

## REMOTE GAMING LEGISLATION IN THE UNITED STATES: A BURDEN ON THE SYSTEM

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### *I. Introduction*

The word “poker” conjures up vastly different images for different people. Some may think of the old west riverboat gamblers, those crafty individuals who always had an ace up their sleeve. Others may imagine friends sitting around a kitchen table playing a friendly game. For yet another group poker is an online game. Millions of people visit popular gambling websites to play online every day.<sup>2</sup> Some play recreationally, whereas others, often young men and women, work as online poker professionals making millions of dollars.<sup>3</sup>

The first online poker sites opened their virtual doors in the mid 1990s.<sup>4</sup> In 2003, online gaming exploded after Chris MoneyMaker won the World Series of Poker (where he took home about two million dollars) after he jockeyed an inexpensive online tournament into a seat at the World Series.<sup>5</sup> In 2005, poker industry giant PartyPoker launched PartyGammon, a website that allowed individuals from across the globe to play backgammon for free or for money. Later that year, PartyPoker’s parent company, PartyGaming, launched a virtual casino, hosting nearly every popular casino game from blackjack to roulette.<sup>6</sup>

Despite the industry’s development in the 1990s and 2000s, the legal status of the online gaming industry has always been

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<sup>2</sup> See, e.g., Hevad Khan—Profile, [http://www.pokerlistings.com/poker-player\\_hevad-khan?show=bio#pp-bio](http://www.pokerlistings.com/poker-player_hevad-khan?show=bio#pp-bio) (last visited Apr. 15, 2008).

<sup>3</sup> Posting of Bryce “TheBryce” Paradis to Stoxpoker, <http://www.stoxpoker.com/node/1494> (Oct. 22, 2007).

<sup>4</sup> PartyPoker, [http://www.partypoker.com/about\\_us/](http://www.partypoker.com/about_us/) (last visited April 15, 2007).

<sup>5</sup> Chris MoneyMaker, <http://www.chrismoneymaker.com> (last visited March 20, 2008).

<sup>6</sup> PartyGaming, [http://www.partygaming.com/about\\_us/](http://www.partygaming.com/about_us/) (last visited March 20, 2008).

tenuous.<sup>7</sup> Some legislators thought the Wire Act of 1965<sup>8</sup> banned all online gambling,<sup>9</sup> while others argued that the Wire Act should be strictly construed to apply only to websites that accepted wagers over traditional phone lines.<sup>10</sup> Additionally, others argued that games like poker are games of skill and, thus, by definition, should not be subject to anti-gambling laws.<sup>11</sup>

This Note considers the current legal status of online gambling in the United States. First, it reviews the Department of Justice's view of online gaming. Second, it reviews the United States' international obligation to provide access to foreign remote gaming operators under the World Trade Organization, which is relevant since most gaming sites are based offshore. This Note discusses recent WTO rulings against the United States.<sup>12</sup> It then studies the Unlawful Internet Gambling Enforcement Act (the "UIGEA" or the "Act") and the effect it has had on the landscape of remote gaming in the United States.<sup>13</sup> Section IV briefly considers the burdens the UIGEA and its proposed regulations might place on the banking industry. Finally, this Note considers three pieces of legislation currently in Congress that could change the legal status of all online gaming, or, at minimum, might induce a study by the National Academy of Science on the impact of remote gaming.<sup>14</sup>

## *II. The Department of Justice, Prosecutions, and the Law*

### **A. Prosecutions**

In October 2006, the United States Congress passed the Security and Accountability for Every Port Act (the "SAFE Port Act") to keep America's ports free from terrorist infiltration and

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<sup>7</sup> *Company Reaches Deal with U.S. in Internet Gambling Case*, N.Y. TIMES, July 19, 2007.

<sup>8</sup> Federal Wire Act, 18 U.S.C. § 1084 (2006).

<sup>9</sup> James Gill, *Teachers, There are Casinos Here At Home*, TIMES-PICAYUNE, Oct. 18, 2006, at 7.

<sup>10</sup> *Id.*

<sup>11</sup> H.R. 2610, 110th Cong. (2007).

<sup>12</sup> Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.1, WT/DS285/ARB (Dec. 21, 2007) [hereinafter Decision by the Arbitrator].

<sup>13</sup> 31 U.S.C. § 536 (2006).

<sup>14</sup> H.R. 2610; H.R. 2046, 110th Cong. (2007); H.R. 2140, 110th Cong. (2007).

money laundering schemes.<sup>15</sup> At the last minute, Senator Bill Frist attached a rider to the SAFE Port Act known as the Unlawful Internet Gambling Enforcement Act.<sup>16</sup> The UIGEA makes it illegal for financial institutions based out of the United States to act as third party funding mechanisms for online gaming sites.<sup>17</sup> For example, if MasterCard enabled an American to put money into his PartyGaming account, MasterCard would be subject to criminal liability under the UIGEA.<sup>18</sup> The Act does not specify exactly what types of sites are illegal to fund, but instead, “defers to underlying State and Federal gambling laws in that regard.”<sup>19</sup>

The Department of Justice has declared certain types of websites, including sports betting sites, illegal.<sup>20</sup> In July 2006 United States authorities arrested David Carruthers, CEO of BetonSports PLC, a publicly traded United Kingdom-based internet sports betting company, because BetonSports had accepted wagers from Americans in violation of the Wire Act.<sup>21</sup> The DOJ also collaborated with Dominican authorities to arrest Stephen Kaplan, BetonSports’ founder.<sup>22</sup> In May 2007, BetonSports pled guilty to racketeering charges under the Wire Act.<sup>23</sup>

The prosecution of the BetonSports founders was not surprising because of their direct relationship to a remote gaming company. But the next set of arrests took many by surprise and

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<sup>15</sup> Security and Accountability for Every Port Act, Pub. L. 109-347 (2006) (codified in scattered sections of 6 U.S.C. and 31 U.S.C.).

<sup>16</sup> Unlawful Internet Gaming Enforcement Act, 31 U.S.C. § 5361 (2006); see also Amy Caslistri, *The UIGEA’s Conservative Backlash Begins*, POKER NEWS, Oct. 20, 2006, <http://www.pokernews.com/news/2006/10/uigea-conservative-backlash-begins.html>.

<sup>17</sup> 31 U.S.C. § 5364 (2006).

<sup>18</sup> *Id.* at 5364(a).

<sup>19</sup> *Id.* at 5361(b); see also Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. 56,680 (proposed Oct. 1, 2007) (to be codified at 31 C.F.R. pt. 132).

<sup>20</sup> *Hearing on Establishing Consistent Enforcement Policies in the Context of Online Wagers*, 110th Cong. (2007) (statement of Catherine Hanaway, U.S. Attorney) [hereinafter Hanaway].

<sup>21</sup> Roy Mark, *Feds Arrest Offshore Gambling CEO*, INTERNETNEWS.COM, July 18, 2006, <http://www.internetnews.com/bus-news/article.php/3620731>.

<sup>22</sup> *Founder of Betonsports Arrested*, BBC NEWS, Mar. 30, 2007, <http://news.bbc.co.uk/2/hi/business/6512699.stm>.

