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The Impact of WTO / GATS Arguments on UIGEA and State Law

The UIGEA did not express any intention to abrogate or modify the WTO GATS, but to the contrary, states that it is not to "be construed as altering, limiting, or extending any Federal or State law…prohibiting, permitting, or regulating gambling within the United States."[1] As a result, both state and federal courts should interpret the UIGEA so as to be consistent with the obligations of the United States under the WTO GATS.

Treaties and statutes have equal force and if there is a conflict between them, then the last one enacted governs.[2] Congress enacted the UIGEA in 2006, more than a decade after it ratified the WTO General Agreement on Trade in Services ("GATS"), so the Act would therefore prevail if there were a conflict between them. However, as a rule of interpretation, a treaty "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."[3] This has been a cornerstone of American jurisprudence for more than two hundred years, dating back to Chief Justice John Marshall, who wrote: "[*A]n*

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[1] Unlawful Internet Gambling Enforcement Act of 2006, Sec. 802, §5361(b).
[2] *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456,458, 31 L.Ed. 386 (1888).
[3] *Cook v. United States*, 288 U.S. 102, 120, 53 S.Ct. 305, 311, 77 L.Ed. 641 (1933). See, *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13, 88 S.Ct. 1705, 1710-11, 20 L.Ed.2d 697 (1968); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3076 61 L.Ed.2d 823 (1979), footnote 16 of this opinion modified, 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979), on remand 605 F.2d 492 (9th Cir. 1979), appeal after remand 641 F.2d 1311 (1981); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 261, 104 S.Ct. 1776, 1783, 80 L.Ed.2d 273 (1984), rehearing denied 467 U.S. 1231, 104 S.Ct. 2691, 81 L.Ed.2d 885 (1984).

act of Congress ought never be construed to violate the law of nations, if any other possible construction remains."[4] This is commonly referred to as the Charming Betsy canon. But is more than a maxim of jurisprudence, it is a principal of law that has practical application here.

Under the WTO GATS, the United States is committed to permitting foreign gambling companies access to the U.S. market, but such access does not have to be unlimited and there are provisions for limiting access for moral reasons. The extent of such limitation has been the subject of much litigation and the WTO has ruled that U.S. federal statutes (the Wire Act, the Travel Act and Illegal Gambling Businesses Act) are contrary to the U.S. commitment to the WTO GATS because while they restrict interstate and international gambling but in no way restrict intrastate gambling. To the extent these federal statutes permit any gambling, they undermine the U.S. position that it is denying access to the U.S. market on moral grounds, and to the extent these laws restrict gambling, they discriminate against foreign suppliers which can only function on the international level.[5] The same is true of state laws. State statutes permitting some form of gambling undermine the moral grounds for prohibition, and state statutes prohibiting other forms of gambling are discriminatory because they limit market access to domestic suppliers.

The situation is made complex due to the fact that the WTO GATS is a treaty among nations, where each nation makes commitments on a national level. But the United States is a nation of limited federal Government, where much of the power resides with the states. This is especially true of the country's gambling laws, where the states generally determine what is and is not legal, and certainly in the case of poker, for example, where there is no federal statute which does not depend on underlying state law.

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[4] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).
[5] 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*, WT/DS285R/RW, adopted 22 May 2007.

The confusion caused by this dichotomy would usually be resolved through the WTO litigation and arbitration processes. But when challenged by Antigua, the United States first adopted a position of denial and then one of concession accompanied by the announcement of its intention to withdraw its commitment to free trade in gambling services. Consequently, there will be limited guidance available to the courts in attempting to interpret the UIGEA so as to make it consistent with the United States commitment under the WTO GATS.

Reduced to its minimum, under the GATS the United States committed to the principle of non-discrimination in granting access to the U.S. markets. That is, it committed to giving foreign suppliers access to the same markets as domestic suppliers. So, even accepting the concept of federalism, where we have empowered state governments and a limited federal government, foreign suppliers are at least entitled access to states where domestic suppliers have access. Any other conclusion would result in the UIGEA modifying the U.S. commitment under the WTO GATS, despite the fact that Congress has exhibited no clear intention to abrogate its respective trade commitments under WTO GATS.

Based on this analysis, it is reasonable to conclude that a foreign Internet gaming operator would not be violating the UIGEA in accepting players from states where some form of gambling is legal. It can also be argued that foreign Internet gaming operators should have access to states which permit remote wagering on horse races, either off-track-betting (OTB) or simulcast wagering. In legalizing remote wagering, those states have undermined their purported justification for prohibiting gambling on moral grounds. This position is even stronger in states where casino gaming, poker and other forms of gaming are legal within a particular state.

