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Gambling and the Law®: The International Law of Remote Wagering, 40 J. Marshall L. Rev. 1159 (2007)

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GAMBLING AND THE LAW®*: THE INTERNATIONAL LAW OF REMOTE WAGERING

I. NELSON ROSE**

I. INTRODUCTION

A general consensus is developing with regard to when a state or nation has the right to exclude Internet and other remote wagering originating in another state or nation. The legal terminology may vary, as will the specific legal doctrine applied in any particular case; but the overarching analysis remains the same. Recent decisions from courts, including the European Court

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Harvard Law School educated, Professor Rose is a consultant to government and industry. He has testified as an expert witness in administrative, civil, and criminal cases throughout the United States, in Australia and New Zealand, including the first NAFTA tribunal on gaming issues. Professor Rose has acted as a consultant to major law firms, international corporations, licensed casinos, Indian tribes, and local, state and national governments, including the province of Ontario, the states of Arizona, California, Florida, Illinois, Michigan, New Jersey, Texas, and the federal governments of Canada, Mexico and the United States.

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of Justice ("ECJ") and United States Supreme Court; tribunals for international agencies, including the World Trade Organization ("WTO"); and announcements from the European Commission, establish a framework for determining when a jurisdiction may keep out foreign legal gambling. These decisions also illustrate how the United States seeks to impose a prohibition on overseas Internet gambling while permitting Americans to bet from their homes and offices with U.S. operators.

A sovereign has the inherent power to exclude all foreign goods and services, including gambling. It expressly volunteers to give up some of this power when it joins a federation or signs a treaty. When signing a treaty, a sovereign state can pick and choose what it will admit. For example, while some governments expressly said that they would not allow foreign gambling when they signed the WTO treaties, the United States did not. Nations can also agree to let down their trade barriers through their actions, a doctrine known as comity of nations.

Gambling, however, is a morally suspect industry. It is one of the few areas where a state can unilaterally change its mind – if it has a good enough reason. A state needs to put forward some evidence to show it has a reasonable belief that it must exclude foreign legal gambling to protect the health, safety, welfare, or morality of its residents, and in doing so will be excused from the commitments it made when it joined the federation or signed the treaty. So, if the United Kingdom has agreed to let in all commercial services from other member states of the European Union, it has the right to keep out foreign large lotteries, so long as it is doing so to protect the health, safety, welfare and morality of its residents. However, excluding foreign legal gambling merely to protect local operators from competition is usually not considered a valid reason to withdraw.

Withdrawing from treaty obligations presents no problem for a state that completely outlaws all forms of gambling. When the state attempts to exclude foreign legal gambling, while allowing local operators to take the same bets from its residents, the state's motive appears to be the elimination of competition to maximize revenue for local operators.

II. DEFINITIONS

Before embarking on a discussion of remote wagering, one must first define frequently used terms. Legal gaming industries use different names for their products and services. Sometimes this is a historic accident, required to make the game legal, or a euphemism. Gaming devices which are remarkably similar are known, in different jurisdictions, as slot machines, video lottery terminals, video bingo, video pull-tabs, fixed odds machines or

amusement with prizes. In Australia, these gaming devices are colloquially called "pokies," apparently after video poker.

Even within the same industry the terms vary. The racing industry, for example, keeps separate statistics for inter-track betting and off-track betting. Inter-track betting occurs when patrons go to a track to bet on a race taking place at another track. Off-track betting is when punters (gamblers) place bets somewhere other than at a track (although they still watch the race on video monitors). The racing industry further divides off-track betting into two categories: "OTBs," where the punters go to a stand-alone facility, and advanced deposit wagering ("ADW"), where they bet from their homes. ADW requires patrons to deposit funds in advance, often using a credit card, and then make bets by phone or computer.

For purposes of deciding whether a state can keep out foreign legal gambling, it is best to start with the most fundamental definition: Any game or scheme with the three elements of prize, chance, and consideration is considered a form of gambling. An activity that is missing one of those elements is not considered gambling. Games where players cannot win a prize of value, even if they have to pay to enter and the outcome is determined by luck, are not considered gambling. These are true amusement games. Games where chance does not determine the outcome are not gambling, but rather games of skill. Free games, such as no-purchase-necessary sweepstakes are not gambling. Although some jurisdictions still use the same definition of consideration for gambling as with non-gambling contracts, the overwhelming majority now require that participants pay to play. Incidental expenditures, let alone mere effort, do not create consideration for gambling.¹ In the eyes of the law, these are merely gifts.

Jurisdictions have the power to regulate and perhaps even prohibit non-gambling activities. Governments have been regulating some of these areas for years. Regulations are changing in some areas, such as skill games and promotional sweepstakes. These regulations are sometimes tougher, sometimes weaker; this goes beyond the scope of this paper. Consequently, the discussions of "gaming" here will here be limited to gambling. Other forms of gaming, such as swords-and-sorcery style video games, are not included. In order to constitute gambling, players have to pay to enter, participants must be able to win money or other valuable prizes, and the outcome must be determined by chance.

The major issues revolve around various forms of widely-acknowledged gambling: state-operated or licensed lotteries, sports betting, pari-mutuel wagering on horse and dog races, slot

1. See, e.g., *Fed. Comm'n Comm'n v. Am. Broad. Co.*, 347 U.S. 284 (1954).

machines, and house-banked table casino games. Poker is almost always gaming of this type, although there is the possibility that poker tournaments can be run as games of skill in some jurisdictions. Day-trading in commodities and stock index futures, on the other hand, are not included, because those activities have been declared by federal statutes as exempt from state anti-gambling laws, at least when conducted on licensed exchanges. Since this article deals with cross-border betting, it is mostly concerned with the current manifestations of these traditional forms of gaming, which are aided by the technology of the telephone, television, mobile phones, computers and, most importantly, the Internet.

III. A HISTORY OF THE RELATIONSHIP BETWEEN GAMBLING AND THE LAW

A. *Three Waves of Gambling in the United States*

There have been three waves of legal gambling in the United States. The United States is in a "third wave" of legal gambling: This is the third time in American history that legalized gambling has swept the nation.²

The first wave began with the earliest settlements of America, funded, in part, by lotteries. This wave lasted through the 1820s and 1830s and ended with the spread of Jacksonian morality, aided by numerous well-publicized scandals. By the beginning of the Civil War, all but three states had outlawed lotteries. Additionally, the first federal anti-lottery laws were adopted.

The Civil War and the expansion of the western frontier brought about the second wave of legalized gambling. The states of the old South allowed gambling because they needed a way to raise money to rebuild their devastated economies. The West allowed legal gambling because it was impossible to outlaw this typical frontier diversion. Soon, however, the second wave came crashing down.

The trappings of civilization brought the desire for respectability to the West. Large public scandals rocked the legal lotteries. The Louisiana Lottery Scandal forced the federal government to shut down the lotteries. Soon, only Nevada and the territories of New Mexico and Arizona remained as outposts of casino gambling.

Shortly after the turn of the 20th century, Nevada and the last territories of the West outlawed all forms of gambling. At the

2. I. Nelson Rose, *GAMBLING AND THE LAW* 1 (1986); I. Nelson Rose, *The Legalization and Control of Casino Gambling*, *FORDHAM URBAN L.J.* 245 (1979-80).

same time, betting on horse races fell into disfavor and the tracks were closed. By 1910, only Maryland, Kentucky and New York continued to allow legalized gambling. The United States was once again virtually free of legalized gambling.

The third wave began with the Depression. Nevada re-legalized casino gambling in 1931. Twenty states opened race tracks in the 1930s, with additional states allowing pari-mutuel betting in every decade since. The big boom began with the first legal state lottery opening in New Hampshire in 1964. Today, only two states, Utah and Hawaii, ban all forms of commercial gambling.

1. American Attitudes Toward Gambling

It is important to note that different forms of gambling have been considered and treated differently throughout American history. The United States inherited its attitudes and laws toward gambling from the English common law. In the earliest days of the common law all forms of gambling were legal; although, the courts could close down as a nuisance any activity that ran the risk of a breach of the peace or depreciation of public morals. Even in the earliest days, different forms of gambling were treated differently. The first English statute to directly affect gambling was signed by King Richard II in 1388 and directed all laborers and serving men to secure bows and arrows and to abandon the pursuit of "tennis, football, coits, dice, casting of stone kaileg, and other such importune games."³ The law reflects the feelings of the society at the time; "gaming," that is, betting on games of chance, was seen as sapping the country's ability to wage war. Later, gaming, and the rowdy houses and saloons where the games were played, was thought to undermine the strength of the nation by taking working men away from the fields and factories. The strong antagonism toward gaming became part of the common law through the passage of additional ancient statutes.⁴

Other forms of gaming did not create the same negative feelings. Horse racing, for example, was supposed to "improve the breed," and was thus actively encouraged, or at least tolerated. The agrarian and pre-industrial societies were built around the working horse. Horse races were tests of endurance. Horses were not specially bred for running. Of course, horses were expensive pieces of property and wagers tended to be limited to bets between the wealthy. It was only with the technological developments of the late nineteenth century, the telephone, telegraph and pari-mutuel tote machines, that the bettors were freed from having to

3. 12 RICH. II, c. 6 (1388).

