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UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

Report of the Panel

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ABBREVIATIONS USED FOR DISPUTE SETTLEMENT CASES REFERRED TO IN THE REPORT

SHORT TITLE	FULL TITLE
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,* WT/DS155/R, adopted 16 February 2001, DSR 2001:V, 2021
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Border Tax Adjustments	Report of the Working Party on Border Tax Adjustments, adopted 2 December 1970, BISD 18S/97
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:VIII, 3327
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada - Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft,* WT/DS70/R, adopted on 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Dairy	Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Second Recourse to Article 21.5 of the DSU by New Zealand and the United States,* WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Canada – Periodicals	Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 20 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain,* WT/DS276/12, circulated 21 July 2003
Chile – Alcoholic Beverages	Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, DSR 2000:I, 281
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002

SHORT TITLE	FULL TITLE
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, 3 May 2002, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207AB/R
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
EC – Computer Equipment	Appellate Body Report, *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Computer Equipment	Panel Report, *European Communities – Customs Classification of certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by the Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EEC – Import Restrictions	Panel Report, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted 12 July 1983, BISD 30S/129
EEC (Member States) – Bananas I	Panel Report, *EEC – Member States' Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R.
EEC – Parts and Components	Panel Report, *European Economic Community – Regulation on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Patents (US)	Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products – Complaint by the United States*, WT/DS50/R, adopted 16 January 1998, as modified by the Appellate Body Report, WT/DS50/AB/R, DSR 1998:I, 41
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
Indonesia – Autos	Panel Report, *Indonesia - Certain Measures Affecting The Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201

SHORT TITLE	FULL TITLE
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 315
Japan – Alcoholic Beverages I	Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 November 1987, BISD 34S/83
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:1, 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3.
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49.
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted on 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002.
US – Carbon Steel	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R and Corr.1
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373

SHORT TITLE	FULL TITLE
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – Cotton Yarn	Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by the Appellate Body Report, WT/DS192/AB/R
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints As Subsidies*, WT/DS194/R, adopted 23 August 2001
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:IV, 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment For "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment For "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW
US – FSC (Article 22.6 – US)	Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29
US – Hot–Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003

SHORT TITLE	FULL TITLE
US – Section 110(5) Copyright Act	Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, 3769
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974,* WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Section 337	Panel Report, *United States Section 337 of the Tariff Act of 1930,* adopted 7 November 1989, BISD 36S/345
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate From India,* WT/DS206/R, adopted 29 July 2002
US – Sugar Waiver	Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, adopted 7 November 1990, BISD 37S/228
US – Tuna (Mexico)	Panel Report, *United States – Restrictions on Imports of Tuna*, 3 September 1991, unadopted, BISD 39S/155
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

LIST OF ABBREVIATIONS

AB	Appellate Body
CPC or CPC Prov.	United Nations, Statistical Papers, Series M, No. 77, *Provisional Central Product Classification*, 1991
CPC 1.1	United Nations, *Central Product Classification Version 1.1,* ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, 2002
DEA	United States Drug Enforcement Administration
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FATF	Financial Action Task Force on Money Laundering
FBI	United States Federal Bureau of Investigation
GAO	United States General Accounting Office
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
NGISC	United States National Gambling Impact Study Commission
NAICS	North American Industry Classification System
RICO	Racketeer Influenced and Corrupt Organizations Statute, codified at 18 U.S.C. §§ 1961-1968
SAA	Statement of Administrative Action
USITC	United States International Trade Commission
USITC Document	United States International Trade Commission, *US Schedule of Commitments under the General Agreement on Trade in Services – With explanatory materials prepared by the US International Trade Commission*
USTR	United States Trade Representative
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
W/120	Services Sectoral Classification List: Note by the Secretariat, MTN.GNS/W/120, 10 July 1991

I. INTRODUCTION

1.1 In a communication dated 13 March 2003, Antigua and Barbuda (hereinafter also "Antigua") requested consultations with the United States, pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII of the General Agreement on Trade in Services (GATS) regarding measures applied by central, regional and local authorities in the United States of America that affected the cross-border supply of gambling and betting services.[1] Antigua attached to its communication an Annex listing US Federal and State measures whose cumulative impact resulted, according to Antigua, in making unlawful the supply of gambling and betting services on a cross-border basis. In a communication dated 1 April 2003, Antigua issued a communication containing a corrected Annex aiming at clarifying "some of the references to the US legislation" which were contained in the original Annex.[2]

1.2 Antigua and the United States held consultations on 30 April 2003, but these consultations did not resolve the dispute. Consequently, in a communication dated 12 June 2003, Antigua requested the DSB to establish a Panel.[3] At its meeting on 21 July 2003, the DSB established a Panel pursuant to the request of Antigua in document WT/DS285/2, in accordance with Article 6 of the Dispute Settlement Understanding. At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Antigua and Barbuda in document WT/DS285/2, the matter referred to the DSB by Antigua and Barbuda in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.3 On 15 August 2003, Antigua requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.4 On 25 August 2003, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. B.K. Zutshi

Members: Mr. Virachai Plasai
Mr. Richard Plender

1.5 Canada, the European Communities, Japan, Mexico and Chinese Taipei reserved their rights to participate in the Panel proceedings as a third party.

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[1] WT/DS285/1 – S/L/110, dated 27 March 2003.
[2] WT/DS285/1/Add.1 – S/L/110/Add.1, dated 10 April 2003.
[3] WT/DS285/2, 13 June 2003.

1.6 On 5 September 2003, the Panel adopted its Working Procedures (Annex A).

1.7 On 17 October 2003, the United States made a request for preliminary rulings, pursuant to paragraph 11 of the Working Procedures. On 20 October 2003, the Panel invited Antigua and Barbuda and the third parties to comment on the US request (Annex B). Antigua submitted its response on 23 October 2003, the European Communities and Japan on 24 October 2003. Chinese Taipei, Mexico and Canada informed the Panel that they would not submit any comments to the US request for preliminary rulings (Annex B). On 29 October 2003, the Panel replied to the US request in a communication to the parties, with copy to the third parties on 29 October 2003 (Annex B).

1.8 The Panel held the first substantive meeting with the parties from 10 to 12 December 2003. The session with the third parties took place on 11 December 2003. The second substantive meeting was held on 26 and 27 January 2004.

1.9 On 20 February 2004, the Panel issued the Descriptive Part of its Panel Report. On 27 February 2004, the parties and third parties provided their comments on the draft Descriptive Part.

1.10 Factual and legal arguments by the parties are reflected in Section III. In addition, Antigua and the United States have submitted a series of exhibits in support of their factual and legal allegations. These exhibits have been considered by the Panel in its findings in Section VI below. A list of these exhibits is contained in Annex G of this Report. Annex C to the Report contains written questions posed by the Panel to the parties during the first and second panel meetings, as well as questions posed to third parties during the first panel meeting.

1.11 On 24 March 2004, the Panel transmitted its Interim Report to the parties. On 7 April 2003, the parties provided their comments on the Interim Report. None of the parties requested that the Panel hold a further meeting with the parties to review part(s) of the Panel's Report. On 16 April 2003, the parties submitted further written comments on the comments that had already been provided on the Panel's Interim Report on 7 April 2003.

1.12 The Final Report of the Panel was issued to the parties on 30 April 2004.

II. CONCLUSIONS REQUESTED BY THE PARTIES

2.1 **Antigua and Barbuda** requests the Panel to find that the United States' prohibition on the cross-border supply of gambling and betting services and its measures restricting international money transfers and payments relating to gambling and betting services are inconsistent with:

(a) the United States' Schedule of specific commitments under the GATS; and

(b) Articles XVI:1, XVI:2, XVII:1, XVII:2, XVII:3, VI:1, VI:3 and XI:1 of the GATS.

2.2 The **United States** requests the Panel to reject Antigua and Barbuda's claims in their entirety.

III. ARGUMENTS OF THE PARTIES

A. FACTUAL ARGUMENTS

3.1 **Antigua** submits that a vast array of gambling and betting games and services are offered on a commercial basis in the United States and elsewhere. These games can typically be categorized into one of the following three broad categories: (i) betting on the outcome of events in which the gamblers do not participate, such as sports contests (for example, horse races, soccer, American football, basketball, and cricket); (ii) card games involving monetary stakes (such as poker, black

jack and baccarat);[4] and (iii) random selection games which are games of chance based on the random selection of numbers or other signs and where the random selection is performed by a machine or the casting of dice. This type of gambling takes various forms, including lotto, keno and bingo; instant lotteries or "scratch card games"; gambling machines; and "table games" such as roulette or "craps". Antigua notes that "gambling," "gaming," "wagering" and "betting" are different terms for the same basic activity. While these terms are generally used interchangeably by the industry and by Antigua in its arguments to the Panel, the industry typically refers to itself as the "gaming industry" and terms such as "gambling and betting" more often refer to the activity.

3.2 The Antiguan government has 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 has developed and matured, the government believes that a standard business model has evolved that successful operators more or less conform to.[5] Antiguan regulation provides for two kinds of gambling and betting licences – interactive gaming and interactive wagering. The gaming licence is for casino-type, random selection and card games and the wagering licence is for sports betting. Some operators possess both licences and players can access either type of service from one Internet site[6], while other operators offer only one service.[7] Casino game operators create "virtual casinos" on their web sites with detailed graphics and enhancements designed to mimic land-based casino settings. These sites offer a variety of card and dice games such as poker, black jack, craps and keno, as well as arcade-type games that provide virtual imitations of video poker terminals, slot machines and other gambling machines. Because of the highly visual aspect of the casino-type games, these services are operated exclusively through Internet connection. The sports betting operators offer the chance to wager on the outcome of sporting contests in a number of different ways, such as straight wagers on match results, transacting in futures markets in player performances, team performances and outcomes of political campaigns and other uncertain future events, and other forms of traditional as well as inventive methods of wagering. All Antiguan sports book operators maintain an Internet web site on which players may place wagers, but many operators also make extensive use of telephone betting, as betting on contests or performances to occur in the future does not need to be visual and the events are independent of the operator's web site.

3.3 With respect to player accounts and player due diligence, the gambling and betting service providers in Antigua offer what is called "account betting" where a player must fund an account with money before being able to enter into wagers. The amount of a wager cannot exceed the funds on deposit in the account and players are not offered credit on which to gamble.[8] If a wager is lost, the amount of the bet is taken from the player's account for the benefit of the operator. If the player wins, the winnings are credited to the account. To realize on their winnings players may request that all or any portion of the funds in their account are directed back to them. In practice as well as by requirement of Antiguan law, winnings and the balance of deposits are transmitted back to the account from which the initial deposit came or, if the deposit was by credit card, sometimes by credit back to the same credit card. In some cases, amounts are paid to players by cheque. To open an account with an operator, prospective players typically fill in a form and submit information directly on-line. The precise information requested at the time of establishing a new account differs from site to site, but the basic objective is to obtain enough information regarding the new player to allow the

[4] Antigua notes that, in the context of a casino these will often be referred to as part of a wider group of "table games" also including random selection games such as roulette or craps.

[5] Antigua indicates that the discussion in paras. 3.2 and 3.4 is based upon the experience and the records of the Antiguan Directorate of Offshore Gaming.

[6] See, e.g., www.intertops.com; www.wsex.com.

[7] See, e.g., www.gamebookers.com; www.bingomania.net.

[8] Antigua notes that this is unlike many land-based casinos in the United States, which will offer some customers the ability to gamble on credit with funds advanced by the casino. Advancing of credit for gaming transactions is against Antiguan law.

operator to perform its own due diligence into the identity of a player. While almost every operator will let a person open an account without the operator having gone through the due diligence process, funding an account and commencing gambling or betting on the account cannot be done without the completion of the process. There are several common methods used by players to fund accounts with Antiguan gaming operators. These include payment by cheque drawn on a bank account or a bank certified or cashier's cheque, wire transfer, electronic transfer to money remittance service providers and credit card. The methods used by operators to perform due diligence on players differ from site to site, but all operators undertake some form of identity verification to come to a reasonable assurance of the identity of the player. In addition to satisfying Antigua's regulatory requirements for identity verification, anti-fraud prevention motivates operators to ensure identification. A number of operators use commercially available databases where large amounts of information on persons can be found, including dates of birth and employment, criminal records, credit history and residential addresses. Operators can also easily determine the location of a player through the tracing of the Internet service provider number generated by the person's computer.

3.4 Concerning fraud prevention, each Antiguan operator maintains an "anti-fraud" department with the objective of preventing abuses of the gaming systems, collusion among players, financial fraud and credit card abuse, under age playing and other occurrences which can result in financial losses to the operator. In general, anti-fraud departments perform the identity checks on prospective players, investigate suspicious conduct and develop strategies to deal with illegal or dishonest practices. It is obvious to the government through its oversight of the industry that with experience, operators have become extremely capable of discerning potentially fraudulent or dishonest players or conduct in a number of ways and mostly by recognisable patterns that have built up over the years. Under age gambling is expressly prohibited by Antiguan law. Experience has shown that under age gambling with Antiguan operators is relatively rare for several reasons. The first obstacle to gambling and betting by minors is the age verification that forms a part of the identification process. A second material obstacle is the need to fund an account before any wagering can commence, which requires access to financial instruments such as cheques and a funded bank account, the ability to send funds by wire transfer from a funded bank account or access to a valid credit card. This is a significant barrier which most minors are unable to overcome, particularly given the practice in the industry to either send winnings and deposits directly back to the account from which deposits were received or crediting winnings directly back to the applicable credit card – in essence denying the minor the ability to access any gaming rewards. Another obstacle to play by minors is market driven – in the rare cases where minors have been able to gamble the result has almost invariably been a refund to the parent or a credit back on a credit card. Another method of restricting the ability of minors to wager on operator web sites can be imposed at the user's end. In practice, many Antiguan operators provide direct links from their web sites to parental control providers such as "Cybersitter," "Net Nanny" and "Surf Watch." Some specifically register themselves with these parental control providers to ensure that access to their sites will be automatically blocked to subscribers. Finally, it is a requirement of Antiguan law that operators display on their sites a warning of the addiction possibilities of gambling and information to assist compulsive gamblers. In practice, this is usually done by a reference and link to organizations such as "Gamblers Anonymous." Furthermore, the government has found that the cross-border gaming industry in Antigua is generally adverse to gambling and betting by problem gamblers. Not only do these people tend to be more problematic for operators – demanding credit and refunds and occupying a disproportionate amount of personnel attention – but their conduct also frequently results in charge-backs on credit cards and reversals of financial transactions. Most operators appear to be able to detect patterns of problem gamblers either at the sign-up stage (where the operators refuse to authorize funding of or playing on an account) or later on during the course of the relationship with the player, in which event the person's account will often be closed and the balance returned to the player.

3.5 Antigua submits that, from a high of up to 119 licensed operators, employing around 3,000 and accounting for around ten per cent of GDP in 1999, by 2003 the number of operators has declined to 28, employing fewer than 500. The government believes that material factors in the decline of the

industry are the increased standards of regulation in Antigua and an increasingly aggressive strategy on the part of the United States to impede the operation of cross-border gaming activities in Antigua. Antigua's regulatory framework for the remote-access gaming industry has two components. The first is the Gaming Regulations[9], adopted on 22 May 2001, which set out, *inter alia*, requirements for operators to have valid licences, the applications for which are subject to rigorous scrutiny by the Gaming Directorate. The Gaming Regulations also: (i) forbid under age gaming; (ii) contain provisions aimed at promoting responsible gaming (including rules requiring warnings of the addictive effects of gambling on operator's websites); (iii) oblige operators to conduct full identity verification checks on prospective players; (iv) prohibit the receiving of payments in cash; and (v) provide that funds can only come from properly verified accounts in regulated financial institutions and that, if possible, winnings must be paid back to that same account. Licensees are obliged to report all suspicious activities to the Directorate. The Directorate itself has investigatory powers under the Gaming Regulations, and oversees, supervises and monitors licensees, key personnel and games offered by licensees. In practice, these powers are regularly used. The Gaming Regulations also address standards in advertising, requiring, among other things, that advertising not be false, deceptive or misleading and not contain indecent, pornographic or offensive content.

3.6 The second component of the regulatory scheme in Antigua is the anti-money laundering efforts of the government, evidenced principally by the Money Laundering (Prevention) Act[10], the Money Laundering Regulations[11], the Money Laundering Guidelines[12] and the actions of the Office of National Drug and Money Laundering Control Policy ("ONDCP"). Antigua is a member state of the Caribbean Financial Action Task Force created under the auspices of the Financial Action Task Force on Money Laundering established by the G-7 in 1989. The Money Laundering Act is a comprehensive, up-to-date statute that criminalizes money laundering and sets up the regulatory authority and powers of the ONDCP. For a variety of reasons, Antigua does not consider the cross-border gambling and betting industry in Antigua as particularly susceptible to money laundering or other forms of financial or organized crime. In particular, operators in Antigua are prohibited from taking cash from players and are required to establish their identity. This is in stark contrast to land-based casinos and other gaming outlets in the United States, where not only can players wager with complete anonymity but also gamble almost exclusively with cash.

3.7 Antigua submits that commercial gambling is an enormous industry in the United States. In 1999 gamblers in the United States wagered more than US $630 billion in state-sanctioned gambling activities and lost US $50 billion in the process.[13] In 1998, 68 per cent of Americans gambled at least once and 86 per cent of Americans have gambled at least once in their lifetime.[14] In 1999, a federal commission, the United States National Gambling Impact Study Commission (hereinafter, "NGISC"), completed a lengthy detailed study on gambling in the United States. The NGISC concluded that:

> "Commercial gambling has become an immense industry. Governments are now heavily involved and increasingly active in pursuit of gambling revenues, either

[9] *Statutory Instruments Antigua and Barbuda,* 2001 No 16, "The Interactive Gaming and Interactive Wagering Regulations of 2001".

[10] *Acts of Antigua and Barbuda,* No 9 of 1996.

[11] *Statutory Instruments Antigua and Barbuda,* 1999 No 35.

[12] *The Money Laundering Guidelines for Financial Institutions* issued by the ONDCP under Section 10 of the Money Laundering (Prevention) Act 1996, 9 September 2002.

[13] *National Gambling Impact Study Commission Final Report* (Hereinafter "NGISC Final Report"), 18 June 1999, p. 7-1, and George Will, "Gambler Nation," *The Washington Post*, 27 June 1999.

[14] Ibid., p. 1-1, citing *National Opinion Research Center Gambling Impact and Behavior Study, Report to the National Gambling Impact Study Commission*, 1 April 1999, p. 6.

> directly through state-owned lotteries and Native American tribal gambling or through the regulation and taxation of commercial operators.[15]
>
> There was no single, overarching national decision to turn the United States into a world leader in gambling. Rather, games of chance spread across the map as a result of a series of limited, incremental decisions made by individuals, communities, states and businesses.[16]
>
> In the next 25 years, gambling could, at its present rate of growth, become more and more like other common and legal, but somewhat restricted, business activities, such as the sale of alcohol or cigarettes. Of course, over time, the basic rules of our economic system would be expected to play a greater role in shaping the pattern of gambling, as the quasi-monopolistic circumstances of the present are replaced by more routine competition."[17]

3.8 Since 1999 state-sanctioned gambling in the United States has continued its expansion at an unprecedented rate, being available in 48 states and covering activities including bingo, horse race betting and other sports gambling, commercial casinos and state-operated lotteries. The omnipresence of fully lawful, state-sanctioned gambling makes the United States the largest national gambling market in the world. The US $630 billion in total amount wagered reported by the NGISC in 1998 and 1999 excludes the most widespread and popular form of gambling in the United States: non-sanctioned or "illegal" sports betting. The NGISC estimated that as much as US $380 billion in illegal wagers are placed annually by American gamblers on professional and amateur sporting events.[18] Despite the enormous growth of this non-sanctioned gambling, the United States' efforts to crack down on illegal bookmakers in the United States have dwindled over the last 40 years. In the NGISC Final Report, the NGISC concluded that illegal sports betting in the United States is "easy to participate in, widely accepted, very popular, and, at present, not likely to be prosecuted."[19]

3.9 Antigua further submits that many of the largest gaming companies in the world are of United States origin and many have overseas interests. These companies use sophisticated remote computer technology to control and monitor overseas operations via the Internet.[20] United States gambling operators are allowed to advertise without restrictions throughout the United States. The NGISC described the advertising of lotteries in the United States as "deceptive", "misleading" and "manipulative."[21] United States casinos, such as in Nevada and Atlantic City (New Jersey), use sophisticated marketing techniques, including direct marketing based on electronically collected data on the gambling behaviour of individual players. For instance, Nevada's modern casinos, especially those on the main casino area in Las Vegas – the so-called "Las Vegas Strip" – are self-contained mini-cities designed to offer non-stop gambling. For instance, the casino floor in the MGM Grand casino is over 170,000 square feet (approximately 16,000 square metres) and holds approximately 3,200 slot machines, 164 table games and a sports betting facility.[22] In order to attract customers, Nevada casinos widely advertise discount travel fares, inexpensive hotel rooms, bargain meals, low-

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[15] *National Gambling Impact Study Commission Final Report – Executive Summary* (hereinafter, "NGISC Executive Summary"), 18 June 1999, p. 1.

[16] Ibid., p. 1.

[17] Ibid., pp.1-2.

[18] NGISC Final Report, p. 2-14.

[19] NGISC Final Report, p. 2-14.

[20] Rod Smith, "Casino Industry Technology: Open Wide, New Progressive Slot System Lets Las Vegas Company Serve Russian Gamblers," *Las Vegas Review Journal* (2 September 2003).

[21] NGISC Final Report, pp. 3-15, 3-16.

[22] Jason N. Ader, *Bears Stearns 2002-03 North American Gaming Almanac*, Huntington Press, Las Vegas, Nevada, p. 36.

cost entertainment and other special events.[23] Some casinos even offer free travel to preferred customers. Under United States law, casinos are permitted to advertise gambling in every state of the nation, even within states which do not permit casino gaming.[24] One particularly successful marketing tool of the Las Vegas casinos is to offer entertainment in the form of shows by major stars, Broadway-style musicals, revue spectaculars and a variety of lounge acts. All of this entertainment has a single purpose – to bring customers into the casino. Entertainment events that boost a casino's gambling winnings are frequently held over, whereas those which do not, regardless of how many tickets are sold, are generally discontinued.[25] The Las Vegas-style casinos are made to keep visitors in the resort complex and near the tables and slot machines.[26] Pathways through a casino are built to emphasize the gambling equipment rather than directing visitors to exits.[27] Gaming equipment is carefully arranged in a compact layout to provide secluded, intimate gambling areas, with the gambling equipment the dominant décor on the casino floor.[28] The gambling areas of casinos are also designed to detach visitors from their daily routine and release their inhibitions and conventional responsibilities.[29] The unusual noise and visual effects of the casino floor purposefully create a sensation which heightens the thrill and pleasant tension of gambling.[30]

3.10 Additionally, most casinos are open 24-hours a day and use a number of techniques to diminish a player's sense of time and money.[31] There are generally no clocks or views to the outside, making it difficult for gamblers to know the time.[32] The casinos convert cash into readily-expendable chips at gaming tables, which has the effect of detaching gamblers from their customary value of money.[33] To further encourage unchecked gambling, casinos offer free alcoholic beverages to anyone who is gambling.[34] For ready access to cash, casinos house banks, automated teller machines, credit card cash machines and offer lines of credit on the casino floor.[35] Gambling operators also use a variety of inducements to keep gamblers in the casino. Winning gamblers are commonly awarded free dinners, over-night stays and entertainment. The motive is quite simple–given a long enough stay, winning gamblers will inevitably return to the tables where the law of probability will ultimately catch up with them. Casinos also maintain electronic databases with data on the gambling behaviour of their individual customers.[36] These data are used for direct marketing to the individual gamblers.[37]

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[23] John M. Findlay, *People of Chance: Gambling in American Society from Jamestown to Las Vegas*, Oxford University Press (1986) (hereinafter "*People of Chance*"), p. 157.

[24] See the decision of the United States Supreme Court in *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 190 (1999) (stating that the United States government's efforts to enforce an antiquated ban on broadcasting advertising of casino gambling was so pierced by governmental exemptions and inconsistencies that the United States government "could not hope to exonerate" the reasons for the ban and further holding that a Louisiana-based casino could lawfully broadcast advertising in neighbouring Texas, where casino gambling was illegal).

[25] David G. Schwartz, *Suburban Xanadu: The Casino Resort on the Las Vegas Stripe and Beyond*, Routledge (2003), p. 95.

[26] *People of Chance*, op. cit. footnote 23, p. 158.

[27] Bill Friedman, *Designing Casinos to Dominate the Competition: The Friedman International Standards of Casino Design*, University of Nevada Reno (2000), pp. 15-18.

[28] Ibid.

[29] *People of Chance*, op. cit. in footnote 23, p. 147.

[30] Ibid., pp. 133-34, citing Robert D. Herman, *Gamblers and Gaming: Motives, Institutions and Controls*, Lexington, Massachusetts (1976), pp. 84 - 88.

[31] Ibid., p. 148.

[32] Ibid., p. 147.

[33] Ibid.

[34] Ibid., p. 157. See also American Gaming Association, "Fact Sheet: Casino Alcohol Policies" (www.americangaming.org/casino_entertainment/aga_facts/facts.cfm/id/31).

[35] American Gaming Association, "Fact Sheet: ATMS/Credit in Casinos" (www.americangaming.org/casino_entertainment/aga_facts/facts.cfm/id/5).

[36] David G. Schwartz, *Suburban Xanadu: The Casino Resort on the Las Vegas Stripe and Beyond*, Routledge (2003), p. 7. An example is the "customer loyalty schemes" of the major casino companies. For instance, Harrah's has developed a sophisticated direct marketing system based on a "national patron database."

Casinos also exchange these data between each other.[38] As of 2003, Nevada has over 2,100 licensed casinos that offer virtually every popular form of state-sanctioned gambling. These casinos host an aggregate of 189,193 slot machines and 6,358 tables for blackjack, craps, roulette and other table games[39] and generate state-wide gaming revenues of US $9.5 billion per year.[40] Las Vegas itself has hosted over 30 million visitors each year since 1997, with more than 35 million visitors in each of the past three years.[41] Approximately 90 per cent of visitors come from places other than Nevada, including all other regions of the United States as well as from foreign countries.[42] In addition to the well-recognised casino operations in Nevada and New Jersey, a number of other states offer casino gambling opportunities as well, including Louisiana, Illinois, Indiana, Missouri, Mississippi, South Dakota, Colorado and Michigan. Further, throughout the United States there are over 340 casino facilities owned by various Native American tribes who, through exemptions under federal law and in many cases with federal assistance, are permitted to offer a wide scope of gambling opportunities at facilities located on tribal lands. Even the United States federal government operates gaming facilities, with about 8,000 slot machines and video poker electronic gaming devices located on 94 United States military bases and installations located outside the United States.

3.11 Antigua submits that the United States horse race betting industry has successfully used advances in communications technology to expand gambling opportunities. As a result, 85 per cent of bets on horse races are made away from the track where the race is run by means of "simulcasting," or the live broadcasting of horse races via satellite communication or other remote means.[43] This includes broadcasting to the television in the home with an opportunity to gamble from home via the

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See www.harrahs.com/e-totalrewards/overview.html. Harrah's customers can earn "reward credits" by gambling in one of Harrah's casinos. To earn these credits a gambler must use a magnetic card that identifies him and allows Harrah's to collect data on where, when and how much the specific customers gamble. This information is then used to develop targeted direct marketing initiatives. Customers can earn "reward credits" in all of Harrah's 24 casinos which are located in several markets in the United States. Rewards include, *inter alia*, "airfare to other Harrah's casinos like Las Vegas or New Orleans." Members of the customer loyalty program can consult their account on Harrah's website. The latter also contains a "Play for Fun" section where players can "learn to play a new game or check out one of [their] favourites." Playing these free games is only possible when you log in as a member of the customer loyalty program, thus revealing your identity. In an interview published in *Casino Journal* of January 2003 Mr. Phil Satre, then Chief Executive Officer of Harrah's, explained how such customer tracking programs have been a key element of Harrah's marketing strategy since at least 1978. Even then "reward credits" earned by gambling needed to be exchanged at gambling facilities so that "obviously that makes a visit to the property."

[37] Mr Gary Loveman, Harrah's President and Chief Operating Officer stated that "[O]ur website is just one example of how we're revolutionizing the way the casino industry utilizes technology". (…) It enables us to communicate directly with our customers and potential customers outside of the casino environment, expanding our marketing reach through effective, efficient application of information technology." See "Casino player awards record 251 Honors to Harrah's" (5 July 2001) at www.gamblingmagazine.com.

[38] For instance the Las Vegas based Mandalay has recently concluded an agreement to share customer data with the Mohegan Sun casino in Connecticut (an "Indian casino" and the second largest casino in the world). Mandalay will send direct marketing pitches to customers of the Mohegan Sun living within 350 miles from the Mohegan Sun (which includes cities such as New York, Philadelphia and Boston). The Mohegan Sun will do likewise with Mandalay customers. Casinos that enter into such agreements will, for instance, offer high spending gamblers a free weekend trip to the more remote casino. See "Mandalay Bay, Conn. casino in deal for marketing," *Las Vegas Sun* (29 August 2003).

[39] Jason N. Ader, *Bears Stearns 2002-03 North American Gaming Almanac*, Huntington Press, Las Vegas, Nevada, pp. 27-28 (2001 figures).

[40] Ibid. (2001 figures).

[41] Las Vegas Convention & Visitors Authority, *Historical Las Vegas Visitor Statistics: 1970 to 2002* (www.lvcva.com/pdf/historical_visitor_statistics.pdf).

[42] Ibid., see also Las Vegas Convention & Visitors Authority, *Frequently Asked Research Questions* (www.lvcva.com/press/faq.html).

[43] See the chart "US Horseracing Statistics", from the Jockey Club, 2003 Factbook Statistical Data.

Internet, the telephone or other means of communication. In 2000, the United States amended the Interstate Horseracing Act[44] to permit betting on horse races over the Internet.[45]

3.12 Antigua also notes that, as of 2002, Nevada had 160 licensed and regulated "bookmakers" which hosted wagering on all professional and amateur sports. When betting with a bookmaker a gambler bets against the bookmaker as opposed to betting against the other gamblers, as is the case with pari-mutuel betting. The most popular sports on which bets are made with Nevada bookmakers are American football, basketball and baseball.[46] Wagers are also accepted on hockey, golf, auto racing, soccer and other sports and athletic events.[47] In fiscal year 1998, sports betting in Nevada reached a high of US $2.3 billion (total amount wagered), generating US $77.4 million in revenues (profits).[48] Primarily due to competition from foreign sports gambling operators, the total amount wagered with Las Vegas bookmakers has slightly decreased since 1998.[49] In 2002, the total amount wagered was US $1.9 billion and industry profits were US $110 million.[50] Nevada bookmakers offer their services to home users via the Internet and the telephone.[51]

3.13 Antigua further submits that the lotteries offer a wide range of games including: (i) instant or scratch-card games, which are offered in all states with lotteries in a huge variety.[52] For example, the California Lottery currently has 39 separate scratch-card lottery games[53] while the Georgia Lottery offers 80 such games;[54] (ii) Lotto is also offered in almost every state with a lottery and typically involves a very high money prize or "jackpot". The current record prize in the United States for one winning lotto entry is US $ 296 million;[55] (iii) keno, which exists in two different types.[56] The first type is a regular periodic drawing one or two times per week. The other type of keno lottery is known as "fast draw" keno, where drawings occur on an electronic monitor every five minutes. As of 2002, keno games were operated by lottery operators in 11 states;[57] (iv) daily numbers games which, like lotto and keno, are a variety of random selection number games. The daily numbers games require players to make a three- or four-digit selection on a daily basis to win a fixed prize in the range of US

[44] Regulation of Interstate Off-track Wagering, 15 U.S.C. §§ 3001-3007, (hereinafter "Interstate Horseracing Act").

[45] Antigua notes that, in December 2000, the definition of off-track wager was amended to include "pari-mutuel wagers, where lawful in each state involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools." See United States General Accounting Office, GAO – 03-89, *Internet Gambling: An Overview of the Issues,* December 2002 (hereinafter, "GAO Report"), p. 43.

[46] Anthony N. Cabot and Robert D. Faiss, "Sports Gambling in the Cyberspace Era," 5 *Chapman Law Review* 1, Spring 2002, p. 7, footnote 33.

[47] Ibid.

[48] NGISC Final Report, p. 2-14, citing Robert Macy, "Ban on college Sports Betting Could Cost State Books Millions", *Las Vegas Review – Journal* (18 May 1999), 4A. The state-sanctioned sports betting market in Nevada makes up only a small fraction, about two per cent, of the total gaming revenues generated in Nevada.

[49] See the statements of Mr Joe Lupo, manager of a bookmaker in Las Vegas, reported in Michael Kaplan, op. cit. footnote 184, pp. 72-73.

[50] Nevada State Gaming Control Board, *Gaming Revenue Report for the year ending 31 December 2002*.

[51] See the advertisement of "Station Casino" for online sports betting in Nevada, in the *Las Vegas Review Journal* (28 August 2003).

[52] *La Fleur's 2001 World Lottery Almanac*, p. 21.

[53] See California Lottery's website, http://www.calottery.com/games/scratchers/scratchers.asp .

[54] See Georgia Lottery's website, www.galottery.com/stc/games/instantgamesCurrent.jsp?focus=games.

[55] *La Fleur's 2001 World Lottery Almanac*, p. 6.

[56] Ibid., p. 13.

[57] Ibid., p. 21. Examples of online promotions and instructions on how to play electronic keno can be viewed at: www.oregonlottery.org/keno/otherplay.shtml.

$500 to US $2,500. [58] Some states hold numbers drawings as often as four times per day. Daily numbers games are offered in almost every state with a lottery;[59] (v) video lottery terminals (VLTs), which are the newest and fastest growing type of gambling offered by lottery operators in the United States.[60] South Dakota introduced the first VLT network in the United States in 1989. Prior to the introduction of VLTs, the South Dakota lottery was struggling with total sales of US $21 million per year. A decade after introducing VLTs, the South Dakota lottery had grown to over US $500 million in annual total sales.[61] Currently VLTs are operated in the States of Delaware, Oregon, New York, South Dakota, Rhode Island, West Virginia, Louisiana and Montana.[62] As of 2000, there were over 60,000 VLTs in the United States with net sales of US $2.3 billion and profits of US $685 million.[63] In the United States, VLTs are viewed as a complementary product to traditional lottery games because they are often located in bars and taverns, establishments which have not been successful as retailers for lottery tickets in the past.[64] Historically, the primary opposition to the expansion of VLTs came from the horse race betting industry, which feared VLTs would reduce their turnover.[65] However, with the successful installation of VLTs at racetracks in Delaware, Louisiana, New York, Rhode Island and West Virginia, the horse race betting industry has become an active proponent of video gambling and actively lobbies for the legalization of VLTs at racetracks;[66] and (v) Sports betting. For instance, the Oregon lottery offers a sports betting game called "Sports Action".[67]

3.14 Finally, Antigua stresses that it is important to keep in mind what this dispute is not about. First, it is not about the Internet gaming industry in general. This proceeding is being brought by the government of Antigua and Barbuda on behalf of its domestic industry and for no other. Second, this is not about unregulated, "free for all" gambling. Antigua is a regulated jurisdiction. When it started developing this industry some eight or more years ago, it did so in a regulated context. Since then, Antigua has overhauled its regulatory scheme twice – most recently with direct participation and assistance from US gambling law experts. And it continues to work on refinements of and improvements to its regulatory scheme. Antigua believes that any resolution of this dispute between Antigua and Barbuda and the United States should take place in an agreed regulatory context. In the consultations with the United States, Antigua and Barbuda expressed its willingness to cooperate with the United States on a mutually agreeable regulatory scheme. The United States showed no interest in doing so, saying only that Internet-based gaming cannot be regulated. Antigua disagrees, as do others – the United Kingdom for example.

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[58] *La Fleur's 2001 World Lottery Almanac*, p. 12. Examples on online promotions and instructions on how to play daily number games, as well as to receive updates on winning numbers, can be viewed at www.oregonlottery.org/pick4/index_beer.shtml.

[59] *La Fleur's 2001 World Lottery Almanac*, p. 21.

[60] Ibid., p. 14.

[61] Ibid., p. 14.

[62] Ibid., p. 14. The Oregon legislature began offering video lottery gaming in 1991 in order to replace the 10,000 gaming machines operating in the grey market. The Oregon legislature contends that the benefits of state-run VLTs include the generation of revenue for state programs, ensuring VLTs were run honestly and fairly and ensuring that taxes were paid on VLT winnings (www.oregonlottery.org/video/aboutvideo.shtml).

[63] *La Fleur's 2001 World Lottery Almanac*, p. 31.

[64] *La Fleur's 2001 World Lottery Almanac*, p. 14.

[65] Ibid., p. 14.

[66] Ibid., p. 14. See also "Match Made in heaven–Lotteries and tracks have proven to be a great partnership with VLTs", *International Gaming and Wagering Business*, July 2003. In this Article Mr John Musgrave of the West Virginia Lottery is quoted as follows: "A great deal of the success that can be found in West Virginia's racetrack video lottery is the result of the foresight held by lawmakers who recognized the virtue of allowing private businesses to undertake the cost and risk of development and general operation while giving the lottery a regulatory role."

[67] Oregon Lottery, www.oregonlottery.org/sports/.

3.15 The **United States** replies that the recent growth in the remote supply[68] of gambling raises serious regulatory concerns for the Government of the United States. New technologies, including high-speed telecommunications and the Internet, have facilitated explosive growth in remote supply of gambling over the past decade. This dramatic increase, whatever its origin, has raised serious regulatory and law enforcement concerns in the United States, where authorities throughout US history have consistently imposed tight regulation on gambling and the remote supply of gambling. Gambling has been one of the staple activities of organized crime syndicates. Law enforcement authorities in North America have seen evidence that organized crime plays a growing part in remote supply of gambling, including Internet gambling. In 1999, the Racketeering Records Analysis Unit of the Federal Bureau of Investigation provided an analysis to the Senate Committee on the Judiciary confirming that "organized crime groups are 'heavily involved' in offshore gambling."[69] On April 29, 2003, Deputy Assistant Attorney General John Malcolm testified at a Congressional hearing that the "Department of Justice is concerned about the potential involvement of organized crime in Internet gambling. ... We have now seen evidence that organized crime is moving into Internet gambling."[70] The Canadian Criminal Intelligence Service has confirmed the involvement of organized crime in Internet gambling, and expects that it will further develop the criminal opportunities associated with Internet gambling.[71]

3.16 Remote supply gambling businesses provide criminals with an easy vehicle for money laundering, due in large part to the volume, speed, and international reach of the transactions involved, as well as the offshore locations of most remote suppliers. The industry is far more cash-intensive than conventional forms of telephone or Internet commerce, yet it lies outside the special regulatory and monitoring structures developed for financial services. Individuals seeking to launder ill-gotten gains through remote supply gambling operations can do so in a variety of ways. The anonymous nature of the interactions and the use of encryption make such transactions difficult to trace. The NGISC, a body established by the US Congress with a mandate to conduct a comprehensive study of the social and economic impacts of gambling, observed in 1999 that:

> "[G]ambling on the Internet may provide an easy means for money laundering. Internet gambling provides anonymity, remote access, and encrypted data. To launder money, a person need only deposit money into an offshore account, use those funds to gamble, lose a small per cent of the original funds, then cash out the remaining funds. Through the dual protection of encryption and anonymity, much of this activity can take place undetected."[72]

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[68] The United States notes that Antigua refers to the supply of gambling services using communications technologies as "cross-border" supply. In the context of this dispute, overuse of the term "cross-border" may create confusion. In fact, a particular activity, such as placing a bet by telephone, may or may not involve communication across a national border. For greater clarity, the United States will therefore refer to supply of gambling services by telephone, Internet or other forms of distance communications as "remote supply" of gambling services. The United States will refer to "cross-border" supply only in the strict sense of GATS Article I:2(a), meaning supply of a service "from the territory of one Member into the territory of any other Member."

[69] Internet Gambling Prohibition Act, Senate Report No. 106-121, p. 16 (1999).

[70] Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Congress 10 (2003) (statement of John G. Malcolm).

[71] Criminal Intelligence Service Canada, 2003 Annual Report on Organized Crime in Canada, pp. 16-17.

[72] NGISC Final Report, p. 5-6 (June 1999). See also Financial Action Task Force, Report on Money Laundering Typologies 2000-2001 at para. 16 (2001) ("It seems that Internet gambling might be an ideal web-based 'service' to serve as a cover for a money laundering scheme through the net. There is evidence in some FATF jurisdictions that criminals are using the Internet gambling industry to commit crime and to launder the proceeds of crime...").

3.17 Gambling is also linked to other types of criminal activities, such as fraud schemes. Criminal fraud schemes have been committed by both the operators of the gambling activity and by the customers of the gambling activity. A prominent example is the problem of fraudulent lotteries, many of which are offered to remote purchasers. The leading US consumer protection agency, the Federal Trade Commission ("FTC"), has warned citizens in the United States about criminal operators that use telephone and mail solicitations to sell fraudulent foreign lottery tickets.[73] In 2002, fraudulent prizes, sweepstakes, and lotteries were among the top ten consumer complaints to the FTC.[74] The FTC has found that most promotions for foreign lotteries are fraudulent.[75] The potential for fraud is heightened when gambling opportunities are supplied from remote locations. The barriers to establishing an online gambling operation are low and unscrupulous operators can appear and disappear within minutes. Criminal firms can obtain customer credit card numbers, take money to open wagering accounts, and then shut down without paying winnings. Moreover, unscrupulous operators can tamper with software in order to manipulate games in their favour. Computer hackers can also alter software to the detriment of consumers.[76]

3.18 The availability of commercial gambling in homes, schools, and other environments where it has traditionally been absent raises special concerns, including concerns relating to the protection of the young. US law regards gambling as an adult activity. However, young people use the Internet more frequently than any other segment of the population. The NGISC reported that more than 69 per cent of 18- to 24-year-olds in the United States use computers for an average of four hours per day.[77] Children make easy targets for remote suppliers of gambling: "[M]any of these gambling web sites have been designed to resemble video games, and therefore are especially attractive to children."[78] The NGISC also found that "[b]ecause the Internet can be used anonymously, the danger exists that access to Internet gambling will be abused by under age gamblers."[79] The American Psychiatric Association has similarly warned that "[y]oung people are at special risk for problem gambling and should be aware of the hazards of this activity, especially the danger of Internet gambling, which may pose an increased risk to high school and college-aged populations."[80] A US Senate Committee considering Internet gambling legislation in 1999 was "particularly concerned about the growth of Internet gambling because young people have been shown, in recent studies, to have significant and growing problems with sports betting. For example, a 1998 study at the University of Michigan found that 35 per cent of student-athletes gambled on sports while attending college."[81] A "growing consensus of research reveals that the rates of pathological and problem gambling among college students are higher than any other segment of the population," the report found.[82] The US Supreme Court has more generally found that "[g]ambling . . . falls into a category of 'vice' activity that could be, and frequently has been, banned altogether."[83] As the explosion in remote supply of gambling has reached homes, schools, workplaces – indeed, any location with an Internet connection – it has provoked greater concern than more isolated forms of gambling because it

[73] FTC Consumer Alert, International Lottery Scams (January 2000).

[74] Federal Trade Commission, A Positive Agenda For Consumers: The FTC Year in Review at p. 13, box 4 (April 2003).

[75] FTC Consumer Alert, International Lottery Scams, January 2000.

[76] See Unlawful Internet Gambling Funding Prohibition Act, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary (statement of John G. Malcolm), p. 10.

[77] NGISC Final Report, p. 5-4.

[78] Senate Report No. 106-121, p. 13 (quoting testimony of Jeffrey Pash, executive vice president of the National Football League).

[79] NGISC Final Report, p. 5-4.

[80] American Psychiatric Association, *APA Advisory on Internet Gambling* (16 January 2001).

[81] Senate Report No. 106-121, p. 14.

[82] Ibid. (quoting testimony of Bill Saum, Director of Agent and Gambling Activities for the National Collegiate Athletic Association).

[83] *United States v. Edge Broadcasting Co.,* 509 U.S. 418, 426 (1993).

is inherently more difficult to control.[84] While many Americans participate in various limited forms of legalized gambling, it remains true nonetheless that restrictions on remote supply of gambling services in the United States reflect legislators' and citizens' concerns about their inability to control an activity as to which many individuals and groups harbour serious ethical and religious reservations.[85]

3.19 Finally, the supply of gambling into private homes, workplaces, and other environments creates additional health risks. The Council on Compulsive Gambling reports that five per cent of all persons who engage in gambling become addicted to it. Dr. Howard J. Schaffer of the Harvard Medical School's Division on Addictive Studies compares Internet gambling to "new delivery forms for addictive narcotics,"[86] and a US Senate committee has concluded that "Internet gambling threatens to expand the number of addicted gamblers."[87]

3.20 The United States further argues that Antigua's statement of facts contains misleading statements, inaccuracies, and irrelevant material. Many of the disputable facts appear to have little bearing on the substance of this proceeding. For the sake of brevity and clarity, the United States focuses on the most broadly misleading elements of Antigua's statement. Contrary to what is asserted by Antigua, the United States actively enforces its laws against domestic illegal gambling. In fact, illegal gambling activity is in no way sanctioned by the United States, and arrest figures for illegal gambling remain impressive. Additionally, Antigua's data do not appear to include the many cases in which gambling was one of several charges, but not the main charge. For example, many cases against organized crime figures include gambling charges. Gambling in the United States is permitted only within particular locations and facilities designated by law, and only in forms that the United States believes can be effectively regulated. Where it exists, it operates under the most rigorous regulatory constraints. As the NGISC observed, "nowhere is gambling regarded as merely another business, free to offer its wares to the public."[88] Instead, gambling "is the target of special scrutiny by governments in every jurisdiction where it exists."[89] The purpose of that regulatory scrutiny is to protect the public, not to protect domestic industry. Indeed, if its purpose were protectionist, it would have failed miserably, since numerous foreign suppliers of gambling services are already present in the US market. Regardless of foreign or domestic origin, all providers of gambling services in the United States operate under severe restrictions. And when it comes to remote supply of gambling, those restrictions are particularly stringent.

3.21 The United States submits that it is puzzled by the breadth of Antigua's description of the gambling market in the United States. Antigua states that it licenses only two types of cross-border

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[84] Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Cong., p. 7 (2003) (statement of the Honorable James A. Leach, Representative in Congress from the State of Iowa) ("Casino gambling as it has been sanctioned in all Western democracies has only been allowed to exist with comprehensive regulation. Internet gambling lacks such safeguards. It is a danger to the family and society at large. It should be ended. From a family perspective, the home may be considered a castle; but it should never be a casino.").

[85] By way of illustration, an unsuccessful 1999 proposal for additional federal legislation restricting Internet gambling enjoyed support from, among others, the African Methodist Episcopal Church; the American Muslim Council; the Christian Coalition; the Church of Jesus Christ of Latter Day Saints; the Family Research Council; Focus on the Family; Friends United Meeting; the National Coalition Against Gambling Expansion; the National Council of Churches; the Presbyterian Church; Rev. Jay Lintner, Director, Washington Office of the United Church of Christ, Office of Church in Society; the United Methodist Church, General Board of Church and Society; the Southern Baptist Convention, Ethics and Religious Liberty Commission; and the Traditional Values Coalition. Senate Report No. 106-121, p. 9 (1999).

[86] Internet Gambling Prohibition Act, Senate Report No. 106-121, (1999), p. 15.

[87] NGISC Final Report, p. 4-1.

[88] NGISC Final Report, p. 3-1.

[89] Ibid.

gambling and betting – "virtual casinos" and sports betting ("sports book") operators, with the former supplied by Internet and the latter by Internet and telephone. These would therefore appear to be the only Antiguan services and service suppliers at issue in this dispute. Concerning casino gambling, Antigua highlights two locations where regulated casino gambling is available – Nevada and Atlantic City – but fails to acknowledge the extreme stringency with which officials in these and other US locations exercise regulatory control over gambling. Antigua also fails to cite any example of a "virtual casino" operating legally anywhere in the United States.

3.22 Antigua's description of lotteries in the United States is misleading. There is no nationwide lottery industry; rather, there are 39 state-operated and -controlled lotteries, each of which offers services solely within the borders of the state that authorized it. All are controlled by stringent legislation, rules and procedures. While there are some lottery games that are offered by lottery authorities of more than one state, they are not offered by remote supply. Similarly, Antigua's description of pari-mutuel wagering mistakenly states that the Interstate Horseracing Act permits betting on horse races over the Internet. The Interstate Horseracing Act does not provide legal authority for any form of Internet gambling. As clarified in the Presidential Statement on Signing accompanying the bill enacting the December 2000 amendments to the IHA, nothing in the IHA (a civil statute) overrides the previously enacted criminal laws applicable to Internet gambling. Specifically, then-President Clinton stated that:

> "The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular, sections 1084, 1952, and 1955 of Title 18, United States Code."[90]

3.23 The Department of Justice has repeatedly affirmed the view that the Interstate Horseracing Act does not override pre-existing criminal laws applicable to Internet gambling and other forms of remote gambling. Indeed, Antigua's own evidence confirms this.[91]

3.24 Finally, with respect to sport wagering, Antigua identifies no examples of the legal offering of sports book services outside Nevada. Nevada regulators have imposed stringent precautions to ensure that sports book services offered by computer and telephone in southern Nevada are provided only within the immediate vicinity, and not through Internet gateways accessible to the general public.

3.25 The United States submits that Antigua's attempts to regulate gambling and money laundering cannot address basic concerns relating to remote supply of gambling. Antigua states that it introduced "industry-directed" regulation of gambling as early as 1997, and that it maintains financial sector regulations that meet or exceed international standards. The United States wishes to comment on these statements briefly even though it notes that Antigua fails to link these assertions to its substantive arguments. Antigua asserts that Antiguan operators "undertake some form of identity verification" of persons who register to use Antiguan gambling services. Antigua further states that children do not register to play on Antiguan gambling sites because children lack access to payment instruments, or because their parents can stop them. In fact, such regulation is infeasible. Children have ready access to payment instruments, and no technology has yet been developed to enable

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[90] Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act, 2001, 36 Weekly Comp. Pres. Doc. 3153, 3155-3156 (December 21, 2000), Exhibit U.S.-17.

[91] See M. Shannon Bishop, *And They're Off: The Legality of Interstate Pari-Mutuel Wagering and its Impact on the Thoroughbred Horse Industry,* 89 Kentucky Law Journal 711, 713 (2001) ("[T]he Department of Justice has recently taken the position that interstate pari-mutuel wagering violates the Interstate Wire Act, indicating that the horseracing industry proceeds in its business at its own risk."), submitted by Antigua to the Panel as Exhibit-39.

constraints on Internet gambling even approaching those that are possible in other settings where gambling can be confined and access to it strictly controlled.[92]

3.26 **Antigua** rejects the US argument that Antigua's arguments contain inaccuracies and misstatements. For instance, Antigua did not misrepresent the law enforcement efforts of the United States when it comes to controlling its non-sanctioned gambling activity. The statistics themselves – from about 123,000 arrests in 1960 down to around 15,000 arrests in 1995 – remain unchallenged and impressive. The United States also fails to describe, much less to establish, how Antigua's description of the lottery industry in the United States is misleading. There are other examples, in each case unfounded and unproven. For instance, the United States submits that the Las Vegas Internet sports betting service referred to by Antigua does not operate on the Internet but on a "local 'Private Network". In reality, the advertisement refers to a so-called "Virtual Private Network". This is a security technology used over the Internet, not a separate local network.

3.27 Antigua submits that the United States has in large part chosen to ignore the points made and evidence offered by Antigua and Barbuda as if they were not made and not offered – with the result being that many of Antigua's arguments have not been rebutted or even addressed. For example, the United States assumes that Antigua is an unregulated jurisdiction. This is not the case and the United States adduced no evidence contradicting Antigua's evidence regarding regulation. As a result the extensive discussion by the United States regarding the ills of unregulated gambling becomes irrelevant. Another striking feature of the US submission is its reliance on completely unsubstantiated, conclusory statements that it describes as "fact." On the few occasions an attempt is made at substantiation, most references are to self-serving statements of American politicians and government officials. In the rare instances where the United States does cite independent sources, the sources prove to be either taken out of context (such as the quote in paragraph 3.19 attributed to Dr. Howard Shaffer who was in fact referring to all forms of electronic gambling and betting), or of dubious value.

B. LEGAL ARGUMENTS

1. Applicability of the GATS

3.28 **Antigua** submits that, in *Canada – Autos*, the Appellate Body found that a threshold question for the application of the GATS is whether the measure at issue is a measure "affecting trade in services."[93] In this dispute it is clear that this is the case. First, there can be no real dispute that the offerings of the gaming industry of Antigua to consumers in the United States and elsewhere constitute "services". Second, it has been firmly established in WTO law that what constitutes "measures (…) affecting trade in services" is to be very broadly construed. As stated by the Appellate Body in *EC – Bananas III:*

> "In our view, the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms

[92] For example, in 2002, the Federal Trade Commission conducted an informal survey in which found that minors could easily access gambling websites. The survey also found that there was no effective mechanism to block minors from entering. Federal Trade Commission, Press release: FTC Warns Consumers about Online Gambling and Children (26 June 2002). See also NGISC Final Report, p. 5-4. ("In most instances, a would-be gambler merely has to fill out a registration form in order to play. Most sites rely on the registrant to disclose his or her correct age and make little or no attempt to verify the accuracy of the information. Under age gamblers can use their parents' credit cards or even their own credit and debit cards to register and set up accounts for use at Internet gambling sites.).

[93] Appellate Body Report on *Canada – Autos*, para. 152. See also Article I:1 of the GATS.

> as 'regulating' or 'governing'. (…) We also note that Article I:3(b) of the GATS provides that 'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority' (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS."[94]

3.29 The services at issue are supplied from Antigua by means of distant communication (in particular through Internet connection, telecommunications or postal or delivery services) into the territory of the United States. Antigua submits that this constitutes "mode 1" or "cross-border" supply of services, as defined in Article I:2(a) of the GATS. This view is supported by paragraph 19 the 1993 Scheduling Guidelines which gives examples for the four modes of supply; this same paragraph has been confirmed, unchanged, in paragraph 28 of the 2001 Scheduling Guidelines[95]. Antigua further notes that a "Progress Report" adopted by the Council for Trade in Services on 19 July 1999 concerning the "Work Programme on Electronic Commerce" mentions that "there was particular difficulty" in making a distinction between supply under modes 1 and 2 ("cross-border supply" and "consumption abroad," respectively).[96] While that may be the case in certain circumstances Antigua believes that this is not the case here.[97] In any event whether the gambling and betting services at issue in this proceeding are supplied in mode 1 or mode 2 does not have a material impact on this dispute because the United States has made the same commitments for both modes of supply.

2. As to whether the United States has undertaken a specific commitment on gambling and betting services[98]

3.30 **Antigua** argues that the GATS itself is a relatively brief document. The full nature and extent of each Member's obligations under the GATS can only be determined by reference to their respective "schedules of specific commitments" that are mandated by GATS Article XX:1. Once developed, the schedules of specific commitments of the Members "shall be annexed to [the GATS] and shall form an integral part thereof."[99] Antigua submits that, in its Schedule of commitments under the GATS[100], the United States has made a full commitment for the cross-border supply of services classified under sub-sector 10.D "Other recreational services (except sporting)."[101] In drafting its Schedule, the United States made use of the Services Sectoral Classification List prepared by the GATT Secretariat during the Uruguay Round multilateral trade negotiations.[102] Sub-sector 10.D of W/120 is headed

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[94] Appellate Body Report on *EC – Bananas III*, para. 220.

[95] *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)*, adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001 (hereinafter the "2001 Scheduling Guidelines").

[96] S/L/74, para. 5

[97] Antigua notes that the 1993 Scheduling Guidelines provide the following explanation about "consumption abroad": "This mode of supply is often referred to as 'movement of the consumer'. The essential feature of this mode is that the service is delivered outside the territory of the Member making the commitment. Often the actual movement of the consumer is necessary as in tourism services. However, activities such as ship repair abroad, where only the *property* of the consumer 'moves,' or is situated abroad, are also covered." See *Scheduling of Initial Commitments in Trade in Services – Explanatory Note*, MTN.GNS/W/164, 3 September 1993, para. 19 (hereinafter the "1993 Scheduling Guidelines"). This definition is taken over without change in para. 29 of the 2001 Scheduling Guidelines.

[98] In addition to the arguments presented here, see also parties' replies to Panel question Nos. 1-8 and 30-31 in Annex C of this Report.

[99] GATS, Article XX:3.

[100] *The United States of America – Schedule of Specific Commitments*, GATS/SC/90, 15 April 1994 (hereinafter the "US Schedule").

[101] Antigua notes that, with regard to that sector, the United States has also made a full commitment for "consumption abroad."

[102] *Services Sectoral Classification* List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991 (hereinafter the "W/120").

"Sporting and other recreational services" and lists "964" as the corresponding CPC number.[103] Its heading 964 "Sporting and other recreational services" is broken down as follows:

"964 Sporting and other recreational services
9641 Sporting services
96411 Sports event promotion services
96412 Sports event organization services
96413 Sports facility operation services
96419 Other sporting services

9649 Other recreational services
96491 Recreation park and beach services
96492 Gambling and betting services
96499 Other recreational services n.e.c."

3.31 Sub-sector 10.D of the US Schedule is headed "Other recreational services (except sporting)". Thus the United States has clearly excluded CPC category "9641 Sporting services" from the commitments it has made in sub-sector 10.D of its Schedule. By the same token sub-sector 10.D of the US Schedule clearly includes CPC category "9649 Other recreational services" which encompasses CPC category "96492 Gambling and betting services". During consultations with the United States, Antigua fully disclosed its interpretation of the US Schedule and the legal basis for that interpretation to the United States, both orally and in writing. In reply the United States simply denied that it has made commitments for gambling and betting services. Despite being asked to do so by Antigua the United States has not explained: (i) why Antigua's interpretation of the Schedule is legally incorrect; (ii) what alternative approaches should be followed to interpret the US Schedule; or (iii) what type of activities are, in the view of the United States, covered by sub-sector 10.D "Other recreational services (except sporting)" in its Schedule.

3.32 Antigua submits that, because the US Schedule is made an integral part of the GATS by Article XX:3 of the GATS, it must be interpreted on the basis of the general rules of interpretation provided for in Article 31 of the Vienna Convention.[104] Antigua's interpretation of the US Schedule follows from: (i) the ordinary meaning of the words "Other recreational services" (Article 31:1 of the Vienna Convention); (ii) agreements and instruments connected to the conclusion of the GATS that are part of its context (Article 31:2 of the Vienna Convention); and (iii) practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31:3 of the Vienna Convention). None of the interpretation methods permitted by the Vienna Convention contradicts Antigua's interpretation of the US Schedule.

3.33 Antigua argues that even an interpretation exclusively based on the ordinary meaning of the words "other recreational services" in the US Schedule leads to the plausible conclusion that gambling and betting services fall within this broadly worded category. It could perhaps be argued that, if only taking into account the "ordinary meaning" of the words, gambling and betting services might be classified under "Entertainment services" (sub-sector 10.A of the US Schedule). However, that would not change the conclusion because the United States also made a full commitment for cross-border supply of services under that category.[105]

[103] Panel Report on *EC – Bananas III (US)*, para. 7.289 and 1993 Scheduling Guidelines, para. 16.
[104] See, by analogy, Appellate Body Report on *EC – Computer Equipment*, para. 84 (concerning the interpretation of a GATT 1994 Schedule).
[105] Antigua notes that the United States also has a full commitment for "consumption abroad" for sub-sector 10.A "Entertainment services".

3.34 Antigua argues that the two most important documents that are part of the context of the GATS for the interpretation of any GATS schedule are the W/120 list and the 1993 Scheduling Guidelines. Paragraph 16 of the 1993 Scheduling Guidelines provides that:

> "[T]he legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on [W/120]. Each sector contained in [W/120] is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognized classification (e.g. Financial Services Annex)."

3.35 This paragraph was carried over in the 2001 Scheduling Guidelines without change. The US Schedule clearly follows the structure of W/120, with the exception of insurance services (sub-sector 7.A) in relation to which the Schedule explicitly states (no doubt pursuant to the Scheduling Guidelines) that "[C]ommitments in this sub-sector are undertaken pursuant to the alternative approach to scheduling commitments set forth in the Understanding on Commitments in Financial Services."

3.36 Antigua states that, during consultations, the United States submitted that W/120 is not a legally binding document. It also stated that the 1993 Scheduling Guidelines provide only general guidance and that the document itself provides in paragraph 1 that it "should not be considered as an authoritative legal interpretation of the GATS." The latter phrase, however, only confirms what is obvious in the light of Article IX:2 of the WTO Agreement which reserves the right to make such interpretations to the Ministerial Conference and the General Council. Furthermore this phrase does not relate to a provision such as paragraph 16 of the 1993 Scheduling Guidelines which provides no interpretation at all (unlike, for instance, paragraph 7 which interprets the national treatment principle). Paragraph 16 (and various others) merely explain how WTO Members should schedule items and how, in the interest of clarity, they should provide concordance with the CPC (or additional definitions) should they wish to use their own classifications or definitions. In doing so, these paragraphs simply set a standard for clear and unambiguous communication in a legal context requiring "the greatest possible degree of clarity."[106] In the absence of such standards for communication, GATS schedules could have varied wildly in the drafting and WTO Members might not have been able to understand each other's schedules. In that light, documents such as the Scheduling Guidelines and W/120 obviously form a very important part of the context of the US Schedule.

3.37 Antigua submits that W/120's status as an "agreement" or "instrument" that is part of the context of the GATS (and the WTO Agreement in general) is further confirmed by Article 22 of the DSU concerning the suspension of concessions in relation to non-compliance with rulings and recommendations of the DSB. Paragraph (3)(f)(ii) of Article 22 provides that "for purposes of this paragraph, 'sector' means: [...] (ii) with respect to services, a principal sector as identified in the current 'Services Sectoral Classification List' which identifies such sectors".[107] Given the clear importance and acceptance of W/120 in construing Member's commitments under the GATS, the United States had the ability unambiguously to exclude gambling and betting services from its commitments under its Schedule. Indeed, numerous WTO Members that made commitments for

[106] 1993 Scheduling Guidelines, para. 16.
[107] The original footnote provides "[T]he list in document MTN.GNS/W/120 identifies eleven sectors."

sub-sector 10.D have totally or partially excluded gambling and betting services from the scope of their commitment in that sector.[108] The United States has not done so.

3.38 Antigua observes that, since the entry into force of the GATS, WTO Members have consistently referred to W/120 (and its cross-references to the CPC) as the classification used for GATS purposes and as the main point of reference for any discussion on the classification of services. The Appellate Body has used the CPC as an interpretative tool even when the issue at stake was the scope of the GATS in general rather than the interpretation of a Member's schedule. In *EC – Bananas III*, for instance, the Appellate Body refers to the CPC when it draws the conclusion that banana traders of United States origin are service suppliers and that their activities come within the scope of the GATS.[109] This qualification allowed the application of Article II of the GATS (application of which is not linked to Member's schedules) to the situation at issue in *EC – Bananas III (US)*. In *Canada – Autos*, several WTO Members and the Panel itself referred to the 1993 Scheduling Guidelines and its addendum[110] when discussing the interpretation of GATS schedules and the GATS itself.[111] None of the parties in that dispute (nor the Panel) submitted that it would be inappropriate to make use of the 1993 Scheduling Guidelines for the interpretation of GATS schedules. Finally, even the United States International Trade Commission (hereinafter "USITC") uses W/120 and its cross-references to CPC as a tool to interpret the US Schedule. In 1997, the USITC published a document explaining the US Schedule.[112] On page viii of that document, it is stated that "[T]he US Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list." The USITC Document also contains a "Concordance of Industry Classifications" which is described as follows:

> "The concordance developed by the USITC clarifies how the services sectors referenced in the GATT Secretariat's list, the CPC System, and the US Schedule correspond. The first column of the concordance identifies the service sectors listed by the GATT Secretariat. The second column identifies the CPC classifications that correspond to the GATT Secretariat's list. The third column identifies the sectors addressed in the US Schedule, and the fourth column provides more detailed information regarding the structure and coverage of the US Schedule."[113]

3.39 According to the actual concordance table included in the USITC Document, sub-sector 10.D of the US Schedule corresponds to sub-sector 10.D of W/120 and CPC code 964. The fourth column (in which more information is provided on the structure and coverage of the US Schedule) provides that sub-sector 10.D of the US Schedule excludes "sporting." It does not, however, state that gambling and betting services, which are covered by CPC code 964, are excluded from the US Schedule.

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[108] Antigua notes that, for instance, Austria, Bulgaria, the European Communities, Finland, Slovenia and Sweden excluded gambling from the scope of their respective commitments under sub-sector 10.D by specifically using the words "other than gambling" or similar words.

[109] Appellate Body Report on *EC – Bananas III*, paras. 225-227. See also the Appellate Body Report on *Canada –Autos*, para. 157, where the Appellate Body draws the conclusion that there is "trade in services" in that case, *inter alia*, on the basis of a reference to the CPC.

[110] *Scheduling of Initial Commitments in Trade in Services: Explanatory Note – Addendum*, MTN.GNS/W/164/Add.1, dated 30 November 1993.

[111] Panel Report on *Canada – Autos*: for Canada, see para. 10.241; for Japan, see para. 6.1002; for both complaining parties (i.e. Japan and the EU), see para. 10.295; for the Panel itself, see para. 10.243.

[112] United States International Trade Commission, *US Schedule of Commitments under the General Agreement on Trade in Services – With explanatory materials prepared by the U.S. International Trade Commission* (hereinafter "USITC Document"), dated May 1997. As is stated on page vii of the USITC Document, the USITC has "assumed responsibility for maintaining and updating, as necessary, the United States' Schedule of Commitments (…)."

[113] Ibid., page viii.

3.40 The **United States** replies that Antigua has failed to explain why any particular US gambling measure(s) that might be relevant in this dispute apply to services or service suppliers operating in a specific services sector inscribed in the US Schedule to the GATS. Instead, Antigua simply asserts that all gambling falls within "other recreational services," or possibly within "entertainment services," and that the United States has made commitments in its schedule under "other recreational services" and "entertainment services." The commitments that a Member schedules for specific sectors under Part III of the GATS apply to the Member's measures affecting the supply of services in those sectors. Article XVI:2 thus refers to certain "measures which a Member shall not maintain or adopt," and Article XVII:1 refers to national treatment "in respect of all measures affecting the supply of services." Article XVIII refers to "commitments with respect to measures." Articles XIX:1 and XX:2 also refer to "measures." In order to establish the relevance of any commitment that the United States may have made, Antigua must therefore make a *prima facie* case: (i) that the United States has adopted or maintained some specific measure(s); (ii) that the scope and meaning of the specific measure(s) adopted or maintained is such that they affect the cross-border supply of gambling services; (iii) that the United States has inscribed a commitment in the relevant sector of its schedule to the GATS for measures affecting those services; and (iv) that the commitment prohibits the maintenance or adoption of such measure(s). In this case, Antigua has refused to make a case as to steps (i) or (ii). This in turn makes it impossible to carry out steps (iii) and (iv). Had Antigua argued the existence and meaning of particular measures, the United States would have been prepared to examine under step (iii) whether the measures affect services subject to one or more US sectoral commitments. By refusing to offer argumentation as to specific measures, however, Antigua has denied the Panel any means to examine whether the United States has made any relevant sectoral commitments under the GATS.

3.41 The United States argues that, even assuming *arguendo* the possible relevance of sector 10, Antigua's claims to find there a US commitment for cross-border supply of gambling services rely on the W/120 and its references to the CPC. These arguments improperly treat W/120 as an agreement or instrument made in connection with the conclusion of the GATS under the customary rules of interpretation of public international law reflected in Article 31(2)(a) or 31(2)(b) of the Vienna Convention. In fact, W/120 is part of the negotiating history of the GATS, which is at best a supplementary means of interpretation pursuant to the customary rules of interpretation of public international law reflected in Article 32 of the Vienna Convention.[114] The context for the US Schedule includes other Members' schedules.[115] Accordingly, the proper context for the US Schedule includes the fact that some Members based their schedules, or parts of them, on the CPC, while others did not. There are a multitude of references to the CPC in some of the Members' schedules, while the US Schedule clearly does not reference or rely on the CPC. This context confirms that Members were free not to use CPC definitions – simply by not referring to them.[116] In fact, many Members' schedules refer to the CPC for some commitments but not all, while others deviate from the W/120 correspondence table comparing W/120 to the CPC by identifying W/120 entries with CPC numbers that represent only a subset of the three-digit CPC numbers listed in W/120. The negotiating history of the GATS confirms that, while Members were encouraged to follow the broad structure of W/120,

[114] The United States notes that, while not saying so explicitly, the *EC – Bananas III (US)* panel appears to have regarded W/120 as part of the negotiating history of the GATS. See Panel Report on *EC – Bananas III (US)*, para. 7.289 (discussing W/120 in the context of the Uruguay Round negotiations). Moreover, W/120 was drawn up by the Secretariat for use for use in negotiations; as such it does not constitute an "agreement relating to the treaty which was made by all the parties" or an "instrument ... accepted by the other parties as an instrument related to the treaty." See Panel Report on *US – Section 110(5) Copyright Act*, para. 6.45. This is confirmed by the fact that some parties referred to it in their schedules and others did not.

[115] According to the United States, the other schedules are "annexes" within the meaning of Vienna Convention Article 31(2). Article XX:3 of the GATS confirms this by providing that "[s]chedules of specific commitments shall be annexed to this agreement and shall form an integral part thereof."

[116] The United States adds that some schedules include interpretive notes in which certain Members agreed that their schedules would have the meaning attributed to them by the CPC, while other schedules include different interpretive notes, or none at all.

it was never meant to bind Members to the CPC definitions, nor to any other "specific nomenclature."[117] Because the United States did not bind itself to, or reference or rely on, the CPC in the text of its schedule, the CPC definitions cannot control the interpretation of the US Schedule.

3.42 The United States submits that the question of whether to tie commitments of the United States or any other Member to CPC definitions was a matter for negotiations, the answer to which should not be imposed *post hoc* through dispute settlement. To do so would contradict the principles relied upon by the Appellate Body in *EC – Computer Equipment,* where the Appellate Body found, with respect to a GATT schedule, that:

> "Tariff negotiations are a process of reciprocal demands and concessions, of "give and take". It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. ... We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for all interested parties."[118]

3.43 The reasoning in *EC – Computer Equipment* is equally applicable to negotiations over services schedules. The terms of the US offer, and of certain other Members' offers, were defined without reference to the CPC. All Members agreed to those schedules, and did so with full awareness that some parties had explicitly chosen to bind themselves to the CPC and others had not.[119] The significance of the presence or absence of explicit CPC references in a commitment was confirmed by the panel in *EC – Bananas III (US).* The panel observed that "in scheduling commitments on 'wholesale trade services', the EC inscribed the CPC item number (622) in its services schedule."[120] It was on the basis of this text that the panel reasoned that: "[T]herefore, any breakdown of the sector should be based on the CPC. Consequently, any legal definition of the scope of the EC's commitment in wholesale services should be based on the CPC description of the sector and the activities it covers."[121]

3.44 The United States further submits that a proper interpretation of the US Schedule, without recourse to the CPC, would show that the United States made no commitment for measures affecting gambling services. In order to give effect to the terms of the wide variety of GATS schedules, the Panel must distinguish between "CPC commitments," which include textual references to numerical CPC codes, and "non-CPC commitments," the text of which make no reference to the CPC. The *EC – Bananas III (US)* panel addressed interpretation of CPC commitments[122], but no panel has yet addressed the interpretation of non-CPC commitments. Because of the absence of a textual basis for

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[117] See *Note on the Meeting of 27 May to 6 June 1991*, MTN.GNS/42, paras.18-19 (24 June 1991) ("The representatives of the United States, Poland, Malaysia and Austria said that the [sectoral classification] list should be illustrative or indicative and not bind parties to any specific nomenclature.").

