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# Why There May Not be an Extraterritorial Sport Right to Online Gambling

OLA O. OLATAWURA\*

## I. INTRODUCTION

Online gambling is a controversial domestic and international activity for most states. Following the decision by the European Court of Justice (ECJ) in *Piorgiorgio Gambelli and Others*,<sup>1</sup> commentators now suggest that the end of state control barring foreign based residents from participating in sport betting is near.<sup>2</sup>

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1. Case C-243/01, *Piorgiorgio Gambelli and Others*, 2003 E.C.R. I-13031, available at <http://curia.eu.int>. Cf. Case C-275/92, *Her Majesty's Customs and Excise v. Schindler*, 1994 ECR I-1039, available at <http://curia.eu.int>; Case C-124/97, *Laara and Others*, 1999 ECR I-6067, available at <http://curia.eu.int>; and Case C-67/98, *Questori di Verona v. Zenatti*, 1999 ECR I- 7289, available at <http://curia.eu.int>. For a discussion of the latter cases, see Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445, 472-79 (2004).

2. See Press Release, European Commission, Sports Betting in Italy: Commission Requests Competition in the Award of Concessions (Oct. 17, 2002), available at <http://europa.eu.int/rapid/> (last visited Nov. 12, 2005) [hereinafter Sports Betting in Italy] (request for Italy to allow publicly quoted EU companies to bid for sport betting concessions); Press Release, European Commission, Free Movement of Services: Commission Inquires into Danish Restrictions on Sports Betting (Mar. 30, 2004), available at <http://europa.eu.int/rapid/> (last visited Nov. 12, 2005) [hereinafter Free Movement of

The European Commission strengthened this view with its declaration to investigate the control by Kingdom of Denmark on the basis of European treaty provisions and the *Gambelli* decision of the ECJ.<sup>3</sup> Recently, in order to supply gambling services in the United States, the government of Antigua and Barbuda initiated an action under the World Trade Organization (WTO) Dispute Settlement Understanding (DSU) process, and subsequently obtained a favorable panel ruling.<sup>4</sup> This Article focuses on and examines the problems of online extraterritorial sport gambling, the roles, and powers of states in promoting or banning the practice, and the status of the practice under International Sport Law (ISL). In light of the difficulties faced in justifying extraterritorial online liability, suggestions are put forward for a review of the practice. These issues are discussed in four parts, beginning with Part II, which examines the nature of extraterritoriality, the arguments to support extraterritorial online gambling, and the negative experiences of sport with international betting. Part III examines how policies and approaches have been formed, leading to rejection of sport gambling. Part IV then discusses the effective legal responses to online gambling from affected parties and the possible solutions to reconcile opposing interests. Finally, in Part V, while affirming the position of the law as against gambling, observations are drawn as to the reasons for the present state of sport betting and what accommodations may be made in the future.

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Services]; Caroline Bissett, *All the Bets are Off(ine): Antigua's Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 400-401 (2004).

3. Statute Law No. 204/2003 (Royal Kingdom of Denmark) prevents foreign based companies from engaging in sport betting activities connected to Denmark. See Free Movement of Services, *supra* note 2. Cf. *Sport Betting and European Union Law*, *infra* Part III.C.

4. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 4, Legal Instruments--Results of the Uruguay Round, *reprinted in* 33 I.L.M. 112, 116 (1994) [hereinafter DSU]; General Agreement on Trade in Services, WTO Agreement, Annex 1B, art. 23, Legal Instruments--Results of the Uruguay Round vol. 28, 33 I.L.M. 1168, 1183 (1994) [hereinafter GATS]; see also Chakravarthi Raghavan, *Internet Gambling Case Ruling Important for Future GATS Disputes*, THIRD WORLD NETWORK, Nov. 17, 2004, available at [www.twinside.org.sg/title2/5690a.htm](http://www.twinside.org.sg/title2/5690a.htm); see also *Antigua Beats US on Online Gaming*, BBC NEWS, Mar. 25, 2004, at <http://news.bbc.co.uk/1/hi/business/3568281.stm> (last visited Nov. 12, 2005).

## II. CLAIMS, CAUSES, AND PROBLEMS

### A. Nature and Problems

Providing or participating in extraterritorial online sport gambling is generally forbidden under national laws.<sup>5</sup> Sport gambling, or “sport betting,” as this Article labels current practices, is based on “sporting bet” or “spread betting” on real life sporting competitions and teams. It is different from machine or fictional wagering or gambling activities such as casino games, fantasy sport, and others. Extraterritorial acts occur when the activity is performed within the jurisdiction or impacts upon the jurisdiction by acts of extraterritorial sport betting companies (“ETSBC”), the customer, or intermediaries. In sport betting, an ETSBC would be involved in extra territorial activities by providing betting services to customers inside or outside the company’s jurisdiction for activities taking place in another jurisdiction.<sup>6</sup> Similarly, the customer inside or outside the jurisdiction is, by direct or indirect payment or receipt of payments, involved in an extraterritorial act.<sup>7</sup>

Illegality takes place when acts are contrary to law. For the ETSBC, it is involved in illegality by seeking stakers inside or outside the prohibited territory without an operating license, undertaking money transactions without authority, and failing to

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5. Certain governments expressly promote their jurisdictions to be used for online sport betting by extraterritorial sports betting companies (ETSBC). Notable ones from the Caribbean are Antigua and Barbuda, Curacao, Costa Rica, and Dominica. In Asia and the Pacific, Australia, Macau, and Hong Kong are the leading states. European jurisdictions include Andorra, Cyprus, Gibraltar, Isle of Man (not from the United States), Jersey, Malta and the United Kingdom. With respect to the United Kingdom, online gambling is widely available, but it is unlawful for United Kingdom based operators to provide gaming services. See Gambling Review Body, Dep’t for Culture, Media & Sport, *Gambling Review Report 5* (2001), at <http://www.culture.gov.uk>. In Europe, states like Austria, Finland (Aalands Island), Ireland, Germany, and Russia have ETSBC in their jurisdictions. For a detailed reference to ESTBC jurisdictions, see *Gambling Licenses.com, Internet Gambling Licenses*, at <http://www.gamblinglicenses.com/licensesDatabase.cfm> (last visited Nov. 12, 2005). As a general rule, rights granted to transact sport betting business may only be presumed to mean national sport betting, so that a special license may be needed for extraterritorial gambling. Consumer protection regulations and statutes apply to foreign consumers dealing with these jurisdictions.

6. See Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?* 50 FED. COMM. L.J. 117 (1997); see also Graham Smith, *Directing and Targeting – the Answer to the Internet’s Jurisdiction Problems?* 5 COMPUTER L. REV. INT’L 145 (2004).

7. See Wilske & Schiller, *supra* note 6.

pay taxes. By its actions, a state and its validly licensed ESTBC are deprived of their commercial rights and revenue. For the customer, it has engaged in an unlawful activity to rig the market, evade taxes, or commit fraud, etc. when an unauthorized company is used for betting or receiving payments. The individual acts of setting up a business, or paying or receiving funds in connection with a sport event without authorization at an offered or agreed price determined before the sporting event, may *de jure* be identified as "sporting fraud."<sup>8</sup> Even though no actual match fixing (*de facto* fraud) is undertaken in cooperation with third parties, the illegality is in the nature of a fundamental *ordre public* with the goal of discouraging payment arrangements in sporting events that determines the result of an otherwise unpredictable activity by an act of one or both parties.

In the quest for commercial extraterritoriality, the promoters encounter three situations. The first is to establish *de facto* business in another state and gain a share of the domestic betting business.<sup>9</sup> In this case, ETSBC become or convert to local companies, working under the legal framework of the new market.<sup>10</sup> The second is to be solely confined to one state and undertake business in other states.<sup>11</sup> This is the classical form of ETSBC. The third, which is the most contentious, is to establish in a state, even if that jurisdiction does not approve of it.<sup>12</sup> Since there is no preexisting or assumed right under national or international law to carry out the activity, irrespective of the goal, there are two major competing policies that determine the extraterritorial outcome. The first is global or regional competition policy. This policy position assumes ETSBC have an international law right to operate in that market. As historically conceived and practiced, an absolute right of exclusivity operates against foreign transactions,

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8. Cf. Law 401/89 (Italy).

9. See generally Laura H. Bak-Boychuk, *Internet Gambling: Is Avoiding Prosecution in the United States as Easy as Moving the Business Operations Offshore?*, 6 SW. J.L. & TRADE AM. 363 (1999) (application of extraterritoriality principle to U.S. online gambling laws).

10. Cf. *id.* at 366 ("It is difficult enough to establish jurisdiction in a particular state over a non-resident based on his Internet contact with that state, let alone over a non-citizen.")

11. Cf. *id.* ("Operators of Internet gambling, no matter where they may be located, can easily transmit betting information online.")

