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in the Context of Online Wagers

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Executive Summary

- The WTO, of which the US is a founding Member, is the principal international legal framework for trade in goods and services. In the field of services – governed by the GATS -- its Members are free to make commitments which open their markets to services providers from other countries. As the American economy turns increasingly to sophisticated services and as it is becoming clear that our future prosperity depends on successful exports, the well functioning of the GATS is a vital interest.

- The USA made a commitment which included access to outside service providers in the field of remote betting. Despite this binding commitment the US has sought through criminal prosecutions and other measures to ban all such remote betting supplied by providers in our WTO partner countries. The United States lost its case in three different proceedings in the WTO. There is no question that under international law the ban on remote betting by providers situated in WTO countries is illegal.

- The Executive Branch of the US sought to justify its conduct by arguing that remote betting was inimical to various public policies. This argument failed since the WTO found that whereas there was a ban on remote betting by outside providers, there was a wholly legal flourishing remote betting industry in the US – notably connected to horse racing – raising the distinct impression that what was at stake was not protecting the public but protecting entrenched domestic special interests.

- Despite this illegality the Executive Branch has persisted in indicting and prosecuting individuals and corporations whose activities should have been protected by the binding international obligations. It is doing that under an alleged shield of the Uruguay Round Agreement Act which took the US into the WTO.

Furthermore, rather than bring itself into compliance, the United States has now engaged in a process of withdrawing its commitments.

- America is a world leader in all areas. It leads by example. In this case the example which the Executive Branch is giving is detrimental to the reputation of the United States as champion of the rule of law, and is detrimental to long term American commercial interests and American Prosperity. In particular, it is an invitation to other countries to prosecute American citizens and even imprison them, despite international treaties which declare the activities of such individuals legal, using the conduct of the United States in this area as an example. Further, it is an invitation to other countries who have given commitment in the service area which benefit American businesses, to withdraw such commitments rather than honor them, when activities of American businesses protected by such commitments are not to their liking.

- Remote betting may indeed create various hazards that require regulation. The WTO/GATS permits such regulation provided it is done on a non discriminatory basis. The United States may and should regulate remote betting, even heavily, to all providers, internal and external. In such a way, it will both protect the interest of its citizens and honor its commitment to the rule of law and reputation as a champion of world of states which respects its international obligations.

Full Written Statement by Professor Weiler

I want to thank Chairman Conyers and the members of the committee for inviting me to be here today.

My name is Joseph Weiler. Since 2001 I have served as Professor of Law and Director of the Jean Monnet Center for International and Regional Economic Law & Justice at NYU School of Law. Prior to that, from 1992 till 2001, I was Manley Hudson Professor of International Law at Harvard Law School and before that a Professor at the Michigan School of Law.

One area of my expertise is the law of the World Trade Organization. I have served on occasion as a WTO Panel Member. I attach to this Statement a full resume.

Recently I have been retained, and continue to be retained, by several Law Firms whose clients include individuals and corporations who have been indicted or are threatened by the US under the Wire Act and other related acts for offering remote internet betting services from outside the United States. I was asked to provide them with expert advice on, *inter alia*, the compatibility of such indictments with US international legal obligations and more generally with the compatibility of the overall US ban on remote betting from providers located outside the US in countries which are Member States of the WTO.

In my testimony to Congress today I want to summarize my principal conclusions and recommendations.

1. The United States is a founding Member of the GATT, and a Founding and prominent Member of the WTO. One of the Agreements which come under the umbrella of the WTO is the GATS – The General Agreement on Trade in Services, under which a Member such is the United States *may* if it so wishes, open certain economic sectors to service providers from other Members. The incentive for a Member such as the US to open up such sectors is self-interest: It is part of complex negotiations whereby other Countries may offer

similar commitments in respect of US service providers. Additionally, opening up internal services to outside providers may be considered in the interest of US Consumers – offering them more choice and enhancing competition which produce efficiency and lower prices. A country is not obliged to give such commitments but once it does it is obliged to respect them – since other countries' adjust their economies in view of such commitments and individual corporations and investors will gear their economic activities based on such commitments and promise of access.

2. The United States voluntarily gave a legally binding Commitment in respect of "*Recreational, Culture and Sporting Services*" which have been held to include gambling and betting services.

3. Notwithstanding its clear international obligation to offer access to the thriving remote betting industry within the United States to providers from other WTO Members, the United States has used the Wire Act and other related Acts criminally to indict and even convict individuals and corporations and effectively to shut out all such access to outside providers.