4. 33 HEN. VIII, c. 9 (1541); THE STATUTE OF ANNE, 9 ANNE, c. 14 (1710).

be physically present at the race. This is when bookmaking became a social problem.

Attitudes toward the lottery can be traced back to the original American colonies. Lotteries have repeatedly gained wide acceptance, only to be hit by scandal and swindles, leading to public revulsion and a desire to outlaw them for all time. Many state constitutions were written while the memories were still fresh of the lottery scandals that ended the first wave of gambling acceptance. Thus, the only form of gambling specifically prohibited by state constitutions was the lottery, with later statutory prohibitions on gaming and bookmaking. For example, the California constitution, written in 1850 by settlers who remembered the lottery scandals, outlaws only one form of gambling: the lottery. During the Gold Rush, California allowed and taxed casinos. However, by the end of the 1850s, gaming was outlawed by state statute. The California Legislature did not feel that it was necessary to outlaw betting on horse races until 1909.

The wide swings in the public's attitude toward gambling and the historical variations on the treatment of the various forms of gambling under the law have led to some remarkable anomalies. Nevada, which has more forms of legal gambling than any other state, still has a constitutional prohibition on lotteries.⁵ In fact, Nevada legislators are strictly forbidden from ever legalizing any form of lottery.⁶ Mississippi is the third largest casino state, after New Jersey, but also does not have a state lottery.⁷

2. *Mishmash of Statutes Regulating Gambling*

It is important to realize that although the cycles of legalized gambling repeat throughout American history, different regions of the country are at different stages of the third cycle. Since different forms of gambling have spread to different jurisdictions at different times, the result is a patchwork quilt of various statutes, regulations, and court and administrative decisions with no interconnectedness. Therefore, it is important to know what form of gambling is involved when asking whether cross-border gaming is prohibited.

5. NEV. CONST. art. IV, § 24.

6. *Id.*; cf. Ed Vogel, *Assemblyman Tries Again with Proposal Calling for Creation of State Lottery*, LAS VEGAS REV. J., Mar. 8, 2007, available at http://www.reviewjournal.com/lvrj_home/2007/Mar-08-Thu-2007/news/13035742.html (describing introduction of joint resolution to amend the state constitution to allow for a state lottery).

7. MISS. CONST. art. IV, § 98 (repealed 1992); see also Alicia Hansen, *As Tax Method, Lottery's a Poor Choice for Mississippi*, CLARION-LEDGER, Feb. 25, 2005, available at, <http://www.taxfoundation.org/news/show/232.html> (describing the hesitation to create the Mississippi lottery).

California statutes provide a good example of a mishmash of laws created over the centuries. The jumble of statutes often produces strange results. The state, like most other jurisdictions, makes it a crime to run a casino. But it is also a crime merely to bet at any "banking or percentage game."⁸ The statute prohibits betting on eleven specific games, including roulette and twenty-one.⁹ This means it is a crime in California just to *play* at any casino table that is house-banked.¹⁰ The statute also prohibits betting on the eleven listed games, even when the players merely bet against each other.¹¹ To avoid breaking the law, California card clubs play "22" with revolving banks. Craps, however, is not on the list. So, casino-style craps, a banking or percentage game, is prohibited, but there is no state law against a floating crap game, where players merely "fade," or match, each others' wagers, and there is no house bank.

The state makes it a crime to sell lottery tickets,¹² but it is not a crime to buy a lottery ticket, even an illegal one. It is a crime for anyone other than a charity to run a bingo game for money, but not a crime to play.¹³ There is a statute making it a misdemeanor to accept, record, or even make a bet on a sporting event,¹⁴ although it has never been used against punters, only bookies.¹⁵

The most bizarre set of laws limits poker to social or state-licensed games, but these later for-profit games can take money out of the pot, or "rake the pot," only three times.¹⁶ Bills passed in the nineteenth, twentieth, and twenty-first centuries, as well as court cases, make it legal for a punter in California to play online poker, so long as the operator rakes the pot only three or fewer times.¹⁷ If the operator takes money out of the pot a fourth time, the unknowing player in California is committing a misdemeanor.¹⁸

8. CAL. PENAL CODE § 330 (2007).

9. *Id.*

10. *See, e.g.*, VICTOR H. ROYER, POWERFUL PROFITS FROM CASINO TABLE GAMES 27 (2004) (describing "house-banked games" as those games allowing a player to play directly against the house, with the house having a built-in edge that always assures a steady win).

11. CAL. PENAL CODE § 330 (2007).

12. CAL. PENAL CODE § 321 (2007).

13. CAL. PENAL CODE § 326.5 (2007).

14. CAL. PENAL CODE § 337a (2007).

15. "A person who determines the odds and receives bets on the outcome of events." BLACK'S LAW DICTIONARY 194 (8th ed. 2004).

16. CAL. PENAL CODE § 337 (2007).

17. CAL. PENAL CODE § 337(j) (2007).

18. Because that would make it a "percentage game," in violation of Penal Code § 330.

IV. INTERSTATE WIRE ACT

A. *To Whom Does the Wire Act Apply?*

Although a sovereign has the inherent power to exclude all gambling including remote wagering, in the past, governments almost never exercised these powers to their theoretical limits. There are a few reasons why lawmakers have refrained from enacting such broad legislation. First, most lawmakers simply have not thought about the issue. If they have, they rarely enact laws that could be interpreted as infringing on the sovereignty of other nations. Second, legislators are reluctant to embarrass themselves by passing laws that cannot be enforced. Third, sometimes there are omissions created by historical (as well as other) accidents. Finally, changes in the law often follow changes in society. Lawmakers are reactive, rather than proactive. They wait until an actual problem has occurred before they take action. In this way, they make laws that address a particular, present problem.

The most important United States federal law restricting remote wagering is the Interstate Wire Act (“the Wire Act”).¹⁹ It was designed to go after “the Wire,” that is, the telegraph wire services illegal bookies used to get horserace results.²⁰ Naturally, at the time the Wire Act was passed, no one could see how it could one day regulate playing poker by phone, let alone via Internet casinos. The statute was passed as part of then-Attorney General Robert F. Kennedy’s “war on crime” in 1961. The broad purpose of the statute is stated as follows:

[T]o assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.²¹

The U.S. Department of Justice (“DOJ”) believes the law covers all forms of gambling transmitted across state lines. But the words of the statute are more limited:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or

19. 18 U.S.C. § 1084 (1994).

20. David G. Schwartz, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET* 138 (Univ. of Nev. Press 2005).

21. H.R. REP. NO. 87-967, 87th Cong., 1st Sess. 1961, S.C.C.A.N. 2631, 1961 WL 4794 (Leg. Hist.) P.L. 87-216, Aug. 17, 1961. (accompanying S. 1656 - INTERSTATE WIRE ACT, 18 U.S.C. § 1084).

contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers [is guilty of a crime].²²

Three United States federal courts have been called upon to determine whether this statute does, indeed, cover all gambling on the Internet. They have unanimously agreed that the language “sporting event or contest” in the statute specifies that the Wire Act is limited to wagers on sports events and races.²³ They held that Internet lotteries and casinos are not banned by this, or any other federal law.²⁴

By its own terms, the Wire Act only applies to individuals who are “engaged in the business of betting or wagering.”²⁵ This means the statute does not apply to mere punters. Courts have agreed with this statement, dismissing charges the few times prosecutors have charged individuals with violating the Wire Act by placing bets.

B. To Which Transactions Does the Wire Act Apply?

The Commerce Clause expressly gives Congress the power to regulate interstate and international commerce. The Wire Act requires that there be a “transmission in interstate or foreign commerce,”²⁶ to give the federal government subject matter jurisdiction under the Commerce Clause. But what does “transmission in interstate or foreign commerce” mean? At least one court that looked at that phrase interpreted it narrowly: the Wire Act requires that the communication be between states of the United States or between the United States and a foreign country.²⁷ It does not cover wagering information sent from international waters to the United States mainland.²⁸ If the claim is that “foreign commerce” is involved, the government has to show that there was contact with a foreign country.²⁹ The Fifth Circuit ruled that sports wagers transmitted from a ship on the high seas to Florida did not fall under Wire Act.³⁰

22. 18 U.S.C. § 1084(a) (2006).