12. Cf. *id.* ("The [U.S.] legislators and the courts today are faced with the daunting task of devising new standards of jurisdiction and feasible regulation methods in the fight against all illegal Internet activities.")

so that any right of absolute access is a novel one. A competition policy would necessarily be an imperative right or power based on an unwavering treaty obligation or similar intrastate regimes. The alternative policy is domestic socioeconomic policy. This is tied to sovereignty, culture, and public policy, and driven less by economics. The outcome is determined according to the sector and the normative culture. Based on the subject matter, various degrees of concessions may be demanded from or granted by the state. Since it is historically accurate that there is no right to sport betting or gambling, it is submitted that sport betting falls within the domestic socioeconomic policy group.<sup>13</sup>

As a result of extraterritorial sport betting, there are important practical and legal issues connected to the existence and impact of the activities for states. Where there are social, economic, and juridical consequences for the jurisdiction implicated, it is necessary to identify which jurisdiction is responsible for the activity. One position is that the territory that allows the ETSBC to operate has territorial or original legislative control over the ETSBC. The position, if formally adopted, constitutes a contentious if not unlawful extraterritorial assertion of jurisdiction over a foreign country. A state does not have the power to prescribe or order an ETSBC based in its territory to conduct business in a different state without the permission or contrary to the law of that second state.<sup>14</sup> At the same time, it may be held duty bound to monitor and assume liability for acts resulting from its assumed jurisdictional authority.<sup>15</sup> Another position is that the outlawing jurisdiction with responsibility for the event should be the one to act. In such a situation, it has the jurisdictional competence over persons inside or outside its territory. It can exercise sovereign power inside its territory and has the right and power, subject to international law or comity, to invoke its laws over foreign residents for acts in its territory.<sup>16</sup>

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13. See *Her Majesty's Customs and Excise v. Schindler*, 1994 ECR I-1039.

14. Rosalyn Higgins, *The Legal Bases of Jurisdiction*, in *EXTRA TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO* 4-7 (Cecil J. Olmstead ed., 1984); see also Wilske & Schiller, *supra* note 6 (asserting that under the territoriality approach to international law, "States can even incur international responsibility if they allow their territory to be used for unlawful activities directed against other States.").

15. See Higgins, *supra* note 14.

16. The settlement of jurisdictional issues in relation to online gambling is aided by the theory of the borderless world wide web (www), such that every www activity connected to, providing, or undertaking business or services in a territory *de facto* and *de*

Apart from states that expressly allow ETBSC to operate indiscriminately, a cautious approach towards gambling is noticeable in states' practices. Certain states grant monopoly rights to state companies within their national or overseas territory.<sup>17</sup> They are not allowed to engage in business the national or overseas territory.<sup>18</sup> Invariably, foreign businesses are kept out. Other state agencies enter into express contracts with foreign agencies or clubs before undertaking business there.<sup>19</sup> Other states provide laws that allow external jurisdictions to specifically opt out of the betting businesses involving their citizens conducted in an ETBSC jurisdiction.<sup>20</sup> Finally, certain states ban online gambling in general.<sup>21</sup>

### B. *The Advocates Cause*

Advocates of extraterritorial rights base their case on four types of arguments, namely; the formalist (*per se*) argument, the technology (do-ability) argument, the transnationalization and globalization of sport and events (consumer demand) argument, and the commercial/employment opportunities (economic impact) argument.<sup>22</sup> The *per se* argument is the primary argument to end or ease prohibitions in other states. It is based on a *per se* or literary interpretation of competition and free trade and services policies. This argument is applied to the rights provided in EU Treaty to establish and take part in services provided in EU member states.<sup>23</sup> Against the US', the General Agreement of Trade in Services (GATS) is taken to be the commercial visa.<sup>24</sup> Secondly, under the technology argument, it is simply claimed that any thing that is possible must be achieved. Undoubtedly, the emergence of

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*jure* takes place there. See Wilske & Schiller, *supra* note 6; see also Smith, *supra* note 6. For implications of this position, see discussion *infra* Part IV.D.

17. See Gambling Licenses.com, *supra* note 5; see generally Kenneth M. Davidson, *Creating Effective Competition Institutions: Ideas for Transitional Economies*, 6 ASIAN-PAC. L. & POL'Y J. 3 (2005) (discussing the structural issues as to how states can draft competition law).

18. See Gambling Licenses.com, *supra* note 5.

19. See *id.*

20. See *id.*

21. See Statute Law No. 204/2003 (Royal Kingdom of Denmark).

22. Cf. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005).

23. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, arts. 43, 49, 236 O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

24. GATS arts. II, VI, VIII, XI, XVI, XVII; see also Bissett, *supra* note 2, at 389-400.

sophisticated media and internet technologies make commercial exploitation of foreign sporting competitions possible to accomplish.<sup>25</sup> It is therefore not necessary as is presently being practiced to establish business offices in all states. Using internet technologies, an ETSBC is able to engage in betting services for major national sport of other countries. Thirdly, the consumer demand argument for sport betting is claimed in the current climate of transnationalization of sporting actors and the financial, corporate and globalization of sport. It is suggested that sport followers, by being equally interested in domestic and foreign sport competitions, have an appetite or respond favorably to international sport betting. This wider market is seen as a logical extension of the local market. At the height of its dominance of European club football, Italian *Serie A* club matches were virtually compulsory television spectacles worldwide. Football fans had favorite clubs and followed the exploits. Similarly, in international competitions, the results of matches involving previously unknown national teams like “Super Eagles” of Nigeria and “Indomitable Lions” of Cameroon against top European and South American national teams create anxieties and interests among football fans. Finally, under an economic impact argument, in light of the mass adherence to popular sport, well-organized competitions, and a rich customer base in foreign markets, sport betting can generate significant financial and employment opportunities that cannot be ignored by states and private entrepreneurs.<sup>26</sup>

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25. According to a leading investor in the global online betting business:

The Internet is global and free of national borders – and therefore we see a unique opportunity in using the Internet to take advantage of comparative advantages of different locations and the worldwide unequal distribution of productive resources (i.e. labor, technology, entrepreneurship, capital and tax structures). Focused on the differences in resource productivities, our investment approach can be described in just three words: perfect resource allocation ... this is how we use the Internet at its best!

GATCOMBE PARK VENTURES, *MISSION*, at <http://www.gpventures.co.uk/mission.htm> (last visited Nov. 12, 2005).

26. According to one source, the estimated amount of money spent on sport betting is more than \$6 billion. AngelCiti Entertainment, *AngelCiti Entertainment Inc.*, at <http://www.angelciti.com/aboutus.asp> (last visited Nov. 12, 2005) (“About Us” section). The gains of certain states suggest that sport betting contributes to the development of the national and local economies. It is very difficult to confirm the profits made by successful ETSBC. One company, Sportingbet, claims it made \$70 million from U.S. bets alone and would have paid \$4.4 million back in taxes. See Tom Weir, *Online Sports Betting Spins Out of Control*, USA Today, Aug. 22, 2003, available at LEXIS, Nexis Library, USATDY File. Another company declares: “With over 120,000 customers worldwide, the gamebookers



A preliminary response can be made to the arguments promoting extraterritorial rights. It is reasonably settled under international economic law that when cultural and other public policies are integral to commercial claims there is no right to rely on a *per se* argument. Important practical policy and principles issues override the formalist or *per se* argument and these may justify a *rule of reason argument*.<sup>27</sup> Within the GATS framework, liberalization of financial services has been notably weak, subject to reservations, based on negotiated rights, and dependent on the extent and nature of sector specific commitments by states.<sup>28</sup> The recently reported reaction by a U.S. trade spokesperson to its cross-border gambling ban appears to confirm this point. He declared that U.S. commitments to open up its service industry were “clearly intended to exclude gambling when the [United States] joined the WTO in 1995.”<sup>29</sup>

With reference to the do-ability argument, it is relevant that

family of betting websites . . . handles over 18 million bets per year and paid in 2003 alone more than £80 million in winnings to its customers.” See Gamebookers Group Ltd., Facts and License, at <http://www.gamebookers.com> (last visited Nov. 12, 2005).

27. See Smith & Fetzer, *supra* note 1, at 475-76; see also IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW (The Hague, Kluwer Law Int., 1999). Within EC law, see Gambelli, 2003 E.C.R. I-13031, at paras. 59-60. Private international law treaties and practice also admit of this practice. See, e.g., European Communities (EC) Convention on the Law Applicable to Contractual Obligations, art. 16, opened for signature June 19, 1980, 1990 O.J. (L 266) 1 [hereinafter Rome Convention]; see also EC Convention on the Civil Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 27(1), available at <http://www.curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm> [hereinafter Brussels Convention].