[118] Appellate Body Report on *EC – Computer Equipment*, paras. 109-110.

[119] Ibid. ("while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members."). The United States submits that Antigua's CPC argument also improperly relies on a document by the USITC, which it refers to under the heading of "practice in the application of the treaty." This document does not constitute practice by parties to a treaty for purposes of the customary rule of interpretation reflected in Article 31:2(b) of the Vienna Convention. See Appellate Body Report on *Chile – Price Band System*, paras. 213-214. Moreover, the document in question has no legal significance. The explicit purpose of the concordance in the document is only to "facilitate comparison of the US Schedule with foreign schedules."

[120] Panel Report on *EC – Bananas III (US),* para. 7.289.

[121] Ibid.

[122] Ibid.

referring to the CPC, the legal definition of the scope of a non-CPC commitment must be deduced through application of customary rules of treaty interpretation.

3.45 The United States notes that Antigua's allegations regarding a possible US commitment for gambling services rely on sectors 10.A and 10.D of the US Schedule to the GATS. However, the relevant text makes no explicit reference to gambling services. The ordinary meaning of "recreational" is "[o]f or pertaining to recreation; used for or as a form of recreation; concerned with recreation."[123] Recreation is "[a]n activity or pastime pursued, esp. habitually, for the pleasure or interest it gives."[124] Recreation is also defined as "refreshment of strength and spirits after work" or "a means of refreshment or diversion."[125] The ordinary meaning of "entertainment" is "[t]he action of occupying a person's attention agreeably; amusement" or "[a] thing which entertains or amuses someone."[126] It is also defined as "the act of entertaining" or "something diverting or engaging."[127] With regard to the "except sporting" notation in sub-sector 10.D of the US Schedule, the ordinary meaning of "sporting" according to the *New Shorter Oxford English Dictionary* is "[t]he action of sport," as well as "participation in sport; amusement; recreation;" and "[i]nterested in or concerned in sport; ... a person interested in sport from purely mercenary motives . . . [n]ow esp[ecially] pertaining to or interested in betting or gambling".[128] "Sporting" is defined in *Merriam-Webster's Collegiate Dictionary* as "of, relating to, used, or suitable for sport" or "of or relating to dissipation and esp[ecially] gambling".[129] The ordinary meaning of "sporting" in "except sporting" thus encompasses gambling. Based on the ordinary meaning of the words "recreational," "entertainment," and "sporting," it is impossible to conclude that gambling and betting services must be considered to fall within sub-sector 10.A "entertainment" or sub-sector 10.D "recreational" services in the US Schedule. Moreover, Antigua has not explained why it thinks gambling services should fall within the "ordinary meaning" of those terms.

3.46 The United States submits that an examination of the US Schedule's context – in particular, other Members' schedules – also fails to demonstrate that the United States undertook a commitment with regard to gambling services. Some Members inscribed gambling-related limitations and restrictions under sub-sector 10.D "recreational services."[130] However, notwithstanding references to the CPC, others included gambling restrictions under sub-sector 10.A "entertainment services,"[131] others inscribed them under tourism services[132], and at least one Member scheduled such restrictions under sub-sector 10.E "other."[133] Significantly, other Members' schedules confirm the existence of a residual "other" category that is within sector 10, but not captured by the text of its other subcategories (sub-sector 10.E). Two Members made commitments in sub-sector 10.E;[134] the United States did not. The fact that Members were free to schedule this residual category provides further support that Antigua's claims are in error. Scheduling of the 10.E residual category would have provided a default location in the US Schedule for services that could not be classified elsewhere in sector 10. As shown above, gambling is one such service. Without textual evidence placing

[123] *New Shorter Oxford English Dictionary,* p. 2508 (1993).
[124] Ibid.
[125] *Merriam-Webster's Collegiate Dictionary,* p. 975 (10th ed. 2001).
[126] *New Shorter Oxford English Dictionary,* p. 829 (1993).
[127] *Merriam-Webster's Collegiate Dictionary,* p. 386 (10th ed. 2001).
[128] *New Shorter Oxford English Dictionary,* p. 3000 (1993).
[129] *Merriam-Webster's Collegiate Dictionary,* p. 1134 (10th ed. 2001).
[130] The United States notes that, for example, eight European Members specifically excluded gambling from 10.D. They are Austria, Croatia, the EC, Finland, Lithuania, Slovenia, and Sweden. A few other Members, such as Australia and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, limited their commitments to CPC headings unrelated to gambling.
[131] The United States notes that Bulgaria excludes gambling from sector 10.A entertainment services. Lithuania, in addition to excluding gambling from 10.D, also scheduled a restriction on gambling under 10.A.
[132] Egypt, Indonesia, Jordan, and Peru exclude or restrict gambling activities under the tourism sector.
[133] Senegal.
[134] Iceland and Senegal.

gambling services elsewhere in sector 10 (and still assuming *arguendo* that such services belong somewhere in that sector), the United States could only have a commitment for gambling services if it had scheduled the 10.E residual category. By not doing so, the United States made no commitment for gambling services. Thus, in the event that the Panel addresses the issue of whether the United States has recorded a commitment for cross-border gambling services in its GATS schedule, the Panel should find that Antigua has failed to prove that gambling services are covered under 10.D, 10.A, or any other commitment inscribed in the US Schedule. This finding would be consistent with the finding by the Appellate Body in *EC – Computer Equipment* that the burden of clarifying a schedule does not lie on the importing Member; rather "clarification ... that may be required during the negotiations is a task for *all* interested parties."[135]

3.47 The United States also points out that the US Schedule of Specific Commitments does not apply to measures of Guam, Puerto Rico and the US Virgin Islands challenged by Antigua. The United States is defined in the text of the US Schedule as "encompassing the 50 states of the United States, plus the District of Columbia."[136] Guam, Puerto Rico and the US Virgin Islands are not part of the 50 states and the District of Columbia. As a result, commitments in the US Schedule do not apply to measures of Guam, Puerto Rico and the US Virgin Islands.

3.48 **Antigua** replies that the arguments and evidence it previously put forward, as well as the third party submissions of the European Communities, Canada and Japan make it very clear that the United States has, in sub-sector 10.D of its Schedule – interpreted with the assistance of the W/120 – made full mode 1 and mode 2 market access and national treatment commitments with respect to gambling and betting services. It is absurd for the United States to suggest that WTO Members abandon W/120 as well as the CPC in favour of dictionary references when interpreting the schedules of fellow Members. Antigua wishes to reiterate that both W/120 and the CPC form a part of the context of the GATS, and it is natural that Members would turn to them for assistance in reading schedules. Noting the US argument that, during trade negotiations, it is incumbent upon exporting countries to seek clarification of the scope of the commitments offered by other WTO Members, Antigua argues that the United States' communication of 7 December 1993, circulated during the Uruguay Round to Members of the Group of the Negotiations on Services comprises the United States' draft final schedule concerning initial commitments under GATS. Paragraph 5 of the introduction to this document states that "[e]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification list (MTN/GNS/W/120, dated 10 July 1991)." Thus the United States' negotiating partners had no reason to doubt that the W/120 document provides the basis for the interpretation of sub-sector 10.D of the US Schedule. And, of course, fellow Members were not referred to the *Merriam-Webster Collegiate* or any other dictionary.

3.49 On the issue of the "ordinary meaning of the words," Antigua does not wish to revisit the United States argument on the dictionary definition of "sporting," which was adequately dealt with by the European Communities in its third party submission. With regard to the ordinary meaning of "recreational" and "entertainment", the United States stated that "Antigua has not explained why it thinks gambling services should fall within the "ordinary meaning" of those terms." However, as pointed out by the European Communities, even the dictionary definitions the United States itself quotes for these words would cover gambling and betting services. In this context, Antigua also refers to the NGISC Final Report, the first sentence of which states that "[T]oday the vast majority of Americans (…) gamble recreationally and experience no measurable side effects related to their gambling (…)".[137] To the same effect, the first sentence of the study on pathological gambling by the United States National Research Council states that "[G]ambling in America has deep cultural roots

[135] Appellate Body Report on *EC – Computer Equipment,* para. 110 (original emphasis).
[136] GATS/SC/90, p. 1.
[137] NGISC Final Report (18 June 1999), p. 1-1.

and exists today as a widely available and socially accepted recreational activity."[138] Further, on page 2 of this same study, it is stated that "[P]athological gambling differs from the recreational or social gambling of most adults, who view it as a form of entertainment and wager only small amounts."[139] Throughout these two reports gambling is consistently referred to as "recreation" or "entertainment." Finally, Antigua would also like to point out that although the United States tries to claim that gambling and betting services are covered by sub-sector 10.E of US Schedule – in which it has made no commitments – the United States fails to note that the concordance table produced by the USITC includes, immediately following the heading "E. Other" a parenthetical containing the words "No corresponding CPC." And, of course, gambling and betting services clearly have their own CPC – preventing sub-sector 10.E from being the location of the United States' putative lack of commitments in the gambling and betting sector.

3.50 The **United States** notes that Uruguay Round negotiators made the GATS very broad; almost all services are within its scope. At the same time, the GATS negotiators explicitly preserved the right of Members to regulate services, subject to their specific commitments and obligations. Antigua's substantive challenge in this case is to prove that the United States has made a commitment that includes gambling. But beyond that, Antigua must then grapple with the fact that even assuming the existence of a commitment, Members remain free to regulate services, even to the extent of declaring particular activities to be illegal, so long as they do so in a manner consistent with their GATS commitments and obligations.

3.51 The United States notes that all parties to this dispute agree that the GATS schedules are an integral part of the treaty; they must be interpreted according to the customary international rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention. Starting with the ordinary meaning of the terms, the terms of the US Schedule indisputably say nothing about gambling as such – neither the word "gambling" nor any synonym for that word appears anywhere in the text of the US Schedule. This means that Antigua bears the heavy burden of proving that the United States, without explicitly saying so, undertook an implicit commitment covering its longstanding and deeply rooted system of regulations on gambling. If the United States and its Uruguay Round negotiating partners had intended such a commitment on the part of the United States, especially on this very sensitive issue, the US Schedule would have said so explicitly. Needless to say, it does not. Antigua nonetheless proposes that gambling is implicit in the ordinary meaning of "other recreational services (except sporting)," or perhaps within "entertainment services." However, the United States has shown that Antigua has failed to prove that the ordinary meanings of the words "recreational" or "entertainment" encompasses gambling. In fact, dictionary definitions point to a very different conclusion. Of the three key terms at issue here, "recreational," "entertainment," and "sporting," the only one that dictionaries associate with gambling is "sporting." And the US Schedule explicitly excludes sporting.

3.52 Customary rules of treaty interpretation further instruct the interpreter to look at the ordinary meaning of words "in context." The context for the US Schedule includes other Members' schedules. Accordingly, the proper context for the US Schedule includes the fact that some Members inscribed references to the CPC in their schedules, while the United States and other Members did not. This makes clear that not all parties intended that their schedules refer to the CPC – and for good reason. The CPC was designed as a statistical device. It was not purpose-built to serve as a nomenclature for binding services commitments. It is hardly surprising then that some Members, including the United States, preferred not to inscribe references to it. This is not to say that the non-CPC Members have undertaken no commitments, nor is the United States suggesting that its obligations are defined by its own subjective expectations. To the contrary, non-CPC commitments are interpreted in exactly the

[138] See Commission on the Social and Economic Impact of Pathological Gambling, Committee on Law and Justice, Commission on Behavioural and Social Sciences and Education, National Research Council, *Pathological Gambling: A Critical Review*, (1999), p. 1.
[139] Ibid., p. 2.

same way as any normal term of a treaty is interpreted: they are to be given their ordinary meaning, in context, and in light of the object and purpose of the treaty. The United States notes that it has been suggested that the Panel should have recourse to the CPC in this dispute because the Appellate Body in the *EC – Computer Equipment* dispute found that panels in goods disputes should have recourse to the Harmonized System. This argument ignores the fact that Harmonized System numbers were an explicit and integral part of the schedule at issue in *EC – Computer Equipment*[140], while it is undisputed that the US Schedule makes no reference to the CPC.

3.53 The United States is of the view that context reveals another significant fact for the interpretation of the US Schedule. The United States has shown that even among Members who generally referred to the CPC, restrictions on gambling were thought to belong in sectors other than "entertainment services" and "other recreational services." A number of assertions have been made in an attempt to distinguish particular schedules of other Members. The important point is that the other schedules previously cited by the United States reveal that Members had difficulty with this issue even in the presence of CPC references. In their absence, Antigua has even less basis to assert that the United States undertook an implicit commitment for gambling. Antigua must be held to its burden of proving where gambling does fall in the US Schedule. Customary rules of treaty interpretation further instruct the interpreter to look at the ordinary meaning of words in light of the treaty's object and purpose. Two considerations about the object and purpose of the GATS are especially relevant here. First, the GATS recognizes "the right of members to regulate ... the supply of services within their territories in order to meet national policy objectives." Second, it provides a framework for "progressively higher levels of liberalization," exemplified by the adoption of a "positive list" approach to scheduling. That approach provided that Members' obligations would depend to a large extent upon the making of "specific" commitments. These objects and purposes of the GATS tend to confirm that Panels should respect a Member's decision to exclude CPC references from its "positive list" commitments.

3.54 The United States further notes that it has been suggested that the United States either failed to clarify its "other recreational services (except sporting)" commitment during negotiations, or that it fails to prove the scope of that commitment in this dispute. On the first issue, the Appellate Body has already made it clear that the importing party does not bear the burden of clarifying its commitments. On the contrary, in the *EC – Computer Equipment* case, the Appellate Body found that the job of clarifying a Member's schedule is a task for all interested parties to achieve through negotiations. This Panel need only point out to Antigua that, consistent with *EC – Computer Equipment,* no panel may impose such a clarification on the parties *post hoc* through dispute settlement rather than through negotiations. On the second issue, Antigua is the party asserting the existence of a US commitment for gambling services, and it alone bears the burden of proving the scope of any commitment that it alleges to be relevant. This is particularly true in this case, where the text reflects a conscious choice by the United States not to adopt CPC references. To throw the burden onto the United States to prove the negative would be nothing more than an unjustifiable attempt to reverse the burden of proof. Antigua bears the burden of proof and has not sustained its burden. Ultimately, the only piece of evidence that it has to support its arguments is the CPC. The United States has explained that the CPC is negotiating history, not context. And in the view of other negotiating history recording the intent of the parties not to be bound by the CPC, or any other extra-agreement nomenclature, it is clear that the CPC was not intended to control the interpretation of a Member's commitments in the absence of an explicit reference to the CPC in a Member's schedule. Without an explicit reference to the CPC in the US Schedule, Antigua has no viable argument for a US commitment. The most it can do is urge that, based on plain meaning, gambling somehow relates to recreation; that it somehow relates to entertainment; and that the Panel should therefore look for a way to fit it into the US sector 10 commitments, notwithstanding the "sporting" exception. As the United States already pointed out, at best that argument would lead to the conclusion that gambling services fall in a sub-sector 10.E "other" category, which the United States chose not to inscribe in its schedule. At the end of the day,

[140] Panel Report on *EC – Computer Equipment*, paras. 2.10 and 2.15.

what Antigua really wants is for this Panel to validate Antigua's subjective position that the US Schedule should be read as if it referred to the CPC, even though it clearly does not. The Panel should decline this invitation, particularly in a context where the text of the US Schedule provides no evidence of a specific intention of the parties to incorporate a commitment in the sensitive area of cross-border gambling services.

3.55 According to the United States, Antigua and the third parties are expending a great deal of rhetorical energy in an effort to seek to modify the text of the US Schedule through dispute settlement. They would like very much through this process to write in references to the CPC where none currently exist in the US Schedule. There is more than a little irony to this, because some of those same parties are right now asking us to do exactly the same thing in negotiations. That, in fact, is the proper forum for that effort, and it is the only proper forum. The dispute settlement system is specifically proscribed from adding to or diminishing the rights and obligations of Members. On this point, the Appellate Body in *EC–Computer Equipment* has already given us an unambiguous answer. The task of clarifying commitments in a GATS schedule, like the tariff schedule in *EC–Computer Equipment*, is one for all interested parties to achieve through negotiations. The US Schedule – without CPC references – is an integral part of the Agreement as accepted by all WTO Members. That Schedule, and not the schedule others would have liked, sets forth US commitments. And that schedule, like other WTO provisions, must be interpreted based on its ordinary meaning, in its context, and in light of the Agreement's object and purpose.

3.56 The United States further argues that Antigua's reliance on the CPC Prov. as the basis for a US commitment is misplaced. Members have unequivocally acknowledged the fact that the CPC does not define commitments made in a schedule that does not refer to the CPC. For example, this was repeatedly confirmed during a 1998 discussion in the Committee on Specific Commitments.[141] The Secretariat's Note recording that discussion recounts the following statement by the United States:

> "Time and resources should not be spent in exhaustive study of the CPC, which was inadequate not only for financial services and telecoms but more generally. That explained why some countries had chosen not to use the CPC as the basis for scheduling and why scheduling in some sectors had been done on a *sui generis* basis. ... Attention should focus on the improvement of W/120. Delegations should indicate which sectors seem to them poorly defined in W/120 or elsewhere and the Committee should work on an understanding to improve these definitions."[142]

3.57 No Member expressed disagreement with the US premise that "some countries had chosen not to use the CPC." In fact, the European Communities agreed that "[d]issatisfaction with [CPC] descriptions was certainly one of the reasons why certain Members had chosen not to use the CPC as the basis for their schedules."[143] In the same discussion, Hong Kong confirmed that "[t]he provisional CPC was merely an individual option for members."[144] In sharp contrast to its position as a third party in the present dispute, the European Communities did not then assert that non-CPC schedules should be read according to the CPC (and thus in defiance of the intent of the parties). On the contrary, the European Communities stated that "[w]hen a schedule made no reference to the CPC, the interpretation of the extent of commitments was difficult.[145] In making this suggestion, the European Communities was acknowledging what the United States has argued from the outset of this

[141] Committee on Specific Commitments, *Report of the Meeting Held on 2 April 1998*, Note by the Secretariat, S/CSC/M/5 (6 May 1998).
[142] Ibid., para. 4.
[143] Ibid., para. 6.
[144] Ibid., para. 10.
[145] Ibid. The United States notes that there was no mandatory requirement to take any such steps during or after the Uruguay Round negotiations.

dispute – that the CPC does not control the interpretation of the schedule of a Member that chose not to refer to it.

3.58 These statements all confirm the basic premises of the US position on this issue – i.e., that a Member scheduling GATS commitments during the Uruguay Round was free to choose or not to choose to inscribe references to the CPC descriptions; that the result of not choosing to inscribe such references is that the CPC does not control the interpretation of that Member's commitment; and that any elaboration that may be desired by another Member must be achieved through negotiations, not through dispute settlement. In light of these considerations, to now read the US Schedule according to the CPC would only improperly "add to or diminish the ... obligations provided in the covered agreements," in direct contravention of Article 3 of the DSU. It should come as no surprise that the United States did not schedule commitments for gambling services, given the overriding policy concerns surrounding those services, which are reflected in the extremely strict limitations and regulation of these services. The United States will further discuss those policy concerns in its arguments on GATS Article XIV (see below, section III.B.8). In fact, in view of those concerns, and the numerous bans or restrictions and strict controls on gambling, it would be surprising to find that the United States did schedule such a commitment.

3.59 **Antigua** submits that what the United States appears to have fallen back to are three, non-technical issues. First, the United States would like the Panel to read the general GATS scheduling methodology essentially in reverse – that is, unless a service sub-sector is expressly mentioned in a schedule, then it is *ipso facto* excluded. But that is not the case. The schedules of the Members are all organized around the concept of services sectors, with the understanding that once a particular service sector is listed in a schedule, then all its sub-sectors are also covered unless the Member clearly limits its commitment in relation to one or more of these sub-sectors. If a Member wanted to exclude an entire sector, it could either expressly say so or simply leave that sector off its schedule. However, the schedules of the Members may differ in one way or another, all schedules are consistent with this approach. Therefore, either gambling and betting services are expressly (or at least clearly) excluded by the United States in its schedule or they are committed to. Together with the third parties, Antigua has made a compelling case for the inclusion of gambling and betting services in sub-sector 10.D of the US Schedule. Secondly, contrary to the assertion made by the United States, Antigua is not trying to "force" the CPC on the United States and its GATS schedule. But Antigua considers it is appropriate that the W/l20 document and the CPC be used in the interpretation of the US Schedule under concepts of international law – and not the least because the USITC has expressly instructed us to do so in a public document.

3.60 For Antigua, the third defence of the United States seems to be the concept that, regardless of what its Schedule might say (or might be interpreted to say) the United States simply would not have made a commitment in the field of gambling services. At the outset, Antigua agrees with the United States when it said to the panel in *Mexico – Telecommunications* (emphasis added):[146]

> "To begin, the United States considers that whether or not Mexico was 'freezing' the level of market access prevailing at the time of the negotiations is irrelevant; the ordinary meaning of Mexico's Schedule speaks for itself and should control. *The extent of a Member's commitments cannot depend upon what it alleges to have intended at the time of the negotiations. The ordinary meaning of Mexico's Schedule instead dictates its commitments.*"

3.61 In Antigua's view, WTO jurisprudence is in agreement with the United States' position in the *Telmex* dispute. The fact that the United States made its commitment "unintentionally" is not relevant for the interpretation of its Schedule. As the Appellate Body pointed out in *EC – Computer*

[146] Second written submission of the Unites States of America, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204 (5 February 2003), para. 20.

Equipment, in relation to a GATT schedule, schedules are an integral part of WTO law and need to be interpreted on the basis of Article 31 of the Vienna Convention – the purpose of which is to ascertain the *common* intentions of the parties. According to the Appellate Body "[t]hese *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty."[147] Antigua also cannot believe that the United States in particular would have made any commitment "unintentionally" and that, during the negotiations on its Schedule, the United States did not realize that the only proper interpretation of the scope of its sub-sector 10.D is that it covers gambling and betting services. As both Antigua and the EC pointed out, quite a few countries, including many with considerably fewer available resources than the United States, were able to recognize where gambling and betting commitments might be made and to expressly exclude these services from their schedules. Antigua may speculate about why the United States may have made full commitments in this area, although the reason, if any, is legally irrelevant. But the most plausible reason is that the United States, as the main advocate of the GATS and in an attempt to convince developing countries to open their services markets, made commitments in all sectors where it did not perceive an immediate competitive threat.

3.62 Finally, Antigua rejects the United States' dictionary-based arguments. The *New Shorter Oxford Dictionary* provides differences for the use of "sporting" as a verbal noun and "sporting" as an adjective. As a verbal noun it means "the action of sport" and "participation in sport; amusement, recreation." According to the dictionary it is used in combinations with other words in the sense of "concerned with." This is of course precisely the type of usage one can expect in a classification such as W/120 or the US Schedule referring to "sporting services." Indeed, this is how the word "sporting" is used in the United States' own NAICS. As an adjective it means "sportive; playful," "engaged in sport or play," "interested in or concerned in sport" or, in more colloquial and ironic language "designating an inferior sportsman or a person interested in sport from purely mercenary motives. Now *esp. pertaining to be interested in betting or gambling. Chiefly in* sporting man." It is clear on the face of these definitions that "sporting" is not normally used as an adjective in relation to a word such as "services." The Panel should also note that according to the United States, the term "sporting" does not only refer to gambling but, as stated in its response to the Panel's question 8, the term "sporting" also covers "other (non-gambling) forms of sporting." Thus, rather than arguing that "sporting" should be given its ordinary meaning, the United States submits that "sporting" should be given all the meanings that can be found in a dictionary. In this case this would include: (i) services concerned with sport; (ii) prostitution; (iii) services related to the spontaneous producing by a plant of an abnormal form or variety; (iv) services related to gambling; and (v) services relating to the taking of risks. Even if it is true that dictionaries mention all these divergent meanings, the term "sporting" cannot simultaneously have all of these different meanings in a document if it is used just once.

3.63 The **United States** notes that both parties disagree as to whether the United States has made a commitment, but appear to agree that the US commitments are part of the text of the GATS, and thus the issue is one of treaty interpretation. As a matter of ordinary meaning, Antigua has argued that gambling services are both "other recreational services" and "entertainment services." The United States has already discussed the ordinary meaning of these terms, and Antigua's arguments to date only confirm the US view that gambling services do not fit properly within the plain meaning of either category. Some sources may refer to gambling casually as "entertainment" or "recreation," yet gambling services also involve considerations of financial gain and other considerations not typically associated with recreational or entertainment services. Indeed, the Solicitor General of Antigua has himself described remote gambling service suppliers as "financial institutions."[148] All of this taken together indicates that this *sui generis* service at most belongs in the residual "E. Other" sub-sector, where the United States made no commitment.

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[147] Appellate Body Report on *EC – Computer Equipment*, para. 84 (original emphasis).

[148] Canadian Broadcasting Corporation, "The Big Gamble," broadcast on *The Fifth Estate*, 31 October 2001.

3.64 Additionally, focusing on "other recreational services," the ordinary meaning of the "except sporting" notation in the US Schedule confirms that the United States has made no commitment for gambling under 10.D "other recreational services (except sporting)." In response to the US point that the ordinary meaning of "sporting" includes gambling, Antigua has referred solely to the arguments of a third party to this dispute, the European Communities. The United States would like to note, however that, first, the EC states that "sporting" is not "commonly used" to refer to gambling. But it provides no evidence to support that assertion; indeed, a stack of dictionaries would seem to contradict it. Second, the EC states that the use of "sporting" in the sense of gambling refers to persons rather than services. If "sporting" means gambling when used to describe the consumer or supplier, it could hardly be said to lose that meaning entirely in reference to the service they consume or supply. Other dictionary definitions provided by the United States imply no such limitation. Third, the EC states that the use of "sporting" in reference to gambling is referred to in one dictionary as an "Americanism," and therefore not within the "ordinary meaning" of a term used in the US Schedule of specific commitments. The *New Shorter Oxford English Dictionary,* which is usually scrupulous in such matters, places no such qualification on the use of sporting to refer to gambling. And, all linguistic prejudices aside, no rule of treaty interpretation provides that the "ordinary meaning" of a word in the English language cannot originate in the United States. Indeed, the fact that the schedule at issue is that of the United States makes it all the more absurd to exclude any meaning *a priori* on the basis that one dictionary calls it an "Americanism." The United States therefore submits once again that the ordinary meaning of the term "sporting" includes gambling services.

3.65 The United States notes that, against the US arguments based on ordinary meaning, Antigua offers an interpretation based on the CPC. In this regard, the United States submits that the text of the US Schedule, viewed in context, shows an affirmative choice on the part of the United States not to refer to the CPC. The negotiating history confirms that parties following W/120 did not intend to be bound by the CPC or any other nomenclature absent explicit references to such nomenclature.[149] The EC itself has subsequently confirmed that "[d]issatisfaction with [CPC] descriptions was certainly one of the reasons why certain Members had chosen not to use the CPC as the basis for their schedules."[150] This statement by the EC undermines the credibility of assertions in the present dispute that Members are somehow bound by the CPC notwithstanding having chosen not to use it. Seeking another way to make the CPC binding on the United States, Antigua has seized on the USITC Document. Should this document state – contrary to the fact – that "the United States has no GATS commitment for gambling services", it would have no interpretive value in a WTO dispute settlement proceeding. A Member may not unilaterally adopt a multilaterally binding interpretation of any provision of a WTO agreement, and such statements by themselves do not constitute subsequent practice under the customary international rules of treaty interpretation as embodied in Article 31 of the Vienna Convention. In any event, the USITC Document makes it clear that the Document is not purporting to interpret the US Schedule. The document itself confirms that the USITC has only been delegated the responsibility to undertake ministerial duties – to "maintain" and "compile" the US Schedule, not to interpret the US Schedule on behalf of the US Government. Indeed, given that a Member may not unilaterally adopt a multilaterally binding interpretation of any provision of a WTO agreement, a delegation of unilateral interpretive authority would make no sense with respect to provisions of the WTO agreements.

3.66 The United States notes that a third party has asserted that the USITC Document may have probative value for the "purpose of throwing light on a disputed question of fact."[151] This statement might be correct if the issue under discussion were factual in nature. It is not. The issue here is the legal interpretation of an annex to the GATS pursuant to the customary rules of treaty interpretation of international law – an area in which the USITC's unilateral document carries no weight in this dispute. Moreover, given that this is an issue of treaty interpretation, Antigua's arguments comparing the

[149] See above para. 3.41, footnote 115.
[150] See above para. 3.57.
[151] Canada's reply to Panel question No. 2.

USITC Document to the US Statement of Administrative Action (hereinafter "SAA") are off point. The SAA has been referenced in WTO dispute settlement to help interpret US domestic law, not WTO agreements. Antigua's various arguments for giving independent force to the USITC Document are untenable, but also unpersuasive for the simple reason that obligations in a GATS schedule must be based on the schedule itself, not on some extrinsic, unilateral document.

3.67 With respect to Antigua's assertions regarding the cover note to draft versions of the US Schedule, the United States disagrees with Antigua's statement that the cover note was not included in the final US schedule annexed to the GATS "simply because such a cover note is not formally part of a GATS schedule as it is attached to the GATS by Article XX:3."[152] Several Members included such notes in their schedules. For example, Australia's schedule begins with a note stating that "[t]he classification of sectors is based on the 1991 provisional Central Product Classification (CPC) of the United Nations Statistical Office, while the ordering reflects the Services Sectoral Classification List (MTN.GNS/W/120 of 10 July 1991)". Needless to say, the final US Schedule includes no such statement. The United States has already confirmed in this proceeding that it used W/120 for the ordering of the US schedule. That is consistent with the note accompanying drafts of the US Schedule. However, unlike Australia and a number of other Members, the United States never adopted the CPC nomenclature. The cover note to draft US Schedules does not indicate otherwise and, as Australia's note further confirms, these were understood to be distinct issues.

3.68 Concerning the 1993 and 2001 Scheduling Guidelines, the United States argues that Antigua lacks any basis for its assertion that "the 2001 Scheduling Guidelines comprise a subsequent agreement between the parties (as per Article 31(3) of the Vienna Convention) regarding the interpretation of existing schedules in the light of the 1993 Scheduling Guidelines."[153] The 2001 document, like its 1993 predecessor, explicitly states that it "should not be considered as a legal interpretation of the GATS." Indeed, both documents were adopted by the Council for Trade in Services, not the General Council or the Ministerial Conference, which have the "exclusive authority" to adopt legal interpretations of the WTO agreements under Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*. Moreover, Antigua's assertion that the 1993 Scheduling Guidelines and W/120 are context within the meaning of Article 31(2)(b) of the Vienna Convention fails for the simple reason that neither document was "made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty," as required under that Article. The United States and Antigua seem to agree that these documents were not made by any party, and insofar as they refer to the CPC, the schedules to the GATS demonstrate that numerous parties accepted them only partially, or not at all, for that purpose.

3.69 The United States considers that Antigua's arguments on the issue of non-existence of a US commitment represent a series of attempts to turn the rules of treaty interpretation on their head by using preparatory work and other extrinsic sources, which could never be more than secondary means of interpretation, to override text of the Agreement. Antigua even goes so far as to assert that the text of a GATS commitment cannot diminish the interpretive value of preparatory work[154] – a statement that is inconsistent with the fundamental principles of treaty interpretation. Certainly the CPC was discussed in the preparatory work for the GATS. Some Members decided to use it always. Some decided to use it when it suited them. Some decided not to use it at all. The texts of the schedules reflect those choices, and show the United States to be in the third category. Mere preparatory work cannot override the text in this case. But the preparatory work can and does confirm the US reading of the text in regard to the CPC. Specifically, it shows that the United States and other Members spoke explicitly of their desire that Members not be bound by any particular nomenclature. Finally, the United States reiterates that if some Members would prefer that all schedules be read according to

[152] Antigua's reply to Panel question No. 3.
[153] Antigua's reply to Panel question No. 1.
[154] Ibid.

the CPC, that is a matter for negotiations rather than dispute settlement. The Appellate Body report in *EC – Computer Equipment* confirms that principle.

3.70 The United States further notes that Antigua quoted the US argument in *Mexico – Telecom* that "the ordinary meaning of Mexico's Schedule speaks of itself and should control." That statement applies equally to the US Schedule – its ordinary meaning speaks for itself and should control. That ordinary meaning does not include gambling services, and does not include references to the CPC. The same text-based approach applies equally to sectors that were not inscribed in the US Schedule, such as 10.E "Other." Notwithstanding Antigua's arguments to the contrary, the United States cannot be found to have made a commitment in sub-sector 10.E when it has declined to inscribe that sub-sector while simultaneously inscribing other sub-sectors under sector 10. Moreover, in paragraph 3.62, Antigua appears to concede that the definition of "sporting" includes gambling. It argues, however, that this meaning is somehow not correct, apparently because Antigua intuits, without any basis, that "sporting" in the US Schedule is a gerund (or "verbal noun") rather than an adjective. Moreover, according to Antigua, a word used only once in a document can only have one meaning, and in this case that meaning cannot encompass gambling. In the view of the United States, these unfounded assumptions represent nothing more than an attempt to artificially limit the ordinary meaning of "sporting."

3. The measure(s) at issue[155]

3.71 **Antigua** argues that, in its request for the establishment of a panel submitted to the WTO on 13 June 2003, the government of Antigua attached an Annex in which it listed a large number of US federal and state statutes that adversely affect the ability of Antiguan service suppliers to provide cross-border gambling and betting services to consumers in the United States. The Annex also included references to a number of illustrative actions by US federal and state authorities that also constitute measures that inhibit the provision of cross-border gambling and betting services into the United States. During the consultations as well as in meetings of the DSB, the United States expressed itself confused by the nature, extent and impact of the measures cited in the Annex. Antigua believes these expressions of confusion to be merely a "red herring" – not only is the United States better positioned than Antigua to coherently construe its own laws, but crucially the United States has unambiguously stated in the context of this dispute that the provision by Antiguan service suppliers of cross-border gambling and betting services into the United States is illegal under United States law. Under such circumstances, the United States should not be allowed to in essence "hide behind" the complexity and opacity of its own legal structure to deflect attention from the fundamental simplicity of this complaint.

3.72 The rules applying to the cross-border supply of gambling and betting services in the United States are complex and comprise a mixture of state and federal law the precise meaning of which is often unclear. The debate on the interpretation of these rules has often been conducted in terms of the legality of "Internet gambling" (because the Internet has become one of the main tools to supply gambling and betting services on a cross-border basis). A recent report by the United States General Accounting Office (hereinafter, "GAO") describes the legal framework for Internet gambling in the United States as "complex".[156] The GAO further summarises the legal framework in the United States as follows:

> "Both federal and state laws apply to Internet gambling in the United States. In general, gambling is a matter of state law, with each state determining whether individuals can gamble within its borders and whether gaming businesses can legally operate there. Since Internet gambling typically occurs through interstate or

[155] In addition to the arguments presented here, see also parties' replies to Panel question Nos. 9-14 and 32-36 in Annex C of this Report.

[156] GAO Report, p. 3.

> international means, with a Web site located in one state or country and the gambler in another, federal law is used to protect the states from having their laws circumvented. To date, the Wire Act[157] is the federal statute that has been used to prosecute federal Internet gambling cases, although courts sometimes disagree on the applicability of certain provisions of the statute. In addition, the Travel Act[158] and the Illegal Gambling Business Act[159] have been used to prosecute gambling entities that take interstate or international bets over the telephone and would likely be applicable to Internet gambling activity. Some states have taken specific legislative actions to address Internet gambling, in some cases criminalizing it and in others relying on existing gambling laws to bring actions against entities engaging in or facilitating Internet gambling."[160]

3.73 The GAO Report directly addressed some of the ambiguities in US law on this issue.[161] Some of these ambiguities are discussed more extensively in a report prepared by Mr. Jeffrey R. Rodefer from the Department of Justice of the State of Nevada.[162] This complexity and ambiguity as well as the overlap between federal law and the laws of the more than 50 states and territories makes it very difficult to identify with complete precision all laws and regulations of the United States that could be applied in the prohibition of the cross-border supply of gambling and betting services.

3.74 Antigua submits that the existence of a complete prohibition is not in dispute. In the context of this dispute, the United States government has stated that the provision of cross-border gambling and betting services (into the United States from abroad) is always unlawful in the entire territory of the United States and under whatever form.[163] Antigua accepts this premise for the purpose of this dispute settlement procedure. Consequently there is no need to conduct a debate on the precise scope of specific United States laws and regulations. The subject of this dispute is the total prohibition on the cross-border supply of gambling and betting services – and the parties are in agreement as to the existence of that total prohibition. The precise way in which this import ban is constructed under United States law should not affect the outcome of this proceeding.

3.75 Antigua submits that, to facilitate the legal discussion, it has made a distinction between two broad types of measures: (i) those which act to prohibit the offering of gambling and betting services *per se* and (ii) those restricting international money transfers and payments relating to gambling and betting services. While the former include statutes criminalising the provision of the services (such as those used by the United States in 2000 to prosecute and imprison a licensed Antiguan operator), the latter category comprises enforcement measures, such as the actions by the Attorney General of New York against Paypal, Inc., a company that provides Internet payment services.[164] The two categories

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[157] Transmission of Wagering Information, 18 U.S.C. §1084, (hereinafter, "Wire Act").

[158] Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprises, 18 U.S.C. §1952, (hereinafter "Travel Act").

[159] Prohibition of Illegal Gambling Business, 18 U.S.C. §1955, (hereinafter, "Illegal Gambling Business Act").

[160] GAO Report, p. 11.

[161] Ibid., pp. 12-17.

[162] Jeffrey R. Rodefer, "Internet Gambling in Nevada. Overview of Federal Law Affecting Assembly Bill 466" published on 18 March 2003 on the website of the Department of Justice of Nevada (www.ag.state.nv.us).

[163] See, e.g., the statement of the United States' representative at the DSB meeting of 24 June 2003: "[…] the United States had made it clear that cross-border gambling and betting services were prohibited under US law." (WT/DSB/M/151, p. 11).

[164] Press Release by the New York Attorney General, dated 21 August 2002 and the "Assurance of Discontinuance" signed between the New York Attorney General and Paypal, Inc. dated 16 August 2002. The New York Attorney General started an inquiry against Paypal because it provided payment services to companies that supply gambling and betting services to persons resident in New York without being expressly authorized to do so under New York law. Because, in the opinion of the Attorney General, this supply of

of measures identified by Antigua are not two rigidly distinct categories. In fact, the measures in the second category of payment-related measures are actions by law enforcement authorities based on the legislative measures in the first category (and are therefore a practical manifestation of the measures in that first category). The only reason why the distinction is made is to facilitate the discussion on the application of specific provisions of the GATS to the facts of this dispute.

3.76 Antigua argues that Article 6.2 of the DSU provides that a request for the establishment of a panel shall "identify the specific measures at issue." The Appellate Body has repeatedly stated that there are two reasons why a Panel request must be precise. First, it forms the basis for the terms of reference which define the scope of the dispute. Second, it serves the due process objective of notifying the defendant and the third parties of the complainant's case.[165] The complexity of the United States' legislation has made it relatively difficult for Antigua to "identify the specific measures" (despite the obvious simplicity of the effect of the United States total prohibition). To avoid misunderstanding and procedural difficulties Antigua adopted the following approach in its Panel request: Section I and Section II of the Annex attached to the Panel request list specific references to United States laws (at both the federal and the state level) that Antigua believed could reasonably be construed as adversely impacting the cross-border supply of gambling and betting services; and Section III of the Annex provides examples of non-legislative measures, such as court decisions, criminal prosecutions or statements and actions by state Attorneys General, that apply some of these laws to the cross-border supply of gambling and betting services. This approach was clearly explained in the Panel request and, for the avoidance of doubt, it was added that "[T]he measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."[166] Further Antigua explicitly stated in the Panel request that: "[a]lthough this is not always clear on the face of the text of these laws, relevant United States authorities take the view that these laws (separately or in combination) have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States." In the circumstances Antigua has used its best endeavours to "identify the specific measures at issue" and submits that it has done more than could reasonably be required from a complainant by conducting a detailed investigation of an arcane area of law of the United States (and by attempting to provide examples of legislation and other measures that adversely impact on Antiguan service suppliers). Clearly, given that United States itself has stated that the offering of gambling and betting services into the United States from Antigua is unlawful in every instance, the United States has been given fair notice of Antigua's claim.

3.77 Antigua notes that at the DSB meeting of 24 June 2003, the United States representative mentioned three procedural concerns with the Panel request of Antigua: (i) the Annex to Antigua's Panel request contained items that "did not constitute 'measures' that could properly be included within the scope of a Panel request"; (ii) the Annex to the Panel request "included several measures which appeared not to have been included in the 1 April 2003 consultation request"; and (iii) "not all of the measures cited in the Annex were related to cross-border gambling and betting." The United States' first apparent concern that some of the US measures listed in the Annex to the Panel request are not "measures" presumably relates to the matters listed in Section III of the Annex (which lists

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gaming services is illegal under New York and United States federal law it would therefore also be illegal for Paypal to provide Internet payment services to businesses offering these unauthorized gaming services. The matter was settled when Paypal agreed to cease processing payments for such gaming companies and pay the sum of US $200,000. Other examples of such measures are provided by the New York Attorney General's press releases of 14 June 2002 and 11 February 2003 announcing similar settlements with 11 banks that provide credit card services.

[165] For instance, Appellate Body Reports on *EC – Bananas III*, para. 142, and *US – Carbon Steel*, para. 126.

[166] WT/DS285/2, 2nd paragraph, last sentence.

court decisions and statements of law enforcement and administrative agencies either taking or explaining actions against cross-border gaming services). However, the measures listed in Section III of the Annex to the Panel request clearly are "measures" within the meaning of the GATS. The United States entities that have taken these measures include the United States Second Circuit Court of Appeals, the Supreme Court of the State of New York, the Gaming Control Board of Michigan and the Attorneys General of the States of Florida, Minnesota and New York. The measures listed in Section III of the Annex to the Panel request come within the meaning of "measure" specified in Article XXVIII(a) of the GATS as either "procedure, decision, administrative action or any other form" taken by "central, regional or local governments and authorities."[167] Further, the measures described in Section III of the Annex are based upon or arise out of a number of the statutory provisions listed in Sections I and II of the Annex and are therefore in any event caught by the GATS in that capacity.

3.78 Antigua notes that the United States' second stated concern relates to measures that "appeared not to have been included" in the consultation request of Antigua. There are a number of differences between the list of measures annexed to the consultation request and the list of measures annexed to the Panel request. The main difference between the two is that the Annex to the Panel request contains considerably fewer measures than the Annex to the consultation request. The United States suggests, however, that certain measures were added in the Annex to the Panel request that do not appear in the consultation request. Presumably the United States' concern is related to three references that contained typographical errors in the Annex to the consultation request, which were corrected in the Annex to the Panel request. These are the following (with the differences underlined):

	Incorrect reference in consultation request	Correct reference in Panel request
Colo. Rev. Stat.	§§ 18-10-101 to 18-10-08 (1999)	§§ 18-10-101 to 18-10-<u>1</u>08 (1999)
New York Constitution	art. <u>II</u>, § 9	art. I, § 9
Rhode Island Constitution	art. I, § 22	art. <u>VI</u>, § 22

3.79 The request for consultations (and the addendum thereto) submitted by Antigua made it clear that the subject matter of this dispute is the United States' prohibition on the cross-border supply of gambling and betting services as it results from the application of a great number of separate laws. In this respect it should have been clear to the United States that these typographical errors are indeed nothing but typographical errors. The reference to the Colorado statutes contained in the consultation request simply makes no sense and it is clear on the face of this reference that it contains an error. Article II, § 9 of the New York Constitution concerns suffrage and Article I, § 22 of the Rhode Island Constitution concerns the right to bear arms. Each of the constitutional articles as corrected in the Annex to the Panel request concern gambling. Here too, it should have been clear to the United States that these were mere typographical errors. In each case, it is difficult to believe that the United States could have been prejudiced by the corrections. Furthermore, in *Brazil – Aircraft* the Appellate Body stated that Articles 4 and 6 of the DSU do not require "(…) a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[168] If "precise and exact identity" were to be a requirement it would never be possible for a complainant to obtain a more precise understanding of the other WTO

[167] Article I:3(a) of the GATS. See also the Appellate Body Reports on *US – Gasoline,* p. 28 and *US – Shrimp,* para. 173, where it is stated that a Member bears responsibility for acts of all its departments of government, including legislative, executive and judiciary. This concept is also clear in Article I:3(a) of the GATS which provides that "each Member shall take such reasonable measures as may be available to it to ensure [observance of the Member's obligations and commitments] by regional and local governments and authorities and non-governmental bodies within its territory."

[168] Appellate Body Report on *Brazil – Aircraft*, para. 132.

Member's measures during consultations – and that would undermine the effectiveness of the dispute settlement process.[169] Finally, the objectives underlying Articles 6.2 and 4.4 of the DSU[170] are the need to define the scope of the dispute and the due process objective of notifying the defendant and the third parties of the complainant's case. Correcting three rather obvious typing errors has certainly not harmed these objectives.

3.80 The United States' third procedural concern that not all the measures cited in the Annex are related to cross-border gambling and betting, is answered in the Panel request itself which explicitly states that the listed measures only come within the scope of this dispute to the extent that they do relate to cross-border gambling and betting. If there are measures in the Annex that do not relate to cross-border gambling and betting in the way described in the Panel request, they are not within the scope of this dispute. Further, Antigua believes that the key issue regarding the measures in this proceeding is whether or not there *are* measures that impede the ability of Antigua to offer cross-border gambling and betting services into the United States. Logically then, if simply one of the measures listed in the Annex to the Panel request has this effect then this matter has been established, even if (*quod non*) the remaining scores of listed measures are irrelevant.[171]

3.81 The **United States** argues that rather than providing an analysis of specific US laws as they relate to gambling, Antigua is asking this Panel to accept a mere assertion as to the effect of such laws – that they represent a "total prohibition" on cross-border gambling – as proof that the United States is in violation of its WTO obligations. The United States recalls the Appellate Body's observation that "...we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."[172] Ignoring this finding, Antigua has refused to provide the Panel with the text of actual laws or regulations, and the reasons for why it views such laws and regulations to be inconsistent with the GATS. Simply put, Antigua has not provided evidence and argumentation regarding specific measures at issue. This approach cannot form the basis for a *prima facie* case in a WTO dispute settlement proceeding. A party cannot advance a *prima facie* case without linking its evidence and argumentation to some specific measure(s), and a mere assertion is not itself a measure.

3.82 The United States submits that, as the complainant, Antigua bears the burden of establishing a *prima facie* case demonstrating that the United States has adopted specific measure(s) and that the measure(s) are inconsistent with obligations that the United States has assumed as a Member of the WTO. As the Appellate Body has consistently found, the burden of proof in WTO dispute settlement proceedings generally rests on the complainant, which must make out a *prima facie* case by presenting sufficient evidence and argumentation to create a presumption in support of its claim.[173] If the complainant succeeds in establishing such a presumption, the respondent may rebut this presumption.[174] Thus, a respondent's measures – such as the gambling-related measures of the United States at issue in this proceeding – must be treated as WTO-consistent until proven otherwise.[175] If

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[169] According to the Appellate Body "the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings." (*India – Patents (US)*, para. 94). See also the Panel Report on *Brazil – Aircraft*, para. 7.9.

[170] In the Preliminary Rulings in *Canada – Measures relating to exports of wheat and treatment of imported grain,* WT/DS276/12, para. 15, the Panel stated that: "(…) Article 4.4 omits the term 'specific' in referring to the 'measures at issue'. We believe this difference in language is not inadvertent and must be given meaning. Indeed, in our view, this difference in language supports the view that requests for consultations need not be as specific and as detailed as requests for establishment of a panel under Article 6.2 of the DSU."

[171] Antigua notes that this point is particularly salient given the agreement of the parties on the legal position of the United States government regarding the legality of these services. See para. 3.74 above.

[172] Appellate Body Report on *US – Wool Shirts and Blouses,* p. 14.

[173] For instance, Appellate Body Report on *Canada –Dairy II,* para. 66, and Appellate Body Report on *EC–Hormones,* para. 98.

[174] Ibid.

[175] Ibid., Appellate Body Report on *US – Carbon Steel*, para. 157.

the balance of evidence is inconclusive with respect to a particular claim, Antigua must be found to have failed to establish that claim.[176]

3.83 The United States notes that Antigua claims that one or more US measure(s) are inconsistent with WTO treaty obligations; Antigua therefore bears the burden of providing evidence and argumentation in support of this claim. In *US – Carbon Steel*, the Appellate Body found that a party making such a claim regarding another party's municipal law "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[177] The Appellate Body went on to describe the type of evidence as to the scope and meaning of municipal law that can be introduced by the complaining party challenging the law of a WTO Member, stating that "[s]uch evidence will typically be produced in the form of the text of the relevant legislation or legal instruments," and "may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."[178]

3.84 The United States points out that, ignoring the most basic burden of proof requirements, Antigua goes so far as to insist that it is under no obligation to adduce evidence as to specific US laws or regulations. Antigua is mistaken. As the Appellate Body found in *India - Patents (US),* where the measure alleged to be in breach took the form of domestic legislation, an examination of relevant provisions of such a law is essential to determining whether a Member has complied with its obligations.[179] Conducting such an examination necessarily means that a panel or the Appellate Body "must look at *the specific provisions"* of domestic law.[180] Antigua appears to agree that the "total prohibition" it identifies as the measure at issue in this dispute must be actually comprised of one or more US laws or regulations. Consistent with *India – Patents (US)* and *US – Carbon Steel,* Antigua must provide the laws or regulations that it views as relevant, as well as evidence and argumentation as to their scope and meaning. Antigua, however, has flatly refused to say exactly which provisions it views as relevant. Indeed, it has neither provided the text of, nor offered evidence or argumentation as to the meaning of, a single word of any US law or regulation restricting gambling.[181] This represents a total failure of proof.

3.85 According to the United States, Antigua misunderstands the US position on this failure of proof, calling it an "argument that the Panel cannot investigate in the aggregate the impact of a series of individual laws."[182] In fact, panels have often examined claims based on the combined effect of two or more measures, but have correctly approached such claims by first examining each specific

[176] For instance, Appellate Body Report on *EC – Hormones,* para. 109.

[177] Appellate Body Report on *US – Carbon Steel,* WT/DS213/AB/R para. 157.

[178] Ibid.

[179] Appellate Body Report on *India – Patents (US)*, para. 66: "It is clear that an examination of the relevant aspects of Indian municipal law and, in particular, the relevant provisions of the Patents Act ... is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law." The Panel in *US – Section 301 Trade Act*, para. 7.18, applied the same principle, stating that "[w]e are ... called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts ... also apply in this respect."

[180] Appellate Body Report on *India – Patents (US),* paras. 68-69 (emphasis added).

[181] The United States notes that Antigua provides a single discrete example in support of its claim that certain law enforcement actions applying US legislative measures are inconsistent with WTO obligations. That example – the Assurance of Discontinuance between the New York Attorney General and PayPal, Inc. – is among the measures in section III of the Annex to the Panel request that the Panel has declined to examine as "separate, autonomous measures." In any event, the United States notes that the example contains a specific restriction on a single company, the scope of which explicitly depends on the scope of underlying laws authorizing or restricting particular gambling transactions.

[182] Comments On The United States' Request For Preliminary Rulings By Antigua And Barbuda, submitted to the Panel on 22 October 2003, para 17.

measure that allegedly contributes to a combined effect.[183] Indeed, it would be impossible to know what the combined effect of various measures is as a matter of municipal law without first examining how each measure works, and then analyzing how these measures interact. The panel in *US – Export Restraints* confronted a similar claim regarding the combined effect of several US measures. In that dispute, the panel quoted the following argument by the United States:

> "It is not clear why, under the reasoning of either Canada or the *United States – Section 301 Trade Act* panel report, the documents in this dispute 'must' be analyzed together. Canada contends that one or more of the documents in question, alone or together, somehow require the DOC to treat export restraints as subsidies. However, the proper analysis of such a claim cannot be undertaken based upon abstract notions of whether documents cited by a complaining party 'must be analyzed together', but on the status of the cited documents, and how they relate to each other, under the responding Member's domestic law."[184]

3.86 The Panel subsequently adopted this approach. Noting that Canada's argument related to measures "taken together," the panel concluded that it would "first analyse them separately, both in respect of the status and the effect of each under US domestic law, and in respect of whatever each says concerning export restraints."[185]

3.87 Similarly, in order to examine the validity of Antigua's claim in this dispute, the Panel must first analyze each measure individually. Antigua thus bears the burden of detailing precisely how each individual measure at issue operates under US municipal law. Antigua then bears the further burden of detailing how, under US municipal law, these individual measures operate together to give rise to the cumulative effect that Antigua is alleging inconsistent with the GATS. The *Japan – Film* panel described this further burden. It found that:

> "[T]o the extent that the United States claims that various "measures" in the areas of distribution, promotion and large stores set in motion policies which are said to have a complementary and cumulative effect on imported film and paper, we consider that it is for the United States to provide this Panel with a detailed showing of how these alleged 'measures' interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each 'measure' acting individually."[186]

3.88 Therefore, Antigua's staunch refusal in this dispute to provide evidence and argumentation relating to each relevant individual measure, as well as to the interaction between the measures under municipal law that supposedly results in Antigua's claimed collective effect, makes it impossible for Antigua to credibly assert that it has sustained its burden of proof in this dispute.

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[183] For instance, in *US – FSC,* the panel examined the effect of a series of tax exemptions "taken together," but did so only after first examining each individual exemption under municipal law. See Panel Report on *US – FSC,* paras. 7.94-7.97. The Appellate Body went on to rely on the panel's examination of individual measures for purposes of its own review, thus confirming the systemic importance of a full examination by panels of individual measures. See Appellate Body Report on *US – FSC,* footnote 23 and paras. 16-18. Similarly, in *Argentina – Hides and Leather,* a panel concluded that two tax resolutions "taken together" gave rise to an inconsistency with Article III:2 of the GATT, but not without first making an individualized evaluation of each resolution. See Panel Report on *Argentina –Hides and Leather,* footnote 319 (stating that measures "taken together" gave rise to inconsistencies) and paras. 1.108-11.115 (evaluating each measure individually).

[184] Panel Report on *US – Export Restraints*, para. 8.83, quoting an argument made by the United States.

[185] Ibid., para. 8.84.

[186] Panel Report on *Japan – Film*, para. 10.353.

3.89 The United States stresses that it is Antigua's burden to provide argumentation explaining what aspect of specific US measure(s) in Antigua's view renders the measure(s) inconsistent with specific US obligations or commitments under the GATS. Since Antigua has failed in all respects to sustain that burden, the United States cannot delve into any specific measure in detail. In the view of the United States, Antigua explicitly seeks to shift its burden of proof onto the United States.[187] It offers no basis for doing so except the complexity of US law – an excuse that the Appellate Body has already rejected as a ground for allocating the burden of proof: "There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case."[188] Antigua admonished the Panel that the United States "should not be allowed to in essence 'hide behind' the complexity and opacity of its own legal structure." To the contrary, the United States submits that the burden has always been on Antigua to come out of hiding and say what specific measures it does or does not seek to challenge, and then to provide evidence and argumentation as to each measure. Antigua has not only failed to do so, it has repeatedly refused to do so.

3.90 **Antigua** submits that the biggest point of contention in respect of the measures is whether Antigua and Barbuda has submitted sufficient proof that the United States maintains "measures" that result in a complete prohibition – or a "total ban" – on the provision of gambling and betting services from Antigua and Barbuda into the United States. However, rather than asking the United States to assume any burden of proof, Antigua's very basic point is that the United States has conceded this point of US law. Given the clear and unambiguous concession of the United States on the complete prohibition – the total ban – Antigua and Barbuda believes that there is simply no sense in proving an already conceded point. In fact, under the laws of virtually every jurisdiction that Antigua is aware of (including the United States), a concession, such as that made in this case by the United States, would result in a stipulation of the conceded fact or issue – precluding further discussion on the topic. The same concept holds true in the WTO. As noted by the European Communities[189], previous panels accepted similar such concessions as being accurate. Moreover, the United States has conceded this point to Antigua in consultations meeting on this matter, as well as in open session before the dispute settlement body in the context of this dispute on two occasions. Despite its insistence that Antigua should prove the point, the United States refers to its prohibition. In multiple public statements and position papers, the United States Department of Justice has unambiguously made this concession. And the United States clearly acts as if there is a prohibition – hence some of the actions taken by the United States and referenced in Section III of the Annex to Antigua's request for consultations in this proceeding. Indeed, Antigua invites the United States to deny that concession before the Panel. Given the concession by the United States, Antigua and Barbuda strongly believes that a detailed discussion of all measures on a state and federal level is unnecessary and would prove difficult and, more importantly, wasteful. Further, consultations between parties are intended not only to resolve disputes, but also to frame and refine the issues.

3.91 Antigua notes that the United States apparently takes the position that a "measure" for purposes of WTO dispute resolution must consist of a discrete "law on the books" and that "measures" can only be a number of such discrete laws. This is a clear misinterpretation of a well-settled area of WTO jurisprudence which has established that many things – government policies, procedures and actions included – may constitute "measures." Indeed, the GATS itself defines "measures" expansively in Article XXVIII(a). Of course, if a measure were required to be a specific, discrete statute or regulation, Members could easily evade the reach of the dispute settlement machinery of the WTO through the use of informal policies and unwritten practices without any legislation or formal rulemaking at all. The point of the United States in this regard seems to be that the admitted "total

[187] See above, para. 3.71, where Antigua states that the United States is "better positioned than Antigua to coherently construe its own laws".

[188] Appellate Body Report on *EC – Sardines*, para. 281.

[189] See below para. 4.15.

ban" cannot itself constitute a "measure" because it is not one discrete law. And so, the United States would submit, Antigua must lead this Panel through a muddle of discrete United States laws and piece together the puzzle of measures that then add up to the sum of the total ban. Antigua disagrees. First, WTO law must not be forced to be interpreted in the light of formal characteristics of the laws of an individual Member. Whether a "measure" that is challenged under the DSU is under domestic law, considered to be comprised of one or more laws, rules or actions cannot therefore be definitive in determining whether the sum of the laws constitute a "measure" under the DSU. Second, while the United States points to a number of panel reports and Appellate Body decisions in which the measure-by-measure "puzzle" was required to be assembled, it fails to note that in each of those proceedings there was genuine disagreement as to the collective impact of the various pieces of legislation. That, of course, is manifestly not the case in this proceeding where Antigua and Barbuda and the United States both agree upon the existence of the complete prohibition. Third, the United States tries to create the impression that the cumulative effect of the complete prohibition created by the mass of specific US laws flows from a complex interaction between these specific laws. In reality, this is not the case. Most of the measures cited in the Panel request are prohibition measures that could arguably be applied independently of each other against Antiguan gaming operators. There are differences, however, in the territorial scope of the laws, as state laws typically only apply or have reach within the territory of the state at issue. Furthermore there appear to exist small differences in substantive scope of some of the laws. The overall result, however, is that all cross-border supply of gambling and betting services from outside the United States is always caught by one (and normally several) of the United States' prohibition laws.

3.92 Antigua argues that although the number of prohibition laws differs from state to state, the state prohibition laws all broadly follow the same pattern – all gambling is prohibited unless a specific exemption has been granted. But while many domestic operators have, in one way or another, obtained an exemption and are therefore allowed to operate lawfully, such exemptions are not available to foreign operators who want to supply gambling and betting services on a cross-border basis. Hence, state laws prohibit all cross-border supply of so-called "unauthorized" gambling, via the Internet or otherwise. The report prepared by the GAO provides a more detailed explanation of how the laws of five states prohibit so-called "unauthorized" Internet gambling.

3.93 Overlaying the network of state laws are United States federal laws. The letter dated 11 June 2003, sent by the United States Department of Justice to the National Association of Broadcasters provides a good example of how the United States itself holds the opinion that several federal prohibition laws might apply to the same conduct. The letter refers to three federal statutes when explaining the illegality of cross-border, "remote access" gambling: (i) the Wire Act, which prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires; (ii) the Travel Act which imposes criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including gambling considered unlawful in the United States; (iii) the Illegal Gambling Business Act which makes it a federal crime to operate a gambling business that violates the law of the state where the gambling takes place (provided certain other criteria are fulfilled such as the involvement of at least five people and an operation during more than 30 days). Each of these three laws separately prohibits the cross-border supply of gambling and betting services from Antigua. However, there is some uncertainty about the exact scope of these laws. For instance, there is debate as to whether or not the Wire Act would also apply to the relatively recent wireless Internet technology or indeed whether it applies to casino-type gambling or only to sports betting. In order to avoid these types of loopholes, United States authorities prosecute on the basis of a combination of these laws.

3.94 Antigua submits that it is for the similar reason of trying to avoid loopholes that it has not challenged the Wire Act alone, although the Wire Act undoubtedly seems to be the most significant law in the United States' prohibition arsenal. Antigua and Barbuda needs to ensure that, at the stage when the United States needs to implement any recommendations and rulings resulting from this

proceeding, the United States cannot take the position that it needs to amend only the Wire Act and can continue to apply its other prohibition laws. This is particularly important because given the huge amount of American legislation on gambling and betting, it cannot be excluded that Antigua and Barbuda has been unable to identify all domestic laws that could possibly be applied against the cross-border supply of gambling services. In this context Antigua and Barbuda submits that it is not only legally possible but also logical for it to challenge the United States' total prohibition on the cross-border supply of gambling. Under domestic United States law this total prohibition is composed of many different prohibition laws which all have a similar effect but which may have a different or slightly different territorial or substantive scope. Taken together, however, they cover the entire United States and all possible supply variants of cross-border gambling services, whether wire-based, wireless or otherwise. It is important to note that, under the federal scheme of the United States and given the international, cross-border nature of the services that Antigua provides, the United States federal government possesses the power to legislate exclusively in a manner that would both be binding on its states and completely resolve this dispute. Accordingly, given that the United States federal government possesses the power under its Constitution to fashion a remedy at the federal level without requiring state-by-state corrective action, the exhausting exercise of plodding through hundreds of state and federal statutes becomes even more obviously wasteful and absurd.

3.95 Antigua reiterates that contrary to the United States' assertions, Antigua and Barbuda has never "refused" to cite or provide evidence of United States laws that together create the total ban. In fact, Antigua's effort at identifying in its panel and consultations requests a huge number of American laws is evidence of its good faith in this endeavour. Despite this, even though it is wasteful and unnecessary in the view of Antigua to do so, Antigua has submitted to the Panel on 8 December 2003 the texts of all the relevant laws listed in its Panel request, together with brief summaries of these laws. Antigua also submitted the texts of all the items listed in Section III of the Annex to its Panel request that had not been submitted previously. Finally, Antigua believes that not much remains to be said about the typographical errors that were discussed at paragraphs 3.78 and 3.80 above; the text of these laws were submitted to the Panel which can verify them.

3.96 The **United States** replies that Antigua has chosen to define the scope of measures at issue in this dispute in exceedingly broad terms, and to ignore the text and meaning of actual US laws. It has rejected the US suggestion that it relate its claims to particular measures – even to the point of accusing the United States of engaging in "litigation tactics." And Antigua alone decided to withhold until more than two months after the date of its first submission the text of the very measures at issue in this dispute. While the United States has some concerns about Antigua's strategy in this dispute, it is not its role to second-guess them. The United States can only point out that Antigua has thus far not provided sufficient evidence and argumentation to establish its *prima facie* case. The United States reiterates that Antigua is apparently still asserting a proposition about the collective effect of US domestic laws relating to the remote supply of gambling, without regard to individual measures and how they work. Antigua, without any basis, labels this effect a "total prohibition on the cross-border supply of gambling and betting services." It asserts that, whatever the effect of the measures at issue individually, in concert they necessarily give rise to an inconsistency with the GATS. While Antigua claims the United States has not conceded any ground in this dispute, Antigua rests its case in large part on a supposed US "concession." No such concession was in fact ever made.

3.97 With respect to its burden of proof, Antigua has previously taken the position that it only needs to assert the alleged overall effect of US domestic law, and that the particular causes of this alleged overall effect – the measures that supposedly result in this effect – are irrelevant. In essence, Antigua wants the Panel to assume the overall effect of US domestic law without first determining how the measures at issue operate and interact, and whether such interaction would in fact comprise the overall effect alleged by Antigua. Antigua's assertion that a mere allegation is all it needs to meet its burden of proof is wrong. The Appellate Body has stated in its *Carbon Steel* report that the burden of providing evidence and argumentation begins with providing the text of the measures at issue, and is then followed by the presentation of authorities and arguments as to the meaning of these measures.

The Appellate Body has also explained in *India - Patents (US)* that an examination of the meaning of relevant provisions of domestic legislation is not just helpful, it is essential to determining whether a Member has complied with its obligations. To borrow the Appellate Body's own phrase, a panel or the Appellate Body "must look *at the specific provisions*" of domestic law. The same is true in this dispute. As the United States has repeatedly emphasized, Antigua's notion of a total prohibition has no legal status under US law. Antigua's mere assertion that this is the effect of US law, without a demonstration of the alleged causes, cannot underpin a panel finding that this is in fact the effect. Assumptions and assertions are not sufficient. In order for the Panel to be able to discharge its duty to make an objective assessment of the collective effect of domestic law with all its significant nuances, Antigua must first provide sufficient evidence and argumentation to support its view of precisely how each individual measure at issue operates under US domestic law. As already noted by the United States, such an approach is consistent with that taken by the panel in *US – Export Restraints* and by other panels. After assessing how each individual measure operates under US law, Antigua must then – given its claim of a collective effect – bear the further burden of proving this collective effect. In *Japan – Film*, the panel found that, in order to establish a claim of collective effect, the United States was required to "provide this Panel with a detailed showing of how these alleged 'measures' interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each 'measure' acting individually." The same standard applies here. Assuming that Antigua proves the meaning of individual measures, it must show their collective effect through evidence and argumentation regarding how these alleged measures interact with one another in their implementation under US domestic law. To borrow a phrase used by Antigua, Antigua must piece together the "puzzle" of its *prima facie* case.

3.98 The United States submits that, on 8 December 2003, Antigua finally gave the Panel the text of the laws that it alleges may or may not comprise the US regulatory structure for remote supply of gambling services. Along with the text of these laws, Antigua provided incomplete, and in some cases misleading, thumbnail sketches of what some of the laws supposedly contain. There are also texts of non-measures and other documentation that the United States was not expecting in what essentially amounts to an additional submission by Antigua. Nonetheless, a cursory analysis of Antigua's documentation (which is all the United States was able to do so far given the timing of the submission) only further reinforces the US view that Antigua has yet to provide sufficient evidence and argumentation to support its view of the meaning of each measure at issue, how each measure is relevant to remote supply of gambling services, and finally how each measure interacts with other measures so as to establish Antigua's *prima facie* case in this dispute. Indeed, the sheer volume of Antigua's 8 December submission only further highlights the vastness of Antigua's unmet burden. Antigua has explicitly sought to shift its burden of proof onto the United States by claiming that the United States is in the best position to meet this burden and that the US legal system is complex. However, not only is Antigua's position contrary to the well-established view of burden of proof in WTO dispute settlement, it is also well-established in the WTO that complexity is not a viable excuse for re-allocating the burden of proof. The presumption remains that the laws of the United States are consistent with the GATS unless and until Antigua as the complainant proves otherwise.

3.99 **Antigua** replies that the United States has relied heavily throughout this proceeding on its assertion that Antigua has not met its burden of proof to establish the existence of any United States measures that are contrary to commitments of the United States under the GATS. Despite its unambiguous position that "cross-border gambling and betting services are prohibited under US law,"[190] the United States has insisted that Antigua bears the "burden of proof" of otherwise establishing in some form this "total prohibition" and that Antigua has not done so. Antigua, on the other hand, has consistently taken the position that not only should the express agreement of the United States as to the existence of the total prohibition obviate the need for the provision of any additional "proof" that the United States indeed totally prohibits the provision of cross-border gambling and betting services from Antigua, but that the conceded total prohibition in and of itself

[190] WT/DSB/M/151, para. 47; WT/DSB/M/153, para. 47.

constitutes a "measure" within the meaning of the GATS. Antigua has never taken the position that the "burden of proof" to establish the existence of actionable measures should be "shifted" to the United States. Rather, Antigua believes that there is, in essence, no burden to be shifted – the parties are in agreement on the scope and extent of the total prohibition, and this agreement has definitive consequences in this proceeding under WTO jurisprudence.[191]

3.100 Antigua submits that the United States' argument that its total prohibition is not a measure that can be challenged in WTO dispute settlement because it is not "something that has a 'functional life of its own' under municipal law"[192] is apparently based on the panel report in *US – Corrosion-Resistant Steel Sunset Review*. However, the Appellate Body has recently reversed the aspect of this panel report on which the United States relies, and found that a measure can be challenged even if it is not mandatory under municipal law:

> "As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."[193]

3.101 The Appellate Body further stated that the reference to a Member's "laws, regulations and administrative procedures" in Article 18.4 of the Anti-Dumping Agreement "must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature."[194] A similar interpretation should, *a fortiori*, apply to the definition of measures in Article XXVIII(a) of the GATS which is formulated more broadly than the phrase used in Article 18.4 of the Anti-Dumping Agreement that was at issue in *US – Corrosion-Resistant Steel Sunset Review*. Antigua already argued this precise point.[195]

3.102 Antigua submits that, in view of the decision of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, it is possible to challenge a total prohibition that is comprised of numerous (i) "specific legislative and regulatory provisions;" (ii) "application[s] of such provisions;" and (iii) "practice[s]."[196] While the Panel needs to establish that this ban exists, it is not necessary for the Panel or Antigua to establish the definitive list of (and analyzed) every law, regulation, application and practice that is part of the total prohibition. The purpose of dispute settlement is to stop the impairment of benefits accruing under the covered agreements. In the context of this proceeding, this means obtaining access for Antigua's gambling and betting services to the US market. For the impairment of Antigua's GATS benefits, it does not matter how many laws make that market access impossible and how exactly they do it. What matters is that this market access is impossible, whilst it should be possible. In performing its analysis, a panel must verify whether benefits are impaired and must have sufficient information about the measures concerned to properly apply the specific provisions of the GATS.

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[191] Antigua's reply to Panel question No. 9.

[192] Request For Preliminary Rulings By The United States Of America, submitted to the Panel on 17 October 2003.

[193] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 89.

[194] Ibid., footnote 87.

[195] See above para. 3.91.

[196] See Panel question No. 10.

3.103 Antigua points out that it is noteworthy that the United States itself stated that putting together all the pieces of the United States legislative puzzle in this area is "an impossible task." That is certainly the case if the standard of evidence concerning municipal law is the one set out in the United States' request for preliminary rulings. In this request, the United States explained that, in its view, even the *United States v. Cohen* decision of the United States Court of Appeals for the Second Circuit[197] is of limited value because it is the opinion of a court inferior to the United States Supreme Court. Consequently, according to the United States, under US law the *Cohen* decision only has value as precedent with respect to the same court and lower federal courts of the Second Circuit. Thus, under this reasoning, Antigua could only challenge before the Panel those individual federal and state laws which the United States Supreme Court has unambiguously confirmed prohibit the cross-border supply of gambling and betting services from Antigua. In this respect the Panel should note that the United States Supreme Court declined to review the conviction of Mr. Cohen. In effect, the approach of the United States would mean that WTO dispute resolution would only be possible in relation to a "measure" whose meaning had been definitively ascertained by the court of final instance of the relevant jurisdiction. This interpretation cannot be correct under WTO law because the formal characteristics of any domestic legal system could make WTO dispute resolution impossible, even in a situation where the meaning in practice of the measure was absolutely clear. Even more directly, the United States continuing insistence that "[a]ssuming that Antigua proves the meaning of individual measures, it must show their collective effect through evidence and argumentation regarding how these alleged measures interact with one another in their implementation under US domestic law" is simply incorrect, both under the definition of measure under the GATS as well as under WTO jurisprudence.

