



# POSSIBLE IMPACT OF WHO'S 'GAMING DISORDER' CLASSIFICATION

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**A**n international health subsidiary of the United Nations has decided that if you play computer video games you might be suffering from a mental health problem called “gaming disorder.” The World Health Organization (WHO) proposed that the new behavioral condition be approved by the World Health Assembly in May 2019 for inclusion in the 11th edition of its International Classification of Diseases and Related Health Problems (ICD-11), the first update to the ICD in over 25 years

Absent some contrary action on the part of the United States, there is a distinct possibility that the WHO proposal will work its way into U.S. domestic law. Assuming it does become a part of U.S. law, the electronic gaming industry may well be subjected to a rash of individual, and perhaps class action, lawsuits for damages incurred as a result of alleged gaming disorders.

This brief article explains the constitutional and international footings for WHO's gaming disorder classification, the manner in which it can impact domestic law, and its potential for triggering new tort claims against electronic gaming manufacturers.

## Constitutional Backdrop

The United Nations and its various specialized agencies, including WHO, are, insofar as U.S. constitutional law is concerned, creatures of treaties and/or executive agreements.

The U.S. Constitution empowers the president to make treaties by and with the concurrence of two-thirds of the Senate.<sup>1</sup> Treaties are an alternative form of lawmaking, but they have the same force and effect as statutory enactments.<sup>2</sup>

Executive agreements, as distinguished from treaties, stem from the president's “executive power,”<sup>3</sup> which authorizes him to conclude international agreements with other nations subject to the conferral of some form of congressional authority. Such authority may take the form of subsequent approval by a simple majority of both chambers of Congress, an existing treaty or statute, or a core constitutional power of the president (e.g., the commander-in-chief power).

Executive agreements have the same standing at law as treaties; the two are interchangeable.<sup>4</sup> In deciding whether to utilize a treaty or executive agreement, the president can, on occasion, be put to a political choice: Is it most expedient to seek the approval of an agreement with another nation by securing a two-thirds vote in the Senate or a simple majority in both the Senate and the House?

## UN and WHO Setting

Under U.S. law, the United Nations is a creature of treaty, having been established at the conclusion of World War II, on Oct. 24, 1945. Originally, the United Nations had 51 members and today it has 194 members. WHO, one of the United Nations' specialized agencies, is a creature of both treaty and executive agreements, having been established on April 7, 1948. In accordance with Articles 57 and 63 of the U.N. Charter, it functions through the coordinating machinery of the U.N. Economic and Social Council and it is governed by all 194 U.N. members acting through its World Health Assembly. Its offices are located in Geneva and it employs approximately 7,000 people.

The general purpose of the WHO is “the attainment by all people of the highest possible level of health.”<sup>5</sup> It was basically conceived to

eradicate widespread communicable diseases such as smallpox and later, the Ebola virus, malaria, tuberculosis, and HIV/AIDS. Over the course of the last 40 years or so, however, the WHO's mission has been dramatically altered and, as a result, it has ventured beyond its originally stated purpose. Today, WHO's role in international health issues has been significantly broadened and now WHO is involved in (1) providing leadership on matters critical to health and engaging in partnerships where joint action is needed, (2) "shaping the research agenda and stimulating the generation, translation and dissemination of valuable knowledge," (3) "setting norms and standards and promoting and monitoring their implementation," (4) "articulating ethical and evidence-based policy options," (5) "providing technical support, catalyzing change, and building sustainable institutional capacity," and (6) monitoring the health situation and assessing health trends."<sup>6</sup>

### 'Gaming Disorder' Classification

On June 18, 2018, the WHO issued the ICD-11 which, for the first time, would include a new malady termed a "gaming disorder." ICD-11 will be voted upon at the World Health Assembly in May 2019, and it is intended to go into effect in member nations in January 2022. This new gaming disorder initiative was led by Dr. Vladimir Poznyak of the WHO's Department of Mental Health and Substance Abuse.

**Gaming interests around the world are rightly concerned that the new WHO classification could provide a unifying definition to facilitate individual and class-action cases against them in the years ahead. In the United States, under the American Psychiatric Association Diagnostic Manual of Mental Disorders (DSM-5), the diagnosis of mental disorders is generally treated separate and apart from physical diseases.**

A diagnosis of this newly proposed mental health disorder would require four findings, as follows: (1) gaming must take precedence over other activities; (2) it must impair control of the afflicted individual's behavior; (3) it must lead to significant distress and impairment in personal, family, and social relationships; and (4) the situation must last for at least a period of 12 months.