28. See Ying Qian, *Financial Services Liberalization and GATS*, in THE INTERNALIZATION OF FINANCIAL SERVICES 63, 64-65 (Stijn Claessens & Marion Jansen eds. 2000). The Australian government which also promotes ETSBC notes that “GATS is not about stopping governments from pursuing *social goals* or providing social services. . . . Governments have the continuing right to regulate to achieve policy goals and have the right to only take on new trade obligations that are in their national interest.” AUSTRALIAN GOVERNMENT DEPT’ OF FOREIGN AFFAIRS & TRADE, FACT SHEET: SERVICES TRADE IN MULTILATERAL NEGOTIATIONS, available at [http://www.dfat.gov.au/trade/negotiations/gats\\_factsheet.html](http://www.dfat.gov.au/trade/negotiations/gats_factsheet.html) (last visited Nov. 12, 2005) (emphasis added). In relation to whether GATS caters for specific national interests, the official website acknowledges “specific exemptions in the GATS to cater for *important national policy interests* which are to protect *public morals or maintain public order*.” THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS): OBJECTIVES, COVERAGE AND DISCIPLINES, available at [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Nov. 12, 2005) (emphasis added).

29. This was in reaction to a WTO Panel Ruling. See *Antigua Beats US on Online Gaming*, *supra* note 4; see also *The WTO and Online Gambling: House of Cards*, THE ECONOMIST, Nov. 18, 2004 [hereinafter *House of Cards*].

sport betting has been historically classified as a domestic matter.<sup>30</sup> No extraterritorial right was assumed or asserted. Those interested in betting on foreign sport knew where to go. True international punters promoted their passions in limited punting territories, where they were personally familiar with the character and nature of the sporting activity.<sup>31</sup> The result has been that betting, by force of law, has remained a national law activity.<sup>32</sup> Finally, in response to the economic impact argument, a cost-benefit counter-argument suggests it is unlikely that a state whose sport is exploited gains from the current model being practiced in the short to medium term or even in the long run.<sup>33</sup> The only likely beneficiaries are foreign parties and states promoting extraterritoriality. It must also be pointed out that the finance/employment rationale is less attractive if the income is unfairly distributed. There is little evidence in support of employment and technology benefits accruing to such states.

### *C. Lighting a Minefield*

Those who promote online extraterritorial sport betting have to convince skeptics and abolitionists of their cause in light of problems associated with the activity.<sup>34</sup> In general, examples of illegal betting and abuse of rights are common. As the following cases will show, match fixing, corruption, and other sporting ills commonly occur. In ICC-managed cricket, it emerged that there was a widespread problem of corruption and match fixing traceable to betting.<sup>35</sup> Indian gangs have conspired with notable

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30. Cf. Testimony of Tom W. Bell, Director, Telecommunications & Technology Studies the Cato Institute, before the National Gambling Impact Study Commission, May 21, 1998, at <http://www.cato.org/testimony/ct-tb052198.html> (last visited Nov. 12, 2005) (“Law enforcement officials in the United States can thus neither arrest nor sentence anyone who offers Internet gambling services from a safe harbor abroad.”).

31. Cf. *id.* (“Outlawing Internet gaming services domestically will simply push the business overseas.”).

32. See discussion, *infra* Part III.D, for the “national law approach” of ISL to sport betting; see also Smith & Fetzer, *supra* note 1, at 473, 479.

33. Advocates of extraterritoriality have not put forward arguments as to what the prohibiting state will substantially gain from their activities. See Pam Eggemeier, *Gambling: An Answer to Budget Troubles?*, THE JOURNAL-STANDARD, May 11, 2004, available at [http://www.journalstandard.com/articles/2004/05/11/local\\_news/news32.txt](http://www.journalstandard.com/articles/2004/05/11/local_news/news32.txt) (reporting the view of a leading U.S. economist, containing adverse cost-benefit results and interview rejecting the economic impact argument).

34. Cf. discussion *infra* Part IV.E.

35. See PAUL CONDON, REPORT ON CORRUPTION IN INTERNATIONAL CRICKET, paras. 22, 66-71, 94-98 (2001), available at <http://www.icc-cricket.com/corruption/>

South African players to fix or throw matches.<sup>36</sup> In ice skating, it emerged from the “Sale affair” that a gang led by a powerful member of the Asia Olympic Committee fixed competitions with French sporting judges to deny Canadian athletes their due.<sup>37</sup> In horse racing, the English Jockey Club remains notorious for betting linked scandals involving races and jockeys.<sup>38</sup> Indeed, so much so, that recently the Australian Horse Racing Board revealed that it was seriously considering not allowing riders from England to take part in the prestigious and highly respected Melbourne Cup.<sup>39</sup> In football, betting has been associated with corruption in China,<sup>40</sup> Malaysia,<sup>41</sup> and England.<sup>42</sup> Although one of the reasons it has been domestically allowed in certain jurisdictions is to lessen crime, sport betting is also associated with serious organized crime.<sup>43</sup> Taking these and other developments, it is very

condon\_report.html (last visited Nov. 12, 2005).

36. *Id.* For widespread cases involving other jurisdictions and players, see *id.* app. B.

37. See *Man accused in figure skating fix attempt to be extradited to U.S.*, CNN.COM, Aug. 1, 2002, at <http://archives.cnn.com/2002/LAW/08/01/figure.skating.fix/index.html> (last visited Nov. 12, 2005).

38. See Patrick Polden, *A Day at the Races: Wood v. Leadbitter in Context*, 14 JOURNAL OF LEGAL HISTORY 28 (1993) (discussing the history of regulation of horse racing following various scandals in the sport); see also Paul Kelso & Greg Wood, *The Moment a Racing Certain Cast a Shadow over a Boom in Online Betting*, THE GUARDIAN, Mar. 8, 2004, at 3 (reporting on the abuse of online betting exchanges by jockey, trainers, and other connections); Greg Wood, *Racing Lurches into Fresh Crisis*, THE GUARDIAN, Mar. 9, 2004, at 34 (reporting on betting fans' view about the integrity of horse racing following race throwing allegations).

39. See Greg Wood, *Racing: Club are Baffled By 'Integrity' Allegation*, THE GUARDIAN, Oct. 21, 2004, at 33 (reporting on the impending ban in racing of British runners from the Australian spring calendar over “management of integrity” allegations); see also Betfair, *Australians on a Loser if They Think They Can Ban Betfair*, UK HORSE RACING AND BETTING EXCHANGE TRADING, at <http://www.laytheodds.com/> (last visited Nov. 12, 2005).

40. See *Corruption 'wrecking Chinese league'*, NAMIBIAN, at <http://www.namibian.com.na/2004/october/sport/046D8AB28E.html> (last visited Nov. 12, 2005) (Chinese soccer club manager declaring that the country's professional league was facing collapse because of rampant corruption and match-fixing connected to “betting on games and other ugly phenomena.”); *Sports Marketing in China Is No Slam Dunk*, BUSINESSWEEK ONLINE, at [http://www.businessweek.com/magazine/content/03\\_37/b3849077.htm](http://www.businessweek.com/magazine/content/03_37/b3849077.htm) (last visited Nov. 12, 2005).

41. See *Deodorizing Sport*, ASIAWEEK.COM, at <http://www.asiaweek.com/asiaweek/97/0404/ed2.html> (last visited Nov. 12, 2005) (semi-professional Malaysian football league tainted by players, coaches, and bookies involved in match-fixing).

42. See *Grobbelaar v. News International, Ltd.*, [2002] 1 W.L.R. 3024 (Malaysian betting syndicate incursion into English league with proposals to players)

43. NATIONAL CRIMINAL INTELLIGENCE SERVICE, UNITED KINGDOM THREAT ASSESSMENT OF SERIOUS AND ORGANISED CRIME 2003, at 6.19, at

unlikely that states, faced with terrorist or criminal gangs, appreciate betting in either the present form or even wider form.<sup>44</sup> Security breaches create a time bomb. It is fair to foresee a situation where a state considers or implements unilateral military, economic, or political sanctions against the ETSBC jurisdiction.

### III. NATIONAL AND INSTITUTIONAL POLICIES

#### A. States' Interests and Values

To a casual punter, betting is meaningless fun. There is probably nothing like a betting hobby. Betting, however, can be very addictive and bring along with it personal and social problems of enduring dimensions.<sup>45</sup> In its evolution, it has emerged as a semi- or fully professional investment activity involving individuals and professionally run organizations. The state therefore has an "interest of responsibility" in controlling betting.

Because betting can be difficult to control and is prone to encourage private corruption, the official existence of betting is dictated by a society's social and moral values.<sup>46</sup> Religious, austere, ethic-conscious societies and institutions react negatively to

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<http://www.ncis.gov.uk/ukta/2003/threat06.asp> (last visited Nov. 12, 2005); see also Steen Bille, *Dangerous Liaisons*, PLAY THE GAME MAGAZINE, 2002, at 3, at <http://www.playthegame.org/upload/3-dangerous.pdf> (last visited Nov. 12, 2005) (on the role of organized crime and corrupt persons and organizations in international sport).

