NZ CIEL Inaugural Conference

‘GAMBLING’ WITH SOVEREIGNTY: COMPLYING WITH INTERNATIONAL OBLIGATIONS OR UPHOLDING NATIONAL AUTONOMY

Henning Grosse Ruse - Khan
Max Planck Institute for Intellectual Property-, Competition and Tax Law (Munich, Germany)
Outline

• General Links between WTO Dispute Settlement and State Autonomy

• Suspending IP Protection – a Viable Way to Enforce International Obligations?

• Amending Existing Commitments – A Viable Way to Escape International Obligations?

• Concluding Remarks
WTO Dispute Settlement and State Autonomy

Does the DSU enforce automatically binding, potentially over-reaching decisions upon WTO Members?

- Art.3.2 DSU: Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements

- But allegations of judicial activism in the Panel, AB practice: EC-Hormones, US-FSC, US-Shrimp as examples for creating new rules...
WTO Dispute Settlement and State Autonomy

• Art.19:1, 21:1 & 22:1 DSU establish an International Obligation to comply with DSB Rulings
• But if the violating WTO Member does not comply, Art.22 DSU foresees only optional compensation or the right for the aggrieved Member to seek retaliation by suspending equivalent WTO obligations

→“the decision to ‘retaliate’ is entirely up to the aggrieved Member itself, just as the decision to correct a violation rests on the sovereign decision of the violator” (R Yerxa)
WTO Dispute Settlement and State Autonomy

→ While the DSU thus does not directly interfere with the sovereign decision to comply, it does provide for a mechanism which should enable a retaliating Member to induce compliance (or: to re-balance reciprocal WTO commitments)

• Is this option to enforce international obligations equally available to all WTO Members?
• Does the DSU provide also small economies with tools to effectively induce compliance?
Suspending IP Protection to Enforce International Obligations

The *US – Gambling* Dispute

- Panels and AB found US measures effectively prohibiting cross border supply of gambling services from Antigua inconsistent with US commitments under ist GATS schedule
- While US could justify this by relying on the public morals exception in Art.XIV:a GATS, the AB was not convinced that US applied its measures in a non-discriminatory way
- US continues not to comply with the DSB ruling, confirmed by a Art.21.5 Panel in March 2007
Suspending IP Protection to Enforce International Obligations

The *US* – *Gambling* Dispute (contd)

- In June 2007, Antigua requested authorisation to retaliate by suspending (i.a.) TRIPS obligations
- As the US objected against the level and type of retaliation (Art.22.3&4 DSU), the matter is referred to arbitration under Art.22.6 DSU
- On 14 December, the arbitrators were to issue their decision over Antigua‘s right to cross-retaliate...
Suspending IP Protection to Enforce International Obligations

Inadequacy of Traditional Retaliation

• Antigua has negligible natural resources, needs to import to supply consumers and businesses
• Imports: 50% from US = 0.02% of US exports
• Higher tariffs on US exports lead to higher domestic prices but has no impact on US exports

→ Asymmetry in market size often makes suspending tariff concessions ineffective
→ Traditional retaliation favours large economies
→ No equal option for enforcing Int. obligations
Suspending IP Protection to Enforce International Obligations

Ratio for Retaliating under TRIPS

- **IP protection under TRIPS crucial** for most industrialised countries (e.g. software-, music-, entertainment-, pharma-industry, brand names)

- **Suspending TRIPS likely to inflict significant harm** on these countries’ key industries – thus creating an incentive to comply

- Further potential **welfare effects** for the retaliating Member (technology transfer, boosting nat. industry, access to drugs)
Suspending IP Protection to Enforce International Obligations

Requirements under Art.22.3 DSU

• Retaliating in the same sector/agreement must be *not practicable* (= negative effect on own economy) or *not effective* (= no real impact on non-complying country); see EC - Bananas III

• *Circumstances* must be „*serious enough*“: Importance of affected trade sector and impact of non-compliance on that sector & on the economy

→ All small economies, when strongly affected by WTO violations, will meet these conditions
Suspending IP Protection to Enforce International Obligations

Conflicts with other Int. IP Agreements

• IP protection under TRIPS overlaps with several other Int. or bilateral obligations to protect IP
• Suspending TRIPS does not automatically legalise withdrawing these obligations
• Generally, suspending lower or equal levels of IP protection should be justified under the right to adopt countermeasures (Art.49-55 on State Responsibility)
• In case of TRIPS-plus obligations, suspending TRIPS does not suffice...
Suspending IP Protection to Enforce International Obligations