<sup>23</sup> *Betonsports Admits Racketeering*, BBC NEWS, May 25, 2007, <http://news.bbc.co.uk/2/hi/business/6689813.stm>.

signaled an aggressive step in the DOJ's assault on remote gaming. The DOJ indicted John Lefebvre and Stephen Lawrence, co-founders of online payment processing site NETeller, and charged them with conspiring to promote illegal internet gambling businesses.<sup>24</sup> In conjunction with the indictment, the DOJ also seized millions of dollars held for American citizens.<sup>25</sup> The Department of Justice then indicted NETeller on the same charges as it had for the founders and pressured the company to pay a \$136 million fine to the U.S. government in exchange for immunity from prosecution.<sup>26</sup> Unlike BetonSports, NETeller does not offer gambling services but merely serves in a payment processing capacity.<sup>27</sup> These two prosecutions signaled to Americans that the United States government would aggressively prosecute those working in the online gaming industry.<sup>28</sup> With the passage of a new act the DOJ may have a new weapon in its arsenal of anti-gambling regulation.

The UIGEA followed decades of anti-gambling legislation in the United States. In 1961 Congress passed the Wire Act, a piece of legislation that made it illegal to "knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers."<sup>29</sup> The Department of Justice has since construed this act to only prohibit only the taking of wagers over phone or internet lines, not the placement of bets.<sup>30</sup> In 1978 Congress passed the Interstate Horseracing Act (the "IHA"), which implicitly amended the scope of the Wire Act by explicitly allowing remote wagering on horseracing.<sup>31</sup>

## B. The Department of Justice on Internet Gaming

Part of the trouble with the current online gaming climate in the United States is the lack of clarity on what is legal and what is

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<sup>24</sup> Hanaway, *supra* note 20.

<sup>25</sup> *NETeller Funds Seized in U.S. Gambling Sting*, YAHOO! FINANCE, Feb. 8, 2007, <http://uk.biz.yahoo.com/08022007/325/neteller-funds-seized-u-s-gaming-sting.html>.

<sup>26</sup> *Company Reaches Deal With U.S.*, *supra* note 7.

<sup>27</sup> Neteller, [http://public.neteller.com/content/en\\_US/services\\_index.htm](http://public.neteller.com/content/en_US/services_index.htm) (last visited March 20, 2008).

<sup>28</sup> Hanaway, *supra* note 20.

<sup>29</sup> 18 U.S.C. § 1084 (2006).

<sup>30</sup> Hanaway, *supra* note 20.

<sup>31</sup> Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 (2006).

illegal. Unfortunately, the Department of Justice has not been successful at alleviating this situation. The ambiguity centers on two questions: First, what is the exact legal status of internet gambling in the United States? And second, how do the new law and regulations affect this status?

United States Attorney Catherine Hanaway represented the DOJ at the House Judiciary Committee's hearing on internet gaming, held November 14, 2007.<sup>32</sup> Hanaway stated in her testimony that the DOJ's "view for some time has been that all forms of Internet gambling . . . are illegal under federal law."<sup>33</sup> Although the Interstate Horseracing Act appears to make remote gambling on horseracing a legal activity,<sup>34</sup> when questioned about the IHA, Hanaway responded that she did not know that the DOJ excludes horseracing cases from prosecution.<sup>35</sup> Her response accurately portrays the legal status of online gambling in the United States: even the department responsible for prosecuting remote gambling cases is not sure about it.

The Wire Act does not provide clarity as to whether it is legal for an individual to place remote wagers, but, individual gamblers in the United States need not worry about prosecution.<sup>36</sup> Representative Bobby Scott, Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, asked Hanaway whether federal law made it illegal to gamble on the internet.<sup>37</sup> Hanaway responded that it was only illegal to engage in the business of taking bets or wagers.<sup>38</sup> Hanaway further conceded that there was no prohibition on online gambling.<sup>39</sup>

The second question to consider is what is the relationship between new legislation and the Department of Justice's view on internet gaming? Even before the enactment of legislation like the UIGEA, the DOJ considered all forms of remote gaming illegal.<sup>40</sup> Hanaway did state, however, that the DOJ is looking forward to the publication of regulations on the UIGEA, which would help clarify

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<sup>32</sup> Hanaway, *supra* note 20.

<sup>33</sup> *Id.*

<sup>34</sup> 15 U.S.C. § 3001 (2006).

<sup>35</sup> Hanaway, *supra* note 20.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

exactly what actions are now covered and how to prosecute cases involving financial institutions should be prosecuted.<sup>41</sup>

So the exact legal status of remote gaming remains murky. What is clear, however, is that the DOJ takes the official position that all wagers or bets taken over the internet are illegal pursuant to the Wire Act.<sup>42</sup> But the DOJ does not consider it illegal to place wagers on the internet, only to take bets.<sup>43</sup> This means that the DOJ will only prosecute illegal remote gambling operations, not individual bettors.<sup>44</sup> Finally, the legal status of remote gambling on horseracing remains unclear. The Department of Justice officially considers it an illegal activity, but also appears to defer to the Interstate Horseracing Act to avoid prosecuting companies that accept online wagers on horseracing.<sup>45</sup> This permissive position on horseracing had the unforeseen consequence of subjecting the United States to prosecution under the World Trade Organization system.

### *III. The World Trade Organization on Internet Gaming*

#### **A. Background**

Beginning in 1965, with the passage of the Wire Act, the United States made a decision to ban remote gambling operators from acting within its borders.<sup>46</sup> However, the horserace gambling industry remains exempt from anti-remote gaming legislation.<sup>47</sup> Since the mid-1990s the United States has been a party to the General Agreement on Trade in Services (“GATS”), a WTO agreement that prohibits any WTO member from favoring domestic providers over foreign providers in certain industries.<sup>48</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 18 U.S.C. § 1084 (2006).

<sup>47</sup> 15 U.S.C. § 3001 (2006); *see also* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.44, WT/DS285/RW (Mar. 30, 2007) [hereinafter *Panel Report*] (discussing whether remote gambling on horseracing is actually legally exempt from United States law, and stating that even if it is not statutorily exempt, it is not prosecuted by the Department of Justice).

<sup>48</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal

In March 2003, Antigua brought a complaint to the WTO challenging the United States' prohibition of remote gambling services offered by Antiguan companies.<sup>49</sup> Antigua claimed that through the Wire Act,<sup>50</sup> the Travel Act,<sup>51</sup> and the Illegal Gambling Businesses Act,<sup>52</sup> the United States violated Article XVI of the WTO General Agreement on Trade in Services.<sup>53</sup> Article XVI provides equal market access for international companies operating in certain sectors.<sup>54</sup> On March 30, 2007, the WTO determined that the United States does not prohibit all remote gaming, and does indeed favor American companies.<sup>55</sup>

In a specific reference to the Interstate Horseracing Act, the WTO Panel held that the United States applies the IHA's prohibitions in a manner "constitut[ing] 'arbitrary and unjustifiable discrimination between countries where like conditions prevail.'"<sup>56</sup> As quoted in the Panel's opinion, the IHA states "[a]n interstate off-track wager *may be accepted* by an off-track betting system."<sup>57</sup> As mentioned above, the DOJ's position on the IHA remains unclear. Although the Department of Justice's representative is not sure about the legal status of remote gambling on horseracing, the DOJ does not prosecute such cases under the Wire Act.<sup>58</sup> Thus the Panel determined that "[w]hilst it is not clear whether these suppliers actually violate the Wire Act, it is clear that none of them are being prosecuted."<sup>59</sup>

According to the Panel, the Department of Justice's lack of prosecution is a sign of differential treatment.<sup>60</sup> If the government body responsible for prosecuting illegal gambling activities makes a point not to prosecute domestic entities who engage in a specific type

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Instruments—Results of the Uruguay Round, art. XVI, 33 I.L.M. 44 [hereinafter GATS].