44. Since 1996 the United States has begun measures to outlaw and monitor credit card payments related to betting. These measures were premised on and continue to be an indication of the security implications of online gambling, especially within the context of the September 11, 2001 events. See *Antigua Beats US on Online Gaming*, *supra* note 4 (United States justifications for gambling restrictions based on links between online gaming and money laundering crimes); National Criminal Intelligence Service, *supra* note 28. Judicial seal of approval for such reasoning was also utilized in the Italian Supreme Court decision of July 24 2004, post-*Gambelli*. The court held that restrictions were justified in the interest of public order, namely to keep gambling free from criminality. See *European Gambling Law*, BETTINGMARKET.COM, at <http://www.bettingmarket.com/eurolaw.htm> (last visited Nov. 12, 2005).

45. One major English sport betting company has identified and acknowledged problems linked to betting for customers. Its website provides suggestions on how to avoid and deal with these problems. See William Hill, *Responsible Gambling*, at <http://www.willhill.com/iibs/EN> (last visited Nov. 12, 2005). There are organizations dedicated to assisting gamblers solve their problems such as "Gamblers Anonymous," a US based organization and "Gamcare," an English based organization. See Gamblers Anonymous, at <http://www.gamblersanonymous.org/> (last visited Nov. 12, 2005); GamCare, at <http://www.gamcare.org.uk/> (last visited Nov. 12, 2005).

46. See Part II.C, for examples of society's moral and social impact on betting. See, e.g., DAVID DIXON, FROM PROHIBITION TO REGULATION 48-72, 329-354 (1991).

gambling. Similarly, socialist and communist societies do not encourage or accept gambling.<sup>47</sup> Betting is in principle likely to be tolerated in capitalist societies or non-religious societies.<sup>48</sup> Nevertheless, these states have varying degrees of tolerance, such that betting may be severely restricted or even outright forbidden.<sup>49</sup> Societies that traditionally support betting usually do so with the hope of generating an economy based on the rich and powerful clients who come *into* their states to bet.<sup>50</sup> Undertaking or pushing for internationalized betting challenges state policy, interests, and values.

In all jurisdictions, gambling has been a sovereign prerogative, such that under national and international laws, there is no right to operate betting establishments.<sup>51</sup> To the extent that gambling officially exists, it is a privileged concession or license from the sovereign.<sup>52</sup> On pragmatic grounds and for functional reasons, exceptional licenses are granted to domestic organizations for sporting activities. In Olympic Movement sport, the state

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47. In China, gambling is banned in sport. See *China to Confiscate Illegal Gambling Profits*, PEOPLE'S DAILY ONLINE, Feb. 26, 2005, [http://english.people.com.cn/200502/26/print20050226\\_174774.html](http://english.people.com.cn/200502/26/print20050226_174774.html); see also DIXON, *supra* note 46, at 72-81.

48. The leading example is Monaco. See generally Online Casino Crawler Monaco, <http://www.onlinecasinocrawler.com/monaco-casinos.php> (last visited Nov. 12, 2005). Others are Australia and UK. See generally CHUCK HUMPHREY, SUMMARY: AUSTRALIAN INTERACTIVE GAMBLING ACT 2001, AUSTRALIAN ONLINE GAMBLING (2005), <http://www.gambling-law-us.com/Articles-Notes/online-gambling-australia.htm>.

49. The notable example is the United States where sport betting is banned in most states with a notable exception of Nevada. See generally Ari Weinberg, *The Case for Legal Sports Gambling*, FORBES.COM, Jan. 27, 2003, [http://www.forbes.com/2003/01/27/cx\\_aw\\_0127gambling.html](http://www.forbes.com/2003/01/27/cx_aw_0127gambling.html). In Monaco, citizens are not allowed to freely enter gambling casinos. In Australia, the current law bans the advertising and provision of online gambling services to Australians. OFF. OF THE LEGIS. DRAFTING, ATTORNEY-GEN.'S DEP'T, INTERACTIVE GAMBLING ACT 2001 (2001). Other states with restricted practices are Switzerland and Canada. See, e.g., Colin. S. Campbell & Gerry J. Smith, *Socioeconomic Impacts and Public Policy: Canadian Gambling: Trends and Public Policy Issues*, 556 ANNALS 22 (1998).

50. The notable examples are Monaco, Malta, Macao, Hong Kong, Britain, and France (horse racing).

51. See, e.g., *The House of Cards*, *supra* note 29.

52. In a recent surprising decision from Germany, the Administrative Court of Kassel, held that a state law provision whereby the state has the exclusive right to operate sport betting is incompatible with constitutional law because it violates Art. 12 (I) of the German Constitution (freedom to choose one's profession). See BETTINGMARKET.COM, EUROPEAN GAMBLING LAW, <http://www.bettingmarket.com/eurolaw.htm> (last visited Nov. 12, 2005). This decision has been criticized. See Johannes Dietlein, *Zur Gemeinschaftsrechtskonformität der hessischen Regelungen über Sportwetten*, 5 COMPUTER L. REV. INT'L 372, 372-375 (2004); cf. *House of Cards*, *supra* note 29.

undertakes its social and financial responsibilities for the benefit of the citizens - particularly its competitive sport persons - through licensees.<sup>53</sup> Should it take an absolutely puritan choice, it would have to directly contribute increasingly expensive public funds. This special concession constitutes an original and socio-economic version of public-private sector partnership. In non-Olympic movement sport, the state allows sport betting to fund its revenues by taxing the rich and leisured class who engage more often than not in less popular sport.<sup>54</sup> Understanding these contexts and issues, it is unacceptable to pressure states into liberalizing its local industry, because it “encourages people to participate in betting.”<sup>55</sup>

However, once forced to liberalize its domestic market and open up the sector to foreign participation, there is a transformation of essentially a public sector, albeit quasi-commercial activity to private sector competition and individualist market values. By venturing into mainstream sports, the promoters enter into a “captive audience” market of loyal or die-hard supporters who associate with a club or sport without much rational or economic debate.<sup>56</sup> Three issues immediately arise. The first is that sport becomes an acute object of commercialization. Already overexploited for their addiction, supporters of sport teams are further exposed to irresistible varieties of marketing offers that ETSCB directly or indirectly propose.<sup>57</sup> Second, well-organized sport leagues and rich societies will be milked from abroad. The “milking” thesis appears to be relevant to Italy where the Italian football *Seria A* league, historically funded by Italian businesses, taxpayers, and football supporters is the leading league

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53. See generally, Official Website of the Olympic Movement, [http://www.olympic.org/uk/organisation/facts/revenue/index\\_uk.asp](http://www.olympic.org/uk/organisation/facts/revenue/index_uk.asp).

54. See generally, Andrea M. Lessani, *How Much Do you Want to Bet that the Internet Gambling Prohibition Act of 1997 is Not the Most Effective Way to Tackle the Problems of Online Gambling?*, THE UCLA ONLINE INST. FOR CYBERSPACE LAW & POL'Y (1998).

55. Such views have been reflected within EU jurisprudence. See *Gambelli*, [2003] E.C.R. paras. 22, 26, 69-70; see also *Free Movement of Services*, *supra* note 2.

56. See Koleman Strumpf, *Online Gambling Ban Doomed to Fail*, CATO INSTITUTE, at <http://www.cato.org/research/articles/strumpf-040210.html> (last visited Nov. 12, 2005) (explaining fans of important clubs are charged a premium for bets on their clubs); see, e.g., Press Release, Gatcombe Park Ventures, Gamebookers Gives Away Kournikova's Sneakers (Nov. 5, 2000), at <http://www.gpventures.co.uk/press.htm>.

57. Examples of marketing offers include the following: first, offering discounts on club or national teams merchandise and products; second, offering regular holiday trips to idyll locations, probably their bases; third, giving convertible loyalty bonus points for every win or reducing entry points for losses. See, e.g., Gatcombe Park Ventures, *supra* note 56 (exploiting the young and old male fan base of Ms. Anna Kournikova).

in the world.<sup>58</sup> If payments are not negotiated or profits paid to these leagues, then it stands to reason, that shareholders are being ripped off for their success.<sup>59</sup> Third, there is a likelihood that foreign beneficiaries of the liberalization policy escape from various social and financial responsibilities while milking the sport.<sup>60</sup>

Concerns about administrative and financial costs may constitute a legitimate basis for refusing foreign participation. By operating from foreign bases, ETSBC are difficult to monitor or control for governments or concessionaires.<sup>61</sup> To unilaterally but effectively monitor the activities and effects of ETSBC, different national laws, courts and tribunals, states would bear overwhelming costs. Accordingly, it follows that where anti-ETSBC regulatory authorities exercise the right or power to monitor and supervise foreign ETSBC, this adds to the domestic costs of supervising or regulating their own domestic betting sector. Similarly, increased costs are born by the pro-ETSBC

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58. See SI.Com, *World Sport XI: List of season's top players has Italian-Dutch Feel*, Aug. 20, 2003, available at <http://sportsillustrated.cnn.com/2003/soccer/08/19/world.sport.xi>.