Even if adopted by the World Health Assembly, further action would be required before the new classification is formally adopted by individual member countries. In the United States, WHO determinations are not self-executing; they require the enactment of enabling legislation carrying forward the proposal in order for it to have the force and effect of domestic law. However, if there is

no clear guidance in the United States, one way or the other, with respect to the new mental disorder, a vacuum in domestic law can arise, permitting U.S. courts to conclude that "international law" (i.e., the WHO classification) is controlling.<sup>7</sup>

### Potential for Mischief

Gaming interests around the world are rightly concerned that the new WHO classification could provide a unifying definition to facilitate individual and class-action cases against them in the years ahead. In the United States, under the American Psychiatric Association Diagnostic Manual of Mental Disorders (DSM-5), the diagnosis of mental disorders is generally treated separate and apart from physical diseases.<sup>8</sup> The DSM-5 does not include a "gaming disorder" inasmuch as the psychiatric and psychological communities generally believe such classification would be premature and that more clinical research and experience is required prior to its consideration.

A number of commentators have noted that there is no more reason for proposing a behavioral addiction pathology for excessive video game playing than there is for proposing a "smartphone disorder" or, years ago, a "telephone disorder" or "television disorder."

The WHO openly proposes that the ICD-11 be considered as an acceptable alternative to DSM-5 in all respects, thus permitting its recognition as a potential expert basis on which to support litigation against gaming manufacturers and sellers for damages allegedly incurred as a result of gaming disorders.<sup>9</sup>

### Anticipated Opposition

Due to the stakes involved in the WHO classification, one would expect the gaming industry to mount a comprehensive plan of opposition pointed toward the eventual defeat of the new "gaming disorder" classification on or before May 2019, when the World Health Assembly will take up the matter. Such a plan of opposition would likely include at least four components, as follows:

- Monitoring the WHO's ongoing activities in Geneva;
- A public and political information and education effort;
- A congressional lobbying plan; and
- Structured executive branch briefings and meetings, including at least the State Department, the Commerce Department, and the White House.

### Prospects

At the 2017 World Health Assembly meeting in Geneva, members of the Trump administration voiced its disapproval of a WHO resolution to "protect, promote, and support breastfeeding" to the exclusion of infant formula. Notwithstanding worldwide support for the resolution, the administration resisted the WHO's attempts to interject itself into U.S. federal policy and regulatory processes, following the policy course originally established by the Reagan administration that, in 1981, announced its opposition to a similar WHO initiative and stated the position that the WHO was not intended to function as an "international FTC" regulating the U.S. marketplace.<sup>10</sup>

In light of its actions in opposition to the breastfeeding resolutions and the anticipated efforts of the electronic gaming industry, it would appear that the prospects for the United States to reject the WHO "gaming disorder" proposal are good. ☺

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### Endnotes

<sup>1</sup>U.S. CONST., art II, § 2; *see also* *Hopkirk v. Bell*, 7 U.S. 454, 456-57 (3 Cranch) (1806).

<sup>2</sup>*Missouri v. Holland*, 252 U.S. 416, 434-35 (1920).

<sup>3</sup>U.S. CONST., art. II, § 1.

<sup>4</sup>*See U.S. v. Belmont*, 301 U.S. 324, 330 (1937); *see also U.S. v. Pink*, 315 U.S. 203, 229 (1942). Treaties and executive agreements supersede state law. U.S. CONST., art. VI, § 2.

<sup>5</sup>WHO CONST., ch. I, art. 1.

<sup>6</sup>*About WHO: What We Do*, WHO, <http://www.who.int/about/what->

[we-do/en](#) (last visited Sept. 20, 2018).

<sup>7</sup>*See The Paquete Habana*, 175 U.S. 677, 708-09 (1900) (U.S. courts are bound to take judicial notice and give effect to a rule of international law when there exists a vacuum in domestic law, i.e., where there is no public act of their own government in relation to the matter).

<sup>8</sup>*See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

<sup>9</sup>The expert's opinion would, of course, be subject to the standards announced in *Daubert* and its progeny.

<sup>10</sup>Explanation of U.S. Vote on the Infant Formula Question at the United Nations and Other Subjects, Transcript of White House Press Briefing, Weekly Com. Pres. Doc. 1447 (May 18, 1981) (available at The Ronald Reagan Presidential Library & Museum).

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