UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

ST. LOUIS DIVISION

CASE NO. 06-CR-00337CEJ

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM HERNAN LENIS,

Defendant.
_______________________________/

MOTION TO DISMISS FOR VIOLATION OF UNITED STATES TREATY

COMES NOW the Defendant, WILLIAM HERNAN LENIS, joined by all Defendants, and move this Honorable Court to dismiss the Indictment in this cause as the instant prosecution violates a treaty commitment of the United States. In support of this application counsel would show the Court the following:

THE INDICTMENT

The Indictment charges William Hernan Lenis with violations of 18 U.S.C. §1962 (Count 1); and §1953 (Count 13). Those statutes were enacted on October 15, 1970 and September 13, 1961 respectively.

THE TREATY

On January 1, 1995, the United States became a signatory to a treaty establishing the

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World Trade Organization (WTO). Costa Rica and Antigua are also signatories. The WTO adopted the General Agreement on Trade in Services (GATS). The WTO and GATS obligate its signatories to not taking any measures that will prohibit or affect the cross-border supply of services to, from or between signatories.

Part 1, Article 1, of the GATS applies to "measures by Members affecting trade in services" and provides:

> (2) For the purpose of this Agreement, trade in services is defined as the supply of a service:
>
> (a) from the territory of one Member to the territory of any other Member;
>
> (b) in the territory of one Member to the service consumer of any other Member;
>
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

The GATS defines "measures by Members" as measures taken by central, regional or local governments and authorities. "Services includes any service in any sector except services supplied in the exercise of governmental authority."

Article XVI of the GATS is contained in Part III under "Specific Commitments." It provides:

> (1) With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in this Schedule.
>
> (2) In sectors where market access commitments are undertaken, the measures which a member shall not maintain or adopt either on the basis of a regional

subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

> (a) limitations on the number of service suppliers whether in the form of numerical quotes, monopolies, exclusive service suppliers or the requirements of an economic needs test;

CONFLICT WITH THE TREATY

The cross-border supply of gambling and betting services from Costa Rica to consumers in the United States is a "Service" which the United States committed not to prohibit or affect by their treaty obligations in the WTO and GATS. The application of these criminal statutes is unquestionably "a measure by [a] Member" as this is a measure taken by the central United States Government and its authorities. The application of the criminal statutes to the cross-border supplying of gambling and betting services is a measure which totally prohibits the very conduct which the Government has by treaty agreed to support. The direct conflict between the United States Treaty obligations and this prosecution requires this Court to resolve the issue of the law to apply herein.

RESOLUTION OF CONFLICT OF LAWS

Article VI, Cl.2 of our Constitution provides that the laws of the United States, including all treaties made under the authority of the United States, are the supreme law of the land. Treaties have the same legal effect as statutes. ***Whitney v. Robertson***, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed 386 (1888). While statutes, like those being applied in the instant prosecution, are of equal authority, where a conflict exists between that which the Government has committed to do in a treaty and that which the Government is, in fact,

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doing, the last expression of the sovereign controls. ***Chae Chen Ping v. United States***, 130 U.S. 581, 95 S.Ct. 623, 32 L.Ed 1068 (1889). In ***Cook v. United States***, 288 U.S. 102, 53 S.Ct. 305 (1933) the Court concluded:

> The treaty, being later in date than the Act of 1922, superceded, so far as the act, the authority which had been conferred by Section 581 upon officers of the Coast Guard to search and seize beyond our territorial waters.

The United States entered into the WTO treaty on January 1, 1995, decades after the criminal statutes allegedly violated were enacted. That a criminal prosecution for facilitating the cross-border supply of betting and gambling services between WTO Members is wholly inconsistent with the United States' commitment to not interfere with the supply of services from Costa Rica to consumers in the United States is beyond dispute. The most recent pronouncement of the law, the WTO Treaty, controls as the law of the land.

