Q&A on Impact of U.S. Compensation Offer in GATS Article XXI Negotiations regarding Gambling Services on U.S. Laws and Regulations

Why is the United States offering to make new services commitments under GATS Article XXI?

In response to a WTO challenge filed by Antigua and Barbuda in 2003, a dispute settlement Panel found that a commitment for "recreational services" contained in the U.S. schedule of market access commitments under the General Agreement on Trade in Services (GATS) should be read to include gambling services. The United States never intended to make a commitment covering gambling and betting services. Nonetheless, while we disagree with the outcome of this case, because of the U.S. commitment to the WTO and the dispute settlement process, we sought ways to bring ourselves into compliance with the decision that did not require any changes in U.S. law or regulation.

As a result, in November 2006, we began a process under GATS Article XXI, which allows WTO members to modify or withdraw GATS commitments, to clarify that our commitments do not cover gambling. Article XXI provides that countries wishing to modify or withdraw GATS commitments must offer to make a "compensatory adjustment" by including new commitments in their schedules. In deciding what new services commitments the United States could offer, we looked at those services sectors in which the U.S. market is open. Many of those were covered in the 2005 U.S. offer tabled in the Doha services negotiations, which was the product of consultation with industry advisors, state governments and regulators, and Congress. We then consulted again with industry advisory committees, representatives of state governments, and Congress, and gathered comments from the public with regard to offering commitments in certain sectors as compensatory adjustments under Article XXI. As a result of this process, we decided to offer commitments for warehousing services (excluding maritime and airport services), private technical testing services, private research and development services, and delivery services relating to outbound international letters. In examining these areas, we also considered carefully whether the relevant commitments would limit federal or state discretion to regulate the services in question in a nondiscriminatory manner. Our conclusion is that they do not.

Will a GATS commitment for research and development conflict with U.S. R&D tax credit programs?

No. The commitments the United States accepted in the Uruguay Round of trade agreements more than 15 years ago state explicitly that they do not apply to research and development subsidies. That is, we reserved the right to treat foreign firms less favorably than U.S. firms when we grant R&D subsidies. The Article XXI offer does not change this provision.

We do propose to undertake a new commitment on *privately* funded R&D, which covers:

R&D services on natural sciences, social sciences and humanities, and interdisciplinary R&D services, excluding R&D financed in whole or in part by public funds.

As an initial matter, it is important to bear in mind that the United States already gives foreign firms conducting commercial R&D in the United States the same general treatment as domestic firms. Consequently, the language being added to the schedule above does not change U.S. policy. However, it also leaves the state and federal governments free to provide foreign companies less favorable treatment than domestic companies with respect to R&D subsidies (the existing limitation) or non-subsidized R&D "financed . . . by public funds" (the limitation in the new R&D commitment).

The existing exclusion of R&D "subsidies" and the new exclusion of "publicly funded" R&D do not cover precisely the same thing, although they do overlap. The existing exclusion of "subsides" makes clear that our commitments do not cover government subsidy programs, which would include actions such as in-kind provision of goods or services by the government that do not involve a direct outlay of funds. The new exclusion of public funding makes clear that government-funded R&D is not subject to our commitments even if it is not subsidized (*e.g.*, a state-funded university contracting with a private firm at standard rates to conduct a study in support of research the university is pursuing). Of course, some government programs may involve both "subsidization" and "public funding" of R&D. and would be excluded from our commitments under either provision

R&D tax credits are in the overlap category. These government programs could be considered subsidies to R&D activities and, therefore, covered by the existing exclusion of R&D subsidies from our commitments. Further, the fact that a government cedes funds to a taxpayer through the mechanism of a tax credit rather than a direct cash payment does not change the fact that "funding" has occurred. Therefore, R&D tax credits would also be covered by the new exclusion for R&D activities financed in whole or in part by public funds.

Apart from the above, we have reviewed the Federal R&D tax credit under section 41 of the Internal Revenue Code. This tax credit can be taken by any firm (whether foreign or domestic) that conducts R&D activities in the United States and, thus, is provided on a non-discriminatory basis. Therefore, this program is consistent with our commitments without needing to resort to the exclusions described above.

Does the commitment for storage and warehousing impact the flexibility of Federal, State and local authorities to make appropriate decisions on the locations of tank farms and LNG facilities?

A GATS commitment for storage and warehousing services does not prohibit limitations on the size and location of tank farms and liquefied natural gas (LNG) facilities. The United States has agreed to undertake market access and national treatment commitments for the following:

Storage and warehouse services (except maritime transport services or services to which the Annex on Air Transport Services applies) (CPC 742).

The GATS is very clear and specific about the types of action a WTO Member may not impose in sectors in which it has undertaken a market access commitment. It may not impose numerical limitations on the number of companies doing business in the market. However, imposing restrictions on the physical size or location of a foreign-owned storage facility, on the same terms as such restrictions are imposed on U.S.-owned facilities, is not a quota.

As long as the regulations do not represent disguised restrictions on trade, the GATS does not prevent adoption of measures "necessary to protect human, animal or plant life or health" or "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to . . . safety." Further, the GATS also exempts measures taken for reasons a WTO Member considers to be in its "essential security interests."[1]

Finally, we do not believe that LNG facilities fall under the commitment for storage and warehousing services at all. The reason such facilities are constructed is not principally to store excess natural gas, but rather to permit its transportation from a seagoing vessel in liquid form to the customer as a gas. Viewed in this light, LNG facilities are properly classified as a maritime transport supporting service, which we explicitly excluded from our WTO commitments.

[1] The safety of tank farms and LNG facilities is outside the competency of USTR. Our purpose here is only to explain that GATS commitments would not impinge on decisions in these matters.