4. Antigua brought a case against the US in the WTO challenging the legality of the US conduct. The United States sought to defend the legality of its conduct before all judicial instances of the WTO. It has lost, comprehensively, in all such proceedings. Its conduct was held to be illegal by a WTO Panel, the WTO Appellate Body (the supreme judicial instance of the WTO) and a subsequent Compliance Panel.

5. In face of such conclusive holding of illegality the US has decided not to appeal the final decision of the Compliance Panel. Instead the US has taken steps to withdraw its GATS commitment in this area. This might be regarded and is regarded by many as a cynical manipulation of the system – you lose the game, so you try and change the rules. It also charts a way and creates a political precedent which might harm US interests when other countries emulate such behavior. Be that as it may, it constitutes a ringing admission by the United States of the illegality of its actions to date.

6. And yet, the US Executive Branch persists in maintaining indictments and threatening indictments that are based on internationally tainted Acts and conduct. In what is in my view a particularly astonishing approach, the Executive Branch is persisting in a policy which includes prosecutions against individuals the legality of whose activities were covered and guaranteed by the international legal obligations of the United States, and is simply seeking to defend itself by relying on the ground that its illegal actions are shielded by the Uruguay Round Implementing Act from suits by individuals in domestic US courts. The approach of the Executive Branch amounts to the following: 'What we are doing may be illegal under international law, but you, the individuals cannot do anything about it, because under our reading of the Uruguay Round Agreement Act we are immune.' Even if the URAA gave such immunity to the Executive Branch – which I do not believe to be the case – this approach amounts to a spectacular contempt to the rule of international law and to American notions of fairness and justice.

7. Let me now dispel some misunderstandings surrounding this saga. The WTO regime (of which the United States is one of the principal architects) is often depicted as encroaching on US "sovereignty" and internal autonomy in an unacceptable way. What, it is sometimes asked, if the United States came to the conclusion that, say, Internet betting posed specific risks to consumers which require regulation or even banning of such forms of betting?

Does the WTO prohibit the US from taking action to protect against such risks? The answer is a resounding no. If such risks exist the US would have full legal authority under the GATS to regulate the industry to protect it against such risks. If it considered it wise it could even impose a ban. But what it cannot do is to regulate or ban in a discriminatory manner. Under its WTO obligations it cannot regulate or ban in a manner which slyly supports and allows domestic providers of remote betting but, for example, bans suppliers from WTO partners. All legal instances in the WTO found that his is exactly what the US is doing today. The WTO found, that whereas the US was trying to justify its ban on outside providers of remote betting services by considerations of public policy and public order it allowed at the very same time within the USA the operation of

"... substantial and even prominent businesses, with, collectively, thousands of employees and apparently tens of thousands of clients, paying taxes or generating revenue for government owners, having traded openly for up to 30 years and in some cases even operating television channels.... The evidence regarding the suppliers demonstrates the existence of a flourishing remote account wagering industry on horse racing in the United States operating in ostensible legality."

The conduct of the Executive Branch in banning outside providers is not just discriminatory and thus in violation of the WTO, but one cannot escape the suspicion that it might be motivated in part by a protection of special interests within the United States rather than protection of consumers.

8. The conduct of the Executive Branch is harmful to the United States in many ways.

- Our economy relies more on more on a robust exporting sector – both in goods and services. The WTO including the GATT and GATS are the principal legal framework which guarantees US businesses a discrimination-free environment in which to sell their products and services in other WTO countries. Imagine that a foreign country took a commitment which, say, allowed American hospitals and doctors access to offer medical services. Imagine further that based on that commitment the US hospitals and doctors began offering services in a WTO Member. Imagine now that this country failed to live up to its commitment and imprisoned American doctors on the ground that a national law forbade the offering of such services to doctors not trained in the host country. We would be rightly outraged. We would be even more outraged if that country turned to the American doctors and said: though we acknowledge that our actions are in violation of our agreement, according to our internal law, you have no recourse. You sit in jail. But what would we say if that country turned around and said – We are only following the example of the United States of America. Our outrage would at this point turn not against such a country but against our own Executive Branch.

- We should be equally concerned by the move of the Executive Branch to withdraw its commitment. What it should do is to bring our law and conduct into compliance with our international legal obligations on which many countries and individuals have relied rather than try to renege on its promises. This is not simply or even primarily a moralistic point. Our country is the trendsetter and leader in so many international arenas. Whether we like it or not, *we lead by example.* As our economy moves increasingly towards a high tech, knowledge based service oriented model and as we realize that our future prosperity will depend increasingly of tapping into export markets, notably the huge emerging markets such as China and India, is it really in our self interest to teach this particular example? When you are caught denying access or discriminating against American businesses in violation of your GATS or GATT obligations, rather than complying, simply withdraw your commitment and change your promise?