<sup>49</sup> *Antigua-United States WTO Internet Gambling Case*, <http://www.antiguawto.com/WTODispPg.html> (last visited Mar. 20, 2008).

<sup>50</sup> 18 U.S.C. § 1084 (2006).

<sup>51</sup> Travel Act, 18 U.S.C. § 1952 (2006).

<sup>52</sup> Illegal Gambling Businesses Act, 18 U.S.C. § 1955 (2006).

<sup>53</sup> Decision by the Arbitrator, *supra* note 12 at ¶ 3.35.

<sup>54</sup> *Id.* at ¶ 1.2.

<sup>55</sup> *Panel Report*, *supra* note 47.

<sup>56</sup> *Id.* at ¶ 6.71.

<sup>57</sup> *Id.* at ¶ 6.105 (emphasis in original).

<sup>58</sup> Hanaway, *supra* note 20.

<sup>59</sup> *Panel Report*, *supra* note 47, at ¶ 6.128.

<sup>60</sup> *Id.* at ¶ 6.77.

of interstate gambling while it prosecutes foreign entities who do so, then that is differential treatment, which violates GATS Article XVI.<sup>61</sup> Indeed, the WTO Panel observed that “[t]he simultaneous prohibition of cross-border supply of remote wagering services, on the one hand, and the lack of a prohibition of some domestic supply of remote wagering services, on the other hand, afford differential treatment.”<sup>62</sup>

### B. Appeals

The United States appealed the Panel’s decision to an appellate body. The appellate panel noted an exception to Article XVI when a country bans an activity otherwise allowed under GATS.<sup>63</sup> If a country justifies its ban on moral grounds, it may be exempt from those GATS obligations.<sup>64</sup> The appellate panel determined that the United States’ moral belief that such gaming activities may have a negative impact on the nation’s residents sufficed to excuse it from its obligations.<sup>65</sup> But, the Interstate Horseracing Act problem remained. The appellate panel appeared baffled that the United States could give a moral justification for banning nearly all forms of remote gaming, yet allow remote gambling on horseracing.<sup>66</sup> The appellate panel thus determined that the United States failed to meet its GATS obligations because it allowed only domestic companies to provide interstate remote gaming on horseracing.<sup>67</sup>

The WTO ultimately ruled in Antigua’s favor.<sup>68</sup> Antigua requested \$3.4 billion per year in damages, based on a calculation of its lost gambling revenue as well as lost market share through not being able to offer gaming services in one of the world’s largest gaming markets.<sup>69</sup> Experts testifying before the House Judicial Committee on whether to legalize remote gaming in the United

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<sup>61</sup> GATS, *supra* note 48.

<sup>62</sup> Panel Report, *supra* note 47 at ¶ 6.121.

<sup>63</sup> GATS, *supra* note 48, at art. XIV

<sup>64</sup> *Id.*

<sup>65</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 1.2.

<sup>66</sup> Panel Report, *supra* note 47, at ¶ 6.77.

<sup>67</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 3.57.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at ¶ 3.76.



States argued that one good reason to legalize the industry was to defeat the prospect of billions of dollars in annual sanctions.<sup>70</sup>

After the Appellate Panel ruled for Antigua, the United States objected to Antigua's calculation of \$3.4 billion in annual damages, requesting that the matter go to arbitration pursuant to Article 22.6 of the Dispute Settlement Understanding ("DSU") of the WTO Marrakesh Declaration.<sup>71</sup> The majority of the arbitrator's decision reviews the basis on which Antigua determined that \$3.4 billion was an appropriate annual figure for damages.

### C. Assumptions and Calculations of Damages

The DSU states that damages should be calculated by finding the "equivalent to the level of nullification or impairment" to the harmed nation.<sup>72</sup> Antigua used five assumptions to arrive at the \$3.4 billion figure, two of which were "1. The United States adheres to its GATS commitments for remote gambling and betting services as established in the dispute . . . [and] 3. The United States does not interfere with the electronic transfer of funds between customers and Antiguan remote operators."<sup>73</sup>

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<sup>70</sup> *Hearing on Establishing Consistent Enforcement Policies in the Context of Online Wagers Before the H. Comm. on the Judiciary*, 110th Cong. 11 (2007) (statement of Joseph H. H. Weiler, Professor, N.Y.U. School of Law).

<sup>71</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 1.6.

<sup>72</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, Legal Instruments—Results of the Uruguay Round, art. 22.4, 33 I.L.M. 1125 [hereinafter DSU].

<sup>73</sup> Antigua made the following five assumptions: "1. The United States adheres to its GATS commitments for remote gambling and betting services as established in the dispute; 2. The United States recognizes that Antiguan law governs Antiguan-based remote gaming operators serving customers located in the United States; 3. The United States does not interfere with the electronic transfer of funds between customers and Antiguan remote operators; 4. The United States does not interfere with advertising by Antiguan remote gaming operators; 5. Antiguan remote gaming operators are not compelled to invest significant resources to counteract United States measures to restrict gaming operators from providing remote wagering services to United States consumers." Decision by the Arbitrator, *supra* note 12 at ¶ 3.2.

These two assumptions are troublesome because it is not clear that the United States will adhere to its GATS obligations or halt its interference “with the electronic transfer of funds.”<sup>74</sup> This Note considers this latter assumption regarding the freedom to perform electronic transfers to remote gaming sites in the next section analyzing the UIGEA. Assumption one is more pertinent regarding the WTO’s award of damages to Antigua when considering whether the United States will adhere to its obligations under GATS to allow “remote gambling and betting.”<sup>75</sup>

Now that the WTO has ruled on remote gambling, one might imagine that the United States would adhere to its GATS obligations. Recall, however, that the Appellate Panel considered the United States’ general ban on remote gaming and found a moral justification for that restriction.<sup>76</sup> The Appellate Panel found the United States in violation of its GATS obligations only to the extent that the nation allows domestic companies to provide remote wagering on horseracing through the IHA while it bans international companies from taking horserace wagers. Thus, the United States’ defiance of GATS has caused damages to Antigua that are limited to lost revenue from the horserace wagering market.<sup>77</sup> After analyzing potential damages based on this new assumption, the Arbitrator determined Antigua’s actual annual damages at \$21 million.<sup>78</sup>

#### **D. Satisfaction of Damages**

The story does not end with the WTO’s dollar decision. While the United States escaped heavy liability, the arbitrator’s decision regarding how Antigua could collect its damages may do more harm to the United States economy than the dollar amount initially suggests. Antigua must have an appropriate mechanism for collecting its \$21 million per year from the United States. Antigua argued that the usual WTO collection mechanisms would not suffice because those methods either would not provide \$21 million per year or would do the nation’s economy more harm than good.<sup>79</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at ¶ 1.2.

