

Black Friday: Have International Online Gaming Regulators Pressed MUTE?

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ALTHOUGH EXPECTED FOR YEARS, the Apr. 15, 2011, indictments against Full Tilt Poker, Poker Stars, and Absolute Poker still sent shock waves through the online poker industry. The indicted individuals and companies have dominated the online poker business in the United States for years, going back to the departure of Party Gaming and other online gaming businesses from the U.S. after the passage of the Unlawful Internet Gambling Enforcement Act (UIGEA). The charges involve not only violations of U.S. gambling laws, but also financial crimes, including bank fraud and money laundering.

U.S. INTERNET GAMBLING LAW—UIGEA

President George Bush made it official on Oct. 13, 2006, when he signed the Port Security Bill. The Senate majority leader at the time, Bill Frist (R-Tenn.), had attached anti-Internet gambling language to the port security measure several hours before Congress adjourned on Sept. 30 for its election recess. The language generally followed the language of UIGEA that had been passed by the House in July 2006. But the Senate had not even held hearings on the measure.

Interestingly, leading up to the passage of UIGEA, public reaction to prohibition bills had not been particularly warm. Various polls found that between 70 and 85 percent of respondents opposed Internet gambling prohibition efforts. On June 9, 2006, the *Los Angeles Times* took congressional representatives to task in an editorial staunchly opposing an all-out prohibition of online gambling. The *Times* found prohibition legislation to be an unnecessary burden on financial firms, which would be precluded from having their services used for electronic betting.

The editorial also criticized Congress for an inherent hypocrisy, considering the continued exemption for online wagering on horseracing, which, thanks to a powerful lobby, has seen a half-decade of legal safeguards in the U.S. The West Coast's largest newspaper further questioned the priorities of Congress in focusing on the banning of online gambling at a time when the nation faced so many political and social problems. The *Times* agreed with many leading gaming industry advocates that regulation, rather than a ban on online gambling, was the proper answer to the issue, citing Britain's recent legalization of Internet gambling as a role model for Americans.

According to Professor Joe Kelly of Catania Gaming Consultants, the passage of UIGEA did little to resolve the legal uncertainty as to what was prohibited Internet gambling. The primary purpose of UIGEA was to block monies going from the player to the offshore gaming operator. Federal regulators, pursuant to UIGEA, required non-exempt participants in designated payment systems to develop procedures by Dec. 1, 2009, to block prohibited payments to online gambling operators.

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INTERNATIONAL ONLINE GAMING REGULATORS: WHY THE LONG SILENCE?

Following an investigation that took until the end of June 2011, the Alderney Gambling Control Commission (AGCC) suspended Full Tilt's licenses, requiring the poker room to suspend all operations from the jurisdiction with immediate effect. The AGCC said in a statement: "The decision to suspend these licenses follows a special investigation prompted by the indictments unsealed by U.S. Attorney General's Office in the Southern District of New York on 15th April 2011, during which grounds were found to indicate that these licensees and their business associates were operating contrary to Alderney legislation." The exact grounds for the action were not specified.

Apart from this, international online gaming regulators from the United Kingdom (UK), Isle of Man, Kahnawá:ke and others have remained silent with regard to Black Friday, which raises the question *why*. The most obvious reason is that these regulators did not require their licensed operators to refrain from taking bets from consumers in the U.S. The more interesting question is *why not*, and here one can only speculate.

The cynical explanation is that in these jurisdictions, online operators generate significant taxes, fees, jobs, and other economic benefits, and that any rule that restricted their operators' profitability would correspondingly limit such economic benefits. So, for example, Isle of Man Economic Development Minister, Allan Bell MHK, told a local Isle of Man newspaper: "The main thrust was to protect the island's good name and reassure the 250 jobs are as secure as we can make them. The current position is that PokerStars will retain its license in the Isle of Man—there is no reason to reconsider that."

