gambling that merited government intervention. But in ruling whether the US had pursued “reasonably available WTO-consistent alternatives”, the panel stated that: “In rejecting Antigua’s invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative.”<sup>25</sup> The panel concluded that the US regulations had a significant impact on trade and the US gambling commitments had created legitimate trade expectations. By not consulting with Antigua, the US failed to prove to the panel’s satisfaction that its regulations on Internet gambling were necessary.

Even though they did not need to, but perhaps to thoroughly disabuse WTO members of the idea that they could ever successfully use the exceptions article in the GATS, the panel gave additional rea-

sons why the US failed to meet the requirements of this article. The panel concluded the introductory words in the article meant that governments also had to prove their regulations did not constitute:

- 1) “arbitrary discrimination”;
- 2) “unjustifiable discrimination” and/or
- 3) a “disguised restriction on trade.”

This interpretation means governments have at least six hoops they have to jump through to qualify for the GATS exceptions provisions, and can fail on any one of them.

The panel said that a country trying to use the exceptions clause has to prove it has applied its regulations consistently in relation to foreign and local suppliers, because “the absence of consistency in this regard may lead to a conclusion that the measures in question are applied in a manner that constitutes ‘arbitrary and unjustifiable discrimination between countries where like conditions prevail’ and/or a ‘disguised restriction on trade’.”<sup>26</sup> The panel concluded that the information provided to it on US enforcement of its gambling regulations was *inconclusive*. Because the exceptions article makes the defendant responsible for proving it has not discriminated, a finding of “inconclusive” means the US did not meet its burden of proof.

The finding of the panel in this regard is full of double negatives, and indicates how very difficult it is for governments to successfully navigate WTO exceptions clauses:

“Accordingly, we believe that the United States has *not* demonstrated that it does *not* apply its prohibition on the remote supply of wagering services for horse racing in a manner that does *not* constitute ‘arbitrary and unjustifiable discrimination between countries where like conditions prevail’ and/or a ‘disguised restriction on trade’ ...[emphasis added]”<sup>27</sup>

Given the panel’s ruling, trade officials should stop trying to dismiss public concerns about the GATS on the basis that if challenged, governments



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can always use GATS exceptions clauses. And governments should drop their efforts to amend the GATS to include even more severe restrictions on the right to regulate. Currently, GATS negotiators are drafting new restrictions on domestic regulation over services to limit it to what is “no more burdensome than necessary.” Proving a regulation is necessary to a WTO panel has now been shown to have little chance of success.

## The Problem Is With the GATS

The US-Gambling decision was very much “a disaster waiting to happen” in terms of the GATS undermining the governmental right to regulate. At conference after conference organized to promote the GATS, speakers have remarked on how far-reaching the agreement’s provisions are. For example, the following observation about the extraordinary nature of GATS market access obligations might seem to be a comment on the panel’s ruling in the US-Gambling case. Yet it was made in 1999, at the World Services Congress organized by the international services lobby and attended by top government services negotiators:


“The GATS article on market access extends beyond traditional concerns of access for foreign service suppliers to encompass all policies which restrict access to a market. This is a major extension of multilateral trade disciplines into the realm of domestic policy...”<sup>28</sup>

Asked by the media for their comments on the decision, US trade officials are stating the US should not have lost because American gambling regulations are “non-discriminatory” – both foreign and US gambling operations are subject to the same restrictions.<sup>29</sup> This kind of statement can fundamentally mislead the public, the media, and elected representatives about the nature of modern trade agreements. Trade agreements in general, and the GATS in particular, now prohibit many kinds of government regulations even when they do not in

any way favour local suppliers over foreign ones. The official “Guidelines for the Scheduling of Specific Commitments”, agreed to by all WTO members including the US delegation, state explicitly that market access applies to measures “whether or not such measures are discriminatory...” These same Guidelines even explain that market access prohibits policies that result in a “zero quota”. If the US or any other delegation had been concerned about what this meant for the right to regulate, they could have demanded revisions to the Guidelines at the time of their drafting.

Statements like the US trade officials’ responses to the panel’s decision are a way of ducking responsibility for the agreements they have drafted and implying that the fault for undercutting governments’ right to regulate lies with WTO panels. Denouncing the US-Gambling decision as “absolutely outrageous”, as US Trade Representative Robert Zoellick has done<sup>30</sup>, diverts attention from the origins of the problem: the GATS fundamentally interferes in unjustifiable ways with a government’s right to regulate.