3.104 Despite Antigua's firm belief that this dispute is best and most efficiently resolved on the basis of the unequivocal agreement between Antigua and the United States on the "total prohibition" constituting a measure of itself, contrary to what the United States has repeatedly asserted, Antigua has provided considerable evidence of and discussion about the construction of the total prohibition under United States law. These efforts have included, among other things: (i) numerous references to and discussions of the principal federal statutes used by the United States to support its total prohibition; (ii) provision to the Panel of the actual text of the principal state and federal laws that underlie the total prohibition; (iii) discussions regarding the basic scheme of state and federal interaction in the area of gambling and betting and how the state and federal laws act to further the total prohibition.

3.105 Antigua submits that, under the complicated and extensive body of law framed by the US federal Constitution, federal legislation and rulemaking, as well as interpretive (and precedent-setting) court decisions, the federal government of the United States has left certain powers exclusively to the various states, while other powers are either solely in the hands of the federal government or, in many cases, shared on various bases between the states and the federal government. One of the primary sources of the power of the federal government to legislate in a manner binding on all of the states is what is known as the "commerce clause" to the United States Constitution.[198] This allows the United States federal government to legislate, exclusively in most cases, in areas of commerce that cross state and international boundaries. This clause has been used historically by the federal government to legislate on a vast number of topics that in many cases only have remote connections with interstate or international commerce.[199]

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[197] 260 F.3d 68 (2nd Cir. 2001), *cert. denied* 122 S.Ct. 2587 (2002).

[198] U.S. Const. art. I, § 8, cl. 3, which provides in its pertinent part that "[T]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[199] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L.Rev. 1387 (1987); Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1 (1999).

3.106 According to Antigua, the United States' total prohibition comprises both state and federal laws, which, broadly speaking, fulfil two different roles: (i) state law generally prohibits all gambling within the territory of a state that has not been specifically authorized by that state; and (ii) federal law prohibits the use of cross-border means to avoid circumvention of the territory-based prohibitions of the individual states.[200] In general, gambling is a matter of state law in the United States. Each state can determine for itself whether individuals can gamble within its borders and which gaming businesses can legally operate there.[201] All states have adopted the same basic legal approach to gambling: it is illegal to offer gambling services in the state unless otherwise expressly authorized by statute. In general, gambling is prohibited by one or more constitutional or statutory provisions, while other constitutional or statutory provisions then "add back" the specific circumstances under which gambling can be offered in the state.[202] Thus, even in Nevada "unauthorized" gambling is synonymous with "illegal gambling". Currently, 48 states and the District of Colombia have given authorizations to offer gambling and betting services within their territory to operators established on their territory.

3.107 Antiguan operators cannot, however, obtain an authorization to supply gambling services from Antigua to any state or territory of the United States. This is often related to specific authorization criteria in legislation but may also be a matter of practice. Antigua has not been able to investigate all the criteria that all states apply to authorize a domestic operator to offer gambling and betting services. In fact, it seems that in many cases states do not use predetermined, objective criteria when granting such an authorization. The Final Report of the United States National Gaming Impact Study Commission[203] states the following about gambling regulation in the states:

> "Governments determine which kinds of gambling will be permitted and which will not; the number, location, and size of establishments allowed; the conditions under which they operate; who may utilize them and under what conditions; who may work for them; even who may own them. And, because governments determine the level and type of competition to be permitted ─ they also are a key determinant of the various industries' potential profits and losses.[204]
>
> […] rivalry and competition for investment and revenues have been far more common factors in government decision-making regarding gambling than have any impulses toward joint planning.[205]
>
> Those decisions generally have been reactive, driven more by pressures of the day than by an abstract debate about the public welfare. One of the most powerful motivations has been the pursuit of revenues."[206]

3.108 Furthermore under the laws or the practice of every state that provides for state-sanctioned gambling in one form or another, the conditions attached to obtaining the right to supply gambling

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[200] Antigua notes that, in some instances, federal laws act exclusively in pursuit of a federal interest that preempts state law. See, e.g., Interstate Horseracing Act; 28 U.S.C. §§3701-3704 (the "Professional and Amateur Sports Protection Act").

[201] GAO Report, p. 11.

[202] Antonia Z. Cowan, "*The Global Gaming Village: Interstate and Transnational Gambling*," 7 Gambling Law Review 251, pp. 255-257. See also "Gambling Law in Five States and Their Effect on Internet Gambling", Enclosure 1 to the Interim Report of the United States General Accounting Office on Internet Gambling (23 September 2002), in which the United States General Accounting Office "discusses the details of the gambling laws in the five states – Massachusetts, Nevada, New Jersey, New York, and Utah – that we judgmentally selected to reflect the wide variations in state gambling laws." Ibid. at p. 18.

[203] *National Gaming Impact Study Commission – Final Report,* 18 June 1999.

[204] Ibid., pp. 1-4

[205] Ibid., pp. 1-5.

[206] Ibid.

services in the state by definition preclude Antiguan operators from qualifying on a cross-border basis. In combination with the general prohibitions in each state, these exclusionary "authorization" state laws prohibit all cross-border supply of so-called "unauthorized" gambling from suppliers in Antigua, via the Internet or otherwise. Some states limit all forms of sanctioned gambling to specific locations within the state. For example: (i) in Colorado, casino gambling may only be conducted in three historic mining towns;[207] (ii) in Connecticut, slot machines and electronic gaming devices ("EGDs") can only operate from the state's Native American casinos[208] and bingo may only be offered at a location which can be physically inspected by state gaming officials;[209] (iii) in Indiana, casino gambling may only be conducted on riverboats on Indiana waterways.[210] This requirement is consistent with the legislative intent of the Indiana gaming statute "to benefit the people of Indiana by promoting tourism and assisting economic development";[211] (iv) in South Dakota, casino gambling (blackjack, poker, slot machines) is permitted only in the city of Deadwood and nine Indian casinos located in the state;[212] (v) Mississippi will only license casino gambling on boats or in other limited defined areas within the state.[213]

3.109 Antigua further submits that some states limit the number of gambling licenses available to service providers. For example: (i) Illinois limits the number of gaming licenses to ten for the entire state;[214] (ii) Louisiana limits the number of riverboat casino licenses to fifteen, with no more than six per designated waterway;[215] (iii) in Iowa, the state has set a maximum number of pari-mutuel operators and casino operators.[216] Antigua notes that some states require the providers of betting and gambling services to be physically present within the state as they provide their services. For example: (i) in Iowa, in order to offer gambling services such as blackjack, craps, roulette, poker, slot machines and video poker, the services must be offered on the licensed facility's grounds;[217] (ii) Nevada will not license any gambling provider whose premises are "difficult to police" or where the conduct of gaming would be inconsistent with the public policy of the state.[218] Moreover, some states require gamblers to be physically present when they are engaged in gambling activities. For

[207] Colorado Division of Gaming, Colorado Gaming Questions and Answers (www.gaming.state.co.us/dogfaq.htm) (visited 22 December 2003).

[208] Connecticut Division of Special Revenue, *Frequently Asked Questions: Agency* (www.dosr.state.ct.us/FAQagency.htm), question no. 4 (visited 22 December 2003).

[209] Connecticut Division of Special Revenue, Administrative Regulations: Operation of Bingo Games, Rule, 7-169-8a (www.dosr.state.ct.us/PDFFolder/OPERATION%20BINGO%20GAMES.pdf).

[210] Indiana Code 4-33-9-1 (stating that gambling can be conducted by licensed providers *on riverboats*) (www.in.gov/legislative/ic/code/title4/ar33/ch9.html); 68 Indiana Administrative Code 2-1-4(c)(1) (requiring applications for riverboat gambling licenses to state which dock the riverboat will be docked) (www.in.gov/legislative/iac/T00680/A00020.PDF).

[211] Indiana Code, 4-33-1-2 (www.in.gov/legislative/ic/code/title4/ar33/ch1.html).

[212] South Dakota Commission on Gambling, *Frequently Asked Questions* (www.state.sd.us/drr2/reg/gaming/frequent.htm).

[213] Mississippi Gaming Commission Regulations, Section II(B)(2) (www.mgc.state.ms.us/).

[214] Illinois Riverboat Gaming Act, 230 Illinois Compiled Statutes 10/7(e) (stating that the state gaming board may issue up to 10 licenses authorizing riverboat gambling) (www.igb.state.il.us/act/section7.html).

[215] Louisiana Gaming Control Law, RS 27:65 (www.legis.state.la.us/tsrs/tsrs.asp?lawbody=RS&title=27&section=65).

[216] This limitation reads as follows: Limitation on location and number of racetracks and excursion gambling boats. 1.6(1) The number of licenses to conduct horse racing shall be one for a racetrack located in Polk County. The number of licenses to conduct dog racing shall be two, one for a racetrack located in Dubuque County and one for a racetrack located in Pottawattamie County. The total number of licenses issued to conduct gambling games on excursion boats shall not exceed ten and shall be restricted to the counties where such boats were operating (or licensed to operate in the future) as of May 1, 1998. Iowa Racing and Gaming Commission, Administrative Rules, 491--1.6(99D,99F) (www3.state.ia.us/irgc/CH1.pdf).

[217] Iowa Racing and Gaming Commission, Administrative Rules, 491--11.5(4)(a)(4) (www3.state.ia.us/irgc/CH11.pdf).

[218] Regulations of the Nevada Gaming Commission and State Gaming Control Board, Regulation 3.010(5) and (7) (http://gaming.state.nv.us/stats_regs/reg3.doc).

example: (i) in Connecticut, in order to gamble at bingo a player must be physically present on the premises where the game is offered;[219] (ii) in Indiana, to gamble on a riverboat casino a gambler must be physically present on the riverboat;[220] (iii) in Iowa, a racetrack can only make payment on winning pari-mutuel tickets upon presentation and surrender by the bettor where the wager was made.[221]

3.110 Historically the main objective of federal law concerning gambling was to protect the territorial integrity of states' gambling legislation by prohibiting the use of interstate or international facilities (such as post and "wire communications") or interstate or international commerce to offer gambling services.[222] While some state laws might purport to extend beyond their borders, the questionable ability to acquire jurisdiction over persons in other states and countries as well as the inability to apply state laws in the generally federal area of interstate and international commerce in virtually every instance limits the effectiveness of state legislation to activities actually occurring and persons actually present within the territory of the state. The existence of federal legislation facilitates the prosecution of suppliers of "unauthorized" gambling to, for instance, New York from another state or another country because the supply of this "unauthorized" gambling then also becomes a federal crime and many of the jurisdictional difficulties of a state prosecution are no longer applicable. Thus the United States federal laws that prohibit interstate and cross-border[223] supply (i.e. the ban on the use of interstate or international commerce or communication facilities) are a critical component of and add to the total prohibition that is in fact already established (albeit difficult to enforce) by the state laws alone. In this respect the Panel should also note that, contrary to what the United States suggests, the laws comprising the federal ban on interstate and cross-border supply of gambling and betting services were not put in place because interstate and cross-border supply of gambling and betting services was considered a greater health risk than the local supply of gambling services. The federal ban on interstate and cross-border supply is merely intended to safeguard the states' ability to regulate gambling as they see fit within their borders.

3.111 Antigua states that it is particularly important to realize what United States federal law does not do. For example: (i) federal law does not require states to regulate gambling within their borders; (ii) federal law does not require states to prohibit gambling within their borders;[224] (iii) federal law does not prohibit telephonic, electronic, Internet or any other forms of remote gambling from occurring within the borders of any state. Thus, ironically (and somewhat difficult to reconcile with the position of the United States that cross-border supply of gambling and betting services poses significant health, law enforcement and other social issues that justify the United States total prohibition), under current federal law every state in the United States, if it so chose, could offer

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[219] Connecticut Division of Special Revenue, Administrative Regulations: Operation of Bingo Games, Sec. 7-169-13a (www.dosr.state.ct.us/PDFFolder/OPERATION%20BINGO%20GAMES.pdf).

[220] Indiana Code, 4-33-9-10 (www.in.gov/legislative/ic/code/title4/ar33/ch9.html).

[221] Iowa Racing and Gaming Commission, Administrative Rules, 491-8.2(4)(g) (www3.state.ia.us/irgc/CH8.pdf).

[222] Internet Gambling Prohibition Act, Senate Report No. 106-121, footnotes 46 and 47.

[223] Antigua is of the view that, throughout this proceeding there has been some uncertainty about, and mixed use of, the proper nomenclature for the gambling and betting services offered by Antigua. While the United States would generally like to call the Antiguan services "remote," Antigua believes that there are many state-sanctioned gambling services provided domestically in the United States that are also "remote" even if originating domestically and even if not involving some type of electronic transmission or communication (such as scratch card gambling offered by lotteries in the United States). Given the language of the GATS ("cross-border supply"), Antigua believes cross-border supply to be the more accurate term for the services being offered by Antigua and prohibited by the United States. See also Antigua's reply to Panel question No. 20. As explained in Antigua's reply to Panel question No. 20, Antigua uses the term "cross-border" as defined by the GATS, i.e. in relation to trade in services crossing borders of WTO Members. The trade in services between states of the United States is described as "interstate."

[224] Antigua notes that there are limited exceptions where the United States has legislated under the power of the "commerce clause" that impact the ability of states to legislate or regulate in certain respects. See footnote 200 above.

completely unregulated Internet gambling to every person located within the borders of the state. Yet Antigua would still be unable to provide any gambling and betting services – regulated or not – into the United States on a cross-border basis.

3.112 The **United States** reiterates that a complaining party must demonstrate, through evidence and argumentation, the existence and meaning of the measure(s) purportedly at issue.[225] Antigua is the party making claims about US domestic law, and it therefore "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[226] An examination of relevant "specific provisions" of domestic law is essential to the assessment of such a claim[227], and Antigua has not provided the evidence and argumentation necessary in order for the Panel to make such an assessment. Antigua has given the Panel a "data dump" of nearly all the measures cited in its Panel request, along with cursory descriptions of those laws. These descriptions are patently insufficient as argumentation. Most obviously, they fail to tell the Panel or the United States precisely which measures Antigua regards as relevant – a failure that Antigua continues to dismiss with the baseless excuse that it is sufficient merely to cite a "range" of measures.[228] Antigua's thumbnail descriptions also fail to allege the impact of each specific provision on remote supply of gambling. Finally – and most fundamentally – Antigua fails to explain how each specific measure relates to its argumentation regarding alleged violations of the GATS.

3.113 The United States maintains that, to the extent that Antigua means to assert a "collective effect" claim, it is well-established that the party asserting such a claim must provide evidence and argumentation to enable the Panel to first examine the independent meaning of each specific measure that allegedly contributes to a combined effect. Then that party bears the further burden of detailing how, under domestic law, the individual measures operate together to give rise to the cumulative effect that is alleged to be inconsistent with WTO obligations. Antigua has not done such an analysis, and has instead explicitly denied any obligation on its part to piece together the "puzzle" of its own claim. Antigua's claim is indeed a puzzle. It is neither the responsibility of the Panel nor that of the United States to guess which measures are relevant and which are not, nor to assemble Antigua's claim of collective effect.[229] As the complainant, Antigua itself formulated its broad claims, thus it alone must undertake the "exhausting exercise of plodding through hundreds of state and federal statutes" to make its *prima facie* case, and the Panel cannot disregard Antigua's failure or explicit refusal to do so.[230] Based on Antigua's inactions, the Panel can only conclude that it is unable to proceed with an examination of any "measure" because Antigua has neglected to articulate its claims with sufficient precision.

3.114 **Antigua** maintains that the most efficient way for the Panel to approach this dispute is on the basis of the unambiguous agreement of the parties that the cross-border provision of gambling and betting services from Antigua to consumers in the United States is always illegal under United States law. Antigua has demonstrated the wide scope of what constitutes a "measure" under the GATS and other WTO agreements, and that WTO jurisprudence supports this approach. Yet, the United States essentially submits that the Panel can only assess Antigua's claim if Antigua first provides a "precise

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[225] The United States indicates it has already pointed out that Antigua's mere assertion as to the collective effect of US gambling laws – that they represent a "total prohibition" on cross-border gambling – cannot amount to proof of a violation of WTO obligations. The notion of a total prohibition is not itself a measure, nor is it a notion with any legal status as such under US law. Antigua misstates the US position as saying that only statutes can be challenged in WTO dispute settlement. This is obviously not the US position.

[226] Appellate Body Report on *US – Carbon Steel*, para. 157.

[227] Appellate Body Report on *India – Patents (US)*, paras. 66-69.

[228] For instance, Antigua's 19 December 2003 letter to the Panel.

[229] Appellate Body Report on *Japan – Agricultural Products II,* paras. 125-131 (finding that a Panel cannot rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it).

[230] See above para. 3.94.

statutory analysis"[231] of all federal and state laws and regulations applying to the cross-border supply of gambling and betting services from Antigua, and also, apparently, of all the laws and regulations authorising and regulating legal gambling in the United States. The United States also believes that it is incumbent upon the Panel to "examine the independent meaning of each specific measure (…)."[232] This concerns thousands of pages of legislative and regulatory provisions and (as the United States itself has noted) would make this case simply impossible. No matter how confidently the United States may so assert, there is no support for this kind of formalistic approach, either in the GATS, any of the other WTO Agreements or under WTO jurisprudence. Such an approach would also make the resolution of many other trade disputes impossible, in particular claims brought by developing country Members against Members that maintain very complex domestic legislation with regard to a specific subject matter. Because of scarce resources, developing countries find it difficult to bring dispute settlement cases to the WTO even when the domestic legislation of the defendant is simple. An approach such as that insisted upon by the United States would serve only to deter developing Members from using the dispute settlement system, effectively limiting access to WTO dispute machinery to the richest Members. Furthermore there will likely be cases where the thousands of pages of domestic legislation are not available in English, French or Spanish. In such a situation a stringent requirement of "precise statutory analysis" of all these provisions would entail, to say the least, an insurmountable translation task. Finally, it would be totally impossible for panels to respect the nine months timeframe laid down in Article 20 of the DSU.

3.115 Antigua acknowledges that there may be circumstances in which a panel nevertheless has to undertake such a "precise statutory analysis," namely in situations where there is a genuine disagreement and a genuine lack of clarity about the effect of a Member's domestic law. But that is patently not the case here. The United States, referring to the Appellate Body Report in *US – Carbon Steel,* argued that Antigua had to submit evidence as to the scope and meaning of United States law. According to that Appellate Body report:

> "Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."

This is precisely what Antigua has done.

3.116 Contrary to what the United States continues to maintain, Antigua has not "failed or refused" to submit evidence of the United States measures. In fact, the evidence submitted by Antigua on this point is more than sufficient to satisfy Antigua's burden of proof and to establish the existence of one or more United States measures – particularly because the United States has either expressly agreed or at least not sought to deny that: (i) all cross-border supply of services from Antigua to the United States that involves placing a bet or wager is prohibited; (ii) it is impossible to obtain an authorization to supply gambling and betting services on a cross-border basis to the United States; (iii) its states maintain physical presence requirements; (iv) its states maintain numerical limits on the number of service suppliers; (v) its states have established monopolies and given exclusive rights to certain domestic operators. The purpose of WTO dispute settlement is to stop the impairment of treaty benefits. It is not to undertake academic analyzeds of Member's domestic laws. It is also not to identify and remove specific "measures" of the defendant. If that were the case a defendant who loses a case could replace its "measures" with new and different "measures" that have the same effect. As already demonstrated by Antigua, under US law, the federal government possesses the exclusive power to legislate in the area of international commerce. If the United States is concerned about how it might comply with an adverse ruling by the DSB against it in this proceeding, it need only look as

[231] See below para. 3.139.
[232] See above para. 3.87.

far as what its Congress has done in countless other situations – impose one federal law governing the relationship between the United States and Antigua that is binding upon all of the states, automatically rendering all contrary state legislation moot.

3.117 The **United States** maintains its views regarding the legal requirements for a *prima facie* case. Moreover, the United States notes that, in support of the view that it may challenge the alleged US "total prohibition", Antigua cites the Appellate Body's report in *US – Corrosion-Resistant Steel Sunset Review* for the propositions that it is "legally possible to challenge such a total ban" and that a panel "is not obliged ... to examine *all* domestic laws, regulations, applications and practices that may contribute" to the alleged total prohibition.[233] Antigua's discussion of *US – Corrosion-Resistant Steel Sunset Review* misreads that report. That report was addressing the question of whether an actual document issued by the US Department of Commerce could be considered a "measure". Here, however, Antigua is seeking to challenge its own creation – its alleged "total prohibition". This alleged "total prohibition" is not a document issued by the US Government and it embodies no act or omission of the United States Government – it is nothing more than verbiage that Antigua attaches without basis to a large group of "specific legislative and regulatory provisions" of the United States.[234]

3.118 On this point, *US – Corrosion-Resistant Steel Sunset Review* affirmatively contradicts Antigua's assertion that this Panel need not examine all the relevant specific provisions that make up the alleged "total prohibition." Indeed, the Appellate Body faulted the panel in that dispute because it "had not conducted any in-depth consideration of the impugned provisions of the" US Department of Commerce document at issue.[235] Moreover, the Appellate Body referred at paragraph 168 to its statement in its recent report on *US – Carbon Steel* that a party asserting that another party's municipal law is inconsistent with a WTO obligation must introduce evidence as to the scope and meaning of that municipal law. Thus, *US - Corrosion-Resistant Steel Sunset Review* if anything confirms the US view that the assessment of claims regarding domestic law requires an examination of relevant "specific provisions" of domestic law.[236] Consistent with this principle, Antigua has the burden of providing evidence and argumentation sufficient to enable the Panel to examine all of the "specific provisions" relevant to Antigua's claims individually and in terms of their interaction under domestic law. To the extent that Antigua fails to say precisely what provisions are or are not relevant, or offer argumentation on specific provisions, it does not even meet the most basic elements of a *prima facie* case. The United States further submits that Antigua still has not sustained its burden of proof regarding the existence and meaning of any state law individually, much less all of them collectively. Antigua asserts that "[S]tate law generally prohibits all gambling within the territory of a state that has not been specifically authorized by that state," yet the language of the statutes provided by Antigua varies widely, as do their meaning, operation, application and interpretation. And, as the United States has previously observed, many seem patently irrelevant. It is Antigua's burden to confront those issues – something it again still has not done.

3.119 The United States notes that, in its second submission, Antigua for the first time cited specific state measures that allegedly "prohibit all cross-border supply."[237] In particular, Antigua cites alleged restrictions on the physical location of gambling in Colorado, Connecticut, Indiana, Mississippi, and South Dakota; alleged limits on the number of licenses for riverboat casinos in Illinois and Louisiana, alleged limits on the number of pari-mutuel operators and casino operators in Iowa; alleged physical presence requirements for gambling service providers in Iowa and Nevada; and alleged physical presence requirements for bettors in Connecticut, Indiana, and Iowa. The United States has examined

[233] See Antigua's reply to Panel question No. 10, See also above para. 3.102.
[234] Antigua's reply to Panel question No. 10.
[235] Appellate Body Report on *US - Corrosion-Resistant Steel Sunset Review*, para. 95.
[236] See above paras. 3.112; 3.84 (citing the Appellate Body Report on *India – Patent US*, paras. 66-69).
[237] See above paras. 3.108 and 3.109.

the sources identified by Antigua for each of those alleged restrictions[238] and is not able to locate any of the cited sources among the items listed in the Annex to Antigua's Panel request. It therefore appears that these alleged restrictions are outside this Panel's terms of reference. In any event, Antigua does not explain how these alleged restrictions affect, much less "prohibit," cross-border supply. Based on Antigua's descriptions, all of them appear to relate exclusively to supply of gambling services by physical presence within a state.

3.120 The United States notes that Antigua also argues that the United States has somehow made a "concession" in this dispute regarding the existence of a "total prohibition" on cross-border supply of gambling services, and that this somehow relieves Antigua of its fundamental responsibility to make a *prima facie* case regarding specific provisions of US law. The United States very forthrightly told both the DSB and this Panel that it does not permit certain services, such as Internet betting, either domestically or on a cross-border basis. The United States has also clarified that it does permit certain other gambling services on a cross-border basis. And it has stated that there is no overarching measure apart from US laws themselves that embodies these restrictions. The "total prohibition" is simply a baseless label created by Antigua. It does not embody, or even accurately describe, the actual provisions of US law, and it is nothing more than another attempt by Antigua to avoid its burden of establishing its *prima facie* case regarding the actual text and meaning of US law.

3.121 The United States submits that nothing that it has said to the DSB or in the course of this dispute relieves Antigua of its burden to show exactly what measures it is challenging, and how those measures, individually or in combination, violate the GATS. The United States neither concedes nor agrees with any of Antigua's propositions about the alleged "total prohibition". Antigua asserts that the *US – Section 301 Trade Act* panel report somehow suggests that it need not examine the US laws and regulations at issue in this dispute, but the *Section 301 Trade Act* panel could not be clearer in opposing this position. In fact, the *Section 301 Trade Act* panel that it is an indispensable first step in any dispute to determine the meaning of the domestic laws at issue in order to then analyze whether those laws breach the Member's obligations.[239] In this dispute, Antigua acknowledges that its alleged total prohibition is "composed of specific legislative and regulatory provisions."[240] Yet Antigua refuses to examine those "specific" instruments, as called for in *Section 301 Trade Act* and numerous other Panel and Appellate Body reports. Finally, Antigua's lengthy assertions about US law governing stipulations, estoppel, and the like are all irrelevant, and need not be addressed at length. Antigua has acknowledged that US law does not govern such issues in this forum[241], and the United States agrees on that point, but disagrees with Antigua's hypothesis about how a US court would deal with these issues given the particular facts of this dispute.

3.122 The United States further notes that it is Antigua itself – not the United States – that established through its own Panel request the terms of reference in this dispute, and thus the extent of its own burden of proof. If Antigua now finds it impossible to sustain this burden, it only has itself – not the United States – to blame. On a related note, Antigua appears to assert that its status as a developing country should exempt it from having to make a *prima facie* case. The United States has high regard and great sympathy for the concerns of developing countries, and welcomes their use of the dispute settlement mechanisms of the WTO. However, it questions whether Antigua's developing country status has been responsible for its decision not to offer a *prima facie* case. Antigua has obtained the assistance in this dispute of a team of US and European counsel who are experts on US and WTO law, as well as a team of US and European academic advisers. Moreover, since Antigua is an English-speaking country, the United States fails to see the relevance of Antigua's concerns about language barriers for developing countries. And finally, and most fundamentally, the United States

[238] See above footnotes 207 to 221.
[239] Panel Report on *US – Section 301 Trade Act*, paras. 7.17-7.18.
[240] Antigua's reply to Panel question No. 10.
[241] Antigua's reply to Panel question No. 9.

questions whether basic notions of due process would ever permit a downward or upward adjustment in the burden of proof based on a Member's level of development.

3.123 The United States submits that Antigua has not met the standard for a *prima facie* case articulated in *Carbon Steel* by merely providing the text of domestic laws – to the tune of a thousand pages or more – and short summaries of some of those laws. The standard as articulated in *Carbon Steel* calls for information that is necessary to engage in an analysis of the meaning, application, interpretation, and interaction of specific provisions of domestic law. The Appellate Body has repeatedly confirmed – for example in *India – Patents (US)* and *US – Corrosion-Resistant Steel Sunset Review* – that this means an analysis of "specific provisions" of US law – not merely provisions and short summaries of the laws. The United States argues that a case built on generalizations about US law does not meet the burden of proof because the purpose of dispute settlement is not to analyze domestic law or "remove specific 'measures' of the defendant." The DSU clearly states in Article 3.7 that, in the absence of a mutually agreed solution, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This just further confirms that Antigua's burden relates to specific measures of U.S. law, not generalizations about US law.

4. GATS Article XVI[242]

3.124 **Antigua** argues that, in its Schedule, the United States has made a full commitment to the cross-border supply of gambling and betting services. Simultaneously, the United States totally impedes cross-border market access by prohibiting all cross-border supply of gambling and betting services. This constitutes a manifest violation of Article XVI:1 of the GATS.

3.125 Antigua further argues that the United States maintains an array of measures that constitute a total prohibition of the supply of gambling and betting services unless this has been authorized (generically or individually) by authorities of the United States (via legislation, regulation or individual licences). Thousands of service suppliers of United States origin have been given an authorization to supply gambling and betting services (often creating monopolies or exclusive service suppliers). It is impossible, however, for service suppliers from Antigua to obtain an authorization to supply services on a cross-border basis. This complete ban on cross-border supply maintained by the United States qualifies as a "limitation on the number of service suppliers" prohibited by Article XVI:2(a) of the GATS. The United States measures violate Article XVI:2(a) not only as establishing a numerical quota (of zero)[243] but also as measures creating monopolies or exclusive service suppliers. The complete ban on cross-border supply also qualifies as a "limitation on the total number of service operations" prohibited by Article XVI:2(c) of the GATS.

3.126 The **United States** replies that Antigua fails to prove the inconsistency of any US measure(s) with Article XVI of the GATS. Article XVI prohibits Members that have inscribed commitments from maintaining or adopting six types of measures referred to in its paragraph 2, sub-paragraphs (a) to (f). Antigua asserts that the United States has made a full commitment applicable to gambling services, and that the United States "totally impedes cross border market access" and therefore violates Article XVI:1 of the GATS. This argument appears to rest on the mistaken assumption that the existence of a commitment in the market access column of a Member's schedule implies a generalized commitment not to impede "market access." In fact, Article XVI does not enshrine a general rule prohibiting measures that impede "market access" in whole or part. Instead, it prohibits

[242] In addition to the arguments presented here, see also parties' replies to Panel questions Nos. 15 and 37-39 in Annex C of this Report.

[243] Antigua suggests to compare, with regard to Article XI:1 of GATT 1994, the Panel Report on *Canada – Periodicals*, para. 5.5.

only those measures falling within the specific categories listed in Article XVI:2.[244] While Article XVI:1 makes clear that the Article addresses market access, it is the closed list in Article XVI:2 that defines the substance of the obligation that Article XVI imposes. Therefore, the Panel should restrict its Article XVI inquiry in this dispute to an examination of whether Antigua has proven that any specific US measures fall within the particular types of measures listed in Article XVI:2.

3.127 The United States further submits that Antigua refers to an "array of measures that constitute a total prohibition" on the cross-border supply of gambling services. Once again, Antigua's failure to cite specific measures makes it impossible for the Panel to examine exactly what types of activity are or are not restricted under US law. Without some evidence – aside from the mere assertion of a "total prohibition" – as to the scope and meaning of US law, Antigua's argument fails. Antigua specifically argues that the alleged "complete ban" violates Article XVI:2(a), which prohibits the maintenance or adoption of "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test," as well as the prohibition in Article XVI:2(c) on "limitations on the total number of service operations ... expressed in terms of designated numerical units in the form of quotas or the requirements of an economic needs test." The United States submits that these provisions require a panel to examine the "form" of the US measure(s) at issue and the way in which such measures are "expressed" – something it cannot do without evidence from Antigua as to the specific measures alleged to be inconsistent with Article XVI:2.

3.128 According to the United States, even if Antigua had attempted to make a *prima facie* case as to how any US measure is inconsistent with Article XVI, which it has not, it could not have done so. The United States can find no US measure listed in Antigua's Panel request that takes the form of "numerical quotas" or is expressed as "designated numerical units in the form of quotas." Nor is the United States aware of any measure within the scope Antigua's Panel request the form or manner of expression of which matches any of the other forms identified in Article XVI:2(a) and XVI:2(c). Indeed, Antigua has pointed to no such measures. As far as the United States is aware, the gambling-related US measures listed in the Panel request are framed entirely in terms of non-numerical criteria that restrict certain forms of activity, rather than numbers of providers, operations, or output. Thus, no relevant US measures would appear to fall within the ambit of Article XVI:2.[245] Antigua's assertion that Antiguan suppliers cannot obtain authorization from regulators in the United States to supply gambling services on a cross-border basis has no relevance by itself, unless Antigua can point to some measure listed in its Panel request that contains some quantitative limitation specified in Article XVI:2, which it has not done.[246]

3.129 **Antigua** further argues that Article XVI:1 of the GATS clearly provides that each Member shall accord services and service suppliers of any other Member treatment no less favourable that that provided for under the terms, limitations and conditions agreed and specified in its Schedule. This language is completely straightforward. The United States has made a full commitment to market access for gambling and betting services from other WTO Members supplied on a cross-border basis while simultaneously it completely prohibits all cross-border supply of gambling and betting services. This constitutes an obvious violation of Article XVI:1.

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[244] 2001 Scheduling Guidelines, para. 8 ("A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI.").

[245] The United States notes in particular that qualitative tests are beyond the scope of Article XVI. The Scheduling Guidelines make explicit what is already clear from the text of the Article: The criteria in sub-paragraphs (a) to (d) of Article XVI "do not relate to the quality of the service supplied." Ibid.

[246] Ibid., para. 10 (stating that "approval procedures or licensing and qualification requirements" need not be scheduled under Article XVI "as long as they do not contain any of the limitations specified in Article XVI").

3.130 According to Antigua, the United States appears to argue that Article XVI:1 does not have a legal significance separate from Article XVI:2. Antigua is of the view that the text of Article XVI:1 is clear, and unambiguously imposes a legal obligation on the United States. If the United States were to be correct that the first paragraph of Article XVI is merely an introductory clause to the second paragraph, by implication the wording of the first paragraph must somehow assist in or otherwise frame the interpretation of the second paragraph. Otherwise, Article XVI:1 would be pointless. Thus Article XVI:2 should be interpreted in a way that ensures that services and service suppliers of the exporting Member are given the treatment by the importing country described in Article XVI:1, which is market access "no less favourable than that provided for (...) in its Schedule." The United States, however, does precisely the opposite and suggests a very restrictive interpretation of the subparagraphs of Article XVI:2. In particular, the United States submits that limitations on the number of service suppliers and limitations on the number of service operations are only caught by Article XVI if they are expressed in the form of specific numerical restrictions. However, as Antigua and the European Communities have pointed out, a total prohibition is a numerical restriction – of zero. As explained by the European Communities, if this were not the case it would be easy for Members to escape the prohibitions of subparagraphs (a) and (c) by refusing to specify an actual number and just simply prohibit any number – exactly what the United States is attempting to do here. Such a restrictive interpretation would also conflict with the objective of Article XVI as defined in its first paragraph.

3.131 As to the United States' argument that qualitative tests are beyond the scope of Article XVI, Antigua submits that it is precisely the point that it is seeking to make. The reason why it is impossible for Antiguan operators to obtain an authorization to supply gambling and betting services into the United States, while so many domestic operators do have such an authorization, is not that the Antiguan operators fail to meet a qualitative test that United States operators do meet. The United States' prohibition applies irrespective of the quality or specific characteristics of the service or the service supplier. Thus, the United States prohibition is a quantitative restriction and not a qualitative restriction. Antigua also points out that Article XVI does not have any "likeness" requirement as that found in Article XVII. Thus under Article XVI, the nature and extent of the domestic industry is in fact irrelevant in assessing a Member's obligations in a sector in which commitments have been made.

3.132 The **United States** replies that Antigua treats Article XVI as if it enshrines a general rule barring measures that impede "market access" in whole or in part. That is simply the wrong interpretation. A market access commitment in a particular sector does not imply that Members lose all rights to restrict particular types of activity in that sector. For example, a commitment for cross-border supply of medical services does not imply that Members must then permit doctors to diagnose patients over the telephone or over the Internet. The only question under Article XVI is whether the measure is in fact one of those listed in Article XVI:2. The list includes, in relevant part, measures identified by their particular "form" – such as "in the form of numerical quotas." The United States points out again that its restrictions on certain remote supply gambling activities are expressed as limitations on the character of the activity supplied, not as quantitative limits or other restrictions within the ambit of Article XVI:2.

3.133 It has been suggested that an across-the-board prohibition on cross-border services could amount to the same thing as a zero quantitative restriction, because under such a prohibition no foreign supplier can provide gambling services from outside the territory of the United States. The legal premises for this argument are obscure; the text of Article XVI:2, quite clearly refers to the numerical expression of such limitations. Moreover, the basic factual premise for this argument is completely absent. There is no across-the-board prohibition on the cross-border supply of gambling services in US law. US law certainly restricts the remote supply of gambling, but these restrictions are not so broad that they prohibit all cross-border supply of gambling services. An examination of specific provisions of US law, had Antigua undertaken one, would have borne this out.

3.134 **Antigua** reiterates that, by maintaining a total prohibition on the cross-border supply of gambling and betting services the United States completely denies market access and violates its obligations under Article XVI of the GATS. This total prohibition violates Article XVI:1 and XVI:2, regardless of whether the provisions are construed separately or jointly – that is even if Article XVI:1 cannot be applied independently of Article XVI:2, it must at the very least govern the interpretation of Article XVI:2. Stated differently, the sum of the rules in the subparagraphs of Article XVI:2 cannot be less than what is set out in Article XVI:1. The United States' total prohibition, as such, is caught by Article XVI:2(a) because it is the equivalent of a zero quota. The ability to apply Article XVI:2(a) to such a non-numerical zero quota is mandated by the principle of effective treaty interpretation and confirmed by the 1993 Scheduling Guidelines.

3.135 In Antigua's view, the individual legislative and regulatory provisions, applications thereof and related practices that make up the United States' total prohibition are also caught by both Article XVI:2(a) and XVI:2(c) as separate measures: (i) federal laws specifically prohibiting "cross-border" supply function, like an establishment requirement, and are therefore the equivalent of a zero quota for cross-border supply; (ii) state laws that prohibit all gambling, in combination with other state laws that exempt specifically authorized gambling without providing a possibility for Antiguan operators to obtain an authorization to supply gambling services on a cross-border basis[247], are the equivalent of a zero quota for cross-border supply; (iii) several state laws or regulations explicitly establish numerical quotas;[248] (iv) several laws or regulations expressly grant exclusive or special rights to operators of domestic origin;[249] (v) several state laws require the physical presence of the operator within the territory of the state[250] and, in doing so, constitute a zero quota for cross-border supply.

3.136 During the first substantive meeting of the parties with the Panel the United States explained that it does not prohibit the cross-border supply of all "gambling and betting services" because it allows cross-border supply of services such as "odds-making" or broadcasting of horse races. Although Antigua does not understand what point the United States seeks to make when qualifying its prohibition in such a way, this may constitute an effort to save its total ban from being found to be the equivalent of a zero quota prohibited by Article XVI. Such an argument would be wrong. If a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that come with in that sector or sub-sector. A Member cannot discharge its treaty obligations by allowing market access only for a fraction of the services covered by a sector or sub-sector while prohibiting all others. This would make market access commitments under GATS largely meaningless. More to the point, if a Member desires to restrict market access with respect to certain services within a sector or sub-sector, it should, as many Members (including the United States) indeed have done, set out the restrictions or limitations on access in the appropriate place on the Member's schedule of commitments under the GATS.

3.137 The **United States** maintains that Antigua fails to prove the inconsistency of any US measure(s) with GATS Article XVI. As the United States has previously explained, Article XVI prohibits Members that have inscribed commitments from maintaining or adopting six types of measures referred to in its paragraph 2, sub-paragraphs (a) to (f).[251] A close comparison between Article XVI:2 of the GATS and its goods counterpart, Article XI of GATT 1994, demonstrates that

[247] See above paras. 3.106-3.108.

[248] See above para. 3.109.

[249] Antigua notes that, for example, each of the 40 states that authorize a lottery allows only one operator, which then is permitted to operate a multitude of gambling games. Authorizations for horse race betting are only given to "associations that control pari-mutuel wagering services on horseracing in the United States" which the United States describes as a "special type of supplier" (see below para. 3.154).

[250] See above para. 3.109.

[251] The United States reiterates that, to the extent that Antigua's claims rest on Article XVI:1, Antigua misconstrues that provision as a general rule requiring market access. Article XVI prohibits only the specific types of limitations on establishment listed in Article XVI:2.

Antigua's claim that its alleged "total prohibition" is *ipso facto* impermissible under Article XVI is incorrect. While Article XI of GATT 1994 states a general rule banning any import or export "prohibition or restriction" except for a duty, tax, or charge, Article XVI:2 of the GATS establishes no such general rule. Instead, it defines, and carefully describes, precise types of limitations that Members shall not maintain or adopt in committed sectors. To prove its case as an initial matter, Antigua has the sole burden of proving that the United States maintains one of the precise types of limitations in Article XVI:2(a) to (f).

3.138 The United States submits that Antigua's claims appear to rely on sub-paragraph (a), which bars the maintenance or adoption of "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test," and on sub-paragraph (c), which bars "limitations on the total number of service operations ... expressed in terms of designated numerical units in the form of quotas or the requirements of an economic needs test." These provisions may be summarized as follows:

Subject matter of limitation	**Prohibited form/manner of expression**
number of service suppliers (sub-paragraph (a))	"in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test" (emphasis added)
total number of service operations or total quantity of service output (sub-paragraph (c))	"expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test" (emphasis added)

3.139 As the table above clarifies, paragraphs (a) and (c) each involve two explicit criteria. First, the subject matter of the limitation must match the subject matter specified in the column on the left. Second, the "form"[252] of the limitation or the manner in which it is "expressed"[253] must correspond to the detailed specifications reproduced in the column on the right. (Also, with respect to sub-paragraph (c), the numerical units in question must be "designated."[254]) Antigua has completely failed to offer the Panel the kind of precise statutory analysis necessary to apply these requirements to US law.

3.140 In fact, the subject matter of the US restrictions on gambling mentioned by Antigua is the character of the activity involved, without regard to the "number of service suppliers" or the "total number of service operations of total quantity of service output." For example, 18 U.S.C. § 1084 applies to persons providing gambling services as a business.[255] It says that such persons may not use certain facilities for certain types of transmissions.[256] It does not purport to restrict the number of

[252] The United States notes that the ordinary meaning of "form" in this context clearly refers to the particular way in which the limitation is manifested, rather than its alleged effect. See *The New Shorter Oxford English Dictionary,* p. 1006 (defining "form" *inter alia* as "shape, arrangement of parts," or "[t]he particular mode in which a thing exists or manifests itself," or, in linguistics, "the external characteristics of a word or other unit as distinct from its meaning.").

[253] The ordinary meaning of the verb "express" in this context is "[r]epresent in language; put into words" or "manifest by external signs." See ibid., p. 890.

[254] The ordinary meaning of the verb "designate" in this context is "[p]oint out, indicate, specify." See ibid., p. 645.

[255] I.e., persons "engaged in the business of betting or wagering." See 18 U.S.C. § 1084(a).

[256] The United States notes specifically, that they may not "knowingly use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a).

providers, operations, or quantity of output of services, much less do so in a form or manner of expression, or with a numerical designation, of the kind indicated in Article XVI:2 (a) or (c). Significantly, 18 U.S.C. § 1084 does not prevent persons engaged in gambling businesses from using wire communications facilities for other purposes.[257] This confirms that the US legislators drafting this provision accepted that a number of gambling service providers would continue to exist and operate without quantitative restraints.[258] Congress only wished to require such providers to observe restrictions on the character of their activities involving wire communications facilities. The two other statutes, 18 U.S.C. §§ 1952 and 1955, also restrict the characteristics of gambling services without purporting to restrict the number of providers, operations, or quantity of output of gambling services. Both statutes make it a crime at the federal level for gambling service providers or other persons to engage in activities that violate certain state and/or federal laws.[259] In each case the restrictions take the form of, and are expressed as, limitations on the characteristics of an activity; they do not mention, much less impose, a "numerical quota," a "designated numerical unit," or any other prohibited form or manner of expression mentioned in Article XVI:2(a) and (c).

3.141 The United States reiterates that Antigua's *de facto* "zero quota" claim lacks both a legal and a factual basis. Legally, this claim incorrectly assumes that Antigua's alleged "total prohibition" is automatically inconsistent with Article XVI:2. As discussed above, while such an assertion might be tenable under GATT Art. XI, there is no automatic "prohibition on prohibitions" under the GATS. Moreover, Antigua's argument is untenable under the actual language of Article XVI:2, which requires that determinations as to the existence of a GATS-inconsistent quantitative restriction be based on the form, manner of expression, and designation of numerical quotas. Factually, Antigua's "zero quota" claim relies entirely on its incorrect assertion of a "total prohibition" on cross-border supply of gambling services. In reality, US restrictions do not preclude cross-border supply of all gambling services, and thus are not a "total prohibition." For example: (i) persons not involved in the business of gambling may transmit casual or social bets by any means, provided that the transmission is permissible under state law; (ii) pari-mutuel betting services may exchange the accounting data and pictures necessary to permit a racetrack outside the United States to offer pari-mutuel betting on US races (and vice-versa), provided that such gambling is legal in both the sending and the receiving jurisdictions; (iii) suppliers of odds making and handicapping services (e.g., handicappers of horse races) as well as other gambling informational services may supply such services, provided that the form of gambling that they facilitate is legal in both the sending and the receiving jurisdictions; (iv) gambling websites may (and many do) provide so-called "free play" games in which no real money is wagered; and (v) any other gambling service that does not consist of actual transmission of a bet or wager is legal to the extent stated in 18 U.S.C. § 1084(b), provided that it also does not violate

[257] 18 U.S.C. § 1084(b) ("Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.").

[258] The United States argues that Antigua incorrectly asserts that "the United States' prohibition applies irrespective of the quality or specific characteristics of the service or the service supplier" and concludes on that basis that "the United States prohibition is a quantitative restriction and not a qualitative restriction." In fact, the application of US restrictions clearly depends on non-quantitative characteristics of the service and/or supplier (e.g., whether the services are supplied by wire communications facilities, whether they comply with sub-federal laws, etc.).

[259] 18 U.S.C. § 1952 essentially makes it a crime at the federal level of government for violators of certain state or federal laws (including, but not limited to, laws pertaining to business enterprises involving gambling, untaxed liquor, narcotics, or prostitution) to extend their activities into interstate or foreign commerce. Section 1952 thus restricts the character of legally authorized gambling services to the same extent as the underlying laws that it enforces. It does not, however, limit the number of providers, number of operations, or quantity of output of such services. Similarly, 18 U.S.C. §1955 makes it a crime at the federal level of government to conduct a gambling business that meets specified size, duration and/or revenue requirements and is in violation of the law of the US state or other political subdivision in which it is conducted.

state law in the US consumer's jurisdiction. As these examples demonstrate, the United States does not "prohibit" cross-border supply of gambling services.

3.142 **Antigua** submits that the late effort of the United States to avoid the scope of Article XVI by stating that it indeed allowed certain cross-border "gambling and betting" services is baseless. The latest US arguments on the interpretation of Article XVI:2 are disingenuous on two accounts. First, the United States interprets Article XVI:2 in a literal, exclusively text-based way. However, it does not do the same with Article XVI:1. The text of the latter unambiguously imposes a legal obligation on a Member to accord services of other Members treatment no less favourable that that provided for in its Schedule. The United States previously argued that the Panel should set aside this clear text on the basis of a phrase from the 2001 Scheduling Guidelines.[260] In Antigua's view, if Article XVI:2 is to be interpreted in a purely text-based way, that should also be the case for the Article XVI:1. Second, the United States' textual analysis of Article XVI:2(a) is disingenuous because it is not based on the actual text of Article XVI but on a table summarizing the text. The actual text of Article XVI:2(a) mentions "limitations on the number of service suppliers *whether* in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test" (emphasis added). The United States has removed the word "whether" and reads Article XVI:2 as if its says "limitations on the number of service suppliers in the form of numerical quotas, monopolies, exclusive service suppliers (...)". However, the fact that the actual text contains the word "whether" indicates that the enumeration following it is not meant to limit the application of Article XVI:2(a) but rather to make it clear that the four forms of limitations on the number of service suppliers explicitly mentioned are in any event caught by Article XVI:2(a).

3.143 As discussed in its response to question 9 from the Panel, Antigua's interpretation is confirmed by the 1993 and the 2001 Scheduling Guidelines which state unequivocally that a nationality requirement for service suppliers would be caught by Article XVI:2(a) as equivalent to a zero quota despite the fact that it does not have the form of a numerical quota. In fact, the United States' interpretation would for example allow a law that explicitly provides that "all foreign services are prohibited" to escape the application of Article XVI, because it is not expressed in numerical terms. This clearly cannot be the case.

3.144 The **United States** recalls that it would under no circumstances concede the existence of a commitment. Although the United States has raised Antigua's failure to provide evidence and argumentation as a threshold matter in this dispute, and also raises it in relation to each of Antigua's substantive claims. To the extent that Antigua makes claims of violation based on its alleged "total prohibition" and fails to relate those to particular US laws and regulations, it also fails to meet its burden for those claims. US previous arguments on these issues and the alleged effect of US statements apply equally to the complaining party's burden under Article XVI and the other substantive provisions at issue. The main issue under Article XVI appears to be the question of Antigua's "zero quota" argument. The United States has explained that such an argument cannot be reconciled with the text of Article XVI, which clearly refers to limitations in the "form" of quotas, and so on. A comparison between Article XVI of the GATS and Article XI of the GATT shows that the GATT provision contains a "prohibition on prohibitions," and the GATS provision does not. Antigua's arguments are therefore inconsistent with the text of Article XVI.

3.145 The United States argues that Antigua also has its facts wrong. In its answer to one of the Panel's questions, Antigua states that "during the final Panel meeting of the session the United States once more made clear its position that the cross-border provision of gambling and betting services from Antigua to the United States was illegal under United States law." In fact, the United States stated at that time, and maintains, that it in fact permits some cross-border supply of gambling services from Antigua. This is what the United States meant when saying that proving a "total prohibition" is an impossible task. Previously, Antigua appeared to argue, based on its "zero quota"

[260] See above para. 3.126, and footnote 244.

theory, that it would take an across-the-board prohibition of all cross-border gambling services to violate Article XVI – hence its misguided effort to try to show a "total" US prohibition on cross-border gambling services. Since the United States in fact permits some cross-border gambling services, and since Antigua disregards the actual content of US law, Antigua lacks a factual basis for arguing a "blanket" prohibition.

3.146 The United States notes that Antigua now asserts that a prohibition on any fraction of the services covered by a sector or sub-sector would amount to a "zero quota" and would therefore be inconsistent with Article XVI:2(a) under Antigua's "zero quota" theory.[261] In other words, Antigua's view is that a full market access commitment means that nothing whatsoever subject to that commitment may be prohibited. This is a significant step beyond the "blanket" prohibition theory previously discussed by Antigua and certain third parties.[262] Antigua's new argument regarding fractional prohibitions fails on the same textual grounds as its blanket prohibition argument, that is, Article XVI only addresses limitations that take certain carefully-specified forms. Moreover, Antigua's fractional prohibition argument does not withstand scrutiny in light of the objects and purposes of the GATS. Members cannot effectively exercise the "right to regulate" services that are the subject of a commitment if they lack any power to prohibit services within a sector or sub-sector that do not conform to the Member's regulation. The right to regulate recognized in the GATS implies the power to set limitations on the scope of permissible activity, as the United States has done with gambling services.

3.147 **Antigua** rejects the US argument that a Member that makes a market access commitment with regard to a certain sector, escapes the application of Article XVI if it does not maintain Article XVI limitations with regard to some of the services within that sector. Antigua believes this is legally wrong: the Article XVI obligation obviously applies to all services within that sector.

5. GATS Article XVII[263]

(a) "Likeness" of services and service suppliers

3.148 **Antigua** argues that services and service suppliers of Antigua are "like" those of the United States. The types of games offered from Antigua are the same as those offered in the United States and all involve the winning or losing of money. The only differences are the origin of the services and the suppliers and the mode of supply (cross-border as opposed to commercial presence). These differences, however, are not relevant in the context of a commitment to national treatment of cross-border supply under the GATS.

3.149 To date, panels and the Appellate Body have addressed the issue of "likeness" in the GATS in only two disputes (*EC – Bananas III (US)* and *Canada – Autos*). In both disputes the panels accepted that the services and the service suppliers were "like" without the extensive discussion that has taken place in the "likeness" debate in the context of the GATT.[264] In the view of Antigua, this is not a coincidence because the concept of likeness will often be less important in disputes concerning trade in services than in disputes on trade in goods.[265] In the case of trade in goods the characteristics of a

[261] See above para. 3.136.
[262] See below para. 4.35.
[263] In addition the arguments presented here, see also parties' responses to Panel questions Nos. 16-26 and 40-43 in Annex C of this Report.
[264] Panel Report on *EC – Bananas III (US)*, para. 7.322, and Panel Report on *Canada – Autos*, paras. 10.247-10.248.
[265] Antigua submits that the view that the likeness debate may be of lesser importance in services context than in goods context is also supported by the Appellate Body's statement in *Japan – Alcoholic Beverages*, according to which the "likeness" concept is a flexible one that may have different meanings in different WTO Agreements and in different circumstances: 'the concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different

specific product are often inherently "locked in" to the good (for instance in a specific type of cement as in *EC – Asbestos*). In the case of trade in services, however, the characteristics of the "product" – the service – are intangible and often easily adaptable.[266] Thus, even if services and service suppliers are "unlike" it will often be relatively simple to adapt the foreign service and service supplier in order to make these "like" their domestic counterparts. Of course, the regulatory system of the importing WTO Member must offer the foreign services and suppliers an opportunity to be or become "like." For example, a WTO Member cannot set up a regulatory system that is only open to domestic services and suppliers and then argue that all foreign services and suppliers are "unlike" because they are unregulated. Such an approach would sanctify a regulatory regime that is inherently discriminatory and cannot therefore be compliant with Article XVII of the GATS. In this respect, Antigua invites the Panel to exercise judicial economy in deciding whether an investigation of specific characteristics of various gaming services is necessary to dispose of this dispute. Antigua strongly believes this not to be the case because access to the US market for gambling and betting services is not determined by the application of objective criteria to the services and the service suppliers. Even an Antiguan service that is identical to a service of US origin (which many – perhaps all – are) would have no access to the United States market simply because it is provided from a foreign location. This factor, however, can play no role in the determination of "likeness" in Article XVII because it is the specific purpose of Article XVII to remove different treatment solely on the basis of origin.[267]

3.150 The fact that services of Antiguan gaming operators are supplied via a different "mode of supply" than services of suppliers of United States origin (cross-border as opposed to commercial presence) does not make these "unlike."[268] If the use of a different "mode of supply" were sufficient for a WTO Member to escape the obligations of national treatment on the basis of "unlikeness," this would seriously undermine the effectiveness of the GATS. In particular, a commitment to national treatment for cross-border supply would be meaningless because the simple fact that a service is supplied cross-border would make that service and its supplier "unlike" their domestic counterparts and remove the national treatment obligation. Such an interpretation is contrary to the principle of

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provisions of the *WTO Agreement* are applied. The width of the accordion in any of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply." (Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 21).

[266] William J. Davey and Joost Pauwelyn, "MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of 'Like Product'" in Thomas Cottier and Petros C. Mavroidis (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (The University of Michigan Press, 2000), p. 13-50, at footnote 14: "It would seem to be difficult to transpose this approach to the GATS. Since most, if not all, features of services and service suppliers are intangible, none of them can really be said to be objectively linked to the service or service supplier itself."

[267] See, by analogy on Article III:4 of the GATT 1994 the Panel Report on *US – FSC (Article 21.5 – EC)* "[W]e view the principal purpose of the 'like product' inquiry under Article III:4 of the GATT 1994 as ascertaining whether any formal differentiation in treatment between an imported and a domestic product could be based upon the fact that the products are different – i.e. not like – rather than on the origin of the products involved" (para. 8.132) and "[W]e do not believe that the mere fact that a good has US origin renders it 'unlike' an imported good" (para. 8.133). See also (again with regard to Article III:4 of the GATT 1994), the Panel Report on *India – Autos*, para. 7.173-7.176. With regard to Article III:2 of the GATT 1994, see the Panel Report on *Indonesia – Autos*, para. 14.113: " ... an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually trade like products" and, also with regard to Article III:2 of the GATT 1994, the Panel Report on *Argentina – Hides and Leather*, paras. 11.168-11.169. With regard to the possibility to make use of hypothetical examples in the "likeness" analysis (in the context of Article III:2 of the GATT 1994), see Appellate Body Report on *Canada – Periodicals*, pp. 20-21.

[268] Note by the WTO Secretariat entitled *The Work Programme on Electronic Commerce* (S/C/W/68) which, in para. 33 (concerning Article XVII of the GATS) states that: "[A]s discussed in the context of Article II on MFN, likeness in the national treatment context also depends in principle on attributes of the product or supplier *per se* rather than on the means by which the product is delivered."

effective treaty interpretation because it renders redundant an important part of the GATS, i.e. all schedules with national treatment commitments for cross-border supply.[269]

3.151 In the context of trade in goods the Appellate Body referred to four categories of characteristics that have been used to assess "likeness" in the context of the GATT: (i) physical properties; (ii) capability of serving the same or similar end-uses; (iii) consumer perception; and (iv) international tariff classification.[270] To the extent that a comparable analysis of characteristics would need to be made in the GATS context, Antigua submits that the gambling and betting services offered from Antigua and those offered in the United States are virtually the same. The types of games are the same and all involve the placing of wagers and the winning or losing sums of money. Consumers perceive Antiguan and US gambling services as interchangeable.[271] Both Antiguan and US origin gambling and betting services are offered to the public via communication technology including telephone and electronic communication. Finally, the international classification of services used in the WTO context, the CPC Prov., provides only one category for gambling and betting services. The more recent versions of the CPC classification, CPC 1.0 and CPC 1.1 also provide for just one category for gambling and betting services.[272] To the extent that suppliers from Antigua and suppliers from the United States provide like services, they are also like service suppliers.[273]

3.152 The **United States** recalls that the panel in *EC–Bananas III (US)* stated that "[i]n order to establish a breach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the (Member) has undertaken a commitment in a relevant sector and mode of supply; (ii) the (Member) has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the measure accords to service suppliers of any other Member treatment less favourable than that it accords to (its) own like service suppliers.[274] The United States has already demonstrated Antigua 's failure to prove the first element – existence of a specific commitment in a relevant sector. Furthermore, Antigua has ignored the second element – adoption or application of a measure affecting the supply of services in the relevant sector and/or mode – by failing to argue the scope or meaning of specific measures. Even if these elements had been established, however, Antigua has also failed on the third element by proving neither how its services and service suppliers are "like" US services and service suppliers nor how specific US measures accord Antiguan services and service suppliers less favourable treatment.

3.153 The United States submits that the burden rests on Antigua to provide evidence demonstrating that Antiguan services and service suppliers are "like" particular US services and suppliers for purposes of GATS Article XVII.[275] Antigua states that it licenses only two types of gambling services

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[269] See also, with regard to the principle of effective treaty interpretation, the Appellate Body Report on *US – Gasoline*, p. 23 and Appellate Body Report on *Korea – Dairy*, para. 81.

[270] Appellate Body Report on *EC – Asbestos*, para. 101.

[271] Antigua notes that various gambling operators of United States origin state that the cross-border supply of gambling and betting services is hurting their sales. See the statement by Mr. Steve Woodall, Fiscal Officer in Idaho (reported in *The Spokesman Review* (2 February 2001); the statement by Mr. Dennis Kennedy, Executive Director of the Ohio Lottery, reported in David Bennett, "Lottery's pot for schools ends up short", *Crain's Cleveland Business* (23 July 2001). See also the arguments put forward by the horse race betting industry in Florida (reported in Jim Saunders, "Video-gambling debate spins in soft economy", *The Florida Times-Union* (28 December 2002); and the statement of Mr. Joe Lupo, manager of a bookmaker in Las Vegas, reported in Michael Kaplan, "Gambling in America: A Special Report", *Cigar Aficionado* (September/October 2002), p. 66.

[272] Both CPC 1.0 (1998) and 1.1 (2002) classify "gambling and betting services" as a class (9692) and subclass (96920) under "Section 9 – Community, social and personal services"; "Division 96 – Recreational, cultural and sporting services"; and "Group 969 – Other amusement and recreational services". The different versions of the CPC can be consulted electronically on http://unstats.un.org/unsd/cr/registry/regct.asp?Lg=1.

[273] Panel Report on *EC – Bananas III (US)*, para. 7.322; Panel Report on *Canada – Autos*, para. 10.248.

[274] Panel Report on *EC – Bananas III (US)*, para. 7.314.

[275] Panel Report on *Canada – Autos*, para. 10.289.

– "virtual casino" services and sports book services, with the former supplied by Internet and the latter by Internet and telephone.[276] Antigua approaches its burden by first dismissing the likeness inquiry as hardly important in the context of services. Antigua essentially urges the Panel to find that in the context of Article XVII it is sufficient to merely assume likeness. Contrary to Antigua's assertions, nothing about the "intangible" nature of services renders likeness a given, or an analysis of likeness unnecessary; services can be like or unlike one another (for example, in their manner of performance), and so can suppliers. Had the Uruguay Round negotiators not believed this, they would not have made likeness of services and suppliers an element of the Article XVII inquiry. According to the United States, Antigua itself identified, in its statement of facts, several different forms of gambling services with different characteristics.[277] Yet Antigua goes on to assert for purposes of Article XVII that gambling services offered from Antigua are "virtually the same" as those offered in the United States, because "the types of games are the same and all involve the placing of wagers and the winning or losing [of] sums of money" and because "consumers perceive Antiguan and United States gambling services as interchangeable." These cursory and baseless assertions ignore the important distinctions between different gambling and betting services. For example, as a general matter, the National Research Council has found that "[t]he characteristics of game technologies, such as the number of gambles offered per time period, the physical and informational environment of games, game rules, speed of play, probabilistic structure, cost per play, and jackpot size, appear to affect gambling preferences and habits."[278] Antigua has not addressed any of these factors. Nor has it addressed distinctions that may be relevant in decisions regarding how to regulate various types of gambling services.

3.154 According to the United States, Antigua also ignores potentially relevant differences in service suppliers. For example, Antigua states that US state lotteries are supplied exclusively through state monopolies, but nowhere does it attempt to say what, if anything, makes its (presumably private, non-state) service suppliers "like" state lottery monopolies in any sense. Nor does it try to explain how its suppliers are "like" the associations that control pari-mutuel wagering services on horseracing in the United States, or any other special type of supplier in the US market. Antigua further fails to address differences in the object of the bet or wager that distinguish different gambling services. For example, the distinctions between selecting random numbers, picking winners in a race or sport, playing a table game with gambling paraphernalia, and other forms of gambling shape consumer perceptions and influence the odds of winning, which determine the profitability of different forms of gambling. Antigua fails to take account of such distinctions between, e.g., its sports book services and gambling services provided in the United States. Indeed, Antigua actually provides evidence that sports betting is unlike pari-mutuel betting by observing that "[w]hen betting with a bookmaker a gambler bets against the bookmaker as opposed to betting against the other gamblers, as is the case with pari-mutuel betting."[279]

3.155 Antigua's own evidence also demonstrates that Internet virtual casinos are unlike real casinos in that the true object of the bet or wager in a virtual casino is the generation by a software algorithm of some random number.[280] This result is often presented through a visual and audio simulation of gambling paraphernalia such as cards, dice, wheels, gaming boards, etc., that one would find in a casino. In contrast to a real casino, however, the online casino is an illusion – a "virtual reality" environment in which outcomes are controlled by a computer rather than by the laws of the physical world. The odds in virtual gambling are thus set by manipulation of the software simulation, and bear no necessary relationship to the outcomes that would occur in a casino with the use of physical

[276] See above para. 3.2.
[277] See above para. 3.1.
[278] National Research Council, *Pathological Gambling: A Critical Review*, pp. 7-5 to 7-7 (1999).
[279] Ibid., see above para. 3.12.
[280] United Kingdom Department for Culture, Media & Sport, *The Future Regulation of Remote Gambling: A DCMS Position Paper*, April 2003, paras. 90, 93.

gambling paraphernalia.[281] Antigua also concedes major differences in consumer perceptions between real and virtual casino services. For example, Antigua admits that the "noise and visual effects of the casino floor . . . heightens the thrill and pleasant tension" that consumers perceive in a real casino.[282] Its own evidence indicates that consumer perceptions are influenced by the physical surroundings, layout, amenities, and real-world stimuli of a real casino.[283] Moreover, Antigua concedes that US consumers who go to real casinos are "brought in" by "shows by major stars, Broadway-style musicals, revue spectaculars, and a variety of lounge acts" as well as meals and other amenities. None of this exists in the virtual casino, in which a lone player sits in front of a terminal in a home, school, office, etc. Thus, far from proving that Internet virtual casinos are like real casinos, Antigua has actually shown the opposite to be true – in terms of consumer perceptions, a virtual casino is nothing like a real casino.

3.156 The United States submits that Antigua further disregards significant differences in scope of availability of different services, particularly availability to minors. To the extent that they can be legally offered, gambling services in the United States operate under intense regulatory controls that constrain the scope of their availability, often to a particular facility. Moreover, there is no means to prevent minors from gaining access to remotely supply gambling services comparable to the means available in connection with supply of gambling services in the United States. Likewise, Antigua fails to address the law enforcement, addiction, and other risks associated with remote supply of gambling. These risks make Internet and other remotely supplied gambling services quite "unlike" other forms of gambling. The Appellate Body has stated in the goods context that "[w]e are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994."[284] Similarly, in the context of Antigua's claims of likeness under GATS Article XVII, the significant differential risks and concerns associated with gambling by remote supply, as compared to other gambling services, are pertinent. The burden rests on Antigua to show that its remotely supplied gambling services are "like" services in the United States in spite of such obvious differences, including, for instance, those relating to law enforcement and consumer protection, protection of youth, and health. Antigua has failed to meet this burden.

3.157 **Antigua** notes that third major prong of the United States' defence against the claims of Antigua and Barbuda is its attempt to categorise the gambling and betting services offered by Antiguan providers as not "like" the gambling and betting services provided by United States domestic suppliers. The US argument is constructed of three contentions. First, the United States attempts to differentiate between various kinds of gambling games and activities. Second, the United States contends that the ownership or structure of particular service suppliers renders them "unlike." Third, the United States attempts to saddle cross-border gambling with regulatory, health and law enforcement concerns that it apparently presumes are not applicable to gambling and betting services provided by domestic suppliers.

3.158 Before getting into detail on the US claims, Antigua wishes to point out some of the misstatements and errors contained in the United States' discussion on this topic. First, Antigua does not license "only two types of gambling services (…)." In fact, Antigua provides for two types of gambling *licenses*, and a significant number of games and gambling opportunities are then furnished under the scope of those two kinds of licenses. Antigua notes that the United States labels as "cursory and baseless" Antigua and Barbuda's statements that gambling services offered from Antigua are

[281] The United States submits that this situation is thus distinguishable from the situation in which electronic supply of a service merely represents another means of supplying the same underlying content or service.

[282] See above para. 3.9.

[283] Bill Friedman, *Designing Casinos to Dominate the Competition: The Friedman International Standards of Casino Design,* University of Nevada (2000).

[284] Appellate Body Report on *EC - Asbestos*, para. 113.

"virtually the same" as those offered by United States service providers and that "consumers perceive Antiguan and United States gambling services as interchangeable." Far from being "cursory and baseless," Antigua's statements are supported by a number of independent sources that were cited in footnote 271 above. Further, the United States asserts that Antigua "disregard[ed] significant differences" and "fail[ed] to address the law enforcement, addiction, and other risks associated with remote supply of gambling (…)." The reality is that Antigua has neither disregarded differences nor failed to address social issues – the United States has simply refused to give Antigua's extensive discussions on the gaming industry and problems associated with gambling any credence, or in fact any reference, whatsoever. More disingenuously, the United States assumes as a fact something which Antigua strongly disputes – that there are any different or more extreme "law enforcement and consumer protection, protection of youth and health" risks associated with cross-border (or what the United States prefers to call "remote" or "remote access") gambling and betting than with domestic gambling and betting in the United States. As will be discussed in detail further on, Antigua's fundamental position is that no meaningful basis exists for distinguishing the services provided by Antiguan operators from those provided by United States operators for the purposes of the GATS.

3.159 Antigua argues that the most serious defect in the United States' discussion on the concept of "likeness" in Article XVII of the GATS is perhaps its complete lack of context. Indeed, other than a reference to the Appellate Body Report in *EC – Asbestos* in an (overstated) effort to establish that health risks can be a factor in determining "likeness," the United States provides no framework for its discussion at all. Perhaps that failure is because in the two reported instances in which "likeness" appeared to have been remotely at issue, the panels have simply concluded without elaboration that the services were "like." The paucity of discussion on the "likeness" issue in these cases lends credence to the point already made by Antigua that, in the services context, "likeness" is much less of an issue given the ease at which services may be made "like."

3.160 According to Antigua, the failure of the United States to provide the Panel with a context for its discussion on "likeness" may be due to the fact that the US claim will not stand up in the face of a complete analysis of "likeness" on the basis of the seminal Appellate Body Report in *EC – Asbestos*. In *EC – Asbestos*, the Appellate Body reviewed a panel determination that two types of fibre and two types of cement incorporating two types of fibre were "like" for purposes of Article III:4 of the GATT 1994. In its report, the Appellate Body, having first thoroughly discussed some of the inherent difficulties in determining "likeness" and surveying the considerable body of GATT 1994 jurisprudence on the subject, proceeded to analyzed the issue under four criteria: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes. Before applying these criteria to the facts in this proceeding, it is important to note various other helpful points that may be gleaned from the Appellate Body Report in *EC – Asbestos*. First, in paragraph 92 of its report, the Appellate Body recognized that "like" products may have different characteristics or qualities, and that important aspects of a "likeness" analysis include: (i) determining what characteristics or qualities are important in assessing "likeness," (ii) determining to what degree or extent the products *must share* qualities or characteristics to be considered "like" and (iii) deciding from whose perspective "likeness" should be considered. Second, analyzing GATT 1994 language substantively similar to Article XVII:1 of the GATS, the Appellate Body concluded in paragraph 99 of its report that the determination of "likeness" was "fundamentally, a determination about the nature and extent of a competitive relationship between and among products."