Factors Determining Economic Feasibility

• **Territoriality** of IP protection: Suspension only justifies unauthorised domestic use; no exports, unless
  – No IP protection applies in Importing Country; or
  – Importing country considers production under IP suspension as international exhaustion (see Art.51, fn.13; Art.6 TRIPS)

→ compliance inducing effect (again) largely depending on **size of domestic market**

• Lack of domestic **production facilities** in DCs – imports only from countries with no IPR grant…
Suspending IP Protection to Enforce International Obligations

• Can Antigua circumvent the problem of its small domestic market by suspending protection for copyrighted movies/music to be offered online?

→ Difficulty of ensuring equivalence, Art.22.4 DSU

→ Overall, **economic feasibility** (to a large extent depending on domestic market size) limits the effectiveness of IP suspension to induce compliance

→ Antigua‘s options to enforce the int. obligation of the US to comply are therefore rather limited...
Amending Existing Commitments to Escape International Obligations

US move to modify its GATS commitments

- In May 2007, the US announced its intention to modify its commitments relating to gambling services under Art.XXI GATS procedures
- Instead of complying with its Int. obligations, the US is bringing these obligations in compliance with its national laws – thereby attempting to resolve the ongoing US – Gambling Dispute

- 8 WTO Members (incl. EC, Canada, India, Japan, Australia) filed requests for compensation
- So far, compensation negotiations are ongoing
Amending Existing Commitments to Escape International Obligations

Procedures under Art.XXI GATS, S/L/80

• Scheduled commitments under GATS can be modified or withdrawn according to Art.XXI GATS.
• After a notification by the modifying Member, all affected Members can request negotiations on (equally favourable) compensatory adjustments.
• If negotiations fail, any affected Member can request a decision by an arbitration body.
• If the modifying Member does not comply with this decision, the requesting Members can withdraw substantially equivalent commitments.
• Certification of modifications, unless objections.
Amending Existing Commitments to Escape International Obligations

Impact on *US – Gambling* Dispute

- As soon as US has validly withdrawn its commitments on cross-border gambling services, it has removed its violation of WTO obligations.
- Antigua thus cannot rely on the DSB rulings anymore and may not retaliate to induce compliance.
  → "you loose the game, so you change the rules"
- However, unless the Art.XXI GATS procedures are completed, Antigua can pursue retaliation under Art.22 DSU (no ‘sequencing‘ analogy) since the original commitments remain valid.
## Comparing options under Art.XXI GATS with those under the DSU

<table>
<thead>
<tr>
<th>DSU aims to uphold Int. obligations to comply with WTO law over sovereignty</th>
<th>Art.XXI GATS allows to uphold national autonomy over int. obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>But DSU safeguards sovereignty by letting countries choose not to comply (and face retaliation)</td>
<td>But the price for departing from existing obligations is to grant compensatory adjustments</td>
</tr>
<tr>
<td>Retaliation depends on aggrieved party to the dispute, includes cross-retaliation</td>
<td>Retaliation/Re-balancing by affected Members, limited to GATS commitments</td>
</tr>
<tr>
<td>Objective review mechanism to test adherence to DSU rules (Art.21.5, 22.6)</td>
<td>No review to test Art.XXI adherence, but individual objections &amp; re-negotiations</td>
</tr>
</tbody>
</table>
Comparing options under Art.XXI GATS with those under the DSU

Extending the Notion to Modify Commitments

• Can Art.XXI GATS-like tools work to uphold autonomy of DCs, small economies?

• Idea to extend re-negotiation mechanism to other areas, e.g. option to allow for waiver-like exceptions from substantive rules: Imagine Thailand attempting to modify its obligations under Art.30, 31 TRIPS to improve access to drugs...

• Additional policy space vs. certainty, predictability

• diplomacy- & power-based influences inherent in re-negotiations work against DCs, small economies
Conclusions

Lessons from *US – Gambling*

- For small economies, the DSU cannot live up to one of its major goals, to enshrine the rule of law over the law of the jungle
- IP cross-retaliation cannot (fully) neutralise market asymmetries & enforce int. obligations
- Next to non-compliance, Art.XXI GATS puts another tool for upholding autonomy in the hands of powerful WTO Members
- But its use to ‘resolve‘ disputes affects the perception of the DSU offering binding settlements
Thank you for your attention

Suggestions, critique and remarks to

henning.gr-khan@ip.mpg.de