59. The possibility of losing income to foreign punters is a serious problem taking the current financial state of football clubs, as well as major European leagues in Italy, Spain England and Germany. See Yael Gaoni, *Gambling Regulator: Enforce betting laws on Web*, GLOBES ONLINE, Sept. 12, 2004, at <http://www.globes.co.il> (according to the Council for the Regularization of Gambling in Sport, illegal gambling was reducing the council's revenue and harming Israeli sport).

60. There is little or no evidence that ETSBC seek to be socially responsible companies or loyal to the development of the sport in the country they exploit. One company, Interwetten Cyprus, disclosed it contributed to sport clubs and causes in Austria, the home country of the founders. See generally Interwetten.com, *About Interwetten*, at <http://www.interwetten.com/webclient/start.html> (last visited Nov. 12, 2005). In Norway and the Kingdom of Netherlands, state betting companies are respectively obliged to donate to the Red Cross and other worthy causes. See, e.g., PokerStars.com, *Notice Board, Poker tournaments raise \$127,805 for Hurricane Katrina Relief*, at <http://www.pokerstars.com/?source=playwinningpoker> (last visited Nov. 12, 2005). In *Stichting De Nationale Sporttotalisator v. Ladbrokes, Ltd.*, the President of the District Court of Arnheim ruled against the defendants, *inter alia*, on the basis that they were in unfair competition with the complainant as they failed to meet the strict criteria for performance objectives of sport lottery, which included donation to good causes and limit to the amount of takings by the local monopoly. See Joris Willems, *No Online-Betting Without Dutch License Stichting De Nationale Sporttotalisator v. Ladbrokes Ltd. and Ladbrokes International Ltd.*, 2 CRI 52 (2003); see also, Gaoni, *supra* note 59. Generally, ETSBC seek to avoid payment of taxes. For the English response, see *Victor Chandler Int'l v. Customs & Excise Comm'r*, 3 W.L.R. 1296 (2003) (Eng).

61. The U.S. General Accounting Office has estimated that there are more than 1,800 internet gambling operations, posing a tough challenge to law enforcement. See *Antigua Beats US on Online Gaming*, *supra* note 4.

regulatory authority in dealing with foreign-based complainants or the foreign activities of ETSBC.

The duty to protect consumers inside and outside the jurisdiction of states influences the acceptance of ETSBC. There is a legitimate concern about how customer-citizens of such companies will have their complaints dealt with. In prominent sporting competitions, one cannot imagine how the affable sport fan thousands of miles away will obtain recourse for administrative mishaps or criminal activities of some sport betting companies. From a cynical perspective, a probable reason why ETSBC do not directly establish business in the states concerned is the possibility of tougher regulation, criminal sanctions for misdemeanors, and civil liability for complacent and irresponsible companies.<sup>62</sup> In other regards, the characteristics of the betting relation make it an adhesive contract. The profession is not transparent in its decision-making. Betting companies usually reserve absolute unilateral power in matters dealing with the customer. Sporting Index Ltd.,<sup>63</sup> an English sport betting company states the following on its website:

The information on this site is not directed at residents of the United States or any particular country outside the UK and is not intended for distribution to, or use by, any person in any country or jurisdiction where such distribution or use would be contrary to local law or regulation. It is the responsibility of visitors to this Site to ascertain the terms of and comply with any local law or regulation to which they are subject. Whilst Sporting Index has made every effort to ensure the accuracy of the information on this Site, the information given on the Site is subject to change, often without notice. It is for guidance only and no liability is accepted by Sporting Index for its accuracy or otherwise.<sup>64</sup>

One company based in Costa Rica, which bets on wagers, including top European football leagues, has general rules, terms

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62. Allegations, bordering on blackmail, made against prohibiting states is that they use the law to discriminate on grounds of nationality solely to protect vested local interests. This is apparently untrue in the case of the United States. There has been federal law in place banning domestic inter-state gambling since 1961. *See id.* However, the *Gambelli* court detected such interests in the Italian position. *See Gambelli*, 2003 E.C.R. 1 at para. 68.

63. Sporting Index, <http://www.sportingindex.com> (last visited Nov. 12, 2005).

64. *Id.*



and conditions that provide:<sup>65</sup>

It is expressly agreed and understood that the contract: Is entered into the countries and jurisdictions of Costa Rica and shall be construed and interpreted in accordance with the laws of Costa Rica Constitutes that all sports book activity (play) occurs in the country and jurisdiction of Costa Rica.

If it's been determined, in the sole opinion of EZ SportsBetting, that any spreader price for any wager or contest has been manipulated, then those wagers will be marked as a loser.

Notwithstanding anything in this agreement, in the event of any dispute regarding a wager or winnings, the decision of EZ SportsBetting will be final and binding in all matters.

Liability of EZ SportsBetting:

1. The decisions of EZ SportsBetting management will be final and binding in all matters between EZ Sports Betting, and players.
3. Players are responsible for withdrawing or playing out any funds, which are held in the user's account. EZ Sports Betting do not undertake to notify players that they have outstanding balances to collect. If an account is inactive for longer than 6 months, the user will forfeit the outstanding balance.

The rules are open to charges of unfairness, that it may be legitimate for a responsible government to ban such companies.

An argument used to challenge the social functions of domestic regulation is that where complainants are based in a regulated sport betting jurisdiction, such as Britain, there is no regulatory problem.<sup>66</sup> In all jurisdictions, however, there are problems with establishing efficient and effective regulatory controls.<sup>67</sup> For example, it is clear that the British government

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65. EZ SportsBetting, General Rules, [http://www.ezsportsbetting.com/general\\_rules.asp](http://www.ezsportsbetting.com/general_rules.asp) (last visited Nov. 12, 2005) [hereinafter EZ SportsBetting, General Rules]; EZ SportsBetting, Terms and Conditions [http://ezsportsbetting.com/terms\\_conditions.asp](http://ezsportsbetting.com/terms_conditions.asp) (last visited Nov. 12, 2005) [hereinafter EZ SportsBetting, Terms and Conditions].

66. See *Gambelli*, 2003 E.C.R. 1 at para. 12.

67. See U.K. DEP'T FOR CULTURE, MEDIA AND SPORT, THE FUTURE REGULATION OF SPORT GAMBLING: A DCMS POSITION PAPER (2003) (reporting a new gambling bill to introduce efficient regulation); cf. Sharon Chin, *Financial Services Regulation: Can History Teach Us Anything*, in 9 CONSUMER PROTECTION IN FINANCIAL SERVICES 141-159 (Peter Cartwright ed., Kluwer Law, 1999).

regulates its own sport betting industry, based on its own peculiar history and for its own benefit.<sup>68</sup> It does not seek to advance or protect foreign sport (which may be in competition with its own), or incur high costs for managing or granting licenses. As a matter of fact, the official government position on the present arrangement and on serious crimes rebuts views of effective control.<sup>69</sup>

Finally, the location and payment of taxes by ETSBC and punters is an issue of economic and political value to other states. Where the status quo is globally promoted, it is and would grow more inconvenient if not irritating that ETSBC are in tax havens or small countries with no connection to the sporting activity, but do not pay tax.<sup>70</sup> Complaints would be loudest from states that ETSBC target and undertake regular transactions with particular customers. Online sport betting denies the states hosting, organizing, or funding an event or a team a taxable share of the proceeds of profit made or sums staked from their quasi-economic activities.<sup>71</sup> One company, EZ SportsBetting, based in Costa Rica, declared the following:

“[It] will not disclose details of individual’s net winnings or losses. This is the responsibility of the individual, and if you reside in a jurisdiction where your winnings are taxable you must keep track of those winnings and report them to the

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68. DIXON, *supra* note 46. Claims of legitimacy and regulation of online sport betting may in fact be dubious. Cf. GAMBLING REVIEW BODY, *supra* note 5, at 5.

69. See NCIS, *supra* note 43, at para. 6.19. The report provides:

Gambling at bookmakers, both on- and off-course, offers a simple and relatively risk free option for laundering money. Typically, the money launderer makes frequent high stake bets at very low odds, resulting in a minimal profit or, more usually, an overall loss. However, all winnings are effectively “clean,” since they are received in the form of cheques, payable either to the individual or to third parties. While bookmakers have an obligation to report suspicious activity under PoCA, they are not yet covered by the Money Laundering Regulations. However, the Government has accepted the recommendations of the Budd Report into the gaming and gambling industries. These include bringing all firms within the regulated sector. The Government has also signalled its intention to establish a Gambling Commission.

*Id.* at para. 6.19. See also U.K. DEP’T FOR MEDIA, CULTURE AND SPORT, *supra* note 67.

70. Such places include Antigua and Barbuda (Gamebookers.com), Curacao (VIPsports.com and Usasportscasino.com), Costa Rica (EZ Sportsbetting) and Cyprus (Interwetten Cyprus). The mischief rule of interpretation is freely employed in this area. See *Victor Chandler Int’l*, 3 W.L.R. 1296.