<sup>77</sup> *Id.* at ¶ 3.187.

<sup>78</sup> *Id.* at ¶ 3.188.

<sup>79</sup> *Id.* at ¶ 4.49.

Article 22.3 of the DSU outlines how to determine what “concessions or obligations to suspend” to satisfy a WTO ruling.<sup>80</sup> As a general rule, “the complaining party should first seek to suspend concessions or other obligations with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment.”<sup>81</sup> In the context of this controversy, the DSU provides that Antigua should first attempt to satisfy its damages by suspending its GATS obligations in the entertainment industry.<sup>82</sup> However, the opinion gives no suggestion that the United States exports any entertainment services to Antigua; the damages collected might be zero.<sup>83</sup> As a secondary option, the DSU allows a country to satisfy its judgments through other sectors within the same agreement, which is the General Agreement on Trade in Services in this instance.<sup>84</sup> Antigua successfully argued that it would suffer more harm than good, or at least would not receive \$21 million in aggregate benefits, by suspending other obligations under GATS.<sup>85</sup> The arbitrator agreed and allowed Antigua to satisfy its award using the most permissive mechanism available.<sup>86</sup>

DSU Article 22.3(c) allows a party that believes “it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement [if] the circumstances are serious enough, [to] seek to suspend concessions or other obligations under another covered agreement.”<sup>87</sup> Antigua successfully used Article 22.3(c) to argue that it should be allowed to suspend its obligations under another WTO agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), rather than under GATS.<sup>88</sup>

### E. TRIPS

The arbitrator found that Antigua properly applied the procedures of Article 22.3 to determine it should be allowed to “take

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<sup>80</sup> DSU, *supra* note 72, at art. 22.3.

<sup>81</sup> *Id.* at art. 22.3(a).

<sup>82</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 4.52.

<sup>83</sup> *Id.* at ¶ 4.55.

<sup>84</sup> DSU, *supra* note 72, at art. 22.3(b).

<sup>85</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 4.56.

<sup>86</sup> *Id.* at ¶ 4.119.

<sup>87</sup> DSU, *supra* note 72, at art. 22.3(c).

<sup>88</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 4.119.

countermeasures in the form of suspension of concessions and obligations under the following sections of Part II of the TRIPS: Section 1: Copyright and Related Rights; Section 2: Trademarks; Section 4: Industrial designs; Section 5: Patents; Section 7: Protection of undisclosed information.”<sup>89</sup> Depending on the scope of the agreement, this might be quite permissive.

The TRIPS agreement has two main purposes: First, TRIPS follows WTO protocol by affording persons or corporations from foreign nations at least the same intellectual property protections as those received by domestic individuals or companies.<sup>90</sup> Second, TRIPS provides specific minimum protections for certain types of intellectual property: copyright, trademark, geographical indications, industrial designs, patents, and undisclosed information such as identities.<sup>91</sup> Suspending United States intellectual property rights in Antigua creates two potential problems. First, American inventors—including individuals, corporations, and musicians—cannot expect their works to receive fair protection in Antigua. Second, to allow one nation to violate American intellectual property leaves the door open for an unregulated black market to develop.

The arbitrator brought up both issues in *European Communities—Regime for the Importation, Sale and Distribution of Bananas (“Bananas III”)*, a famous case involving the suspension of TRIPS rights. The arbitrator there observed that third-world country WTO members were not allowed to purchase or receive restricted information from Ecuador, even though Ecuador was permitted to violate various intellectual property rights.<sup>92</sup> But one could imagine the problems inherent in opening this door to one country, especially if that country does not have effective mechanisms to halt the outward flow of intellectual property. The *Bananas III* arbitrator noted that it could not put border restrictions on Ecuador to stop an

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<sup>89</sup> *Id.* at ¶ 5.6.

<sup>90</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, art. 3.1, 33 I.L.M. 81.

<sup>91</sup> *Id.* at pt. II.

<sup>92</sup> Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, ¶ 153, WT/DS27/ARB/ECU (Mar. 24, 2000).

outward flow of black market intellectual property.<sup>93</sup> And the arbitrator also mentioned that often the nation being penalized under TRIPS does not own the intellectual property rights being breached.<sup>94</sup> Those individuals and corporations who own the rights and actually end up being penalized “are highly unlikely to have any connection with the [disagreement].”<sup>95</sup> This same disconnect between penalizing the intellectual property owners rather than the government implicitly appears in the Decision by the Arbitrator as well.

The right to violate TRIPS may be the harshest part of the arbitrator’s decision. Because the United States decided to apply its remote gaming rules inconsistently within the industry and towards other nations, in violation of its WTO obligations, American individuals with no relationship to the industry are the most likely to suffer. This determination is no fault of the WTO arbitrator, who merely used the existing system to protect Antigua’s rights. Rather the harshness arises from decisions the United States government made regarding its adherence to international obligations.

#### ***IV. The Unlawful Internet Gambling Enforcement Act of 2006***

As part of its reasoning to determine damages, Antigua stated it would make \$3.4 billion more per year on remote gaming if “[t]he United States [did] not interfere with the electronic transfer of funds between customers and Antiguan remote gaming operators.”<sup>96</sup> When Antigua first filed suit with the WTO, the United States had no laws requiring interference with electronic transfers. In October 2006, the U.S. Congress passed the SAFE Port Act of 2006. The Act was anti-terrorism legislation designed “[t]o improve maritime and cargo security through enhanced layered defenses, and for other purposes.”<sup>97</sup> Title VIII of the SAFE Port Act became known as the “Unlawful Internet Gambling Enforcement Act of 2006.”<sup>98</sup>

The UIGEA does not add any further regulations to internet gaming within the United States; rather, it relies on existing

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<sup>93</sup> *Id.* at ¶ 155.

<sup>94</sup> *Id.* at ¶ 157.

<sup>95</sup> *Id.*

<sup>96</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 3.2.

