

# The WTO Ruling – A Wolf in Sheep’s Clothing

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In the latest chapter in the World Trade Organization (“WTO”) dispute between the United States and Antigua over U.S. regulation of cross-border internet gambling, the online gaming industry has lost a round. Virtually all the favorable findings contained in the initial decision, relating to the inability of the U.S. to regulate online gambling on a worldwide basis, were undone in this appeal. This is quite a common occurrence in the legal field – a wonderful victory is snatched away by a reviewing tribunal, with the swipe of a pen.

While the appellate decision was not favorable to the online gaming industry, there are some positive terms of the decision. Most notably, some provisions of U.S. law must be brought into compliance with the applicable treaties, to avoid apparent inconsistencies in how Internet gambling is treated by this country.

While both sides claimed victory, the U.S. was clearly the big winner here, and not for the reasons that are most apparent. To the advantage of the United States, the U.S. Justice Department dodged a bullet with its attempts to restrict worldwide commerce through its enforcement of the Wire Act and other federal laws. The feds are now apparently safe to prohibit online gambling directed at U.S. residents, without violating any international trade agreements. Nevertheless, this most unfavorable ruling is not the worst part of the decision. The real concern for the industry should be the justification for this seemingly over-reaching power now apparently granted to the D.O.J. In other words: Why can it do this? Why is the U.S. government free to impact the world’s economy in a negative way, by restricting this increasingly common form of international commerce?

The answer? Morality. Public Order. Say what? The U.S. actually convinced the WTO appeals panel that the public’s morals and order demanded that it have the ability to prohibit online gaming, even if that prohibition impacted international trade and agreed-upon WTO treaties. The U.S. trotted out the traditional ‘parade of horrors’ commonly associated with land based gambling, like public corruption, organized crime, and money laundering. Nevertheless, no

‘evidence’ of these adverse impacts of gambling was submitted to the WTO. Instead, the U.S. referred to Congressional reports and testimony indicating that the Wire Act, the Travel Act, and the Illegal Gambling Business Act “were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud...and pathological gambling.”<sup>1</sup> On this limited information contained in the U.S. legislative record pertaining to a law that was directed at telephonic sports betting, and having nothing to do with online gaming, the panel concluded that the United States proved that there was a ‘genuine and sufficiently serious threat...posed to one of the fundamental interests of society.’<sup>2</sup>

Such “evidence” would never sustain the burden of proof in any civil or criminal case brought in the U.S. justice system. In fact, no evidence was submitted to the WTO that would tie online gaming with organized crime, corruption, or money laundering. Unfortunately, that troublesome fact did not stop the WTO appellate body from finding that such evidence exists, and that the federal prohibitions on Internet gambling are “necessary.”

Equally distressing is the panel’s finding that the federal gambling legislation, which parenthetically has never been found by the courts to apply to typical online casino gaming, was necessary to serve “very important societal interests”; specifically including the United States’ concerns relating to “underage gambling.”<sup>3</sup> Moreover, the initial panel’s finding that the availability of gambling on the Internet contributes to gambling by minors, was approved on this appeal.<sup>4</sup> These findings highlight the significant challenge currently facing the industry: How to keep children from accessing online gambling services?

Age-restriction is an issue that the industry itself must pro-actively self-regulate. The other alleged concerns caused by online gambling, such as influence of organized crime, public corruption and money laundering, can be readily disproved through a proper evidentiary procedure. However, age verification must be responsibly addressed by the industry if legalization and regulation are ever to become a reality. Before any real progress can be made on the issue of legalization, U.S. authorities, and indeed international authorities, must be comfortably convinced of the fact that the online gaming industry takes the issue of underage gambling seriously. While several age verification devices currently

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<sup>1</sup> Decision at ¶ 296.

<sup>2</sup> Decision at ¶ 297.

<sup>3</sup> Decision at ¶ 301.

<sup>4</sup> *Id.* at ¶ 313.

exist;<sup>5</sup> none have been implemented as industry standards. The primary reason for reluctance to institute these roadblocks to underage use are a belief that they cause loss of user sign-ups and interruption of traffic flow. Even if true, these justifications can no longer serve as a basis to avoid responsible age verification in the industry, and the WTO decision emphasizes this concern.

Every setback must be viewed as a learning experience, and the WTO ruling certainly falls into the category of a setback. While the U.S. will need to pay closer attention to the consistency of its online gaming prohibitions, the WTO cleared the way for continued U.S. prohibition, based on the alleged concerns about organized crime, public corruption, money laundering, and age verification. The industry now has a road map that it must follow, in order to demonstrate that these concerns are not viable.

While any industry has its share of corruption, online gaming is no more vulnerable to organized crime, public corruption or money laundering than sanitation, construction, or a host of other industries. These alleged concerns should not serve as a legitimate basis on which the United States can avoid its obligations under international trade treaties. However, the industry has some hard choices to make, and some ground to travel, when it comes to age verification. This issue must be taken away from the prohibitionists, and the industry leaders must demonstrate the necessary leadership to confront this concern head on. Otherwise, this issue will continue to rear its ugly head, to the detriment of the industry.

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<sup>5</sup> Eg, the author's BirthDateVerifier™, [www.BirthDateVerifier.com](http://www.BirthDateVerifier.com), fingerprint password devices, credit card verification, database systems, warning pages