71. For poorer states that subsidize teams and competitions with public revenue, this is morally objectionable. It constitutes an appropriation of the fruits of their labor.

proper authorities.”<sup>72</sup>

In all these instances, whether on strict legal or economic grounds, the resort to extraterritorial control measures and activities by responsible or affected states become obvious and necessary.<sup>73</sup>

### B. *The National Sport Federation (NSF) or Sport Governing Authority (SGA)*

In organized sport, it is impossible to engage in betting without the authority of the NSF or SGA.<sup>74</sup> Two reasons justify this position. In the first case, as a general rule, these parties must be able to answer or explain what is going on to the state and the supporters, if called upon.<sup>75</sup> Secondly, they must have a right to control or share in the proceeds derived from their organized activities.<sup>76</sup> In doing so, either party will officially authorize or endorse the activities of ETSBC. Authorization or endorsement, however, exposes them to foreign claims abroad. Again, the possibility of foreign commercial contracts depends upon the relationship of the sport to the state or the Olympic Movement. Without a state authority, NSFs or SGAs would be in breach of statutory license to operate. Furthermore, where state consent is granted, as a rule, the NSF is obliged to consider its connections with the Olympic Movement ethics and rules.<sup>77</sup> A NSF or SGA whose sport does not belong to the Olympic Movement has a wider discretion or right on which path to take.

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72. EZ SportsBetting, Terms and Conditions, *supra* note 65. Rule 10 of the general rules discusses nondisclosure of winning or losses to any governmental agency. See EZ SportsBetting, General Rules, *supra* note 65.

73. See Higgins, *supra* note 14, at 3-14.

74. See Weir, *supra* note 26, at 2A (explaining that all major U.S. sport federations and the NCAA oppose sport betting); cf. Bettingmarket.com, SCANDINAVIAN GAMBLING MARKET, at <http://www.bettingmarket.com/scand.htm> [hereinafter SCANDINAVIAN GAMBLING MARKET]; Case C-203/02, British Horseracing Bd., Ltd. v. William Hill Org., 2004 E.C.R. I-6 (affirming a database right for horse racing database companies); *No Online-Betting Without Dutch License*, *supra* note 60.

75. Cf. Weir, *supra* note 26, at 2A.

76. Cf. *infra* Part IV.C; see also Online Casino City, *Betfair, Rugby League Sign Memorandum* (Dec. 23, 2004), at <http://online.casinocity.com/news/news.cfm?ArticleId=53753> (last visited Nov. 12, 2005).

77. Interestingly, states pledge loyalty to the Olympic Movement and provide in their statute books that NSFs must work on Olympic Movement principles. See *infra* Part III.D.

### C. Sport Betting and European Union Law

As a result of EU law two major issues have now arisen about the promotion and existence of a mandatory sport betting right and policy. The first is compliance with EU treaty obligations. The second is protection of cultural and moral heritage as a matter of national public policy. In light of EU treaty rights, *Piergiorgio Gambelli* case is identified by the Commission and courts with liberal access for ETSBC of EU origin.<sup>78</sup> In *Gambelli*, criminal proceedings were brought against Italian parties who were intermediaries to an English-based sport betting company, under Italian law that imposed a prison term of one year for unlawful trading. The national court observed that the defendants and their principal were within the context of EU law engaging in an apparently legitimate activity, and that the state's promotion of sport betting was more or less the same as that of the parties, that it could not be said they were doing anything immoral or against public order. It therefore referred the case to the ECJ for an opinion.

There are certain weaknesses in conclusions of liberal access, beginning with a misdirection of law, that EU treaty provisions and accompanying jurisprudence are automatically and wholly applicable. To the contrary, it is settled law and policy that sport is a special subject matter, practiced differently from other economic entities, and that this uniqueness must guide the interpretation or application of EU laws. It does not appear that this check was applied.<sup>79</sup> The view that European publicly quoted companies

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78. See generally *Gambelli*, 2003 E.C.R. at 1. Courts in Germany (Hessian Administrative Court of Appeal on Feb. 9, 2004) and the Kingdom of Netherlands (Court of Arnhem on June 2, 2004) have relied on *Gambelli* to allow extraterritorial online betting and the establishment of foreign corporations. See SCANDINAVIAN GAMBLING MARKET, *supra* note 74; cf. Her Majesty's Customs and Excise v. Schindler, 1994 E.C.R. I-1039; Läärä v. Finland, 1999 E.C.R. I-6067, 6103; Questore di Verona v. Zenatti, 1999 E.C.R. I-7289, 7317. The evolution of EU substantive jurisprudence from complete freedom of states to proportionality and compliance with EU treaty rights has recently been discussed in a recent article. See Smith, *supra* note 1, at 472-79. A strict reading of *Gambelli* is that it is based upon imperative general interests that acknowledge state measures restricting foreign participation as a result of consumer protection, prevention of fraud, incitement to squander and preservation of public order. If the measures taken by the state are found to be inconsistent, excessive (not proportional) so that it affects the possibility of complying with general treaty obligations, then such particular measures must be set aside by the national court. See *Gambelli*, 2003 E.C.R. paras. 65, 67, 68, 75-76.

79. Disregarding fundamental differences, the Court of Justice of the European Communities ("ECJ") appears to have treated sport betting concessionaires as other

should be allowed access to sports betting practice in a member state is based on certain errors, namely: being a publicly quoted company is synonymous with proper regulation, and that the values of a public limited company are those of a carefully regulated sector such as horse racing or sport.<sup>80</sup> At least in sport, the opposite is the case. The UK horse racing betting experience contradicts the application to betting companies.<sup>81</sup> Indeed, there are objections at the highest level of sport administration of clubs and core sport companies going to the capital market, because capital market corporate values and processes run counter to sport's regulatory ethos.<sup>82</sup> Inevitably, the goals of these commercially driven operators will clash with that of the state's sport ethos. It is also argued that because a state allows certain domestic companies in its jurisdiction to operate licenses, it must be prepared to allow foreign companies. This point with respect to sport betting is only valid, if the companies are based in that state. Companies based elsewhere operating under different professional rules and standards must show that they can offer equivalent or superior performance compared to the local one. This point is important where there are no harmonized rules and the companies may come with different history, rules, or standards that may negatively impact the local industry.

The second major issue is the judicial activation of the breakdown of the common ethical sport values prevalent in European sport society. The ECJ and courts that have followed a wider interpretation of *Piergiorgio Gambelli* employ a market theory – treaty rights rationale. With the exception of a few states, there is an acknowledgement of a common problem regarding the practice and management of gambling in Europe.<sup>83</sup> Further, a judicial analysis ought to proceed with the respect for sport in

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public service concession contracts. *See Gambelli*, 2003 E.C.R. para. 48. Other commercial or financial services are products of political and economic power of states designed to control and secure revenue. Sport betting is a privileged activity, which the state licenses to an independent sport federation, for the benefit of Olympic and non-Olympic sport movements. The designations are for peculiarly moral and social reasons, rather than politics and economics.

80. *Cf. id.*

81. *See id.* para. 74.

82. A. O'Connor, *Blatter Censures Clubs for Sale of Shares*, THE TIMES (UK), Apr. 9, 2003, at 38 (criticism of clubs operating on the stock market because it forces them to invest more shareholder's funds).

83. *See also Schindler*, 1994 E.C.R. I-1039, para. 80-81.

European Union jurisprudence and values.<sup>84</sup> In *Piergiorgio Gambelli*, it was clear that all the states that participated in court proceedings were not in support of an open policy for sport betting.<sup>85</sup> They, and the European Commission, admitted that the regulation of the activity was a state's right and acknowledged socio-moral problems with gambling in general.<sup>86</sup> Unfortunately, the court refused to accept a distinction between various forms and uses of gambling which if done, the localized functions of sport betting could be better appreciated.<sup>87</sup> However, in the court's reasoning:

In so far as the authorities of a member state incite and encourage consumers to participate in lotteries, game of chance, and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue [barring foreign companies and criminalizing parties who take part].<sup>88</sup>

This statement validates the reasoning from the referencing court. Both courts conflate various issues into one: promotion of participation by the licensed body. Surely, two wrongs do not make a right. It is unclear whether the court is inferring that agencies undertaking licensed business cannot advertise, or that the state's motive in promoting interest-equated unkindly with *inciting*—to generate funding for its sport program is the same as that of an ETSBC's motive. By forcing states to open up, invariably, the reaction of most states would gravitate towards repressing extraterritorial sport betting agencies in their states. This is a problem the European Commission apparently now realizes. It has indicated the desire to lead a new initiative. Of course, some states consider it a legitimate interest to protect local licensees against foreign ETSBC.<sup>89</sup> This is different from few states' promotion of ETSBC because of revenue associated that

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84. The common sporting value could have been the starting point, rather than a general policy application.