<sup>97</sup> Security and Accountability for Every Port Act, Preamble.,

<sup>98</sup> 31 U.S.C. § 5361 (2006).

legislation as its backdrop.<sup>99</sup> The Act prohibits United States financial institutions from acting as intermediaries between individuals and illegal online gambling websites.<sup>100</sup> But the UIGEA does not suggest how exactly to regulate the flow of funds, or what mechanisms of transfer are prohibited. It leaves these issues to regulations that will be promulgated by the Board of Governors of the Federal Reserve System and the Department of the Treasury.<sup>101</sup>

### A. Regulations

On October 4, 2007, the Treasury published and sought comments on a draft regulation (the “Regulations”) under the UIGEA, but as of this writing has not published the final regulations.<sup>102</sup> The Regulations reflect the Treasury’s apparent lack of enthusiasm for promulgating regulations on the flow of money through American financial institutions to internet gaming companies. The UIGEA required the Treasury to publish rules within 270 days of its enactment, but the Treasury took almost three months longer.<sup>103</sup> The timing may not appear meaningful, but when viewed in context with the text of the Regulations, it is apparent that the Treasury has reservations about the UIGEA and appears to believe effective regulation may not be possible.<sup>104</sup>

The Treasury acknowledged five common types of payment systems that could be used to fund online gaming sites, and the mechanisms available to regulate them.<sup>105</sup> These types are automatic clearing house systems, card systems, check collection systems, money transmitting businesses, and the wire transfer-system.<sup>106</sup> The Treasury suggested the UIGEA might not be as effective as Congress had hoped by acknowledging it may “exempt certain restricted transactions or designated payment systems from any requirement imposed by the regulations if the agencies jointly determine that it is

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<sup>99</sup> *See id.* at § 5361(b).

<sup>100</sup> *Id.* at § 5362(10)(D)(iii).

<sup>101</sup> *Id.* at § 5364(a).

<sup>102</sup> Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. at 56,680.

<sup>103</sup> 31 U.S.C. § 5364(a) (2006).

<sup>104</sup> Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. at 56,680.

<sup>105</sup> *Id.* at 56,697.

<sup>106</sup> *Id.*

not reasonably practicable to identify and block, or otherwise prevent or prohibit the acceptance of, such transactions.”<sup>107</sup> This means that certain industries will not have to adhere to the UIGEA, so will have an effective monopoly on the remote gaming business, and may therefore make a substantial amount of money in transaction fees solely because the government cannot think of an effective way to regulate them. Also, the ability and willingness to exempt certain industries merely because they are difficult to regulate suggests a lack of interest in actually regulating the industry at all. For example, the Treasury proposes to regulate only financial institutions that have a direct customer relationship with internet gambling companies, which may exempt a large percentage of transactions between Americans and online gaming companies.<sup>108</sup>

Exempting all institutions except those with a direct customer relationship with internet gambling companies renders the UIGEA essentially ineffective. Imagine a situation in which an American gambler decides to deposit money into his account in an online site based in Antigua. The American goes to AmeriBank, a United States financial institution with no ties to the gaming site, and asks it to wire money to AntiguaBank. AntiguaBank receives the money and passes it along to its customer, the internet gaming company. Because AntiguaBank does not operate in the United States, it is beyond American jurisdiction, and thus not regulated by the Treasury. Meanwhile, AmeriBank remains exempt from the UIGEA’s regulations because it has no direct customer relationship with the gaming company. The end result is that the American gambler can use the traditional banking system to deposit money into an online account and the Regulations cannot stop it.<sup>109</sup>

### **B. Safe Harbor**

According to the Regulations, financial institutions are responsible for knowing whether their customers are illegal remote gambling companies.<sup>110</sup> But the Regulations provide a safe harbor for companies if they follow certain identification procedures.<sup>111</sup> Under Section 6: Policies and Procedures, safeguards “are deemed

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<sup>107</sup> *Id.* at 56,682.

<sup>108</sup> *Id.* at 56,687.

<sup>109</sup> *See id.* at 56,687.

<sup>110</sup> *Id.* at 56,686.

<sup>111</sup> *Id.* at 56,697-98.

reasonably designed to prevent or prohibit restricted transactions if they . . . screen potential commercial customers to ascertain the nature of their business; and [include] as a term of the commercial customer agreement that the customer may not engage in restricted transactions.”<sup>112</sup> If the financial institution follows certain procedures, it may be shielded from liability even if it determines its customer has received restricted transactions.<sup>113</sup> The due diligence required for safe harbor changes slightly between transaction types, but most types follow the same general pattern of requiring initial and continual due diligence.<sup>114</sup>

The problem with due diligence, however, is the heavy cost it imposes on financial institutions.<sup>115</sup> Not only will financial institutions have to conduct both initial and continuous due diligence, which may eventually evolve to scrutinizing every transaction, according to the regulations these institutions will also have to monitor and police other customers’ activities.<sup>116</sup> The Treasury asks that financial institutions

have policies and procedures to be followed if the participant becomes aware that one of its customer relationships was being used to process restricted transactions. These policies and procedures could include a broad range of remedial options, such as imposing fines, restricting the customer’s access to the designated payment system . . . and terminating the customer relationship by closing the account.<sup>117</sup>

According to this excerpt, the Treasury not only asks financial institutions to monitor their customer’s activities, but also requires them to act as enforcers by imposing fines and other penalties on their customers.<sup>118</sup> This means that any financial institution that wishes to keep an illegal gaming company as a customer may be able

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 56,698-99.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 56,689.

<sup>118</sup> *Id.*



to do so without fear so long as the bank performs the occasional due diligence and imposes fines on offending customers.<sup>119</sup>

While it appears relatively simple to circumvent the Treasury's regulations, the Treasury's monitoring requirements are draconian. The Regulations require "non-exempt participants in card systems [like credit cards] and money-transmitting businesses [like Western Union]" to conduct regular monitoring.<sup>120</sup> Financial institutions will not only have to monitor their own customers' banking activities, but will also have to monitor "[w]eb sites to detect unauthorized use of the relevant designated payment system, including unauthorized use of the relevant designated payment system's trademarks."<sup>121</sup> Financial institutions may also have to monitor non-customer websites to determine if their trademarks are being used illicitly, even if the institution has no other financial or business incentive to do so.<sup>122</sup>

The Treasury has not yet published its final regulations, so it remains unclear how the UIGEA will be implemented. Currently, the proposed Regulations appear internally inconsistent. On the one hand, the Treasury attempts to control the activities of financial institutions by regulating their relationships with their customers. On the other hand, the Treasury leaves the door open for a range of impermissible activities. The justifications for the Treasury's lenient attitude appear to be either an acknowledged lack of effective enforcement mechanisms or else a desire to let financial institutions police themselves.<sup>123</sup> Either way, the Regulations appear extremely permissive and may render the UIGEA toothless.

Other legislation pending in Congress may shift the United States' position on internet gaming from prohibition to regulation.<sup>124</sup> If this change occurred, the United States would find itself in a much better position to regulate both the financial and gaming industries.

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 56,680-91.

<sup>124</sup> *See, e.g.*, H.R. 2046, 110th Cong. (2007) (proposing to regulate remote gaming to protect "against underage gambling, compulsive gambling, money laundering, and fraud for those citizens who choose to gamble online"); H.R. 2610, 110th Cong. (2007) (proposing to clarify the applicability of certain federal statutes to exempt "games of skill, and establish certain requirements with respect to such games, and for other purposes").