- The United States justly used to enjoy a world reputation as a champion of liberty, rights and the rule of law. I think it is acknowledged by all political forces that in recent times this reputation has been seriously diminished compromising American leadership and American interests. In some areas, notably in the area of the war on terror and national security, there might be a feeling that existing rules of international law compromise the ability of the United States effectively to defend itself. I make no pronouncement on that. But if this is the case, it would seem to me that in all other areas, where national security is not involved, this country would be well served if its Executive Branch was particularly vigilant and scrupulous in observing the rule of law, which includes a respect for international legal obligations. This is, too, in the interest of the United States. It should be recalled that United States signed and supported the WTO Dispute Resolution Understanding which provides, *inter alia*, in Article 17.14

  An Appellate Body report shall be adopted by the DSB and *unconditionally accepted by the parties to the dispute* unless the DSB decides by consensus not to

adopt the Appellate Body report within 30 days following its circulation to the Members." (Emphasis added.)

Article 21.1 of the DSU provides in turn:

> Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members

It should also be recalled that the United States is often on the winning side of trade disputes, and when it is on the winning side it insists vigorously that its trading partners faithfully comply with their legal obligations.

To give but one example: In its famous dispute with the European Union as regards exportation of Meat Hormones, the US won its case. Here are the words of the representative of the US in the WTO:

> The representative of the United States said that this was an important juncture in the dispute settlement process. Her delegation welcomed the [European Union's] statement. It was important for the integrity and viability of the dispute settlement mechanism that Members complied with the DSB's recommendations. In this case, the Communities' obligations were clear. In accordance with the rulings, the ban had not been supported by scientific evidence nor by any of the risk assessments presented during the proceedings. All the risk assessments that had been conducted had proved that the six hormones in question were safe. This meant that compliance with the DSB's recommendations required the Communities to remove the ban on the importation of meat produced with the use of any of the six hormones to promote growth.

The matter this Committee is considering is not about National Security; the US Executive Branch is the custodian of the United States national interest. It is not in American interest

to weaken the ability of the United States to insist on prompt compliance with WTO rulings by others.

- When a Member fails to comply with a decision of the WTO Appellate Body and Dispute Settlement Body, it opens itself to trade sanctions by the winning country in the form of withdrawal of concessions. This has been interpreted by some to suggest that as long as the US was willing to submit itself to such sanctions, it was discharging its obligations under the WTO system. This is an utter misconception of the system. The withdrawal of concessions is meant to be a sanction and incentive for a recalcitrant Member to fulfill its obligation, not an indulgence you buy to expiate your wrong doing. To argue otherwise would be the equivalent of a rich man claiming that as long he was willing to pay the fine, he was under no legal obligation to move the car he parked in front of a fire hydrant.

9. This Committee is not a court of law so I will spare it a lengthy legal analysis concerning the question whether or not individuals may rely in their defense against the indictments brought against them on the fact that the Acts on which such indictments have been brought have been found to be in violation of the US legal obligations when applied to individuals supplying remote betting services from other WTO Members. Some language in the Uruguay Round Agreement Act notwithstanding I think there are weighty legal arguments that individuals should not be denied, *in defending themselves*, the ability to argue that Congress did not intend in approving US participation in the WTO, that prosecutorial discretion should be exercised in a manner which would bring the United States into violation of its international legal obligations. There is, however, one crucial point which should be of interest to this Committee. In many of its utterances the Executive Branch has taken the position that it is defending the "sovereignty" of the United States as a whole, and that in its conduct in this matter it is executing the will of Congress. I respectfully and vigorously dispute both these propositions. When a country solemnly adopts an international legal obligation and then honors that obligation it does not compromise its sovereignty – it manifests its sovereignty. For generations the United States has taken the view that all Congressional Acts should, if at all possible, be interpreted and applied in such a way as to respect international obligations solemnly

undertaken by this Country. This is called the Charming Betsy doctrine. We expect the same from all other countries. It is possible to interpret both the Uruguay Round Agreement Act (taking the US into the WTO) and the Statutes under which the Executive Branch is seeking to ban remote betting from service suppliers located in our WTO partners, in a manner which would respect American international legal obligation and commitment to the rule of law. The Executive Branch is doing no service to the US by violating these obligations, and laying the responsibility at the feet of Congress. Congress should not allow such.

10. As I indicated above, it is clear that remote betting over the internet does pose various legitimate concerns. There are potential hazards to, for example, consumers which do not exist in on-site gambling. If the United States were to adopt a "prohibition mentality" the WTO would not prevent the US from banning all such betting, provided such a ban could be justified on grounds of public policy and public morality and was applicable to *all* remote betting, internal and external. I do not think such a total ban is either wise or likely. The alternative is to adopt a regulatory regime which would address the hazards of remote betting and would apply with no discrimination both to domestic and foreign service providers from our WTO partners. In this way the US would both address its legitimate social concerns and respect its international legal obligations.