23. *See, e.g., In re Mastercard Intern Inc.*, 313 F.3d 257, 262 n.20 (5th Cir. 2002) (stating that a plain reading of the statute “clearly requires that the object of the gambling be a sporting event or contest”).

24. *See id.* at 262 n.21 (stating that although the plaintiffs engaged in online gambling, because it did not involve sporting events or contests, it was not covered by the Wire Act).

25. 18 U.S.C. § 1084(a).

26. *Id.*

27. *United States v. Montford*, 27 F.3d 137, 139 (5th Cir. 1994).

28. *Id.*

29. *Id.*

30. *Id.*

C. Limitations on Jurisdiction Under the Wire Act

One inherent limitation on the reach of the laws of every state and country is the sovereignty of other states and countries. Many governments, including individual state governments, are not governments of limited power like the United States federal government. These governments have the inherent power to prohibit all gambling and do not need to find a provision in their constitutions giving them subject matter jurisdiction. Of course, a sovereign may voluntarily agree to limit its power by joining a federation, signing international treaties or accepting the doctrine of comity,³¹ which requires governments to mutually respect each others' laws.

The High Court of South Africa concisely summarized the limits of sovereignty in a recent case holding that an Internet casino, licensed by the Kingdom of Swaziland, was subject to the laws of Gauteng when it tried to advertise or take bets from residents of Gauteng:

By requiring a person who renders service in this country to be licensed albeit that that person is in a foreign country while rendering that service, our legislature is not prescribing to that person what he or she may do in the foreign country. The legislature is prescribing what the effect of what the person does may be in this country.³²

V. PRESUMPTIONS AGAINST EXTRATERRITORIAL REACH OF STATUTES

A government has the power to regulate activities taking place within its borders. It has the power to regulate activities involving its citizens or their property in international waters and airspace, assuming there is no conflict with the rights of other governments. A state or country may even be able to punish those who do harm to its citizens who are physically within the borders of another sovereign.³³ But international law does not allow a state or country to regulate an activity which has no impact on that sovereign or its citizens if the activity is conducted by foreign nationals in their own territory.³⁴

This presumption against the extraterritorial reach of statutes has led to the creation of some legal presumptions that

31. Often called "comity of nations," to distinguish it from judicial comity where one court defers hearing a case because it is being heard by a court in a different court system.

32. *Casino Enter. Ltd. v. Gauteng Gambling Bd.*, Case No. 28704/2004 (Nov. 27, 2006), available at 11 GAMING L. REV. 72.

33. See Restatement (Third) of Foreign Relations Law of the U.S. § 402 (1986) (describing bases of jurisdiction to prescribe).

34. *Id.*

have a major impact on interpreting whether a law prohibits cross-border wagering. Even though a government might have the power, there is often a strong presumption that lawmakers have not reached out beyond their jurisdictions' borders in enacting a statute. Therefore, any prohibition on gambling which does expressly state that it applies to cross-border wagers will be presumed to include only activities taking place within the borders of that particular government entity. For example, U.S. federal criminal statutes do not apply to activities taking place entirely outside of the territorial boundaries of the United States, unless the statute itself contains an extremely clear statement of congressional extraterritorial intent.

The strong presumption against extraterritorial application of federal criminal statutes has been part of American law for decades. In 1922, the U.S. Supreme Court reaffirmed this doctrine: If Congress intends a criminal prohibition to apply outside the United States, it must "say so in the statute."³⁵ The only exception is the limited class of offenses committed directly against the federal government itself, such as the foreign theft of U.S. government property.³⁶

Federal courts have consistently halted criminal proceedings when the conduct took place outside the United States and no statement of Congressional intent to intrude on the sovereignty of an independent nation could be found in the statute. For example, in *United States v. Velasquez-Mercado*,³⁷ an indictment for a federal sex crime was dismissed, because the allegations stated that the act occurred outside the United States, and "the plain language of the statute," did not clearly indicate an extraterritorial reach.³⁸ And in *Ito v. United States*,³⁹ the Ninth Circuit Court of Appeals overturned a defendant's conviction for bringing aliens into the United States where the defendant's conduct occurred outside U.S. territorial waters.⁴⁰

U.S. federal civil statutes carry the same heavy presumption that they are limited to acts committed within the territory of the United States. In the past, courts have been more willing to look beyond the language of the statute itself in civil cases to see if the legislative history reveals a clear Congressional extraterritorial intent. However, in 1991, the U.S. Supreme Court declared that there must be a clear statement of Congressional extraterritorial

35. *United States v. Bowman*, 260 U.S. 94 (1922).

36. *See, e.g., United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1974) (holding that the United States had jurisdiction to prosecute appellants for theft of government property even though the alleged acts occurred abroad).

37. 697 F. Supp. 292 (S.D. Tex. 1988).

38. *Id.* at 294.

39. 64 F.2d 73 (9th Cir. 1933).

40. *Id.* at 75.

intent (in the statute itself) in civil as well as criminal laws.⁴¹ A strict drafting standard is necessary to avoid “unintended clashes between our laws and those of other nations which could result in international discord.”⁴² This reflects the growing respect for international law and the impact American laws can have on the sovereignty of foreign nations.

There are, of course, times when it is clear that a government has acted to prohibit or regulate cross-border gambling. These are usually recently enacted statutes designed to prevent local residents from betting over the Internet. The most common approach is to make it a crime for an individual to take a bet online from a punter who is physically present in that jurisdiction.

A growing number of legislatures have passed statutes and regulations aimed at punishing financial institutions and others who facilitate the gambling transaction. For example, Nevada enacted a law that expressly makes it a crime in Nevada for a person located anywhere in the world to accept a wager over the Internet from a person physically located in Nevada.⁴³ This statute meets the test for overcoming the presumption that a law will not have extraterritorial reach.

Another example is the recently enacted Unlawful Internet Gambling Enforcement Act (“the Act”).⁴⁴ The Act makes it a crime for a gambling business anywhere in the world to accept money for a gambling transaction that violates a federal or state law.⁴⁵ It also calls for regulations to require financial institutions and e-wallets to identify and block money transfers for unlawful online gaming.⁴⁶ Although the Act is supposedly aimed at the transfers of funds, it bizarrely does not actually make it a crime to transfer money for illegal gambling.⁴⁷

VI. CROSS-BORDER GAMBLING

Because the illegal operator is seen as being more dangerous to society than the buyer of the illegal goods or services, laws against gambling are often more concerned with the illegal operator than the patron. Additionally, lawmakers realize that it would be simply impossible to arrest every patron, and having

41. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 255-56 (1991).

42. *Id.* at 248.

43. SB 318, 69th LEG., REG. SESS. (Nev. 1997) (codified at NEV. REV. STAT. §§ 465.091-465.094 (2007)).

44. 31 U.S.C. § 5361 (2006).

45. *Id.*

46. *Id.*

47. *Id.* The many problems with the Act may have been the hasty way it was enacted. The Act was rammed through Congress at the last hour by then-Majority Leader Bill Frist (R.- TN). He attached it to a ports security bill and would not allow Democrats to read the Act before voting.

laws on the books that cannot be enforced creates disrespect for the law as a whole and creates opportunities for venality.

Cross-border is unique in that, by definition, it is only the patron who is physically present in the jurisdiction and thus easy to arrest. The illegal operator is outside of the jurisdiction. The first proposed U.S. federal prohibition on Internet gambling,⁴⁸ if it had been enacted, would have been the first time it would have been a crime to merely make a bet via the Internet. The agency charged with enforcing federal criminal law, the DOJ, spoke out against the bill, making it clear that the agents did not want to be in the business of knocking on bedroom doors to arrest five-dollar bettors.

No matter how the prohibition on cross-border gambling is set-up, there are almost always express exceptions written into the statute for forms of gambling that are legal in that jurisdiction. This is necessary since it is often the government itself who is in the business of Internet gambling.

It is common for state lotteries, outside of the United States and Canada, to take bets from their own residents' homes and offices by computer and phone. Even in North America, the lotteries of the four Canadian Atlantic provinces have joined together to sell tickets online,⁴⁹ and American state legislatures are considering proposals for at-home sales. But these are far behind developments in Europe, where government-run lotteries take online bets on sports events.

