



## Peace through Interamerican Community Action

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## **CAFTA JEOPARDIZES MAINE'S GAMBLING REGULATIONS**

### ***International Gambling Firms Would Gain Right to Challenge Maine Gambling Bans***

#### **Case Illustrates CAFTA's Threat to Maine Sovereignty Calls into Question Role of USTR**

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#### **Maine Law Bans Gambling**

- "All gambling in Maine is illegal unless expressly permitted by statute, *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983)" (letter from Maine Attorney General Steven Rowe to Youbet.com, Inc. February 9, 2005, demanding that the company adds Maine to the list of states whose residents may not open accounts with the company).
- It is illegal to accept horseracing wager from anyone located in Maine unless the person accepting the wager is licensed by the Maine Harness Racing Commission (L.D. 1053, passed by the Maine legislature, May 2005).

#### **WTO: No Bans Permitted in a Committed Service Sector, Including Gambling**

- Antigua-Barbuda recently challenged the United States Internet gambling ban as a violation of United States market access commitments under the General Agreement on Trade in Services (GATS). U.S. trade negotiators had committed all forms of gambling to World Trade Organization (WTO) rules *by mistake*, a mistake that went undetected for nearly 10 years until Antigua-Barbuda's challenge. The WTO agreed, saying that a ban on an activity in a committed service sector – even if applied equally to domestic and foreign service providers – is equivalent to a "quota of zero" and therefore a violation of GATS market access rules. However, the WTO Appellate Body ruled on appeal that the U.S. market access violation is, in the case of Internet gambling, excused by the "public morals" exception in GATS. The WTO accepted the U.S. argument that concerns about public morals (such as money laundering, fraud, gambling addiction and underage gambling) are greater with Internet gambling than they are with casino gambling.<sup>1</sup>
- On May 31, Attorneys General from 29 states, including Maine, sent a letter to U.S. Trade Representative Rob Portman calling on him to withdraw the U.S. gambling commitment, which USTR so far has not done. According to the Attorneys General, state laws regulating gambling, including limitations on the number of casinos or slot machines, state monopoly lotteries, and

<sup>1</sup> See further: Peter Riggs, "The WTO Gambling Decision: Implications for State Regulation of Gambling," Forum on Trade and Democracy, [http://www.forumdemocracy.net/trade\\_topics/gambling/wto\\_gambling\\_decision\\_0405.html](http://www.forumdemocracy.net/trade_topics/gambling/wto_gambling_decision_0405.html).

exclusive Indian gaming rights, are now subject to challenge before the WTO because WTO rules apply to all “government measures,” including state law.<sup>2</sup>

- Furthermore, the Attorneys General stated that the WTO Appellate Body ruling has “*significant, troubling implications for the rights of states to regulate in a wide range of service sectors well beyond gambling*” ranging from advertising and anti-spam rules to land-use and zoning rules. For example, Maine’s billboard advertising ban could be in jeopardy because the United States has also committed advertising to the GATS rules.

### **CAFTA is an Even Greater Threat to Democratic Regulation of Gambling than the WTO, Giving International Gambling Firms the Right to Challenge Maine Gambling Regulations in Private Trade Tribunal**