85. See *Gambelli*, 2003 E.C.R., para. para. 30-40. The particular states are Italy, Belgium, Greece, Finland, France, Luxembourg, Portugal, Spain, and Sweden. However, the support of France and Luxembourg were conditioned by references to proportionality and non-discrimination.

86. *Id.* at para. para. 32-34, 42. See also *Schindler*, 1994 E.C.R. I-1039, para. para. 80-81.

87. *Gambelli*, 2003 E.C.R., paras. 38, 51.

88. *Id.* at para. 69.

89. See *Id.* at paras. 25-40.

will accrue to their states. For most others, there are deeper problematic concerns that a general and wider opportunity for sport betting will override sport culture and ethics and create social and criminal crises.

#### D. *The Role of International Sport Law (ISL)*

So far, the debates do not examine, apply, or discuss the acceptance or rejection of sport betting by ISL. The overarching and internationally recognized “Olympic Movement principle” and its application of ISL as the recognized specialized order in international sport is relevant to forum and parties involved in the debate. Three substantive points determine the outcome of sport betting. Firstly, there are fundamental doctrines and general principles of ISL that dictate how sport-related transactions are conducted.<sup>90</sup> These are not in favor of current practices of extraterritorial sport betting.<sup>91</sup> While the ISL commerce doctrine promotes sport related trade, it is constrained by the olympism doctrine and other ISL public international law sources.<sup>92</sup> Cumulatively, these sources implicitly or explicitly reject “excessive commercialism.”<sup>93</sup> For example, extraterritorial sport betting, which is a form or expression of gambling, is not acceptable. As an organic rule, traceable to Baron Coubertain, and despite the commercial pragmatism of his modern successors, the modern Olympic Movement does not promote or legally recognize internationalized gambling. Implicitly, states that promote ETSBC breach ISL.

90. See INT’L OLYMPIC COMM., CODE OF ETHICS, art. B6 (1999), available at [http://multimedia.olympic.org/pdf/en\\_report\\_17.pdf](http://multimedia.olympic.org/pdf/en_report_17.pdf) [hereinafter IOC CODE OF ETHICS].

91. Cf. IOC CODE OF ETHICS, *supra* note 90, (“The Olympic parties must not be involved with firms or persons whose activity is inconsistent with the principles set out in the Olympic Charter and the present Code.”).

92. IOC CODE OF ETHICS, *supra* note 90.

93. “Excessive commercialism” in sport means commercial practices that are not necessary and/or abusive. It is both a question of fact and legal policy whether online sport betting is excessive or unnecessary for: (i) all sport; (ii) certain sport; (iii) all countries, irrespective of global position; (iv) certain countries, considering their cultural, geographical, or regional affiliation; (v) all sport movements, Olympic and Non-Olympic; and (vi) certain sport movements, Olympic or non-Olympic. See also U.N. EDUC., SCIENTIFIC & CULTURAL ORG., INT’L CHARTER OF PHYSICAL EDUC. & SPORT, art. 7.1 (1978) (adopted by Res. 3/3.1/2 at the General Conference of UNESCO, 20th sess., Paris, Nov. 21, 1978); U.N. EDUC., SCIENTIFIC & CULTURAL ORG., INTERGOVERNMENTAL COMM. FOR PHYSICAL EDUC. & SPORT, OTTAWA DECLARATION ON INTERGOVERNMENTAL CO-OPERATION IN THE FIELD OF SPORT (CIGEPS), 7th sess., (Ottawa, Oct. 26, 1990).

Secondly, under the applicable law doctrine, ISL categorizes sport betting within the “classical national law” approach. Compared to classical universalist and recent neo-modern approaches, the national law approach has a sovereignty inspired territorial deference towards transnational sport commerce regulation and rights.<sup>94</sup> There is no right of legitimate expansion into a foreign or third state. Other states have the power to reject it as matter of public policy.<sup>95</sup>

#### IV. REACTION AND SOLUTIONS

##### *A. Sport Betting Outside the EU and On Line Betting*

Apart from a few countries outside the EU, sport betting is generally outlawed and is culturally unacceptable.<sup>96</sup> Where allowed in certain sports, like the rest of Europe, it is a privileged enterprise dependent on a license.<sup>97</sup> As an illegal underground enterprise, there is a majority consensus that it should never become open. To promote extraterritorial sport betting could discourage relatively culturally neutral states from participating in international sporting activity. Conservative societies may desist from promoting domestic sport or taking part in international sport associated with sport gambling. Transnationally, the whole “sport for all” movement faces the problematic question of a cultural or ‘western’ agenda.<sup>98</sup> In these societies, the argument will

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94. M. Bedjaoui, *Law and Sport: Towards a Necessary Harmony in an Unconventional Couple*, 1993 OLYMPIC REV. 499, 502 (stating “Today, sports is clearly transnational, international. . . . The jurisdictional powers of the sport movement should . . . be considered . . . as . . . derived from or conceded and delegated by the territorial sovereign power.”).

95. This is in accordance with the classical principle of territoriality in international law. Cf. *The WTO and Online Gambling: House of Cards*, THE ECONOMIST, Nov. 20, 2004, at 85.

96. In the United States, the Wire Wager Act bans interstate gambling on sports, 18 U.S.C. §1084 (1994). See *In re Mastercard Int’l Inc.*, 132 F. Supp. 2d. 468, 480 (E.D. La. 2001). See also The Unlawful Internet Gambling Funding Prohibition Act, H.R. 21, 108th Cong. (1st Sess. 2003). This Act would block American citizens from payment by credit cards and other sources by placing bets and wagers online. Following the passing of a bill by the House of Representatives, the U.S. Senate Banking, Housing, and Urban Affairs Committee unanimously voted in favor of recommending the bill.

97. Most jurisdictions, including the United States, allow betting on horse racing and similar sports. Online betting is not necessarily accepted.

98. In women’s soccer, relatively conservative Christian-inclined societies like Brazil, Korea, and the United States will be ideologically united with liberal and conservative Muslim women societies in Malaysia, Arab Republic of Egypt, Gulf Co-operation Council



be that they do not want to be pawns or tools of the gambling industry. In light of ISL and local laws banning betting, opponents of such association may positively consider legal measures to stop such extraterritorial practices abroad.<sup>99</sup>

### B. Clubs & National Teams

The reaction of professional clubs and national teams to ETSBC practice is also germane. As part of the economic impact argument, it has been suggested that sport betting will grant more revenue to sport and help teams develop. Those who make this argument can draw examples in certain sports, usually non-Olympic and less popular sports.<sup>100</sup> There is no compelling evidence that the per centum income from sport betting by top Olympic Movement associated sports is alluring. Similarly, most clubs and national teams of popular sports do not proclaim or promote sport betting to their supporters, particularly for fear of losing support or generating an adverse reaction.<sup>101</sup> Fairly successful clubs and leagues do not need the money, especially if it would breed negative publicity. Indeed, it is generally settled that sportspersons should not bet in matches involving their teams. Further, sportspersons involved in legalized betting face an adverse reaction from fans and the press.<sup>102</sup> In light of the

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States, or the Kingdom of Saudi-Arabia. It is also culturally sensitive for most male Iranian, Tunisian, or Saudi fans or their football authorities to find their teams being placed on betting odds. See *Foot Long Term, World Cup 2006*, at <http://www.sportingodds.com> (last visited Nov. 12, 2005) (listing Tunisia's odds of winning the World Cup as 500/1, Iran's odds as 1000/1, and Saudi Arabia's odds as 2000/1).

99. See also Weir, *supra* note 26 (stating that legislation to block payments to online gambling operations is supported by all U.S. major pro-sports leagues and the NCAA). However, research conducted on some online sport betting websites reveals the placement and use of sport properties of major international ISFs (IOC, FIFA, and UEFA) and NSFs from the US (NBA, NFL, NHL, and MLB) and European football. Only one of the sites disclaimed any endorsement or affiliation with these bodies. It may not be sufficient to disclose lack of relationship for a finding of breach of trademark rights or passing off. See Case C-206/01, *Arsenal Football Club plc v. Reed*, 3 W.L.R. 450 (E.C.J. 2003). See also *Tolley v. Fry*, 1 K.B. 467 (Eng. H.C. 1930) (regarding an amateur golfer successfully suing for defamation as a result of defendant's association or representation of him endorsing products, contrary to sporting rules applicable to amateurs).

100. Such sports include animal racing, auto racing, and rugby.

101. Few European football clubs are associated with betting in Austria (FK Astra Magna and S.V. Ried) Spain (RCD Espanyol); France (St. Etienne FC) and England (Middlesbrough FC).