J.H.H. Weiler

Biographical Sketch

J.H.H. Weiler is University Professor at New York University and European Union Jean Monnet Chair at NYU School of Law. Professor Weiler is Director of the Jean Monnet Center for International and Regional Economic Law & Justice at NYU.

Previously he served as the Manley Hudson Professor of International Law at Harvard Law School.

He is, too, Visiting Professor at London School of Economics; Honorary Professor at University College, London; Honorary Professor at the Department of Political Science, University of Copenhagen and Co-Director of the Academy of International Trade Law in Macao, China.

He is a Fellow of the American Academy of Arts and Sciences.

He is a Reporter of the American Law Institute (International trade: WTO).

He holds degrees from Sussex (B.A.); Cambridge (LL.B. and LL.M.) and The Hague Academy of International Law (Diploma of International Law); he earned his Ph.D. in European Law at the EUI, Florence. He is recipient of Doctorates *Honoris Causa* from London University from Sussex University and from the University of Macerata and is Honorary Senator of the University of Ljubljana.

He has been Visiting Professor at, among others, the University of Paris, the Institut d'Etudes Politiques de Paris (Science Po), the Hebrew University of Jerusalem, the Max Planck Institute for International Law at Heidelberg, All Souls College, Oxford, Chicago Law School, Stanford Law School, Yale Law School, the Ortega Y Gasset Institute, Madrid, the University of Toronto, the University of Frankfurt and the University of Ljubljana.

He served as a Member of the Committee of Jurists of the Institutional Affairs Committee of the European Parliament co-drafting the European Parliament's Declaration of Human Rights and Freedoms. He was a member of the *Groupe des Sages* advising the Commission of the European Union on the 1996/97 Amsterdam Treaty. He was a member of the Advisory Group of the Greek Presidency of the European Union during the negotiations of the Constitutional Treaty and has been an advisor to several governments of Member States of the European Union.

He is a WTO Panel Member and a NAFTA Panel Member (Ch. 11).

He is a founding Editor of the European Journal of International Law, of the European Law Journal and of the World Trade Review.

He is a Member of the Advisory Boards or Scientific Committees of the Journal of Common Market Studies, Cahiers de Droit Européeen, Common Market Law Review, European Foreign Affairs Review, the Maastricht Journal of European and Comparative Law, World Trade Review, the Columbia Journal of European Law, the Harvard International Review, the Harvard Journal of International Law, the (Australian) Federal Law Review, the Journal of European Integration, the European Foreign Policy Bulletin online, ELSA-Selected Papers of European Law, the Irish Journal of European Law, the Slovenian Law Review, IMT Lucca Institute for Advanced Studies, and the Institute for International Law and Security Studies at the University of Minnesota. He is a Member of the Board of Management of the European Research Paper Archive. He is on the Board of Directors of the American Journal of International Law. He is also a Member of the Scientific Advisory Board of the Asia-Pacific Journal of EU Studies.

He is a Council Member of the Centre for European Economic and Public Affairs, University College, Dublin, a Member of the Board of the Centre for the Law of the European Union at University College, London, Member of the International Advisory Board, Queen's University, Belfast, U.K. and at the Ortega Y Gasset Institute, Madrid, Spain. He is Member of the Advisory Council of the Interdisciplinary University Center, Herzelia, Israel. He is Member of the Advisory Board of the Center for International, Comparative Law, The Dickinson School of Law, PennState and Member of the International Council of the Institute for Global Legal Studies, Washington University School of Law, St. Louis and a board member of the Scientific Advisory Board at the Max-Planck-Institute fuer auslaendisches oeffentliches Recht und Voelkerrecht in Heidelberg, Germany. He is a Member of the International Advisory Board of the Contemporary Europe Research Centre of the University of Melbourne, Australia and a Member of the International Board of the Concord Research Center at the College of Management, Israel. He is a Council Member of the Association for Hebraic Studies, AHS Institute, USA. He is a Member of the International Advisory Panel of the National University of Singapore. He is a Member of the Advisory Board of the Instituto de Empresa Business School, in Madrid, Spain.

He is author of articles and books in the fields of International, Comparative and European law. His publications include *Un'Europa Cristiana: Un saggio esplorativo,* (BUR Saggi, Milano, 2003 – translations into Spanish, Polish, Portuguese, German, Dutch, Slovenian and French) *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford Univ. Press, 2000) *The European Court of Justice.* Edited with Grainne de Burca, (Oxford Univ. Press, 2001).