Around the world, state-licensed operators for years have taken bets on sports events and horse races. These were often allowed by phone, so it was natural to extend the law to include the Internet. Even in the United States, states like New York have allowed ADW on horse races for many years. In December 2000 Congress amended the Interstate Horseracing Act to expressly allow ADW by computer, so long as the bet was legal in both the state where the patron was located and the state where the OTB accepted the bet.⁵⁰

48. The original was the Kyl Bill, named after its author Jon Kyl, U.S. Senator from Arizona.

49. The Atlantic Lottery Corporation is comprised of the Lotteries Commission of New Brunswick, Nova Scotia Gaming Corporation, Prince Edward Island Lotteries Commission, and the Province of Newfoundland and Labrador. Atlantic Lottery Corporation, <http://www.alc.ca/English/AboutALC/WholsALC/> (last visited Nov. 10, 2007). Online games are available to residents of those provinces at <http://www.alc.ca/English/ALCProducts/InteractiveGame>.

50. INTERSTATE HORSERACING ACT OF 2000, 15 U.S.C. § 3004 (2006). This led to some bizarre laws. California law required that a person be physically present at an off-track betting facility to make a bet. Rather than admit that ADW allowed at-home betting, the California Legislature passed a statute containing the express legal fiction that a patron is physically present at an

VII. POLICE POWERS

When a government acts to prohibit cross-border gambling, is that action valid? In analyzing whether a jurisdiction has the power to prevent cross-border betting, it is necessary to step back and analyze that government's legal relationships with other sovereignties. These legal relationships fall into two categories. The first is the more common situation, where the state or nation has no relevant legal restrictions on its power. The second situation, which has become of great interest recently, occurs when governments have limited rights to exclude extraterritorial legal gambling, due to other law. The latter situation includes states that belong to federations and are restricted under federal laws or federal constitutions; nations that have voluntarily, sometimes unintentionally, agreed to let in legal gambling from other specific countries under treaties; and governments bound by the doctrine of comity, where out of courtesy and mutual respect, rather than because they are bound by a written document, states and nations recognize the laws of some other states or nations.

A. Information About a State's Police Power

A sovereign government by definition has power over its own territory and citizens. It is thus the inherent right of every sovereign state to protect its borders from intrusions. This right is so fundamental that it need not be spelled out explicitly in a constitution or statute.

The state's right derives not only from its right to continue to exist as an independent state, but also from the state's police power. The police power is the inherent right, and perhaps the obligation, of a government to protect the health, safety, welfare and morals of its citizens. In the European Union ("E.U."), it is called the "overriding public interest." This allows member states to take actions that violate the treaties creating the E.U. when in the best interest of a given member state. In the context of the World Trade Organization ("WTO"), the police powers are referred to as "necessary" actions. "Necessary" actions can be taken in violation of the WTO treaties for reasons of necessity, such as preserving public order.

The police power is most commonly connected with governmental action taken in emergency situations, especially where public health is endangered, as in a fire or an epidemic. But gambling, licensed or illegal, has always been held to fall within a state's police power.⁵¹ For example, the U.S. Supreme

off-track betting outlet if he makes an ADW bet by phone or computer from his home or office.

51. The perception of gambling as something akin to disease is illustrated by the United States Supreme Court's definition of a lottery:

Court declared in *United States v. Edge Broad. Co.*:

[w]hile lotteries have existed in this country since its founding, States have long viewed them as a hazard to their citizens and to the public interest. Gambling does not implicate a constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether."⁵²

The police power has three interesting, and unusual, attributes. First, a government's police power is virtually unlimited. It is the nature of government that the state exercise power for the good of society as a whole, at the expense of individual rights. This is obvious in totalitarian and authoritarian regimes. However, the same is true of democracies. Since Jean-Jacques Rousseau published his *Social Contract* in 1762,⁵³ it has been generally accepted that a democratic state derives its sovereign power from the surrender by individuals of their natural liberties.

Constitutional and other legal safeguards protect citizens from improper use of the government's power. But, when a jurisdiction is faced with a threat to the health, safety and welfare of its citizens, particularly in an emergency, the police power prevails. The police power trumps constitutional and other legal rights; government has the legal right and power to do literally almost anything to anyone. For example, during an epidemic, government health officials will not wait for a jury trial before quarantining a house. At its most extreme, a government can even take life without due process safeguards, as when the police use deadly force.

There seems to be little doubt that a government can invoke its police powers to regulate gambling. In fact, because gambling is treated as a police power issue, governments can act in ways that would be unthinkable in other commercial and social settings. In *Mills v. Agnew*, a federal district court said, "[t]he police power of the State to suppress gambling is practically unrestrained."⁵⁴ In *Summersport Enterprise, Ltd. v. Pari-Mutuel Commission*, a

Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple.

Stone v. Miss., 101 U.S. 814, 818 (1880) (quoting *Phalen v. Va.*, 49 U.S. 163 (1850)).

52. *Id.* at 425.

53. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Penguin Classics ed. 1968) (1762).

54. 286 F. Supp. 107, 109 (D. Md. 1968) (citing *Ah Sin v. Wittman*, 198 U.S. 500 (1905)).

Florida court said, “[b]ecause we are dealing with authorized gambling, the state may exercise greater control and use the police power in a more arbitrary manner.”⁵⁵

Second, a government’s police power is often tied to morality. It was once a well-assumed principle that the government played an important role in upholding the moral standards of a community. But in the 1970s, there emerged a widespread belief among opinion-leaders in many countries in situational ethics, that there are no absolute standards of right and wrong. By the 1980s, even anti-gambling crusaders rarely argued that gambling should be outlawed because it is immoral; they feared being viewed as right-wing religious fanatics. However, the government’s police powers are still aimed at morally suspect behavior, even if the justifications given are more pragmatic than religious.

For example, the Florida Supreme Court upheld and rationalized that state legislature’s ban on Sunday racing and betting as follows:

[T]he legislature could reasonably find that the Sunday racing and betting restrictions serve several legitimate state purposes which promote the public health, safety, morals, and general welfare of the citizens of the state of Florida. The restrictions serve these legitimate purposes: 1) they encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities; 2) closing such facilities on what might otherwise be the busiest day of the week could help curb the compulsive gambler syndrome; and 3) racing on less busy days means there is less opportunity for mischief that sometimes attends these events, and therefore a lighter burden on law enforcement authorities is created. . . . The mere fact that the state of Florida has no uniform day of rest for other businesses does not preclude the legislature from having a day of rest and surcease from racing and pari-mutuel wagering.⁵⁶

Gambling has always been inextricably linked with the morality of a society. The explosion of legal gambling in recent years has not weakened government police power over gambling. In a California State Appellate decision, the court stated:

[Plaintiffs] further urge that because of greater acceptance of gambling, the prohibition on the forwarding of money to be wagered on horse racing is an archaic and unreasonable exercise of the police power It has long been settled that the police power extends to objectives in furtherance of the public peace, safety, morals, health and welfare, and the prohibition or regulation of betting on horse

55. 493 So.2d 1085, 1089 (Fla. Ct. App. 1986) (citing *Hialeah Race Course, Inc. v. Gulf Stream Park Racing Ass’n.*, 37 So.2d 692 (Fla. 1948)).

56. *Div. of Pari-Mutuel Wagering, Dep’t of Bus. Regulation v. Fla. Horse Council, Inc.*, 464 So.2d 128, 130 (Fla. 1985).

ances falls within the power. Not only does the Legislature have the power to completely prohibit wagering on horseraces, but it may also limit such wagering to persons physically present within the enclosure.⁵⁷

Third, governmental police power tends to be a local issue. In *Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico*, the U.S. Supreme Court upheld Puerto Rico's nearly universal ban on advertising by Puerto Rican licensed casinos.⁵⁸ The Court observed that restrictions aimed at promoting the welfare, safety and morals of the residents of a state represent a well-recognized exercise of state police power.⁵⁹ Whether the government involved is a state in a federation, like the states of Australia and the United States, or a "state" in a treaty organization, like the European Union or World Trade Organization, it is the state that is primarily concerned with police power issues. Unlike other areas of commerce, it is highly unusual for a federal government, let alone a treaty organization, to overrule police power decisions of member states.⁶⁰ Higher levels of government are not usually concerned with police power issues, unless there is a perception that a threat to society exists that is beyond the control of local government.

Police power is usually a state issue based on history and practicality. During the formative stages of modern governments, the protection of citizens' health and safety was best left to authorities on the scene. Given the technology existing then, and perhaps even today, the major threats of fire and disease were not controllable from distant national capitols.⁶¹ The very nature of the Internet has led to an unusual level of involvement by federal governments, particularly in Australia and the United States, into online gambling.

