

Business Europe / By Erika Mann and Nao Matsukata

## America's Wavering Free-Trade Commitment

The trans-Atlantic relationship has experienced significant challenges in recent years, particularly on trade matters. European capitals have witnessed the rise of protectionism in the U.S. with growing unease. This growing hostility toward free trade has left the EU as the lone defender of the world trading order. And now the American attitude is threatening European businesses.

The U.S. had a sterling record of upholding its global treaty commitments on trade until last summer. That's when the U.S. withdrew from obligations to open its multibillion-dollar market to online gaming under the WTO's General Agreement on Trade in Services (GATS).

This decision followed a series of losses in trade litigation with the small Caribbean country of Antigua and Barbuda. The WTO ruled that the U.S. discriminated against its trade partners by denying them market access through the extraterritorial enforcement of laws regarding online gaming. But rather than alter U.S. law and policy to comply with its treaty commitments, the Bush administration abrogated those treaty commitments, claiming it had never intended to open the market to foreign competition when the GATS was negotiated in 1994.

The effect on business has been twofold. First, this unprecedented U.S. action destabilized a dispute-resolution process agreed upon by 150 countries, and designed to avoid the retaliatory trade policies of the early 20th century. If this process founders, a number of companies could be affected by a new series of trade wars. Service industries in general may suffer from the unpredictability of future market closures.

More narrowly, the U.S. has continued to pursue, and threaten, the discriminatory prosecution of various European companies through the extraterritorial application of U.S. law. So far, these companies include U.K. public gaming firms PartyGaming and 888, as well as global financial institutions

HSBC, Barclays, RBS and Dresdner. These prosecutions continue to occur even though all such companies ended their involvement in the U.S. online gaming market two years ago. American firms, however, are still operating similar businesses free and clear.

The U.S. is negotiating compensatory damages with various of its WTO partners under the terms of the withdrawal process. These damages, however, do not address the substantial loss of market share for European industry. Nor do they rectify the selective and discriminatory enforcement of U.S. laws that have sheltered American business from foreign competition.

This de facto closure of the U.S. market to online gaming has cost European industry, banks and investors dearly. It has wiped out billions of dollars in market capitalization and prospective annual revenues, and caused widespread interruption in business development and job losses. The fact that these businesses and individuals remain at risk of criminal prosecution only exacerbates this damage.

Reluctantly, the EU has been forced to consider two options to restore a degree of fairness to the relationship: further litigation at the WTO, and legislation to protect European nationals from illegal U.S. prosecutions. The latter, a "blocking statute" similar to the EU response to U.S. sanctions on Cuba a decade ago, would prevent the extradition of European nationals facing extraterritorial U.S. prosecution. An EU delegation pressed the significance of the matter in visits this week with Congress and the administration, but the meetings failed to produce any real results.

Europe's concern, however, goes beyond issues of legal sovereignty and commercial damages. The Bush administration's attempt to create a separate standard for the U.S. under the global trade system opens the door for similar brinkmanship by other countries.

Already, China has gained leverage from Washington's selective rejection of global trade rules. This summer, Beijing claimed a new precedent to defend itself in WTO litigation over its inadequate protection of intellectual property. The protection of IP is a big issue in Europe: EU Trade Commissioner Peter Mandelson estimated in 2007 that Chinese violations of IP rights cost European companies 20% of their revenues in China, and 70% of European businesses operating in China claim to have suffered IP theft.

Chinese diplomats in Geneva borrowed their arguments from Washington, claiming essentially that Beijing never intended during its WTO accession to make such commitments. If China loses this case, will it continue to follow Washington's example by withdrawing from select WTO commitments as well?

The Bush administration's policy decisions have belatedly drawn congressional attention. House Judiciary Chairman Robert Conyers, for example, has held hearings regarding the questionable policy of extraterritorial prosecutions, and the potential for backlash against U.S. business world-wide.

The risks from American abuse of the trade system rise cumulatively. U.S. disregard for Europe's legal sovereignty and for the principles of free and fair competition undercut a system that delivers many benefits to the European and U.S. economies. Those benefits, however, will continue to accrue only if the system's integrity is preserved. Europe can't go it alone, nor can it be expected to sacrifice long-term economic interests to political expediency. Brussels looks to restore and rebuild the U.S.-EU partnership, but doing so will require a renaissance of responsible leadership from Congress, and the next White House, alike.

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EU-based firms  
are feeling  
the pinch.