3.161 Returning to the four criteria applied in *EC – Asbestos*, Antigua and Barbuda submits that a "physical properties" comparison is inherently more problematic when dealing with a service than with a discrete product, particularly given the various methods by which a service can be supplied. While the United States has not presented its "likeness" discussion in the context of *EC – Asbestos*, two of the United States' themes might be applicable to these criteria: (i) the ostensible differences

between Antiguan gambling and betting services and those of United States domestic providers that arise primarily because the Antiguan services are "remote" or furnished on a cross-border basis; and (ii) the ostensible differences between Antiguan gambling and betting services and those of United States domestic providers that arise because the outcome of certain games offered by Antiguan operators is determined by computer equipment and not "by the laws of the physical world". Framed mostly through discussion of the superficial differences between "bricks and mortar" gaming and "remote" gaming, the United States' first and most elaborate argument is that cross-border supply via remote communication, in and of itself, makes Antiguan services (and its service suppliers) "unlike" those of domestic providers. As explained above, this simply cannot normally be the case in a context where a Member has made a commitment to "national treatment" of cross-border supply of services. By definition, cross-border supply requires the use of remote communication – thus if the different mode of supply *ipso facto* results in a conclusion that services are "unlike" it would render Members' commitments in respect of cross border supply under the GATS meaningless. Indeed, the United States has itself stated in a submission to the WTO on electronic commerce that "there should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality."[285]

3.162 Antigua and Barbuda submits therefore that, in the context of a commitment by a Member to national treatment of cross-border supply, there must at least be a presumption that the fact that the services are provided by cross-border supply cannot, standing alone, make a service "unlike" a domestically provided service. Antigua agrees that in certain specific circumstances a service could be considered "unlike" only because it is supplied on a cross-border basis. However, in line with Antigua's reasoning above, and the position expressed by Japan in its third party submission, Antigua and Barbuda believes that it is for the United States to rebut what should be an assumption of *prima facie* "likeness" of services supplied on a cross-border basis. Antigua does, however, disagree with Japan when it submits that cross-border supply can be considered "unlike" domestic supply simply because the regulatory circumstances are different. As the European Communities observes, this would make commitments on cross-border supply meaningless because regulatory circumstances will almost always be different for cross-border supply. Or, as in Antigua's case, a Member could simply refuse to accept another Member's regulatory scheme or refuse to allow the other Member's service suppliers to qualify under its own regulatory scheme. Furthermore, this approach would conflict with the approach adopted by the Appellate Body in cases such as *US – Gasoline.* In a further attempt to brand the Antiguan gambling and betting services as "unlike" those of United States providers, the United States cites certain law enforcement and health concerns to assert that cross-border supply of gambling and betting services via remote communication is sufficiently "unlike" United States domestic gambling and betting to require radically different treatment under the GATS. As the Appellate Body in *EC – Asbestos* considered "health risks" associated with a product as part of its "physical properties," Antigua will do so in this dispute as well.

3.163 Antigua notes that the primary "concerns" of the United States in this respect appear to be (i) the risk of under age gambling; (ii) the risk of increased pathological gambling; (iii) the risk of abuse of non-domestic service providers for money laundering purposes; and (iv) the heightened risk of crime, fraud and related consumer protection issues. Antigua notes initially that the United States fails to substantiate its statements about the "differences" in the nature of these risks in the context of "remote" gaming as opposed to domestic gaming. The scant traces of "evidence" submitted by the United States on this point should never be enough to justify a distinction between services for the purposes of Article XVII of the GATS. In paragraph 114 of its report in *EC – Asbestos,* the Appellate Body noted that it was particularly important for panels to focus on physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In that case, the Appellate Body determined that the very real health risks inherent in the physical properties

[285] *Work Programme on Electronic Commerce*, Submission by the United States, WT/GC/16 (12 February 1999).

of asbestos fibres would clearly affect the competitive position of the product in the marketplace, as, given a choice between two otherwise similar products, it was logical to conclude that most consumers would prefer a non-carcinogenic product over a competing product that is a proven carcinogen. Under this analysis, Antigua and Barbuda believes that the supposed regulatory and health risks referred to by the United States in this proceeding have a materially different impact in this case than did the health risks at issue in *EC – Asbestos*. In particular, the factors raised by the United States cannot in any material respect influence the decision of a consumer to use the services of a licensed and regulated Antiguan provider over those of a licensed and regulated domestic United States provider – and indeed, the fact that so many United States consumers do use the services of Antiguan gaming companies confirms that these concerns are not relevant from the perspective of the consumer. The possible law enforcement and health concerns raised by the United States are the concerns of the authorities, not of the individual gambler, and consequently cannot influence the consumer's decision. If these law enforcement or regulatory concerns were to have a place in this case, it would be in the context of Article XIV of the GATS. Indeed, in its report in *EC – Asbestos* the Appellate Body explicitly made this point when it stated in paragraph 115 that (original emphasis):

> "Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products. The same, or similar, evidence serves a different purpose under Article XX(b), namely that of assessing whether a *Member* has a sufficient basis for 'adopting or enforcing' a WTO-inconsistent measure on the grounds of human health."

3.164 Article XX(b) of the GATT 1994, of course, is fundamentally the same as Article XIV of the GATS. The United States, however, has not raised an Article XIV defence in this proceeding.

3.165 Antigua notes that the United States' second argument concerning physical properties seems to be that, in the random selection games offered by Antiguan operators, the random selection is performed by software and not by the laws of the physical world. This distinction only relates to random selection games and not to sports betting or card games, which presumably the United States is not attempting to distinguish on this basis. In its discussion, the United States fails to mention that in the case of almost all random selection games offered in the United States, the random selection is performed by a machine – not exactly the "laws of the physical world." This includes lotteries, gambling machines and table games such as roulette. Some gambling machines legally available in the United States are mechanical (for instance traditional slot machines, although an increasingly large number of "traditional" slot machines are in fact computers with a mechanical façade over them), others are electronic (for instance video lottery terminals and video poker and other card game terminals). In fact, gamblers in the United States will often not know whether the machine that performs the random selection is electronic or mechanical. Clearly, it is not possible to differentiate in any material, meaningful way between US and Antiguan gambling on this basis. More importantly, Antigua's evidence, and the popularity of remote gambling in the United States demonstrates that this alleged "physical difference" in the operation of the various games has no impact on consumer preferences and no impact on the competitive position of cross-border gambling service providers vis-à-vis domestic service providers, nor has the United States submitted any evidence to indicate that consumers care one bit whether a machine delivers its result electronically or mechanically. Thus Antigua concludes that the United States has not submitted arguments or evidence sufficient to support a conclusion that United States and Antiguan gambling and betting services are "unlike" due to differences in "physical properties."

3.166 Turning to the second and third criterion elaborated in *EC – Asbestos,* what the Appellate Body summarised in paragraph 117 of its report as "end-uses" and "consumers' tastes and habits," Antigua considers the two criteria together, which the Appellate Body in *EC – Asbestos* considered particularly important because they "involve certain of the key elements relating to the competitive relationship between products (…)." Evidence from independent sources already submitted by

Antigua (see footnote 271) shows that consumers in the United States do switch between gambling and betting services offered domestically and gambling and betting services offered on a cross-border basis via remote communication. This evidence clearly indicates that the two methods of service delivery do in fact compete with each other. The United States' admission that there is "explosive growth" and a "dramatic increase"[286] in such gambling further confirms this. Antigua and Barbuda believes that no one would dispute that: (i) the selling of music over the Internet competes with the selling of music in "brick and mortar" stores; (ii) the delivery of specialized news services over the Internet competes with paper based delivery of such services; and (iii) the selling of books, wine, cars or other products via the Internet or mail-order catalogues competes with the selling of these products in "brick and mortar" establishments. In all these cases it is clear that the "brick and mortar" and the Internet based business model compete because they are capable of "serving the same or similar end-uses" and are perceived as interchangeable by consumers. There is no reason why this would be different for gambling services and suppliers of such services, nor has the United States offered any evidence of any such difference.

3.167 Antigua notes that the United States alleges that the two methods of delivering the gambling and betting services at issue here should be viewed differently than the examples just cited because "brick and mortar" casinos use marketing techniques such as shows by popular stars, free meals and audiovisual effects to attract customers which cross-border suppliers can not offer. This is irrelevant because it concerns marketing techniques and not the service or the service supplier. What is important here is, as the Appellate Body recalls in *EC – Asbestos*[287], that some characteristics may be meaningful and others not when determining whether things are "like." For instance, while there may be a number of superficial distinctions between the way a slot machine might look in a casino versus how a computer generated slot machine looks at a computer terminal, both involve an individual, frequently sitting alone, engaging in unsupervised gambling activity. The mere assertion by the United States that the Antiguan games and services are "different" from those of domestic providers is simply no evidence. Further, the United States offers no evidence that the supposed "differences" have any impact on the "end-use" of the services or "consumer tastes and habits." Antigua, on the other hand, has shown that the offerings do compete with each other for consumer attention.

3.168 Antigua notes that the United States cites various "differences" but then fails to indicate that the putative difference has any probative effect whatsoever. For example, the United States says (see above paragraph 3.154) "[I]ndeed, Antigua actually provides evidence that sports betting is unlike pari-mutuel betting by observing that '[w]hen betting with a bookmaker a gambler bets against the bookmaker as opposed to betting against the other gamblers, as is the case with pari-mutuel betting.'" But after making this point, the United States fails to demonstrate or even allege that a gambler cares whether he or she is betting against a bookmaker or other gamblers. In light of the foregoing discussion, Antigua and Barbuda submits that on the basis of their capability of serving the same or similar end-uses and on the basis of consumer perception Antiguan and United States gambling and betting services must be considered "like" for purposes of GATS Article XVII.

3.169 The fourth and final criterion for "likeness" considered by the Appellate Body in *EC – Asbestos* is the tariff classification of the product. In the context of this dispute, this would equate to the classification of the offered services under W/120 and the CPC. As Antigua has already established, W/120 and the CPC both provide for just one category applicable to gambling and betting services. This is particularly important given the comprehensiveness of the CPC and the huge number of categories delineated under it. Having reviewed, at quite some length, the applicability of the *EC – Asbestos* methodology on "likeness" to the facts in this dispute with the United States, Antigua is brought to the inevitable conclusion that the Antiguan gambling and betting services are "like" those offered by United States suppliers for purposes of the GATS.

[286] See above para. 3.15.
[287] Appellate Body Report on *EC – Asbestos*, para. 92.

3.170 Concerning the issue of "like service suppliers", Antigua notes the US argument that Antiguan service suppliers are not "like" certain service suppliers of United States origin, namely state-owned lotteries, "associations controlling pari-mutuel wagering services" or "any other special type of supplier in the US market." With regard to this issue Antigua and Barbuda agrees with the European Communities that the ownership of a service supplier can play no role in determining the "likeness" of service suppliers. To hold otherwise would be contrary to the principle of effective treaty interpretation, as it would make it very easy for WTO Members to circumvent Article XVII of the GATS by only giving authorizations to so-called "special" domestic operators such as state owned companies. This would largely nullify the effect of the GATS in sectors such as telecommunications and postal services, where Members often maintain state monopolies. If such was the case, even Members with full commitments on market access and national treatment could simply and effectively prevent all forms of competition from other Members. In addition, Antigua cannot see how the United States can argue that it does not violate Article XVI and, in the context of Article XVII, justify its refusal to give Antiguan operators an authorization on the basis that it only gives authorizations to "special" operators of domestic origin. Surely a Member cannot simultaneously argue that, on the one hand, it does not maintain monopolies and exclusive rights and therefore does not violate Article XVI, and that, on the other hand, foreign operators cannot be given a licence because they are unlike the "special" operators of domestic origin that have been given a licence. On a more basic level, there is simply nothing in evidence to indicate that consumers care at all about the legal structure or identity of the providers of "like" gambling services, and it is quite possible that the "likeness" of service providers has little functional relevance in this case. In similar circumstances, the Appellate Body, in paragraph 7.322 of its report in *EC – Bananas III* simply concluded that "to the extent that entities provide these like services, they are like service providers."

3.171 While Antigua and Barbuda firmly believes that the issue of "likeness" is properly and conclusively resolved in its favour, it also thinks that the United States has raised some tangential issues that should be addressed. In particular the United States refers to differences in game characteristics such as the rules of the game. However, the United States makes no attempt to explain how, on that basis, it could possibly make a distinction between gambling services of Antiguan and United States origin. Not all differences – to the extent that they actually are differences – can justify different treatment under an international trade treaty (let alone radically different treatment). A red car is undoubtedly "unlike" a blue car in one respect, namely its colour. This does not allow however, different treatment under WTO law. Given the need for "remote" gambling and betting service providers to compete effectively against domestic operators, in most cases significant effort is made to create game play and "feel" as similar to domestic offerings as possible. In this respect, Antigua and Barbuda submits that it is unaware of any product offering by its gambling and betting service suppliers that has no clear counterpart in the games offered by domestic suppliers in the United States.

3.172 In this context it is also important for the Panel to keep in mind that the debate on likeness in this case does not take place in a context of an authorization system in the United States based on objective, qualitative criteria – a context one would perhaps normally expect in an Article XVII debate. Antiguan gambling services are not prohibited in the United States because of specific game rules or other specific characteristics, and they cannot become legal by adapting game characteristics to objective, qualitative criteria. They are prohibited because they are supplied from abroad. Consequently, specific game characteristics are irrelevant to this dispute because whatever they are, or could become, under the United States legal scheme cross-border Antiguan gambling services of any kind – even if completely identical in every way to United States domestic services – would still be prohibited.

3.173 Turning to law enforcement and health concerns, Antigua submits that, as is true with the "differences" in the various games or services provided by Antiguan gaming operators over those provided by United States operators, Antigua and Barbuda believes that its earlier discussion in the context of *EC – Asbestos* fully addresses the relevant impact of law enforcement and health concerns in making a "likeness" determination. However, the numerous unfounded allegations of the United

States with respect to law enforcement and health issues should be addressed specifically in more detail. As noted earlier, the United States' concerns seem to be in four distinct areas: (i) under age gambling; (ii) pathological gambling; (iii) money laundering; and (iv) organized and other crime, fraud and consumer protection concerns. From the outset, Antigua observes that the United States does not provide any evidence in its first submission that any of these concerns are particularly associated with the cross-border provision of gambling and betting services from Antigua and Barbuda. Nor does the United States counter the substantial evidence submitted by Antigua that is expressly to the contrary. Antigua will show not only that there is no evidence of any pathologies or other problems associated with cross-border gambling services different than those historically associated with gambling in general, but also that there is no evidence that cross-border gambling results in higher levels of pathologies or greater law enforcement risks than domestic gambling.

3.174 Antigua submits that, in analysing youth gambling issues, it is important to note that both Antigua and Barbuda and the United States set minimum legal ages for gambling. Unlike Antigua and Barbuda however, which strictly prohibits gambling by those younger than 18 years of age, the United States permits youths under the age of 18 to gamble on charitable games such as bingo or pull tabs in approximately 19 states, either alone or in the presence of their parents.[288] The United States avers in paragraph 3.18 that "remote" access gaming poses an unacceptable and unmanageable risk of under age gambling, but not surprisingly it provides no evidence to support this statement. The only material concerning under age gambling it does refer to, does not relate to remote access gaming. In fact, numerous investigations have shown the existence of under age gambling in the United States but these all concern conventional gambling opportunities offered by operators inside the United States. The NGISC reports:

> "Although illegal in every state, the sale of lottery tickets to minors nevertheless occurs with a disturbing frequency. For example, one survey in Minnesota of 15-to 18-year-olds found that 27 per cent had purchased lottery tickets. Even higher levels of 32 per cent, 34 per cent, and 35 per cent were recorded in Louisiana, Texas, and Connecticut, respectively. In Massachusetts, Connecticut, and other states, lottery tickets are available to the general public though self-service vending machines, often with no supervision regarding who purchases them. Thus, it is not surprising that a survey conducted by the Massachusetts Attorney General's office found that minors as young as 9 years old were able to purchase lottery tickets on 80 per cent of their attempts, and that 66 per cent of minors were able to place bets on keno games. Seventy-five per cent of Massachusetts high school seniors report having played the lottery."[289]

3.175 Antigua and Barbuda is not aware of any investigation that has found under age participation in remote access gambling to be a significant problem. The obvious reason for this is that remote access gambling requires the use of financial instruments such as credit cards which are not generally available to minors. Because of this significant practical hurdle, the legally sanctioned, cash intensive forms of gambling available in the United States are a much more attractive option for the under age gambler. The United States further argues that preventing under age use of remote access gambling is not feasible, and asserts, in paragraph 3.25, that "[C]hildren have ready access to payment instruments, and no technology has yet been developed to enable constraints on Internet gambling even approaching those that are possible in other settings where gambling can be confined and access to it strictly controlled." It is difficult to see, however, how any age restriction system could be less effective than the situation described in the paragraph from the NGISC on under age lottery playing. Particularly troublesome to Antigua and Barbuda in the face of the United States' allegations in respect of minors' access to payment instruments and lack of control technology is the fact that the

[288] Table 1 from I. Nelson Rose, "The United States: Minimum Legal Age to Place a Bet," *Futures at Stake: Youth, Gambling and Society*, Howard J. Shaffer, ed., University of Nevada Press (2003).

[289] NGISC Final Report, 18 June 1999, pp. 3-4.

United States has recently adopted legislation that aims to protect minors from harmful content on the Internet by expressly providing that on-line merchants can be protected against claims of violations of the legislation by using credit cards as an exclusive means of payment in order to prevent access by minors to harmful content such as pornography.[290] The United Kingdom also makes use of the fact that payment systems such as credit cards are not available to minors to prevent under age use of remote access gambling facilities.[291]

3.176 Regarding pathological gambling, Antigua notes that, in 2001, a group of seven eminent experts in the psychology of gambling, including Dr. Howard Shaffer of Harvard University (who is quoted by the United States) published a seminal editorial in the *Journal of Gambling Studies*. The editorial was an appeal to the scientific community researching gambling behaviour to adopt a more serious and "scientific" approach when making statements about the impact of gambling. In the Article they stated that "[I]mmature fields like gambling studies also provide the opportunities for quasi-scientists and even charlatans to influence the public, policy makers and perhaps themselves to thinking that their "evidence" supports a particular treatment, causal relationship or public policy."[292] In this respect Antigua notes that the United States submits, in paragraph 3.18, that gambling websites have been designed to resemble video games and therefore are especially attractive to children. This conclusion is based on a statement of the executive vice president of the National Football League who, presumably, is a football expert, not a psychologist who studies gambling behaviour. In any event none of the games offered from Antigua and Barbuda are designed to resemble video games in order to attract children.

3.177 Antigua and Barbuda has extensively surveyed literature associated with problem gambling, and has been unable to find any discernable body of scientific evidence to support the assertion of the United States that remote access gambling is any more problematic than other forms of gambling when it comes to compulsive, problem or other forms of pathological gambling. However, to better substantiate its findings, Antigua and Barbuda engaged the services of internationally recognized experts in the field of pathological gambling to advise with respect to evidence of particular problems associated with remote (and in particular, Internet) gambling. These experts confirmed the results of Antigua's own research, and in fact each has pointed out some areas in which Internet gambling may present fewer risks associated with problem gambling than "brick and mortar" gambling.[293]

3.178 Antigua submits that, concerning money laundering, the United States makes, in paragraph 3.16, the unsubstantiated statement that "[r]emote supply gambling businesses provide criminals with an easy vehicle for money laundering (…)." It further submits that "[t]he industry is far more cash-intensive than conventional forms of telephone or Internet commerce, yet it lies outside the special regulatory and monitoring structures developed for financial services." And it concludes, in paragraph 3.25, that "Antigua's attempts to regulate gambling and money laundering cannot address basic concerns relating to remote supply of gambling." The alleged insufficiency of Antigua and Barbuda's anti-money laundering measures is not explained further. The United States simply states it to be so, and in so doing ignores the fact that international bodies such as the Financial Action Task Force (or "FATF") and the Caribbean Financial Action Task Force have recognized the effectiveness of Antigua's anti-money laundering legislation. The United States even ignores the fact that it has itself lifted a so-called "Financial Advisory" in relation to money laundering that it had imposed on

[290] "The Child Online Protection Act", 47 United States Code Ann. §231.

[291] United Kingdom Department for Culture, Media & Sport, *The Future Regulation of Remote Gambling: A DCMS Position Paper* (April 2003), para. 43.

[292] Howard J. Shaffer, Mark Dickerson; Jeffrey Derevensky, Kenneth Winters, Elizabeth George, Marvin Karlins, Walter Bethune (eds.), *Considering the Ethics of Public Claims: An Appeal for Scientific Maturity*, Journal of Gambling Studies, Vol. 17. No. 1 (2001), p. 1.

[293] Prof. Mark Griffiths & Dr. Richard Wood, *Is Internet Gambling More Addictive and/or Problematic Than Other Forms of Gambling?*, The International Gaming Research United, Division of Psychology, Nottingham (UK), October 2003 (document submitted by Antigua to the Panel).

Antigua and Barbuda in 1999. This Financial Advisory advised financial institutions to give "enhanced scrutiny to all financial transactions routed into or out of Antigua and Barbuda."[294] In 2001, the United States considered this no longer necessary due to regulatory changes in Antigua and Barbuda and lifted the Financial Advisory. In doing so, it made no exemption for gambling and betting transactions. Furthermore, the United States' explanation as to why remote supply gambling businesses provide criminal enterprises with an easy vehicle for money laundering lacks credibility. The United States seems to argue that money can be laundered by placing it in a gambling account, losing a small amount of it and requesting repayment of the balance (which would apparently somehow make the original source untraceable). Not only do Antigua's Gaming Regulations require that winnings be paid back to the same bank account or credit card from which the stake was paid, they also prohibit funding accounts with cash. Further, the use of credit cards and other financial instruments leaves a large and traceable electronic footprint.

3.179 Antigua notes that, in footnote 72, the United States also refers to money laundering methods allegedly described in a report from the FATF. However, the examples in that FATF report do not describe how Internet gambling can be used as a money laundering vehicle. The FATF report submitted as evidence by the US does mention however, that "cash remains the major if not primary form in which illegal funds are generated."[295] Furthermore, that report states that "traditional casino gambling has been confirmed as being a well used channel for money laundering in some FATF jurisdictions"[296] and it mentions specific methods used in casinos in the United States involving safe deposit boxes. Should there remain any further doubt about the money laundering opportunities presented by the cash-heavy United States gambling business versus the non-cash gambling industry in Antigua and Barbuda, Antigua submits a copy of a recent press Article describing how a major Las Vegas casino that has a representative in Tokyo had been facilitating the money laundering efforts of a member of a Japanese organized crime syndicate.[297] The presence of cash transactions in a gambling operation is key to its attractiveness for money laundering. And because remote access gambling in Antigua makes no use of cash at all, it is simply not attractive for money laundering. This is confirmed by the GAO which reported the following findings from its investigation on Internet gambling:

> "Banking and gaming regulatory officials did not view Internet gambling as being particularly susceptible to money laundering, especially when credit cards, which create a transaction record and are subject to relatively low transaction limits, were used for payment. Likewise, credit card and gaming industry officials did not believe Internet gambling posed any particular risks in terms of money laundering. (…) In general, gaming industry officials did not believe that Internet gambling was any more or less susceptible to money laundering than other electronic commerce businesses and noted that the financial industry – which is responsible for the payments system – is better suited to monitoring for related suspicious activity in the area than the gaming industry itself."[298]

3.180 Antigua notes that the United Kingdom, which has spent considerable time and effort studying the feasibility of Internet gambling, also takes the view that "there appears to be a paucity of proof" that money laundering through Internet gambling sites is "a significant problem" and that "[i]t

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[294] United States Department of the Treasury – Financial Crimes Enforcement Network, *FinCEN Advisory*, Issue 11 (April 1999).

[295] Financial Action Task Force on Money Laundering, *Report on Money Laundering Typologies, 2000-2001* (1 February 2001), para. 39.

[296] Ibid., para. 37.

[297] "Las Vegas Casinos Named in Arrest – Money Laundering Involving Japan Loan Shark Alleged", in *reviewjournal.com* (14 November 2003), at http://www.reviewjournal.com/lvrj_home/2003/Nov-14-Fri-2003/news/22583394.html.

[298] United States General Accounting Office, GAO Report, p. 37.

is safe to say that gambling transactions completed online can be more secure than cash business conducted in traditional gambling outlets."[299]

3.181 Concerning crime, fraud and consumer protection concerns, Antigua notes that, in paragraph 3.15, the United States levels the allegation that "[l]aw enforcement authorities in North America have seen evidence that organized crime plays a growing part in remote supply of gambling, including Internet gambling." In the same paragraph, the United States quotes a government official as saying that "[w]e have now seen evidence that organized crime is moving into Internet gambling." However, in neither case does the United States bother to share any of this "evidence" with the Panel, and characteristically its claims about organized crime involvement in Internet gambling are completely unsubstantiated. The United States continues, in paragraph 3.17, to make unsubstantiated, largely irrelevant statements about possible fraud risks that may be associated with the provision of cross border gambling services. However, Antigua and Barbuda fails to see the relevance of fraudulent lotteries in the context of this dispute, nor does it see any support for the United States' claims that the "potential for fraud is heightened when gambling opportunities are supplied from remote locations." Antigua notes in particular that, in the "Top 10 Consumer Fraud Complaints" submitted as evidence by the United States (which is not specific to electronic commerce), the category "Prizes, Sweepstakes & Lotteries" ranks seventh with four per cent of all complaints. This is behind: Internet auctions at 13 per cent; Internet services and computer complaints at six per cent; advance-fee loans and credit protection at five per cent; and shop-at-home and catalogue sales at four per cent. Although Antigua questions the relevance to this dispute of "prizes, sweepstakes and lotteries," in the "Top 10 List" such activities are ranked just before: business opportunity and work-at-home plans at three per cent; and telephone services and health care at two per cent each. While Antigua and Barbuda does not take law enforcement and health related issues lightly, the fact of the matter is that these concerns are applicable to gambling and betting in general and indeed to a large number of other economic activities, not simply to cross-border or "remote access" gambling and betting. And, just as the United States has chosen to do, Antigua and Barbuda has determined that these risks and concerns, to the extent present at all, can be acceptably minimised through effective regulation.

3.182 The **United States** reiterates that Antigua has failed to prove the fundamental premises that its services and service suppliers are "like" US services and service suppliers, and it has not shown how specific US measures accord Antiguan services and service suppliers less favourable treatment. The differences between the views of Antigua and the United States flow from a fundamental difference in their respective understandings of the principle of national treatment. Antigua appears to claim that a cross-border commitment for gambling services would mean that allowing any domestic gambling opens the door to all forms of cross-border gambling, regardless of likeness of services or service suppliers. If one applied this novel view of national treatment to the medical services example above, it would mean that so long as certain domestic doctors are allowed to diagnose certain patients under limited circumstances within a Member's territory, all cross-border doctors must be allowed to diagnose all patients by telephone or Internet throughout that Member's territory. The United States takes a very different view. A cross-border commitment for national treatment entitles the provider of another Member to offer services only to the extent that like domestic suppliers can offer the like services. That simply means that where domestic doctors cannot diagnose patients over the telephone or by other means of remote supply, neither can foreign doctors.

3.183 The United States submits that, after a cursory treatment of the issue of likeness of services and service suppliers in its first submission, Antigua has more recently adopted the strategy of trying to reverse its burden of proof by asserting that "the United States has not submitted arguments or evidence sufficient to support a conclusion that the United States and Antiguan gambling and betting

[299] United Kingdom Department for Culture, Media & Sport, *The Future Regulation of Remote Gambling: A DCMS Position Paper*, April 2003, paras. 69-70.

services are 'unlike.'"[300] Antigua is again trying to ignore the complaining party's burden of proof in WTO dispute settlement proceedings. Antigua is the party asserting a violation of Article XVII, therefore Antigua alone bears the burden of providing evidence and argumentation proving likeness. Past panel and Appellate Body reports provide little detailed discussion of the legal issues surrounding likeness of services and suppliers, but the basic framework for such an analysis is clear. A panel assessing likeness must make a case- and fact-specific analysis of the particular services and suppliers at issue. In doing so, the panel must examine the characteristics of the allegedly like services and suppliers. These characteristics are not defined in the text of the GATS, and vary on a case-by-case basis. To engage in this analysis, this Panel must first identify the services and suppliers it is comparing. Antigua has described the types of services and suppliers it licenses as Internet "virtual casinos" and Internet and telephone sports betting ("sports book") operators.[301] The Panel's task therefore appears to be to determine whether Antigua has in the first instance established that its Internet "virtual casino" services and suppliers are "like" US non-remote gambling services and suppliers, and whether Antigua's Internet and telephone sports book services and suppliers are "like" sports book services and suppliers in the State of Nevada (the only part of the United States where such services are allowed).

3.184 The United States disagrees with Antigua's suggestions that the Panel must examine characteristics that relate to the "end use" of a service or "consumer tastes and preferences" regarding that service, including consumer preferences and the "physical" characteristics of the service. Contrary to Antigua's argument, these are by no means the only factors to consider in a GATS likeness analysis. As discussed below, likeness in the context of this particular dispute depends more heavily on the regulatory characteristics of services and suppliers. Assuming *arguendo* that consumer perceptions nonetheless play a role in a GATS likeness analysis, a full analysis of the characteristics relevant in shaping consumer perceptions weighs strongly against a finding of likeness between virtual and real gambling.

3.185 The United States submits that remote gambling has different consumers. Antigua's own evidence shows that Internet gambling services have different customer bases than other gambling services, as reflected by Bear Stearns' conclusion that "Internet gamers are generally not the same customer as land-based gamers."[302] Indeed, Internet gambling sites tend to attract gamblers who do not consume other forms of gambling, partly by virtue of the ability to indulge in gambling in seclusion without the stigma or effort required to go to a public gambling facility.[303] Most telling of all is the fact that Antigua's own consultants unequivocally state that Internet gamblers are different from other gamblers in terms of "financial stability, motivation, physiological effects, need for acknowledgement, and social facilitation."[304] Besides, Antigua itself concedes that a virtual casino is

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[300] See above para. 3.165. Antigua's comments on the issue of likeness consisted of an attack on what it described as "claims" by the United States regarding the absence of likeness. See above paras. 3.158 and 3.160. Needless to say, the only "claims" at issue regarding likeness in this dispute are the unsubstantiated claims made by Antigua.

[301] The United States notes that Antigua seems to take issue with this characterization, but has offered no alternative description of its services and suppliers for purposes of a "likeness" analysis. Antigua clearly stated that it offers an interactive gaming license, which is "for casino-type, random selection and card games" – also described by Antigua as "virtual casinos" – supplied by Internet; and an interactive wagering license, which is "for sports betting" supplied by Internet or telephone. See above para. 3.2. These services and their operators are the relevant Antiguan services and suppliers for purposes of a likeness analysis.

[302] Bear Stearns, *E-Gaming: A Giant Beyond Our Borders*, p. 55 (September 2002). This assessment plainly contradicts the four anecdotal statements relied on by Antigua (see above footnote 271 and para. 3.166) for the proposition that its services are "virtually the same" as services offered in the United States.

[303] American Psychiatric Association, *APA Advisory on Internet Gambling* (16 January 2001), p. 1 (discussing solitary nature of Internet gambling).

[304] Prof. Mark Griffiths & Dr. Richard Wood, *Is Internet Gambling More Addictive and/or Problematic Than Other Forms of Gambling?*, The International Gaming Research United, Division of Psychology, Nottingham (UK), October 2003 (document submitted by Antigua to the Panel), pp. 5-6.

a mere imitation of a real casino.[305] The games operate differently; while designed to resemble real casino games, virtual games actually consist of betting on software algorithms.[306] Antigua's own evidence shows that the environments virtual casino services operate are completely different from those of real casinos.[307] As to other forms of remotely supplied gambling, Antigua still has not attempted to offer specific proof of likeness. The United States reiterates that particular forms of gambling have operational and supplier characteristics that sharply distinguish them from other forms of gambling. The two most clear-cut examples are lotteries and pari-mutuel wagering, which differ from other forms of gambling both in terms of their operation (for example, by a common pool in the case of pari-mutuel betting) and their suppliers.

3.186 The United States argues that in assessing "end use" or "consumer tastes and preferences," as Antigua urges, the Panel should begin from the premise repeatedly asserted by Antigua – that gambling is a recreational service. Assuming that to be the case for purposes of argument[308], the "end use" of a gambling service would be to provide recreation. The characteristics shaping consumer perceptions of gambling services would therefore be primarily those characteristics that influence the recreational value of gambling activity. Antigua's "end-use" and "consumer perception" arguments thus require the Panel to determine whether the recreational experience provided by a virtual casino is similar enough to that of a real casino to make them "like services." The United States submits that it is not. No one would dispute that, in terms of the consumer's experience, services providing graphical "virtual reality" simulations that mimic such recreational activities as horseback riding, participation in sports, etc., are unlike actual participation in those activities. In the context of recreational services, where the consumer's purpose is to purchase the recreational experience itself, the qualitative difference between the consumer's experience in a real setting as compared to a virtual setting assumes vastly greater importance than such a distinction might have in the context of other services.

3.187 The United States has already shown that real casinos offer a vastly different consumer experience than virtual casinos, and that the virtual games do not involve the use of traditional gaming paraphernalia.[309] This evidence demonstrates that the sensations and environmental attributes likely to shape consumer perceptions of recreational value of an Internet virtual casino are no more "like" those of a real casino than the attributes of participation in a football video game are like those of participation in a real football game. And the factors that shape the recreational value of a virtual casino are worlds apart from the characteristics of a real casino. Antigua's own consultants, Prof. Griffiths and Dr. Wood, appear to agree. They cite a litany of differences that distinguish the

[305] Antigua states that a virtual casino "is designed to mimic land-based casino settings" and provides "virtual imitations of video poker terminals, slot machines and other gambling machines."

[306] Given the differences between goods and services, it may be more accurate to refer not only to "physical" characteristics, but also to "operational" or "functional" aspects of the service. Antigua dismisses the these issues as "superficial." Such characteristics cannot be dismissed as irrelevant, especially not in the gambling context, where they determine consumer's chances of win or loss (i.e., the "price" of the gambling service).

[307] The United States notes that Antigua attempts to respond to this point by simply claiming that a person sitting at a real slot machine is having the same experience as a person playing a virtual slot machine from a home, school, etc. As discussed below, Antigua's own evidence confirms that the consumer perception of the virtual setting differs greatly from the real setting.

[308] The United States reiterates that it is only assuming *arguendo* the existence of a commitment for such services for purposes of explaining the failure of Antigua's argument. As discussed above, gambling services are not "other recreational services (except sporting)" within the meaning of the US specific commitments.

[309] See above para. 3.155. Antigua tries to dismiss some of these differences as mere "marketing techniques" that have no impact on consumer perceptions, but overlooks the fact that the entire point of a "marketing technique" is to influence consumer perceptions. Moreover, Antigua's assertion is further contradicted by its submission of a report stating that consumers in the U.S. perceive gambling as a diversion rather than a daily activity. See Bear Stearns, *E-Gaming: A Giant Beyond Our Borders*, (September 2002), p. 45. If true, that would suggest that the qualitative difference in consumer experience between virtual and real casinos is especially pertinent to US consumers.

allegedly recreational experience of Internet gambling from that of traditional gambling. For example, they observe that: (i) "the 'physical' transaction of collecting winnings ... can be highly rewarding" – and lack of this sensation creates a "barrier" between traditional gamblers and gambling on the Internet;[310] (ii) "Internet and traditional gamblers appeared to be different in terms of motivation to gamble. Traditional gamblers gambled for more expressive and affective reasons than Internet gamblers. Traditional gamblers enjoyed gambling as a means of escape. The 'real' gambling environment was more conducive to satisfying these needs than Internet gambling in the home";[311] "[T]raditional gamblers reported greater physiological effects (e.g., increased heart rate) when gambling compared to Internet gamblers. For instance, traditional gamblers reported more feelings of nausea, dizziness and stomach contractions after experiencing a sizeable loss";[312] "Internet gambling sites may not satisfy a deeper psychological need – the need for self-esteem. Typically, gambling establishments have always operated in a social environment. An important aspect of such an environment has been the level of social reinforcement that exists. ... At first sight, it would appear that social reinforcement is unavailable in Internet gambling, i.e., if you win on an Internet gambling site, who is there to witness it?"[313] All of these observations go directly to the issue of consumer perception. They confirm that consumer perceptions of Internet gambling are nothing like perceptions of real gambling. Antigua's comparison between Internet gambling and Internet sale of music, or sale of goods (books, wine, etc.) reinforces the foregoing point. In Antigua's examples, the consumer's end objective in using a particular service is to transact for the attainment of something – be it a song, a bottle of wine, etc. – that is identical or nearly identical to the product or service one could get by going to a physical facility. In such a case, whether the shopping is done in a real or a virtual environment may be immaterial to the likeness of the service supplied. In a case where the consumer is buying the experience of engaging in recreation, however, one must recognize that consumers will inevitably perceive the simulation of a recreational activity in a virtual environment as vastly different from actually experiencing such activity in the real world.

3.188 The United States disagrees with Antigua's assertion that the regulatory and law enforcement risks inherent in a service are relevant to "likeness" only insofar as they shape consumer perceptions and competitive relationships in the marketplace for services.[314] The United States also disagrees with Antigua's denial that virtual casinos or other forms of gambling by remote supply involve different regulatory and law enforcement risks than real casinos. Regulatory distinctions are directly relevant under GATS Article XVII, and should be considered in their own right – not solely through the lens of consumer perceptions. The GATS explicitly recognizes in its preamble the "right of Members to regulate" services. The "like services and suppliers" language of Article XVII must therefore be interpreted in light of that object and purpose of the GATS. Thus one must consider not only the different competitive characteristics of a service or supplier as such, but also the existence of regulatory distinctions between services in interpreting and applying the likeness analysis under Article XVII. Such issues have sometimes been addressed in the goods context under the rubric of consumer perceptions and their impact on competitive relationships[315], but they merit independent consideration in the context of the GATS. They assume particular importance in this dispute because gambling is so heavily regulated. As previously discussed, the United States maintains and applies a

[310] Prof. Mark Griffiths & Dr. Richard Wood, *Is Internet Gambling More Addictive and/or Problematic Than Other Forms of Gambling?*, The International Gaming Research United, Division of Psychology, Nottingham (UK), October 2003 (document submitted by Antigua to the Panel), p. 5.

[311] Ibid.

[312] Ibid.

[313] Ibid., pp. 5-6.

[314] See above para. 3.163, where Antigua also quotes the Appellate Body's statement in *EC–Asbestos* that "[U]nder Article III:4, evidence relating to health risks may be relevant in assessing the competitive relationship in the marketplace between allegedly 'like' products." In the services context, regulatory distinctions between services and suppliers have a significant impact on the "competitive relationship in the marketplace" between those services and suppliers, and could therefore be considered under that analysis.

[315] For example, the Appellate Body in *EC – Asbestos* considered health dangers in the context of consumer perceptions. See Appellate Body Report on *EC – Asbestos*, para. 113.

regulatory distinction between remotely supplied gambling services and other gambling services, with the former subject to even tighter restrictions than the latter. This distinction arises from the numerous distinguishing law enforcement, consumer protection, and health concerns associated with the remote supply of gambling.

3.189 The United States has provided evidence showing that US law enforcement authorities have seen organized crime playing a growing role in Internet gambling.[316] Antigua claims that any such concerns are indistinguishable from existing concerns about organized crime involvement in other forms of gambling. The comments of a Canadian law enforcement official show why Antigua is incorrect, and confirm the views of US law enforcement. According to a Detective Inspector of the Ontario Illegal Gaming Enforcement Unit:

> "Internet Gambling provides organized criminals with everything they could ever want from a criminal enterprise: anonymity, large amounts of cash, the ability to control the odds, very little chance of getting caught, and power. Criminals gravitate towards money and the more fast-moving the money is, the more appealing it is."[317]

3.190 The US Federal Bureau of Investigation ("FBI") Racketeering Records and Analysis Unit provided the following assessment to Congress in 1999:

> "Organized crime ['OC'] groups are heavily involved in offshore gambling. OC involvement is in four different areas. (1) Using offshore sports books as layoff sources for US based bookmaking operations, (2) Extending credit to finance offshore gambling operations, (3) Setting up offshore gambling operations temporarily for the purpose of ripping off customers, (4) Setting up offshore gambling operations as a permanent means of income for the organization."[318]

3.191 Looking ahead, the FBI stated that "[O]ffshore gambling will become increasingly popular as it is legalized and accepted in more nations throughout the world. Despite it's appearance of legitimacy, organized crime has already infiltrated the industry".[319] As the foregoing comments suggest, while the tentacles of organized crime clearly reach many forms of gambling, remotely supplied gambling, and Internet gambling in particular, raises uniquely grave concerns. These include, *inter alia,* the enticing new opportunities for organized crime presented by the amount of money and manipulability inherent in Internet gambling; the opportunity to use gambling by remote means of supply as a clearinghouse through which organized crime bookmakers in the United States

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[316] The United States notes that by asserting that US claims about the involvement of organized crime in Internet gambling are "unsubstantiated," Antigua is apparently choosing simply to disbelieve the official statements of US and Canadian authorities on this issue cited in para. 3.15 above. Nonetheless, these statements are clear. Moreover, at a Congressional hearing on 3 October 2001, Dennis M. Lormel, who was then chief of the Financial Crimes Section at the Federal Bureau of Investigation, had the following discussion with a US legislator:

Rep. Oxley: I won't ask you to discuss specifics, but is the Bureau pursuing any cases that involve a linkage between Internet gambling and money laundering?

Mr. Lormel: Yes, sir. There are a minimum of two pending investigations, as we speak, that I'm aware of. It's more in keeping with our organized-crime site [sic] of the house, which is not my area of expertise. But I am -- from my prior assignment in Pittsburgh, I'm aware of a case that we actually worked in our shop out there.

Rep. Oxley: And are you pursuing any cases linking organized crime to Internet gambling?

Mr. Lormel: I believe so, sir, yes.

Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before House Committee on Financial Services, 107th Cong., p. 42 (2001).

[317] L.D. Moodie, Detective Inspector, Ontario Illegal Gaming Enforcement Unit, Gambling Law Enforcement Systems Issues Conference (8 March 2002), p.18.

[318] Federal Bureau of Investigation, RRAU Analysis of Offshore Gambling (1999), p. 1.

[319] Ibid., pp. 4-5.

can "lay off" their bets;[320] and the opportunity for organized criminals to more easily hide their involvement in gambling and evade law enforcement by operating beyond the intense scrutiny of regulators and law enforcement officials in the gambler's jurisdiction.[321]

3.192 The United States argues that Antigua asserts that it has enacted laws to deal with money laundering, but whatever the impact of Antigua's legislation, it is not relevant to the issue of the concerns regarding the susceptibility of remote supply of gambling to money laundering in the United States. Moreover, a September 2003 report by the US Drug Enforcement Administration ("DEA") disagrees with Antigua's assertions. The DEA report concludes that "Internet gambling in Antigua and Barbuda is sometimes used for money laundering."[322] It also states that Internet gambling in three other Caribbean countries raises money laundering concerns.[323] Similarly, a US State Department report, while praising changes in Antigua's statutes, nonetheless concluded that Antigua "remains susceptible to money laundering because of its loosely regulated offshore financial sectors and its Internet gaming industry."[324] Antigua denies that the potential for fraud is heightened when gambling is supplied from remote locations, and again asserts that there are no special concerns regarding fraudulent Internet gambling. It is true that many forms of gambling involve a high potential vulnerability to fraud and other crimes; that is a major reason why gambling services require the utmost regulatory scrutiny. But here again Antigua disregards the even greater threat when fraudulent gambling services operate far away from their victims, through anonymous media, and in some cases subject to at best uncertain law enforcement scrutiny. It also disregards the inherent manipulability of Internet gambling. The NGISC found that "the global dispersion of Internet gambling operations makes the vigilant regulation of the algorithms of Internet games nearly impossible."[325] Antigua goes to great lengths to try to show that Internet gambling is no more addictive than other forms of gambling. Yet ultimately it only proves the obvious proposition that the precise mechanics of gambling addiction is a novel issue on which not all authorities agree. The United States has already demonstrated that the respected American Psychiatric Association views Internet gambling as posing a special health threat, and other evidence corroborates that threat.[326] Whether the health threat comes

[320] See, e.g., Press Release, dated 4 June 2002, 17 Members and Associates of the Gambino Crime Family Indicted for Corruption on the New York Waterfront, United States Attorney's Office for the Eastern District of New York ("The defendants allegedly used off-shore wire-rooms in Costa Rica to place tens of thousands of dollars in sports bets per week for approximately 30 bettors.").

[321] The United States notes that the latter concern was a major factor in the adoption of restrictions on the remote supply of gambling in the early 1960s. At the time, long before the Internet exacerbated the problem, US Attorney General Robert F. Kennedy already testified that "our information reveals numerous instances where the prime mover in a gambling or other illegal enterprise operates by remote control from the safety of another State – sometimes half a continent away." Testimony of Attorney General Robert Kennedy, Hearings Before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess., (1961), p. 4.

[322] Drug Enforcement Administration, *The Drug Trade in the Caribbean: A Threat Assessment*, (September 2003), DEA-03014, p. 3. See also See Bear Stearns, *E-Gaming: A Giant Beyond Our Borders*, (September 2002), p. 40, (discussing Antigua and five other jurisdictions, and concluding that "although these major markets provide for some of the most lucrative and popular gaming sites on the Internet, they also provide for the least amount of public information. . . . In our view, this lack of access to information increases the risk profile of the region tremendously.").

[323] Ibid., pp. 12, 19, and 31.

[324] US State Department, International Narcotics Control Strategy Report: Money Laundering and Financial Crimes (March 2003), p. XII-87, available at http://www.state.gov/documents/organization/18171.pdf.

[325] NGISC Final Report, pp. 5-6. Putting the point more bluntly, the Senate Committee on the Judiciary stated that the Committee agreed with one of the NGISC commissioners, who stated that "anyone who gambles over the Internet is making a sucker bet" Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Congress 10 (2003) (statement of John G. Malcom) , p. 6.

[326] For example, the American Psychiatric Association states that "Internet gambling, unlike many other types of gambling activity, is a solitary activity, which makes it even more dangerous: people can gamble

from the nature of Internet play itself or simply from the added population of potential victims – including youth – reached by a medium as pervasive as the Internet is an interesting question for scientific debate, but it is not relevant to this dispute. Even if (*quod non*) Internet gambling is only equally addictive, or only half as addictive, opening the floodgates to legalized remote supply of gambling services into homes, schools, offices, etc., would clearly involve an enormous growth in the opportunity for gambling and, consequently, for gambling addiction.[327]

3.193 According to the United States, Antigua admits that the United States imposes age restrictions on non-remote gambling, but argues that Internet gambling poses no greater risk of child and youth gambling. Antigua specifically denies that any of the remotely supplied gambling games offered from Antigua are designed to resemble video games or be attractive to children. The United States attached to its second submission images of a few of the numerous child-oriented games offered on gambling websites licensed by the Antiguan government. The video game presentation, cartoon-like design, and childish iconography of such games such as "Haunted House," "Rock'n Roller," "Dinosaur Slots," "Alien Alert," "Goblins Cave," and "Ocean Princess" speak for themselves.[328] Antigua also argues that minors lack access to credit cards and other payment instruments. The testimony of a senior executive of Visa (which describes itself as the world's largest consumer payment system)[329] before the US Commission on Online Protection refutes Antigua's assertion in the clearest possible terms. After observing that the Child Online Protection Act "basically assumes that only adults have access to a credit card or a debit card," the Visa executive testified:

> "To the contrary, it is important for the Commission to understand that this assumption simply is not correct. Access to a credit card or a debit card is not a good proxy for age. The mere fact that a person uses a credit card or a debit card in connection with a transaction does not mean that this person is an adult.
>
> Many individuals under the age of 17 have legitimate access to, and regular use of, credit cards and debit cards. For example, parents may designate their child as an 'authorized user' of the parent's credit card or debit card. This actually is quite common, particularly for credit cards. Whenever this occurs, the child will have access to the parent's credit card number or debit card number and can use that card number to access materials deemed 'harmful to minors' on the Internet.
>
> In addition, many children under the age of 17 have their own deposit accounts and may have access to a debit card that accesses such account. [...]

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uninterrupted and undetected for unlimited periods of time." American Psychiatric Association, *APA Advisory on Internet Gambling* (16 January 2001), p.1.

[327] The United States notes that one of Antigua's own consultants has stated that "[r]esearch has consistently shown a positive relationship between the availability of gambling and both regular and problem gambling." See Mark Griffiths and Paul Delfabbro, The Biopsychosocial Approach to Gambling: Contextual Factors in Research and Clinical Interventions, eGambling: The Electronic Journal of Gambling Issues, issue 5 (2001), available at http://www.camh.net/egambling/archive/pdf/EJGI-issue5/EJGI-issue5-complete.pdf. See also NGISC Final Report, pp. 4-19 (stating that "[a]s the opportunities for gambling become more commonplace, it appears likely that the number of people who will develop gambling problems also will increase.").

[328] In addition, the American Psychiatric Association states that "[o]ne significant hazard is that many online games sites – which target children and teens – have direct links to gambling sites. Many of these sites offer "freebies" and other supposed discounts to get young people started." American Psychiatric Association, *APA Advisory on Internet Gambling* (16 January 2001), p. 2.

[329] Visa describes itself as "the world's leading payment brand and largest consumer payment system," with more than 396 million cards issued through U.S. financial institutions. See http://usa.visa.com/personal/newsroom/?it=ss_/index.html.

> Thus, although the [Child Online Protection] Act assumes that only adults have access to a credit card or a debit card, it is important for the Commission to understand that this assumption is simply not true. As a result, the Commission may want to focus its attention on more suitable methods of verifying age."[330]

3.194 The same Visa executive also noted the danger of unauthorized use of credit cards by minors.[331] In addition, a 1999 survey conducted in the United States found that 28 per cent of respondents between the ages of 16 and 22 had at least one major credit card, including seven per cent of the younger high school students (age 16 to 18).[332] Since 1999, efforts to market credit cards to Americans under the age of 18 have only expanded.[333] Thus Antigua's assertion that "payment systems such as credit cards are not available to minors" is wrong; minors do have ever-increasing access to such instruments, therefore the anonymity of Internet gambling does in fact create a significant opportunity for under age gambling as compared to other forms of gambling that can be controlled through in-person supervision.

3.195 Whether the foregoing law enforcement, health, and consumer protection concerns are viewed separately or together, it is clear that significantly different regulatory issues arise in connection with the remote supply of gambling by virtue of the fact that it is supplied remotely. The United States does not assert that such concerns would always establish a regulatory distinction between remotely supplied services and non-remote services. Likeness is a case-by-case analysis. Gambling is a special case because it is a service that is "the target of special scrutiny by governments in every jurisdiction where it exists."[334] Remote supply of gambling poses a far greater danger of eluding that scrutiny, causing the various problems described above and therefore requiring a regulatory distinction between remote supply and other forms of supply.

3.196 The United States submits that to the extent that international classifications bear on the issue of likeness, the explanatory notes to recent services classifications support the finding of a "likeness" distinction between remote supply of gambling and other forms of gambling. For example, the most recent version of the CPC, version 1.1, identifies four distinct components of CPC subclass 96920, "Gambling and betting services." They are (1) "organisation and selling services of lotteries, lottos, off track betting," (2) "casino and gambling house services," (3) "gambling slot-machine services," and (4) *"on-line gambling"* (emphasis added).[335] Antigua asserts that W/120 and the CPC both provide a single category for gambling services. Of course, this is incorrect with respect to the W/120 categories, which do not mention gambling services. With respect to the CPC, it is hardly surprising the provisional document referenced in the GATS negotiating history, unlike its more recent successor, did not address the new phenomenon of on-line gambling. These sources should not play a significant role in any likeness analysis that the Panel might undertake in this particular dispute.

3.197 **Antigua** submits that the United States uses much of its Article XVII discussion not only to develop its "remote" gambling theory but also to lay out its claims concerning "law enforcement and

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[330] Testimony of Mark MacCarthy, Senior Vice President for Public Policy, Visa U.S.A., Before the Commission on Online Protection (9 June 2000), pp. 3-4.

[331] Ibid., p.3.

[332] American Savings Education Council, *1999 Youth and Money Survey, available at* http://www.asec.org/youthsurvey.pdf, pp. 4, 11.

[333] Amit Asaravala, Why Online Age Checks Don't Work, *Wired News* (10 October 2002). ("Since [1999], credit card companies have been making it even easier for minors to get cards in their names.").

[334] NGISC Final Report, p. 3-1.

[335] Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, code 96920. See also International Standard Industrial Classification of all Economic Activities, ST/ESA/STAT/SER.M/4/Rev.3.1, E.03.XVII.4, code 9249, (with explanatory note breaking down "gambling and betting activities" into five distinct categories, consisting of (1) "sale of lottery tickets," (2) "operation (exploitation) of coin operated gambling machines," (3) "operation (exploitation) of coin operated games," (4) "operation of gambling cruises," and (5) *"operation of virtual gambling websites"* (emphasis added)).

health considerations." The United States uses both of these concepts to allege that Antiguan gambling and betting services and service suppliers are not "like" gambling and betting services and service suppliers domiciled in the United States. Antigua stresses it does not believe there is any meaningful category of "remote" gambling for the purposes of this dispute. Antiguan services are necessarily "remote" because they are furnished cross-border, but this does not change their character as fundamentally gambling and betting services. The United States complaint that Antigua wishes to reverse the "burden of proof" on the issue of likeness is another misstatement. Antigua has demonstrated with considerable evidence and legal discussion that its gambling and betting services are "like" those in the United States for purposes of Article XVII – and that the United States has failed utterly to establish the contrary.

3.198 According to Antigua, the US argument that Antiguan so-called "remote" gambling services do not compete with the gambling services offered domestically by United States operators because "remote gambling has different consumers" is based on a statement in the Bear Stearns' report that "Internet gamers are generally not the same customer as land-based gamers."[336] But this obviously does not mean that "Internet based" and "land-based" gambling and betting services do not compete. It simply means that, in Bear Stearn's view, gamblers choose their preferred distribution channel. For example, most consumers who buy music over the Internet will normally reduce or stop their visits to "brick and mortar" music shops. But, of course, there is competition between the two distribution channels because consumers switch from one to the other – just like a gambler can switch from one land based casino to another. The United States also refers to the statements in the expert report of Professor Griffiths and Dr. Wood that Internet gambling could involve a smaller risk of excessive gambling or "gambling addiction" than the more traditional forms of gambling available in the United States.[337] To the extent that regulatory concerns can play a role in the context of Article XVII at all (which Antigua and the EC both discount), Antigua repeats that not every difference in public interest concerns raised by domestic and foreign services is capable of justifying radically different treatment. Certainly the prohibition of a less harmful foreign service cannot be justified by the argument that it is not "like" a more harmful domestic service that is allowed.

3.199 With regard to the claim that cross-border gambling offers a "mere imitation" of a casino, Antigua submits, first, that casino "imitations" form only part of the Antiguan product offerings. Second, and more importantly, Antigua strongly disagree that various product offerings can be meaningfully distinguished on what are really superficial comparisons between how they look, how they sound or whether their components clink about mechanically or connect electronically. The mistake the United States makes in trying to compare cross-border gambling and domestic gambling with physical activities such as "virtual reality" horse riding and actual horse riding is this – it is the recreational activity of gambling – the experience of winning or losing – that is fundamentally being engaged in, not the flipping of cards or the watching of a screen. The flipping of cards and the watching of a screen are merely the methods through which the same recreational experience is delivered. This is precisely why the United States' prohibition focuses on the wagering of money. A US exhibit to the Panel provides examples of statutory provisions articulating state gambling policies. The statute cited for Louisiana says "[G]ambling has long been recognized as a crime in the state of Louisiana and despite the enactment of many legalized gaming activities remains a crime. Gambling which occurs via the Internet embodies the very activity that the legislature seeks to prevent". In this connection, it is important to keep in mind that, as Dr. Howard J. Shaffer of Harvard University has stated in his expert's report that Antigua has submitted to the Panel, in essence, all gambling is experienced "locally" by the individual gambler himself[338], irrespective of whether the source of the gambling is a slot machine in a casino, a scratch ticket that the gambler scratches at home or an Antiguan operator who communicates via the Internet.

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[336] See above para. 3.185.

[337] See above paras. 3.185 and 3.187.

[338] Howard J. Shaffer, *Internet Gambling & Addiction*, Harvard Medical School, Division on Addictions (16 January 2004), p. 8.

3.200 Antigua notes it is possible to engage in the dubious activity of comparing gambling offerings. For instance, Antigua provided the Panel with examples of scratch cards with a casino theme marketed by United States lotteries. These are also "mere imitations" of a casino and cannot be distinguished on that basis from Antiguan services. Casino games and their "imitators" all operate on the basis of the same simple premise – random selection. The fact that random selection is performed by a software algorithm does not make a random selection game "unlike" a random selection game using another selection method. Furthermore random selection by software algorithms is used on a grand scale in state-sanctioned gambling in the United States and consequently cannot be the basis of a distinction between random selection games of Antiguan and United States origin.[339] Alleged "operating differences" are in any event irrelevant for the betting on sports and other future events and for card games where players play against each other via Internet connections rather than whilst all sitting together in the same room (both major components of the Antiguan gambling industry). Further, these alleged differences cannot distinguish Antiguan cross-border gambling services from non-casino gambling that is legally and prolifically offered in the United States such as lotteries, the electronic gambling devices (or "EGDs") that are available in thousands of American pubs, bars, truck stops and convenience stores, or the "remote access" gambling that is offered by United States operators.

3.201 Antigua maintains that the regulatory issues are not relevant for the assessment of likeness under Article XVII. Further, the United States is being disingenuous when it claims to "regulate" so-called "remote" gambling differently than "other gambling services." What the United States in fact does is prohibit cross-border gambling from other WTO Members, tolerate extensive domestic inter-state gambling and regulate at state level the rest of the massive domestic gambling market (whether "remote" or "non-remote"). The United States also continues to make its vague and unsubstantiated allegations that "remote gambling" poses a greater organized crime threat. The United States says in its second submission that "Antigua is apparently choosing simply to disbelieve the official statements of U.S. and Canadian authorities on this issue (...)." That is absolutely correct, at least in so far as such statements are intended to apply to the cross-border gambling industry in Antigua. Further, the United States does not explain exactly what constitutes "organized crime" but in most of the materials submitted by the United States, the crime at issue appears to be the gambling itself – and, of course, this makes the United States' argument circular: the gambling is organized crime because the United States declares it illegal.

3.202 Antigua agrees with the United States that it is more difficult to police an activity that is partially taking place abroad. However, this applies to all cross-border economic activity and trade. Furthermore organized crime syndicates can and do abuse many areas of international trade to further their criminal objectives.[340] The answer to this threat is not a blanket prohibition of international trade but international cooperation. Despite the cynical statement that "Internet gambling in Antigua and Barbuda is sometimes used for money laundering,"[341] the United States does not cite even one specific

[339] See articles describing the use of computerized drawings and games by United States lotteries in "the Minnesota Lottery's New Digital Draw Show Debut," www.telecomgamefactory.com, (5 March 2003), "The Lottery Draw," *Public Gaming International,* (March 2003), and Patricia McQueen, "Lottery, Department of Revenue - Summary. See also Matt Connor, "Game Trends", *International Gaming & Wagering Business* (January 2004), p. 28: "With a majority of the slots currently in use in U.S. casinos being the video variety (…)".

[340] The report referred to by the United States in above footnote 324. The report describes how "international trade", as such, is abused for criminal purposes (U.S. State Department, *International Narcotics control Strategy Report: Money Laundering and Financial* Crimes (March 2003) p. XII-27). See also United States Drug Enforcement Agency, Department of Justice, *Drug Intelligence Brief: Money Laundering in Canada* (August 2003), p. 6 (www.usdoj.gov/deal/pubs/intel/03034/03034.pdf) (concluding that as of August 2003 organized crime syndicates in the United States and Canada uses Canadian jewelry stores, travel agencies, video rental stores, courier services, land-based casinos and international computer networks to launder illicitly obtained proceeds).

[341] See above para. 3.192.

example of money laundering via Antiguan gambling operators. Further, as of this day, the Antiguan authorities have received no communication whatsoever from the United States – much less any requests for judicial cooperation – concerning money laundering via Antigua' s gambling industry. Yet, Antigua has received numerous other requests or enquiries from the United States about other instances of financial crime under the Mutual Legal Assistance Treaty which exists between Antigua and the United States and which the United States acknowledges operates successfully. If the United States has any information about infiltration of organized crime syndicates in the Antiguan gaming industry or the use of our industry for money laundering purposes, the United States would have communicated this information to Antigua to ensure appropriate action by both our authorities and theirs. Antigua has since 1999 handled more than 30 formal requests for information from the United States under a Mutual Legal Assistance Treaty yet not one of these requests involved criminal conduct related to Antigua's gaming industry. Antigua is and has always been willing to cooperate with the United States to combat crime. For instance, the Office of National Drug and Money Laundering Control Policy (the "ONDCP") routinely cooperates with the United States Drug Enforcement Administration or ("DEA") and the Federal Bureau of Investigation ("FBI"). In fact, DEA and FBI agents often operate in unison with the ONDCP agents.

3.203 Antigua notes that the United States tries to substantiate its allegation concerning organized crime by referring to a statement from the investment bank Bear Stearns[342], which bases its view on the fact that little public information is available about Antiguan operators. However, if Antiguan operators were able to operate lawfully and if they were confident that the information would not be used by the United States to prejudice their position, more information would be made publicly available to the Americans. It was not so long ago that the Directorate of Offshore Gaming would routinely contact the United States government for background information on American citizens applying for gaming licenses in Antigua. Also, in 1997 the then-director of Offshore Gaming travelled to the United States expressly to meet with United States officials to discuss the Antiguan gambling and betting industry and any concerns that the United States might have with respect to the industry. A copy of her report to the Prime Minister on these meetings is submitted to the Panel as exhibits. On the topic of consumer fraud, the United States has not provided even one example involving Antigua but only makes general statements about Internet gambling, irrespective of source. The United States asserts the compelling need for regulation and appears to suggest that other countries, and in particular countries such as Antigua, can never be capable of regulating a service as well as a developed economy like the United States. Of course, it can never be sufficient for a WTO Member to make such a general, unsubstantiated statement – in its own terms a "mere assertion" – to escape its obligations under the GATS. Any other position would turn the GATS into an agreement that only works in one way: export from developed countries to developing countries.

3.204 Antigua considers that the real answer to any actual concerns the United States may have regarding the abuse of cross-border trade for money laundering, consumer deception, fraud or other criminal activities is international cooperation.[343] The Panel should also note that there is clear evidence of involvement of organized crime, money laundering and consumer fraud in the United States' own gambling industry.[344] Yet the United States does not prohibit this domestic gambling. Much effort has been expended by the United States to convince the Panel that cross-border gambling and betting presents unique health risks to American citizens, although the United States appears to come around to the point of view that "the precise mechanics of gambling addiction is a novel issue

[342] See below para. 3.280.

[343] A view shared by the United States' Federal Trade Commission, see "FTC Chairman Muris presents the FTC's New Five-Point Plan for attacking cross-border fraud and highlights links between competition and consumer protection", Federal Trade Commission (31 October 2002).

[344] See document entitled "Organized Crime in the United States Gambling Industry", Document entitled "Money Laundering in the United States Gambling Industry", and document entitled "Fraud within the United States Gambling Industry".

on which not all authorities agree."[345] Antigua responds that a "novel issue on which not all authorities agree" *per se* is an insufficient basis on which to distinguish between services under the GATS.

3.205 Antigua submits that on the substance of the United States claim, the very short opinion from the American Psychiatric Association[346] cited by the United States is based on studies prepared by Professor Griffiths and Dr. Wood and by Dr. Shaffer – each of whom serves as an expert to Antigua in this proceeding. The opinion in fact says very little about risks specifically related to Internet gambling. First, it mentions that Internet gambling is often unregulated. Internet gambling in Antigua is regulated. As stated many times previously, Antigua is prepared to amend its regulatory scheme if the United States were to have any specific concerns or suggestions. Second, it mentions that Internet gambling is a solitary activity but that is also the case for most gambling in the United States. Third, it mentions that people who gamble on the Internet can gamble uninterrupted and undetected for unlimited periods of time. However, United States operators lawfully use numerous techniques to ensure that gamblers do just that in order to maximize the gambler's losses (and the operator's gains).[347] The remainder of the document from the American Psychiatric Association simply discusses the risks of gambling in general.

3.206 In his Article prepared for this proceeding, Dr. Shaffer, Director of the Harvard Medical School Division of Addictions and one of the leading experts in the field, concludes that to the extent there is a demonstrable difference at all in the health risks associated with gambling, the primary distinction is not between Internet gambling and other forms of gambling, but between "rapid-cycle" games and other kinds of gambling that involve either more deliberation or participation by other persons. A thorough reading of Dr. Shaffer's paper reveals that only sports gambling and multi-player table games appear to clearly evade the "rapid-cycle" effect or the single player environment that may exacerbate health concerns. But it is clear from Dr. Shaffer that, as acknowledged by the United States in the quote above, this is not a field in which there is any scientific certainty. The United States pleads that allowing the use of the Internet or the telephone to offer gambling and betting services from Antigua would "open the floodgates" and would add to the "population of potential victims." This smacks of the unscientific hysteria that Dr. Shaffer and his colleagues warned against in their joint editorial in the *Journal of Gambling Studies* and that he references in his paper submitted to you today.[348] Such bare hyperbole simply cannot form a basis for distinguishing between services for purposes of the GATS.

3.207 According to Antigua, the reality is that numerous legal gambling opportunities are available in the United States to people who want to gamble, with or without Internet gambling. Certainly the expansion of gambling opportunities has not been a concern to the United States in the past. In 1999 the NGISC called for a pause in the expansion of gambling opportunities. Since then, however, gambling opportunities have expanded considerably in the United States[349] and total gross gaming revenue increased almost 25 per cent from already very high levels.[350] Furthermore lotteries promoted by American authorities themselves, and not by private companies, use aggressive and sophisticated marketing techniques to sell as many lottery products as possible. One of their most widespread selling techniques is to market scratch cards as impulse purchase products on the counters of thousands of shops throughout the country.[351] In this respect it is worth referring back to the quote

[345] See above para. 3.192.
[346] American Psychiatric Association, *APA Advisory on Internet Gambling* (16 January 2001).
[347] See above para. 3.9.
[348] See above para. 3.176.
[349] Document entitled "Examples of recent expansion of gambling opportunities in the United States".
[350] 1998 figures compared to 2002 figures.
[351] The Report concerning the Wisconsin Lottery "97-2 Wisconsin Lottery, Department of Revenue – Summary, and the statement of the Ohio lottery reported in *Public Gaming International* (September 2002), p. 20 ("The Ever-Advancing ITVM," *public Gam,ing International,* (September 2002)).

from the *Champion v. Ames* decision of the United States Supreme Court in the United States first submission referring to the "widespread pestilence of lotteries" which "infests the whole community; it enters every dwelling; it reaches every class." Furthermore the Panel should note that the United States federal government has even *subsidised* Native American tribes to develop gambling enterprises.[352] Against this background the United States cannot credibly contend that it seeks to limit gambling opportunities. What they describe as the "population of potential victims" already comprises the entire United States population. Allowing cross-border gambling simply provides another gambling option to choose from.

3.208 Antigua wish to draw the Panel's attention to the 1999 decision of the United States Supreme Court in the *Greater New Orleans* case.[353] The Supreme Court found that federal rules that prohibited the broadcasting of advertisements for private casinos whilst allowing it for Native American casinos was unconstitutional. In that case the United States argued that the prohibition was necessary to protect the American public from gambling opportunities. However, the Supreme Court found that, whatever the character of the broadcasting ban was in 1934 when it was adopted, "the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal." The Supreme Court also rejected the federal government's argument that Native American casinos were a lesser threat because they operated in isolated locations and found that: "[I]f distance were determinative, Las Vegas might have remained a relatively small community or simply disappeared like a desert mirage."[354] This is an authoritative statement that is highly relevant for the current dispute. As a result of the *Greater New Orleans* ruling, United States gambling operators can now advertise in all states.

3.209 In Antigua's view, the United States has also made nothing but "mere assertions" regarding the supposed increased risk to children posed by Internet gambling. Antigua has shown not only that its regulatory scheme and the nature of the business in general works against the participation of children in cross-border gambling, but that there are other ways to avoid child gambling as well. While the United States quotes a credit card official to the effect that credit cards are available to children[355], this does not change the fact that the United States Congress has seen fit to legislate the use of credit cards as an effective way to keep children from engaging in potentially harmful behaviours on the Internet. Antigua has presented additional factual evidence regarding child gambling in the United States.[356] This material also shows that United States government-run lotteries actively target the youth market, and even the under age market.[357] Suffice it to say that American children have many opportunities to gamble (for instance on scratch cards with "cartoon-like design and childish iconography"[358]) and Antigua believes that Internet gambling is among the very least accessible ways for them to do so. The United States has presented no evidence to the contrary. The last "likeness" point raised by the United States is international classification in the most recent version of the CPC[359]. But the most recent version of the CPC does not provide a different subclass for Internet gambling. Rather it explicitly includes "on-line gambling" in the same category as other "gambling and betting services" – thus supporting Antigua's position.

3.210 Recalling that it does not concede the threshold issue of a commitment, the **United States** notes that Antigua argues for a likeness analysis closely following the goods model, while at the same

[352] The US Supreme Court's Decision in *Cabazon*, 480 U.S. 202, 107 S.Ct. 1083.
[353] *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173 (1999).
[354] 527 U.S. 173, 119 S.Ct. 1923, at p. 10.
[355] See above para. 3.193.
[356] Document entitled "Youth Gambling", p. 4.
[357] Document entitled "Youth Gambling", p. 2 (with regard to the under age market, note the statement from the Washington D.C. Lottery concerning "Generation X, Generation Y and Generation Z." See also Iowa Lottery Winner Claim Form, a "Winner claim form" of the Iowa lottery that allows minors to claim their winnings by post.
[358] See above para. 3.193.
[359] See above para. 3.196.

time arguing that likeness is not important. The United States maintains that likeness is a crucial component of the Article XVII inquiry, and supports an analysis in this case that looks at regulatory concerns, such as those identified by the United States, which have a significant impact on likeness in the particular context of gambling services. A number of third parties also appear to support examination of regulatory concerns on a case-by-case basis. The United States disagrees with Antigua's disjunctive reading of "services and service suppliers." If the text were intended to mean that likeness could be proven with respect to one or the other, but not both, it would have said services "or" service suppliers. Instead, the drafters chose the word "and," reflecting an intent to require that likeness of both the services and their suppliers be shown. The parties to the GATS negotiations did not intend that likeness with respect to suppliers only, or with respect to services only, without regard to one another, would be sufficient – the two are intertwined. A contrary reading would lead to absurd results – such as finding likeness of suppliers even though they supply different services.

3.211 The United States maintains its arguments regarding the particular regulatory concerns surrounding remote supply of gambling services, and wishes to emphasize and elaborate on a few key points. Remote supply of gambling services presents additional regulatory risks that do not exist, or are not present to the same degree, in non-remote settings, such as casinos. In a casino, the gambler must be physically present. Therefore, he or she can be identified with a reasonable degree of certainty. Casinos are thus able to restrict access to minors, known criminals, persons who are known to be financially insolvent, and so on. However, due in large measure to the virtual anonymity of remote media such as the Internet, remote supply gambling operations cannot reliably identify their customers. The evidence on age verification submitted by the United States to this Panel illustrates this fact. Similarly, disreputable suppliers can exploit the anonymity of remote media in ways not possible with non-remote supply of gambling services. Remote gambling also presents special health and youth protection risks in part because it is available to anyone, anywhere – including compulsive gamblers and children – who can gamble 24 hours a day with a mere "click of the mouse." Isolation and anonymity compound the danger. In the words of a gambling addict interviewed on the videotape provided by the United States, "nobody has to see you do it" and "nobody has to know."[360]

3.212 With respect to Antigua's continuous argument that the United States has not shown the link between Internet gambling and various forms of crime, the United States has already established that remote supply of gambling is particularly susceptible to organized crime, money laundering, and other forms of crime, and also raised law enforcement concerns when discussing Article XIV. The United States remains unable to discuss pending law enforcement matters out of concern for compromising criminal investigations, but has located publicly available evidence of one case study that illustrates the link between criminal activity and Internet gambling. Mr. William Scott describes himself as one of the persons responsible for bringing gambling to the island of Antigua.[361] Antigua licensed Mr. Scott to operate an Internet gambling site in spite of the fact that records available publicly show that Mr. Scott had been convicted of racketeering in the United States. In an October 2001 Canadian television broadcast, Mr. Scott admitted that he was a felon and had spent three years in prison.[362] In an interview with the same Canadian program, the Solicitor General of Antigua, Mr. Lebrecht Hesse, stated that the Government of Antigua was not aware that this individual was a felon and that it had no indication of such during the "due diligence" process that led to the granting of a license to operate a gambling web site to a convicted felon. The segment of the broadcast transcribed below follows a long discussion of Mr. Scott's background and a Canadian company with which he did business. It picks up with Mr. Scott's release from prison and his decision to relocate his operations.