- CAFTA’s Services Chapter contains the same market access rules as GATS, the same areas of commitment, including all forms of gambling, and the same general exceptions, including that for public morals. However, CAFTA also includes an Investment Chapter that allows foreign investors to challenge government measures that are inconsistent with the Agreement. The Investment Chapter does not contain the “public morals” exception for inconsistent measures.
- A foreign gambling firm with substantial business interest in a Central American country that merely “*attempts to make... an investment*” in Maine would have standing to challenge Maine’s gambling restrictions (CAFTA, art. 10.28) because even an “*expectation of gain or profit*” is a form of investment protected by CAFTA (CAFTA, art. 10.28).
- A CAFTA challenge of state gambling regulations is possible. Costa Rican companies maintain about 23% of the English-language Internet gambling market with 366 sites.<sup>3</sup> For example, the British Sportingbet PLC, the largest Internet gambling company in the world, would have standing under CAFTA to challenge Maine gambling restrictions because the company has recently acquired Paradise Poker.com, which is based in San Jose, Costa Rica.<sup>4</sup>
- Sportingbet might argue successfully that any Maine gambling restrictions that adversely affects Sportingbet’s market share or market access amount to “measures equivalent to expropriation” (CAFTA, art. 10.7: Expropriation and Compensation). In case of a challenge, the U.S. could not justify Maine’s gambling restrictions as necessary to protect “public morals” because there is no public morals exception in CAFTA’s Investment Chapter.
- If Sportingbet’s challenge were successful, Maine could have to change its laws or Maine and U.S. taxpayers could be forced to compensate Sportingbet for Maine gambling bans that affect their profitability even if such restrictions are democratically enacted and in the public interest.
- No domestic gambling firm could successfully bring similar claims in U.S. courts under U.S. laws as property rights are much narrower under U.S. law than under CAFTA. Thus, CAFTA gives foreign investors greater rights than U.S. law gives domestic investors.

<sup>2</sup> To read the Attorney Generals’ letter, see:

[http://www.polarisinstitute.org/polaris\\_project/public\\_service/news/US%20states%20AG%20to%20USTR%20on%20gambling1.pdf](http://www.polarisinstitute.org/polaris_project/public_service/news/US%20states%20AG%20to%20USTR%20on%20gambling1.pdf)

<sup>3</sup> See: Sean Hewens, “Potential Investor-State Challenges to U.S. Gambling Laws,” May 16, 2005 draft. Draft available on request.

<sup>4</sup> See also: Jerry Spangler, “Online gaming may recruit Costa Rica in its U.S. push,” Deseret Morning News, 30 June, 2005.

## **CAFTA side letter on Gambling Calls USTR Role into Question**

In a CAFTA side letter to Costa Rica signed by former Trade Representative Robert Zoelick, the USTR inadvertently affirms CAFTA's threat to democratic regulation of gambling:

*“Dear Minister Trejos: I have the honor to confirm ... Nothing in Chapter Ten (Investment) or Eleven (Cross-Border Trade in Services) prevents the United States or Costa Rica from adopting, maintaining, or enforcing any measure consistent with the Agreement relating to sports books or other gambling activities within their respective national territories”*  
(emphasis added).

This statement is misleading. It asserts merely that in gambling, CAFTA prevents governments from doing what CAFTA prevents them from doing. It neglects to state the key fact: that whatever gambling measures governments adopt, maintain or enforce, and whatever the purpose of these measures, they would have to conform with all applicable CAFTA rules. In short, while designed to give a contrary impression, this statement obliquely confirms that CAFTA would fetter governments' ability to regulate gambling.

As a result of widespread concerns about the U.S.-GATS Gambling case USTR should have been keenly aware of, and taken special care in negotiating, gambling issues in CAFTA to protect governments' right to regulate gambling. Indeed, the fact that the USTR exchanged a side-letter on gambling indicates that U.S. negotiators were aware of the political sensitivities of this vital issue. Thus, USTR's failure to exempt all existing federal and state gambling measures from the trade agreement – their failure to safeguard governments' future regulatory freedom in gambling – raises troubling questions about the role of the USTR in the CAFTA negotiations.

- Even after the recent GATS gambling ruling, is the USTR unaware of the risks that CAFTA would pose to federal and state regulation of gambling, now and in the future?
- Is the USTR under the mistaken impression, as US trade officials were in the GATS gambling case, that U.S. gambling laws are beyond the reach of CAFTA rules?
- Is the USTR under the impression that the risks CAFTA poses to gambling regulations in the United States are manageable or justifiable? If the USTR has made this determination, on what basis did USTR make it?

**Ultimately, passing CAFTA would undermine responsible, democratic regulation of gambling throughout the United States, thereby advancing the interests of international gambling companies at the expense of the U.S. public.**

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