There is no dispute that a state has the power to protect its citizens from illegal gambling. The question of a government's ability, under its police power, to control the transmission of information and wagers connected with gambling that is clearly

57. *Advanced Delivery Serv., Inc. v. Gates*, 183 Cal. App. 3d 967, 975-76 (Cal. Ct. App. 1986).

58. 478 U.S. 328, 341 (1986), *limited on First Amendment grounds in*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

59. *Id.*

60. "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

61. Nations also have the inherent power to protect their borders from physical intrusion including acts of war by foreign governments.

illegal both where the bet is made and where it is taken was resolved years ago.⁶²

B. Can the United States Exercise Extraterritorial Jurisdiction?

If the form of gambling is illegal in its country of origin, then the government of the receiving country where the punter is located has the legal right to keep it out. Of course, as the first part of this paper showed, it is often difficult to know whether the gambling activity is illegal even under the laws of the jurisdiction trying to ban the gaming website. It is obviously nearly impossible to be sure that the country of origin bars this particular form of gambling. Even if gambling is illegal there, almost all jurisdictions have little regard for activities taking place outside their borders. It is very possible that the laws of the country of origin do not cover gambling operations where the bettor is in another country.

Fortunately for prosecutors and other government agents trying to bar foreign gaming, the question of legality in the country of origin is of no particular significance for the first class of governments, those not having other limits on their police powers. Being legal in another jurisdiction in this situation gives the foreign gaming operator no protection. Under the police power, governments routinely exclude goods and services shipped from countries where the items are legal. Whether it is Saudi Arabia barring the importation of alcoholic beverages, the United Kingdom forbidding advertisements of sex tours in Thailand or China banning soft-core pornography from abroad, the assertion that the activity is legal in the country of origin is not even made.

United States v. Moncini is an example of a typical case illustrating the issue of extraterritorial jurisdiction arising in the United States.⁶³ In *Moncini*, child pornography, illegal under American law, was delivered to someone in the United States.⁶⁴ All parties involved stipulated that in their country of origin, Italy, child pornography was legal and could be legally mailed.⁶⁵ The only question was whether the U.S. federal government could exercise jurisdiction over a foreign national acting legally in his home country.⁶⁶ The court of appeals held that the relevant criminal statute was sufficiently explicit, the detrimental effects from the defendant's activities were felt in the United States and part of the offense occurred in the United States, as the letters

62. See, e.g., *People v. Milano*, 89 Cal. App. 3d 153, 163 (Cal. Ct. App. 1979) (affirming constitutionality of statute regulating dissemination of gambling information).

63. 882 F.2d 401 (9th Cir. 1989).

64. *Id.* at 402.

65. *Id.* at 403.

66. *Id.*

traveled through the U.S. mail system and were delivered to their destination in the United States.⁶⁷ Relevant for cross-border betting, the Court specifically rejected defendant's argument that the crime was complete at the time the letter was deposited in the mail in Italy.⁶⁸ The court held that under the specific statutes involved, mailing of child pornography was a continuing offense, so that part of the offense was committed in the United States.⁶⁹

VIII. WHEN STATES AGREE TO DROP TRADE BARRIERS

Recent decisions from the WTO, ECJ, and trial and appellate courts in Europe and the United States have shown that there are limits on a state's power to keep out goods and services it finds detrimental to its citizens' welfare. A body of law has developed which makes it possible to analyze whether a law that makes cross-border betting extremely difficult, or even impossible, is legally valid in these cases. The laws under review almost always involve statutes and regulations enacted by a jurisdiction preventing companies outside the jurisdiction from accepting wagers from punters who are physically within the state. In other words, these are laws expressly designed to prevent cross-border gambling, so long as the operator is outside the boundaries of the state or nation. It is common to find that legal gambling, including Internet gaming, is permitted by companies that are licensed by that same state or nation, even that the government is running gambling games itself.

The major restrictions on a government's police power are created by the government itself. For example, these restrictions occur in the following situations: a state joins a federation and subjects itself to federal statutes, treaties, and a federal constitution; a nation signs a bilateral treaty with another country or a multilateral treaty with a large number of other nations and agrees to either allow in goods and services from its treaty partners, or at least to limit its criminal prosecutions of those partners' citizens; or a state or nation decides to underwrite agreements for many years based on courtesy to respect the laws of other jurisdictions with similar legal systems (a comity of nations).

The ECJ has derived a number of different principals from the Treaty of Rome, which created the modern European Union. These principles all point to member states having to let in

67. *Id.*

68. *Id.*

69. *Id.* Jurisdiction is proper if part of the offense occurred within the United States. *Rocha v. United States*, 288 F.2d 545, 547 (9th Cir. 1961). Even if no part of the offense occurred in the United States, the federal government can prosecute the foreign defendant if grounds for exercising extraterritorial jurisdiction are present. *Id.* at 548.

commerce from other member states. The first ECJ case involving gambling dealt with advertisements for lotteries.⁷⁰ The ECJ ruled that lotteries are services, not goods, but member states were obligated to let in services from other member states.⁷¹ Later cases involved slot machines, so the ECJ ruled that trade barriers to goods had also been removed by the Treaty of Rome. Member states also cannot prevent citizens of the member states from establishing businesses. Nor can they erect barriers to the free transmission of financial instruments.

Member states in the United States face similar barriers to goods and services from sister states of the Union. The doctrine is known as the "Dormant Commerce Clause." The actual Commerce Clause of the U.S. Constitution only discusses the power of Congress to regulate interstate, international and Indian commerce.⁷² But courts have long accepted the idea that the individual states of the United States cannot, usually, keep out legal trade from other states of the union. Dormant Commerce Clause jurisprudence forbids individual states from regulating within their borders commerce that is essentially national or international in character in such a way as to "burden" interstate or international commerce.

The Dormant Commerce Clause question arises when Congress has not spoken clearly on a particular issue. This is the case with Internet gambling. In their constitutional law treatise, Professors John Nowak and Ronald Rotunda summarize this area of jurisprudence by stating "that local legislation that thwarts the operation of the common market of the United States exceeds the permissible limits of the dormant Commerce Clause."⁷³ "Because some states might opt to legalize on-line gambling, legislation in other states aimed at prohibiting on-line gambling undoubtedly would disrupt the common market of the United States and violate the Dormant Commerce Clause."⁷⁴

In the complaint filed by Antigua against the United States for barring Antigua's licensed Internet gaming operators, the WTO held that the United States had agreed to let in these legal services.⁷⁵ The WTO panels treated the question as one of the interpretation of the treaty, the General Agreement on Trade in

70. Case C-275/92, *Customs and Excise v. Schindler*, 1994 E.C.R. I-1039.

71. *Id.*

72. U.S. CONST. art. I, § 8, cl. 3.

73. RONALD R. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* (3d ed. 1999).

74. Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L.R. 1045, 1076 (1999).

75. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) [hereinafter WTO Panel Decision].

Services (“GATS”).⁷⁶ According to Article I, Section 3 (b) of the GATS, “services” includes any service in any sector, except those relating to the exercise of governmental authority.⁷⁷ And while gambling has not been mentioned by name, financial services are absolutely included.⁷⁸ Article I, Section 2 (a) defines “trade in services” as the supply of a service from the territory of one Member into the territory of any other Member.⁷⁹ Article XVII of GATS requires each Member to extend the same treatment to the services and service suppliers of any other Member that it would give its own native suppliers of the same services (“like services”).⁸⁰ Further, the United States and other nations published Schedules of Specific Commitments, according to Article XX, outlining the areas of services in which they committed to this harmonization, liberalization and open access.⁸¹ Other countries expressly stated on their Schedules that they were not agreeing to let in “gambling”; the United States did not.

IX. BUT GAMBLING IS DIFFERENT

The wording of the tests may differ, and certainly the actual applications of the policies to real-world situations vary greatly, but the basic principals restricting a government’s ability to exclude cross-border betting are surprisingly consistent: A government that is obligated to let in goods and services of other jurisdictions must let in outside legal gambling, unless it can show that the exclusion is to protect its residents. Laws that merely protect the local gambling operations from outside competition are invalid. But even restrictions designed to limit gaming for solid reasons of protecting a society are invalid, if they discriminate in favor of local operators

There were few precedents dealing with cross-border gambling prior to the explosion of Internet gaming. In earlier cases, the issue of whether a government could exclude legal gambling from its partners, mostly involved lottery tickets (that are easy to ship through the mail). But, in addition, there are other morally suspect industries producing goods and services that are routinely subjected to the police power of a state, such as alcoholic beverages and tobacco, which have also been the subjects of court decisions.