[...]

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[360] Canadian Broadcasting Corporation, "The Big Gamble", broadcast on *The Fifth Estate* (31 October 2001).

[361] Ibid.

[362] Ibid.

> *Reporter*: Antigua has a law that you can't – a licensee can't – have a criminal record. You were sentenced to eight years for illegal bookmaking and extortion.
> *Mr. Scott*: Illegal bookmaking and extortion, that's correct. [...]
> *Reporter*: So how did, how did you get around the rule in Antigua?
> *Mr. Scott*: Uh, I think it was grandfathered in. I mean, I just put down, and they licensed me. [...]
> *Reporter*: So how did Bill Scott slip through the cracks?
> *Solicitor General Hesse*: How did he ... I don't know what you mean by that. He has a criminal record? [...]
> *Reporter*: I spoke to him yesterday and he admits it.
> *Solicitor General Hesse*: A due diligence was conducted on him and this did not come out.
> *Reporter*: Not a very good due diligence. It is not difficult to find out. Forgive me sir.
> *Solicitor General Hesse*: No. We have people who conduct it. We don't do this due diligence ourselves.
> *Reporter*: So what do you do now?
> *Solicitor General Hesse*: You have raised a very important issue and I have to mount an investigation into it.[363] [...]

3.213 The United States submits that the report on this videotape states that convicted felon William Scott transferred his license to a relative. Notwithstanding that transfer, the tape showed him to be actively involved in the supply of gambling services. Mr. Scott still owned an Internet gambling concern based in Antigua as recently as last year[364], and to the best of US knowledge, he continues to provide gambling services by remote supply from Antigua. Mr. Scott does in fact have a lengthy criminal history in the United States. Most notably, he received three concurrent eight year sentences entered in 1984 after his guilty plea to three counts of a six-count criminal indictment. The indictment included one count of violating the Racketeer Influenced and Corrupt Organizations Act based upon multiple predicate acts of bribery of police officials, the act of conducting an illegal bookmaking business, and multiple acts of extortion for the payment of gambling debts through the use of violence or other criminal means to cause harm to a person. The indictment also contained five counts of extortion for the payment of gambling debts through threats of the use of violence or other criminal means to cause harm to a person. In 1998, the United States issued an arrest warrant for Mr. Scott based on a criminal complaint for federal gambling violations. Mr. Scott is a fugitive from that complaint. The United States argues that William Scott is by no means the only supplier of remote gambling services. There are many others operating from Antigua and other locations. The United States has already discussed its views on organized crime involvement in remote supply of gambling, and provided the views of the US Federal Bureau of Investigation. In the view of the United States, Mr. Scott is the tip of the iceberg.

3.214 On the related issue of money laundering, the United States disagrees with Antigua's statement that there is essentially no difference in the relative threat between remote and land-based casino gambling. Unlike casino gambling in which the gambler is physically present, Internet gambling allows for virtually anonymous and instantaneous communications that are difficult to trace to a particular individual or account. While it is true that casino gambling can be used, among other things, to launder the cash proceeds of crime during the placement stage of money laundering, remote supply of gambling is a convenient vehicle for money launderers to conceal the ownership and nature of the proceeds through layering and integration, the second and third stages of money laundering. Due in part to the virtual anonymity available to Internet gamblers, remote supply gambling operations are not susceptible to effective anti-money laundering and "know your customer" requirements. The volume and speed of remote transactions, combined with the virtual anonymity of

[363] Ibid.
[364] Prospectus – Consolidated Gaming Corporation Limited, (31 January 2003), p. 33.

such transactions, makes remote supply of gambling a prime mechanism for the money launderer to conceal and disguise the proceeds of illicit activity by creating a deceptive "paper trail" that makes the money appear to be legitimate. In the layering stage, money launderers conceal transactions by burying them in huge volumes of transactions daily and by creating records and "audit trails" that conceal and disguise the true nature, source and ownership of the ill-gotten gains of crime. Remote supply of gambling is especially well-suited to facilitate money laundering in the layering stage.

3.215 The United States further submits that Antigua is unable to persuasively rebut its own evidence on the differences in customers and customer experiences that distinguish remote and non-remote gambling. Bear Stearns has observed that Internet and land-based customers were not the same, to which Antigua replies, implausibly and without any basis, that this really means that the two services are competing for the same customers. Moreover, Antigua's argument that gambling is only about the "experience of winning or losing" without regard to the recreational impact of remote or non-remote settings contradicts the statements of its own consultants. The United States further notes that Antigua implies that the United States somehow endorses statements by Antigua's consultants that the Internet poses a lesser health risk than other forms of gambling. That is incorrect. In line with the views of the respected American Psychiatric Association, the United States continues to view Internet gambling as posing a greater health risk. And a reasonable observer could hardly deny that the Internet and other remote media propagate this risk to large new populations of potential victims.

3.216 The United States argues that Antigua makes assertions about lotteries and other distinct US gambling services without having proven likeness between these particular services and suppliers and any Antiguan services and suppliers. For example, Antigua asserts that lotteries target under age players, citing the example of an Iowa lottery form. In fact, the Iowa lottery, like other US lotteries, is age-restricted (in Iowa players must be 21). Had Antigua examined Iowa law, it would have found that Iowa regulations require a seven-day suspension of the license of any retailer that sells a ticket to an under age player, followed by 30 days for the second offence within one year, followed by one year for the third offence within one year.[365] US state lotteries enforce age restrictions, and in many cases offer special programs to curb under age gambling.[366] Moreover, members of the National Association of State and Provincial Lotteries subscribe to advertising restrictions designed to ensure that lottery advertising does not appeal to persons under the legal purchase age[367], all of which is far more than Antigua could possibly do to limit under age Internet gambling, given the lack of effective age verification technologies. Finally, the United States rejects Antigua's assertions that despite clear evidence of money laundering, organized criminal activity and fraud involved in domestic gambling, the United States does not prosecute domestic illegal gamblers. The United States describes below in paragraph 3.235 the hundreds of prosecutions involving illegal gambling. However, only a handful of illegal gamblers based outside the United States have been prosecuted, such as Jay Cohen who is currently in prison.

3.217 Referring to the television documentary[368] submitted by the United States, **Antigua** submits that this video is offensive and totally irrelevant to the legal questions that arise in this proceeding: the fact that the United States seeks to adduce it as evidence at all, let alone at this late stage, makes the ruse all the more obvious. This programme portrays Antigua as a backwater, the Antiguan Solicitor General, who is African and whose mother tongue is not English, finds himself depicted as incompetent. The approach adopted by the producers of this documentary is precisely what one would expect from sensational commercial television seeking to maximise its viewing figures and advertising revenues. If the United States is struggling so much in this case that it needs to resort to a

[365] Iowa Admin. Code Sec. 531–12.12(4), at http://www.legis.state.ia.us/Rules/Current/iac/531/53112/53112.pdf.

[366] See http://www.naspl.org/support.html; http://www.naspl.org/programs.html.

[367] See http://www.naspl.org/nasplad.html.

[368] Canadian Broadcasting Corporation, "The Big Gamble", broadcast on *The Fifth Estate* (31 October 2001).

media hatchet-job of a small developing country that does not have the clout to get a retraction, then the United States is really clutching at straws. The most offensive fact of all, however, is that by submitting this video as evidence, the United States explicitly adopts the views expressed in it as its own formal view vis-à-vis Antigua. If put in the context of the rest of the US argument, the United States is essentially saying that Antigua is a backwater, irredeemably incapable of organising a respectable gaming, or any other industry. This is an astonishing statement, which sends a message to all developing countries that they can be condemned with the weakest reputational attacks. The United States does not have to assess the regulatory efforts of Antigua and consequent behaviour of its operators – it can simply refuse market access to all Antiguan companies on the basis of outright prejudice.

3.218 Antigua notes, however, that this position is in stark contrast with the latest Strategy Report of the United States State Department concerning money laundering and financial crimes, published in March 2003, which describes at some length the responsible steps taken by Antigua to regulate its financial services and gaming industries, [369] based on the United States own analysis by its competent agencies and not by a producer or a television station. It is also in contrast to a letter sent to the Prime Minister of Antigua and Barbuda a few weeks ago by the US Secretary of State, Mr Collin Powell, thanking him for Antigua's cooperation in the fight against money laundering and drug trafficking. No regulatory system is foolproof. That is the case for gaming regulation in Antigua, but also for gaming regulation in the United States. A number of exhibits submitted by Antigua in this dispute make that abundantly clear. As to Mr. Scott, on whose example the United States seeks predominantly to rely, the facts do not in any event demonstrate that the Antiguan regulatory system is fatally flawed. The gambling related offences in relation to which Mr. Scott pleaded guilty took place 20 years before the documentary was made. When Mr. Scott first came to Antigua there was no gambling regulation in force but since its introduction he has to the best of our knowledge been scrupulously compliant in relation to every aspect. Two years ago Mr. Scott's company was sold to a publicly held Australian company and he retired from the business: the United States' statement that he "continues to provide gambling services by remote supply from Antigua" is therefore wholly false. The United States said he was the tip of the iceberg: given the falsity of their remarks about him, that iceberg has melted in the stark sunlight of truth. Overall, therefore, it is not clear why anything in this television programme makes a case against Mr. Scott which Antigua should have pursued, let alone a case against the Antiguan gaming industry as a whole. In any event, Antigua and the United States have a Mutual Legal Assistance Treaty under which the United States has made numerous requests and inquiries of Antigua, and received swift responses. If the United States has any concerns about any operator in the gaming industry in Antigua, why have they not brought this to the attention of our authorities so that appropriate action could be taken?

3.219 The **United States** replies that Antigua protests too much with regard to the Canadian Broadcasting Corporation program that the United States provided on video tape. Antigua has submitted dozens of journalistic reports as evidence, and this one submitted by the United States is no different; it is entitled to the same evidentiary weight. If anything, it has greater probative value because in the video the actors speak for themselves. Moreover, the lack of due diligence displayed before granting William Scott a license indicates that Antigua does not screen persons before granting them a licence to operate an Internet gambling site. While the due diligence requirement may be the law in theory, Antigua's practice has sometimes diverged from this theory. This is a similar type of problem that was observed in the 1990s, when some of Antigua's offshore banks were found to be engaged in money laundering and persons of questionable character – some of whom were later convicted of fraud and money laundering in US courts – had been granted licenses to operate Antiguan banks. There is a similar concern regarding Antigua's money laundering laws, which appears to have resulted in no convictions since they were enacted and the advisory issued by the US Treasury was withdrawn.

[369] US State Department, *International Narcotics Control Strategy Report: Money Laundering and Financial Crimes* (March 2003), p. XII-87 to XII-89.

3.220 Concerning the reference made by Antigua to the report issued by the US Department of State in March 2003 as evidence that the US government has no concerns with Antigua, the United States wishes to quote from the first sentence of that report on page 209 under the heading of Antigua and Barbuda: "Antigua and Barbuda has comprehensive legislation in place to regulate its financial sector, but it remains susceptible to money laundering because of its loosely regulated offshore financial sectors and its Internet gaming industry."[370] As reflected in the State Department report, the issue is not whether Antigua has laws on the books, the question is whether those laws are adequately enforced. The United States is also encouraged by the statement of the delegate of Antigua that Mr. Scott may no longer be operating an Internet gambling site in Antigua;[371] this understanding that he operated the business as late as 2003 was based upon a document submitted by the United States to the Panel.[372] The United States would be interested in Antigua's views on how he got licensed in the first place, and continues to be concerned about the operation of gambling businesses through third parties, as cases have been prosecuted in the United States where a person who cannot be licensed continues to run a gambling operation through third parties.

(b) Treatment no less favourable

3.221 **Antigua** argues that the US Schedule provides no limitations on national treatment for the cross-border supply of gambling and betting services. The fact that the United States' measures at issue in this case disfavour services and service suppliers of other WTO Members compared to services and service suppliers of United States origin needs no further explanation.

3.222 The **United States** submits that on the "less favourable treatment" prong of Article XVII, Antigua again offers no argumentation at all; it merely asserts that this issue "needs no further explanation." The United States has pointed out from the earliest stages of consultations that its restrictions applicable to Internet gambling (and other forms of gambling services that Antiguan firms seek to supply on a cross-border basis) apply equally within the United States. Antigua fails to provide evidence or argumentation pointing to any US law or regulation restricting supply of services or service suppliers from outside the United States that is not accompanied by an equal or greater restriction on services originating inside the United States. Its claim therefore must fail. Underlying this failure of proof is a failure on the part of Antigua to address the fact that relevant restrictions on remote supply of gambling under US law, whether by Internet or other means, are based on objective criteria that apply regardless of the national origin of the service or service supplier. As the Chairman of the Group of Negotiations on Services observed with respect to Article XVII during the final stages of the Uruguay Round negotiations, "distinctions without a link to national origin and based on objective criteria would not normally violate the national treatment provisions."[373] Stripped down to its essence, Antigua's Article XVII claim is plainly unsustainable. If accepted, Antigua's argument would let Antiguan companies offer gambling on a scale and in a manner that would be illegal for US suppliers. Such an outcome would afford Antiguan companies treatment vastly more favourable than domestic suppliers – something that Article XVII clearly does not require.

3.223 **Antigua** replies that literally thousands of gambling and betting services are offered in the United States by state-sanctioned providers. Antigua has shown the existence and extent of these operations. On the other hand, it is not possible for Antiguan suppliers to obtain an authorization to supply gambling services on a cross-border basis. The United States nevertheless submits that there is no violation of Article XVII of the GATS because the laws that prevent Antiguan service suppliers from supplying gambling services by "remote" means also prevent United States domestic service suppliers from doing the same. Antigua disagrees. Article XVII:3 explicitly provides that formally

[370] Ibid., p. 209.
[371] Ibid., para. 5.
[372] Prospectus – Consolidated Gaming Corporation Limited, (31 January 2003).
[373] See *Informal GNS Meeting – 10 December 1993, Chairman's Statement,* MTN.GNS/49, circulated 11 December 1993, section 1.

identical treatment can be less favourable if it modifies conditions of competition. Prohibiting foreign cross-border service suppliers from using means of remote communication makes it impossible for them to supply their services. The impact of that prohibition on domestic operators is clearly much less far reaching, as they can still supply services via other means even if not considered "remote." Thus, the "formally identical treatment" advanced by the United States modifies conditions of competition very considerably. In fact, it makes competition from Antigua and Barbuda impossible.

3.224 In Antigua's view, "remote access" gambling is rampant across the United States in a variety of different forms, from the off-track betting services and the Internet-based betting to the most obvious form of "remote" gambling – the lotteries – which market their products in almost 180,000 stores, petrol stations, pharmacies, news stands, bars and restaurants (not to mention stand-alone self-service lottery vending machines) that have nothing but at best an electronic connection to the source of the lottery. The federal laws that prohibit the use of remote communication to offer gambling services do not apply to these operations, either because the remote communication does not cross a state or international border (which is the case for the lotteries) or because the operations have obtained an exemption (which is the case for the horse race betting industry). The United States argues that lotteries "are not offered by remote supply." [374] In fact, virtually all lottery games in the United States are offered by remote supply. Starting in the early 1980s, providers of United States lotteries invested heavily in electronic communications networks linking their central computers with thousands of purpose-built computer terminals set up in the approximately 180,000 retail points mentioned above for the specific purpose of making lottery gambling as accessible as possible. These communication networks have also allowed the lotteries to compete with casino-style gaming by offering more and more frequent games. Long before the arrival of the Internet, the lotteries referred to these games as "on-line" games.[375] In essence, Antiguan suppliers of "on-line" gambling games do the same as the lotteries. But rather than using the very expensive purpose-built communication networks that the US lotteries use, Antiguan operators use the generic technology of the Internet.

3.225 Antigua does not agree with the US arguments that the amendment of the Interstate Horse Racing Act allowing betting by the Internet has no legal effect under United States law. [376] Antigua cannot see how a law adopted by the United States Congress can have no legal effect, particularly given that operators in the United States are offering betting services via the Internet. Most importantly, however, the United States undertakes no law enforcement actions against these large scale Internet betting operations. If the United States continues to argue that these operations are unlawful under United States law, Antigua and Barbuda will have to withdraw its suggestion to the Panel not to examine the actions listed in Section III of the Annex to its Panel request as separate measures. In a situation of selective enforcement of the law against foreign suppliers only, law enforcement measures obviously "do something" that is relevant for the purposes of WTO law – they result in less favourable treatment. Antigua submits that the United States' inference that it is in the process of investigating these operations lacks credibility. The United States has undertaken considerable law enforcement efforts against Antiguan operators. Yet, no enforcement action whatsoever has been taken against its domestic operators, who must present a much easier law enforcement target, given their presence within the territory. The Panel should further note that one of these Internet betting businesses, Capital OTB, is a public corporation owned by the State of New York. In addition, the United States' position on this issue is linked to its attempt to characterise gambling opportunities in the United States as "confined to particular locations." As demonstrated in the map showing the locations of casinos in the United States[377], the "particular locations" (which on the map do not include the thousands upon thousands of lottery sales outlets mentioned above) do not appear very limited or "confined."

[374] See above para. 3.22.
[375] NGISC Final Report, p. 2-1.
[376] See above para. 3.22.
[377] "Casinos in the United States", *Bear Stearns 2002-2003 North American Gaming Almanac*.

3.226 The **United States** reiterates that the burden also rests on Antigua to provide evidence and argumentation showing that its services and suppliers receive "less favourable treatment." The United States again points out that US restrictions applicable to Internet gambling and other forms of gambling services that Antiguan firms seek to supply on a cross-border basis apply equally to those remote supply activities within the United States. In this regard the United States would like to correct the misstatement by Antigua that Antiguan gambling services "are prohibited because they are supplied from abroad." This is incorrect. The laws governing remote supply of gambling apply equally within the United States.

3.227 **Antigua** emphasises that to the extent that Article XVII of the GATS can play a role in this dispute[378], Antigua believes that the United States' total prohibition and the legislative and regulatory provisions, applications thereof and related practices that make up the total prohibition violate Article XVII in a number of ways.[379] First, the United States' total prohibition, as such, violates the United States' commitment to national treatment of cross-border supply. Domestically supplied gambling and betting services are permitted whilst cross-border supply of foreign services is completely prohibited. Second, the federal laws and other legislative and regulatory provisions, applications thereof and related practices specifically prohibiting or preventing cross-border supply from Antigua whilst allowing domestic supply, whether remote or in person, within states by authorized domestic suppliers, result in less favourable treatment of Antiguan services and service suppliers. Third, the United States' authorities allow in a number of instances, whether because it is lawful or as a matter of selective enforcement of state and federal laws, the "remote" supply of gambling and betting services between states in the United States. The United States' authorities do not, however, allow cross-border supply of gambling and betting services from Antigua. Fourth, even if it were to be correct that all "remote" supply of gambling and betting services was effectively prohibited in the United States, *quod non*, the United States would still be in violation of Article XVII of the GATS because such formally identical treatment of Antiguan and United States origin services results in less favourable conditions of competition for Antiguan services and service suppliers: domestic operators can still supply their services "in person" (i.e. non-remote). For service suppliers in Antigua, however, it is obviously impossible to supply services in person. This violates Article XVII in the context of a full national treatment commitment to cross-border supply. Fifth, the state laws that prohibit all gambling, while exempting gambling specifically authorized but without providing a possibility for Antiguan operators to obtain an authorization to supply the same services on a cross-border basis[380], result in less favourable treatment of Antiguan services and service suppliers. Sixth, the state laws or regulations that grant exclusive or special rights to operators of domestic origin[381] result in more favourable treatment of those domestic operators and their services compared to Antiguan services and service suppliers. And, seventh, the state laws that require the physical presence of the operator within the territory of the state[382] result in less favourable treatment of Antiguan service suppliers that seek to supply their services on a cross-border basis.

3.228 The **United States** submits that it is important to recall that even within a group of like services or like suppliers, nothing in the GATS prevents the maintenance of nationality-neutral regulatory distinctions.[383] Thus, even if one assumes for the sake of argument that Antigua could

[378] See Antigua's reply to Panel question No. 16.

[379] Antigua notes that some of these violations comprise *de jure* less favourable treatment whilst others comprise *de facto* less favourable treatment. Yet other violations are difficult to qualify as *de jure* or *de facto* less favourable treatment. The application of Article XVII, however, does not require the qualification of a particular instance of less favourable treatment as *de jure* or *de facto.* It only requires the establishment of less favourable treatment of like services.

[380] See above paras. 3.106 and 3.107.

[381] See above footnote 249.

[382] See above para. 3.109.

[383] Robert E. Hudec, *GATT/WTO Constraints on National Treatment: Requiem for an "Aim and Effect" Test*, 32 International Lawyer 619-649 (1998), at: http://www.worldtradelaw.net/articles/hudecrequiem.pdf,

show likeness between some remotely supplied gambling service and supplier and a non-remote gambling service and supplier (which it cannot), the United States may nonetheless maintain a regulatory distinction between remote and non-remote supply of gambling services.[384] The GATS only requires that such distinctions, whether *de jure* or *de facto,* must afford no "less favourable treatment" to foreign suppliers on the basis of national origin (Article XVII:1 and XVII:2). It also provides that treatment that "modifies the conditions of competition" in favour of domestic like services or suppliers "shall be considered to be less favourable" (Article XVII:3). US restrictions on remote supply of gambling services comply with these requirements. One pair of commentators has observed that "a foreign crook who is subject to a nation's criminal laws is still receiving 'national treatment.'"[385] That observation applies equally in this dispute. As the United States has repeatedly pointed out, US restrictions on remote supply of gambling apply regardless of national origin. Nonetheless, Antigua appears to make a claim of *de jure* discrimination based on its assertion that US law authorizes two domestic gambling services – pari-mutuel betting on horseracing and state lottery services – to operate by remote supply.[386] Once again, Antigua's assertions are factually incorrect. The United States has addressed the issue of remote supply of pari-mutuel wagering on horseracing in its responses to the Panel's questions.[387] To briefly summarize, Antigua claims that US federal law in the form of the Interstate Horseracing Act creates an "exemption" that permits remote supply of pari-mutuel wagering on horseracing by domestic suppliers. This is incorrect. US federal criminal statutes continue to prohibit the transmission of bets or wagers on horse races to the same extent that they prohibit other forms of remote supply of gambling services. The 2000 amendment to the Interstate Horseracing Act did not alter pre-existing federal criminal law.[388] In fact, contrary to Antigua's claims, the Interstate Horseracing Act actually provides more favourable treatment to foreign suppliers of gambling services. As noted in the US response to the Panel's question 22, US laws do not prohibit remote supply of information assisting in the placing of pari-mutuel wagers on horseracing (or any other form of gambling) as long as the information is being transmitted from a place where that betting is legal to a place where that betting is legal. In the pari-mutuel horseracing context, the Interstate Horseracing Act imposes special requirements on the supply of such gambling services domestically (e.g., requiring certain written consent agreements), but does not impose any

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p. 30-31 ("[A] government is permitted to distinguish between otherwise "like" service providers by imposing regulatory distinctions based on some other characteristic of the service provider or service transaction.").

[384] The United States considers that this distinction is not, contrary to Antigua's assertion, an intermodal distinction between cross-border supply and supply by local presence. A US domestic remote supplier is no less subject to US restrictions on remote supply of gambling than a remote supplier operating on a cross-border basis.

[385] Don Wallace, Jr. and David B. Bailey, *The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions,* 31 Cornell Int'l L.J. 615, 627 (1998).

[386] The United States recalls that, as noted above, Antigua still has not shown, and cannot show, that it offers "like services" through "like suppliers" with respect to either of these services.

[387] See the United States' replies to Panel question Nos. 21-22.

[388] In above para. 3.225, Antigua suggested in connection with this issue that it might "withdraw its suggestion to the Panel not to examine the actions listed in Section III of the Annex to its Panel request as separate measures," apparently for the purpose of asserting a new claim of *de facto* less favourable treatment. Antigua cannot "withdraw" its clarification regarding the measures at issue here. The Panel's terms of reference are what they are; they are established by the complaining Member's Panel request, not by how a responding party defends itself. Antigua has already clarified, in the Panel's words, that "it does not intend to treat the items listed in Section III as distinct and autonomous 'measures' but, essentially, will seek to rely upon them as evidence to illustrate the existence of a general prohibition against cross-border supply of gambling and betting services in the United States." See Communication from the Panel, 29 October 2003, para. 31, in Annex B of this Report. The Panel has therefore already determined that it "will not consider and examine [the items in Section III of the Panel request] as separate, autonomous measures." Ibid. Any attempt by Antigua to retract its clarification of its Panel request would amount to an improper attempt to expand the Panel's terms of reference.

requirements on cross-border supply of the same services.[389] Foreign services and suppliers thus get a better deal under the Interstate Horseracing Act than their domestic counterparts.

3.229 According to the United States, Antigua asserts that lottery games are offered by remote supply in the United States, apparently because, unsurprisingly, state lotteries use computers and other electronic devices to communicate with their various offices and distributors. Each of the distribution mechanisms that Antigua identifies (stores, gas stations, pharmacies, newsstands, bars and restaurants, and vending machines) requires the service consumer to present himself or herself in person at an authorized lottery distribution location. Thus the supply of the service by these means is non-remote. In other words, Antigua simply confuses the fact that lotteries often have many retail points of presence with the entirely different concept of remote supply.

3.230 The United States argues that overshadowing Antigua's *de jure* national treatment claims regarding lotteries and pari-mutuel betting on horseracing is a much more ambitious claim about *de facto* national treatment. Antigua argues that although US law provides "formally identical" treatment to foreign and domestic services and suppliers, the fact that it restricts remote supply of gambling more severely than non-remote supply alters the "conditions of competition" in the market for gambling services in a way that disfavours Antiguan suppliers. The basis for Antigua's argument is difficult to discern. As a factual matter, one can only assume that the abolition of US restrictions on the remote supply of gambling would pose an enormous new competitive threat to Antiguan services and suppliers, as major US-based gambling service providers would begin offering their services in competition with those of Antiguan websites. Nonetheless, Antigua complains that it is disadvantaged because US domestic suppliers can still supply their services by means that are not remote. This argument fails because Antigua has not offered evidence of any restriction that would stop its suppliers from supplying their services by the same non-remote means available to domestic suppliers. Hence there is no national treatment violation. If what Antigua really means to argue is that it is inherently harder for foreign suppliers to supply non-remote services in the United States, then its argument is precluded by Article XVII, footnote 10, which states that:

> "Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers."

3.231 Consistent with footnote 10, even if one assumes, contrary to fact, that the United States made a national treatment commitment for gambling services, the United States would be under no obligation to make up for the fact that Antiguan services and their suppliers are from somewhere other than Nevada, New Jersey, etc., and by reason of that fact may find it inherently more difficult to offer non-remote gambling services in the United States than would be the case for some domestic suppliers. Through footnote 10, the negotiators of the GATS anticipated and rejected precisely this kind of argument.

3.232 **Antigua** submits that the United States clearly has and enforces laws that specifically outlaw gambling services that cross international borders. This is *de jure* discrimination in the context of a national treatment commitment for cross-border supply, irrespective of whether these laws also prohibit inter-state gambling. To the extent that these laws would indeed prohibit inter-state gambling, Antigua has shown that they are not enforced against domestic operators which also constitutes a discrimination. The US argument on less favourable treatment is entirely based on the notion of "remote supply," an unspecified distribution method which is allegedly not used by United States gambling operators. The United States argues, for instance, that lottery gambling is not "remote" because lotteries use computers and vending machines that are placed in the 180,000

[389] 15 U.S.C. § 3002(3) (defining an "interstate off-track wager" to include only domestic wagers between US states); § 3004(a) (requiring a consent agreement as a condition precedent to acceptance of an interstate off-track wager).

"authorized lottery distribution locations" in the United States. But this obviously is "remote" gambling because the gambler does not need to physically go to the lottery to play. Rather, he can play in the local grocer, pharmacy, petrol station or other location where he must go to buy other products in any event. Furthermore lotteries do allow players to play at home. United States lotteries allow players to purchase tickets to participate in numerous drawings spread out over several months or even a year.[390] Players can verify winning numbers on the television or the Internet. Many United States lotteries allow players to purchase lottery tickets by post, pay by cheque or even credit card, and then claim any winnings by post – all without ever leaving the home.[391] Several United States lotteries also have games that allow players to participate from home in a televised lottery game.[392] Some United States lotteries can even be played from home by minors under the age of 18, as illustrated by the form used by the Iowa lottery which allows under age gamblers to claim their winnings by post.[393] Sports betting operators in Las Vegas also allow punters to place bets on events occurring in the near- or the far-distant future, return to their homes and claim their winnings by post days, weeks or months later.[394]

3.233 Antigua submits that, given the absence of a clear definition of the term "remote"[395], a discussion concentrating on whether or not something is "remote" is unlikely to be fruitful. Rather the discussion should be conducted on the basis of the terms of Article XVII which requires "conditions of competition" that are "not less favourable" for "like services." In paragraph 3.230, the United States stated that Antigua "has not offered evidence of any restriction that would stop its suppliers from supplying their services by the same non-remote means available to domestic suppliers." This begs the question whether it would be legal for Antiguan operators to place computers in bars, shops or other outlets through which consumers could then gamble with Antiguan operators (similar to, for instance, the New York state lottery).[396] Such an operation would violate state law because it is not specifically authorized and it would of course also violate the Wire Act and the other federal anti-gambling laws because the gambling service crosses an international border.

3.234 In Antigua's view, this gives rise to two further issues in the debate about the application of Article XVII to the inability of Antiguan services suppliers to use specific distribution methods. The first issue is "less favourable treatment within specific distribution methods." The United States allows its gambling operators to use distribution methods (whether intra-state or inter-state) that could be used by Antiguan operators to supply gambling and betting services on a cross-border basis: the Internet, telephone, post, television, vending machines, electronic links with computers and the like. The United States prohibits, however, the use of these distribution methods for Antiguan services. This inevitably results in a finding of "less favourable treatment." The second issue is "less favourable treatment across specific distribution methods." In Antigua's view, the United States also violates Article XVII by allowing domestic suppliers to use distribution methods that require physical

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[390] Information on how to play New York's Mega Millions lottery game, found at www.nylottery.org.

[391] See, for instance, the Virginia Lottery (which offers "subscriptions for season tickets" that can be ordered from home by regular post [www.valottery.com/megamillions/subscription.asp] and allows winnings to be collected by sending a signed lottery ticket, regular post, with a return address on it www.valottery.com/faq/kb_detail.asp?id=7]). The Illinois lottery's Internet web site offers players a downloadable form to purchase up to a year's worth of lottery tickets by mail, with payment to be made by credit card. (www.illinoislottery.com/subsections/Subscrip.htm). See also www.nylottery.org regarding "Lotto from Home" in New York.

[392] For instance, the material on the Ohio lottery's "The Cash Explosion – Play-At-Home Bonus Box".

[393] Iowa Lottery Winner Claim Form (the claim form specifies how minors under the age of 18 can claim their winnings [www.ialottery.com/LegalRequirements/claimform.pdf]).

[394] Extract from the 2002 NAICS Definition, Exhibit AB-208 [sic]. The Panel notes that, when commenting on the draft descriptive part, Antigua indicated that the correct reference was to Exhibit AB-198, containing material from the "Venetian" casino in Las Vegas.

[395] In its reply to Panel question No. 20, Antigua has explained how it intended to use the term "remote gambling." The United States obviously uses this term in a different way.

[396] Information on how to play Quick Draw, found at www.nylottery.org.

commercial presence (such as brick and mortar casinos) whilst prohibiting the use of a distribution method that can be used for cross-border supply (such as the Internet). Because of its commitment to national treatment of cross-border supply, the United States must allow Antiguan operators to compete with United States' brick and mortar casinos under equal conditions of competition. This does not mean that they should receive formally identical treatment (which is indeed unlikely in view of the different distribution method). It does, however, mean that the United States must allow fair competition.

3.235 The **United States** notes that Antigua has asserted a lack of prosecution of violators of US laws restricting remote supply of gambling, and horseracing in particular.[397] The United States has already provided the Panel with statistics and individual cases attesting to the robust enforcement of such laws. To add to that information, the Organized Crime and Racketeering Section of the Department of Justice has compiled statistics concerning the number of racketeering prosecutions approved by the RICO Review Unit from 1992 to 2002 alleging predicate violations of federal gambling statutes 18 U.S.C. § 1084, 18 U.S.C. § 1955, or both. In other words, these are federal racketeering cases that were premised on two federal gambling laws. Over that period, the Department of Justice approved 90 of those cases.[398] The United States does not keep statistics on the number of cases in which the fact pattern alleged involved international as opposed to purely domestic gambling activity. However, the Deputy Chief of the Organized Crime and Racketeering Section, has confirmed based on his many years of personal experience that the vast majority of these 90 cases involved purely domestic betting activity, not cross-border gambling. In fact, that is only a fraction of all the gambling cases pursued by the federal government. In all, US statistics show 125 cases filed under Section 1084 and 951 cases filed under Section 1955 between 1992 and September 2003. Many of those cases involve multiple defendants, so the number of individuals involved would be substantially higher. The majority of these cases involve the activities of organized crime syndicates. In addition there were cases filed under Section 1952 involving illegal gambling, but those statistics would include other kinds of cases as well, since Section 1952 is not limited to gambling. As these numbers reflect, illegal gambling continues to be a primary enforcement program in the 24 Organized Crime Strike Force Units in U.S. Attorneys' offices around the United States. All but a very few of these cases involve purely domestic illegal gambling activity. There have only been a handful of cases (some of them with multiple defendants) that involved supply of gambling from outside the United States.

3.236 The United States notes that, regarding horseracing in particular, Antigua asserts in its response to the Panel's question 19 that the United States fails to prosecute providers of remote gambling on horseracing. In fact there have been many reported court cases (representing just a small fraction of all prosecutions) in which the Department of Justice used federal gambling laws challenged by Antigua to prosecute illegal wagering on horseracing.[399] Regarding the activities of entities such as Youbet.com, this issue came to prominence well after 1998, when the United States took action against Mr. Jay Cohen, Mr. Scott, and other Antigua-based remote suppliers. It was not until December 2000 that amendments to the Interstate Horseracing Act created what some now cite, incorrectly, as the statutory basis for Internet gambling on horseracing. The United States is aware of these activities and US law enforcement officials do not agree with assertions made by the service providers who rely on this alleged justification. While the United States is not at liberty to discuss pending investigations or prosecutions, it can point to the fact that Youbet.com itself disclosed in its

[397] Antigua's reply to Panel question No. 19.

[398] Department of Justice document – Criminal Caseload Statistics, 18 U.S.C. 1955.

[399] *Erlenbaugh v. United States*, 409 U.S. 239 (1972);*United States v. Southard*, 700 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1987); *United States v. Denton*, 556 F.2d 811 (6th Cir.), *cert. denied*, 434 U.S. 892 (1977); *United States v. O'Neill*, 497 F.2d 1020 (6th Cir. 1974; *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974); *United States v. Swank*, 441 F.2d 264 (9th Cir. 1971); *United States v. Bergland*, 318 F.2d 159 (7th Cir. 1963), *cert. denied*, 375 U.S. 861 (1963);*United States v. Athanas*, 362 F. Supp. 411 (E.D. Mo. 1973); *United States v. Yaquinta*, 204 F. Supp. 276 (N.D.W.Va. 1962).

2002 annual report that "the United States Justice Department is in the process of taking action against selected companies that it deems to be operating without proper licensing and regulatory approval."[400] The company added that, while it "believes that its activities conform" to applicable laws, "this conclusion is not free from doubt."[401] The annual report went on to acknowledge that Youbet.com "faces the risk" of criminal proceedings and penalties brought by the government, and the United States agrees with that risk assessment.[402] Finally, Antigua has raised the issue of restrictions on advertising for gambling services. Antigua, however, has again failed to identify what laws or regulations on this subject, if any, within the scope of the Panel's terms of reference allegedly embody this restriction. The same is true of Antigua's new assertions about the Indian Gaming Regulatory Act ("IGRA"). The IGRA is outside the Panel's terms of reference.

3.237 **Antigua** rejects the US statement with regard to the activities of entities such as Youbet.com that "this issue came to prominence well after 1998." Page 5-4 of the NGISC Final Report discusses the activities of Youbet.com and footnote 14 mentions that the website was visited on 17 March 1999. The activities of TVG are discussed at page 2-13 of the same report.

3.238 The **United States** notes that Antigua insists that it does not ask that its services and suppliers be treated more favourably than US services and suppliers. Yet at the same time, Antigua asks that the United States allow remote services and suppliers to operate cross-border from Antigua when they are not allowed to do so domestically. It also asks that the United States engage in the development of international standards to permit remote supply[403] when no such standard permits such activity domestically. In short, these requests by Antigua make clear that it is in fact asking that its services and suppliers be allowed to do things that domestic services and suppliers cannot do.

6. GATS Article VI[404]

3.239 **Antigua** argues that the United States maintains numerous laws and regulations prohibiting the supply of gambling and betting services unless a specific authorization has been granted. These are "measures of general application affecting trade in services" caught by Article VI:1 of the GATS. Many service suppliers of United States origin have been given an authorization to supply gambling and betting services. It is impossible, however, for foreign service suppliers to obtain an authorization to supply services on a cross-border basis or to even apply for such an authorization. Antigua submits that this constitutes a violation of Article VI:1 of the GATS.

3.240 Antigua further argues that Article VI:3 of the GATS implies that a WTO Member is obliged to make authorization procedures that are open to domestic service suppliers available to suppliers from other WTO Members that want to supply services on which a commitment has been made. By prohibiting all cross-border supply of gambling and betting services, the United States obviously does not fulfil that obligation with respect to those services.

3.241 The **United States** argues that Antigua's claim fails both because of Antigua's failure to prove the existence of relevant US commitments and because Antigua fails to meet its burden of proof, with respect to any particular measure(s), that such measure(s) are not "administered in a reasonable, objective, and impartial manner." Antigua has provided no evidence at all about the administration of any of the measures identified in its Panel request. In fact, such measures apply equally to all services

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[400] Youbet.com, Inc., U.S. Securities and Exchange Commission Form 10-K Annual Report under Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal Year Ended 31 December 2001, Commission File Number: 33-13789LA (15 April 2002), available at: http://www.sec.gov/Archives/edgar/data/814055/000102140802005310/0001021408-02-005310.txt.

[401] Ibid.

[402] Ibid.

[403] See below Antigua's arguments regarding GATS Article XIV.

[404] In addition to the arguments presented here, see also parties' replies to Panel question No. 27 in Annex C of this Report.

and service providers, regardless of origin, and are routinely applied against domestic as well as foreign lawbreakers.[405]

3.242 The United States further submits that Article VI:3 contains certain transparency requirements relating to the processing of applications to supply a service in a committed sector. Antigua has not shown that the United States has undertaken any commitments regarding gambling services in general or cross-border gambling services in particular. Thus, Antigua cannot demonstrate that Article VI:3 is relevant in this dispute. Moreover, Antigua has pointed to no occasions on which US authorities have failed to inform Antiguan suppliers regarding decisions on their applications. Indeed, Antigua has not demonstrated that its gambling service suppliers have ever filed any relevant applications. Rather, Antigua asserts that Article VI:3 "implies" something that it does not say – that "a WTO Member is obliged to make authorization procedures that are open to domestic suppliers available to suppliers from WTO Members that want to supply services on which a commitment has been made." In fact, what Antigua is seeking is something that Article VI:3 on its face does not provide – namely, a requirement that the United States give foreign suppliers the right to provide services that even its domestic suppliers do not have a right to provide.

3.243 **Antigua** replies that given what has been demonstrated above, it is clear that the United States' conduct also violates Article VI:1 and Article VI:3 of the GATS. The United States has made a full commitment to the cross-border supply of gambling and betting services, yet while it prohibits all cross-border supply of these services from Antigua, numerous operators of domestic origin are allowed to supply gambling and betting services in the United States. This constitutes an obvious violation of Article VI:1. The United States submits that there is no such violation because the laws that are used against Antiguan service suppliers "are routinely applied against domestic as well as foreign lawbreakers." However, the numerous exemptions from these laws that have been granted to gambling operators of United States origin are not equally available for domestic as well as foreign operators.

3.244 Antigua reiterates that Article VI:3 provision implies that all authorization procedures that are open to domestic service suppliers should be equally open to suppliers from other WTO Members that wish to supply services for which a commitment has been made. United States domestic service providers can and do qualify for authorization to offer gambling and betting services. Yet Antiguan service providers cannot. The United States asserts that "Antigua has not demonstrated that its gambling service suppliers have ever filed any relevant applications," yet, on the other hand, it has made it very clear that all cross-border supply of gambling and betting services is prohibited. Given this, Antigua fail to see why Antiguan operators would have filed any applications for authorization, much less under what authority such a filing could have been made.

3.245 The **United States** submits that Antigua's claim does not correspond to the text of Article VI. Antigua cites portions of this provision relating to the administration of US measures, but it identifies no flaws in the administration of US gambling laws. Instead, its arguments seek to convert Article VI into an implicit obligation of better-than-national-treatment. Under Antigua's view, Article VI effectively means that Members must let cross-border suppliers supply services that are beyond the scope of activities permissible for suppliers with a local presence. The text of Article VI simply does not bear that interpretation. Antigua appears to believe, mistakenly, that by alleging an inconsistency with Article XVI or XVII, it has automatically proven, without evidence or argumentation, an inconsistency with Article VI. Antigua has failed to offer anything approaching a *prima facie* case of violation of Article VI.

[405] The United States notes that, since Antigua does not even purport to challenge specific US state or local laws authorizing (as opposed to restricting) various forms of gambling, any assertions relating to measures affirmatively authorizing gambling are beyond the scope of this dispute.

3.246 Furthermore, Antigua appears to be unable to cite any instance in which "authorization to supply" a gambling service in the United States was refused.[406] Moreover, Antigua states that it "has not been able to investigate all the criteria that all states apply to authorize a domestic operator to offer gambling and betting services," making it difficult for the United States to understand how Antigua can credibly assert that such procedures "by their very terms exclude Antiguan suppliers." In any event, an examination of such procedures would seem to lie outside the Panel's terms of reference, since they were not identified in Antigua's Panel request.

7. GATS Article XI[407]

3.247 **Antigua** argues that the United States also maintains measures that restrict international money transfers and payments relating to the cross-border supply of gambling and betting services. United States authorities particularly seek to restrict payments and transfers relating to "unauthorized" gambling and betting services with businesses that "usually operate offshore in foreign locations".[408] "Legally authorized gaming transactions" are exempt from these measures.[409] The purpose of these measures is to prevent foreign suppliers of gambling and betting services from offering their services on a cross-border basis. To the extent that these measures reinforce the prohibition measures discussed in paragraph 3.75 above, they violate Articles XVI:1, XVII and VI:1 of the GATS. These measures also violate Article XI:1 of the GATS.

3.248 The **United States** submits that Antigua asserts, again without any argument, that US measures to prohibit money transfers relating to gambling violate Article XI:1 of GATS. Antigua's claim fails first of all because of Antigua's failure to prove the existence of a relevant specific commitment. Moreover, even if such a commitment had been proven, Antigua has made no attempt to explain how or why any specific measure violates Article XI:1, and thus fails to make a *prima facie* case. In asserting its claim, Antigua refers to "measures discussed in paragraph [3.75]". This paragraph makes reference to an agreement between the New York Attorney General and PayPal, Inc, which is found among the items in section III of the Annex to Antigua's Panel request. First of all, the United States notes the Panel's preliminary ruling that it will not consider and examine these items as "separate, autonomous measures."[410] In any event, the text of the PayPal agreement provides that PayPal agrees to "cease processing any payments for online gambling merchants" involving New York members of PayPal and gaming not expressly authorized under US law.[411] It further provides that PayPal agrees to "block automatically (...) any credit card or debit card funded payments by PayPal's New York members" that should bear certain coding indicating an Internet gambling transaction.[412] Antigua has provided no evidence that these provisions represent the application of restrictions on movements of funds across borders. On the contrary, by their own terms they apply

[406] Antigua reply to Panel question No. 11.

[407] In addition to the arguments presented here, see also parties' replies to Panel question No. 29 in Annex C of this Report.

[408] "Financial giant joins fight against online gambling," Press Release from the Office of the New York State Attorney General (14 June 2002).

[409] "Agreement reached with Paypal to bar New Yorkers from online gambling," Press Release from the Office of the New York State Attorney General (21 August 2002). On 10 June 2003, the United States House of Representatives adopted legislation known as H.R.2143, the "Unlawful Internet Gambling Funding Prohibition Act". This is designed to unambiguously prohibit banks and other financial service providers from engaging in financial transactions involving gambling and betting services from non-United States based gambling operators (Section 4(2)(E)(ix) excludes "any lawful transaction with a business licensed or authorized by a State" thus exempting United States gambling operators from the prohibition to facilitate payment of Internet gambling services). The second component of the United States Congress, the Senate, has yet to adopt this legislation.

[410] See Communication from the Panel, 29 October 2003, para. 31, in Annex B of this Report.

[411] "Assurance of Discontinuance" signed between the New York Attorney General and Paypal Inc. (16 August 2002), para. 20.

[412] Ibid., para. 21.

without regard to whether the payments in question are destined for further transfer to a domestic or international destination.

3.249 **Antigua** replies that the United States attempts to deflect the issue of a violation of Article XI:1 by making use of its procedural tactics aimed at excluding the non-legislative items from the scope of this dispute. The United States stated above that actions by Attorneys General (and the actions of the New York Attorney General in the context of PayPal, Inc. are particularly relevant here) do not constitute measures under the GATS because they are not binding; they are merely applications of United States domestic law. In the interest of procedural efficiency, Antigua suggested that the Panel not address the issue because it does not really matter for the adjudication of this dispute whether these actions constitute separate measures or whether they are examples clarifying the meaning of the law.

3.250 Antigua submits that in the case of the PayPal matter, paragraphs 14 through 16 of the agreement referenced in its Panel request identify the legal provisions that form the basis of the Attorney General's action in the case.[413] The action by the New York Attorney General against PayPal confirms that these legal provisions can be used to stop money transfers to Antiguan gaming operators. If the United States would somehow dispute that this action by the New York Attorney General is correctly based on United States law, this would be another reason for Antigua and Barbuda to withdraw its suggestion to the Panel not to examine the measures listed in Section III of the Annex to its Panel request as separate measures. If, contrary to what the United States argued in its request for preliminary rulings, such an action is not based on legislation it becomes a separate "measure" in its own right, even within the restrictive interpretation of this term advanced by the United States. With regard to the substance of this matter, the United States argues that the Attorney General's action applies to any Internet gambling transaction and is not specifically aimed at the cross-border supply of such services. Not only is that irrelevant, but it is also inaccurate. Paragraph 20 of the PayPal agreement provides that PayPal shall cease processing payments "other than gaming transactions that are expressly authorized under New York law." Furthermore, the New York Attorney General has openly stated that the real objective of his actions against financial intermediaries is to stop gambling businesses that "usually operate offshore in foreign locations, beyond the enforcement power of local authorities."[414] Indeed, there are no measures in New York or elsewhere in the United States that seek to stop financial transfers in relation to gambling transactions that are considered lawful in the United States.

3.251 The **United States** reiterates that Antigua's assertion that some US measure or measures violates Article XI, which deals with "restrictions on international transfers and payments," is completely unsubstantiated. Antigua offered no theory as to how or why a particular measure might violate Article XI, and it has conceded that the only example it cited in this regard – an agreement between the New York Attorney General and Pay Pal, Inc. – is not being challenged as such. This empty assertion is emblematic of Antigua's complete failure to offer evidence and argumentation in support of its substantive claims. To the extent that Antigua means to rely on items cited in the PayPal agreement, it bears the burden of providing evidence and argumentation concerning such items.

3.252 Moreover, insofar as Antigua is citing this agreement as evidence of the application of other measures, its arguments are misplaced.[415] The Paypal agreement discusses New York gambling laws, but it does not say that such laws bar international payments and transfers for gambling services. The

[413] "Assurance of Discontinuance" signed between the New York Attorney General and Paypal Inc. (16 August 2002).

[414] "Ten Banks End Online Gambling with Credit Cards", Press Release from the New York Attorney General (11 February 2003), p. 2; see also "Financial Giant Joins Fight Against Online Gambling", Press Release from the New York Attorney General (14 June 2002), p. 1.

[415] Antigua's response to Panel's question 29.

agreement itself is not an application of those laws as such; rather, it is a mutual settlement of a disputed matter entered into in the exercise of the settlement authority possessed by both parties.[416] Such settlements reflect only the parties' anticipation that one or more criminal penalties might be applied, and the crafting of an alternative solution agreed to by them – a solution that often does not resemble the actual application of the criminal penalties. The United States therefore submits that the voluntary remedies settled upon in the Paypal agreement are not probative of the meaning or application of the laws that gave rise to that dispute. Moreover, both the Paypal agreement and the underlying laws are neutral regarding the destination of payments. The fact that Paypal is permitted under the agreement to make transfers for forms of gambling that are lawful in New York does not indicate otherwise. Such transfers can be to domestic or international destinations, as can transfers for unlawful gambling.

8. GATS Article XIV[417]

3.253 **Antigua** observes that it is possible that the United States may try to invoke one or more of the general exceptions of Article XIV of the GATS. It would of course be inconsistent for the United States to seek to do so given its principal position during consultations that it has made no commitment in relation to gambling and betting services. At the DSB meeting of 24 June 2003 the United States nevertheless stated that cross-border gambling and betting services are prohibited because of "the social, psychological dangers and law enforcement problems that they created, particularly with respect to Internet gambling and betting."[418] The United States also expressed "grave concerns over the financial and social risks posed by such activities to its citizens, particularly but not exclusively children."[419] Antigua also points out that in a Note, the WTO Secretariat states, with regard to the protection of public morals and the maintenance of public order under Article XIV, that "[M]easures to curb obscenity or to prohibit Internet gambling might well be justified on these grounds."[420] Article XIV of the GATS is an "affirmative defence" and, if the United States were to invoke it, the burden of proof would be on the United States.[421] Therefore, it is for the United States to make its case under Article XIV and for Antigua to respond. In the interest of procedural efficiency, Antigua nevertheless submits a number of general considerations on the interpretation of Article XIV of the GATS. Of course, Antigua will only be able to respond in full to a possible Article XIV defence when (and if) the United States presents one.

3.254 Antigua notes that Article XIV of the GATS has not yet been interpreted by panels or the Appellate Body. However, the interpretation and application of Article XX of the GATT 1994 (the corresponding GATT provision) by the Appellate Body, WTO panels and GATT panels provides useful and relevant guidance, particularly so because the text of Article XIV of the GATS and Article XX of the GATT 1994 is largely identical. The "chapeau" of both provisions is identical but for the reference to "trade in services" in Article XIV of the GATS (as opposed to the reference to "international trade" in Article XX of the GATT 1994). The subparagraphs of Article XIV of the GATS that the United States may try to invoke in this case use the pivotal term "necessary" to establish a connection between the subparagraph and the chapeau. The term "necessary" is used in a similar way in some of the subparagraphs of Article XX of the GATT 1994. In view of the similarity between Article XIV of the GATS and Article XX of the GATT 1994, Antigua submits that, just like Article XX of the GATT 1994, Article XIV of the GATS requires a two-tiered analysis: first,

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[416] "Assurance of Discontinuance" signed between the New York Attorney General and Paypal Inc. dated 16 August 2002., para. 10.

[417] In addition to the arguments presented here, see also parties' responses to panel's questions 44 and 45 in Annex C of this Report.

[418] WT/DSB/M/151, para. 47.

[419] Ibid.

[420] *The Work Programme on Electronic Commerce*, Note by the Secretariat, S/C/W/68 (16 November 1998), para. 26.

[421] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 16 (with regard to GATT Article XX).

provisional justification of a measure as "necessary" under one of the subparagraphs and, second, further assessment of the measure under the "chapeau."[422]

3.255 In *Korea – Various Measures on Beef*, the Appellate Body confirmed the "necessary" test adopted by the Panel in *US – Section 337*[423], i.e. that a measure is not "necessary" when "a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'."[424] In *Korea – Various Measures on Beef*, the Appellate Body has also "outlined" a weighing and balancing process that is comprehended in the "reasonable alternative" test of the GATT Panel report *US – Section 337*:

> "It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument.
>
> There are other aspects of the enforcement measure to be considered in evaluating that measure as 'necessary'. One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce[425], that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*. A measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects.
>
> In sum, determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[426]

3.256 Antigua notes that the dispute on *Korea – Various Measures on Beef* concerned the application of Article XX(d) of the GATT 1994. When the Appellate Body interpreted Article XX(b) in *EC – Asbestos*, it referred back to its analysis of "necessary" in *Korea – Various Measures on Beef*.[427] This shows that the Appellate Body's analysis in *Korea – Various Measures on Beef* does not exclusively apply to Article XX(d) of the GATT 1994 but is likely to apply by analogy to all similar necessity tests, including those of Article XIV of the GATS.

3.257 In its report on *US – Shrimp*, the Appellate Body described Article XX of the GATT 1994 as requiring the following:

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[422] Appellate Body Report on *US – Gasoline*, p. 22; Appellate Body Report on *US – Shrimp*, paras. 119-121.

[423] GATT Panel Report on *US – Section 337*, BISD 36S/345.

[424] Appellate Body Report on *Korea – Various Measures on Beef*, para. 166.

[425] (*original footnote*) We recall that the last paragraph of the Preamble of the GATT of 1994 reads as follows: 'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade *and to the elimination of discriminatory treatment in international commerce*.'" (emphasis added)

[426] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 162-164.

[427] Appellate Body Report on *EC – Asbestos*, paras. 171-172.

> "[A] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences."[428]

3.258 In *US – Shrimp*, the Appellate Body found that the United States regulation at issue did not meet the chapeau's test because: (i) it imposed a "rigid and unbending" standard that left no scope for taking into account other specific policies and measures that an exporting country may have adopted to protect the general interest objective at issue;[429] (ii) it imposed a "rigid and unbending" standard on other countries that did not take into account the conditions prevailing in the 'exporting countries;[430] and (iii) it had made no effort to pursue international cooperation with relevant countries in order to deal with the policy concerns at issue before imposing an import ban.[431]

3.259 In *US – Gasoline*, the Appellate Body found that the words "discrimination between countries," in the chapeau of Article XX of the GATT 1994 covers discrimination between the exporting and importing country (national treatment) as well as discrimination between exporting countries (most favoured nation treatment).[432]

3.260 The **United States** argues that Antigua has failed to make out its case. Indeed, it is unable to make out a case for the simple reason that there is no breach of any US GATS obligation. It is therefore unnecessary for the Panel to examine Antigua's claims in light of Article XIV of GATS. Nonetheless, the United States believes that, in order to develop the fullest possible appreciation of the scope and gravity of the issues at stake in this dispute, it is important to understand the vital policy objectives served by US measures restricting gambling. In so doing, these US measures would easily meet the requirements of Article XIV. The fact that these measures so clearly fall within Article XIV also serves to confirm that it would have been incomprehensible for the United States to make them the subject of a specific commitment.

3.261 The United States notes that Antigua mentioned three statutes: 18 U.S.C. § 1084, 18 U.S.C. § 1952; and 18 U.S.C. § 1955. Since the "total prohibition" asserted by Antigua is not a notion capable of any independent existence under US law, an examination of Article XIV can only take place in the context of these specific measures. The United States therefore addresses the following discussion to the origins, operation, and purpose of the three statutes that Antigua has deigned to mention in the course of its arguments.

3.262 Following the inauguration of President John F. Kennedy, the US Department of Justice launched an all-out assault on organized crime in the United States. As part of that effort, Attorney General Robert F. Kennedy proposed the Attorney General's Program to Curb Organized Crime and Racketeering. Sections 1084 and 1952 of Title Eighteen, United States Code, formed part of that program. Congress enacted them in 1961. Explaining the overall effect of his program, including the portions that would become §§ 1084 and 1952, Attorney General Kennedy observed that organized

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[428] Appellate Body Report on *US – Shrimp*, para. 156.
[429] Ibid., para. 163.
[430] Ibid., para. 177.
[431] Ibid., para. 171.
[432] Appellate Body Report on *US – Gasoline*, pp. 23–24.

crime posed an "acute" danger to the United States, and that "the need for action is clear."[433] The question, in his words, was "what can be done effectively to curtail these hoodlums and racketeers who have become so rich and so powerful." His answer:

> "These people use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size.
>
> Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime, all throughout the country."[434]

3.263 The United States argues that Attorney General Kennedy emphasized that the goal of his package would not be to displace state laws restricting gambling, but to aid in their enforcement.[435] Noting that federal law enforcement work in other areas had been "effective" and "helpful to local law enforcement," he urged that similar enforcement cooperation between federal and state authorities was "essential in getting action against organized crime, which is so well organized and so well entrenched on a multistate basis that local law enforcement often is virtually powerless to act without aid and assistance of the federal government."[436]

3.264 The United States reiterates that Section 1084 prohibits a person in the business of betting or wagering from knowingly using a wire communication facility to transmit in interstate or foreign commerce bets or wagers or information assisting in the placing of bets or wagers. As previously noted, this statute does not prevent the cross-border supply of gambling information so long as the information assisting in the placing of certain types of bets or wagers is being transmitted from a state or foreign country where such wagering is legal to a state or foreign country where wagering on the same event is legal, or if the information is being transmitted for news reporting.[437] The main purposes of § 1084, as articulated at the time of its consideration by Congress, are to aid in the enforcement of state and local laws and, in so doing, to suppress organized gambling. The legislative history describes them in the following terms:

> "The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offences and to aid in the suppression of organized gambling by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce."[438]

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[433] Kennedy testimony, p. 11.

[434] Ibid., p. 2 ("Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling. From huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including the bribery of local officials.").

[435] Ibid.

[436] Ibid.

[437] 18 U.S.C. § 1084(b).

[438] House of Representatives Report No. 87-967, pp. 1-2 (1961). See also Kennedy testimony, p. 6 ("It cannot be overemphasized that this bill is designed, first to assist the States and territories in enforcement of their laws pertaining to gambling and like offenses. Second, the bill would in that regard help suppress organized gambling ....") (original emphasis omitted). Attorney General Kennedy emphasized that the legislation was not aimed at "a social wager between friends." Ibid., US court decisions have confirmed these purposes. For example, a 1983 decision of a federal appellate court found that § 1084 was enacted to assist the states in enforcing their own laws against gambling. See *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1983).

According to Attorney General Kennedy, the restrictions on remote supply of gambling reflected in § 1084 were needed as an additional enforcement tool because the use of wire communications technologies for the dissemination of gambling information frustrated local law-enforcement efforts.[439]

3.265 The United States reiterates that Section 1952 of Title 18, United States Code, prohibits travelling in interstate or foreign commerce, or using the mails or any facility in interstate or foreign commerce, with intent to, *inter alia,* "distribute the proceeds of any unlawful activity" or "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter perform[] or attempting to perform" such act. The term "unlawful activity" is defined to include "any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or of the United States." The primary purpose of § 1952, as articulated by Attorney General Kennedy, is to enable the Federal Government to "take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety."[440] In his words, "[t]he target clearly is organized crime."[441] Government investigations made it clear that "only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials."[442]

3.266 Section 1955 of Title 18, United States Code, was enacted by Congress as part of Title VIII of the Organized Crime Control Act of 1970. In the Statement of Findings prefatory to that Act, Congress described the threat posed by organized crime in grave terms:

> "(1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavours as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labour unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."[443]

3.267 The United States notes that Section 1955 prohibits conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business. Section 1955(b) defines the term "illegal gambling business" as "a gambling business which – (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2000 in any single day." Congress articulated three broad reasons for including § 1955 in the Organized Crime Control Act. First, the Congress and the President viewed gambling income as the "lifeline of organized crime" and the means by which it financed other activities.[444] Second, Congress

[439] Kennedy testimony, p. 5.
[440] Kennedy testimony, p. 15.
[441] Ibid., p. 16.
[442] Ibid.
[443] 18 U.S.C. § 1961 note.
[444] 116 Congressional Record H9711 (daily ed. 7 October 1970) (Statement by Rep. Poff).

and the President expressed concern that gambling "preys upon society," especially the poor.[445] Third, from a law enforcement standpoint, "gambling is more susceptible than most organized crime activities to detection and prosecution."[446] Commenting on the law enforcement purpose in particular, a legislator observed that:

> "[T]itle VIII's expansion of the Federal jurisdiction over large scale gambling cases will improve local efforts [to enforce antigambling laws], not merely by providing an impetus for effective and honest local law enforcement, but also by making available to assist local efforts the expertise, manpower, and resources of the Federal agencies which under existing Federal antigambling statutes have developed high levels of special competence for dealing with gambling and corruption cases."[447]

Several US courts have confirmed and elaborated on these purposes.[448] For example, the courts have confirmed that § 1955 is a measure against organized crime[449], and that it provides an enforcement tool in cases where local officials fail to prosecute illegal gambling.[450]

3.268 Because all of the foregoing measures operate in part as measures to enforce state restrictions on gambling, it may be useful for the United States to elaborate on the policy concerns that underlie state-level restrictions. Generally speaking, state laws prohibiting or restricting various forms of gambling rest on state policies relating to public health, safety, welfare, and the preservation of good order. The examples of state gambling policies submitted by the United States provide further elaboration on these state policies.

3.269 The United States submits that Article XIV of the GATS is clear that "nothing" in the GATS "shall be construed to prevent the adoption or enforcement by any Member of measures" falling within the terms of that article. Accordingly, there can be no doubt that the United States may maintain sections 1084, 1052, and 1955 since they meet the requirements of Article XIV, over and above the fact that they are also consistent with the remainder of the GATS. In order to meet the requirements of Article XIV, a measure must fall within the scope of paragraphs (a) to (e) of Article XIV, and it must meet the requirements of the introductory provisions in the *chapeau* of

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[445] Ibid. See also House of Representatives Rep. No. 91-1549, p. 53 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4029, ("The provisions of this title [referring to 18 U.S.C.§ 1955] do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function.").

[446] 116 Congressional Record H9711 (Statement by Rep. Poff).

[447] Ibid., at H9712.

[448] See, e.g., *United States v. Scavo*, 593 F.2d 837, 841 (8th Cir. 1979) (In enacting § 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was "intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern.." (quoting House of Representatives Rep. No. 1549, 91st Cong. 2d. Sess. (1970)); *United States v. Hawes*, 529 F.2d 472, 478 (5th Cir. 1976) (It is not the purpose of § 1955 to prohibit gambling, but only to prohibit "illegal" gambling of such a size as would affect interstate commerce. Organizers of illegal gambling activities are among the organized criminal elements targeted by Congress.).

[449] *United States v. Box,* 530 F.2d 1258, 1264-65 (5th Cir. 1976) (Clearly, the dominant concern motivating Congress to enact § 1955 was that large-scale gambling operations in this country have been closely intertwined with large-scale organized crime, and indeed may have provided the bulk of the capital needed to finance the operations of organized crime. The target of the statute was large-scale gambling operations – local "mom and pop" bookmaking operations were to be left to state law.).

[450] *United States v. Nugent*, 389 F. Supp. 817, 819 (W.D. La. 1975) (The legislative history of 18 U.S.C. § 1955 indicates Congress' intention to place in the hands of the prosecutor a weapon with which to attack the corruption of local law enforcement personnel and public officials by persons involved in illegal gambling operations.).

Article XIV.[451] Article XIV has not been interpreted through dispute settlement. Some of its provisions are similar to provisions of Article XX of the GATT, while others differ in certain respects.

3.270 The operative language in the opening phrases of Article XIV(c) of the GATS is virtually identical to Article XX(d) of the GATT 1994. Article XIV(c) protects measures that are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS]." The text states that these measures include, *inter alia,* laws or regulations relating to "the prevention of deceptive and fraudulent practices"[452] and laws or regulations relating to "safety."[453] The text indicates that this GATS provision applies to laws that are (i) designed to "secure compliance" with laws or regulations not themselves inconsistent with some provision of the GATS, and (ii) "necessary" to that end.[454]

3.271 The United States argues that, first, a panel must determine whether the measure in question is designed to ensure compliance with other WTO-consistent measures.[455] Article XIV(c)(i)-(iii) provides examples of these types of measures – examples that are intended to be illustrative rather than exhaustive, as indicated by the use of the word "including." Second, a panel must examine whether a measure is "necessary."[456] In doing so it should apply the ordinary meaning of the term, which has been described in the following manner by the Appellate Body:

> "The word 'necessary' normally denotes something 'that cannot be dispensed with or done without, requisite, essential, needful'. We note, however, that a standard law dictionary cautions that:
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> > [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity."[457]

3.272 The United States notes that this ordinary meaning indicates that "the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable.'"[458] Moreover, the concept of necessity is a continuum that may extend, depending on the nature of the interest served, all the way to measures that "make a contribution" to compliance.[459] In the services context, a panel should also bear in mind the particular objects and purposes of the GATS, including recognition of the

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[451] Appellate Body Report on *US – Gasoline* (interpreting Article XX of the GATT).

[452] GATS Article XIV(c)(i).

[453] GATS Article XIV(c)(iii).

[454] Appellate Body Report on *Korea – Various Measures on Beef*, para. 157 ("For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance.")

[455] Panel Report on *Canada–Periodicals,* para. 5.9 (interpreting Article XX of the GATT).

[456] The United States notes that the views expressed here regarding the term "necessary" under Article XIV of the GATS are restricted to that context, and do not necessarily apply to the same term in other provisions of the GATS, or in other WTO agreements.

[457] Appellate Body Report on *Korea – Various Measures on Beef*, para. 160 (interpreting Article XX of the GATT).

[458] Appellate Body Report on *Korea – Various Measures on Beef*, para. 161 (interpreting Article XX of the GATT).

[459] Ibid. (interpreting Article XX of the GATT).

"right of Members to regulate." This includes the right of a Member to heavily restrict a highly risky service (in this case, gambling by remote supply) while allowing the use of a less risky service.[460]

3.273 The United States argues that Congress designed §§ 1084, 1952, and 1955 in large part to serve as law enforcement tools to secure compliance with other WTO-consistent US laws. Most obviously, these statutes "secure compliance" with state laws restricting gambling and other like offences by enhancing the enforcement of such measures. Sections 1084, 1952, and 1955 make an essential contribution to the enforcement of state law. Before these federal laws existed, violators of state gambling laws often avoided prosecution by supplying their services remotely, from locations out of reach of state and local law enforcement authorities. Sections 1084 and 1952 address that problem by enabling federal law enforcement authorities to pursue remote suppliers of illegal gambling who violate state law, even if those violators are beyond the reach of state or local authorities. Section 1955 similarly furthers enforcement of state laws by enabling federal authorities to pursue large gambling businesses that violate state law, especially in cases where state authorities are unable or unwilling to address the problem. The design of §§ 1952 and 1955 confirms their role as enforcement measures, inasmuch as a violation of state law is an express element of the offence described in each of those statutes. In the case of § 1084, the same characteristic is reflected in the fact that the statute includes an exception in § 1084(b) the scope of which depends on the extent to which gambling activity is lawful under state law. Moreover, as described above, the legislative history of these measures is painstakingly explicit in recording the fact that they were designed in large part as measures to aid in the enforcement of state restrictions on gambling in situations where such compliance was doubtful.

3.274 The United States argues that as to the substance and WTO-consistency of the state laws with which these measures are designed to secure compliance, it suffices to note that most of them are among the many measures included in the CD-ROM containing copies of State and Territorial Legislation that Antigua provided to the Panel;[461] yet Antigua has failed to make out a *prima facie* case with respect to any of these measures. Therefore their WTO consistency can be presumed. Section 1952 also secures compliance with other state laws not challenged by Antigua, including laws relating to liquor, narcotics, and prostitution.[462] The state gambling laws, which §§ 1084, 1952, and 1955 help to enforce, protect fundamentally important state policies relating to public health, safety, welfare, and the preservation of good order. Prominent among these is society's interest in remaining free from crime, and organized crime in particular. More generally, these policies protect the public from the law enforcement, consumer protection, health, and other concerns associated with gambling and more fully described elsewhere by the United States.[463]

3.275 As measures against organized crime, §§ 1084, 1952, and 1955 are necessary to secure compliance with all the various WTO-consistent US criminal laws violated by organized crime activities. As discussed above, §§ 1084, 1952, and 1955 are clearly measures against organized crime, and legislative history and subsequent interpretations confirm that purpose. Inherent in the concept of "organized crime" are certain types of criminal activity in which organized crime groups typically engage.[464] The specific crimes most closely associated with organized crime include, in

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[460] Appellate Body Report on *EC–Asbestos,* para. 168 (interpreting Article XX of the GATT) ("Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.")

[461] One relevant group of statutes not included in that selection is are the statutory age limits on participation in gambling activities established by every US state. Antigua has acknowledged the existence of these restrictions. As with other state-level restrictions, §§ 1084, 1952, and 1955 are necessary to secure compliance with these laws.

[462] 8 U.S.C. § 1952(b) (defining "unlawful activity" for purposes of § 1952).

[463] See above paras. 3.189-3.195.

[464] The United States notes that, in the words of one commentator, every organized crime activity is made up of "more specific crimes, which constitute what we know as organized crime." See Jay S. Albanese,

addition to gambling offences, such crimes as loan sharking (i.e., illegal lending), prostitution, the sale and distribution of drugs and/or pornography, the fencing (i.e., illegal purchase) and distribution of stolen property, money laundering, and labour racketeering (i.e., the use of force or threats to obtain money for ensuring jobs or labour peace).[465] In addition, the pursuit of these organized crime activities often entails acts or threats of murder, kidnapping, arson, robbery, bribery, and extortion, not to mention lesser crimes such as assault, fraud, and larceny.[466] The Panel will not be surprised to learn that all of the foregoing offences are crimes under the federal and/or state laws of the United States. The WTO consistency of these US criminal laws is not in question, nor could Antigua seriously dispute the importance of the interests that they serve. Nor can it seriously question the importance of combating organized crime.

3.276 The United States notes that to effectively enforce these underlying criminal laws against organized criminals, law enforcement authorities require special statutory tools that are adapted to the challenges posed by sophisticated, well-financed criminal groups. Sections 1084, 1952, and 1955 are three such tools.[467] As with terrorist groups and other criminal groups, one essential enforcement strategy for pursuing organized crime is to place restrictions on its major sources of funds.[468] Gambling has long been recognized as a major source of funds for organized crime, and clearly a major purpose behind the enactment of §§ 1084, 1952, and 1955 was to restrict that source of funds and ensure that it would not escape the scrutiny of law enforcement officials.[469] Congress further confirmed the association between these specific measures and enforcement in the field of organized crime when it enacted Title IX of the Organized Crime Control Act of 1970, known as the Racketeer Influenced and Corrupt Organizations Statute, or, more commonly the "RICO" statute.[470] In the RICO statute, Congress defined "racketeering activity" as including, *inter alia*, acts indictable under §§ 1084, 1952, and 1955.[471]

3.277 In addition, §§ 1084, 1952, and 1955 were all enacted out of the firmest possible conviction that they were indispensable to defeating organized crime.[472] The Senate Report for the Organized Crime Control Act of 1970 thus stressed that:

> "What is needed here ... are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be

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The Prediction and Control of Organized Crime: A Risk Assessment Instrument for Targeting Law Enforcement Efforts, p. 19, at http://www.ojp.gov/nij/international/programs/ukr_pred_paper.pdf (2002).