The more high-minded explanation is that these jurisdictions simply have a disagreement with the U.S. regarding the legality of Internet gambling and the reach of U.S. law. Their theory is that if online gambling is legal in the jurisdiction in which it is regulated, such jurisdiction need not accord U.S. prohibitory law any extraterritorial applicability. Put another way, they assert that international legality trumps U.S. prohibition, just as the U.S. asserts that its prohibition trumps international legality.

Notwithstanding the foregoing, only one Internet gaming regulatory jurisdiction has so far been will-

ing to press the legality argument against the U.S. That jurisdiction is Antigua.

ANTIGUA'S WORLD TRADE ORGANIZATION ACTION VERSUS U.S.

Antigua and Barbuda (Antigua) is a former British colony. In 2001, it became one of the first countries to adopt comprehensive Internet gambling regulations. Antigua has long been a leader in the development, regulation, and oversight of the burgeoning online gaming sector. The island country encouraged online gaming to supplement its tourist industry, providing vital jobs and government revenue.

In June 2003, Antigua filed a complaint before the World Trade Organization (WTO) Dispute Settlement Body, alleging that U.S. policies preventing credit card companies and banks from honoring Antigua online gaming transactions were a violation of the General Agreement on Trade and Services (GATS). In 2005, it obtained a decision from the WTO in its favor, ruling that United States efforts to prohibit the provision of gambling and betting services to consumers in the U.S. violated American free-trade commitments under GATS.

In 2004, Sir Ronald Sanders, the country's ambassador to the WTO, told Bloomberg News that Antigua had lost more than \$90 million in income and 4,000 jobs because of U.S. actions against Internet gaming. He told the *New York Times*: "The U.S. says it wants open competition. But it only wants free trade when it suits the U.S."

Some online gaming operators enthusiastically hailed the WTO ruling as a major victory. Most experts, however, doubted that the decision would alter the existing hostility of the U.S. toward online gambling. Ultimately, Antigua was granted the right to impose retaliatory trade sanctions against the U.S. But that's not a threat likely to worry U.S. policymakers, unless larger countries, such as the UK, join Antigua's fight.

All in all, it is a stretch to hope that the U.S. will change its ways based on possible retaliatory trade sanctions with Antigua. The threat of trade sanctions could intensify, however, in the unlikely scenario that other, larger, countries decide to join Antigua against the U.S. At the time of the initial WTO ruling, Frank Fahrenkopf, the head of the land-based gaming industry's powerful trade association, the

American Gaming Association, recently told the *Las Vegas Sun*: “Even if Antigua were to win two years down the road, the impact of that means that Antigua and Barbuda can put sanctions on products Americans sell to Antigua. I doubt that’s going to shake up anyone.”

Antigua should revisit the WTO’s 2007 ruling that favored Antigua, levying \$21 million in sanctions against the U.S. He recommended recently that the country should consider targeting services, copyrights, and trademarks of American companies, to recoup the millions of dollars in lost revenue from the gaming sector.

U.S. HYPOCRISY AND THE WTO

The WTO dispute between Antigua and the U.S. is unique beyond its David vs. Goliath aspect. Most WTO rulings involve disputes over tangible products, such as lumber, steel, and auto parts, rather than services. This is the first WTO decision involving the Internet, and also the first to involve gambling.

Gambling is nearly omnipresent in the U.S.—from local convenience stores that sell lottery tickets, to racetracks and bingo halls, to video lottery terminals, to riverboat casinos, to Native American casinos and the mega-resorts of Las Vegas and Atlantic City. In fact, only two of the 50 U.S. states have no gambling whatsoever. The problem for the U.S. is perception.

Casino gaming is legal, and successfully regulated and taxed, in many states. State governments also make millions from their own gambling businesses: the lotteries. Yet, when this otherwise accepted form of entertainment moves to the Internet, gambling opponents attack it as illegal. Logic dictates that if the U.S. legalizes and regulates land-based gambling, it should legalize and regulate the same type of gambling when delivered via an alternative medium.

MISSING IN THE BLACK FRIDAY DEBATE: WHAT ABOUT PROTECTING PLAYERS?