Although there has been some controversy on the issue, today there is little doubt that a government that has an absolute ban on

76. GENERAL AGREEMENT ON TRADE IN SERVICES, Apr. 15, 1994, 33 ILM 1167, 1869 U.N.T.S. 183 [hereinafter GATS].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

a morally suspect commerce does not have to let it in, even if it originates in other states in its federation or treaty partners.

So, if Utah wants to be a "dry" state and completely prohibit alcoholic beverages, it does not have to allow the sale of those beverages simply because the manufacturer or retailer is in another American state. A state or nation that makes it a crime to sell lottery tickets, with no exceptions, does not have to allow sister states or treaty partners to sell lottery tickets to its residents. This was the situation in *Schindler*,⁸² Europe's first important cross-border betting case. When the United Kingdom prohibited all large-scale lotteries, the ECJ held that it could keep out advertisements for legal lotteries originating in the Federal Republic of Germany, another member of the European Union⁸³

The United Kingdom had agreed when it signed the Treaty of Rome that it would not bar the importation of goods and services from other countries signing the Treaty.⁸⁴ But a British law made it a crime to send tickets or advertisements of lotteries into Great Britain. The ECJ first held that lotteries were services subject to the Treaty and that E.U. member states could almost never impinge on the freedom of other member states to provide services. But then the Court carved out an exception, given "the peculiar nature of lotteries":

First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

61. Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in

82. Case C-275/92 *Schindler* [1994] ECR I-1039.

83. *Id.*

84. Services are subject to Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and goods to Article 30; they could not be barred if at least one of the service or goods providers is established in a Member State other than that in which the service or goods are offered. Lotteries were held to be services; slot machines are goods.

society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.

62. When a Member State prohibits in its territory the operation of large-scale lotteries and in particular the advertising and distribution of tickets for that type of lottery, the prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organized in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services. Such a prohibition on import is a necessary part of the protection which that Member State seeks to secure in its territory in relation to lotteries.⁸⁵

It is important again to emphasize that *Schindler* involved a government that had completely prohibited (at the time) the form of gambling under consideration. The case would be even easier if a government has outlawed all gambling.⁸⁶

But the situation is radically different once a state or nation legalizes a form of gambling and attempts to keep out identical forms from sister states or treaty partners.

Take the case of a state that is part of a much larger nation. States in a federation are, almost by definition, not allowed to put up barriers to legal commerce from other states in the union. The purpose in creating a federation is to create a single country, even if the member states retain a great amount of their original power. The state's police power will trump the federal constitution's requirement that states must let in commerce from sister states, only if the state erecting the trade barriers has taken a strict prohibitionist stance, barring locals and foreigners alike from selling the morally suspect goods or services. Once a state has permitted even a small amount of trade in a morally suspect business, outsiders in sister states in the federation have strong arguments that they should be allowed to trade inside as well.

States can and do raise police power concerns to justify raising barriers to outside competitors while allowing the local businesses, or even the state itself, to operate identical businesses without restrictions. Sometimes the arguments work; but a court has to agree that not just companies in other states but those other states themselves may not be as concerned about issues like consumer health and safety. It is difficult to convince a court that

85. Case C-275/92 *Schindler* [1994] ECR I-1039.

86. Ironically, for a nation that supposedly had a public policy against large-scale lotteries, following *Schindler*, the U.K. authorized and now operates one of the largest, if not the largest, lotteries in the world.

State A, which licenses gaming operations, is justified in keeping out a competing gaming operation licensed by State B in the same nation. For example, there have been a few land-based casino companies who have been licensed by Nevada regulators and yet found unacceptable by New Jersey regulators.

The more common situation is illustrated by an important case handed down by the U.S. Supreme Court in May 2005.⁸⁷ The states of New York and Michigan allowed their local wineries to sell wine online for delivery to local residents, but put up substantial barriers to out-of-state wineries.⁸⁸ The Court rejected the states' police power justifications: "keeping alcohol out of the hands of minors and facilitating tax collection."⁸⁹

Justice Kennedy, writing for a five to four majority, noted that the twenty-six states that allow direct shipment of wine report no problem with minors.⁹⁰ He concluded this was not surprising, since minors are more likely to consume beer, wine coolers, and hard liquor than wine, minors have more direct means of obtaining wine and minors want to obtain alcohol without waiting.⁹¹

It is interesting to speculate about whether these arguments would have been more successful if the state had a law allowing local gaming operators to take bets on the Internet while prohibiting all outsiders – which is exactly the situation in Nevada and some countries. By statute, it is a crime in Nevada for anyone anywhere in the world to take a bet online from someone who is physically in Nevada; it is also a crime for anyone in Nevada to take a bet online from anyone outside of Nevada, with the significant exception that these prohibitions do not apply to Nevada's licensed casinos. The situation is almost the exact opposite for online gambling than ordering wine on the Internet: minors are more likely to bet online than at a casino, minors have no more direct means of betting at casino games than on the Internet and there is no gratification more instant than winning online. This would seem to indicate that a state like Nevada could justify allowing only its licensed operators to take bets from the state's residents over the Internet, so that it could limit the amount of underage betting by the state's residents.

The problem for a state making this argument was Justice Kennedy's next conclusion: "Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations

87. *Granholm v. Heald*, 544 U.S. 460 (2005).

88. *Id.* at 468-70.

89. *Id.* at 490.

90. *Id.*

91. *Id.*

limiting only out-of-state direct shipments.”⁹² As with the second police power justification, facilitating tax collection, the Court found that the dangers exist in any direct delivery of wine, as it would of gambling, regardless of whether the shipper were in-state or out-of-state.⁹³ So, if Nevada were really interested in discouraging underage gambling, it would not allow even its own licensees to take bets on the Internet.

The ECJ and the Appellate Body of the World Trade Organization have adopted standards that are very similar to those embodied in federated states. A member nation may fairly easily use its police power to keep out other members’ legal gaming, if it permits no one at all to operate similar forms of gambling. Once the country allows its local businesses to take bets, it has the burden of justifying any barriers it imposes on foreign operators. Protecting the local monopoly operator from competition, although a valid and entirely understandable reason, is never sufficient. The overriding reasons relating to public interests that might justify a member state of the European Union excluding gambling goods and services from a provider in another member state are listed in paragraphs 60 and 61 of the *Schindler* decision, quoted above.⁹⁴

X. PRACTICAL PROBLEMS WITH REMEDIES

The ECJ has come to the interesting conclusion that the high court of each individual member state shall decide whether the state’s law meets those objectives set forth in *Schindler*. Even in the case of state-created monopolies, that same state’s highest court is given the power to decide whether the monopoly is justified. So, where the national law of Finland grants to a single Finnish public body exclusive rights to operate slot machines in the national territory, it creates “an impediment to freedom to provide services.”⁹⁵ Such an impediment may be justified on grounds relating to the protection of consumers and the maintenance of order in society.⁹⁶ Who decides? The very same government that created the monopoly:

[T]he power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities’ power of assessment. It is for those authorities, therefore, to assess whether

92. *Id.*

93. *Id.* at 491.

94. Case C-275/92, *Schindler* [1994] ECR I-1039.

95. Case C-124/97, *Markku Juhani Laara, Cotswold Microsystems Ltd. and Oy Transatlantic Software Ltd. v. Kihlakunnansyyttaja (Jyvaskyla) and Suomen Valtio (Finnish State); Reference for a preliminary ruling: Vaasan Hovioikeus - Finland*, 1999 E.C.R. I-06067.

96. *Id.*

it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.⁹⁷

Similarly, a U.K. sports book that wanted to take bets from Italy was told, “[i]t is for the national court [of Italy] to determine” if Italy’s highly limited sports betting is justified.⁹⁸

The most extreme example was a licensed U.K. sports book that challenged Italy’s monopoly on Internet sports betting.⁹⁹ Even though the ECJ made it clear in its comments that it felt Italy could not justify its exclusion of other member state’s operators on the ground that it was discouraging gambling, when Italy itself was rapidly expanding and promoting legal gambling, the court still said it is up to the highest court of Italy to decide the question.¹⁰⁰

XI. APPLYING THIS ANALYSIS TO ANTIGUA’S COMPLAINT AGAINST THE UNITED STATES IN THE WORLD TRADE ORGANIZATION

The World Trade Organization came to similar conclusions as to the standards to be applied when one member state claims it is excluding businesses that are legal where they originate from another member state for reasons of “necessity.” The widely reported decision arose when Antigua filed a complaint against the United States for prohibiting cross-border betting by Antigua’s licensed Internet gambling operations.¹⁰¹ The Appellate Body not only stated the standards to be applied to such claims, it then, unlike the ECJ, decided for itself whether those standards had been met.¹⁰²

The United States asserted that its federal criminal statutes prohibiting international gambling, the Wire Act, the Travel Act, and the Illegal Gambling Business Act, were measures necessary “to protect public morals or maintain public order.”¹⁰³ Specifically, the United States stated that the laws were passed to address concerns “pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.”¹⁰⁴ In this, the first case before the WTO ever to raise the “necessity” defense, the

97. *Id.*

98. Case C-67/98, *Questore di Verona v. Diego Zenatti*, 1999 E.C.R. I-7289.

99. Case C-243/01, *Criminal Proceedings Against Piergiorgio Gambelli and Others* (2003).

100. *Id.*

101. Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter WTO Appellate Decision].