[465] Ibid., pp. 19-20.

[466] 18 U.S.C. § 1961(1)(A) (defining "racketeering activity" in part to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical .. which is chargeable under State law and punishable by imprisonment for more than one year.").

[467] See above paras. 3.261-3.267.

[468] United States Attorney' Bulletin, June 1999, p. 27, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4703.pdf ("Most crimes have some type of financial gain as the primary motive. Curtailing or eliminating the proceeds of criminal activity can have a substantial impact on reducing crime overall. ... Taking the profit out of crime is also an important step in eliminating the operating capital needed to fund ongoing criminal activity.").

[469] See above paras. 3.262-3.267.

[470] Codified at 18 U.S.C. §§ 1961-1968.

[471] 18 U.S.C. § 1961(1)(B).

[472] For example, Attorney General Kennedy testified before the U. Senate that there was an "acute need" for §§ 1084 and 1952. Kennedy testimony, p. 17. See also ibid., p. 5 (§ 1952: "[T]his bill is vital. We need it. Local law enforcement officials need it. The country needs it.").

> made on their source of economic power itself, and the attack must take place on all available fronts."[473]

As this quotation suggests, a major goal of US law enforcement efforts against organized crime is to attack its sources of money and power.

3.278 The United States notes that Article XIV(a) provides a general exception for measures that are "necessary to protect public morals or to maintain public order." The text does not elaborate on these provisions except to note, with respect to public order, that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[474] Article XIV(a) provides an exception for measures "necessary to protect public morals or to maintain public order." The term "public order" refers to the familiar civil-law concept denoted in French by the expression "*ordre public*" and its functional counterpart in common-law systems, the concept of "public policy" (although the latter term is also used in other contexts with a broader meaning). In the words of Judge Lauterpacht, the concept of "public order" refers to the "fundamental national conceptions of law, decency and morality."[475] "Public morals" in turn refers to standards of right and wrong that can be described as "belonging to, affecting, or concerning the community or nation."[476] The concepts of public order and public morals are closely associated with restrictions on gambling. For example, the original use of "public morals" in the GATT followed prior multilateral trade negotiations in which it was well-understood that restrictions on the importation of lottery tickets – the forerunner of modern restrictions on cross-border gambling – would fall within the public morals exception.[477] Indeed, Members continue to maintain similar restrictions for similar reasons.[478] As to Internet gambling in particular, Antigua has correctly noted

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[473] Senate Rep. No. 91-617, 91st Cong.,1st Sess., p. 79 (1969). President Nixon similarly noted in his Message on Organized Crime that organized crime's "economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, ... the importation of narcotics," and certain other crimes. Ibid., p. 35. The Senate Report also incorporated the American Bar Association's conclusion that "[t]he magnitude of the [organized crime] problem makes it clear that all legitimate methods of combating organized crime must be utilized." Ibid., p. 76.

[474] Article XIV, footnote 5.

[475] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden),* 1958 I.C.J. 55, 90 (Judgment of 28 November) (sep. op. of J. Lauterpacht).

[476] "Public" means "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation," and "moral" means "Of or pertaining to human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong....". See *New Shorter Oxford English Dictionary,* pp. 1827, 2204.

[477] The United States notes that the Economic Committee of the League of Nations put forward a draft convention that included an exception for "[p]rohibitions or restrictions imposed for moral or humanitarian reasons or for the suppression of improper traffic, provided that the manufacture of and trade in the goods to which the prohibitions relate are also prohibited or restricted in the interior of the country." See Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement drawn up by the Economic Committee of the League of Nations to serve as a Basis for an International Diplomatic Conference, League of Nations Doc. C.E.1.22. 1927 II.13. pp. 10, 15 (1927). Commenting on this draft, the US State Department observed that the moral exception was "necessary" because of "American prohibitions or restrictions imposed for moral or humanitarian reasons or to suppress improper traffic relate inter alia to intoxicating liquors, smoking opium and narcotic drugs, *lottery tickets,* obscene and immoral articles, ... [etc.]." Department of State, The Secretary of State to the Minister in Switzerland (Wilson), in Papers Relating to the Foreign Relations of the United States, 1927, p. 257 (1942) (emphasis added). In the debate over the proposed exception, the representative of Egypt asked whether a prohibition on the importation of foreign lottery tickets would be covered by the moral exception. The president of the conference stated that such prohibitions would be covered by the exception for measures adopted for "moral or humanitarian reasons." International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference, p. 110, League of Nations Doc. C.21.M.12. 1928 II.7, p. 110 (1928).

[478] The United States argues that, for example, the 1999 Trade Policy Review of Israel observed that Israel maintained an import prohibition on "[t]ickets or publicity items for lottery or gambling" and identified the reason for this prohibition as "[p]ublic morals." *Trade Policy Review - Israel - Report by the Secretariat*,

that the WTO Secretariat in 1998 observed, with regard to the protection of public morals and the maintenance of public order under Article XIV, that "[m]easures to curb obscenity or to prohibit Internet gambling might well be justified on these grounds."[479] In the GATS, invocation of the "public order" portion of this exception is limited to measures necessary to respond to "genuine and sufficiently serious" threats to a fundamental interest of society.

3.279 Remote supply of gambling raises significant concerns relating to the maintenance of public order and the protection of public morals. The United States has shown that gambling by remote supply is particularly vulnerable to various forms of criminal activity, especially organized crime.[480] Maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of "public morals" and one of "public order." As Congress found when it enacted the Organized Crime Control Act, the specific threats posed by organized crime include, among others, social exploitation; corruption and subversion of the democratic processes; economic losses and instability; and diminution of the domestic security and general welfare of the United States and its people.[481] These grave concerns meet the high standard for "genuine and sufficiently serious" threats to a fundamental interest of society, as required in the case of "public order" by footnote 5 of the GATS.

3.280 According to the United States, Antigua's own evidence dispels any possible doubt about the gravity of such concerns in the specific context of remote supply of gambling. The first paragraph of the Bear Stearns report submitted by Antigua states that:

> "Many offshore jurisdictions, particularly those in the Caribbean, exert little or no regulatory control over gambling site operators, who are for the most part unknown. More importantly, they are beyond the control of the US Justice Department. Still, these sites generate up to 60% of their revenues from the vast American market. They are a direct pipeline of dollars out of the US into virtually unknown hands. In addition, such sites fall under loose offshore reporting requirements, so it is unclear how these funds are spent. *In our view, this uncertainty could pose a risk to national security from terror and/or criminal organizations.*"[482]

WT/TPR/S/58, table III.8 (1999). Similarly, the 1999 trade policy review of the Philippines listed limitations on foreign ownership of gambling operations (e.g., racetracks) under a heading that referred, *inter alia,* to limitations "for reasons of ... risk to health and morals." *Trade Policy Review - The Philippines - Report by the Secretariat*, WT/TPR/S/59, table III.11 (1999) (The document does not specify precisely which reason is associated with the gambling ownership restriction, but from the context of the document it is reasonable to infer that restriction is based on "morals" or "health and morals."). Numerous countries prohibit imports of gambling paraphernalia on GATT Article XX grounds, although it is not always possible to discern whether these restrictions are attributed to public morals or to some other Article XX exception. To cite just one example, El Salvador "operates import prohibitions on a limited number of products, generally on grounds of health, security, morality or environmental protection," and includes gambling paraphernalia on the list of such products. See *Trade Policy Review - El Salvador - Report by the Secretariat,* WT/TPR/S/111, para. 50 and table III.5 (2003).

[479] *The Work Programme on Electronic Commerce*, Note by the Secretariat, 16 November 1998, S/C/W/68, para. 26. While not legally binding, this observation by the Secretariat further confirms the association between restrictions on gambling and the protection of public morals and maintenance of public order.

[480] See above paras. 3.189-3.192.

[481] See above para. 3.266 (quoting Statement of Findings accompanying the Organized Crime Control Act of 1970).

[482] See Bear Stearns, *E-Gaming: A Giant Beyond Our Borders*, (September 2002), p. 1 (emphasis added). See also ibid., p. 40, (discussing Antigua and five other jurisdictions, and concluding that "although these major markets provide for some of the most lucrative and popular gaming sites on the Internet, they also provide for the least amount of public information. In our view, this lack of access to information increases the risk profile of the region tremendously. As we stated earlier in this report, we believe that the Caribbean

3.281 The United States argues that Antigua's own evidence thus confirms that the United States is not alone in viewing remote supply of gambling as a potential vehicle for organized crime and other forms of lawlessness that threaten public order and public morals. In addition, the United States has shown that remote supply greatly expands gambling opportunities into settings – such as homes and schools – where it has not traditionally been present and is not subject to the controls present in other settings.[483] By thus expanding gambling from controlled settings into uncontrolled settings, remote supply expands the audience of potential gamblers – most notably by making it easy for children to gamble. While adults can be expected to exercise their own moral judgment, society recognizes that children have a less well-developed sense of right and wrong. Thus the availability of gambling in uncontrolled settings naturally provokes concerns about public morals that are present to a far lesser degree when gambling is conducted away from homes and schools and subject to verifiable age controls.[484]

3.282 The United States has already shown that §§ 1084, 1952, and 1955 are indispensable tools in the fight against organized crime and other forms of criminality.[485] At the same time, these statutes serve to suppress betting by remote supply, and are in that respect necessary to prevent the intrusion of gambling into uncontrolled settings. Taken together, these public order and public morals concerns should lead a panel to conclude that remote supply of gambling poses a grave threat to the maintenance of public order and the protection of public morals in the United States – certainly enough so to justify the maintenance and enforcement of origin-neutral restrictions on gambling such as those found in §§ 1084, 1952, and 1955.

3.283 The United States submits that the chapeau of Article XIV imposes an additional requirement that any measure provisionally justifiable under (a) through (e) not be "applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services." The purpose of the chapeau of Article XIV is to avoid abuse or misuse of the particular exceptions set forth in Article XIV(a) through (e).[486] The restrictions in §§ 1084, 1952, and 1955 meet the requirements of the chapeau. None of these measures introduces any discrimination on the basis of nationality. On the contrary, as the United States has repeatedly observed, they apply equally regardless of national origin. Therefore the only question with respect to the chapeau is whether these laws constitute "a disguised restriction on trade in services." Antigua has asserted that the real purpose of US restrictions on remote supply of gambling is protectionism. As the foregoing discussion of the legislative history of §§ 1084, 1952, and 1955 amply illustrates, Antigua is mistaken. These measures were enacted long before Internet gambling was even thought possible, and for reasons having nothing to do with protection of domestic industry. There is simply no basis on which to assert that they constitute "a disguised restriction on trade in services." On the contrary, their application is a legitimate and non-discriminatory response to the continuing threats posed by remote supply of gambling – including those newer threats posed by Internet gambling.

3.284 Antigua's comments suggest a belief on its part that the United States should be required to address its concerns about remote supply of gambling by negotiating international regulatory standards.[487] This suggestion suffers from at least two basic flaws. First, as a legal matter, nothing in the text of the GATS requires such action. Second, as a factual matter, the absence of any US

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market, in which we believe a large number of operators are domiciled, could present a threat to national security given the lack of available information.")

[483] NGISC Final Report, pp. 5-1 ("[O]n-line wagering promises to revolutionize the way Americans gamble because it opens up the possibility of immediate, individual, 24-hour access to the full range of gambling in every home."). See also US arguments above, para. 3.18 (discussing classification of gambling as vice activity and concerns about its spread into homes, schools, etc.).

[484] See above paras. 3.193 and 3.18.

[485] See above paras. 3.261-3.267.

[486] Appellate Body Report on *US – Gasoline,* pp. 22 and 25.

[487] See for instance above para. 3.14.

domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to seek negotiations to permit such a regime for its cross-border suppliers. The United States recognizes that certain other countries – including, most obviously, Antigua itself – have determined that they can regulate the remote supply of gambling services in a manner that those countries consider to be sufficient. Indeed, each Member has the right to determine for itself the level of law enforcement to provide through its domestic laws and regulations.[488]

3.285 The United States reiterates that the Panel has before it extensive evidence of the study and debate that has taken place in the United States concerning the possible regulation of remotely supplied gambling services. In spite of all of this study and debate, the United States has not found it possible to develop regulations for the remote supply of gambling on a domestic basis that would provide sufficient levels of law enforcement to satisfy the priorities of US regulators.[489] Given this context, it is unreasonable to expect the United States to negotiate an "agreed regulatory context" for cross-border supply of such services. In closing, the United States wishes to reiterate that there is no need for the panel to reach Article XIV issues in order to resolve this dispute. While the maintenance and enforcement of US restrictions on gambling clearly serves the interests identified by the GATS negotiators in Article XIV as being of overriding importance, it does so in a non-discriminatory manner that is in all respects fully consistent with the GATS.

3.286 **Antigua** notes that, after having never mentioned Article XIV of the GATS, the United States for the first time raised this provision on 9 January 2003. Even so, it is not entirely clear that the United States is actually asserting Article XIV as a defence. The United States says it is "unnecessary for the Panel to examine Antigua' s claims in the light of Article XIV" but that its measures "would easily meet the requirements of Article XIV." Article XIV provides an affirmative defence and if the United States does not invoke it, then the Panel should not address it. Antigua does certainly not request the Panel to apply Article XIV and refers to the language already quoted and contained in paragraph 3.285 above "the United States wishes simply to reiterate that there is no need for the panel to reach Article XIV issues in order to resolve this dispute." To the extent that the United States seeks to somehow raise an "informal" Article XIV type defence, it does so only with regard to three federal statutes and not with regard to other federal or state statutes. The three federal statutes at issue are the Wire Act, the Travel Act and the Illegal Gambling Business Act. With regard to these three federal statutes the United States essentially raises three Article XIV type defences.

3.287 Antigua states that, first, the United States submits that the three statutes are "necessary" "for the enforcement of state laws on gambling" and are therefore covered by Article XIV(c). Article XIV(c) exempts measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." The United States says that its state laws are consistent with the GATS and that therefore the federal laws enhancing those laws are exempted under Article XIV(c). This reasoning is obviously circular and merits only a brief response. An Article XIV issue can only arise when a WTO Member violates its GATS obligations. Antigua

[488] Appellate Body Report on *Korea – Various Measures on Beef*, para. 176 ("It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO consistent laws and regulations.").

[489] As the United States has pointed out, among the issues that have prevented the US regulators from authorizing remote supply of gambling are the significantly greater regulatory concerns associated with remote supply of gambling, See above paras. 3.189-3.195, including the law enforcement and other concerns described above that led to the enactment of, and require the enforcement of, §§ 1084, 1952, and 1955. Internet gambling poses such severe regulatory difficulties that the US National Association of Attorneys General ("NAAG"), representing state law enforcement officials, has taken the unusual step of asking the federal government to enact new legislation to make US restrictions on Internet gambling more explicit. See NGISC Final Report, pp. 5-9. As the NGISC observed, "NAAG's position on Internet gambling is a rare stance by the association in support of increased federal law enforcement and regulation and is a clear indication of the regulatory difficulties posed by Internet gambling." Ibid.

challenges the lack of market access and the absence of equal conditions of competition. To the extent that United States laws contribute to this violation they cannot be invoked as a justification for this infringement under Article XIV(c).

3.288 The second Article XIV type defence seems to be that these statutes are "necessary" for the enforcement of the criminal laws violated by organized crime and are therefore covered by Article XIV(c). The crimes mentioned by the United States include loan sharking, prostitution, sale and distribution of drugs, distribution of stolen property, murder, kidnapping, arson and robbery. Apparently the United States believes that the prohibition of all cross-border gambling and betting services from Antigua is "necessary" to enable the United States to combat organized crime and prevent the commission of these crimes – a baffling proposition which lacks all credibility. In any event, in evaluating the United States' claim, the Panel must take into account, on the one hand, the extent to which the prohibition contributes to that end and, on the other, the extent to which the prohibition produces restrictive effects on international commerce.[490] In Antigua's view, this evaluation is very simple: (i) the United States has submitted no evidence of organized crime involvement in Antigua's gambling industry nor has it submitted any evidence that Antigua would not cooperate with criminal investigations and prosecutions by the United States; (ii) the effect of the United States' measures is the most restrictive possible: total prohibition. Consequently, this aspect of the defense fails. Antigua points out a 1989 decision of the United States Supreme Court[491], where the Supreme Court had to balance the desire of the State of California to prohibit certain forms of gambling on Native American reservations against the Native American and federal interest of promoting tribal economic development. As the United States does here, in that case California submitted that its gambling restrictions were necessary to prevent the infiltration of Native American tribes by organized crime. The Supreme Court rejected this argument because the fears expressed by California were, as is true here, but a vague allegation.

3.289 Antigua notes that the United States' third Article XIV defence is that the three federal statutes are "necessary to protect public morals or to maintain public order" as provided in Article XIV(a). The footnote to Article XIV(a) clarifies that this exception needs to be interpreted narrowly: "[T]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. In *Korea – Various Measures on Beef* the Appellate body also found that when evaluating whether a measure is "necessary":

> "[A] treaty interpreter (...) may (...) take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument."[492]

3.290 Antigua notes that the United States wisely does not argue that gambling and betting is, as such, contrary to public morals and public order. In view of the wide availability of gambling in the United States and the active involvement in the promotion of gambling of both the state and the federal governments, such a claim would have no credibility at all. The United States does, however, argue that public order and public morals are endangered because of the alleged organized crime threat (which Antigua has already dealt with) and because "[..] remote supply greatly expands gambling opportunities into settings – such as homes and schools – where it has not traditionally been present and is not subject to the controls present in other settings." However, this would only be problematic for children because the United States concedes that "adults can be expected to exercise their own moral judgment." Antigua has already explained to the Panel that age verification and other technologies exist (and many are being used) to reduce the chances of minors gambling on the

[490] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 162-164.
[491] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
[492] Appellate Body on *Korea – Various Measures on Beef*, para. 162.

Internet with Antiguan operators. While the United States has made plenty of "mere assertions," it has not provided any evidence to the contrary with respect to Antigua's industry.

3.291 Antigua submits that, even if the United States could establish that current age verification systems are not effective, other methods of preventing under age gambling are conceivable that would be less restrictive on international trade than a total prohibition. For instance, the United States could cooperate with Antiguan operators in verification of social security numbers or other government means of identification. Or, gambling and betting accounts with Antiguan operators could be opened in person at news agents or other specifically designated shops. In such circumstances the age verification system would be exactly the same as that used by lotteries in the United States. Consequently, the United States' total ban on cross-border supply from Antigua cannot possibly be said to be "necessary" because its "remote" character would not allow age verification. Antigua recalls it has shown that the United States tolerates a substantial amount of under age gambling and that state lotteries aggressively target the youth market. One must therefore conclude that youth gambling and the strict enforcement of its laws on under age gambling is of only limited importance to the United States.

3.292 Antigua submits that, even were the United States to make out a provisional defence under Article XIV, it is required to demonstrate that the three federal statutes in question meet the additional requirements of the "chapeau" of Article XIV. This is clearly not the case. First, the United States discriminates against Antiguan services because they cannot be supplied through distribution methods that are available for the distribution of domestic services. This is an obvious "unjustifiable discrimination". Second, even when comparing the treatment of purely Internet and telephone based Antiguan services with that of services that the United States describes as "non-remote," the United States' total prohibition does not meet the requirements of the chapeau. As effected by the three federal statutes explored by the United States, the total prohibition is a "rigid and unbending"[493] measure. While the United States refuses to consider cooperation with Antigua regarding its alleged objectives of age verification and fighting organized crime, such international cooperation would not only be a less "rigid and unbending" and trade restrictive policy, but it would also be a much more effective tool for the United States to achieve its stated objectives. The United States dismisses, out of hand, the suggestion of cooperation with Antigua, despite the fact that it follows from the Appellate Body report in *US – Shrimp* that under the chapeau, a total prohibition cannot be justified by a Member that refuses to pursue international cooperation. In this context, the Panel should refer to an interview[494], where the president of the International Association of Gaming Attorneys explains how the expansion of United States gaming companies into the United Kingdom benefits from cooperation between the regulators of the two countries. Thus, international regulatory cooperation in the gaming sector is possible and is already taking place – albeit to the exclusive advantage of companies from the United States.

3.293 As a final point on the chapeau, Antigua refers the Panel to two letters of the president of an association of the state lotteries in the United States (the "NASPL"), one of which specifically concerns this dispute.[495] In both letters it is repeated *verbatim* that the NASPL "does not take a position on Internet gambling, per se" but that it is the position of the NASPL "that each individual state should be permitted to legislate and regulate the forms of gaming conducted within its borders, as well as the methods by which gaming is offered to the citizens of the state." This means in practice that state governments determine "the various industries' potential profits and losses" and in that process "rivalry and competition for investment and revenues" is the main motivation.[496] The two letters from the NASPL clearly indicate what the states' real concern is with Internet gambling – not

[493] Appellate Body Report on *US – Shrimp*, para. 177.
[494] "Talking Points: Legal Eagle", *International Gaming & Wagering Business* (January 2004), p. 10.
[495] "Aubin, Lemons and Musgrave: Running Racinos and Raking in Revenue", *Public Gaming International*, (May 2003).
[496] See above para. 3.107.

that it is inherently more dangerous than other forms of gambling but simply that it will undermine the states' ability to determine the conditions of competition in the gambling sector in view of the economic benefits accruing to the state and its local operators. Thus, this is further evidence that the United States' total ban on Internet gambling services from Antigua is "a disguised restriction on trade in services."

3.294 The **United States** maintains its view that the Panel need not reach the issue.[497] The United States would also like to invite the Panel to reflect on the Article XIV implications of some of its earlier discussion – including the discussion of Mr. Scott, money laundering and other dangers, and the statistics on federal prosecutions in gambling cases. These observations further support the law enforcement arguments and the public order and public morals arguments discussed above by the United States. Moreover, the Canadian television program[498] provided on videotape to the Panel also includes, among other things, an on-camera interview with a Canadian police official commenting – before September 11, 2001 – on the concern that money from Internet gambling could flow to "organized terrorist groups." He calls it a "very real scenario that could be occurring now and that could certainly develop in the future." Clearly these are matters to be taken seriously.

3.295 In response to Antigua's statements about international cooperation, the United States would welcome Antigua's continued assistance in the investigation and prosecution of money launderers and others who violate US law. In particular, the United States would note the assistance provided by Antiguan law enforcement in turning over records of EuroFed Bank, which Pavel Ivanovich Lazarenko and others used to launder funds. While it is not true that the United States has "refused" to pursue international requests for assistance as suggested by Antigua, there is a basis for a reluctance to do so if the case involves Internet gamblers. For example, Antigua publicly took a position contrary to the United States in the prosecution of Jay Cohen by filing an amicus brief in support of Mr. Cohen in the US Supreme Court. In addition, in its licensing of William Scott, a convicted felon, the fact that procedures apparently were not followed is troubling. These matters suggest that requests for assistance would not be fruitful if the investigation involves or is related to an Internet gambler. Finally, the *Cabazon* case cited by Antigua affords no support for Antigua's attempts to downplay the threat of organized crime. That case rests on the principle that "Indian tribes retain attributes of sovereignty over both their members and their territory and that tribal authority is dependent on, and subordinate to only the Federal Government, not the States." It was in that narrow context of limited state power that the Court held that the State of California's interest in keeping charitable bingo games from being infiltrated by organized crime was not sufficient to override the Federal and tribal interests in promoting self-sufficiency by the tribe. The court did not in any way conclude that organized crime is not a serious problem in relation to gambling – and certainly not in relation to forms of gambling more serious than charitable bingo. On the contrary, the United States already cited Supreme Court precedent confirming the dangers of organized crime in relation to gambling.

IV. ARGUMENTS OF THE THIRD PARTIES[499]

A. CANADA

4.1 Canada submits its views on the interpretation of a Member's Schedule under the GATS – in this case the United States – but does not reach any conclusions on whether or not the United States is in breach of one of its obligations under the GATS. Canada submits that the W/120 Classification List and the corresponding CPC numbers are, pursuant to Articles 31 and 32 of the Vienna Convention, relevant sources for the purpose of interpreting the specific commitments in the US

[497] See the United States' reply to Panel question No. 44.

[498] Canadian Broadcasting Corporation, "The Big Gamble", broadcast on *The Fifth Estate* (31 October 2001).

[499] See also the replies of the third parties to questions from the Panel in Annex C of this Report.

Schedule. When the specific commitments of the United States at issue in this case are interpreted in the light of the W/120 Classification List and the CPC numbers referred to in it, the only reasonable conclusion is that the United States has taken "full" modes 1 and 2 market access and national treatment commitments with respect to gambling and betting services.

4.2 Pursuant to Article XX:3 of the GATS, the Schedule of a Member forms an integral part of the GATS. The rules of interpretation that apply with respect to a GATS Schedule thus are the same as those applicable with respect to the rest of the Agreement. This means that the Schedule of a Member, and the specific commitments contained therein, must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention. Although this position has not been specifically stated in the context of the GATS, it is supported by findings of the Appellate Body in the context of the GATT 1994. In *EC – Computer Equipment*, the Appellate Body stated that:

> "A Schedule is […] an integral part of the GATT 1994 […]. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention."[500]

4.3 This position was later affirmed by the Appellate Body in *EC – Poultry*, *Canada – Dairy* and *Korea – Various Measures on Beef*.[501] While there are differences between tariffs and specific commitments, the Appellate Body's reasoning is equally applicable with respect to the interpretation of a GATS Schedule. This also accords with Article 3:2 of the DSU and the Appellate Body's view that "the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention apply to *any* treaty, in *any* field of public international law."[502] The specific commitments of a Member – in this case the United States – must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Schedule in their context and in the light of the object and purpose of the GATS (and the WTO Agreement more generally).[503] To the extent appropriate, recourse may also be had to supplementary means of interpretation.[504]

4.4 The United States clearly used and followed the structure of the W/120 Classification List to schedule its specific commitments. However, its Schedule does not include explicit references to the CPC numbers that, in the W/120 Classification List, are associated with a particular services sector or sub-sector. This does not mean, as the United States suggests, that the CPC numbers associated with a particular services sector or sub-sector in the W/120 Classification List are irrelevant, inapplicable or to be ignored when interpreting the United States' specific commitments. Rather, they form part of the context that, pursuant to Article 31 of the Vienna Convention, must be taken into account by the interpreter of these specific commitments.

4.5 In *US – Section 110(5) Copyright Act*, the following remarks were made concerning the requirements for an "agreement" or "instrument" to exist within the meaning of Article 31:2 of the Vienna Convention:

> "The International Law Commission explains in its commentary on the final set of draft articles on the law of treaties that this provision is based on the principle that a unilateral document cannot be regarded as forming part of the context unless not only was it made in connection with the conclusion of the treaty, but its relation to the

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[500] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[501] Appellate Body Report on *EC – Poultry,* para. 82; Appellate Body Report on *Canada – Dairy*, paras. 131-133; Appellate Body Report on *Korea – Various Measures on Beef*, paras. 96-97.

[502] Appellate Body Report on *US – Hot-Rolled Steel*, para. 60. With respect to Article 3:2 of the DSU, see Appellate Body Report on *US – Gasoline*, p. 17.

[503] Vienna Convention, Article 31.

[504] Ibid., Article 32.

> treaty was accepted by the other parties. 'On the other hand, the fact that these two classes of documents are recognized in paragraph 2 as forming part of the 'context' does not mean that they are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case.' *It is essential that the agreement or instrument should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty. Any agreement or instrument fulfilling these criteria will form part of the "context" of the treaty and will thus not be treated as part of the preparatory works but rather as an element in the general rule of interpretation*."[505]

4.6 The W/120 Classification List (and by implication the CPC numbers referred to in it) meets these criteria and at least qualifies as an "instrument" within the meaning of Article 31:2 of the Vienna Convention. The W/120 Classification List was prepared by the then GATT Secretariat at the request of Uruguay Round participants. In particular, the Montreal Ministerial Declaration called for the preparation of such a list by the Secretariat.[506] The revised version of the W/120 Classification List, dated 10 July 1991, which is the version that was (and still is) used by Members, was based on comments from Uruguay Round participants.[507] The 1993 Scheduling Guidelines, also prepared by the then GATT Secretariat at the request of Uruguay Round participants, called for the general use of the W/120 Classification List in order to achieve the greatest possible degree of clarity in the description of each sector or sub-sector scheduled.[508]

4.7 While there is no question that the 1993 Scheduling Guidelines are not an authoritative legal interpretation of the GATS – they specifically state that they are not – there is also no question that, in

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[505] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.45 (quotation marks in text; emphasis added; notes omitted).

[506] MTN.TCN/7 (MIN), 9 December 1988, Part II, para. 10. See also Note by the Secretariat, *Reference List of Sectors*, MTN.GNS/W/50, 13 April 1989. According to Canada, the fact that the Uruguay Round participants acted through the GATT Secretariat for the preparation of the W/120 Classification List – this was arguably the practical and effective way to work in a concerted manner on such a matter – obviously does not mean that the W/120 Classification List should not be considered to have been "made by the parties" within the meaning of Article 31:2 of the Vienna Convention.

[507] See cover-note by the Secretariat on the W/120 Classification List.

[508] 1993 Scheduling Guidelines, para. 16 in particular:

The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on the Secretariat's revised Services Sectoral Classification List. Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN Provisional Central Product Classification.

Example: A Member wishes to indicate an offer or commitment in the sub-sector of map-making services. In the Secretariat list, this service would fall under the general heading "Other Business Services" under "Related scientific and technical consulting services" (see item l.F.m). By consulting the CPC, map-making can be found under the corresponding CPC classification number 86754. In its offer/schedule, the Member would then enter the sub-sector under the "Other Business Services" section of its schedule as follows:

Map-making services (86754)

If a Member wishes to use its own sub-sectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.

accordance with their stated purpose, they assisted all Members in the preparation of their Schedules and the listing of their specific commitments.[509] For instance, the GATS did not prescribe any particular format for the Schedules of Members, apart from what is specified in Article XX. The 1993 Scheduling Guidelines provided a standard format for the Schedules of Members, which was used and followed by Members in implementing their Article XX obligations. Following numerous consultations, a revised version of the 1993 Scheduling Guidelines was adopted by the Council for Trade in Services on 23 March 2001, for the purpose of the current round of negotiations. The revised 2001 Scheduling Guidelines have retained, unchanged, the statement quoted above contained in the 1993 Scheduling Guidelines[510]. The foregoing suggests that there is agreement among Members that, in general, the classification of sectors and sub-sectors in a Schedule should be based on the W/120 Classification List and the corresponding CPC numbers referred to in it. A Member can, of course, depart from the W/120 Classification List and the corresponding CPC numbers. In such a case, however, it should provide concordance with the CPC or, if this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of a specific commitment. According to Canada, the DSU[511] offers further evidence of the acceptance by Members of the W/120 Classification List (and by implication the CPC numbers referred to in it) for the purpose of scheduling their specific commitments. In elaborating upon how Members may suspend concessions with respect to services sectors, Article 22 relies on the W/120 Classification List to define these sectors.[512]

4.8 Canada does not challenge the fact that a Member may, in certain cases, have departed from the W/120 Classification List and the corresponding CPC numbers associated with it. This possibility is specifically provided for in the 1993 Scheduling Guidelines (and the revised 2001 Scheduling Guidelines). No Member was forced or obliged to schedule specific commitments in accordance with the W/120 Classification List and the corresponding CPC numbers. As previously emphasized, however, a Member that intended to depart from the W/120 Classification List and the corresponding CPC numbers was asked to provide concordance with the CPC or, in cases where this was not considered possible, to give a sufficiently detailed definition to avoid any ambiguity as to the scope of a specific commitment. In a number of instances, the United States did depart from the W/120 Classification List and the corresponding CPC numbers in a clear and unambiguous manner, that is, in the manner suggested in the 1993 Scheduling Guidelines. In two cases where the United States did not wish to include certain elements otherwise covered by the W/120 Classification List and, by implication, the corresponding CPC numbers, it specifically said so.[513] Similarly, in scheduling its specific commitments on environmental services, the United States, while using the W/120 Classification List, expressly defined the activities covered by its specific commitments.[514] In scheduling specific commitments on hospital and other health care facilities, the

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[509] Ibid., para. 1. See also Panel Report on *EC – Banana III (US)*, para. 7.289, where it is stated that "[i]n the Uruguay Round negotiations participants agreed to follow a set of guidelines for the scheduling of specific commitments under the GATS."

[510] See above footnote 508.

[511] The DSU is one of the Multilateral Trade Agreements binding on all Members: WTO Agreement, Article II:2.

[512] DSU, Article 22:3(f)(ii). This invalidates the United States' assertion that the W/120 Classification List is only part of the negotiating history of the GATS and therefore cannot constitute anything more than a supplementary means of interpretation under Article 32 of the Vienna Convention. It supports the argument that the W/120 Classification List qualifies as an "agreement" within the meaning of Article 31:2(a) of the Vienna Convention.

[513] With respect to Computer and Related Services, the following entry is made in the US Schedule: "(MTN.GNS/W/120 a) – e), except airline computer reservation systems)." With respect to Publishing, the following entry is made: "(Only part of MTN.GNS/W/120 category: 'r) Printing, Publishing'." GATS/SC/90, pp. 61 and 73.

[514] See US Schedule, p. 87. The entry "Environmental Services" is followed by note 19, which provides that "[i]n each of the following sub-sectors, United States' commitments are limited to the following activities: […]"

United States expressly defined the scope of that sub-sector in its Schedule.[515] *A contrario*, where the United States has simply followed the W/120 Classification List, without any clear and explicit departure from it and the corresponding CPC numbers, it should be inferred that the specific commitments at issue are to be interpreted in the light of the W/120 Classification List and the CPC numbers associated with it.

4.9 The specific commitments provided for in a Member's GATS Schedule are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members.[516] In *EC – Computer Equipment*, the Appellate Body stated, in the context of Schedules of tariff concessions under the GATT, that tariff negotiations are a process of reciprocal demands and concessions and that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members.[517] Thus, the meaning of a tariff concession must be determined based on the common intention of the Members.[518] By analogy, when interpreting a specific commitment under the GATS, one must ascertain the common intention of the Members. The common intention of the Members in regard to the Schedule of the United States is that where it simply follows the W/120 Classification List, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments are to be interpreted in the light of the W/120 Classification List and the CPC numbers associated with it. The alternative would be that where the United States failed to include in its Schedule an explicit reference to the CPC number for a services sector or sub-sector listed in accordance with the W/120 Classification List, then the CPC number should be ignored for the purpose of interpreting the corresponding commitment. The effect of this would be to make those specific commitments largely dependant on the subjective and unilateral interpretation of the United States. This cannot be the common intention of the Members.

4.10 Canada submits that in *EC – Computer Equipment* the Panel, when interpreting the European Communities' Schedule under the GATT, did not consider the *Harmonized System* and its *Explanatory Notes*. The Appellate Body reacted as follows:

> "We are puzzled by the fact that the Panel, in its effort to interpret the terms of Schedule LXXX, did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. […] We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*."[519]

4.11 By analogy, one would be puzzled if, as suggested by the United States recourse were not had to the W/120 Classification List and the corresponding CPC numbers intrinsically linked with it where the Schedule of a Member follows the W/120 Classification List. This would be all the more surprising considering that the USITC has itself recognized the close correspondence between the United States' specific commitments, the W/120 Classification List and the CPC numbers referred to

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[515] US Schedule, p. 117. The entry "Hospital and Other Health Care Facilities" is followed by the following definition: "Direct ownership and management and operation by contract of such facilities on a 'for fee' basis"

[516] See Preamble of the GATS, third paragraph. See also GATS Article XIX:1.

[517] Appellate Body Report on *EC – Computer Equipment*, para. 109.

[518] Ibid., paras. 84 and 109.

[519] Appellate Body Report on *EC – Computer Equipment*, para. 89.

in it, stating that while "[t]he US Schedule makes no explicit references to CPC numbers, […] it corresponds closely with the GATT Secretariat's list [the W/120 Classification List]."[520]

4.12 Canada is therefore of the view that the W/120 Classification List and the corresponding CPC numbers qualify as "context" for the purpose of interpreting the specific commitments in the US Schedule. Accordingly, in the present case, Canada agrees with Antigua and Barbuda that the United States has taken "full" modes 1 and 2 market access and national treatment commitments with respect to gambling and betting services. This is based on the United States' modes 1 and 2 commitments for "Other Recreational Services (except sporting)," which, according to the W/120 Classification List, refer to CPC number 964.[521] CPC number 964 includes CPC number 96492 – gambling and betting services.

4.13 Canada argues, alternatively, that in the event that the W/120 Classification List and the corresponding CPC numbers do not qualify as "context" within the meaning of Article 31:2 of the Vienna Convention, the W/120 Classification List and the corresponding CPC numbers can be referred to as supplementary means of interpretation of the US Schedule under Article 32 of the Vienna Convention. The W/120 Classification List and the corresponding CPC numbers referred to in it are part of the historical background against which the GATS and the Schedules were negotiated. Recourse to them may thus be had in appropriate cases, that is, in those instances where the US Schedule simply follows the W/120 Classification List, without clearly and explicitly departing from it and the corresponding CPC numbers. Without such recourse to the W/120 Classification List and

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[520] See USITC Document, p. viii. Canada notes the US argument that this document has no legal significance since the explicit purpose of the concordance in the document is only to "facilitate comparison of the US Schedule with foreign schedules". In Canada's view, this statement is factually incomplete and legally incorrect. The relevant part of the document reads, at p. viii:

> To facilitate comparison of the US Schedule with foreign schedules, the USITC has developed a concordance that demonstrates the relationships between sectors found in the US Schedule, sectors identified in the GATT Secretariat's Services Sectoral Classification List, and sectors defined and numbered in the United Nations' Provisional Central Product Classification (CPC) System. In preparing national schedules, countries were requested to identify and define sectors and sub-sectors in accordance with the GATT Secretariat's list [the W/120 Classification List], which lists sectors and their respective CPC numbers. Accordingly, foreign schedules frequently make explicit references to the CPC numbers. The US Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list.
>
> The concordance developed by the USITC clarifies how the service sectors referenced in the GATT Secretariat's list, the CPC system, and the US Schedule correspond. […]

Canada submits that such a statement by the organization (a federal agency) that, "[a]t the request of the Office of the United States Trade Representative […] assumed responsibility for maintaining and updating, as necessary, the [US Schedule]" has probative value and is a factor confirming other evidence that there is a close correspondence between the United States' specific commitments, the W/120 Classification List and the CPC numbers referred to in it (Ibid, p. vii). In *Chile – Alcoholic Beverages*, para. 7.119, the Panel noted that statements by a government against WTO interests are most probative.

[521] See US Schedule, p. 123. According to Canada, it is clear that in the case of this specific commitment the United States was following the classification of the W/120 Classification List. Sub-sector 10.D in the W/120 Classification List is entitled "Sporting and other recreational services." The United States' entry for sub-sector 10.D reads "Other Recreational Services (except sporting)." The logical conclusion is that recreational services, except sporting, within the meaning of sub-sector 10.D of the W/120 Classification List has been included in the US Schedule. The United States' almost exclusive reliance on definitions of dictionaries to interpret this specific commitment, in particular the terms "except sporting", is in effect an attempt to have the Panel read the specific commitment out of its context, contrary to what is mandated by Article 3:2 of the DSU and the rules of interpretation of the Vienna Convention. In this regard, it is worth recalling the Appellate Body's observation that dictionaries are not dispositive statements of definitions of words appearing in agreements and legal documents. Appellate Body Report on *United States – Offset Act (Byrd Amendment),* para. 248.

the corresponding CPC numbers, the meaning of the United States' specific commitments would remain ambiguous and obscure. This is demonstrated by the inability of the United States to clearly identify, absent recourse to the W/120 Classification List, where in its Schedule gambling and betting services have been included or excluded.

4.14 Canada asks the Panel to find that the W/120 Classification List, including the CPC numbers referred therein, is a relevant source for the purpose of interpreting the specific commitments in the US Schedule. This conclusion is legally justified under Article 31 or, alternatively, Article 32 of the Vienna Convention. It is also supported by the findings of the Appellate Body in *EC – Computer Equipment*.

B. EUROPEAN COMMUNITIES

4.15 The European Communities notes that a statement such as the one made by a US representative and reported in the minutes of the Dispute Settlement Body in connection with this dispute[522], while not relieving Antigua and Barbuda of its burden of proof, is pertinent to this question. Statements of Members' representatives interpreting their own domestic law have been accepted as having probative value in previous panel proceedings.[523] However, the European Communities indicates that its comments are based on the assumption *arguendo* that a prohibition on the "supply of gambling and betting services from outside the United States to consumers in the United States"[524] exists in the US legal system.

4.16 The European Communities argues that such a prohibition is within the scope of GATS. Article I:1 of the GATS defines the scope of the agreement as covering "measures by Members affecting trade in services". A prohibition of cross-border supply of gambling and betting services contained in legislative or administrative measures is no doubt a "measure by a Member" because it results from an action of public authorities of a Member.[525] The term "affecting" is not defined in the GATS. Previous reports have made clear that the term "affecting", in its ordinary meaning, context and in the light of the object and purpose of the GATS, suggests a broad meaning, notably of "having an effect on".[526] A prohibition of cross-border supply of gambling and betting services affects trade in services under Article I:1, the GATS because it impacts on the conditions of competition between the suppliers established in the Member maintaining it and those providing such services cross-border. All other conditions being equal, such prohibition provides an incentive to consumers to turn to service suppliers within the US territory over like services supplied from the territory of other Members, thereby modifying the conditions of competition. The incentive is obviously a particularly powerful one, since consumers who continue to gamble through websites operated e.g. from Antigua and Barbuda are doing so in breach of the law. The services at issue – namely gambling and betting services – are not excluded from the GATS by Article I:1 (or I:3) and their trade is thus covered by the Agreement. Similarly, the term "supply of a service" has also broad coverage. According to GATS Article XXVIII(b) it includes "the production, distribution, marketing, sale and delivery of a service."[527]

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[522] See WT/DSB/M/151, page 11.

[523] Panel Report on *US – Section 301 Trade Act*, paras. 7.115, 7.121 and 7.125.

[524] WT/DS285/2, para. 2.

[525] Pursuant to Article I:3(a) of the GATS, "in fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory".

[526] Appellate Body Report on *EC – Banana III*, para. 220.

[527] See also Panel Report on *EC – Bananas III (US)*, para. 7.281, where the Panel recognized that the "the drafters consciously adopted the terms 'affecting' and 'supply of a service' to ensure that the disciplines of the GATS would cover any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service."

4.17 In the view of the European Communities, the US Schedule, interpreted in accordance with customary rules of interpretation of public international law codified in the Vienna Convention, includes commitments on gambling and betting services. Although GATS Schedules of specific commitments have been reviewed in previous reports[528], panels and the Appellate Body have not as yet specifically addressed the criteria for their interpretation. Nonetheless, the interpretation of Schedules annexed to the GATT 1994 and the GPA by the Appellate Body[529] and WTO panels[530] undoubtedly provides relevant guidance, particularly so because the text of Article II:7 of the GATT 1994 and Article XX:3 of the GATS set out the legal status of Members' Schedules of tariff concessions/ specific commitments in largely identical terms. The *EC – Computer Equipment* Appellate Body report provides the general standard for interpretation of WTO Schedules.[531] In that report the Appellate Body examined the legal nature of a Member's tariff Schedule in order to address the question as to whether and how the general rules of treaty interpretation as set out Articles 31 and 32 of the Vienna Convention are applicable in the interpretation of the former. In that respect it held:

> "A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention."[532]

4.18 Like Article II:7 of the GATT 1994, which refers to the Schedules of concessions as an "integral part of the Agreement", Article XX:3 of the GATS provides that "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof". This confirms that GATS Schedules must also be treated as treaty language and accordingly be interpreted pursuant to the customary rules of treaty interpretation. This applies to all commitments contained in all Members' Schedules, and the distinction drawn by the United States, i.e. between "CPC commitments," which include textual references to numerical CPC codes, and "non-CPC commitments," the text of which make no reference to the CPC, is unsupported inasmuch as it suggests different interpretative approaches for commitments which are all integral part of an international agreement.

4.19 The European Communities argues that in the Uruguay Round negotiations, participants agreed on the 1993 Scheduling Guidelines for the scheduling of specific commitments under the GATS[533] according to which the classification of sectors should be based on the W/120, also developed during the Uruguay Round. In turn, each sector listed in the 1991 Sectoral classification is identified by the corresponding CPC number. According to the 1993 Scheduling Guidelines, Members should schedule their commitments on the basis of the CPC or otherwise in such a way as to ensure precision and clarity.[534]

4.20 In its GATS Schedule, the United States has closely followed the structure of the W/120. It has in particular made a commitment for the cross-border supply of services classified under sub-sector 10.D "Other recreational services (except sporting)." Sub-sector 10.D of the 1991 Sectoral classification is headed "Sporting and other recreational services" and it is identified therein by the corresponding CPC "964" code. The CPC 964 category, equally headed "Sporting and other

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[528] Panel Report on *EC – Bananas III (US)*, paras. 7.287 ff.

[529] Appellate Body Report on *EC – Computer Equipment*; AB Report, *Canada – Dairy*; Appellate Body Report on *Korea – Various Measures on Beef*.

[530] Panel Report on *Korea – Various Measures on Beef*; Panel Report on *Korea – Procurement.*

[531] The European Communities notes that this report has been cited and the findings stated therein in relation to schedules' interpretation have been reaffirmed in all subsequent reports dealing with the issue.

[532] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[533] MTN.GNS/W/164 and Add.1; Panel Report on *EC – Bananas III (US)*, WT/DS27/R, para. 7.289.

[534] MTN.GNS/W/164, paras. 1 and 16.

recreational services", is further broken down into two sub-sectors, namely 9641: "Sporting services" and 9649: "Other recreational services". Finally, the latter encompasses CPC category 96492: "Gambling and betting services". The United States has also followed the structure of W/120 in drafting its commitments under sector 10 of its Schedule, including sub-sector 10.D. It has only modified the title of sub-sector 10.D, which reads "Other recreational services (excluding sporting)" instead of "Sporting and other recreational services" (and has made a commitment for the cross-border supply of services falling within such sub-sector). Admittedly, the United States has not inscribed in connection with sub-sector 10.D the equivalent CPC number. However, had it wanted to depart from the CPC classification, it should have done so explicitly. Therefore, by excluding "sporting" under sub-sector 10.D of its Schedule, the United States has only excluded services comprised in CPC category 9641, that is sporting services. To the contrary, by not listing any limitations on cross-border supply of services with respect to "other recreational services", the United States has included in its commitment the entire CPC category 9649, which further encompasses CPC category 96492: "Gambling and betting services". In the view of the European Communities, interpretation of a treaty provision under the rules codified in the Vienna Convention starts by examining the ordinary meaning of a treaty provision, in its context and in the light of its object and purpose.[535]

4.21 The European Communities argues that the ordinary meaning of the US specific commitments relating to Sector 10 ("Recreational, cultural and sporting services") does not warrant the conclusion that gambling and betting services are excluded from such commitments. The US interpretation of the ordinary meaning of the definitions for sub-sectors 10.D and 10.A is contradicted by the very dictionary definitions of some key terms employed in Sector 10 of its schedule quoted by the United States. First, the United States makes much of a reference to gambling and betting in connection with the term "sporting" in the *New Shorter Oxford English Dictionary*. The European Communities notes that the one quoted by the United States is certainly not a commonly used meaning of the term. What is more, under the very definition in the *New Shorter Oxford English Dictionary* on which the United States relies, only when it is referred to a person is the term "sporting" taken to refer, *inter alia*, to gambling. The full quote from the *New Shorter Oxford English Dictionary* is as follows:

Sporting, *adj*.

1	a	Sportive; playful. *rare*.
	b	Engaged in sport or play.
	c	Of a plant etc.: tending to produce abnormal varieties or sports
2	a	Interested in or concerned in sport
	b	Designating an inferior sportsman or a person interested in sport from purely mercenary motives. Now *esp*. pertaining to or interested in betting or gambling. Chiefly in *sporting man*.
	c	*sporting girl, woman*, a prostitute, a promiscuous woman.[536]

Thus, under the definition that the United States quotes, a sporting *man* may be a person interested in betting or gambling (he can also be merely interested in sport, under definition 2.a). This, however, does not prove that sporting *services* pertain to or include gambling. Likewise, a sporting woman may be a prostitute, but this presumably does not mean that sporting services pertain to or include prostitution. An adjective, such as "sporting" qualifies another term (typically a noun) and its meaning in a given case depends on the term it is meant to qualify.

4.22 The European Communities further submits that the United States also refers to another dictionary definition under which the adjective "sporting" is somehow related to gambling. The

[535] Vienna Convention, Article 31:1.

[536] *New Shorter Oxford English Dictionary* (emphasis added), New York, Oxford University Press, 1993.

European Communities is not in a position to verify the source quoted by the United States.[537] It notes nonetheless that another US dictionary, the *Webster's New World Dictionary of American English*, reads:

Sporting, *adj*.
1 of, having to do with, or for sports, or athletic games, etc.
2 interested in or taking part in sports, or athletic games, etc.
3 sportsmanlike; fair
☼4 interested in or having to do with games, races, etc. characterized by gambling or betting
5 *Biol*. inclined to mutate –
☼ Americanism [538]

4.23 The meaning relating to gambling, besides definitely not being a common one, is qualified by the dictionary itself as an "Americanism". The European Communities therefore doubts that the meaning to which the United States points can be really considered the "ordinary meaning" within the meaning of the Vienna Convention *on the Law of Treaties*.[539] Also, if applied to services, the above definition would mean "having to do with games, races, etc. characterized by gambling or betting". This does not entail that "sporting *services*" *include* gambling and betting services. Accordingly, the ordinary meaning of the heading for sub-sector 10.D – "Other recreational services (except sporting)" in the US Schedule does not exclude that gambling and betting services fall under that sub-sector.

4.24 The European Communities notes that the United States further refers to dictionary definitions of the terms "entertainment" and "recreational" and, after allegedly establishing the ordinary meaning of the term "sporting", the United States hastens to infer that "[b]ased on the ordinary meaning of the words "recreational", "entertainment" and "sporting" it is impossible to conclude that gambling and betting service must be considered to fall within sub-sector 10.A."[540]

4.25 The European Communities submits that, even taking the definition of the term "entertainment" provided by the United States, it is hard to deny that gambling and betting is e.g. "[a] thing which entertains or amuses someone." Likewise, taking the definition of the term "recreational" referred to by the United States, it is hard to deny that gambling and betting is "used for or as a form of recreation". The United States, has certainly not demonstrated the contrary by merely quoting these definitions and making the conclusory assertion that a different interpretation is "impossible". Furthermore, sub-sector 10.A in the US Schedule clearly designs a rather broad category - the reference to theatre, live bands and circus services is merely illustrative of what is encompassed by the term "entertainment services". Accordingly, the term "entertainment", used to define sub-sector 10.A of the US schedule, may well also cover gambling and betting services, just as the term "recreational", used to define sub-sector 10.D, may also cover such services.[541] This further confirms that, based on the ordinary meaning of the definitions used in sector 10, gambling and betting services are not excluded from the US schedule.

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[537] That is, the *Merriam-Webster's Collegiate Dictionary*, 10th ed., 2001.

[538] *Webster's New World Dictionary of American English*, V. Neufeldt and D. B. Guralnik eds., New York, Simon & Schuster, 1993, 3rd college ed., p. 1297.

[539] The European Communities notes that, to the extent that the meaning referred to by the United States could be considered as a "special meaning", then, pursuant to Article 31:4 of the Vienna Convention, it shall be given to the term "sporting" only "if it is established that the parties so intended" (the burden of proof being on the party asserting that special meaning).

[540] See above para. 3.45.

[541] According to the European Communities, one reason why sub-sector 10.D is the proper classification for gambling and betting is that the United States itself has indicated that it considers CPC code 964 to fall under sub-sector 10.D instead (see USCIT document).

4.26 The European Communities further argues that each of the specific commitments of a Member must be placed in its own - different - context, which is first of all the Schedule to which it belongs. For the purposes of interpretation of the US specific commitments, the US Schedule and its structure, not the commitments taken by other Members, are the most relevant context. The United States tries to support its conclusion that it has taken no commitments for gambling and betting services by referring to Schedules of other Members as "context". It is somehow surprising that the United States, having tried to distance itself from the classification and scheduling approach of most other Members, particularly of those which expressly followed the CPC classification, is placing so much emphasis on this different scheduling practice. In any event, the references to other Members' Schedules, while not supporting the US position, often prove the contrary.

4.27 Having argued, on the basis of its own reading of the ordinary meaning, that it has excluded gambling and betting services by the way it has written the heading of its sub-sector 10.D, the United States seems to further argue that in fact, sub-sector 10.D is not really the appropriate heading for those services – witness the fact that other Members have referred to them under sub-sectors 10.A or 10.E of their respective Schedules. One common feature of the schedules of other WTO Members referred to by the United States in connection with this point is that, unlike the US one, all expressly refer to gambling and betting services (and, for those schedules referring to the CPC codes, any departure from such codes appears to be expressly provided for). This in turn means that one cannot, in the absence of such express references in the US Schedule, automatically infer that gambling and betting services also do not fall under sub-sector 10.D of such Schedule. Moreover, each of the commitments in other Members' Schedules has to be placed in its own – different – immediate context, which is the Schedule to which each belongs.

4.28 Thus, it is true, for example, that one WTO Member, Senegal, has inscribed gambling services under a residual sub-sector 10.E headed "other", instead of 10.D, and this notwithstanding a reference to CPC in that Schedule. However, looking at Senegal's Schedule, it is clear that Senegal has used sub-sector 10.D not to cover the entire CPC category 964 (which also encompasses gambling and betting). To the contrary, Senegal only classified under 10.D a very limited selection of CPC 964, that is "Recreational fishing". By contrast, a similar clear limitation of the scope of sub-sector 10.D is lacking in the US Schedule. Having limited sub-sector 10.D to a very specific part of CPC 964, Senegal logically had to classify gambling services elsewhere in its Schedule - which it did in sub-sector 10.E. It is to be noted that in Senegal's Schedule there is no reference to any CPC code in connection with sub-sector 10.E. This brings to what appears to be the second contextual argument of the United States, which is based on the fact that two WTO Members included in their Schedules an additional residual category 10.E. The United States points out that, unlike those two Schedules, its own does not include such a residual category. It is not clear to the European Communities how this confirms that the claim of Antigua and Barbuda is unfounded. If the United States means to say that, in order to include gambling and betting services, it would have needed this extra category in its Schedule, this is wrong for a number of reasons. First, the United States is in numerous company, given that only two Members have added a residual sub-sector 10.E in their schedule. Nonetheless, other WTO Members arguably do not contest to have undertaken commitments in relation to gambling and betting services even without such residual sub-sector. As for Iceland, it is true that a sub-sector 10.E has been added to a schedule that otherwise corresponds in full to the CPC. However, this is done in accordance with the 1991 Sectoral classification (W/120), which relates CPC 964 code (also encompassing gambling and betting) to sub-sector 10.D. Furthermore, this does not mean that gambling and betting services fall under sub-sector 10.E in Iceland's Schedule. Quite to the contrary, having equated sub-sector 10.D to CPC 964, Iceland correctly included gambling under that sub-sector in its Schedule. Therefore, Iceland's Schedule does not prove that an extra sub-sector is needed in order to have commitments on gambling and betting services. The very fact that only two other Members needed an extra category (10.E), and only one of them to classify gambling, does not take away that many other Members did not need it and yet committed or limited their commitments on gambling. Thus, the presence of a category 10.E is not indispensable to take full or limited commitments on gambling and betting, contrary to what the US seem to suggest. In addition, the US

schedule already contains a residual category for "other recreational services" – 10.D precisely. There is therefore no need for another "Other" category in that Schedule.

4.29 It is also curious that the United States, having asserted that a limitation on gambling and betting have been inscribed in its Schedule by writing a limitation on sporting services in sub-sector 10.D, at the same time maintains that commitments for the same service category should have been written under a different (and residual) sub-sector of Sector 10 (that is under sub-sector 10.E: "Other"). Furthermore, the US Schedule already includes a residual sub-sector – 10.D precisely. It is thus not clear why an additional residual category would be needed. Also, the fact that another WTO Member – Lithuania – mentions gambling and betting services under both sub-sector 10.A and 10.D does not mean that such services are irrelevant under (or excluded from) the latter. In addition, if it were necessary to also inscribe limitations under 10.A, the United States should have done it too, but it did not do so. Furthermore, the fact that some WTO Members – Egypt, Indonesia, Jordan and Peru – have mentioned gambling under the "Tourism" Sector of their Schedules also does not prove that the United States has no commitments for gambling and betting under Sector 10.D. Those mentions do not concern gambling and betting services *per se*, but only specific instances of provision of such services which are directly connected with tourism services. To the extent that commitments in the "Tourism" Sector also cover certain gambling and betting services, the United States should have also inscribed limitations for those services in Sector 9 of its Schedule, but it did not.

4.30 The European Communities further argues that the 1993 Scheduling Guidelines and the W/120 are also pertinent to the interpretation of the WTO Schedules of specific commitments in accordance with customary rules. This also applies to the US Schedules. Those two documents have been developed and used as reference during the Uruguay Round negotiations, and thus constitute preparatory works and circumstances of the conclusion of the GATS and the WTO Agreement, within the meaning of Article 32 of the Vienna Convention.[542] These documents confirm that the US Schedule does not depart from the CPC system definition as regards sub-sector 10.D ("Other Recreational Services"). Accordingly, by excluding sporting services from its sub-sector 10.D, the United States has excluded what is considered to be sporting services under the CPC system, but not also gambling and betting services.

4.31 The W/120, irrespective of whether it is a legally binding instrument of its own, is part of the preparatory works of the GATS and the WTO. The fact that the United States, which closely followed its structure, was not bound either by it or by the CPC system, does not mean that such Member did not follow the CPC system, directly or through the W/120, in a particular case. As for the 1993 Scheduling Guidelines, irrespective of the legal status, their overall objective must have been shared by the negotiators.[543] The guidelines were circulated by the GATT Secretariat in response to requests by participants[544], who agreed on them. Moreover, their objective was to "achieve precision and clarity", and to this effect Members not following the CPC classification should have provided unambiguous commitments otherwise. Clarity of commitments in turn guarantees the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" [which] is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994.[545] Thus, security and predictability, besides being an objective of the WTO Agreement generally, has been specifically recognized to be relevant in connection with GATT tariffs schedules. But it is at least as important for the scheduling of commitments on services.[546] It is therefore not pure coincidence that the US Schedule follows closely

[542] Appellate Body Report on *EC – Computer Equipment*, para. 86.
[543] Panel Report on *EC – Bananas III (US)*, para. 7.289.
[544] MTN.GNS/W/164, p. 1, footnote 1.
[545] Appellate Body Report on *EC – Computer Equipment*, para. 82.
[546] The European Communities notes that, similarly to the GATT 1994, the GATS is also aimed at "promoting the interests of all participants on a mutually advantageous basis" and at "progressive liberalization" (Preamble, paras. 2 and 3).

the 1991 Sectoral classification, mirroring what virtually all other WTO Members have done. The references to the CPC codes in the 1993 Scheduling Guidelines are aimed at providing such predictability because the CPC offers a relatively sophisticated tool for defining the sectors/ sub-sectors for which Members undertake commitments. This is made clear in paragraph 16 of the Scheduling Guidelines.

4.32 Referring to CPC codes was not the only possible way contemplated by the 1993 Scheduling Guidelines to achieve clarity. However, where Members intended not to follow the CPC system, they were requested by the Scheduling Guidelines to provide such predictability otherwise – that is by clarifying and defining otherwise the content of their commitments: "If a Member wishes to use its own sub-sectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment."[547] In other words, while use of the CPC definitions was not mandatory, departure from those definitions was not free and unconditional. Rather, departure was to be done so as to ensure predictability through some alternative means. Departure from the CPC system was not meant to allow convenient ambiguity in a Member's Schedule. If the United States did not provide concordance at the time it put forward its Schedule, or other sufficiently detailed definition to avoid any ambiguity, it means that it did not intend to depart from the CPC.

4.33 Moreover, the United States itself recognized, in the last draft Schedule it tabled at the end of the Uruguay Round negotiations in December 1993, that the scope of its sectoral commitments corresponds to the 1991 Sectoral classification.[548] Paragraph 5 of the introductory language to the US Draft Final Schedule mentions, in pertinent part, that "[E]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)." The US Draft Final Schedule includes, *inter alia*, sector 10, which is defined in identical terms to the sector 10 appearing today in document GATS/SC/90. So is in particular sub-sector 10.D, equally labelled "OTHER RECREATIONAL SERVICES (except sporting)". Thus, paragraph 5 of the introductory language to the US final offer contains an express admission that the US Draft Final Schedule was in principle based on the 1991 Sectoral classification – and therefore also on the CPC, to which the latter makes reference. The same paragraph also states that only when expressly mentioned does the US Draft Final Schedule depart from the 1991 Sectoral classification. Clearly, however, sub-sector 10.D does not contain any such express mention. It is also worth mentioning that identical language to that of paragraph 5 just quoted also appears in the introduction to the second Revised Conditional Offer tabled by the United States earlier during the Uruguay Round.[549] To the best of the knowledge of the European Communities, the US second Revised Conditional Offer is also the one where a specific commitment on "Other recreational services" first appears, and again, it is defined in terms of "OTHER RECREATIONAL SERVICES (except sporting)". This means that the US specific commitment on "other recreational services" was always accompanied by an indication that it was based on the 1991 Sectoral classification. It also means that sub-sector 10.D was drafted on the basis of the 1991 Sectoral classification – whether or not it was so because the United States was bound to it. And, as noted by Canada[550], there are only two instances where the United States made explicit exceptions to the 1991 Sectoral classification. The United States seems to argue that other WTO Members should have sought clarification from the United States of the scope of its commitments. In fact, the language quoted from the US Draft Final Schedule and second Revised Conditional Offer shows that it was the United States itself that provided such clarification, including in the last offer it

[547] MTN.GNS/W/164, page 7, para. 16, *in fine*.

[548] Communication from the United States of America, *Draft Final Schedule of the United States of America concerning Initial Commitments*, MTN.GNS/W/112/Rev.3, 7 December 1993.

[549] *Communication from the United States of America, Revised Conditional Offer of the United States of America concerning initial commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993, p. 1.

[550] See above para. 4.8.

tabled at the end of the negotiations in December 1993. It also shows that there is no attempt to impose a link with the CPC definitions *ex post facto*, contrary to the US contention.

4.34 The European Communities further argues that the need for clear and predictable commitments also underlies the explanatory document of the US Schedule prepared by the USITC at the request of the USTR. For sub-sector 10.D, that document expressly recognizes the correspondence between the US Schedule, the 1991 Sectoral classification and the relevant CPC codes, which include gambling and betting. Having expressly recognized in that document what can already be inferred from its own Schedule and from paragraph 16 of the 1993 Scheduling Guidelines (that is, that the US Schedule does not depart from the CPC description for sub-sector 10.D), the United States cannot in good faith attempt to unilaterally restrict the scope of its commitments in dispute settlement. The "security and predictability" of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" pursued by the WTO Agreement would otherwise be compromised.

4.35 As for GATS Article XVI, the European Communities argues that two elements must be reviewed under Article XVI:1, i.e. whether the US Schedule of specific commitments includes market access commitments on gambling and betting services and whether maintaining such a measure amounts to less favourable treatment than committed. Moreover, under Article XVI:2, the measure in question must not be of any of the six types of prohibited measures listed therein. Concerning the first point, the European Communities submits that the US specific commitments, specifically in sub-sector 10.D of the US Schedule, correctly interpreted, also cover gambling services. Second, given that the United States has inscribed no limitation in its Schedule of specific commitments for gambling and betting services provided under mode 1, a prohibition on the "supply of gambling and betting services from outside the United States to consumers in the United States", which is a complete limitation on provision under that mode, would clearly entail less favourable treatment than provided in such Schedule. Thirdly, a "blanket" prohibition of cross-border gambling services means that no foreign gambling service can enter ("access") the US gambling market under the so-called "mode 1" of service provision and that no foreign supplier can operate from outside the US territory on the US market. This is tantamount to saying that there is a quantitative restriction ("numerical quota") within the meaning of Article XVI:2(a) of the GATS, which quota equals zero. The United States, while contesting that the measures referred to by Antigua and Barbuda in its request for panel establishment contain numerical quotas, does not appear to contest Antigua and Barbuda's statement that a complete ban would constitute a numerical quota. On the other hand, the fact that Article XVI:2(a) refers to "limitations on the number of service suppliers … in the form of numerical quotas" does not in itself indicate that a particular number or ceiling of providers operations or output must be expressly indicated in a measure in order for it to be caught by such provision. Otherwise, it would indeed not be difficult for Members to fashion their measures in such a way as to escape the prohibition in Article XVI:2(a).

4.36 As to GATS Article XVII, the European Communities argues that, to establish a violation of this provision, one must assess: (i) whether the US schedule of specific commitments includes market access commitments on gambling and betting services; (ii) whether there are like services/suppliers; and (iii) whether maintaining such measure amounts to less favourable treatment than granted to domestic services and suppliers, that is (a) whether the measure modifies the conditions of competition and (b) this is in favour of domestic services and suppliers.

4.37 As regards the identification of like domestic service or suppliers, the European Communities shares the Appellate Body's view on the need for a case-by-case approach to the issue of "likeness" in WTO provisions. Furthermore, some special caution needs to be exercised to avoid mechanical transposition to services of criteria developed in connection with trade in goods. Services are, generally, a different "case". In the two cases in which the term as it appears in the GATS has been interpreted so far, the services and suppliers at issue were found to be "like" by focusing on the

similarity of the activity performed and of the result of such activity (that is the service itself).[551] The intangibility of services may make certain other similarities extremely subjective and too uncertain properly to appreciate. It is thus important to focus on the characteristics of the services at issue themselves and other objective elements. The classification of services in Members' Schedules will also be a useful indicator because classification generally reflects a certain level of differentiation between the various activities listed. Indeed, it is most likely that services will not be "like" one another if classified in different parts of a Schedule.

4.38 Activities which are essentially the same (e.g. the provision of wholesale trade services) will most likely lead to a finding of "likeness". On the other hand, focusing on the service activity *per se* also allows to make distinctions, where appropriate. Thus, for example, in the case of "specialized medical services" covered by the CPC number 93122, one will need to further distinguish between different kinds of specialization. A cardiologist's activity will be distinguishable from an ophthalmologist's – and the difference in activity will also tell something about whether these two specialized services can compete. Or, to take one example from environmental services, "nature and landscape protection services" covered by CPC number 9406 include service activities as diverse as ecosystem protection services, disaster assessment and abatement services, climate change studies. The capability of serving the same or partially common end uses will normally also confirm the similarities or differences of two services resulting from an analysis of the "attributes" or "features" of a service *per se*. Thus, to return to the example of specialized medical services, a service by a cardiologist will also serve a different purpose than a service by an ophthalmologist. Reliance on more subjective elements – such as consumer perception – may greatly reduce predictability of GATS commitments and obligations, contrary to the objectives of the WTO Agreement. This is especially so when consumer perception may have been affected by past or current regulatory or other restrictions.

4.39 Differences in elements extrinsic to the services themselves – such as in terms of law enforcement and consumer protection, protection of youth – are not as such relevant to decide whether two services are "like" (even if they may respond to differences in the characteristics of two services). Otherwise, given that services provided cross-border are often regulated differently from services provided domestically, there could hardly ever be likeness between the former and the latter. Thus, for example, US international telecommunication service providers would not be like the domestic Mexican provider because the Mexican regulator cannot impose fine on them. Likewise, the nature or identity of the shareholders of two service suppliers may not as such make services "unlike".

4.40 The European Communities further submits that paragraph 3 of Article XVII expressly refers to a modification of the conditions of competition (to the detriment of foreign services and suppliers) as an indication of "less favourable treatment". This provision suggests that the purpose of the GATS national treatment obligation is to protect the expectations of equal competitive conditions between foreign and domestic services and suppliers.[552] A notion of "likeness" that were so narrow such that it would not be permissible to take account of the competitive relationship between foreign and domestic services would not seem to be in line with the full text and objective of Article XVII.

4.41 For the European Communities, the fact that a prohibition on the "supply of gambling and betting services from outside the United States to consumers in the United States" would violate GATS provisions does not rule out that the violations may be justified under GATS Article XIV thereof. In view of the close correspondence in wording and function between Article XIV of the GATS, and Article XX of the GATT 1994, the European Communities concurs with Antigua and Barbuda that the former provision is an affirmative defence. As such, it would be up to the United

[551] Appellate Body Report on *EC – Bananas III*, para. 227; Panel Report on *Canada – Autos*, paras. 10.248, 10.285 and 10.289.

[552] Similarly to Article III of GATT 1994 (see Appellate Body Report on *EC – Asbestos*, paras. 98-99, referring to the Appellate Body Report on *Japan – Alcoholic Beverages II*, paras. 109-110).

States to show that a prohibition on cross-border supply of services is justified on grounds foreseen in Article XIV (which it has not done in its first written submission). For the same reasons of close similarity to Article XX of the GATT 1994 both in drafting and in function, Article XIV should be interpreted in the light of the pertinent GATT *acquis*.

C. JAPAN

4.42 On the issue of whether the United States undertook commitments on gambling and betting services (CPC 96492), Japan submits that the relations between the headings in the US Schedule and CPC classification is not clear, as there is no explicit reference to CPC number in the US Schedule. This is an issue of vital importance for the legal stability of the commitments undertaken by Members during the Uruguay Round and the continuing services negotiations. The 1993 Scheduling Guidelines state in paragraph 15 that "the legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector and sub-sector scheduled", and make reference to the W/120 and CPC numbers. It might be argued that the same paragraph states that only "(i)n general," "the classification of sectors and sub-sectors should be based on the Secretariat's revised Services Sectoral Classification List." Moreover it might be argued that the 1993 Scheduling Guidelines is not a legally binding document. However, given the practice of Members to frequently refer to this document, to W/120 and the CPC in the course of negotiations and after, it could at least be said that there existed an implicit confidence among Members that each would respect those documents and classification. The question seems to be whether offers are sufficiently defined when not referencing or relying on the CPC, without any positive indication of the items which are included. Should this be the case, then Members would be forced, in the context of current services negotiations, to bring with them the *Merriam-Webster's Collegiate Dictionary* on every bilateral exchange with the United States. Or they would be forced to request the United States to provide a set of US definitions for the respective sectors and sub-sectors where commitments are proposed in the US initial offer (TN/S/O/USA), possibly together with corresponding US domestic industrial classification.

4.43 In this dispute, if the United States is to refuse to accept that it has undertaken commitment on gambling and betting services (CPC 96492), it is not sufficient to merely prove that the said services are not included in sub-sector 10.D of its Schedule. The United States should also elaborate on what specific service sub-sectors are actually included under the same heading. The United States also fails to prove that it made it sufficiently clear at the time of Uruguay Round negotiations on which specific sub-sectors that it intended to undertake commitments under the heading "10.D. OTHER RECREATIONAL SERVICES (except sporting)." Had there not been, at the time of the negotiations, an explicit and comprehensive statement by the United States regarding the specific content of that heading in its Schedule, the general expectation that the United States respected the structure of W/120 and the CPC needs and deserves a full protection; when specific commitments are undertaken on a CPC four digit-number service item, it indicates that those specific commitments cover all CPC five digit-number service items. Japan notes that its arguments above are without prejudice to a possibility that some sub-classification of a service sector specifically committed under a heading in the sector/sub-sector column of a Member's schedule or some measures thereupon could be affected by some provisions of the GATS and its Annexes, such as Article I:3(b).