RECENT WTO RULING

This very conflict was recently addressed by the WTO (WTO Dispute DS285). In March of 2003, pursuant to the WTO treaty, Antigua requested "consultations" with the United States regarding measures, specifically criminal prosecutions and threatened criminal prosecutions, applied by authorities in the United States which affected the cross-border supply of gambling and betting services operating in Antigua. Antigua alleged that the prosecution of individuals and businesses involved with or supporting internet gambling based in Antigua was a violation of the United States' treaty obligation. Antigua considered that the cumulative impact of the United States measures was to totally prevent the supply

of gambling and betting services from one WTO member to another on a cross-border basis. The Antiguan government presented evidence to the WTO that it had taken steps since the mid 1990s to build up a primarily internet based "remote access" gaming industry as part of its economic development strategy. As the cross-border gaming industry in Antigua developed and matured, the Government of Antigua licensed their gaming industry. Antigua submitted to the WTO information that it had 19 licensed operators employing over 3,000 people and accounting for approximately 10% of the gross-national product of the country in 1999. By 2003, the number of operators had declined to 28, employing fewer than 500 people. The Antiguan government alleged that a material factor in the decline of the industry was the increasingly aggressive strategy on the part of the United States to impede the operation of cross-border gaming activities in Antigua through criminal prosecutions like this one. The dispute was submitted to the WTO pursuant to their "Dispute Resolution Procedures."

Antigua claimed that one or more U.S. measures are inconsistent with the WTO treaty obligations. Among them, a letter dated June 11, 2003 sent by the United States Department of Justice to the National Association of Broadcasters explaining the illegality of cross-border remote access gambling. The Government advised in that correspondence that the Wire Act prohibits gambling businesses to knowingly receive or send certain types of bets and information that assisted in placing bets over inter-state and international wires. Antigua also pointed out that the Travel Act imposes criminal penalties for those utilizing

interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity. Also, the Illegal Gambling Business Act makes it a federal crime to operate a gambling business which violates the law of the state in which the gambling takes place. Each of these three laws separately prohibits the cross-border supply of gambling services from Antigua to the United States.

Antigua claimed that the United States had made a full market access commitment for the cross-border supply of gambling and betting services pursuant to its treaty obligations. At the same time, the United States took the position that U.S. criminal statutes forbid the acceptance of gambling and betting services from outside the United States.

After hearing presentations by both the United States and Antigua, the WTO concluded that the United States criminal laws which are being applied to internet gambling were "measures that affected trade and services" contrary to the WTO's agreement. The WTO **panel** concluded that the enforcement of these U.S. laws against internet gambling originating in Antigua necessarily affected trade and services within the meaning of Article 1, Section 1 of the GATS. The WTO also concluded that the United States had made a market access commitment that would permit cross-border internet gambling. The WTO panel further concluded that the U.S. criminal laws at issue prohibit the cross border supply of gambling and betting services in the United States in a manner inconsistent with the treaty obligations of the United States in the GATS. The WTO recommended that the Dispute Settlement Body request the United States to bring the measures that prohibit cross-border

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"remote access" gambling into conformity with its obligations under the GATS treaty.

On April 7, 2005 the **Appellate Body** of the WTO filed its report on the Antigua-United States dispute. The **Appellate Body** of the WTO also concluded that the United States had committed to grant full market access to gambling and betting services and further upheld the WTO **panel's** finding that the United States acts inconsistently with regard to Article XVI of the GATS which provides for market access. The limitations being placed on market access by the United States, like prosecutions in the instant case, are not specified as an exception in any United States' schedule filed with the WTO. The WTO found the U.S. Government's use of criminal laws to prosecute individuals who are involved in internet based remote access gambling and betting services is violation of the United States treaty commitment. At its meeting of April 20, 2005, the WTO **Dispute Settlement Body** adopted both the **Appellate Body** report and the **panel** report, as modified by the **Appellate Body** report.

COMPLIANCE WITH THE TREATY IS REQUIRED

An arbitration, regarding U.S. compliance with their treaty obligation was then empaneled. The arbitrator, upon the United States' representation and position that new laws would have to be enacted to comply with the treaty, concluded (at paragraph 50 of the award):

> In my view, the need for prompt compliance means that it is incumbent upon the United Stats to use the flexibility available in its legislative process to ensure rapid implementation.

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Ultimately, the Arbitrator determined that a reasonable time for the United States to implement the recommendations and rulings of the DSB was 11 months and two weeks from April 20, 2005. Compliance was "required" by April 3, 2006.