102. *Id.*

103. WTO Appellate Decision, WT/DS285/AB/R (Apr. 7, 2005).

104. *Id.*

Appellate Body found that the concerns related to gambling were legitimate.¹⁰⁵

[I]t is clear to us that the interests and values protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) serve very important societal interests that can be characterized as “vital and important in the highest degree” in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC—Asbestos*.¹⁰⁶

The Appellate Body then went on to hold, based on the detailed findings of the panel which took evidence from Antigua and the United States, that the U.S. federal government had indeed presented facts supporting its assertions that its prohibitions on Internet gambling, although having a severe impact on trade originating in other WTO countries, were necessary to address its important police power claims (except organized crime).¹⁰⁷

The Appellate Body noted that the Panel: (i) found that the three federal statutes protect “very important societal interests”; (ii) observed that “strict controls may be needed to protect [such] interests” and (iii) found that the three federal statutes contribute to the realization of the ends that they pursue.”¹⁰⁸ Although the Panel recognized the “significant restrictive trade impact” of the three federal statutes, it expressly tempered this recognition with a detailed explanation of certain characteristics of, and concerns specific to, the remote supply of gambling and betting services.¹⁰⁹ These included: (i) “the volume, speed and international reach of remote gambling transactions”; (ii) the “virtual anonymity of such transactions”; (iii) “low barriers to entry in the context of the remote supply of gambling and betting services” and the (iv) “isolated and anonymous environment in which such gambling takes place.”¹¹⁰

Even if a government can name significant public policy interests that it needs to protect, and convinces the court or other decision-maker that the restrictions on cross-border gambling it has enacted actually do protect those interests, the restrictions will be declared invalid if they are overbroad or discriminate against foreign operators.

A statute or regulation is overbroad if there exists another way to achieve the same police power goals without infringing on

105. *Id.*

106. *Id.* (quoting Appellate Body Report, *EC—Asbestos*, ¶ 172).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

fundamental rights. A ban on advertising of legal gaming would be unconstitutional or violate treaty rights if the desired goal of reducing gambling by minors could be achieved through related, but less intrusive means, such as limiting the times and places where gaming ads may appear, or unrelated means, such as restricting hours of operation or requiring guards at the door. However, even though a system of licensing might be equally as effective as the complete prohibition of gambling in protecting minors and compulsive gamblers, preventing fraud or keeping out organized crime, governments are not required to legalize gaming, because gambling has always had a moral element.¹¹¹

The police power of a government that is part of a federation or a treaty organization is also limited by the requirement that it not discriminate against its sister sovereigns. Even if a nation or state can justify its restrictions on cross-border wagers originating from another state of its federation or a treaty partner to protect its important local public interests, the law will be struck down if it arbitrarily discriminates in favor of local gaming operators. In keeping with this principle, the U.S. Supreme Court struck down state laws which made it relatively easy for local wineries to take orders on the Internet and deliver wine to people's homes in the state, but difficult or impossible for wineries in other states of the union to do the same. The ECJ has repeatedly looked at whether a member state has restrictions on cross-border betting while allowing local operators to take bets from its citizens, and if so, whether the discriminatory laws can be justified on public policy grounds.

The WTO concluded that the United States was violating the rights of Antigua operators to take horseracing bets from residents of the United States.¹¹² It is important to note how limited this ruling was. The WTO's Appellate Body ruled that the United States had agreed to let in legal gambling from other treaty nations, that three of its federal criminal statutes interfered with commerce from Antigua's online gaming operators, but that the United States was justified in prohibiting Internet gambling because of its concerns about public policy interests.¹¹³ Only in one minor area was Antigua successful. It showed that Congress had amended the Interstate Horseracing Act ("I.H.A.") in December 2000 to allow individuals to place bets on horse races from their homes by phone or computer, but only if the punter lived in a state that allowed such bets and the bet was placed with an OTB

111. The decision in *Schindler* contains a detailed discussion on why states and nations are free to decide for themselves whether they want to prohibit all legal gambling.

112. WTO Appellate Decision, WT/DS285/AB/R (Apr. 7, 2005).

113. *Id.*

operator in a state where accepting such bets was legal.¹¹⁴ The statute quite clearly and expressly prohibited exactly the same wagers being made with licensed operators in other countries, such as America's WTO treaty partner, Antigua. The WTO concluded that there was no justification for this discrimination, and that the federal government of the United States was thus in violation of its WTO treaty obligations.¹¹⁵

Does this mean that the United States has to open its doors to all Antigua Internet gambling? Although the government of Antigua and others seem to think this is the case, it is not. All the U.S. government has to do is alter the I.H.A. It can do this in one of two ways.

First, Congress can eliminate the I.H.A. completely, or at least those sections that permit at-home wagering. The horse racing industry is large and politically powerful, creating tens of thousands of jobs directly and indirectly. At-home wagering, ADW, under the I.H.A., is not large at the moment. The industry is in competition with all other forms of gambling and entertainment and will not give up any part of the I.H.A. without a struggle.

Second, Congress can amend the I.H.A. to allow foreign licensed OTB operators to take wagers from Americans on horse races. It is interesting to note that the latter solution would do little to change what is now occurring. Foreign nations, particularly Canada and Mexico, already allow their OTBs to take bets on U.S. races. American law enforcement authorities and regulators acquiesce in this open violation of the I.H.A. and the Wire Act by not stopping U.S. racetracks from sending the signals of their races to these countries. Similarly, OTBs in the United States often take bets from Americans on foreign races and federal and state authorities do not shut them down. The United States could be in complete compliance with requirements of the WTO ruling if it slightly expanded the existing situation to allow Americans to bet directly with licensed foreign OTBs. It might as well also allow U.S. OTBs to take similar bets on horse races from foreigners, where legal under their local law.

The DOJ raised the rather unique legal argument that the IHA did not mean what it said. The DOJ argued that the Wire Act outlawed cross-border betting of all kinds, and that the IHA, being a civil statute, could not amend this criminal law. According to the DOJ, the IHA allowed people to bet on out-of-state horse races, but only with an OTB operator who was in their own states. Besides being factually questionable, given the large, established cross-border betting industries involving horse races, dog races

114. *Id.*

115. *Id.*

and state lotteries, the argument was legal nonsense. And the WTO politely said so.¹¹⁶

The WTO held that the express language of the IHA allowed cross-border betting between states of the United States, but not with foreign nations.¹¹⁷ Since there was no way the United States could justify this discrimination against Antigua, the WTO ordered the United States to make changes to fulfill its treaty obligations.¹¹⁸ The DOJ asked for, and was given additional time (nearly a year) until April 3, 2006 for the U.S. government to fix its federal laws to make things equal.¹¹⁹

The remedy, again, was simple: Change the Interstate Horseracing Act into an International Horseracing Act. The government was not going to enact a law that seemingly would expand legal gambling without raising one cent of tax revenue that might even hurt some U.S. businesses. It seemed the government did not want to be seen as having to change an American law to abide by a decision of foreign powers.

In fact, the only reference this author found to the WTO decision in the Congressional Record occurred on February 16, 2006, when Sen. Max Baucus (D. Mont.), introduced S.2317, to require the U.S. Trade Representative “to take actions with respect to priority foreign country trade practices”¹²⁰ The bill has a revealing section titled “Sense of Congress Regarding Sovereignty”:

(a) Findings:

(3) Another primary responsibility of the United States Government is to ensure that Federal and State laws are not usurped by foreign governments or organizations.

(4) A World Trade Organization (WTO) panel recently concluded that United States prohibitions on Internet gambling violate the United States commitments under the WTO . . .

(b) Sense of Congress—

(1) . . . the United States policy should be to prevent the loss of Federal and State sovereignty . . .

(2) laws that State and local governments have validly adopted . . . should not be overridden by provisions in trade agreements.¹²¹

No bill was submitted in Congress to amend the IHA.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. 152 CONG. REC. S 1413, S 1414 (2006).