4.44 Concerning the issue of interpretation of "like services" as provided in Article XVII of the GATS, Japan notes Antigua's arguments that the issue of "likeness" plays a less significant role in the context of trade in services than in the context of trade in goods, and that the characteristics of a specific service or service supplier are often not inherently "locked in" to the product and are often easily adaptable. This issue of "likeness", however, requires a cautious consideration of all conditions surrounding services, including appropriate policy considerations. Moreover, in Japan's view, it should be confirmed that identification of "likeness" of trade in services should be made, as that of trade in goods, on a case-by-case basis, on certain criteria and without over-simplification or excessive generalization of the characteristics of services or service suppliers; mere similarity in the

appearance of types of games or in the essential nature or functions of winning and losing money should not suffice to identify the "likeness" of services. Japan could support the US argument that "likeness" of services should be identified, as appropriate, taking into account such elements as consumer perception, scope of availability, law enforcement environment and possible risk involved in some particular services. In fact, such scope for argument is, Japan believes, a necessary component of the very structure of the GATS. It could be argued that the US restrictions on Internet gambling which are equally applicable within the United States might have some implication on the US consistency with Article XVI of the GATS.

4.45 In some service sectors, it could be argued, in identifying "likeness", differences in regulatory circumstances need to be, as appropriate, taken account of. When services are supplied cross-border, regulatory circumstances are completely different from those supplied through commercial presence; service suppliers are outside the country and therefore are not administratively and judicially accountable to the government or to the consumers in the same manner as domestic suppliers. In gambling and betting services, for example, in which policy considerations such as prevention of international organized crimes are particularly essential, such a difference in regulatory circumstances might justify, to a certain extent, different regulatory framework to be applied to different modes. In other words, certain services, when supplied cross-border, are recognized to be under less sound regulatory circumstances than when supplied domestically; it therefore could be argued from the viewpoint of the consuming Member, these two cases are not like services to be accorded the same treatment. Under a full national treatment commitment in cross-border mode, it is considered that there is still room, at least in some services, for treating as not like services, cross-border services and commercial-presence services of similar appearance and functions, if the necessity of differentiated treatment in light of high regulatory requirement and difference in regulatory circumstances, etc. is sufficiently proven by the consuming Member.

4.46 Without prejudice to the arguments above, and taking carefully into account the reference to the same question in the Panel Report on *Canada – Autos*[553], Japan also would like to invite attention of the Panel to the issue of a possible function of modes of supplying services in identifying "likeness" of services. When this issue was taken up by the Council for Trade in Services in its Regular Session meeting on 19 March 2002 under an agenda item of "proposal for a technical review of GATS provisions", the views of Members were not uniform.[554] In these discussions, Members' attention was drawn to the commonality of the usage of "like services and service suppliers" in GATS Articles II:1 and XVII:1-3. In the absence in Article II of the phrase "in the sectors inscribed in its Schedule", the obligation apparently covers all services sectors and sub-sectors whether commitments are undertaken or not. This, if "likeness" of services is to be established across modes, in turn could effectively expand the obligation of a Member beyond what it has inscribed in its Schedule. When Member A, for example, has inscribed "None" in the mode 3 national treatment column in a particular service sector, Member A is obliged through Article XVII of the GATS to extend to like services and service suppliers of Member B treatment ("treatment b") in the same mode no less favourable than that it accords to its own service and service suppliers. Then, through Article II of the GATS, in turn, Member A is obliged to extend treatment no less favourable than "treatment b", to like services and service suppliers of Member C, for example, in cross-border mode of supplying services, whatever inscription Member A has made in the mode 1 national treatment column in the same particular service sector. Therefore, there was a suggestion that modes of supplying services might have a certain function in identifying "likeness" of services. This consideration is not explicit in the Panel Report on *Canada – Autos*. Japan, therefore, considers that a possible function of the mode of supplying services, together with the findings of the *Canada – Autos* Panel Report needs to be considered, if at all the Panel needs to make findings upon the issue of "likeness" of services.

[553] Panel Report on *Canada – Autos*, para. 10.307.
[554] S/C/M/59, paras. 20-39

D. MEXICO

4.47 Mexico submits that its government has decided to participate as a third party in this dispute because of its systemic interest in the proper interpretation and application of the GATS disciplines and of the specific commitments of WTO Members on national treatment and market access. Of particular interest to Mexico is the relationship between the specific commitments of WTO Members, the W/120, and the CPC. Mexico disagrees with the US contention that the CPC numeric codes are not relevant in interpreting the United States' specific commitments under the GATS. In Mexico's view, the CPC is a means of interpreting and giving meaning to the United States' specific commitments.

4.48 Firstly, Mexico shares the view expressed by Canada that "[t]he common intention of Members in regard to the Schedule of the United States is that where it simply follows the W/120 Classification List, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments are to be interpreted in the light of the W/120 Classification List and the CPC numbers associated with it".[555] Secondly, Mexico considers that the W/120 and the corresponding CPC numeric codes unquestionably qualify as "supplementary means of interpretation" under Article 32 of the Vienna Convention. As such, they can always be used to confirm the meaning of the United States' specific commitments resulting from the application of the general rule of interpretation in Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure. Consequently, it is wrong to refer, as the United States has done, to "non-CPC commitments". Under Article 32, the CPC numeric codes and definitions can be relevant in interpreting the Schedule of Specific Commitments of all WTO Members.

E. CHINESE TAIPEI

4.49 Chinese Taipei did not submit its views to the Panel.[556]

V. INTERIM SECTION

5.1 On 7 April 2004, pursuant to Article 15.2 of the DSU, Article 16 of the Panel's Working Procedures and the revised Timetable for Panel Proceedings, the parties provided their comments on the Interim Report. None of the parties requested a further meeting to review part(s) of the Panel's Report. On 16 April 2004, pursuant to the revised Timetable for Panel Proceedings, the parties submitted further written comments on the comments that had already been provided on the Panel's Interim Report on 7 April 2004.

5.2 Pursuant to Article 15.3 of the DSU, this section of the Panel Report contains the Panel's response to the main comments made by the parties in relation to the Interim Report and forms part of the Findings of the Panel's Report.

A. PUBLIC RELEASE OF THE CONFIDENTIAL INTERIM REPORT

5.3 When, on 24 March 2004, the Panel transmitted its Interim Report to the parties, we clearly indicated that such Interim Report was strictly confidential. Indeed, pursuant to the DSU, all panel proceedings remain confidential until the Panel Report is circulated to the WTO Members. We had also explicitly emphasized at all our meetings with the parties that the Panel's proceedings were confidential. This was accepted by the parties and reflected in the Panel's Working Procedures and in all our relevant correspondence with the parties.

[555] See above para. 4.9.
[556] Chinese Taipei replied, however, to various questions from the Panel (see Annex C).

5.4 Therefore, we note with concern that the confidentiality of the Panel proceedings has been breached on various occasions.

5.5 For instance, it has come to our attention that the representative of Antigua and Barbuda has been quoted in press releases as commenting on confidential aspects of the Panel proceedings.[557] Within hours of its transmission to the parties, the Interim Report was referred to in the press and commented upon by both parties to the dispute.[558] On 26 March 2004, an international law firm published a commentary on the Interim Report, from which it appears that the authors, not being a representative of either of the parties in this case, had access to the text of the Interim Report.[559]

5.6 In its comments to the Panel, dated 16 April 2004, Antigua stated that its delegation:

> "... was contacted by a member of the international press corps who was already aware of both the release and the ultimate conclusions of the Interim Report. The press representative in question informed the delegation that information on the contents of the report was provided to him by sources independent of the parties."[560]

5.7 In a letter to the Panel dated 27 April 2004, the United States requested that the Panel:

> "... investigate whether 'sources independent of the parties' breached the confidentiality of the interim report, and that it inform the parties of the results of this investigation and any actions taken in response."

5.8 The Panel notes first that the statement made by Antigua and referred to in paragraph 5.6 is very serious in that it may imply that a member of the Panel or the WTO Secretariat breached the confidentiality requirement of the DSU. The Panel wishes to assert forcefully that neither the Panel nor the Secretariat has done so. Third parties cannot be blamed since they do not receive a copy of the Interim Report.

5.9 On 28 April 2004, the Panel asked Antigua to clarify this statement and, in particular, the assertion that information was provided by a source independent of the parties.

5.10 By letter dated 29 April 2004, Antigua stated as follows:

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[557] See, for instance, *Antigua and U.S. Disagree on Dispute Panel*, Online Casino News – August 2003, at http://www.casinomeister.com/news/sept2003.html ("When this route was foiled by an inability to agree on the composition of the panel, Antigua lead negotiator Sir Ronald Sanders accused the Americans for being responsible for the lack of progress, saying 'We were provided with two lists of people by the WTO secretariat, most of whom were rejected by the U.S. on the basis that they didn't like what someone said about them or wrote about them or whatever'."); *U.S. Loses Preliminary Ruling in Review By WTO Internet Gambling Restrictions*, WTO Reporter, 12 November 2003 ("Antigua's ambassador in London Sir Ronald Sanders, who represents the country at the WTO, welcomed the preliminary decision Nov. 10 as a 'positive development' and said the panel was already moving ahead with its work."); *WTO Panel Concludes First Hearing of Antigua-United States Dispute*, found on the website of the Government of Antigua and Barbuda, at http://www.antigua-barbuda.com/busnss_politics/body_wto_firsthearing.html ("The Caribbean state's Chief Foreign Affairs Representative, Sir Ronald Sanders, said Friday 'This has been a long up hill battle but we have overcome every obstacle so far. These included the US attempt to stop the establishment of the Panel, then its failure to agree with us on the composition of the Panel, and finally its filing of a 'no-case' submission which was overturned by the Panel.").

[558] See, for instance, *Antigua Claims Victory Over US in Gaming Dispute*, by R. Waddington, Reuters, 24 March 2004, found at http://msnbc.msn.com/id/4594859/; *WTO Ruling Said To Open U.S. To Internet Gaming*, by Scott Miller from the Wall Street Journal, published by Dow Jones Newswires on 24 March 2004.

[559] See *WTO Panel Rules Against United States in Internet Gambling: What Does it Mean*? By Kay Georgi and Philippe Vlaemminck, Coudert Brothers.

[560] *Comments by Antigua and Barbuda on the Request by the United States for Review of Precise Aspects of the Interim Report*, 16 April 2004.

> "On 24 March 2004 the Antiguan delegation was approached by a member of the international press corps who was clearly aware of both the release of the Interim Report and its overall conclusion. The journalist did not disclose the source of the information to the Antiguan delegation, nor does the delegation have any idea to date what the source was.
>
> Please note that Antigua did not make any allegation with respect to the source of the information; rather in the Comments Antigua simply reported what was told to the Antiguan delegation by the journalist. Antigua offers its apologies for any misunderstanding."

5.11 Assuming that Antigua's assertions are true, in the Panel's view, even if the journalist had claimed to have received information about the Interim Report from a source independent of the parties, it was inappropriate, in light of the confidentiality requirement contained in the DSU, for Antigua, as a party, to have commented to the journalist on the contents of the Report.

5.12 In light of the circumstances, the United States felt obliged to comment on the Interim Report, and, thereby, also violated its obligation to ensure confidentiality of the Interim Report.

5.13 To conclude, the Panel wishes to emphasize that disregard for the confidentiality requirement contained in the DSU affects the credibility and integrity of the WTO dispute settlement process, of the WTO and of WTO Members and is, therefore, unacceptable.

B. EDITORIAL/TYPOGRAPHICAL CHANGES

5.14 The parties have suggested a number of editorial changes to the Panel's Interim Report and corrections of typographical errors. The Panel has largely accepted these suggestions. As requested by the United States, the Panel has clarified and/or elaborated upon certain factual descriptions contained in the Interim Report, including those relating to the Travel Act, the Illegal Gambling Business Act, statistics on US enforcement and the websites of TVG, Capital OTB and Xpressbet.com. The United States has also asked the Panel to reconsider the use of certain terms such as "expectations", "errors", "late submissions" and more or less "trade restrictive" and the Panel has done so.

5.15 Antigua requested the Panel to add references to support a conclusion that Antigua has made a prima facie demonstration that the federal measures at issue prohibit the cross-border supply of gambling and betting services. The Panel believes that Antigua is not entitled at this late stage of the proceedings to attempt to make or add to its demonstration of its claims that the GATS has been violated.

C. MEMBERS' RIGHT TO REGULATE AND TO PROHIBIT GAMBLING AND BETTING SERVICES

5.16 The United States has suggested that the approach taken by the Panel in the Interim Report may be read as "supporting the criticisms levelled by numerous groups against the GATS as being overreaching and an unjustified intrusion into the sovereign ability of Members to regulate in the area of services".

5.17 In our view, it is clear that *WTO Members do have the right to regulate and to prohibit gambling and betting services, if they so wish.* In the present case, we reached the conclusion that the United States had undertaken a specific commitment for cross-border supply of gambling and betting services. In this context, the Panel would like to reiterate here its Concluding Remarks contained in paragraphs 7.3 and 7.4 of the Interim Panel Report:

> "The Panel wishes to note that it is well aware of the sensitivities associated with the subject-matter of this dispute, namely gambling and betting services. Our conclusions are directly linked to the particular circumstances of this dispute. We note in this regard that the United States may well have inadvertently undertaken specific commitments on gambling and betting services. However, it is not for the Panel to second-guess the intentions of the United States at the time the commitment was scheduled. Rather, our role is to interpret and apply the GATS in light of the facts and evidence before us.
>
> We also wish to emphasize what we have *not* decided in this case. We have not decided that WTO Members do not have a right to regulate, including a right to prohibit, gambling and betting activities. In this case, we came to the conclusion that the US measures at issue prohibit the cross-border supply of gambling and betting services in the United States in a manner inconsistent with the GATS. We so decided, not because the GATS denies Members such a right but, rather, because we found, *inter alia*, that, in the particular circumstances of this case, the measures at issue were inconsistent with the United States' scheduled commitments and the relevant provisions of the GATS."

D. THE US SCHEDULE

5.18 The United States has suggested that the Panel, in its interpretation of the US Schedule, had set aside the ordinary meaning of "sporting", which it had excluded from its specific commitment under sub-sector 10.D ("Other recreational services (except sporting)"). The United States has also argued that the Panel has accorded undue importance to the context (i.e. the 1993 Scheduling Guidelines and W/120) and, by so doing, it has ignored the difference between Members' schedules that include explicit references to the CPC and those that do not.

5.19 Although the terms "gambling and betting services" do not appear in its Schedule, the United States has undertaken specific commitments under sub-sector 10.D, entitled "Other recreational services (except sporting)". The Schedule does not provide a definition of those terms and during the Panel proceedings, the United States did not provide any definitional framework of its schedule in general and this entry in particular, even in response to a specific question by the Panel on the issue.[561] The Panel was, thus, obliged to interpret the US specific commitments under sub-sector 10.D in order to give meaning to the terms contained therein. The Panel did so by examining, first, the ordinary meaning of such terms. Since the dictionary definitions of the term "Other recreational services (except sporting)" did not allow a definitive conclusion to be reached, the Panel continued its analysis to consider the context of that term, in accordance with the Vienna Convention on the Law of Treaties.

5.20 When the Panel made reference to the 1993 Scheduling Guidelines and to W/120 as "context" of the GATS, it did not suggest that such "context" was *part of* the GATS. The relevant "context" was never considered with a view to identifying any obligations that could have been imposed on the United States. Rather, when interpreting the specific commitment undertaken by the United States, the Panel read the US Schedule *in light of* the 1993 Scheduling Guidelines and W/120. The Panel, therefore, did not reach the conclusion that schedules that contain references to the CPC are necessarily like schedules that do not contain such references. The Panel reached the conclusion that the effective interpretation of the terms "Other recreational services (except sporting)" in the circumstances of this case included gambling and betting services.

[561] Panel question No 5.

E. MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF TRADE IN SERVICES

5.21 The United States has argued that the Interim Report does not address the issue of the legal consequences flowing from the fact that, under US law, state laws cannot be and are not used to prosecute conduct by an actor located wholly outside the state and having no presence there. The United States has also submitted that it is not aware of any argumentation by Antigua on this issue that would allow the Panel to resolve the issue of applicability of these state laws to the cross-border supply of gambling and betting services.

5.22 In our view, the state laws at issue are within the scope of the GATS since these measures "affect trade in services" within the meaning of Article I:1 of the GATS. The Panel has found that the measures at issue entail prohibitions on the supply of gambling and betting services. In our view, prohibitions on certain types of activities necessarily affect trade in services with respect to that activity. We agree with the Appellate Body's statement in *EC – Bananas III* that "the scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services". There is no reason why measures adopted by regional and local governments and authorities cannot *a priori* "affect the supply of a service" within the meaning of Article I:1 of the GATS, even if such measures cannot be enforced extraterritorially.

5.23 This being said, we would like to emphasize that whether a measure "affecting trade in services" within the scope of the GATS in accordance with Article I:1 is inconsistent with one or more provisions of the GATS is a distinct matter which calls for a separate determination under the relevant GATS provisions.

5.24 We have revised the section of the Interim Report entitled "Measures at issue" so as to more clearly reflect our understanding of the meaning of Article I:1 of the GATS and its application in this case.

F. ARTICLE XIV

5.25 The United States objected to the interpretation and application of Article XIV of the GATS made by the Panel. In particular, the United States objected to the Panel's conclusion that it had a "burden" to prove that it could not guard against those risks specific to remote gambling by means having a less restrictive trade impact than a prohibition on the remote supply of gambling and betting services. According to the United States, there is no such "burden" under Article XIV. The United States also opposed the Panel's conclusion that, in the context of the necessity test under Articles XIV(a) and (c), the United States was obliged to consider invitations by Antigua and cooperation with other Members to address concerns expressed by the United States to justify its prohibition on gambling and betting services by remote means and to explore whether there were WTO-consistent alternatives.

5.26 It is well established under WTO law that it is for the Member invoking the application of a justification provision (such as Article XIV of the GATS) to demonstrate that it has complied with the requirements of such a provision. It was, therefore, for the United States to demonstrate that the measures at issue were "necessary" to "protect public morals" or to "maintain public order". The Panel reached the conclusion that the measures at issue were indeed designed so as to protect public morals or to maintain public order; but the United States had failed to demonstrate that they were "necessary" since it had not shown that there was no WTO-consistent alternative measure reasonably available that would provide the United States with the same level of protection against the risks it had identified. It was in this context that we considered it relevant that the United States had not accepted Antigua's invitation to discuss and consider WTO-consistent alternatives that might or could address the United States' concerns.

5.27 Even if the United States had considered that no such alternative currently exists, it could not properly have prejudged the situation that may arise in the future. It is because the United States had made a specific market access commitment with respect to cross-border trade of gambling and betting services that it was obliged to consider WTO-consistent alternatives, including those that may be suggested by Antigua and other Members before and while maintaining its prohibition on the cross-border supply of gambling and betting services.

5.28 Finally, we would like to reiterate that in concluding that the United States had not fulfilled the conditions in order to benefit from the protection of Article XIV of GATS in the circumstances of the present case, we have neither found nor maintain that WTO Members, including the United States, have forfeited their sovereign right and ability to regulate the cross-border supply of services, consistently with the GATS, particularly for the protection of public morals or for the maintenance of public order.

VI. FINDINGS

A. INTRODUCTION

1. Terms of reference of this Panel

6.1 The terms of reference of this Panel are determined by the Request for the Establishment of a Panel circulated by Antigua and Barbuda to the DSB on 13 June 2003.[562] The Panel request refers to the specific GATS provisions that, according to Antigua, have been violated by the United States as well as the US measures that Antigua wishes to challenge.

6.2 Antigua has claimed that the GATS Schedule of the United States includes specific commitments on gambling and betting services. Antigua has further claimed violations of, and has developed argumentation in its submissions with respect to, Articles VI:1, VI:3, XVI:1, XVI:2, XVII:1, XVII:2, XVII:3 and XI:1 of the GATS.[563]

6.3 The United States denies these claims. It argues that its Schedule makes no such commitment on gambling and betting services and that, in any case, the measures at issue are not inconsistent with its GATS obligations. It also invokes Article XIV(a) and Article XIV(c) of the GATS in its defence.

2. Structure of this Panel Report

6.4 Since all the provisions in respect of which Antigua has developed violation claims are applicable only in sectors and sub-sectors in which specific commitments exist, the Panel will need to examine whether the United States has undertaken a specific commitment with respect to gambling and betting services. The Panel will examine this issue first because the absence of any relevant commitment by the United States would suffice to dismiss this case.

6.5 Secondly, the Panel will address the issue of, and the difficulties associated with, the identification, interpretation and effect of the measure(s) being challenged by Antigua. The Panel will have to determine whether Antigua has identified with sufficient clarity the measures it seeks to challenge. In particular, the Panel will have to determine, *inter alia*, whether, under the GATS and the DSU, Antigua can challenge in dispute settlement proceedings what Antigua refers to as a "total prohibition" on the cross-border supply of gambling and betting services, as a measure in and of itself.

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[562] WT/DS285/2, 13 June 2003 (hereinafter referred to as the "Panel request"). See the Request for Preliminary Rulings in Annex B.

[563] The Panel notes that, in the Panel request, Antigua claimed violation of Article VIII of the GATS, paras. 1 and 5. However, Antigua did not pursue this claim during the Panel proceedings.

6.6 Thirdly, the Panel will examine whether Antigua has demonstrated that the measures at issue violate the relevant GATS provisions identified in the Panel request. The Panel will proceed in the following order: Article XVI, paragraphs 1 and 2; Article XVII, paragraphs 1 to 3; Article VI, paragraphs 1 and 3; and Article XI, paragraph 1.

6.7 If necessary, that is, if a violation of any of the GATS provisions invoked by Antigua is established, the Panel will examine whether the United States has demonstrated that the challenged measures are justified under Article XIV (a) and/or (c) of the GATS.

3. Interpretation of WTO provisions

6.8 The Panel recalls Article 3.2 of the DSU which states that:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

6.9 It is now established[564] that the "customary rules of interpretation of public international law" include at least Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "Vienna Convention"). Accordingly, in this dispute, we will make reference to Articles 31, 32 and 33, which are cited below.

6.10 Articles 31, 32 and 33 of the Vienna Convention read as follows:

> "Article 31
>
> (*General rule of interpretation*)
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

[564] See for instance Appellate Body Reports on *US – Gasoline*, p. 17; *EC – Hormones*, para. 181; *India – Patents (US)*, para. 45; and *US – Shrimp*, para. 114.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

(*Supplementary means of interpretation*)

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

Article 33

(*Interpretation of treaties authenticated in two or more languages*)

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

4. Burden of proof

6.11 The Panel recalls the rules on burden of proof in WTO dispute settlement proceedings, which, in essence, require that a party asserting an allegation must prove it.

6.12 In *US – Wool Shirts and Blouses*, the Appellate Body made the following statement on the issue of burden of proof:

"[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted

> and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
>
> In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[565]

6.13 The Panel in *Turkey – Textiles*, in a finding not addressed by the Appellate Body, summed up the rules on burden of proof under WTO jurisprudence as follows:

> "(a) it is for the complaining party to establish the violation it alleges;
>
> (b) it is for the party invoking an exception or an affirmative defence to prove that the conditions contained therein are met; and
>
> (c) it is for the party asserting a fact to prove it."[566]

6.14 Therefore, in the present dispute, it is for Antigua to establish that the measures at issue violate Articles XVI, XVII, VI and XI of the GATS, while it is for the United States to establish, if need be, that the challenged measures benefit from the justification provisions of Article XIV of the GATS.

5. Judicial economy

6.15 In deciding whether to exercise judicial economy over any of Antigua's claims, the Panel recalls that the principle of judicial economy is recognized in WTO law. In *US – Wool Shirts and Blouses*, the Appellate Body made clear that panels are not required to address all the claims made by a complaining party. The Appellate Body relied on the explicit aim of the dispute settlement mechanism, which is to secure a positive solution to a dispute (Article 3.7) or a satisfactory settlement of the matter (Article 3.4). Thus, the basic aim of dispute settlement in the WTO is to settle disputes and not to develop jurisprudence. The Appellate Body stated:

> "[G]iven the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[567]"[568]

6.16 In its supporting reasoning, the Appellate Body also explored Article 11 of the DSU, the provision setting out the mandate of panels, and found nothing in this provision that would require

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[565] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

[566] Panel Report on *Turkey – Textiles*, para. 9.57. See also Panel Report on *Argentina – Textiles and Apparel*, paras. 6.34-6.40.

[567] (*original footnote*) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the DSU.

[568] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 19.

panels to examine all legal claims made by a complaining party. The Appellate Body relied on previous dispute settlement practice, *inter alia*, under the GATT 1947. Specifically, it stated: "if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated."[569]

6.17 Yet, the Panel is aware of the limits to its discretionary right to exercise judicial economy. As the Appellate Body stated in *Australia – Salmon*, the right to exercise judicial economy cannot be exercised where only a partial resolution of a dispute will result:

> "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[570]

6.18 In the present dispute, the Panel will need to address the issue of judicial economy and it will do so according to these guiding principles.

6. Definitional issues

6.19 A number of definitional issues have arisen in this dispute that need clarification before the Panel can proceed further with its examination of Antigua's claims.

(a) Definition of "gambling and betting services"

6.20 This dispute is about "gambling and betting services". The *Shorter Oxford English Dictionary* defines "to gamble" as:

> "[P]lay games of chance for (a lot of) money; indulge in betting, esp. habitually; risk money, fortune, success, etc., on the outcome of an event [...]."[571]

6.21 Pursuant to the *Shorter Oxford English Dictionary*, "to bet" is defined as:

> "[S]take (an amount of money, etc.) against another's in support of an affirmation or on the outcome of a doubtful event; risk an amount of money etc. against (a person) by agreeing to forfeit it if the truth or outcome is not as specified. [...]"[572]

6.22 The Panel also notes that, according to the *Internet Gambling Report*:

> "Gambling involves any activity in which a person places a bet or wager. Generally, a bet or wager occurs when a person risks something of value on the outcome of an uncertain event: (1) in which the bettor does not exercise any control; or (2) which is determined predominantly by chance."[573]

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[569] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 18 (footnote omitted).
[570] Appellate Body Report on *Australia – Salmon*, para. 223.
[571] Shorter Oxford English Dictionary, 2002.
[572] Shorter Oxford English Dictionary, 2002.
[573] A. Cabot & L. V. Csoka, *What is Gambling?*, in Internet Gambling Report, 6th edition, ed. by M. Balestra, River City Group, United States, 2003, p. 14.

6.23 The *Internet Gambling Report* distinguishes three broad categories of gambling and betting: (i) casino-type games, including games such as roulette, blackjack, slot-machines, poker, craps, and baccarat; (ii) lotteries, including games such as lotto, keno, bingo, video lottery terminals (VLTs) and scratch cards; and (iii) sports betting, including betting on the outcome of different sporting events (soccer, American football, cricket, etc.). This last category would also include betting on horseracing and greyhound racing.[574]

6.24 During these proceedings, the parties gave indications as to what activities should be considered as "gambling and betting" services for the purposes of this dispute. Antigua indicated that:

> "[A] vast array of gambling and betting games and services are offered on a commercial basis in the United States and elsewhere. These games can typically be categorized into one of the following three broad categories: (i) betting on the outcome of events in which the gamblers do not participate, such as sports contests (for example, horse races, soccer, American football, basketball, and cricket); (ii) card games involving monetary stakes (such as poker, black jack and baccarat);[575] and (iii) random selection games which are games of chance based on the random selection of numbers or other signs and where the random selection is performed by a machine or the casting of dice. This type of gambling takes various forms, including lotto, keno and bingo; instant lotteries or 'scratch card games'; gambling machines; and 'table games' such as roulette or 'craps'. Antigua notes that 'gambling', 'gaming', 'wagering' and 'betting' are different terms for the same basic activity. [...]
>
> Antiguan regulation provides for two kinds of gambling and betting licences – interactive gaming and interactive wagering. The gaming licence is for casino-type, random selection and card games and the wagering licence is for sports betting. Some operators possess both licences and players can access either type of service from one internet site[576], while other operators offer only one service.[577] Casino game operators create "virtual casinos" on their web sites with detailed graphics and enhancements designed to mimic land-based casino settings. These sites offer a variety of card and dice games such as poker, black jack, craps and keno, as well as arcade-type games that provide virtual imitations of video poker terminals, slot machines and other gambling machines. Because of the highly visual aspect of the casino-type games, these services are operated exclusively through internet connection. The sports betting operators offer the chance to wager on the outcome of sporting contests in a number of different ways, such as straight wagers on match results, transacting in futures markets in player performances, team performances and outcomes of political campaigns and other uncertain future events, and other forms of traditional as well as inventive methods of wagering. All Antiguan sports book operators maintain an internet web site on which players may place wagers, but many operators also make extensive use of telephone betting, as betting on contests or performances to occur in the future does not need to be visual and the events are independent of the operator's web site. "[578]

6.25 In response to a question posed by the Panel, Antigua further indicated that:

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[574] A. Cabot, *Traditional Versus Internet Gambling*, in Internet Gambling Report, 6th edition, ed. by M. Balestra, River City Group, United States, 2003, p. 39.

[575] Antigua notes that, in the context of a casino, card games will often be referred to as part of a wider group of "table games" including random selection games such as roulette or craps.

[576] (*original footnote*) See, e.g., www.intertops.com; www.wsex.com.

[577] (*original footnote*) See, e.g., www.gamebookers.com; www.bingomania.net.

[578] Antigua's first written submission, paras. 25, 39-40.

> "Antigua seeks to supply all types of services that involve the making of a bet or wager to consumers in the United States, subject to services that are prohibited by Antiguan law, such as those involving the use of pornographic, indecent or offensive material. It is difficult to cover every possible permutation in a list, but the product offerings encompassed by the gambling and betting services that Antigua seeks to offer include: (i) Random selection games (in whatever form and including games that are traditionally described as 'lotteries' or 'casino-type games' in their probably endless permutations). (ii) Event-based gambling. (iii) Card games and other games of skill involving monetary stakes. (iv) Person-to-person gambling (so-called 'betting exchanges')."[579]

6.26 The United States indicated that it allows the cross-border supply of certain gambling services, such as:

> "[...] (i) persons not involved in the business of gambling may transmit casual or social bets by any means, provided that the transmission is permissible under state law; (ii) pari-mutuel betting services may exchange the accounting data and pictures necessary to permit a racetrack outside the United States to offer pari-mutuel betting on U.S. races (and vice-versa), provided that such gambling is legal in both the sending and the receiving jurisdictions; (iii) suppliers of odds making and handicapping services (e.g., handicappers of horse races) as well as other gambling informational services may supply such services, provided that the form of gambling that they facilitate is legal in both the sending and the receiving jurisdictions; (iv) gambling websites may (and many do) provide so-called 'free play' games in which no real money is wagered."[580]

6.27 Moreover, when asked the supply of which services is prohibited both domestically and on a cross-border basis, the United States stated that the prohibition concerned:

> "[T]he transmission of a bet or wager by a wire communication facility across state or U.S. borders, such as Internet and telephone betting. Other gambling services that are similarly restricted both domestically and cross-border include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events."[581]

6.28 The Panel does not believe that it is necessary in the circumstances of this case to define exhaustively the service activities falling under "gambling and betting services", as these are not treaty terms in this dispute. Therefore, the Panel does not need to "interpret" these terms as such. In light of the ordinary meaning of the words, the submissions of the parties and the specialized literature to which we have made reference, the Panel considers that "gambling and betting services" include any activity involving the placing of a bet or wager, that is, instances where a person risks something of value (generally money) on the outcome of an uncertain event. A bet or a wager can be made with respect to casino-type games, lotteries and sporting events, irrespective of how these services are supplied. The Panel notes that the definition of "gambling and betting services" for the purposes of this dispute includes, at a minimum, the services that Antigua seeks to supply cross-border to the United States as well as the other services the supply of which the United States allows cross-border.[582]

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[579] Antigua's reply to Panel question No. 33.
[580] United States' second written submission, paras. 26-27.
[581] United States' reply to Panel question No. 35.
[582] For instance the United States refers to "Persons not involved in the business of gambling may transmit casual or social bets by any means, provided that the transmission is permissible under state law;

(b) "Cross-border" and "remote" supply

6.29 This dispute concerns one of the four modes of supply under the GATS, that is, the so-called "cross-border supply" of gambling and betting services (hereinafter also referred to as supply by "mode 1"), which is defined in Article I:2 (a) of the GATS as follows:

> "For the purpose of this Agreement, trade in services is defined as the supply of a service:
>
> > (a) from the territory of one Member into the territory of any other Member;
> >
> > [...]"

6.30 The Explanatory Note on Scheduling of Initial Commitments in Trade in Services[583] (hereafter called "The 1993 Scheduling Guidelines") further explains that cross-border supply concerns a service "delivered within the territory of the Member, from the territory of another Member". The Guidelines also provide the following example of cross-border supply:

> "International transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (e.g. a computer diskette, or drawings) are all examples of cross-border supply, since the services supplier is not present within the territory of the Member where the service is delivered."[584]

6.31 In this dispute, the Panel will use the term "cross-border supply" exclusively in the sense of Article I:2(a) of the GATS.

6.32 "Cross-border" must be distinguished from "remote" supply, which is a term that has been used by the parties in this dispute. The Panel will use the latter term to refer to "any situation where the supplier, *whether domestic or foreign*, and the consumer of gambling and betting services are not physically together". In other words, in situations of remote supply, the consumer of a service does not have to go to any type of outlet where the supply is supervised, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier offers the service directly to the consumer through some means of distance communication.[585] Hence, cross-border supply is necessarily remote, but remote supply amounts to "cross-border" supply only when the service supplier and the consumer are located in territories of different Members. The Panel understands "non-remote" supply to refer to situations where the consumer presents himself or herself at a supplier's point of presence.

6.33 The expression "means of delivery" will be used in this Report to refer to the various technological means (mail, telephone, Internet, etc.) by which a service can be supplied cross-border

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Parimutuel betting services may exchange the accounting data and pictures necessary to permit a racetrack outside the United States to offer parimutuel betting on U.S. races (and vice-versa), provided that such gambling is legal in both the sending and the receiving jurisdictions; Suppliers of odds making and handicapping services (*e.g.,* handicappers of horse races) as well as other gambling informational services may supply such services, provided that the form of gambling that they facilitate is legal in both the sending and the receiving jurisdictions; Gambling websites may (and many do) provide so-called 'free play' games in which no real money is wagered; any other gambling service that does not consist of actual transmission of a bet or wager is legal to the extent stated in 18 U.S.C. § 1084(b), provided that it also does not violate state law in the U.S. consumer's jurisdiction." United States' second written submission, paras. 26-27.

[583] The Panel discusses in section VI.B of this Panel Report the legal value of the 1993 Scheduling Guidelines in interpreting the GATS.

[584] Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164, 3 September 1993, paras. 18-19.

[585] See United States' first written submission, para. 7 and United States' reply to Panel question No. 42.

or remotely. Unless otherwise indicated, "cross-border" and "remote" supply cover all the various technological means of supplying services.

B. HAS THE UNITED STATES UNDERTAKEN SPECIFIC COMMITMENTS ON GAMBLING AND BETTING SERVICES?

1. Claims and main arguments of the parties

6.34 Antigua claims that by virtue of entry 10.D in its GATS Schedule of Specific Commitments[586] under subheading "Other Recreational Services (except sporting)", the United States has made a full market access and a full national treatment commitment for the cross-border supply (mode 1) of "gambling and betting" services.[587]

6.35 The United States denies this claim altogether, contending that its Schedule makes no such commitment.[588]

6.36 In support of its claim, Antigua argues that the US Schedule is based on the Services Sectoral Classification List[589] and that sub-sector 10.D of the US Schedule includes CPC category "9649 Other recreational services" which encompasses CPC category "96492 Gambling and betting services".[590]

6.37 Antigua points out that, since under Article XX:3 of the GATS, Members' schedules are an integral part of the GATS, they must be interpreted on the basis of the Vienna Convention's rules of interpretation. On that basis, Antigua argues that an interpretation based on the ordinary meaning of the words "Other recreational services" in the US Schedule leads to the conclusion that gambling and betting services fall within this broadly worded category. Alternatively, they could fall under sub-sector 10.A, "Entertainment services". With respect to the context of the US Schedule, the two most important agreements and instruments connected to the conclusion of the GATS that are relevant for the interpretation of GATS Schedule are W/120 and the 1993 Scheduling Guidelines. As to the practice in the application of the GATS, Antigua submits that WTO Members have consistently referred to W/120 (and its cross-references to the CPC) as the classification used for GATS purposes and as the main point of reference for any discussion on such a classification. Even the United States International Trade Commission uses W/120 and its cross-references to CPC as a tool to interpret the US Schedule. Moreover, the US Draft Final Schedule[591] during the Uruguay Round confirmed that the United States had scheduled specific commitments according to the 1993 Scheduling Guidelines and W/120.[592]

6.38 The United States replies that Antigua has incorrectly interpreted the US Schedule to the GATS. Even assuming *arguendo* the possible relevance of sector 10, Antigua's claims to find there a US commitment for cross-border supply of gambling services rely on W/120 and its references to the CPC Prov. Document W/120 is part of the negotiating history of the GATS, which is at best a supplementary means of interpretation. The United States argues that the context for the US Schedule

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[586] The United States of America – Schedule of Specific Commitments, GATS/SC/90, 15 April 1994 (hereinafter the "US Schedule").

[587] Antigua's first written submission, paras. 160-162.

[588] United States' first written submission, paras. 59-62.

[589] Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991 (hereinafter the "W/120").

[590] Antigua's first written submission, paras. 160-162.

[591] Communication from the United States of America, Draft Final Schedule of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.3, 7 December 1993.

[592] Antigua's first written submission, paras. 164-178; Antigua's first oral statement, paras. 27-32.

includes other Members' schedules. Accordingly, the proper context for the US Schedule includes the fact that some Members based their schedules, or parts of them, on the CPC, while others did not.[593]

6.39 The United States submits that a proper interpretation of the US Schedule, without recourse to the CPC, would show that the United States made no commitment for measures affecting gambling services. Because of the absence of a textual basis for referring to the CPC, the legal definition of the scope of a non-CPC commitment must be deduced through application of customary rules of treaty interpretation. Antigua's allegations regarding a possible US commitment for gambling services rely on sub-sectors 10.A and 10.D of the US Schedule to the GATS, which do not contain an explicit reference to gambling services. The ordinary meaning of "sporting" in sub-sector 10.D confirms that the United States has made no commitments for gambling and betting under that sub-sector. Gambling is a *sui generis* activity that, if it belongs anywhere in sector 10, it can only be in sub-sector 10.E, where the United States made no commitment.[594]

6.40 The United States further submits that the USITC Document[595] is merely an "explanatory" text prepared by an independent agency and does not purport to interpret the US Schedule.[596] Finally, the cover-note to the US Draft Final Schedule only confirms that the United States followed the structure of W/120, without adopting the CPC nomenclature.[597] The United States concludes that it should come as no surprise that it did not schedule commitments for gambling and betting services, given the overriding policy concerns surrounding those services, which are reflected in the extremely strict limitations and regulations of these services in the United States.[598]

2. Assessment by the Panel

(a) Method of interpretation to be adopted by the Panel

6.41 As a preliminary issue in this dispute, the Panel will have to decide whether the US Schedule includes specific commitments on gambling and betting services notwithstanding the fact that the words "gambling and betting services" do not appear in the US Schedule.

6.42 Article XX of the GATS provides, in paragraph 1, that each Member "shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement." Paragraph 3 of Article XX stipulates that "[s]chedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof." In this dispute, there is no controversy about the application of Article XX as such, but rather over the interpretation of a Member's schedule of specific commitments which, pursuant to Article XX, is an integral part of the GATS.

6.43 The section of the US Schedule in respect of which the parties have diverging views reads as follows:[599]

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[593] United States' first written submission, paras. 63-67.

[594] United States' first written submission, paras. 68-76; first oral statement, paras. 23-41.

[595] United States International Trade Commission, *US Schedule of Commitments under the General Agreement on Trade in Services – With explanatory materials prepared by the U.S. International Trade Commission* (hereinafter "USITC Document"), dated May 1997.

[596] United States' first written submission, para. 66 and footnote 90; United States' reply to Panel question No. 2; United States' second oral statement, paras. 7-9.

[597] United States' second oral statement, paras. 10-11.

[598] United States' second written submission, para. 15.

[599] US Schedule, pp. 71-72 (extract).

Sector or sub-sector	Limitations on market access	Limitations on national treatment
10. RECREATIONAL, CULTURAL, & SPORTING SERVICES		
A. ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None
B. NEWS AGENCY SERVICES	[...]	[...]
C LIBRARIES, ARCHIVES, MUSEUMS AND OTHER CULTURAL SERVICES	[...]	[...]
D. OTHER RECREATIONAL SERVICES (except sporting)	1) None 2) None 3) The number of concessions available for commercial operations in federal, state and local facilities is limited 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None

6.44 Considering that, pursuant to Article XX:3 of the GATS, schedules of specific commitments form an integral part of the GATS, the rules of interpretation that apply with respect to GATS schedules are the same as those applicable to the GATS itself. In this dispute, all parties and third parties agree that customary rules of treaty interpretation are applicable to the interpretation of the US Schedule. Moreover, in *EC – Computer Equipment*, the Appellate Body set out the interpretative rules regarding tariff concessions under the GATT 1994:

> "Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. *As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.*" (emphasis added)[600]

6.45 This jurisprudence is relevant, *mutatis mutandis*, in respect of the GATS Schedules.[601] Therefore, the content of the US Schedule should be considered as treaty language and, pursuant to

[600] Appellate Body Report on *EC – Computer Equipment*, para. 84. The Appellate Body confirmed this finding in *EC – Poultry*, para. 81 and *Canada – Dairy*, para. 131. The Panel notes that the Vienna Convention was also used to interpret government procurement schedules. In *Korea – Procurement* (para. 7.9), the panel, noting relevant Appellate Body jurisprudence and the fact that, according to Article XXIV:12 of the GPA, "Notes, Appendices and Annexes to [the GPA] form an integral part thereof" referred to "customary rules of interpretation of public international law as summarized in the Vienna Convention in order to interpret" the GPA schedules of the party complained against.

[601] In this respect, we recall that in its Report on *EC – Bananas III*, the Appellate Body stated that, in agricultural schedules, a Member "may yield rights and grant benefits, but it cannot diminish obligations", thus confirming the findings contained in the Panel Report on *US – Sugar Waiver* with respect to GATT tariff

Article 3.2 of the DSU, should be interpreted in light of the general rules of treaty interpretation set out in the Vienna Convention, in particular Articles 31, 32 and 33.[602]

6.46 Pursuant to Article 31 of the Vienna Convention, the US Schedule must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Schedule when read in their context and in light of the object and purpose of the GATS and the WTO Agreement.[603] Of particular relevance in the present dispute is the principle of "effective treaty interpretation"[604], which derives from the requirement that treaties be interpreted in good faith, and whereby all terms of a treaty (including in the present dispute the terms of the US Schedule) should be given a meaning (see paragraph 6.49 below).

6.47 The Panel will thus start by examining the ordinary meaning of various key terms used in the US Schedule. However, dictionary definitions are generally not conclusive and the Panel will have to examine the context of the US Schedule. In this regard, the Panel will examine whether document W/120 and the 1993 Scheduling Guidelines: (i) are part of the context within the meaning of Article 31:2 of the Vienna Convention, and, as such, should be used to assess the legal context within which the ordinary meaning of the terms of the US Schedule must be determined; or (ii) whether, rather, they are part of the preparatory work of the GATS or the circumstances of its conclusion, in which case they can only be used as supplementary means of interpretation under Article 32 of the Vienna Convention. The Panel will address the relevance of other Members' practice with regard to their GATS schedules, in the interpretation of the US Schedule. For the same purpose, it will also examine the practice of the United States as reflected in its Schedule. Finally, the Panel will consider the object and purpose of the GATS.

6.48 In the second instance, pursuant to Article 32 of the Vienna Convention, the Panel will resort to supplementary means of interpretation, including the history of negotiations, to confirm the meaning resulting from the application of Article 31. Under Article 32, the Panel will look at various instruments comprising the preparatory work of the GATS and the US Schedule.

(b) Application of the general rules of treaty interpretation to this case

(i) Effective interpretation

6.49 The requirement that a treaty be interpreted in "good faith" can be correlated with the principle of "effective treaty interpretation", according to which all terms of a treaty must be given a

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schedules. We see no reason why this principle should not apply to GATS schedules as well. We believe, therefore, that, although services schedules are considered as treaty provisions for the purpose of their interpretation, they should comply with the main provisions of the GATS.

[602] The text of Articles 31 and 32 of the Vienna Convention is reproduced in para. 6.10 of this Report.

[603] The Panel notes that the Appellate Body has established a sequence concerning the consideration of elements contained in Article 31 of the Vienna Convention. The Appellate Body stated: "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought". See Appellate Body Report on *US – Shrimp*, para. 114. See also Panel Reports on *US – Section 301 Trade Act*, para. 7.22; *India – Patents (US)*, para. 7.18; *US – Underwear*, para. 7.18; Appellate Body Report on *Argentina – Footwear (EC)*, para. 91.

[604] See Appellate Body Report on *US – Gasoline*, p. 23. See also the Appellate Body Reports on *Japan – Alcoholic Beverages II*, p. 12, *US – Underwear*, p. 16, *Argentina – Footwear (EC)*, paras. 81 and 95, *Korea – Dairy*, para. 81, *US – Section 211 Appropriations Act*, para. 338 and *US – Offset Act (Byrd Amendment)*, para. 271.

meaning. We also note that "the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable".[605]

6.50 Good faith is a core principle of interpretation of the WTO Agreement. On several occasions, the Appellate Body has emphasized the importance of the principle of effectiveness whereby "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of the treaty to redundancy or inutility".[606] The Appellate Body has also stressed the importance of this principle in the interpretation of agriculture schedules.[607]

6.51 Since, as indicated above, the United States undertook a full commitment with respect to market access and national treatment under sub-sector 10.D, the terms *Other Recreational Services (except sporting*), and the commitment thereof, must have a meaning. We need, therefore, to determine the meaning of these terms and, thereby, the scope of the US commitments in question.

6.52 In *EC – Computer Equipment*, the Appellate Body stated that:

> "The fact that Member's Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among all Members."[608]

6.53 The Panel is of the view that this finding is equally relevant for GATS schedules. The primary purpose of treaty interpretation is to identify the *common* intention of the parties. The Vienna Convention rules have been developed to help in assessing in objective terms what was or what could have been the common intention of the parties to a treaty. The Panel will thus proceed to determine the *common* intention of the parties concerning the US Schedule, and, more particularly, with respect to sector 10 (*Recreational, Cultural & Sporting Services*) of that Schedule.

(ii) Ordinary meaning of the term

6.54 According to the United States, the ordinary meaning of "sporting" includes "gambling" and, thus, confirms that the United States has made no commitments for gambling and betting services in sub-sector 10.D.[609] Antigua, Canada and the European Communities disagree with this interpretation.[610]

6.55 The full definition of "sporting" (adj.) contained in the *Shorter Oxford English Dictionary* (1993 edition), reads as follows:

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[605] Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition, 1984, p. 120. Under Article 31.3(c) of the Vienna Convention, the Panel could also examine whether "any other relevant rules of international law" could be applicable in the interpretation of the terms used in the US Schedule. This could, for instance, lead the panel to examine the US Schedule in light of the effective treaty interpretation principle. The Panel will, however, refer to the effective treaty interpretation principle pursuant to the first sentence of Article 31. The Panel will also examine other principles of interpretation, as supplementary means of interpretation, pursuant to Article 32 of the Vienna Convention.

[606] Appellate Body Report on *US – Gasoline*, p. 23. See also the Appellate Body Reports on *Japan – Alcoholic Beverages II*, p. 12, *US – Underwear*, p. 16, *Argentina – Footwear (EC)*, paras. 81 and 95, *Korea – Dairy*, para. 81, *US – Section 211 Appropriations Act*, para. 338 and *US – Offset Act (Byrd Amendment)*, para. 271.

[607] Appellate Body Report on *Canada – Dairy*, para. 135.

[608] Appellate Body Report on *EC – Computer Equipment*, para. 109.

[609] United States' first written submission, para. 71.

[610] Antigua's first oral statement, para. 30; Canada's written submission, para. 23 and footnote 30; European Communities' written submission, paras. 26-33.

"**1a** Sportive; playful. *rare*. **b** Engaged in sport or play. **c** Of a plant etc.: tending to produce abnormal varieties or sports. **2a** Interested in or concerned in sport. **b** Designating an inferior sportsman or a person interested in sport from purely mercenary motives. Now *esp*. pertaining to or interested in betting or gambling. Chiefly in *sporting man*. **c** *sporting girl, woman*, a prostitute, a promiscuous woman *N. Amer.* **3** Orig., providing good sport or entertainment. Later, characterized by sportsmanlike conduct; fair-minded, generous."[611]

6.56 Other dictionary definitions of "sporting" read:

"**1 a**: of, relating to, used, or suitable for sport **b**: marked by or calling for sportsmanship **c**: involving such risk as sports contender may expect to take or encounter (a sporting chance) **2**: of or relating to dissipation and especially gambling" **3**: tending to mutate freely."[612]

"**1** Engaged in sport of play. **b** Sportive; playful. **c** Of plants, etc. **2. a** Interested in, accustomed to take part in, field sports or similar amusements. **b**. Esp. *sporting man*: now used to denote a sportsman of an inferior type or one who is interested in sport for purely mercenary motives."[613]

"**1**. of, relating to, suitable for, in, or engaged in sports: *a sporting event, sporting goods, sporting* dogs. **2** characteristics of a sportsman; fair or obliging: *That was very sporting of* him. **3.** of or relating to gambling, esp. on sports."[614]

"sporting adj **1** belonging, referring or relating to sport • *Gun dogs are classed as sporting dogs*. **2** said of someone, their behaviour, attitude, nature, etc: characterized by fairness, generosity, etc • *It was sporting of him to lend me the car*. **3** keen or willing to gamble or take a risk • *I'm not a sporting man, but I like a bet on the Grand National*. **sportingly** adverb."[615]

"**1.** Used in or appropriate for sports: *sporting goods.* **2.** Characterized by sportsmanship. **3.** Of or associated with gambling."[616]

6.57 The *Penguin Pocket English Dictionary* (1988) and the *New Oxford Thesaurus of English* do not refer to "gambling" as a possible meaning of "sporting". Similarly, the *New Roget's Thesaurus* (1978) does not refer to gambling/wagering as possible synonyms for "sporting" (and vice-versa).

6.58 The Panel notes that the United States quoted the following definitions:[617]

1 b: suitable for or characteristic of a sportsman: marked by or calling for sportsmanship (a ~ solution of the problem) **c**: involving such risk as a sports contender may reasonably take or expect to encounter (a ~ chance of success) **2 a**: of,

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[611] *The Shorter Oxford English Dictionary*, 1993 (original emphasis).

[612] *Merriam-Webster Dictionary Online*, found at http://www.m-w.com/cgi-bin/dictionary, vistied on 11 November 2003.

[613] *The Oxford English Dictionary*, vol. X, (1938). The Supplement to the *Oxford English Dictionary*, Vol. IV (1986) states, with respect to *sporting man*: "[A]lso used in other collocations referring to low gaming and betting."

[614] *Collier's Dictionary*, 1977.

[615] *Chambers Online Reference*, at http://.chambersharrap.co.uk/chambers/chref/chref.py/main, visited on 14 November 2003.

[616] *The American Heritage Dictionary*, Online edition, at http://www.bartleby.com, visited on 14 November 2003.

[617] United States' reply to Panel question No. 8.

> relating to, or preoccupied with dissipation and esp. gambling; *often;* FAST FLASHY*(*~ gents and their ladies) **b**: engaged or used in prostitution **3**: lending to produce sports usu, with exceptional frequency (a ~ strain of evening primrose).[618]
>
> **1.** engaging in, disposed to, or interested in open-air or athletic sports; a rugged, sporting man. **2.** concerned with or suitable for such sports; sporting equipment. **3.** sportsmanlike. **4.** interested in or connected with sports or pursuits involving betting or gambling *the sporting life of Las Vegas*. **5.** involving or inducing the taking of risk, as in a sport (1580-1600); SPORT + -ING').[619]
>
> **1.** Appropriate for or used in sports. **2.** Marked by sportsmanship. **3.** Of or having to do with gambling.[620]
>
> **1. used in sports**: relating to or used in sports activities • *sporting dogs* **2. fair**: in keeping with the principles of fair competition, respect for other competitors, and personal integrity **3.** GAMBLING **of gambling**: relating to gambling, or taking an interest in gambling **4. risking:** willing to take a risk.[621]

6.59 The word "sporting" encompasses various definitions, relating to different activities or characteristics (sports, gambling, prostitution, plant biology). Some dictionary definitions of "sporting", when referring to gambling and betting activities, appear to convey a pejorative connotation ("of or relating to dissipation and especially gambling"[622]). Moreover, the word "sporting", when defined to encompass gambling, is used mainly to qualify a person ("Chiefly in sporting man", see above *Shorter Oxford English Dictionary*) interested in betting, and thus, may not be the most appropriate word for describing services activities. Antigua and the European Communities note that, considering that the same dictionary defines a "sporting woman" as a prostitute, this raises the question of whether the word "sporting", under the approach suggested by the United States, would also encompass prostitution.[623] Several dictionary definitions quoted above suggest that gambling activities encompassed under "sporting" are essentially those relating to sporting events; hence, it remains unclear whether, by excluding "sporting", the United States excluded all activities involving the placing of bets and wagers like, among other things, casino-related activities and lotteries.

6.60 Moreover, the words "sportifs"[624] and "deportivos"[625] respectively French and Spanish translations of "sporting", do not cover gambling-related activities.

6.61 On the basis of the various dictionary definitions quoted above, including in French and Spanish, we find that the *ordinary* meaning of "sporting" does not include gambling.

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[618] *Webster's Third New International Dictionary*, 1986.

[619] *The Random House Dictionary of the English Language*, 2nd ed., 1987.

[620] *Webster's II New Riverside University Dictionary*, 1988.

[621] *Encarta World English Dictionary*, available at http://encarta.msn.com/dictionary_/sporting.html, 2004.

[622] *Merriam-Webster Dictionary Online*, op. cit., footnote 612.

[623] Antigua's second oral statement, para. 27; European Communities' written submission, para. 30.

[624] "Sportif" is defined as follows: "adj. [...] 1. Propre ou relatif au sport, aux différents sports. [...] Qui a un caractère de sport, de compétition (et non de simple exercice). [...] Mouvementé, tumultueux. [...] 2. Qui pratique, qui aime le sport. [...] Qui atteste la pratique du sport. [...] Qui respecte l'esprit du sport, manifeste de la sportivité. [...]." *Le Nouveau Petit Robert – Dictionnaire alphabétique et analogique de la langue française*, Dictionnaires Le Robert, 2002.

[625] "Deportivo" is defined as follows: "adj. Perteneciente o relativo al deporte. 2. Que sirve o se utiliza para practicar un deporte. 3. Ajustado a normas de corrección semejantes a las que deben observarse en deporte. 4. Dicho de la ropa y de la forma de vestir: Cómoda e informal. [...] 5. m. automóvil deportivo. [...]". *Diccionario de la Lengua Española*, Real Academia Española, 22nd ed, 2001.

6.62 The Panel turns now to Antigua's argument that the ordinary meaning of the words "other recreational services" (sub-sector 10.D of the US Schedule) or "entertainment services" (sub-sector 10.A of the US Schedule) encompass "gambling and betting services". According to the United States, the ordinary meaning of these words does not encompass gambling activities. The *Shorter Oxford English Dictionary* defines "entertainment" and "recreational", respectively, as:

> "The action of occupying a person's attention agreeably; amusement. **b** A thing which entertains or amuses someone, *esp*. a public performance or exhibition designated to entertain people."[626]

> "Of or pertaining to recreation; used for or as a form of recreation; concerned with recreation". The word "recreation" is defined as: "[T]he action of recreating (oneself or another), or fact of being recreated, by some pleasant occupation, pastime or amusement".[627]

6.63 The Panel considers that an interpretation of the US Schedule relying mainly on the ordinary meaning of the words as defined in dictionaries does not provide sufficient clarity as to the scope of the sector/sub-sector concerned and leaves many interpretive questions open. This problem is particularly acute in respect of sector 10, where words such as "recreational" and "entertainment" could cover virtually the same types of services activities. In other words, the ordinary meaning of "entertainment" and "recreational" does not ensure the mutual exclusiveness[628] of the sub-sectoral headings, which is a prerequisite for a classification system.[629]

6.64 This latter problem is exemplified by the response given by the United States to a question posed by the Panel.[630] The United States indicated, with respect to the scope of its commitment under sub-sector 10.D, that an interpreter could find, consistently with customary rules of treaty interpretation, that:

> "'Other recreational services (except sporting)' (10.D) includes services that fall squarely within the plain meaning of 'recreation' and are distinguishable from either 'sporting' or 'entertainment.' Such activities could include, *inter alia,* the operation of such recreational facilities as marinas, beaches, and parks, as well as the organization and/or facilitation of non-sporting recreational activities."
>
> 'Entertainment services' (10.A) includes services that fall squarely within the plain meaning of 'entertainment' and are distinguishable from either 'sporting' or 'recreation'. Such activities could include, *inter alia,* services consisting of the operation of entertainment facilities, such as theaters, dance halls, music halls, and

[626] *The Shorter Oxford English Dictionary*, 2002 (5th ed.).
[627] Ibid.
[628] The Panel notes that the introduction to the CPC Prov., for instance, states that "[T]he CPC is a system of categories covering both goods and services that is both exhaustive and mutually exclusive." See Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991), p. 7 (emphasis added).
[629] An interpretation based mainly on the ordinary meaning, without recourse to the CPC or any *sui generis* definition, would raise various questions, such as: what would be covered by "entertainment services" (10.A), in addition to theatre, live bands and circuses? What would be precisely the "other cultural services" in 10.C? How and where to draw the "border" between 10.A and 10.C? What is the difference between "entertainment" (10.A) and "recreational" (10.D) as these words are largely synonymous? For instance, where would discotheques, amusement parks, services provided by composers and sculptors, zoos be categorised under the five items of sector 10? How would a clear separation be ensured between sector 10 and other sectors/sub-sectors of W/120, such as audiovisual services?
[630] Panel question No. 7.

> other performing arts venues; and the organization and/or facilitation of such entertainment activities."[631]

6.65 In view of the ordinary meaning of the words "recreational", "entertainment" and "sporting", the Panel fails to understand the United States' claim that the operation of facilities such as marinas, beaches and parks "fall squarely within the plain meaning" of "recreation" and are "distinguishable" from "entertainment". Similarly, it is not clear why theatres, dance halls, music halls, etc. "fall squarely within the plain meaning of 'entertainment'" and are "distinguishable" from "recreation". In fact, it seems that the words "entertainment" and "recreation" are largely synonymous and could be used interchangeably.

6.66 Moreover, in the Panel's view, gambling and betting have, *a priori*, the characteristics of being entertaining or amusing, or of being used as a form of recreation. The National Gambling Impact Study Commission (NGISC) states that "[t]oday the vast majority of Americans [...] gamble recreationally";[632] the US National Research Council states that "[p]athological gambling differs from the recreational or social gambling of most adults, who view it as a form of entertainment and wager only small amounts".[633] Therefore, the Panel finds it difficult to assert, as the United States does, that "[T]o the extent that other services fall within sector 10 but do not fall within sub-sector 10.A to 10.D, those services reside by default in sector 10.E, 'other'."[634]

6.67 On the basis of these considerations, the Panel concludes that the ordinary meaning of the words "Other recreational services (except sporting)" and "entertainment services" leaves a number of questions open and does not allow it to reach a definitive conclusion on whether or not the US Schedule includes specific commitments on "gambling and betting services" in sector 10 (Recreational, cultural and sporting services). The Panel also notes the Appellate Body's view that dictionary definitions do not necessarily provide a final answer and "leave many interpretive questions open".[635] In another dispute, the Appellate Body recalled that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents".[636]

6.68 The Panel needs, therefore, to continue its analysis pursuant to Article 31 of the Vienna Convention which stipulates, *inter alia*, that the ordinary meaning of the terms of the treaty must be examined in their context and in the light of the object and purpose of the treaty.

(iii) ... ordinary meaning ... in light of the context ...

6.69 According to Article 31:2 of the Vienna Convention, the "context" comprises:

> "[I]n addition to the text, including its preamble and annexes:
>
> > (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

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[631] United States' reply to Panel question No. 7.

[632] *National Gambling Impact Study Commission Final Report* (hereinafter "NGISC Final Report"), 18 June 1999, p. 1-1.

[633] Commission on the Social and Economic Impact of Pathological Gambling, Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council, *Pathological Gambling: a Critical Review*, (1999), p. 1.

[634] United States' reply to Panel question No. 7.

[635] Appellate Body Reports on *Canada – Aircraft*, para. 153 and in *EC – Asbestos*, para. 92.

[636] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 248.

> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

6.70 Furthermore, Article 31:3 stipulates that "[t]here shall be taken into account, together with the context [...] any subsequent agreement between the parties [...] or [..] any subsequent practice in the application of the treaty [...]".

6.71 Parties and third parties refer to W/120 and the 1993 Scheduling Guidelines as being relevant for the interpretation of the US Schedule. However, they disagree as to whether these two documents: (i) belong to the "context", within the meaning of Article 31:2(a) of the Vienna Convention; (ii) are to be examined as a subsequent agreement or are evidence of the subsequent practice of Members, pursuant to Article 31:3(a) or (b); or (iii) are "supplementary means of interpretation" within the meaning of Article 32. The United States also argues that the proper context for interpreting the US Schedule includes schedules of other Members. Finally, the context for the interpretation of US specific commitments includes the US Schedule and its structure. The Panel will examine these various elements in turn.

1993 Scheduling Guidelines and W/120 as part of the context

6.72 The Panel will start by examining whether W/120 and the 1993 Scheduling Guidelines belong to the context of the US Schedule within the meaning of Article 31:2(a) of the Vienna Convention.

6.73 The Appellate Body found that, when interpreting GATT tariff schedules, the *Harmonized System* ("HS") and its *Explanatory Notes* should be taken into account:

> "[W]e are puzzled by the fact that the Panel, in its effort to interpret the terms of Schedule LXXX, did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature."[637]

6.74 The Panel also notes the US argument that "Harmonized System numbers were an explicit and integral part of the schedule at issue in *EC – Computer Equipment*, while it is undisputed that the US Schedule makes no reference to the CPC".[638] In *EC – Computer Equipment* both the European Communities and the United States were parties to the HS, i.e. there was no controversy as to the relevance of the HS, whereas, in this dispute, there is some controversy as to the relevance – or at least part of it – of W/120, in particular with respect to CPC references.

6.75 So, while there are undoubtedly differences between tariffs and services schedules, it is our view that the Appellate Body's reasoning can be transposed in the context of GATS Schedules. Beyond the particular circumstances of the *EC – Computer Equipment* dispute, there is a more general principle which we can discern in the Appellate Body's findings which is that documents used as a "basis" for conducting requests – offers during a market access negotiations – should be taken into account for interpreting schedules. This is the case of both W/120 and the 1993 Scheduling Guidelines.

6.76 In *EC – Computer Equipment*, the Appellate Body did not indicate whether the HS and its Explanatory Notes belonged to the "context", within the meaning of Article 31 of the Vienna

[637] Appellate Body Report on *EC – Computer Equipment*, para. 89.
[638] United States' first oral statement, para. 31.

Convention, or were, rather, supplementary means of interpretation according to Article 32. In *US – Section 110(5) Copyright Act*[639], the panel made the following statements concerning the requirements for an instrument to be part of the "context" within the meaning of Article 31:2 of the Vienna Convention:

> "The International Law Commission explains in its commentary on the final set of draft Articles on the law of treaties that this provision is based on the principle that a unilateral document cannot be regarded as forming part of the context unless not only was it made in connection with the conclusion of the treaty, but its relation to the treaty was accepted by the other parties.[640] [...] It is essential that the agreement or instrument should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application.[641] It must equally be drawn up on the occasion of the conclusion of the treaty.[642] Any agreement or instrument fulfilling these criteria will form part of the 'context' of the treaty and will thus not be treated as part of the preparatory works but rather as an element in the general rule of interpretation."[643]

6.77 For W/120 and the 1993 Scheduling Guidelines to be part of the context within the meaning of Article 31:2(a), three conditions should be fulfilled. They must: (i) "relate" to the treaty, i.e. the GATS; (ii) constitute an agreement made between all the parties or an instruments made between some parties and accepted by the others as such; and (iii) be "in connexion" with the conclusion of the GATS.

6.78 With respect to the first condition, the stated objective of the 1993 Scheduling Guidelines is to "explain ... how commitments should be set out in schedules in order to achieve precision and clarity. ... a common format for schedules as well as standardization of the terms used in schedules are necessary to ensure comparable and unambiguous commitments."[644] Members felt the need to complement the GATS (Article XX) to ensure that GATS schedules would "speak" a common language. Clearly, GATS schedules cannot be understood without reference to the 1993 Scheduling Guidelines. For instance, basic terms such as "None", Unbound", and "Unbound*", which are used in *all* schedules, do not appear in the GATS itself; thus, they make sense only with reference to the 1993 Scheduling Guidelines. Also, the very format of GATS schedules was established in the Guidelines.[645] Both the 1993 Scheduling Guidelines and W/120 are "concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application."

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[639] Panel Report on *US – Section 110(5) Copyright Act*, para. 6.45.

[640] (*original footnote*) Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition, 1984, p. 129.

[641] (*original footnote*) Yasseen, L'interprétation des traités d'aprés la Convention de Vienne sur le Droit des Traités, op.cit., p. 37; cited by Sinclair, op.cit., p.129.

[642] (*original footnote*) "Il y a ici une certaine notion de contemporanéité, l'un ou l'autre peut être concomitant à cette conclusion, mais il peut la précéder ou la suivre sans s'en éloigner trop. Cette condition est justifée par l'idée même du contexte." See: Yasseen, op.cit., para. 16, p. 38.

[643] (*original footnote*) Sinclair, op. cit. 129. Sinclair mentions the example of the Council of Europe, where governmental experts charged with the task of negotiating and formulating an international convention of a particular topic, draw up, in parallel with the text of the convention, an explanatory report which sets out the framework within which and the background against which the convention has been drawn up, and which then goes on to furnish an Article by Article commentary on the text. The explanatory report is agreed upon unanimously by the governmental experts responsible for drawing up the text of the convention and it is adopted simultaneously with the text of the convention.

[644] 1993 Scheduling Guidelines, para. 1.

[645] 1993 Scheduling Guidelines, p. 12.

6.79 All this suggests that, although they are not an authoritative interpretation of the GATS[646], the 1993 Scheduling Guidelines are, nevertheless, inextricably linked to the GATS itself. As suggested by the European Communities, it is indubitable that the 1993 Scheduling Guidelines and W/120 assisted Members in the preparation of their schedules. The 1993 Scheduling Guidelines provide indications as to how Members collectively understand their GATS obligations in relation to their specific commitments. In that sense, we agree that their overall objective must have been shared by negotiators.[647]

6.80 Although both W/120 and the 1993 Scheduling Guidelines were "technically" drafted by the Secretariat – this was arguably the most practical and efficient way to work on such a matter – they can be considered "agreement[s] ... made between all [Members]" or an "instrument[s] ... made by one or more [Members]" but accepted by all of them as such within the meaning of Article 31:2(a) and (b) of the Vienna Convention. In this regard, it may be recalled that the two documents were prepared by the – then – GATT Secretariat, at the behest of the Uruguay Round participants. The participants can thus be considered to be the "intellectual" authors of the documents.[648] Besides, both documents were the object of a series of formal and informal consultations during which Members had the opportunity to amend them and to include changes. Both were circulated as formal "green band" documents with the agreement of the participants.[649]

6.81 Finally, both W/120 and the 1993 Scheduling Guidelines are "in connexion" with the GATS. Both documents were drafted in parallel with the GATS itself, with the stated purpose of being used as "guides" for scheduling specific commitments under the GATS and for the subsequent interpretation of Members' schedules. In that sense, they can be considered to have been "drawn up on the occasion of the conclusion of the treaty".[650] As to W/120, it was used by most WTO Members during the Uruguay Round to establish their schedules of specific commitments.[651] As indicated by Antigua and Canada, W/120 is referred to in Article 22.3(f) of the DSU[652] for the purpose of defining

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[646] Paragraph 1 of the 1993 Scheduling Guidelines states that "the answers [to questions that might occur to persons responsible for scheduling commitments] should not be considered as an authoritative legal interpretation of the GATS".

[647] European Communities' written submission, para. 68.

[648] At the 1988 Montreal Ministerial Conference, Ministers agreed that future work in the services negotiations should provide for the "compilation by the secretariat of a reference list of sectors by February 1989. This process could be assisted by submissions by participants" (MTN.TNC/7(MIN), Part II). The 1993 Scheduling Guidelines have been prepared by the Secretariat "in response to requests by participants" (MTN.GNS/W/164, footnote 1).

[649] In various instances, the 1993 Scheduling Guidelines are referred to as the "agreed" Guidelines. See, for instance, informal Paper for the Group of Negotiations on Services, *Verification of Schedules of Commitments and MFN Exemptions – Opening Statement*, 10 February 1994, para. 2 (emphasis added) and *EC – Banana III*, para. 7.289. By contrast, the *Explanatory Note* on *Listing of MFN Exemptions*, which was drafted and discussed at the same time, has remained an informal document because Members' agreement on it has never been secured (see *Listing of Article II Exemptions – Explanatory Note by the Secretariat*, Job No. 2061, 15 September 1993).

[650] Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition, 1984, p. 129.

[651] The Panel notes that the huge majority of GATS schedules are based on W/120, although they do not explicitly state so: they follow its structure, headings and codes, with only minor derogations for a few of them. Only three schedules do not follow the general structure of W/120; however, even in these cases, one can identify some "traces" of W/120, for instance at sub-sectoral level. Only six schedules contain an explicit reference to W/120. The Panel also notes that most Members chose to refer to CPC numbers to define the scope of their commitments: (i) only 17 schedules adopted a non-CPC approach; (ii) a few schedules have a "mixed" approach, i.e. they include CPC numbers for some sectors only. The systematic use of W/120 and CPC references is even more striking with the 20 Members that have acceded since the end of the Uruguay Round. A survey of these schedules shows that they are all based on W/120 and all but one used CPC references.

[652] The relevant provision reads: "for the purpose of this paragraph [i.e. paragraph 3, referring to the suspension of concessions], "sector" means: [...] (ii) with respect to services, a principal sector as identified in

what a services "sector" is in case of suspension of concessions. At the time of the conclusion of the WTO Agreement, Members made reference to W/120 in connexion with the DSU; this lends support to the view that W/120 can be considered as belonging to the context within the meaning of Article 31:2 of the Vienna Convention.

6.82 On this basis, both W/120 and the 1993 Scheduling Guidelines were agreed upon by Members with a view to using such documents, not only in the negotiation of their specific commitments, but as interpretative tools in the interpretation and application of Members' scheduled commitments. As such, these documents comprise the "context" of GATS Schedules, within the meaning of Article 31 of the Vienna Convention and the Panel will use them for the purpose of interpreting the GATS, GATS schedules and thus the US Schedule. In so doing, the Panel is aware that: (i) the 1993 Scheduling Guidelines do not represent an authoritative interpretation of the GATS; and (ii) there was no obligation imposed on WTO Members to use the W/120 and its references to the CPC. Yet, these instruments must be examined, as context, to determine the ordinary meaning of the terms used in a Member's GATS Schedule and these terms must have a meaning. The Panel will now proceed to interpret the US Schedule, in particular sector 10, in the context of document W/120 and the 1993 Scheduling Guidelines.