UNITED STATES' COMPLIANCE

Although outside the arbitrator's compliance date, the United States enacted new laws directly dealing with internet gambling in October, 2006: 31 U.S.C. §§5361; 5362; 5363; 5364; 5365; 5366 and 5367.

It is clear from this legislation that the United States has spoken on the topic of internet gambling. Although the new federal internet gambling statutes followed the enactment of the WTO, a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of congress has been clearly expressed. ***Transworld Airlines, Inc. v. Franklin Mint Corporation***, 465 U.S. 243, 252, 104 S.Ct. 1776, 1782 (1984). The "Congressional findings and purpose" set forth in §5361 are a clear expression of congressional intention to make internet gambling illegal regardless of any prior treaty obligation[1].

The government now has criminal statutes directed at internet gambling with which they may prosecute individuals involved in internet gambling. These new statutes, however, are **not** those charged in this case and, therefore, do nothing to support the Government's

[1] Whether the new criminal laws, as a later expression of the supreme law of the land continues to be in conflict with the treaty obligation and the ramifications thereof are not addressed herein. Application of the October, 2006 legislation in the instant case would be an impermissible ex post facto application as to these defendants.

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position in response to this motion. To the contrary, the enactment of the new internet gambling laws underscores Defendant's argument in this case that the United States cannot use criminal laws to prohibit the cross-border supply of gambling services which enacted before it entered its commitment to the WTO treaty. The enactment of these new criminal laws is a concession by the United States that application of existing criminal laws enacted prior to the WTO is problematic for the United States. Because the law at the time of the alleged offense conduct in this case not only permitted, but encouraged internet gambling among and/or through WTO Members, the Government cannot now criminally prosecute the defendant using criminal laws which preceded the treaty and with which, were in direct conflict.

THE WTO TREATY IS JUDICIALLY ENFORCEABLE

Recently, the Supreme Court addressed the judicial enforceability of a treaty in ***Hamdan v. Rumsfeld***, 1265 S.Ct. 2749 (2006). The treaty before the Court in ***Hamdan*** was the Geneva Convention. Rejecting the United States' argument that Courts do not have the power to consider the merits of a convention claim, the Court reversed the District of Columbia Circuit Court and concluded that ***Hamdan*** could invoke the Geneva Convention to challenge procedures used by a U.S. Military commission brought pursuant to an executive order in his trial.

A defendant may not be prosecuted in violation of the terms of a treaty. ***United States v. Rauscher***, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed 425 (1886). That a treaty is

enforceable as the law of the land was fully considered in the *Head-Money* Cases, ***Edye v. Roberton***, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed 798 (1884) in which the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations, was expressed in the following language:

> A treaty is primarily a contract between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country....A treaty, then, is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would a statute.

The WTO treaty, as the law of the land at the time of the allege conduct herein, encouraged and made legitimate the very affairs the government now seeks to criminalize. The United States could have scheduled internet gambling services as an exception to their treaty obligation. That they did not and now choose to prosecute the Defendants in this case cannot be reconciled. The treaty established the rights of individuals in Costa Rica to extend to individuals in other WTO nations, including the United States, internet remote access wagering and the concurrent rights of U.S. citizens to accept those services. The Government, through this prosecution, denies in practice the very rights that the treaty

sought to assure. The treaty must be enforced.

CONCLUSION

The Government must speak with one voice and speak with specific clarity to provide due process. Here, the Government has spoken with several voices whose message, at various times, has changed. Prior to entry into the WTO Treaty in 1995, the Government may well have used their RICO laws, Wire Act, Mail Fraud, money laundering and related allegations to reach the conduct of providing internet "remote access" betting and gambling services from Costa Rica. After the January 1, 1995 enactment through the October 13, 2006 enactment of 18 U.S.C. §5361-67, the law of the land was to permit internet gambling pursuant to U.S. obligations under the WTO and GATS. During that time, the controlling law was the WTO treaty and the charges brought herein, as contrary thereto, should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all counsel/parties of record listed on the attached Attorney Service List on this 18th day of December, 2006.

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/s/ Alan S. Ross
BY:____________________________
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