121. TRADE COMPETITIVENESS ACT OF 2006, S. 2317, 109th CONG. § 7 (2006).

XII. THE WORLD TRADE ORGANIZATION'S DECISIONS AND THE UNITED STATES' RESPONSE

When April 3, 2006 rolled around, the DOJ took the bizarre position that the United States was now in compliance with its treaty organizations – bizarre, because the United States had not followed the WTO Appellate Body's order.

To illustrate, imagine a trial, ending with the court entering a permanent injunction, ordering the defendant to make some change in the way it does business. Now, instead of making those changes, the defendant takes a year, only to say that the changes need not be made, because the defendant deserved to win. Even if the defendant's lawyers throw in a few more footnotes, they are probably going to be held in contempt of court – especially because they are making the same losing arguments in front of the same judges.

Not surprisingly, the United States lost. Third parties, including China, Japan and the European Communities joined in criticizing the U.S. position that it could comply with an order by merely raising the same old arguments, or even new arguments.

However, the position of the United States led to more than losing a case. It provided an opportunity for the decision-maker to reexamine the entire record. And the WTO Appellate Body found further problems with U.S. compliance.

The WTO Dispute Settlement Body (“DSB”) has now issued its Report¹²² on whether the United States has complied with the WTO's orders. The DSB decided that the original decision of the Appellate Body contained more than merely a finding that the United States was discriminating against Antigua with the IHA.¹²³ It took a more nuanced position. The DSB focused on language like this from the Appellate Body: “the United States has not demonstrated that – in light of the existence of the Interstate Horseracing Act – the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied consistently with the requirements” of the GATS treaty.¹²⁴

The DSB now reads that statement as meaning that the United States failed to meet its burden, and that the Wire Act, Travel Act and IGBA violate the GATS treaty.¹²⁵ Although those federal laws might be justified as necessary to protect Americans,

122. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, 11 GAMING L. REV. (2007), available at http://www.wto.org/english/tratop_e/dispu_e/285rw-a_e.doc [hereinafter DSB Decision].

123. *Id.*

124. WTO Appellate Decision, WT/DS285/AB/R (Apr. 7, 2005).

125. DSB Decision, WT/DS285/RW (Mar. 30, 2007).

the fact that the IHA might allow remote wagering puts all U.S. prohibitions on Internet gambling at risk.

By failing to quickly comply with the WTO's original decision, the DOJ also allowed time for Antigua to find ways to bring in all the intrastate gambling that is allowed in the United States. Even the DOJ had to admit that the Wire Act did not prohibit remote wagering that took place entirely within one state. Antigua showed that eighteen states allow people to bet from their homes, not only on horse races, but also on dog races, sports (in Nevada) and jai alai. Many of those state statutes expressly refer to the IHA.

The Report slammed the DOJ for continuing to raise the argument that the IHA does not allow interstate bets on horse races, when the DOJ has never brought a criminal or civil action against any OTB operating under the provisions of the IHA.¹²⁶ Worse, now that it was looking at intrastate wagers as well, the WTO pointed to the DOJ's own position, that the IHA does allow people to make remote wagers with operators in their own states.

Finally, the DSB looked at the messy Unlawful Internet Gambling Enforcement Act. Looking at the language of the statute, the DSB concluded that the relationship between the IHA and the Wire Act was ambiguous, and the United States had the burden to show the IHA had not altered the Wire Act.

Since the original proceedings, the United States had an opportunity to remove any ambiguity and thereby comply with the recommendations and rulings of the DSB. Instead, rather than take that opportunity, the U.S. government enacted legislation that confirmed that the ambiguity at the heart of this dispute remains and, therefore, that the United States has not complied.

The WTO has now declared that not only U.S. federal laws, but also the laws of many states, discriminate against Antigua's licensed Internet operators. Additionally, the WTO concluded that the United States discriminates not only on cross-border betting on horse races, but on all forms of remote wagering, even when a bet does not cross a state line.

The WTO has the power to enforce its decision. One proposal is to exempt Antigua from all American copyrights, allowing it to sell movie and music DVDs and CDs without paying any royalties.

The United States is left with only a few options. First, Congress could outlaw all remote wagering. Currently, eighteen states allow people to bet from their homes, not only on horse races, but also on dog races, sports events (in Nevada) and jai alai. It is unclear whether the larger multistate lotteries and linked progressive slot machine networks would also have to go. But, even if the federal government had this power, it would mean

126. *Id.*

devastating these industries and throwing tens of thousands of people out of work. As one example, two-thirds of all horseracing bets are made on races that are not taking place at the same location as the bettors.

Second, Congress could amend the Wire Act to expressly allow Antigua's licensed sports and race books and casinos to take bets from the United States. It is unlikely that the current administration will implement a law that would overrule a state's policy toward gambling. The United States would leave the WTO before it forced states like Utah to permit Internet gambling.

The United States seems to be trying a new strange solution. On May 4, 2007, the U.S. Trade Representative's office announced that the United States was not bound by the WTO's decision, because, once again, the United States should have won.

This time the United States is asserting that it can unilaterally change its treaty obligations with no consequences, because the United States never intended to permit foreign legal remote gaming operators when it signed the GATS treaty. In a recent statement, Deputy U.S. Trade Representative John Veroneau stated that the United States would simply no longer be bound by its treaty commitments and would not pay any compensation to any other country.¹²⁷

There are a few problems with this position. First, it ignores the many pages spent in legal analysis by various WTO panels, all of whom concluded that the United States had committed itself to an open door policy toward gambling. The WTO looked at the language the United States used, such as expressly agreeing to let in all services under the category "Recreational, Cultural & Sporting Services." This included everything from circuses to news agencies, with the sole exception of "sporting services." The WTO analyzed that language in English, French and Spanish and looked at precedents from the UN treaties. Most importantly, it noted that other countries simply put the word "gambling" on the list of services they wished to exclude.

Second, the Bush Administration undoubtedly does not have the power to change the nation's treaties. The U.S. Constitution requires that treaties are made by the President only with the advice and consent of the Senate.¹²⁸ The President does not have the power to act unilaterally to change the nation's treaty obligations.

Third, the GATS treaty, like all good legal instruments, allows its signatories to change their commitments. Of course, this cannot be done unilaterally without consequences. Otherwise,

127. Doug Palmer, *U.S. to Keep Internet Gambling Ban*, WASH. POST, May 5, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050401280.html>.

128. U.S. CONST. art II, § 2.

the treaty would be meaningless. The Bush Administration's position is that the United States can freely renounce its treaty commitments without paying compensation because no other country could have possibly thought the United States was agreeing to let in foreign gambling when it signed the GATS treaty, since that violated federal laws.

Article XXI of the GATS is entitled "Modification of Schedules." It provides, in pertinent part:

1. (a) A Member . . . may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected . . . by a proposed modification or withdrawal notified . . . the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached . . . such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.¹²⁹

There is nothing in this language that would allow the United States to avoid paying compensation because it did not intend to leave "gambling" off its schedule of prohibited services. Worse, the treaty clearly requires that every other country that feels that it will be hurt by the United States unilaterally changing its treaty commitment toward foreign legal gambling must now make a claim if it wants compensation. The European Union will undoubtedly file such a claim. Will the United States pay, when the arbitrator reaches the same decision? The United States has the most to lose, if the power of the WTO to enforce its decisions is undercut. If the United States can unilaterally change its treaty commitments and ignore decisions of the WTO, what happens

129. GATS, Apr. 15, 1994, 33 ILM 1167, 1869 U.N.T.S. 183.

when other countries do the same against American goods and services?

XIII. CONCLUSION

It is now possible to answer the question, "When may a state or country keep out foreign legal gambling?" But the analysis can be extremely complicated, requiring an examination of exactly what type of gambling is involved, the statutes and regulations that might apply, and the relationship between the governments of the operator and the bettors.

Under international law, a sovereign government does not have any restrictions on keeping out foreign legal gambling or any other commerce. But states that are part of federal nations and countries that have signed trade agreements often cannot keep out legal goods and services from their sister states and trade partners. However, gambling comes under a government's police power, and thus is treated differently from almost all other legal commerce. A state or nation may choose to completely outlaw all gambling, or the type of gaming under consideration, and it is not required to open its doors to an activity that it considers immoral or dangerous. Once a government has legalized a form of gaming, it is more difficult for it to argue that it is excluding nearly identical forms of gambling because of its public interest concerns. However, it may be able to justify an exclusion of remote wagering, especially via the Internet, because there are additional dangers not present with bets made face-to-face. But even here, governments cannot discriminate against outside gaming operators while allowing local businesses to take identical at-home wagers from its residents.