***V. Burdens of Banking Regulations on United States Banks  
Conducting Foreign Transactions***

The Regulations may not be inconvenient for only online gamblers and illegal gaming companies, they may also impose a huge burden on the banking system.<sup>125</sup> In fact, the House Committee on Financial Services held a hearing on April 2, 2008 entitled “Proposed UIGEA Regulations: Burden without Benefit?” The Regulations require banks to monitor public information as well as customer transactions.<sup>126</sup> But they provide an exception to the general rule of monitoring if a bank’s immediate customer is not an illegal remote gaming site.<sup>127</sup>

By regulating in this manner the Regulations place a new burden on banks, which will not have a significant corresponding benefit. Since Congress passed the Wire Act in 1961, the DOJ has considered illegal the operations of remote gaming companies.<sup>128</sup> Thus, the UIGEA’s sole contribution is to prohibit American banks from having a direct customer relationship with an offshore online gaming company.

If the only change is to prohibit a direct customer relationship, the Act becomes ineffective. It will not stop online gaming from continuing to operate offshore or maintaining its American customer base. The industry will simply have to rely on non-American banks. Thus, American banks will be subject to greater scrutiny, but will not have the ability to collect the fees they would if the government regulated rather than prohibited the online gaming industry. As Wayne Abernathy, Executive Vice President of the American Bankers Association put it “the statute as enacted and the regulations as proposed are both burdensome and unworkable and are unlikely to result in stopping illegal Internet gambling.”<sup>129</sup>

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<sup>125</sup> *Proposed UIGEA Regulations: Burden Without Benefit?* 110th Cong. (2008) (Statement of Harriet May, the Credit Union National Association) [hereinafter “May”].

<sup>126</sup> Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. at 56,598.

<sup>127</sup> *Id.* at 56,685.

<sup>128</sup> *Id.*

<sup>129</sup> *Proposed UIGEA Regulations: Burden Without Benefit?* 110th Cong. (2008) (Statement of Wayne A. Abernathy, the American Bankers Association) [hereinafter Abernathy].

***A. Precedent for Arguing “Burden” on Certain Regulations***

The complaint that the Regulations place an undue burden on the banking industry deserves serious consideration, and such changes have some precedent in the system.<sup>130</sup> The “Joint Report to Congress” (“Joint Report”), published in July 2007 by the Federal Financial Institutions Examination Council (“FFIEC”) contains a number of examples of the burdens that certain regulations impose on the banking industry, and the willingness of administrative agencies to reconsider those regulations.<sup>131</sup> The Joint Report criticized the PATRIOT Act, which, among other anti-terrorism measures, contained provisions that were designed to force banks to know their customers’ identities and to monitor their banking activities for suspicious transactions.<sup>132</sup> The FFIEC responded with promising commentary that could narrow certain PATRIOT Act requirements.<sup>133</sup> The FFIEC also considered anti-money laundering and suspicious activity reports and agreed with commentators that the regulations could be burdensome.<sup>134</sup> It stated that part of the goal of “the federal banking agencies” was “minimizing [the] burden on regulated institutions that are required to file such reports.”<sup>135</sup> The Council said that it would continue to analyze current regulations and attempt to make them as non-burdensome as possible.<sup>136</sup>

The UIGEA needs to be reconsidered within the framework established by the FFIEC’s comments. The UIGEA, unlike the PATRIOT Act, is not legislation that protects the nation from terrorists or money laundering.<sup>137</sup> As the various witnesses at the April 2, 2008 hearing noted, the UIGEA adds no benefit to the banks and little discernable benefit to the nation at large.<sup>138</sup> The best

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<sup>130</sup> See generally Fed. Fin. Insts. Examination Council, JOINT REPORT TO CONGRESS, July 31, 2007, *Economic Growth and Regulatory Paperwork Reduction Act*, 72 FED. REG. 62036, (Nov. 1, 2007).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 62040.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See May, *supra* note 125; see also Abernathy, *supra* note 130.

solution now is new legislation that overrides the divisive goals of the UIGEA.

### *VI. Other Remote Gaming Legislation Currently in Congress*

The public uproar over the UIGEA and the DOJ's recent crackdown on online gaming executives has prompted legislative action.<sup>139</sup> Some simply wanted to study the societal effect of online gaming, while others wanted to fully overhaul the legalization and regulation of the industry.<sup>140</sup> The acts have received varying degrees of support. While they serve somewhat different purposes, all the proposed acts seek to maximize the potential value of remote gaming, which could be recognized through legalization and effective regulation.<sup>141</sup>

#### **A. Internet Gambling Regulation and Enforcement Act**

In October 2006, almost immediately after Congress passed the UIGEA, Rep. Barney Frank attacked it. He expressed concern for the loss of individual freedom that a government ban on online gaming would cause.<sup>142</sup> In particular, when it comes to activities like online gambling, Congressman Frank believes that Americans should be free to do what they want in the privacy of their own homes.<sup>143</sup> And both he and other representatives recognized that States have a particular interest in gambling.<sup>144</sup> Since a few States do not allow any form of gambling in their jurisdictions, including lotteries, many politicians believe all States should be free to determine whether

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<sup>139</sup> See H.R. 2046, 110th Cong. (2007); H.R. 2610, 110th Cong. (2007); H.R. 2140, 110th Cong. (2007).

<sup>140</sup> E.g., H.R. 2046, 110th Cong. (2007) (proposing a licensing requirement for internet gaming companies); H.R. 2610, 110th Cong. (2007) (proposing language clarification and additional requirements applicable to games of skill); H.R. 2140, 110th Cong. (2007) (proposing a study on internet gambling by the National Academy of Sciences).

<sup>141</sup> See e.g., H.R. 2046, 110th Cong. (2007); see also H.R. 2610, 110th Cong. (2007); see also H.R. 2140, 110th Cong. (2007).

<sup>142</sup> Kate Phillips, *House Backs Crackdown on Gambling on Internet*, N.Y. TIMES, July 12, 2006, at 18.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

online gaming occurs within their borders, rather than rely on a blanket federal law to make that decision.<sup>145</sup>

After Congress passed the UIGEA, many poker players complained that the Act provided an exemption for wagering on horseracing, which, in their view, requires less skill than poker does.<sup>146</sup> Poker players and some politicians argued that as a game of skill, poker should be exempt from the UIGEA and any other pieces of anti-remote gaming legislation.<sup>147</sup> The Internet Gambling Regulation and Enforcement Act of 2007 (the "IGREA") proposes a blanket federal legalization of remote gaming.<sup>148</sup> It recognizes that millions of Americans participate in online gaming, even though the companies may not operate legally in the United States.<sup>149</sup> Internet gaming is currently a \$13 billion industry worldwide, with North American wagers making up "an estimated 47 percent of the global gross gaming yield."<sup>150</sup> Congressman Frank's bill would create a safe and regulated online gaming community that would contribute to the American tax base, and still avoid some of the questionable aspects of online gaming that exist in the current unregulated structure, including the opportunities for cheating and underage gambling.<sup>151</sup>

Critics of remote gaming, like the Family Research Council and Senator Goodlatte, have three concerns. They are concerned that children may have access to internet gaming, that adults may be at a greater risk to become compulsive gamblers, and that gambling websites might be used as fronts for money laundering or terrorist activities.<sup>152</sup> The IGREA proposes a range of safeguards that include integrating age verification software into the registration process and

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<sup>145</sup> *Hearing on Establishing Consistent Enforcement Policies in the Context of Online Wagers Before the H. Comm. on the Judiciary*, 110th Cong. 9 (2007) (statement of Annie Duke) [hereinafter Duke].