It should be noted that on May 4, 2007, the Office of the United States Trade Representative announced the intention of the United States to "clarify" its commitments with

respect to its Internet gambling services.[6] This should have no impact on a WTO defense for years to come. First of all, the announcement only concerns the intent of the United States to modify its commitment. The commitment has not actually been withdrawn. Second, there is a serious legal question as to whether the United States Trade Representative or any party in the Executive Branch, including the President himself, can modify the WTO commitment without the approval of the Senate. Third, the United States cannot unilaterally modify its commitment, but must adhere to strict WTO rules in doing so. The withdrawal of a WTO commitment ("concession" in WTO parlance) must be accepted by all the members of the WTO and the following countries have objected to the United States' modification: Antigua, Australia, Brazil, Canada, China, China Taipei, Costa Rica, the European Union (on behalf of 27 member states), Japan, and Mexico.

If the Charming Betsy canon is properly applied and the WTO GATS argument succeeds, a foreign Internet gaming operator would be deemed legal in every state within the United States. However, its success may vary from state to state, according to the type of gambling which is legally available in each state. For instance, a court could very well hold that providing Internet poker is legal in California because California has legalized poker tables and legalized Internet gambling on horse races. Conversely, a court could also hold that such activity is illegal in another state, such as Tennessee for example, because the only gambling available in that state is a state-run lottery. This is entirely new ground and there is no known precedent on point.[7]

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[6] U.S.T.R. News (May 4, 2007).

[7] There are presently two cases pending in the US federal courts involving the effect of the WTO GATS on Internet gambling. Several defendants in the BetOnSports prosecution have filed Motions to Dismiss asserting that the WTO GATS superseded the Wire Act. Although this memorandum is concerned with an interpretation of the UIGEA, which was enacted subsequent to the WTO GATS, rather than the Wire Act, which was enacted before it, the court's reasoning as to the relationship of the WTO and U.S. statutory law should be enlightening. There has also been an action filed by iMEGA seeking an injunction to prevent implementation of the UIGEA based in part on the WTO GATS. This suit is largely based upon untested interpretations of law and may be dismissed. If it is not dismissed,

The WTO GATS argument is based on the WTO's underlying principle of non-discrimination. That is, as a general rule, member countries cannot discriminate against foreign providers. The strength of the WTO argument in the context of interpreting the reach of the UIGEA is that WTO GATS covers potential Internet gaming activity within all 50 states. However, one key weakness is that Internet gaming has not expressly been made legal within any single state. Consequently, a foreign Internet gaming operator must argue, for example, that brick and mortar table games and Internet games of the same ilk should be treated as the same; *or alternatively*, one can argue that Internet gaming of one type (such as poker) and Internet wagering on horse races or some other type of gambling, should be treated as the same, depending on what forms of gambling are legal in each of the states. The WTO argument would be greatly enhanced if Internet poker or some other form of Internet gaming was ever made legal by the lawmakers in even just one state within the US.[8]

The WTO argument may be effectively presented at the federal level and additionally on a state-by-state basis due to allegations of underlying violations of state law. However, the WTO actually treats nations as single entities and ignores internal borders. Consequently, if one state permits some form of Internet gaming, then the country permits it and, arguably, it must allow access to foreign providers. Moreover, the fact that the UIGEA only permits states to legalize Internet gaming on the intrastate level actually strengthens the WTO GATS argument because that emphasizes and underscores the fact that the UIGEA is itself discriminatory. In accord with a fair and reasonable application of the Charming Betsy canon in this context, it should be

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the court could find that the UIGEA is valid, but that it must be interpreted so as to be consistent with the WTO GATS. This would support the WTO / GATS arguments as discussed herein.

[8] It would seem prudent for Internet gaming operators to promote an effort to have intrastate Internet gaming (e.g., poker) legalized in some states. In view of the fact that it can only be legalized on the intrastate level under the UIGEA, the state would probably have to have a large enough population to provide the necessary liquidity. California, Texas and New York may be worthy of consideration for such an effort in that regard.

concluded by both state and federal courts that the UIGEA must be read consistent with United States obligations under WTO GATS.

A brief note about extraterritorial reach of state law vis-à-vis UIGEA :

The UIGEA states that it does not alter or extend existing state laws,[9] so if a state law did not apply to a foreign Internet gaming operator before enactment of the UIGEA, then it does not apply now. This is important because state laws generally do not apply to parties outside the state unless they so provide. It is not a matter of whether the state has the power to apply its own laws extraterritorially, which is a jurisdictional issue, but whether the state statute was ever intended to apply beyond the borders of the state. Unless there is a separate statute giving extraterritorial reach to the state's criminal code or a statute specially states that it applies to parties or acts outside the state, there is a strong presumption that it does not.[10]

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[9] 31 U.S.C. § 5361(b) (2007).

[10] Congressional Research Service, The Library of Congress, *Extraterritorial Application of American Criminal Law* 20 (2006); I. Nelson Rose, *Gambling and the Law 7, The Future Legal Landscape for Internet Gambling § VII, The Second Emerging Major Fight: States v. States* (2000).