What is seemingly missing from all the discussion about “Black Friday” and the U.S. Department of Justice (DOJ) enforcement action against online poker Web sites is the lack of any specific action

from international gaming jurisdictions, specifically Alderney, the Isle of Man, and Kahnawá:ke. These jurisdictions have done little—if anything—to protect players and their deposits.

An activity licensed and regulated in a foreign country is shuttered, with foreign bank accounts frozen and Web domains commandeered, all possibly to clear the field for the benefit of potential U.S. gaming companies interested in entrance into the online poker business. And there is little or no effort by licensing jurisdictions to protect player funds from a seemingly overreaching DOJ. Again, the notable exception is Antigua.

The high-profile arrest of Betonsports former Chief Executive in July 2006, at Dallas-Fort Worth International Airport in Texas during an international flight layover, led to widespread disruption throughout the international online gaming community and represented a new assault by the U.S. government on cross-border competition for gambling and betting services. Antiguan regulators stood up to the U.S. to protect players that trusted in companies licensed and regulated in Antigua.

The Financial Services Regulatory Commission (FSRC) of Antigua obtained a restraining order against Betonsports (Antigua) Ltd. in the Eastern Caribbean Supreme Court in the High Court of Justice. Under the order, Betonsports, an interactive gaming and interactive wagering service provider, was restrained from, among other things, entering into any agreement or arrangement to sell, transfer, or otherwise dispose of cash and assets within or outside of Antigua without the consent, management, and supervision of the FSRC. The FSRC’s intentions were to ensure that Betonsports’ consumers were protected to the maximum extent possible, and that Antigua’s laws and regulations were followed during the closure of Betonsports U.S.-facing operations.

Kaye McDonald, Director of Gaming for the FSRC, explained in a press release that “while the jurisdiction of the United States government over Betonsports is questionable, by virtue of being the holder of an Interactive Gaming and Interactive Wagering license issued by the Antiguan and Barbudan authorities, Betonsports has acquiesced to our International jurisdiction over the company and its assets. It is important for the protection of consumers that whatever assets Betonsports has remaining be properly available to depositors and other creditors and not be

dissipated on fines or penalties or otherwise improperly disposed.”

Mr. Lebrecht Hesse, at the time Chairman of the FSRC, added that “we believe that the United States should step aside and ensure that our regulators can enforce and oversee the application of the laws of Antigua and Barbuda to the orderly dissolution of Betonsports. We are disappointed that the United States efforts to prohibit cross-border competition in gambling and betting services have led to the disruption of a once-healthy and robust service provider, but we are just as adamant that our jurisdiction be respected in the interests of consumers and others.”

CONCLUSION

First, Antigua is the only jurisdiction to have challenged, and defeated, the U.S. in a dispute before the WTO regarding online gambling. The import of the WTO ruling was clear: the U.S. acts discriminatorily, improperly, and in a protectionist manner when it disallows international online gaming while allowing online gaming on horse racing and other forms of gambling in the U.S.

Second, in authorizing its licensees to offer gaming in the U.S., only Antigua was acting in confor-

mity with—and not contrary to—international law and agreements.

Finally, of all the Internet gaming regulatory jurisdictions, only Antigua has been consistently and aggressively taken actions to protect players as a result of U.S. enforcement actions.

When the top tier of Internet gaming regulatory jurisdictions is enumerated, Antigua is sometimes forgotten. For all the reasons enumerated previously, it should not be because, in many ways, Antigua is actually the *premier* online gaming regulatory jurisdiction.

Editor’s Note: *After this article was finalized, the Alderney Gambling Control Commission (AGCC) announced, on September 29, 2011, that it had revoked the license of Full Tilt Poker (FTP) for “[s]erious breaches of AGCC regulations includ [ing] false reporting, unauthorised provision of credit, and failure to report material events.” The AGCC added that the revocation would not prevent a reactivation of Full Tilt’s business under new ownership and management. Regarding players’ funds, the AGCC stated that “[u]nresolved claims by players against FTP become a matter for the police and civil authorities. Now that FTP’s licenses have been revoked, AGCC no longer has jurisdiction over these companies.”*