<sup>146</sup> See 31 U.S.C. § 5362(10)(B)(iii)(I) (2006); see also 15 U.S.C. § 3001 (2006); see also Poker Players Alliance, *Talking Points*, <http://www.pokerplayersalliance.org/pokernow.php> (last visited Mar. 20, 2008).

<sup>147</sup> Poker Players Alliance, *Poker Players Alliance: Fight for Poker*, <http://www.pokerplayersalliance.org/> (last visited April. 15, 2008).

<sup>148</sup> H.R. 2046, 110th Cong. (2007) at § 5383.

<sup>149</sup> *Id.* at §5381.

<sup>150</sup> *Id.* at § 5381(a)(1), (4).

<sup>151</sup> *Id.*

<sup>152</sup> *Hearing on Establishing Consistent Enforcement Policies*, *supra* note 145 (statement of Thomas McKlusky, the Family Research Council) [hereinafter McKlusky].

gaming software.<sup>153</sup> The IGREA also proposes mechanisms to promote tax collection, discourage money laundering and fraud, and provide a means to identify and contact compulsive gamblers to offer help.<sup>154</sup>

Furthermore, the IGREA proposes background checks and constant regulation of the gaming companies and their executives.<sup>155</sup> This will protect American consumers from sites run by unscrupulous individuals.<sup>156</sup> If online gaming sites are illegal, a winner is less likely to pay taxes on his winnings,<sup>157</sup> but gamblers have an incentive to support regulation of online gaming because it ensures the games are fair and the companies are honest.

The IGREA also takes into account a number of other interests regarding online gaming. First, States have a strong interest in controlling gaming within their borders. By using software offered by companies like Aristotle, online gaming companies will be able to determine the location of their users and shut their doors to individuals in jurisdictions that ban online gaming.<sup>158</sup> The software works. For example, in October 2006, PartyGaming successfully

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<sup>153</sup> Aristotle, Inc. currently provides age and location verification software for some state run e-lotteries, including New York State's e-lottery. *Hearing on Establishing Consistent Enforcement Policies*, *supra* note 145 (statement of Aristotle, Inc. CEO Michael Colopy) [hereinafter Colopy]; *see also* H.R. 2046 at § 5383(g)(1).

<sup>154</sup> H.R. 2046 at § 5383(g)(3),(5)-(6).

<sup>155</sup> *Id.* at § 5383(d)(2)(C)-(D).

<sup>156</sup> Online gaming unfortunately has a somewhat bad record of customers being cheated by their sites. Because these companies are subject to limited regulation, unwary Americans have fallen victim to a few sites closing their doors without any notice and without paying back customer funds (usually because they co-mingled customer deposits with operation funds), Freakonomics Blog, <http://freakonomics.blogs.nytimes.com/2007/10/17/the-absolute-poker-cheating-scandal-blown-wide-open/> (last visited Oct. 17, 2007) (discussing the October 2007 discovery in the online poker community of a cheating scandal going on at one of the major online poker sites, Absolute Poker, in which the company's CEO played under a so-called "god account", that could see the cards of every other player at the table).

<sup>157</sup> A brief review of internet message boards relating to online gambling, such as [www.twoplustwo.com](http://www.twoplustwo.com), shows the negative attitude many online gamers take towards declaring all or even part of their winnings.

<sup>158</sup> Colopy, *supra* note 153.

blocked any person playing from an American IP address.<sup>159</sup> Moreover, any State that does not want internet gaming in its jurisdiction can make that decision at any time.<sup>160</sup> If a State does not decide to ban remote gaming within 90 days of the passage of the IGREA but later wants to restrict such the activities, all online gaming sites have until the January 1st following 30 days after the State passes such a law to close its doors to that state's residents.<sup>161</sup>

The IGREA also took into account the interests of professional sports leagues like Major League Baseball, the National Football League, and the National Hockey League.<sup>162</sup> This act allows individual professional sports leagues to opt out.<sup>163</sup> A league that is particularly concerned with remote gambling may impose a ban in a similar manner to States.<sup>164</sup> But if the league does not ban gambling on its games within 90 days of the IGREA's passage, the league must give a site until the January 1st following 30 days after its decision to ban remote gaming to comply.<sup>165</sup> A remote gaming company's failure to comply with this provision carries the same fines and penalties as any other violation under IGREA: a fine and imprisonment of not more than five years.<sup>166</sup>

The IGREA would be the most protective measure for online gaming sites. It allows sites almost free rein, unless individual states or sporting leagues opt out of the bill.<sup>167</sup> The IGREA's permissive nature for all gambling activities may, however, be its downfall as some legislators may be willing to support a bill protecting games of skill, but not sports betting or other gambling.

### **B. Skill Game Protection Act**

Congressman Robert Wexler introduced "The Skill Game Protection Act" (the "SGPA") to clarify and narrow the UIGEA.<sup>168</sup>

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<sup>159</sup> Press Release, PartyGaming Plc., United States Legislation (Oct. 2, 2006), *available at* [http://partygaming.com/images/docs/061001\\_USLegislation2.pdf](http://partygaming.com/images/docs/061001_USLegislation2.pdf).

<sup>160</sup> H.R. 2046 at § 5385(a).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at §5386.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at § 5386(b).

<sup>166</sup> *Id.* at § 5388(a).

<sup>167</sup> *Id.* at § 5389(b).

<sup>168</sup> *Id.*

Specifically, the SGPA increases the number of exceptions to gaming sites that fall under the UIGEA to include games of skill like bridge, mah-jong, backgammon, and poker.<sup>169</sup> The SGPA further requests that the government take appropriate steps towards stopping minors and compulsive gamblers from playing such games, as well as creating regulations to prevent laundering and allow the collection of appropriate taxes.<sup>170</sup> This part of the SGPA, however, is merely a suggestion, and does not include the same kind of specific framework that Frank developed in the IGERA.<sup>171</sup>

The SGPA may find more support in Congress than the IGERA for two reasons. First, the SGPA may prove more palatable because it protects only so-called “skill games.”<sup>172</sup> People generally recognize games like chess to be entirely skill-based, and although there is an element of luck involved in poker, the IGERA classifies the diverse group of poker games as “skill games.”<sup>173</sup> At the House Judiciary Committee’s hearing on internet gaming, held November 14, 2007, professional poker player Annie Duke spoke convincingly about what it takes to be a professional poker player.<sup>174</sup> She spoke in detail about how, by studying the game, poker players can increase their edge over opponents, thus making the game one of skill.<sup>175</sup> Even Chairman Conyers agreed with Duke that the real issue does not center on whether poker is a game of skill.<sup>176</sup> Conyers suggested that games like poker might be regulated as a form of government paternalism.<sup>177</sup>

Second, the SGPA will likely receive more support than the IGERA because it lacks regulatory structure. This reason may seem counterintuitive, but speaks to the history of anonymity in online gaming. Although poker players want some regulation to ensure their games are fair, many players have never paid taxes on their winnings because their identity is hidden behind an online name.<sup>178</sup> Although

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<sup>169</sup> *Id.* at § 2(1).