102. An example is Mr. Michael Owen, formerly of Liverpool F.C. in England. However, sportspersons attributed with addiction problems gain fan sympathetic support. An example is Mr. Michael Jordan, formerly of the Chicago Bulls in the United States.

foregoing, clubs and teams can seek legal action to prevent their names from being associated with sport betting inside or outside their jurisdiction because it infringes the law of their states and it may harm their local and international fan base. The complaints may deal with the use of their names, logos and symbols, or the representation of endorsement or association.<sup>103</sup>

### *C. Domestic Concessionaires and National Sport Federations (NSFs) Rights*

For being deprived of legitimate source of income, domestic concessionaires may initiate civil action in local courts.<sup>104</sup> Standing or *locus* may be based on contractual security, interests or statutory authority to develop and manage commercial interests in the sport. If ETSBC are found liable and fail to settle the judgment debt, they may of course be closed down. Substantive remedial claims would be based on restitution, property, and intellectual property rights. Procedural remedies include *Anton Pillar* orders, *mareva* injunction, account for profit, damages, and permanent injunction. Where commercial or *sporting* goodwill will be damaged inside or outside the territory, the protection of sport right as property interests is cognizable.<sup>105</sup> A claim in restitution may be possible from profits realized from the spectacle or stake.<sup>106</sup> Where IPR claims are involved, there will invariably be an internationally recognized right in a foreign state in light of the 1994 TRIPs Agreement.<sup>107</sup>

### *D. State Powers and Rights*

It is settled that states have extraterritorial powers over their

103. See *Arsenal Football Club*, 3 W.L.R. at 450. See also *Tolley*, 1 K.B. at 467.

104. Cf. Willems, *supra* note 60 (Liability may be based, *inter alia*, on unfair competition grounds).

105. Cf. Gaoni, *supra* note 59.

106. Joanna Bird, *Choice of Law*, in RESTITUTION AND THE CONFLICT OF LAWS 79 (Francis Rose, ed., 1995).

107. TRIPs has proved to be very instrumental in promoting and enforcing IPRs internationally and reducing states initiatives. See generally, CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS 66-90 (2000), and DUNCAN MATTEWS, GLOBALIZING INTELLECTUAL PROPERTY RIGHTS--THE TRIPs AGREEMENT 1-6, 46 (2002). See also Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Diversion*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS 161 (Drahos & Mayne, eds., 2002) and Christopher Arup, *TRIPs: Across the Global Field of Intellectual Property*, [2004] EIPR 7, 8.

citizens abroad. It is also now settled that states have powers to deal with harmful extraterritorial conduct that have effect in their jurisdictions, particularly those that breach fundamental economic and criminal laws.<sup>108</sup> The pro-ETSBC jurisdiction, in civil disputes, has two duties. Under its national law, it may refuse to enforce the contract between the parties.<sup>109</sup> Under international law it is obliged to enforce the law of the anti-sport betting jurisdiction.<sup>110</sup> It can, however, refuse to cooperate with the indictment of parties acting under its own laws. On the other hand, the anti-ESTBC jurisdiction has two options. It can develop technologies that trace and bar sport betting sites, thereby frustrating or slowing down transactions in its jurisdiction. Secondly, it can criminalize and punish citizens and foreign parties engaged in online sport betting.<sup>111</sup>

### *E. A Win-Win Solution?*

Contrary to the present moral and legal imbroglio, sport betting can be made more palatable and secure the requisite global legal recognition.<sup>112</sup> It is simply too naive to back out of measures that will improve the economic regime and independence of the international sport movement.<sup>113</sup> It is indeed possible to draw in more global customers without fear of religious or cultural backlash. A suggested policy is to blur the distinction between sporting lotteries and sport gambling, by creating a new sport

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108. Higgins, *supra* note 14.

109. This is the case in England as a result of legislative protection of consumers under The Unfair Terms in Consumer Contracts Regulations SI 1999 (UK). In the European Union, this is as a result of the Unfair Terms in Contract Directive 1993, Council Directive 93/13/EEC, of 5 April 1993.

110. In allowing arbitration for a dispute with anti-trust implications, the United States Supreme Court noted that the arbitral tribunal could not disregard the role of the law. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985). The ECJ has also stressed that competition regimes are basic and fundamental components of the legal framework of private relationships. See *Case C-126/97, Eco-Swiss China Time Ltd v. Benetton International NV*, 1999 E.C.R. 3055. The general rule in international private law is that public policies of states should be recognized. This is recognized within the Rome Convention. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 80/934/EEC, art. 16, 1980 O.J. (L266) 5, available at <http://www.rome-convention.org>.

111. Gaoni, *supra* note 59. See also JULIAN DING, *E-COMMERCE LAW & PRACTICE* 96-98 (1999). Cf. *supra* Part II.A

112. See Strumpf, *supra* note 56.

113. See, e.g., Statement by Senator Jon Kyl (USA) "We're not in this to make money. We're in this to maintain the integrity of sports." Weir, *supra* note 26.

property managed with the cooperation of all stakeholders and ensuring that betting funds presently paid to ETSBC are invested in the national/local communities whose games are exploited.<sup>114</sup> Overall, four sets of cooperative interaction involving ETSBC and others should take place. The first set involves individual cooperation agreements between ETSBC, ISFs and NSFs. For example, (1) ownership, concession of organization rights; (2) licensed use of names, symbols and statements; (3) information on sport persons and family members transactions; (4) payment terms and limits; and (5) right of termination.

The second set involves cooperation between ETSBC and individually targeted states. Existing and prospective customers' states will be concerned a number of issues such as the language of the transaction, taxation matters, certification testimonial and conditions, age of punters, financial security of companies involved, information on company accounts, truthful declaration on size of punters, investment in the local sport market, annual report, anonymity policy and exceptions, and limitation of customer stake.

The third set involves a state's domestic structural arrangements to induce confidence in the local industry. In general, states will aim at providing a high standard of legal regulation that meets the concern of other states and consumers. This involves: (1) establishing a strong centralized government agency; (2) establishing a department on Sport and ETSBC; (3) reassessing the entry level of promoters of ETSBC; (4) reassessing the entry qualification of punters; (5) reassessing the terms ETSBC provides in their contract and assurance that they meet appropriate and acceptable standards;<sup>115</sup> (6) providing credible dispute resolution procedures within the national law framework; and (7) ensuring that national laws are provided online by the ESTBC.

The fourth set is for a negotiated multilateral convention or model law on sport betting. Negotiations at a multinational level by all stakeholders under the auspices of UNIDROIT OR UNCITRAL and a sponsoring or co-sponsoring country will address concerns such as: (1) sovereign rights against betting; (2)

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114. Cf. *Schindler*, 1994 ECR I-1039 at para. 57.

115. These include rules imposing a good faith standard and the *contra proferentem* rule. Some sites visited have apparently fair and reasonable rules.

extraterritorial rights of anti-ESTBC states; (3) rights of participating activity states; (4) rights of ETSBC states; (5) powers and duties of ETSBC states; (6) cooperation between states; and (7) duties of ISFs and NSFs.

## V. CONCLUSIONS

The exposition undertaken reveals that the structure of online gambling is presently dictated by private corporate interests. There is a controversial unilateral state support met with an equally traditional unilateral state opposition. A distinction has not been made between sport betting and other forms of betting and gambling. No specialized department for ETSBC exist. There is a commercial gap in the sport product market which is exploited by certain groups. State interests, proprietary, sporting, and cultural policy objections are at stake and can be legitimately raised to prevent the growth of the practice. However, a radically refined mutually beneficial version with serious earning potential can be developed. If sufficiently attractive, it can be legitimized as a global or regional sport product under national and international law, as well as by ISL. Organizational stakeholders, ETSBC jurisdictions, interested states, and intergovernmental organizations will be involved in creating an alternative product.

This Article examined the claim but argued against the unilateral right to engage in extra territorial online sport gambling. There is no right to extraterritorial sport gambling under customary or treaty sources of international law. There are various identifiable competing interests at stake. An interpretative recourse to formal rules of treaties promoting freedom of services is not helpful. States must be left to determine how they want to deal with sport gambling under their sovereign powers.<sup>116</sup> Even if sport gambling is promoted and condoned by certain states, there are extraterritorial legal and policy problems associated with the activity. The general sporting world and national communities have been losers in the present model being practiced. Within a *lex specialis* ISL context, the right to extraterritorial gambling is not acknowledged. Recognized ISL doctrines, rules and approaches practicable in the field do not promote online gambling. In Olympic Movement sport, overriding international legal policy is against sport betting. There is a limited scope for freedom in non-

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116. Smith & Fetzer, *supra* note 1, at 477.

Olympic movement sport. On this finding, it cannot be prudent that governments or ISFs unilaterally allow sport betting. Therefore the truly internationalized industry has not yet taken off. The existence or recognition of the right needs democratic legalization after consultation of stakeholders rights from the state to ISFs, supporters, clubs, and organized civil society. When this debate is concluded the next stage is the drafting of a convention where all the issues will be tackled. Otherwise, one can bet that any law from or within a single jurisdiction will be controversial.