Rather than attempting to fix this problem, trade negotiators from the US and some other countries are making it worse. They are pushing to broaden and deepen GATS commitments while drafting new GATS clauses to provide even wider scope for challenges to non-discriminatory domestic regulation. And they are inserting GATS-like wording into new regional trade agreements. In other words, they are guaranteeing there will be even more “absolutely outrageous” panel decisions like US – Gambling in the future.

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## Endnotes

<sup>1</sup> World Trade Organization, “United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services,” Report Of The Panel, WTO document symbol WT/D285/R, 10 November 2004

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- <sup>2</sup> The other case, "Mexico – Measures Affecting Telecommunications Services", is analyzed in another CCPA briefing paper: "Telmex Panel Strips WTO of Another Fig Leaf", Vol. 5 No. 2, July 2004
- <sup>3</sup> "United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services," para. 5.16, p. 133.
- <sup>4</sup> Reuters news service, for example, described the case as a "David-and-Goliath" battle in its 10 November 2004 story "US to Appeal Gambling Ruling".
- <sup>5</sup> Wall Street Journal, "U.S. ban on web gambling breaks global trade pacts, says WTO", 25 March 2004, Page A2.
- <sup>6</sup> Utah even has an article in its state constitution that says "The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose."
- <sup>7</sup> All of these challenges were successful. Algeria for its part is reconsidering whether it will join the WTO if that means allowing alcohol imports. See BBC News, "Alcohol Ban Row Rages in Algeria", 9 November 2004, <http://news.bbc.co.uk/2/hi/business/3997067.stm>.
- <sup>8</sup> "United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services," para. 6.493, p. 244
- <sup>9</sup> The GATS is available on the WTO Web site at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)
- <sup>10</sup> E-Commerce Times, "Internet Gambling — Regulate or Litigate?", 2 November 2004
- <sup>11</sup> E-Commerce Times, "WTO Turns Up Heat on US Online Gambling Ban", 10 November 2004
- <sup>12</sup> North American Association of State and Provincial Lotteries, "Did You Know?", <http://www.naspl.org/faq.htm>
- <sup>13</sup> WTO, "Services Sectoral Classification List – Note by the Secretariat", MTN.GNS/W/120, 10 July 1991
- <sup>14</sup> The particular UN classification used is called "CPCProv", and it can be found at "<http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1>"
- <sup>15</sup> WTO, "THE UNITED STATES OF AMERICA - Schedule of Specific Commitments", GATS/SC/90, 15 April 1994
- <sup>16</sup> See the specific breakdowns of these classifications at <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=9649>
- <sup>17</sup> "United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services," para. 6.136, p. 169.
- <sup>18</sup> Ibid, Footnote 836, p.202.
- <sup>19</sup> Ibid, para. 6.416, p. 226
- <sup>20</sup> Ibid, para. 3.416, p. 58
- <sup>21</sup> Ibid, para. 6.316, p. 209
- <sup>22</sup> Ibid, para. 6.264, p. 199. The panel stated: "The ordinary meaning of the terms used in the first paragraph of Article XVI also indicates that nothing would prevent a Member from providing to services and service suppliers of all Members treatment more favourable than that provided for in its schedule or that it provides to its own services and service suppliers."
- <sup>23</sup> The EC conditional offer in the current round of GATS negotiations makes it clear that the EC commitment of waste management services covers disposal of hazardous wastes. See "Communication from the European Communities and Its Member States – Conditional Initial Offer", TN/S/O/EEC, 10 June 2003
- <sup>24</sup> The single case where governments have successfully defended their regulations as necessary is EC-Asbestos, and in ruling on this case, the Appellate Body said it was within its prerogative to evaluate how important a country's regulatory objectives were.
- <sup>25</sup> "United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services," para. 6.531, p. 254
- <sup>26</sup> Ibid, para. 6.584, p. 265.
- <sup>27</sup> Ibid, para. 6.607, p. 270.
- <sup>28</sup> Tony Warren and Christopher Findlay, "Measuring Impediments to Trade in Services.", 2 November 1999, World Services Congress – Atlanta.
- <sup>29</sup> E-Commerce News, "WTO Turns Up Heat on US Online Gambling Ban", 10 November 2004. The article cited a US trade official saying "It is not a case where U.S. companies can do one thing but Antigua and Barbuda companies can not."
- <sup>30</sup> Reuters, "WTO gambling decision 'deeply flawed' – Zoellick", 25 Mar 2004
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