<sup>170</sup> *Id.* at § 2(6).

<sup>171</sup> H.R. 2046 at § 5383.

<sup>172</sup> H.R. 2046 at § 2.

<sup>173</sup> *Id.*

<sup>174</sup> Duke, *supra* note 145.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> PriceWaterHouseCoopers, *Estimate of Federal Revenue Effect of Proposal to Regulate and Tax Online Gambling—Executive Study Prepared*



they have not explicitly said this is the reason, the Poker Players Alliance, a lobbying group representing American online poker players, supports this bill over the IGREA.<sup>179</sup> It would give their members the upside of government protection with none of the downside like forced taxation on winnings. While the IGREA and the SGPA contain a significant amount of overlap, which may require legislators to pick a side, not all proposed legislation is so fracturing. Representative Shelley Berkley introduced a more neutral bill called the “Internet Gambling Study Act” (the “IGSA”), addressed in the next section.

### C. Internet Gambling Study Act

The IGSA proposes that the National Research Council of the National Academy of Science conduct a “detailed examination . . . of the issues posed by the continued spread and growth of interstate commerce with respect to Internet gambling, as well as the impact of the Unlawful Internet Gambling Enforcement Act on Internet gambling in the United States.”<sup>180</sup> Before Congress decides to take a stance against online gaming, it should first perform a study to determine the impact on minors, compulsive gamblers, future trade agreements under GATS, federalism issues, and the potential tax revenue that could be gained by legalization and regulation.<sup>181</sup>

Even the idea of a simple study has created tension among legislators. At a November 14, 2007 Judiciary Committee hearing, Thomas McClusky of the Family Research Council opposed such a study.<sup>182</sup> When pressed, McClusky admitted that his group is against all forms of gambling, including the lottery.<sup>183</sup> Nevertheless, gambling, in one form or another, is legal in forty-eight states, so such a stud on the pros and cons of remote gaming does not seem beyond the boundaries of reason.<sup>184</sup>

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for: UC Group (Dec. 6, 2007), available at <http://www.safeandsecureig.org/media/taxestimate.pdf>.

<sup>179</sup> Bigpoker.ca Podcast, available at <http://www.bigpoker.ca/rounders/poker-show-archives/> (Nov. 18, 2007).. [Need to provide the source]

<sup>180</sup> H.R. 2140 at § 2(b).

<sup>181</sup> *Id.* at § 3(a)(2).

<sup>182</sup> McClusky, *supra* note 152.

<sup>183</sup> *Id.*

<sup>184</sup> Duke, *supra* note 145.

## VII. Conclusion

Since 2006 the online gaming industry has found itself the subject of both increased scrutiny and legislation.<sup>185</sup> In spite of the political wrangling within the United States, the exact legal status of online gaming remains unclear. First, it is evident that Americans still have the right to gamble online if the activity has not been prohibited in their State.<sup>186</sup> Further, a company may not take a wager over the phone lines—which includes the internet—unless that company only accepts wagers in the online horseracing industry.<sup>187</sup> Finally, according to the UIGEA, it is illegal for a United States financial institution to facilitate transactions between an American and an online gaming company.<sup>188</sup> However, because the Treasury found it would be too difficult to regulate financial transactions between banks and non-customers, its proposed regulations exempt such transactions from the UIGEA.<sup>189</sup> With such regulations the Act has few teeth.

Over the same period, however, the remote gaming industry has won some major battles on the international level. The World Trade Organization held that that the United States violated its international obligations by banning Antiguan remote gaming operators from operating within the United States.<sup>190</sup> The WTO agreed that the United States had a moral interest in banning the gambling activity, but appeared puzzled by the fact that the U.S. would ban all forms of remote gambling except horseracing.<sup>191</sup> Because of the U.S.'s decision to allow remote gambling on horseracing, the WTO ruled Antigua had the right to receive \$21 million in annual damages from the United States.<sup>192</sup>

Unfortunately, although the United States government created the problems at the WTO level, it will not pay the damages. Instead, because Antigua may now violate the TRIPS agreement,

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<sup>185</sup> See 31 U.S.C. § 5361 (2006).

<sup>186</sup> Hanaway, *supra* note 12.

<sup>187</sup> 18 U.S.C. § 1084 (2006); 15 U.S.C. § 3001 (2006).

<sup>188</sup> 31 U.S.C. § 5364 (2006).

<sup>189</sup> Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. at 56,685.

<sup>190</sup> Decision by the Arbitrator, *supra* note 12, at ¶ 1.2.

<sup>191</sup> *Id.* at ¶ 3.57.

<sup>192</sup> *Id.* at ¶ 3.188.

innocent United States citizens with no connection to the remote gaming industry will pay the damages award. The WTO took a forceful step by allowing Antigua to violate its obligations under TRIPS.<sup>193</sup> By doing so the organization sent a signal to the United States that by continuing to violate its obligations under the WTO, it would be subject to the harsh penalties.

Not only has the United States government violated its international obligations, it has also created a regulatory structure that places a huge burden on the country's banking industry. Whether or not a United States bank has online gaming companies as its customers does not change the landscape of remote gaming in the United States. Americans can still legally do business with online gaming sites, and the U.S. banks can facilitate those transactions so long as the online gaming site is not their customer.<sup>194</sup> By creating such an environment, the United States government has effectively taken business away from its banking industry without showing a discernable benefit to the new regulations.

Thankfully, some politicians have recognized that the United States should not subject itself to continued WTO liability and should not handicap its own banking industry. These politicians have proposed two bills to regulate online gaming within the United States.<sup>195</sup> For all the differences between the bills, supporters of each agree the government should perform a study to determine the exact social and financial effects of online gaming in the United States.<sup>196</sup> In fact, PriceWaterhouseCoopers published a study in December 2007 unequivocally stating that the United States is foregoing \$500 million to \$1 billion in annual tax revenues from the online gaming industry.<sup>197</sup> Perhaps the government should take that study a step further and look at how the legalization of remote gaming sites would affect United States citizens.

Legalization and regulation of online gaming would create enormous revenues for the United States and would stop its citizens from being financially punished under the WTO decision. Furthermore, the government would not have to try to enforce essentially unenforceable laws, laws which even the DOJ does not

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<sup>193</sup> *Id.* at ¶ 5.6.

<sup>194</sup> Prohibition on Funding of Unlawful Internet Gambling, 72 Fed. Reg. at 56,685.

<sup>195</sup> H.R. 2046; H.R. 2610.

<sup>196</sup> *See* H.R. 2140.

<sup>197</sup> PriceWaterhouseCoopers, *supra* note 178.

appear to understand fully. Finally, consistent legalization of all forms of internet gambling would remove the appearance that the U.S. government is pandering to the horseracing lobby. The United States government must step back from its protectionist stance on remote gaming and seriously consider the IGREA and the SGPA. By doing so the United States can avoid unenforceable laws and WTO penalties, dramatically increase its own tax revenue, and help its banking industry.