Interpreting the US Schedule in the context of document W/120 and the 1993 Scheduling Guidelines

6.83 The US Schedule does not contain any explicit reference to the CPC. We recall also that the United States has included under sector 10 a sub-sector, namely, sub-sector 10.D, entitled *Other Recreational Services (except sporting)*. In light of the public international law principle of effective interpretation, such terms in the US Schedule must be given a meaning. The Panel needs, thus, to proceed to interpret the US Schedule, in particular sub-sector 10.D, in light of the ordinary meaning of the terms used *in the context of document W/120 and the 1993 Scheduling Guidelines*.

6.84 Paragraph 15 of the 1993 Scheduling Guidelines states that:

> "[S]chedules record, for each sector, the legally enforceable commitments of each Member. It is therefore vital that schedules be clear, precise and based on a common format and terminology."[653]

6.85 Paragraph 16 of the 1993 Scheduling Guidelines states:

> "[T]he legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector and sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on the Secretariat's revised Services Sectoral Classification List [MTN.GNS/W/120]. Each sector contained in the Secretariat list is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN Provisional Central Product Classification. […] If a Member

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the current "Services Sectoral Classification List" which identifies such sectors". A footnote to subparagraph (ii) indicates that "[T]he list in document MTN.GNS/W/120 identifies eleven sectors" and lists them.

[653] *Scheduling of Initial Commitments in Trade in Services: Explanatory* Note, MTN.GNS/W/164 (3 September 1993) (hereinafter the "1993 Scheduling Guidelines"), para. 15. The same requirement appears in the *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (28 March 2001) (hereinafter the "2001 Scheduling Guidelines"), para. 22.

> wishes to use its own sub-sectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment."[654]

6.86 The 1993 Scheduling Guidelines are not an authoritative legal interpretation of the GATS for various reasons. First, they explicitly state as much.[655] Second, according to Article IX:2 of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of WTO agreements. However, as part of the context for the interpretation of the US Schedule, the 1993 Scheduling Guidelines explain the intention of Members with regard to the nature and scope of the Members' GATS scheduled commitments and how Members should and can read each other's Schedules.

6.87 Paragraph 16 of the 1993 Scheduling Guidelines suggests that there was an understanding among Members that, in order to secure clarity and predictability, the classification of sectors and sub-sectors should be based on W/120 and the corresponding CPC numbers. The Panel agrees with the United States that no Member was forced or obliged to schedule specific commitments in accordance with W/120 and the CPC numbers and that the CPC was not binding on Members. However, as argued by the European Communities, "departure from W/120 and CPC definitions was not free and unconditional and was not meant to allow convenient ambiguity in Members' schedules".[656] Pursuant to paragraph 16 of the 1993 Scheduling Guidelines, a Member intending not to use W/120 and/or the corresponding CPC numbers had two options: (i) to use its own sub-sectoral classification or definition and give concordance with the CPC; or (ii) if this was not possible, to give a "sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment". In fact, paragraph 16 of the 1993 Scheduling Guidelines is nothing other than the expression of a general requirement of transparency to ensure clarity and predictability of the specific commitments, expressed in the GATS preamble.

6.88 The relevant section of W/120 is as follows:

"SECTORS AND SUB-SECTORS — CORRESPONDING CPC

[...]

10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES (other than audiovisual services)	
A.	Entertainment services (including theatre, live bands and circus services)	9619
B.	News agency services	962
C.	Libraries, archives, museums and other cultural services	963
D.	Sporting and other recreational services	964
E.	Other	

[...]"

[654] Para. 16 of W/164.
[655] Para. 1 of W/164.
[656] See para. 4.32 above.

6.89 CPC number 964, corresponding to sub-sector 10.D (*Sporting and other recreational services*), is broken down as follows:

"964 Sporting and other recreational services

9641 Sporting services
96411 Sports event promotion services
96412 Sports event organization services
96413 Sports facility operation services
96419 Other sporting services

9649 Other recreational services
96491 Recreation park and beach services
96492 Gambling and betting services
96499 Other recreational services n.e.c."

6.90 The United States argues that "because [the United States] did not bind itself to, or reference or rely on, the CPC in the text of its Schedule, the CPC definitions cannot control the interpretation of the US Schedule. The question whether to tie commitments of the United States or any other Member to CPC definitions was a matter for negotiations, the answer to which should not be imposed post hoc through dispute settlement [...]."[657] The Panel would like to make two remarks with respect to this statement. First, the fact that the United States did not bind itself to the CPC does not mean that the CPC is not relevant for the purpose of determining the ordinary meaning of the US Schedule, in its context, and in light of the object and purpose of the GATS. The Panel is of the view that, even if it is not binding, the CPC, through the context of W/120 and the Scheduling Guidelines, remains relevant for the interpretation of the US Schedule.

6.91 Secondly, in this dispute, there is no question of seeking to "impose" the CPC on the United States, but simply to give a meaning to a US commitment according to the customary rules of treaty interpretation. If the United States had made clear references to the CPC, the interpretation of the US Schedule would be controlled by the CPC definitions that would compose the ordinary meaning of the terms of the treaty. This is not the case here. The United States had the possibility to provide its own definitions for sub-sector 10.D. It did not. In the absence of any clear terms or any other clear indication of the meaning and scope of the US entries in sub-sector 10.D of its Schedule, the Vienna Convention points to a series of instruments that should be used to assist in the interpretation of the US Schedule. Such instruments include W/120, which refers to CPC definitions, and the 1993 Scheduling Guidelines which explains the relationship between Members' schedules, W/120 and the CPC. In these findings, we do not mean to suggest that "CPC schedules" are like "non-CPC schedules". Clearly, where "non-CPC" schedules provide a sufficiently detailed definition, the scope of the commitment should not be ambiguous, as in the present case. The Panel is obliged to give meaning to a specific entry in the US Schedule, in light of the particular circumstances of this case. Moreover, the US documents that the Panel will examine pursuant to Article 32 of the Vienna Convention (see below) tend to confirm – rather than contradict – this approach.

6.92 In its decision in *EC – Computer Equipment*, the Appellate Body stated that:

> "[w]hile each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members."[658]

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[657] United States' first written submission, paras. 64-65.

[658] Appellate Body Report on *EC – Computer Equipment*, para. 109. See also the similar reasoning of the Appellate Body in *Canada – Dairy*, para. 139 when dealing with the unilateral commitments made by Canada in its Agriculture Schedules.

6.93 The Panel is of the view that W/120 and the 1993 Scheduling Guidelines assist in establishing the common agreement among WTO Members with respect to the content of the US Schedule. Where the US Schedule follows W/120 without any clear departure and in the absence of any specific definition, the United States has created an expectation that its commitments must be interpreted in the light of W/120 *and* the corresponding CPC numbers. Sub-sector 10.D of the US Schedule is entitled *Other Recreational Services (except sporting)*; we understand that this sub-sector corresponds to CPC 964 (*Sporting and other recreational services*). By explicitly excluding *Sporting services*, the United States has excluded the category of services corresponding to CPC 9641 (*Sporting services*). Hence, what remains under sub-sector 10.D of the US Schedule is the CPC category 9649 (*Other recreational services*), which includes, *inter alia*, *gambling and betting services* (CPC 96492). Therefore, the US Schedule, read in the light of paragraph 16 of the 1993 Scheduling Guidelines, is to be understood to include a specific commitment on gambling and betting services under sub-sector 10.D (*Recreational services (except sporting)*).

6.94 The Panel wishes to underline that there is no suggestion that the "context" (i.e. the 1993 Scheduling Guidelines and W/120) is a part of the text of the GATS and would, therefore, "bind" Members. Thus, while the 1993 Scheduling Guidelines and W/120 do not impose any "obligations" on Members, nevertheless, an interpreter trying to interpret and appreciate relevant GATS obligations must read them, where appropriate, in light of the 1993 Scheduling Guidelines and W/120. This is the reason why these two documents are relevant when trying to give meaning to the terms used in the US Schedule. In this dispute, an interpretation based mainly – if not exclusively – on the ordinary meaning of the words does not ensure the clarity and predictability of the US specific commitments at stake.[659]

6.95 Finally, even if the 1993 Scheduling Guidelines and W/120 were "only" preparatory work, the Panel's conclusions would be the same: Article 32 of the Vienna Convention allows a Panel to resort to preparatory work as supplementary means of interpretation when the interpretation according to Article 31 "leaves the meaning ambiguous or obscure".

6.96 The Panel will further discuss below other elements of evidence confirming that the United States led other Members to believe in good faith that, unless otherwise provided for, the ordinary meaning of the terms of the US Schedule should be read in light of W/120, including the CPC references.

Other Members' GATS Schedules as part of the context for the interpretation of the US Schedule

6.97 The United States refers to other Members' schedules as being part of the context in which the US Schedule must be interpreted. The Panel concurs with the United States that other Members' schedules comprise the "context" within the meaning of Article 31:2 of the Vienna Convention. All Members' schedules are annexed to the GATS and, according to Article XX:3, are "an integral part thereof".

6.98 The United States does not need to invoke the fact that other Members did not use the CPC to justify its own choice not to refer to the CPC because it was entitled to do so anyway. In that sense, the practice of other Members is relevant only to confirm that, as stipulated in the 1993 Scheduling Guidelines, Members were free to use or not to use the CPC. If the United States wanted to rely on the other Members' schedules, as evidence of a "practice of Members" relevant in the interpretation of its own Schedules, it should have demonstrated that such Members' practice was coherent and consistent. We believe that the few examples pointed to by the United States do not evidence any such practice by Members. The Panel agrees with the European Communities that each of the commitments in other Members' schedules has to be placed in its own – different – immediate

[659] See above at para. 6.87.

context, which is the schedule to which it belongs.[660] Each schedule has its own intrinsic logic, which is different from the US Schedule. Moreover, no Member could invoke the fact that other "non-CPC" Members did not provide "sufficiently detailed definitions" to justify ambiguities in its own schedule.

6.99 Moreover, the Panel fails to see the direct relevance of other Members' schedules to support the US argument that the United States has not undertaken specific commitments on gambling and betting services.

6.100 In particular, the Panel does not accept the US argument that "the United States could only have a commitment for gambling services if it had scheduled the 10.E residual category". The mere fact that two Members scheduled gambling and betting services under 10.E is not sufficient to allow the United States to argue that, should it have undertaken specific commitments, it would have done so under 10.E as well. More than two Members seemed to be of the view that gambling and betting services belong to sub-sector 10.D, and made commitments, or introduced limitations with respect to those services. Moreover, the reason why two Members scheduled gambling under sub-sector 10.E can be determined only on the basis of an examination of the Schedules concerned; this is outside the terms of reference of this Panel.

6.101 The United States further argues that should it have undertaken a commitment on gambling and betting, it would have done so under 10.E ("Other"). This appears to be at odds with the other US argument that the exclusion of "sporting" under sub-sector 10.D had the consequence of excluding gambling and betting services.[661] The Panel takes note of the US response to a question posed by the Panel,[662] but is nevertheless of the view that the two US arguments contradict the principle that entries in a classification system – and in a Schedule – should be mutually exclusive. Further, these arguments are in contradiction with the USITC Document, which indicates that sub-sector 10.D corresponds to CPC 964 (which includes gambling) and that there is "no corresponding CPC" for sub-sector 10.E (see below paragraphs 6.122 *et seq.*). Moreover, this argument is also difficult to reconcile with the cover-notes to the US draft Schedules during the Uruguay Round (see below paragraphs 6.115 *et seq.*).

6.102 On the basis of these considerations, the Panel is of the view that an examination of the schedules of other Members does not allow it to conclude that, should the United States have undertaken specific commitments on gambling and betting services, it would have done so under sub-sector 10.E. The US Schedule, interpreted in the context of the schedules of other Members, does not contradict our previous conclusion that the US Schedule, includes a specific commitment on gambling and betting services under sub-sector 10.D (*Recreational services (except sporting)*).

The US Schedule as context for the interpretation of sub-sector 10.D

6.103 The Panel agrees with the United States that, under the GATS, Members can "define their offers (and their ensuing obligations) in terms which suits their needs"[663] (the 1993 Scheduling Guidelines do not say otherwise). The Panel notes that the US Schedule follows closely the structure of W/120, in particular as far as sector 10 is concerned. The numbering used by the United States in its Schedule for all sectors and sub-sectors corresponds to that of W/120. But for a few minor drafting changes (omission of the word "services", for instance), the sectoral and sub-sectoral headings are similar to those contained in W/120. The section on *Recreational Services* in the US Schedule is placed under number 10, as in W/120. The first three sub-sectors (A to C) on which the United States has undertaken commitments have the same denominations as in W/120 and are placed in the same

[660] European Communities' written submission, paras. 44-60.
[661] United States' first written submission, paras. 75 and 71.
[662] In particular, the United States' reply to Panel question No. 8.
[663] United States' first written submission, para. 65, referring to Appellate Body Report on *EC – Computer Equipment*, paras. 109-110.

order. The United States entitled sub-sector 10.D *Other recreational services (except sporting)*, as compared to *Sporting and other recreational services* in W/120. Finally, the Panel also notes that the USITC itself states that "[t]he U.S. Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list".[664]

6.104 In a number of instances, the United States departed from W/120 and, as recommended in the 1993 Scheduling Guidelines, clearly indicated that it was doing so. For instance, in two cases, the United States did not wish to include certain elements otherwise covered by W/120 and it specifically said so.[665] Similarly, in scheduling its specific commitments on environmental services, the United States, while using W/120, expressly defined the activities covered by its specific commitments.[666] With respect to "Financial Services - Insurance", the US Schedule indicates, as stipulated in paragraph 16 of the 1993 Scheduling Guidelines, that "commitments in this sub-sector are undertaken pursuant to the alternative approach to scheduling commitments set forth in the Understanding on Commitments on Financial Services".[667] In scheduling specific commitments on hospital and other health care facilities, the United States expressly defined the scope of that sub-sector in its Schedule.[668]

6.105 When asked by the Panel which classification system, if any, the United States had followed in establishing its Schedule, the United States replied that "subject to some changes (e.g. "except sporting"), the United States generally followed the W/120 *structure*", adding that its Schedule should be interpreted according to Articles 31 and 32 of the Vienna Convention.[669] The United States did not indicate a relevant US industry classification system for interpreting its Schedule.[670] In its Schedule, the United States has not provided any kind of definition for the sub-sectors listed under sector 10, contrary to what is recommended in the 1993 Scheduling Guidelines. Finally, we recall that dictionary definitions leave a number of questions open.

(iv) ... ordinary meaning in light of the object and purpose of the treaty

6.106 The object and purpose of the GATS lends support to the conclusion that the ordinary meaning of the terms used in the US Schedule, when read in their context, is that the United States has undertaken specific commitments on gambling and betting services in sub-sector 10.D of its Schedule. Our conclusion derives from the need to provide clarity and precision in respect of the US entry under sub-sector 10.D (*Other recreational services, except sporting*) and the fact that, unless otherwise indicated in the schedule, Members were assumed to have relied on W/120 and the corresponding CPC references.

6.107 The need for clarity and precision in Members' schedules referred to in the 1993 Scheduling Guidelines is consistent with the preamble to the GATS which stipulates, *inter alia*, that, in establishing the GATS, Members sought the expansion of trade in services "under conditions of transparency". This requirement of transparency is undoubtedly an object and purpose of the GATS – and the WTO in general – and applies equally to GATS schedules of specific commitments. Indeed, schedules of specific commitments determine, *inter alia*, the scope of market access and national

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[664] See the section below dealing with *US practice – USITC Document*, and in particular para. 6.132.

[665] With respect to "Computer and Related Services", the US Schedule contains the following entry: "(MTN.GNS/W/120 a) – e), except airline computer reservation systems)." With respect to "Publishing", the following entry is made: "(Only part of MTN.GNS/W/120 category: 'r) Printing, Publishing'."

[666] The entry "Environmental Services" is followed by note 19, which provides that "[i]n each of the following sub-sectors, United States' commitments are limited to the following activities: […]".

[667] US Schedule, p. 54.

[668] US Schedule, p. 117. The entry "Hospital and Other Health Care Facilities" is followed by the following definition: "Direct ownership and management and operation by contract of such facilities on a 'for fee' basis".

[669] United States' reply to Panel question No. 5 (emphasis in the original).

[670] United States' reply to Panel question No. 6.

treatment obligations that Members undertake under the GATS. It is, therefore, important that schedules be readily understandable by all other WTO Members, as well as by services suppliers and consumers.

6.108 The Appellate Body found that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994."[671] This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS.

6.109 Finally, our conclusion is compatible with the principle of progressive liberalization as embodied in Article XIX of the GATS and the preamble of the GATS.

(v) Conclusions under Article 31 of the Vienna Convention

6.110 In its interpretation of the US Schedule in light of Article 31 of the Vienna Convention, the Panel noted that dictionary definitions of key terms in that Schedule ("entertainment", "recreational", and "sporting") do not exclude that gambling and betting services could be covered under sub-sector 10.D of the US Schedule. We also found that these definitions are less than conclusive. The Panel then examined the terms of the US Schedule in the context of W/120 and the 1993 Scheduling Guidelines and found that, where the US Schedule follows W/120 without any clear departure and in the absence of any specific definition, there would be reason enough for Members to believe that the scope of sub-sector 10.D in the US Schedule corresponds to that of W/120 *and* the corresponding CPC numbers. Thus, the Panel believes that the US Schedule, read in the light of paragraph 16 of the Scheduling Guidelines, can be understood to include a specific commitment on gambling and betting services under sub-sector 10.D (*Recreational services (except sporting)*).

6.111 CPC 96492 does not offer an explanatory note for "gambling and betting services". However, for the purpose of this dispute, the Panel will proceed on the basis of the parameters proposed in the Introduction to the Report (see above Section VI.A.6).

6.112 The Panel will now resort to Article 32 of the Vienna Convention (supplementary means of interpretation), to confirm the meaning imparted to sub-sector 10.D of the US Schedule on the basis of its examination under Article 31.

(vi) Supplementary means of interpretation

6.113 In *EC – Computer Equipment*, the Appellate Body found it appropriate to resort to "supplementary means of interpretation", pursuant to Article 32 of the Vienna Convention:

> "The application of [the] rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of a term [footnote omitted]. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to: '... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'. With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."[672]

[671] Appellate Body Report on *EC – Computer Equipment*, para. 82.
[672] Appellate Body Report on *EC – Computer Equipment*, para. 86. See also Appellate Body Report on *Canada – Dairy*, paras. 138-139.

6.114 Under Article 32, the Panel will take into account preparatory work. However, Article 32 is not limited to preparatory work, but allows a treaty interpreter to take into consideration other supplementary means of interpretation.[673] The Panel will thus consider other relevant material.

Preparatory work

Cover-notes to US draft Schedules during the Uruguay Round

6.115 Antigua and the European Communities referred to US Draft Final Schedules towards the end of the Uruguay Round. The relevant paragraph of the cover-note to the US Draft Final Schedule, dated 7 December 1993, reads as follows:

> "[E]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)".[674]

6.116 This text also appeared in the Revised Conditional Offer tabled by the United States on 1 October 1993.[675] The European Communities indicated that the same paragraph was included in the cover-note of the Schedule of the United States, tabled on 15 December 1993.[676] The entire cover-note was deleted from the US Schedule that was circulated on 15 April 1994 as GATS/SC/90.[677]

6.117 This cover-note qualifies as preparatory work, as well as circumstances of the conclusion of the treaty, and is undoubtedly relevant as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention.

6.118 In the Panel's view, the fact that this reference to W/120 was made at a crucial stage during the services market access negotiations and was contained in three successive drafts cannot be ignored as it would have led participants to believe in good faith that the "scope" of the US commitments "corresponded" to the "sectoral coverage" of W/120. The date of 15 December 1993 marked the end of the Uruguay Round negotiations, including the services negotiations. The only activity in the area of services thereafter, during the early months of 1994, was a process of verification of schedules

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[673] "Article 32 gives only examples of the principal supplementary means of interpretation. [...] There are several other means of interpretation, though it is not always easy to distinguish them from familiar legal techniques, often based on commonsense or grammatical rules." Aust A., *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 200. See also Elias T. O., *The Modern Law of Treaties*, Sÿthoff Publishers, Leiden, 1974, p. 80 and Sir R. Jennings and Sir Arthur Watts, *Oppenheim's International Law*, Longman Publishers, Harbour, 9th ed., 1996, pp. 1275-1282.

[674] Communication from the United States of America – Draft Final Schedule of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.3, 7 December 1993.

[675] Communication from the United States of America – Revised Conditional Offer of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.2, 1 October 1993. The cover-note does not appear in the first and second draft schedules circulated by the United States. See Communication from the United States of America, Conditional Offer of the United States of America Concerning Initial Commitments, MTN.GNS/W/112, 13 November 1990. Communication from the United States of America, Revised Conditional Offer of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.1, 21 January 1992.

[676] Communication from the United States – Schedule of the United States Concerning Initial Commitments on Trade in Services, MTN.GNS/W/112/Rev.4, 15 December 1993. This document was circulated in paper copy only.

[677] The Panel notes that a number of draft final schedules presented between October and December 1993 started with a cover-note where Members were giving some indications on the content of their schedule and/or the conditions attached to its circulation. The decision to suppress these cover-notes seems to have been taken during the process of verification of schedules, which took place between January and March 1994, but, since this process was largely informal, it has not been possible to identify a written source confirming this point.

which was not meant to modify the substantive results of the negotiations.[678] Thus, contrary to what is suggested by the United States[679], the scope of the results of the negotiations could not be altered unilaterally after 15 December 1993.[680]

6.119 The scope of the "sectoral coverage" in W/120, referred to in the cover-notes, can only be determined when reading W/120 in its entirety, i.e. by reading the left-hand column (*Sectors and Sub-sectors*) jointly with the right-hand column (*Corresponding CPC*). Indeed, the left-hand column, which enumerates the sectoral and sub-sectoral headings, is not sufficiently informative by itself. In many, if not most cases, the ordinary meaning alone of the eleven sectors and some 160 sub-sectors listed in that column cannot determine with sufficient clarity the scope of the sector or sub-sector concerned. Also, the ordinary meaning is not sufficient to ensure the mutual exclusiveness of the headings, which is a prerequisite for any classification system. In W/120, the sectoral and sub-sectoral headings must be read in conjunction with the CPC references indicated in the right-hand column; these CPC references ensure that the headings are mutually exclusive.[681]

6.120 The cover-notes indicate that the United States used W/120 not only for the "ordering"[682] of its Schedule or for establishing its "structure", but also to determine the *scope* of its commitments, except where specifically noted otherwise, even though it chose not to refer to the CPC, as it was indeed entitled to do under the 1993 Scheduling Guidelines. Nevertheless, it is clear that, as the negotiations progressed and were finalized, the understanding of Uruguay Round participants with respect to the commitments offered by the United States was that the United States had followed W/120. Document W/120 *in its entirety* was the benchmark instrument that Uruguay Round participants could rely on in good faith to assess the content of the US offer until the very end of the negotiations. In *EC – Computer Equipment*, the Appellate Body noted, in particular that:

> "[I]t appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the Harmonized System's nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. [...] We believe [...] that a proper interpretation of [the] Schedule [...] should have included an examination of the *Harmonized System* and its *Explanatory Notes*."[683]

6.121 In this dispute, the cover-notes indisputably testify that services market access negotiations were held on the basis of W/120 and contribute to determining the common intention of the participants to the Uruguay Round negotiations with regard to the content of the US Schedule, and, thus, the obligations that the United States was willing to undertake. It can, therefore, be concluded

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[678] This process was announced in the Airgram GATT/AIR/3544, dated 14 January 1994, (Uruguay Round: Group of Negotiations on Services – General Agreement on Trade in Services: Verification of Schedules of Commitments and MFN Exemptions): "[a]s announced by the Chairman of the GNS in the Group's meeting of 11 December 1993, and as agreed by the Group, a process of verification of schedules of commitments in services and of lists of MFN exemptions will be established as set out below. It is emphasised that, negotiations on services having been concluded, the purpose of this process is to confirm the technical accuracy of schedules and exemption lists and not to amend their substantive content." Moreover, during an informal meeting on 11 December 1993, the Chairman of the GNS had stated that after 15 December 1993, the "schedules and MFN lists cannot be modified or withdrawn in any way that would alter the results of the negotiations. Only additional commitments could be incorporated or MFN exemptions withdrawn". See Processing and Verification of Final Schedules and Exemption Lists, Statement by the Chair of the GNS on 11 December 1993, informal document dated 12 December 1993. There is no record of this meeting.

[679] United States' reply to Panel question No. 30.

[680] This opinion appears to be shared by the European Communities in its reply to Panel question No. 3.

[681] The Panel notes that the introduction to the CPC Prov., for instance, states that "[t]he CPC is a system of categories covering both goods and services that is both exhaustive and mutually exclusive." See Provisional Central Product Classification, Statistical Papers, Series M No. 77, United Nations (1991), p. 7 (emphasis added).

[682] United States' second oral statement, para. 11 and reply to Panel question No. 3.

[683] Appellate Body Report on *EC – Computer Equipment*, para. 89.

that the common intention of the Members, at the time the US specific commitments were negotiated, was that where the US Schedule visibly followed W/120 without any clear and explicit departure, the specific commitments at issue were to be interpreted in the light of W/120 and the CPC numbers associated with it. The fact that the cover-note does not explicitly refer to the CPC does not change our conclusion. In fact, the indication, contained in three successive US draft schedules, that the "scope of the sectoral commitments of the United States corresponds to the sectoral coverage" in W/120 was sufficiently clear in itself.

Other supplementary means of interpretation

US practice – USITC Document

6.122 As indicated in paragraph 6.114, the Panel is of the view that Article 32 of the Vienna Convention is not necessarily limited to preparatory material, but may allow treaty interpreters to take into consideration other relevant material. A commentator indicates that the principle of acquiescence is one of these possible aids to interpretation: "[i]f a party has made plain its understanding of the meaning of a provision, and it later applies it in that sense without objection, other parties may not be able to insist on a different interpretation. Article 31:3(b) might also apply".[684]

6.123 Antigua argues that the United States International Trade Commission ("USITC") itself indicates that sub-sector 10.D of the US Schedule corresponds to sub-sector 10.D of W/120 and CPC code 964.[685] In their responses to the Panel, Antigua, Canada, the European Communities and, to some extent, Mexico, argue, in essence, that the USITC Document can be used as an interpretative aid, which has probative value and confirms other evidence (such as the 1993 Scheduling Guidelines or the cover-note to the US Draft Final Schedule) concerning the interpretation of the US Schedule. These Members also argue that the acts of the USITC can be attributed to, and bind, the US government (in particular given the fact that the USITC was formally mandated by the USTR to maintain the US Schedule).[686]

6.124 In its reply to a question posed by the Panel, the United States argues that the USITC Document is "merely an 'explanatory' text" by an "independent agency" which is meant to facilitate comparison with other documents. Contrary to the Statement of Administrative Action ("SAA"), the USITC Document does not provide authoritative interpretative guidance of US law. According to the United States, the USITC Document does not bind the United States with respect to the US Schedule because the United States, like all Members, cannot unilaterally adopt multilaterally binding interpretations of a term of the GATS.[687]

6.125 As a starting point, the Panel agrees with the United States that the USITC Document is not a binding interpretation of the US Schedule because no Member can unilaterally adopt binding interpretations of any WTO agreement, nor of any international treaty. However, this does not mean that the USITC Document must be disregarded altogether. While the USITC Document cannot, on its own, determine the scope of the US Schedule, it is undoubtedly one element in the body of evidence that the Panel can and must consider when assessing the common intentions of the Members for the purpose of interpreting the scope and the meaning of the US Schedule. Therefore, the Panel must determine the interpretative value of the USITC Document with respect to the US Schedule.

[684] Aust A., *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 200.
[685] *US Schedule of Commitments under the General Agreement on Trade in Services*, United States International Trade Commission, May 1997 (hereinafter "the USITC document").
[686] Replies to Panel question No. 2 by Antigua, Canada, the European Communities and Mexico.
[687] United States' reply to Panel question No. 2.

6.126 The USITC is an agency of the US federal government, created by an Act of Congress.[688] It was given a number of powers and responsibilities under a number of federal statutes[689], including the power to make rules and regulations.[690] The USITC Document consists of "explanatory materials" produced by the USITC in connection with the US Schedule. As to the role of the USITC in relation to the US Schedule, the Panel notes that "[a]t the request of the Office of the United States Trade Representative, the United States International Trade Commission (USITC) assumed responsibility for maintaining and updating, as necessary, the United States' Schedule of Commitments [...] and List of MFN Exemptions".[691] The USTR is also an agency of the US federal government, created by Act of Congress.[692] It is given a variety of powers and responsibilities under a number of federal statutes[693], including the power to make rules and regulations[694], the power and responsibility for the conduct of all international trade negotiations, including "any matter considered under the auspices of the World Trade Organization"[695] and, in particular, to "develop (and coordinate the implementation of) United States policies concerning trade in services."[696]

6.127 We believe that, as an agency of the United States government with specific responsibilities and powers, actions taken by the USITC pursuant to those responsibilities and powers are attributable to the United States.

6.128 This conclusion is supported by the International Law Commission ("ILC") *Articles on the Responsibility for States of Internationally Wrongful Acts.*[697] Article 4, which is based on the principle of the unity of the State, defines generally the circumstances in which certain conduct is attributable to a State.[698] This provision is not binding as such, but does reflect customary principles of international law concerning attribution. As the International Law Commission points out in its commentary on the Articles on State Responsibility, the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognised in international judicial decisions."[699] As explained by the ILC, the term "state organ" is to be understood in the most general

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[688] 19 U.S.C. §1330.
[689] See, e.g., 19 U.S.C. §§1331-1339; 19 U.S.C. §2151.
[690] 19 U.S.C. §1335.
[691] USITC Document, p. vii.
[692] 19 U.S.C. §2171(a).
[693] See, e.g., 19 U.S.C. §§ 2171(c)-(f).
[694] 19 U.S.C. §2171(e)(3).
[695] 19 U.S.C. §2171(c)(1)(C).
[696] 19 U.S.C. §2114c(1)(A).
[697] On 12 November 2001 the Resolution on the Responsibility of States for internationally wrongful acts was adopted by the general Assembly of the United Nations. The third paragraph of this resolution stats that the General Assembly "takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."

698 Article 4 states that: "The conduct of any State organ shall be considered an act of that 'State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.' An organ includes any person or entity which has the status in accordance with the internal law of the State." *Articles on the Responsibility for States of Internationally Wrongful Acts*, as annexed to the UN General Assembly Resolution of 12 December 2001, A/RES/56/83.

[699] *Commentaries to the draft Articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2; J. Crawford, *The International Law Commission's Articles on State Responsibility- Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, commentary to Article 4 at p. 94, para. 3 and footnote 108.

sense.[700] It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.

6.129 The fact that certain institutions performing public functions and exercising public powers are regarded in internal law as autonomous and independent of the executive government does not affect their qualification as a state organ.[701] Thus, the fact that the USITC is qualified as an "independent agency" does not affect the attributability of its actions to the United States, because what matters is the activity at issue in a particular case, not the formal qualification of the body concerned.

6.130 Consequently, official pronouncements by the USITC in an area where it has delegated powers are to be attributed to the United States. In this dispute, the USITC Document can legitimately be considered to be probative of the United States' interpretation of its own GATS Schedule. The Panel will now turn to the content of the USITC Document.

6.131 The relevant section of the USITC Document reads as follows (bold added):[702]

GATT Secretariat's Services Sectoral Classification List	**United Nations' Provisional Central Product Classification System**	**U.S. Schedule of Services Commitments**	**Notes**
Sectors and Sub-sectors	**Sections, Divisions, Groups, Classes**	**Sector-Specific Commitments**	
10.RECREATIONAL, CULTURAL AND SPORTING SERVICES		10.RECREATIONAL, CULTURAL AND SPORTING SERVICES	*GATT and U.S. section 10 excludes audiovisual services*
A. Entertainment services	Class 9619: Other entertainment services	A. Entertainment services	*GATT and U.S. sector "10.A: Entertainment services" includes theatre, live bands and circus services.*
B. News agency services	Group 962: News agency services	B. News agency services	
C. Libraries, archives, museums and other cultural services	Group 963: Library, archive, museum and other cultural services	C. Libraries, archives, museums and other cultural services	
D. Sporting and other recreational services	**Group 964: Sporting and other recreational services**	**D. Other recreational services**	***U.S. sector "10.D: Other recreational services" excludes sporting***
E. Other (*No corresponding CPC*)		E. No U.S. commitment	

6.132 According to the USITC, the purpose of the document is:

[700] The International Law Commission's Articles on State Responsibility, p. 95, para. 6.

[701] The International Law Commission's Articles on State Responsibility, p. 92, para. 6 and p. 98, para. 11.

[702] USITC Document, p. 25.

> "[T]o facilitate comparison of the U.S. Schedule with foreign schedules, the USITC has developed a concordance that demonstrates the relationships between sectors found in the U.S. Schedule, sectors identified in the GATT Secretariat's Services Sectoral Classification List, and sectors defined and numbered in the United Nations' Provisional Central Product Classification (CPC) System. In preparing national schedules, countries were requested to identify and define sectors and sub-sectors in accordance with the GATT Secretariat's list, which lists sectors and their respective CPC numbers. Accordingly, foreign schedules frequently make explicit references to the CPC numbers. The U.S. Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list. *The concordance developed by the USITC clarifies how the service sectors referenced in the GATT Secretariat's list, the CPC System, and the U.S. Schedule correspond*."[703] (emphasis added)

6.133 The content of the USITC Document is not a binding interpretation on the United States. However, it has probative value as to how the US government views the structure and the scope of the US Schedule, and, hence, its GATS obligations. This document confirms other evidence already discussed by the Panel regarding the scope of the United States' specific commitments: W/120, the 1993 Scheduling Guidelines and the cover-notes to the US Uruguay Round Draft Schedules. The USITC Document clearly states that sub-sector 10.D of the US Schedule "corresponds" to CPC 964. Under this sub-sector, the United States' Schedule explicitly excluded "sporting services" (CPC 9641), but not "gambling and betting services" (CPC 96492). This confirms the Panel's conclusion following its analysis pursuant to Article 31 of the Vienna Convention, that the US Schedule includes specific commitments on gambling and betting services.

(c) Conclusion

6.134 Therefore, the Panel finds that the US Schedule includes, under sub-sector 10.D, entitled "Other recreational services (except sporting)", specific commitments on gambling and betting services.

(d) Final comments

6.135 Lastly, and before the Panel takes leave of this issue, it would like to note the United States' position that it did not and indeed could not have scheduled a commitment for gambling and betting services given the long legislative history of tight regulation of these services. As stated by the United States:

> "The fact that these measures so clearly fall within Article XIV also serves to confirm that it would have been incomprehensible for the United States to make them subject of a specific commitment."[704]

Again:

> "[I]t should come as no surprise that the United States did not schedule commitments for gambling services, given the overriding policy concerns surrounding those services, which are reflected in the extremely strict limitations and regulations of these services. [...] In fact, in view of those concerns, and the numerous bans or

[703] USITC document, p. viii.
[704] United States' second written submission, para. 73.

> restrictions and strict controls on gambling, it would be surprising to find that the United States did schedule such a commitment."[705]

6.136 The United States has repeated several times in these proceedings that it did not intend to schedule a commitment for gambling and betting services.[706] This may well be true, given that the legislation at issue in this dispute predates by decades, not only the GATS itself, but even the notion of "trade in services" as embodied therein. We have, therefore, some sympathy with the United States' point in this regard. However, the scope of a specific commitment cannot depend upon what a Member intended or did not intend to do at the time of the negotiations. In this context, the Panel recalls that:

> "[T]he purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intention of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectation' of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from mutually advantageous negotiations between importing and exporting Members."[707]

6.137 While Members are expected to negotiate, apply and interpret their treaty obligations in good faith, there are no provisions in the WTO Agreement that would allow a Member's intentions to be probed and determined, except as reflected in the treaty language.

6.138 Pursuant to Article XVI:4 of the WTO Agreement, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Thus, independent of any expectation or any unintentional mistake, the United States' obligations pursuant to Article XVI:4 are to ensure that its relevant laws are in conformity with its WTO obligations, including any commitments undertaken in its GATS Schedule.

C. THE MEASURE(S) AT ISSUE

1. Claims and main arguments of the parties

6.139 Antigua's request for the establishment of this Panel lists as the challenged "measures" federal and state laws as well as court decisions, state Attorneys' General statements, websites and agreements between US enforcement agencies and credit card companies.[708] In its submissions, Antigua argues that all of these "measures" constitute a "total prohibition" on the cross-border supply of gambling and betting services that is inconsistent with the United States' obligations under the GATS.[709] In support of its claims that the GATS has been violated, Antigua relies upon what Antigua refers to as an "admission" by the United States before the DSB and before the Panel in these proceedings that the United States maintains a prohibition on the cross-border supply of some gambling and betting services.[710]

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[705] United States' second written submission, para. 15

[706] See also first oral statement, para. 26 ("The United States submits that if the United States and its Uruguay Round negotiating partners had intended such a commitment [on gambling and betting services] on the part of the United States, especially on this very sensitive issue, the US Schedule would have said so explicitly. Needless to say, it does not.")

[707] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[708] Request for the Establishment of a Panel by Antigua and Barbuda, WT/DS285/2.

[709] Antigua's first written submission, para. 1; Antigua's first oral statement, para. 23; Antigua's second written submission, paras. 5, 13, 19 and 21; Antigua's reply to Panel question No. 32.

[710] Antigua's first written submission, paras. 1, 133 and 136; Antigua's first oral statement, para. 13; Antigua's reply to Panel question No. 9; Antigua's second written submission, paras. 8 and 136.

6.140 The United States claims that Antigua's identification of challenged measures is not consistent with the DSU and the GATS. According to the United States, a "total prohibition" is not a "measure" within the meaning of the DSU and the GATS.[711] Moreover, Antigua's argumentation on the instruments that are said to result in this "total prohibition" is insufficient to satisfy Antigua's burden to provide a prima facie demonstration that these instruments affect the cross-border supply of gambling and betting services in a manner inconsistent with the United States' obligations under the GATS.[712] The United States also submits that nothing that United States has said to the DSB or to the Panel in the course of these proceedings relieves Antigua of its burden to say exactly what measures it is challenging and how it alleges that those measures, individually or in combination, violate the GATS.[713]

2. Relevant WTO provisions

6.141 Article I:3 of the GATS reads as follows:

> "'[M]easures by Members' means measures taken by:
>
> (i) central, regional or local governments and authorities; and
>
> (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.
>
> In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory."

6.142 Article XXVIII(a) of the GATS provides that "measure" means:

> "[A]ny measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."

6.143 In addition, Article XXVIII(c) provides that "measures by Members affecting trade in services" include measures in respect of:

> "(i) the purchase, payment or use of a service;
>
> (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
>
> (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member."

6.144 Article XXIII of the GATS provides that:

> "If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU."

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[711] United States first written submission, para. 2; United States' first oral statement, para. 17; United States' reply to Panel question No. 9; United States' second oral statement, paras. 10-11.

[712] United States' first written submission, paras. 3 and 44; United States' second written submission, para. 7; United States' second oral statement, para. 2.

[713] United States' second oral statement, para. 19.

6.145 Article 3.3 of the DSU provides that:

> "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

6.146 Article 6.2 of the DSU provides that the request for the establishment of a panel:

> "[S]hall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

6.147 It is also important to bear in mind that the measures(s) that have been challenged in a panel request may, at the end of the dispute settlement process, be the subject of DSB recommendations under Article 19.1 of the DSU, which provides that:

> "Where a panel or the Appellate Body concludes that a *measure* is inconsistent with a covered agreement, it shall recommend that the Member concerned[714] bring the measure into conformity with that agreement. In addition to its recommendations, the panel and the Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

3. Assessment by the Panel

(a) "Measures" being challenged

(i) Legal standard relating to the identification of the measures being challenged

6.148 The Panel commences by noting that the purpose of the exercise that we will undertake in this section of our Report is to identify the measures that the Panel will consider in determining whether the specific provisions of the GATS that Antigua has invoked have been violated. Under WTO law, the measures that a panel is obliged to consider are those contained in the relevant panel request. However, for reasons that are explained in greater detail below, the issue of which measures we are obliged to consider in this case is not a straightforward one. We set out below the framework within which we will determine which measures should be considered by us in assessing Antigua's claims of violation of the GATS.

6.149 First, we note that the provisions of the GATS and the DSU that have been referred to above clearly require that a Member must specifically identify the "measures" that are the basis for a claim that another Member has failed to fulfil its obligations or specific commitments under the GATS. In particular, Article XXIII of the GATS effectively provides that Members may have recourse to the DSU in cases where one Member considers that another Member has not abided by its obligations and/or specific commitments under the GATS. In turn, Article 6.2 of the DSU requires that "specific measures" be identified in a panel request.

6.150 In our response to the US request for preliminary rulings[715], we concluded that, since Article 6.2 of the DSU is a general provision governing the content of panel requests, it must be read together with relevant provisions contained in the concerned WTO agreements.[716] In this case, the

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[714] (*original footnote*) The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[715] Annex B of the Panel Report contains our response to the US request for preliminary rulings.

[716] The Panel's response to the US request for preliminary rulings, para. 34.

relevant provisions are contained in the GATS. Articles I:3 and XXVIII(a) and (c) of the GATS together broadly define the "measures" to which the provisions of the GATS apply. To the extent that the definition of a "measure" in Articles I:3 and XXVIII(a) and (c) of the GATS is broader than the meaning attributed to that term under Article 6.2 of the DSU, the definition contained in the former supplements the meaning of "measures" under the latter.[717]

6.151 Amongst other things, the identification of the measures challenged in a dispute is important to determine the terms of reference of a panel and to ensure that the defending party is well informed about the basis of the complaint against that party. In *EC – Bananas III*, the Appellate Body made clear that:

> "It is important that a Panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the Panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[718]

(ii) Identification of "measures" by Antigua in this dispute

6.152 The identification and definition of what "measures" are being challenged by Antigua in this dispute have been difficult issues with which the Panel has had to grapple since the very inception of these Panel proceedings. The Panel sets out below in some detail the evolution of the way in which Antigua has argued its case to illuminate these issues and to provide some context for the Panel's determination as to which measures it should consider in determining whether the specific provisions of the GATS that Antigua has invoked have been violated by the United States.

6.153 In its Panel request, Antigua states in relevant part that:

> "The Government of Antigua and Barbuda considers that certain measures of central, regional or local governments and authorities of the United States are inconsistent with the United States' commitments and obligations under the General Agreement on Trade in Services (GATS) with respect to the cross-border supply of gambling and betting services.
>
> The rules applying to the cross-border supply of gambling and betting services in the United States are complex and comprise a mixture of state and federal law. The relevant laws are listed in Sections I and II of the Annex attached to this request. Although this is not always clear on the face of the text of these laws, relevant United States authorities take the view that these laws (separately or in combination) have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States. Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services. The measures listed in the annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations.
>
> The total prohibition of gambling and betting services offered from outside the United States appears to conflict with the United States' obligations under GATS and

[717] The Appellate Body has already so determined in *Guatemala – Cement I*: Appellate Body Report, para.75. See also the Appellate Body Report on *US – Hot-Rolled Steel*, para. 62.
[718] Appellate Body Report on *EC – Bananas III*, para. 142.

its Schedule of Specific Commitments annexed to the GATS (and in particular Sector 10.D thereof) for the following reasons:

> (a) The central, regional or local authorities of the United States allow numerous operators of United States origin to offer all types of gambling and betting services in the United States (sometimes via exclusive rights or monopolistic structures). There appears to be no possibility for foreign operators, however, to obtain an authorization to supply gambling and betting services from outside the United States. This appears to conflict with the United States' commitments and obligations under GATS, including Articles VI:1, VI:3, VIII:1, VIII:5, XVI:1, XVI:2, XVII:1, XVII:2 and XVII:3 and its Schedule of Specific Commitments.
>
> (b) The United States authorities also restrict international transfers and payments relating to gambling and betting services offered from outside the United States. Some of the non-legislative measures listed in Section III of the Annex are examples thereof: the measures described in the documents released by the Florida Attorney General and the New York Attorney General. These restrictions appear to violate Articles VI:1, XI:1, XVI:1, XVII:1, XVII:2 and XVII:3 of GATS and the United States' Schedule of Specific Commitments."[719]

6.154 In its first written submission, Antigua framed its argumentation on the basis of what it considered to be an admission by the United States that there is a "total prohibition" on the cross-border supply of gambling and betting services in the United States. On the basis of this admission, in its first written submission, Antigua did not discuss in any detail the specific provisions of US laws in support of its allegation that the United States maintains measures inconsistent with its obligations under Articles XVI, XVII, VI and XI of the GATS.[720]

6.155 Following Antigua's first written submission, the United States made a request for preliminary rulings.[721] In its request for preliminary rulings, the United States asked the Panel to declare that Antigua's challenge of a network of federal and state laws, which, according to Antigua, together constitute a "total prohibition" on the cross-border supply of gambling and betting services, is not compatible with the GATS, the DSU and the WTO Agreement.[722]

6.156 In its response to the United States' request for preliminary rulings, the Panel noted that, in its Panel request, in its first written submission, and in its comments on the US request for preliminary rulings, Antigua had indicated that it is *effectively challenging the overall and cumulative effect of various federal and state laws* which, together with various policy statements and other governmental actions, constitute a total prohibition on the cross-border supply of gambling and betting services which is, in Antigua's view, inconsistent with the US GATS obligations.[723] Indeed, at that stage of the proceedings, we considered that this was the basis upon which Antigua was framing its challenge.

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[719] Request for the Establishment of a Panel by Antigua and Barbuda, WT/DS285/2.

[720] See, for example, Antigua's first written submission, paras. 133 and 136.

[721] The United States made a request for preliminary rulings on 17 October 2003, details of which are set out in Annex B.

[722] United States' request for preliminary rulings, paras. 16-21.

[723] See para. 17 of the Panel's response to the US Request for preliminary rulings. The Panel's characterisation of Antigua's challenge was based, *inter alia* on paras. 13-17 of Antigua's comments on the United States' request for preliminary rulings and paras. 140-143 of Antigua's first written submission.

6.157 However, in its second written submission, Antigua stated that it is challenging a "total prohibition" on the cross-border supply of gambling and betting services. According to Antigua, this total prohibition "*in and of itself constitutes a measure within the meaning of the GATS*".[724] When we asked Antigua whether it was challenging specific legislative and regulatory provisions, the specific application of those provisions, and/or US practices vis-à-vis (foreign) cross-border supply of gambling and betting services, Antigua confirmed that it was challenging all three aspects with the objective of bringing the "total prohibition itself before the Panel".[725] Antigua submitted at that stage of the Panel proceedings that it considered it "logical and efficient to challenge the United States' total prohibition as a measure in and of itself composed of specific legislative and regulatory provisions, applications and practices that separately and jointly impair Antigua's GATS benefits".[726]

6.158 The United States argues that the concept of a "total prohibition" is devoid of any legal meaning or consequences under either US law or the GATS. In fact, throughout these proceedings, the United States has maintained the position that Antigua cannot challenge a "total prohibition" on the cross-border supply of gambling and betting services as a single measure.[727] The United States considers that the only claims within the scope of Antigua's Panel request and, therefore, within the Panel's terms of reference, are "as such" claims in respect of specific legislative provisions and/or the collective effect of two or more such provisions.[728] According to the United States, Antigua is essentially making assertions about the collective effect of US domestic laws relating to the remote supply of gambling and betting services, without regard to individual measures and how they work. The United States submits that panels have often examined claims based on the combined effect of two or more measures but have correctly approached such claims by first examining each specific measure that allegedly contributes to a combined effect.[729] According to the United States, it is not possible to know what the combined effect of various measures is as a matter of municipal law, without first examining how each measure works and then analysing how these measures interact.[730] The United States adds that the Appellate Body in its recent report on *US – Carbon Steel* made clear that a party asserting that another party's municipal law is inconsistent with a WTO obligation must introduce evidence as to the scope and meaning of that municipal law.[731] In the United States' view, in order to succeed with its claims, Antigua must identify which *specific* provisions of the US laws are inconsistent with which *specific* provisions of the GATS, and it must demonstrate prima facie how and why such inconsistencies arise.[732]

6.159 Antigua has consistently stated that it is wasteful and unnecessary to identify the various domestic legislative provisions that will need to be brought into conformity with the GATS.[733] It argues that there is no need to conduct a debate on the precise scope of specific US laws because the United States has admitted a total prohibition on the cross-border supply of gambling and betting services under US law.[734] It further argues that the fact that a "measure" that is challenged in the

[724] Antigua's reply to Panel question No. 10; Antigua's second written submission, para. 8; Antigua's second oral statement, para. 12.

[725] Antigua's reply to Panel question No. 10.

[726] Antigua's reply to Panel question No. 10.

[727] United States first written submission, para. 2; United States' first oral statement, para. 17; United States' reply to Panel question No. 9; United States' second oral statement, paras. 10-11.

[728] United States' reply to Panel question No. 10.

[729] United States' first written submission, para. 50; United States' second written submission, para. 7.

[730] United States' first written submission, para. 74; Antigua's first oral statement, paras. 17-18.

[731] United States' first oral statement, para. 16; United States' second oral statement, paras. 10-11.

[732] United States' first written submission, para. 50; United States' first oral statement, para. 16; United States' second oral statement, paras. 10-11.

[733] Antigua's first oral statement, para. 25; Antigua's reply to Panel question No. 10. See also para. 23 of Antigua's second written submission where it states that it has "not been able to investigate" all the criteria that all states apply to authorize a domestic operator to offer gambling and betting services.

[734] Antigua's first written submission, para. 136; Antigua's first oral statement, para. 13; Antigua's reply to Panel question No. 9; Antigua's second written submission, paras. 8 and 136. Antigua further argues that

WTO may comprise one or more laws, rules or actions under domestic law cannot be definitive in determining whether the sum of the laws constitutes a "measure" within the meaning of the DSU.[735]

6.160 The United States does not appear to admit the existence of a "total prohibition" on the cross-border supply of gambling and betting services although it does admit a prohibition on the remote supply of most gambling and betting services.

6.161 During two successive DSB meetings, the United States stated that a prohibition on the "cross-border supply of gambling and betting services under US laws" exists in the United States.[736] The panel's decision in *US – Section 301 Trade Act* appears to support the view that the United States should be bound by these statements.[737] The statements were made by representatives of the United States to express their understanding of US law. They were made in the context of a formal WTO meeting for the record. The United States has not argued that the representatives were acting outside the authority bestowed upon them in making these statements.

6.162 Further, in response to a question posed by the Panel as to which gambling and betting services are prohibited in the United States, the United States responded:

> "The United States is referring principally to services involving the transmission of a bet or wager by a wire communication facility across state or U.S. borders, such as Internet and telephone betting. Other gambling services that are similarly restricted both domestically and cross-border include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events."[738]

6.163 The United States separately identified aspects of the cross-border supply of gambling and betting services that it says are *not* prohibited in the United States:

> "US restrictions do not preclude cross-border supply of all gambling services, and thus are not a 'total prohibition'. For example:
>
> - Persons not involved in the business of gambling may transmit casual or social bets by any means, provided that the transmission is permissible under state law.
>
> - Parimutuel betting services may exchange the accounting data and pictures necessary to permit a racetrack outside the United States to offer parimutuel betting on U.S. races (and vice-versa), provided that such gambling is legal in both the sending and the receiving jurisdictions.
>
> - Suppliers of oddsmaking and handicapping services (*e.g.,* handicappers of horse races) as well as other gambling informational services may supply such services, provided that the form of gambling that they facilitate is legal in both the sending and the receiving jurisdictions.

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there may be circumstances in which a panel has to undertake a precise statutory analysis, namely, in situations where there is a genuine disagreement and a genuine lack of clarity about the effect of a Member's domestic law. Antigua submits that this is patently not the case in this dispute: Antigua's first oral statement, para. 18; Antigua's second oral statement, para. 15.

[735] Antigua's first oral statement, para. 17.

[736] WT/DSB/M/151, para. 47 (24 June 2003); WT/DSB/M/153, para. 47 (21-23 July 2003).

[737] Panel Report on *US – Section 301 Trade Act*, paras. 7.118–7.125.

[738] United States' reply to Panel question No. 35.

- Gambling websites may (and many do) provide so-called "free play" games in which no real money is wagered.

- Any other gambling service that does not consist of actual transmission of a bet or wager is legal to the extent stated in 18 U.S.C. § 1084(b), provided that it also does not violate state law in the U.S. consumer's jurisdiction."[739]

6.164 On the basis of the foregoing, we understand that the United States admits that federal and state laws are applied and enforced so as to prohibit what it describes as the "remote supply" of most gambling and betting services.[740] The United States defines "remote supply" as:

> "[S]ituations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. Non-remote supply means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc."[741]

6.165 Despite the fact that the United States has admitted that federal and state laws are applied and enforced so as to prohibit what it describes as the "remote supply" of most gambling and betting services, what remains unclear is: what are the specific provisions of those laws that prohibit the remote supply of gambling and betting services in the United States and with which specific provisions and why are they inconsistent with the GATS?

6.166 As is evident from the foregoing, the Panel has encountered significant difficulty in pin-pointing the specific measures at issue in this dispute. Given that Antigua appears to have argued in its most recent submissions that it seeks to bring the "total prohibition" on the cross-border supply of gambling and betting services before the Panel, we consider that there are two critical issues that we need to decide before we can proceed to examine and assess Antigua's claims of violation with the GATS. First, can Antigua challenge a "total prohibition" on the cross-border supply of gambling and betting services under US law as a measure in and of itself in the context of this dispute? Secondly, if Antigua is not entitled to challenge such a "total prohibition" as a measure in this dispute, which measures must the Panel consider in determining whether Antigua has demonstrated its claims that the GATS has been violated? We consider these issues in turn below.

(b) Can Antigua challenge a "total prohibition" on the cross-border supply of gambling and betting services under US law as a measure in and of itself in the present dispute?

6.167 Pursuant to Article 7 of the DSU and the Appellate Body's findings in *EC – Bananas III* [742], the Panel must refer to Antigua's Panel request in determining whether or not Antigua can challenge a "total prohibition" as a measure in this dispute given that it is the Panel request that defines our terms of reference.

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[739] United States' second written submission, paras. 26-27.

[740] We note that in its reply to Panel question No. 35, the United States submitted that the transmission of a bet or wager by a wire communication facility across state or U.S. borders, such as Internet and telephone betting, the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events are restricted *both domestically* and *cross-border*. We understand from this statement that federal *and* state laws prohibit the remote supply of gambling and betting services.

[741] United States' reply to Panel question No. 42.

[742] Appellate Body Report on *EC – Bananas III*, para. 142.

6.168 We recall that, in its Panel request[743], Antigua argues that "certain measures of central, regional or local governments and authorities of the United States" are inconsistent with the United States' commitments and obligations under the GATS with respect to the cross-border supply of gambling and betting services. The Panel request goes on to state that "the relevant laws are listed in Sections I and II of the Annex attached to this request" and that "Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services". Also of relevance is the fact that the Panel request states that "the measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."[744]

6.169 Nowhere in its Panel request does Antigua list a "total prohibition" as a measure that is sought to be challenged. Rather, in its Panel request, Antigua describes the effect of the laws referred to in Sections I and II of the Annex as "prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States". The Panel request then goes on to state that this effect, which is subsequently labelled in the Panel request as "the total prohibition" of the supply of gambling and betting services offered from outside the United States, conflicts with the United States' obligations under the GATS.

6.170 It is apparent to us from the Panel request that Antigua identified the measures contained in its Annex as those that were the subject of its challenge under the GATS. It is also apparent to us that Antigua refers to the "total prohibition" in its Panel request to describe the alleged effect of the measures listed in Sections I and II of the request.

6.171 We consider that Antigua is bound to rely upon the measures identified in its Panel request. Since it did not identify the "total prohibition" as a measure in and of itself, it is not entitled to rely upon it as a "measure" in this dispute. Moreover, we consider that, in the present dispute, even if the "total prohibition" were to have been identified as a "measure" in its Panel request, Antigua is not entitled to rely upon the "total prohibition" as such for the reasons set out below.

6.172 Article XXVIII(a) of the GATS provides that a "measure" under the GATS is "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, *or any other form*" (emphasis added). The reference to "any other form" in this definition indicates a broad interpretation of the term "measures" in the context of the GATS.

6.173 In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in discussing the meaning of the term "measure" under WTO law, made reference to Article 3.3 of the DSU. In particular, it stated that:

> "Article 3.3 of the DSU refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*'. (emphasis added) This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'. In principle, *any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings*. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.
>
> In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific

[743] The relevant aspects of Antigua's Panel request are set out in para. 6.153 above.
[744] Antigua's reiterates this in para. 141 of its first written submission.

> situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, *instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance*.
>
> ...
>
> This analysis leads us to conclude that there is *no basis*, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, *for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings* under the Anti-Dumping Agreement."[745] (emphasis added)

6.174 In summary, the definition of "measures" under the GATS as well as jurisprudence regarding the interpretation of this term in the context of the DSU indicates a broad reading of the term under the GATS. It includes any "act or omission attributable to a WTO Member" and "instruments of a Member containing rules or norms ... irrespective of how or whether those rules or norms are applied in a particular manner".

6.175 Notwithstanding the broad concept of "measures" under the GATS and the DSU, the Panel believes that, in the circumstances of this case, the alleged "total prohibition" on the cross-border supply of gambling and betting services describes the alleged effect of an imprecisely defined list of legislative provisions and other instruments and cannot constitute a single and autonomous "measure" that can be challenged in and of itself, even if it is claimed that, together, these legislative provisions and other instruments result in a total prohibition. Our reasons for forming this conclusion are as follows.

6.176 First, as we understand it, Antigua's use of the term "total prohibition" in this case is by way of *description* of an alleged effect to which it takes objection, namely the fact that Antigua's suppliers are prohibited from providing gambling and betting services in the United States on a cross-border basis. As noted above, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* made it clear that "instruments of a Member containing rules or norms could constitute a 'measure'" that may be the subject of challenge under the DSU. We do not consider that a "total prohibition" as explained by Antigua can be construed, in this dispute, as an "instrument" within the meaning ascribed to that term by the Appellate Body because it is a description of an effect rather than an instrument containing rules or norms.

6.177 Secondly, Article 6.2 of the DSU requires that measures be "specifically" identified in a panel request. In our view, the "total prohibition" has not been "specifically" identified. In particular, the details of how it is constituted are far from clear. We recall in this regard that Antigua has listed 93 laws in its Panel request. However, during the course of these proceedings, Antigua itself raised the question as to which of these laws and which provisions of these laws, if any, should be examined as part of the alleged "total prohibition". In particular, in response to a question posed by the Panel requesting clarification as to what Antigua is specifically challenging, Antigua referred to the laws in its Panel request and replied as follows:

> "It is important to note ... that Antigua has cited all these laws in its Panel request in order to be as comprehensive as possible, *not* because it believes that each law is an essential part of a "puzzle" without which there would be no total prohibition. ... *most of the laws cited in the Panel request are prohibition laws that could be applied*

[745] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 81-82 and 88.

> *independently of each other to prohibit cross-border supply from Antigua*."[746] (emphasis added)

6.178 The Panel attempted on several other occasions to seek clarification from Antigua as to what exactly it is challenging. When asked by the Panel which specific provisions of which specific legislative measures it is actually challenging, Antigua replied:

> "Antigua is in essence challenging *every* legislative provision that *could be construed* to form *a piece* of the United States' total prohibition on the cross-border supply of gambling and betting services. The statutory provisions that the United States *appears* to rely on most heavily in its law enforcement actions, *or are most likely* to form *part* of the total ban, were listed in the Annex to Antigua's Panel request and also have been submitted to the Panel, together with summaries."[747] (emphasis added)

6.179 In its first oral statement, Antigua underlined "[its] effort at identifying, in [its] Panel and consultations requests, a huge number of American laws", which, in its view, demonstrates "good faith". However, at the same time, it states that the complexity and ambiguity as well as the overlap between federal and state laws made it "very difficult to identify with complete precision all laws and regulations of the United States that could be applied in the prohibition of the cross-border supply of gambling and betting services."[748] Antigua also states that it finds it "wasteful and unnecessary" to engage in such an identification exercise.[749]

6.180 In our view, in the light of the relevant provisions of the DSU, in particular Article 7 concerning the "terms of reference" and the prima facie requirements of Antigua's burden of proof, we believe that it is crucial, and not "wasteful and unnecessary", to be precise and consistent in the identification of the measures at issue.

6.181 Thirdly, the Panel recalls that the identification of the challenged measures is critical not only in terms of defining the Panel's terms of reference and informing the defending party of the legal basis of the complaint so that it can defend itself but also because the challenged measure, if found to be in violation of a WTO agreement, must be brought into conformity with that agreement pursuant to Article 19.1 of the DSU. In our view, the ability of an instrument to be brought into conformity with a WTO Agreement is an important consideration in determining whether or not a measure has been sufficiently identified for the purposes of the DSU and the GATS.

6.182 The Panel fails to see how the United States could be requested to implement a DSB recommendation to bring a "prohibition" into compliance with the GATS pursuant to Article 19.1 of the DSU when an imprecisely defined "puzzle" of laws forms the basis of the "total prohibition" that has been identified by Antigua as the challenged measure.[750] The Panel also fails to see how the DSB could monitor the implementation process pursuant to Article 21.6 of the DSU and how an implementation panel established under Article 21.5 of the DSU could assess the WTO compatibility of any implementing measure, if there is no certainty as to which laws should ultimately be changed

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[746] Antigua's reply to Panel question No. 32.
[747] Antigua's reply to Panel question No. 10.
[748] Antigua's first written submission, para. 135.
[749] Antigua's first oral statement, para. 25.
[750] Indeed, it could be said that Antigua itself has acknowledged this. Antigua submits that "Antigua and Barbuda needs to ensure that, at the stage when the United States needs to implement any recommendations and rulings resulting from this proceeding, the United States cannot take the position that it needs to amend only the Wire Act and can continue to apply its other prohibition laws. This is particularly important because, given the huge amount of American legislation on gambling and betting, it cannot be excluded that Antigua and Barbuda has been unable to identify all domestic laws that could possibly be applied against the cross-border supply of gambling services." : Antigua's first oral statement, para. 22.

to address a "total prohibition" in the event that such a prohibition were to be found to be in violation of the GATS.

6.183 Antigua has argued that the fact that the "total prohibition" is comprised of a large number of different statutory provisions does not mean that the United States would have to abolish or amend all the individual legislative provisions to bring it into conformity with the GATS since the US federal government possesses power to legislate in the area of international commerce in a manner that would "pre-empt" all contradictory state laws and regulations.[751] With respect to this argument, we note that our role here is to identify which measures are inconsistent with the GATS. Under Article 19.1 of the DSU, if we conclude that a measure is inconsistent with the GATS in this dispute, we can only make a recommendation to the DSB that the United States "bring [its] measure into conformity with [the GATS]". It is clear from the terms of Article 19.1 that our role does not extend to dictating how the United States should implement such a recommendation. At best, pursuant to the second sentence of Article 19.1, we could make suggestions as to how the United States could implement our recommendation once adopted by the DSB. However, these suggestions would not be binding on the United States. Accordingly, we consider that the fact that the United States may possess a power to legislate to override contradictory states laws and regulations with respect to the supply of gambling and betting services is not a matter for our consideration in these proceedings but may be of relevance in the context of the assessment, if any, of the implementation of our recommendations under Article 21.5 of the DSU.

6.184 Finally, Members' national laws are always presumed to be compatible with the WTO Agreement.[752] Antigua, as the complaining party in this dispute, bears the burden of properly identifying measures with some detail and explanation so as to allow the United States to defend itself adequately. The fact that the United States has admitted a total or partial prohibition on the remote supply of certain gambling and betting services under US law does not relieve Antigua of its obligation to specifically identify and demonstrate WTO inconsistencies that result from such a prohibition. Moreover, the fact that a prohibition on the remote supply of gambling and betting services may exist under US law does not, in our view, necessarily mean that such laws are contrary to the GATS or to the WTO Agreement. Antigua must still prove that the US prohibition constitutes a WTO-inconsistent restriction in respect of which the United States may also be able to invoke general or specific exceptions to justify such a prohibition. Accordingly, we fail to see how a simple allegation of a total prohibition can enable Antigua to meet its burden of proof.

6.185 On the basis of the foregoing, we conclude that Antigua is not entitled to rely upon a "total prohibition" on the cross-border supply of gambling and betting services as a "measure" in and of itself in this dispute.

(c) Measures that the Panel should consider in determining whether the GATS has been violated

6.186 The question remains as to which measures the Panel should consider in determining whether or not the United States has violated its obligations under the GATS Agreement.

6.187 As we stated above, we consider that we are bound to examine the measures that Antigua has identified in its Panel request. The Panel request refers to measures listed in Sections I and II of the Annex to Antigua's Panel request, which, according to the request, are laws applying to the cross-border supply of gambling and betting services in the United States. The Panel request also refers to measures listed in Section III of the Annex, which, in Antigua's words are "examples of measures by non-legislative authorities of the United States applying [the laws contained in Sections I and II] to

[751] Antigua's first oral statement, para. 24; Antigua's reply to Panel question No. 10; Antigua's second oral statement, para. 18.

[752] Appellate Body Report on *US – Carbon Steel*, para. 115

the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services."

6.188 The total number of measures contained in Sections I, II and III of the Annex to Antigua's Panel request is 105. The measures listed in the Panel request are a mix of federal and state laws, court decisions, state Attorneys' General statements, websites and agreements between US enforcement agencies and credit card companies.

6.189 We asked Antigua to clarify whether the Panel was expected to consider all of the items listed in the Panel request in our determination of whether or not the United States has violated the GATS.[753] Antigua responded:

> "Antigua is challenging all three aspects which are intrinsically linked and are all elements of the total ban that Antigua seeks to challenge in this case. *Legislative and regulatory provisions* are given a practical effect by their *application* to specific cases. If, for example, the United States maintained its prohibition but did not enforce it, then the impairment of Antigua's GATS benefits would be much less substantial and Antigua would probably not have started this proceeding. The United States *practice* vis-à-vis the foreign cross-border supply of gambling and betting services is also based on or at least purported to be based on legislative and regulatory provisions.[754] In Antigua's view it would not be logical or effective to challenge some of these elements and not others."[755]

6.190 Antigua stated very clearly in the above response that it is challenging laws, applications and practices relating to the legality of the United States' prohibition on the remote supply of gambling and betting services. We refer below to Antigua's submissions and evidence, which, in our view, are relevant in deciding which laws, applications and practice the Panel may consider in determining whether the United States has violated the Articles of the GATS that Antigua has invoked. We first examine "specific applications", followed by "practice" and, finally, we will consider the "laws" at issue.

(i) Specific applications

6.191 With respect to the specific applications Antigua seeks to challenge, when questioned by the Panel for further information as to when and how efforts by Antigua's operators to provide cross-border supply of gambling and betting services had been the object of refusal by the US enforcement authorities, Antigua stated that it was not able to point to any specific rejection of its request for a licence to provide cross-border supply of gambling and betting services, despite having effectively

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[753] Panel question No. 10 reads as follows: "Is Antigua and Barbuda challenging: (i) specific *legislative and regulatory provisions* that are claimed to amount to a prohibition on the cross-border supply of gambling and betting services *as such*; and/or (ii) the specific *application* of such provisions; and/or (iii) the US *practice* vis-a-vis the foreign cross-border supply of gambling and betting services?"

[754] (*original footnote*) *See, e.g.,* the "Assurance of Discontinuance" entered into in August 2002 between the Attorney General of the State of New York and Paypal, Inc. (a copy of which is found at Exhibit AB 56) and the discussion of that document in Antigua's response to Question 29. *See also* Exhibits AB 73, 92, 94, 96 and 98.

[755] Antigua's reply to Panel question No. 10. In addition, Antigua submits that it is possible to challenge in dispute settlement proceedings a total prohibition that is comprised of numerous specific legislative and regulatory provisions, application[s] of such provisions and practices: Antigua's second written submission, para. 13.

asserted as much in its first written submission and first oral statement.[756] For the purposes of clarifying its allegations, in response to a question posed by the Panel, Antigua submitted:

> "What was meant here was not that Antiguan operators had applied to supply gambling and betting services into the United States and were refused—the point was that under United States law, it is impossible for Antiguan suppliers to meet any authorization criteria. There are two reasons for this. First is the obvious, that the United States government considers the provision of cross-border gambling and betting services illegal, and thus it would be illegal under United States law as it currently exists for Antiguan suppliers to gain authorization. At the first Panel meeting Antigua asked the United States to explain how Antiguan service providers could lawfully provide gambling and betting services into the United States. In response, the United States confirmed that this was not possible.
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> Second, *under the laws or practice* of every state that provides for state-sanctioned gambling in one form or another, the conditions attached to obtaining the right to supply gambling services in the state by definition preclude Antiguan operators from qualifying on a cross-border basis. Thus, even if the United States did not maintain its total prohibition, Antiguan operators could still not lawfully offer their services under the authorization schemes of the various states."[757] (emphasis added)

6.192 This response appears to us to indicate that Antigua is challenging laws together with related practices rather than specific applications of the relevant laws. However, also in response to a question posed by the Panel soliciting support for an allegation made by Antigua that it is illegal for Antigua and Barbuda operators to provide gambling and betting services in the United States, Antigua referred to three court cases in which the relevant provisions of the Wire Act, the Travel Act and the Illegal Gambling Business Act were applied.[758] It also referred to examples of law enforcement action against financial intermediaries.[759] Finally, it referred to various statements by government officials advising national advertisers not to allow advertising for off-shore Internet gambling services.[760] Although not all of these items would necessarily be "applications" within the meaning of WTO jurisprudence, they could, nevertheless, be used as evidence of how the challenged measures are effectively interpreted and applied by the United States that is, evidence of the United States' practice.

6.193 Some of these items are referred to in Section III of the Annex to Antigua's Panel request.[761] Section III lists documents that are categorized by Antigua in the request as "Other United States and State actions or measures". We note that in our response to the United States' request for preliminary rulings, we concluded that:

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[756] See, for example, Antigua's first written submission, paras. 183 and 197 and Antigua's first oral statement, para. 88.

[757] Antigua's reply to Panel question No. 11.

[758] In its reply to Panel question No. 12, Antigua refers to the following court cases: *United States v Jay Cohen* (Exhibit AB-83), *Vacco ex rel. People* v *World Interactive Gaming Corp* (Exhibit AB-97) and *United States v Truesdale* (Exhibit AB-115).

[759] In its reply to Panel question No. 12, Antigua also refers to Exhibits AB-56, 57, 58, 73, 92 and 98, which it says contain examples of law enforcement action against financial intermediaries and media companies carrying advertising for foreign gambling and betting services.

[760] In its reply to Panel question No. 12, Antigua refers to Exhibits AB-73, 86, 92 and 116 as examples of state action taken regarding the advertisement of offshore Internet gambling and betting services.

[761] In particular, Section III of the Annex to Antigua's Panel request lists two of the court cases referred to by Antigua, namely, *United States v Jay Cohen* (Exhibit AB-83) and *Vacco ex rel. People* v *World Interactive Gaming Corp* (Exhibit AB-97). Section III also lists four of the examples of law enforcement action against financial intermediaries and media companies referred to by Antigua, namely those contained in Exhibits AB-56, 57, 58 and 98.

> "Given that Antigua & Barbuda has indicated that it does not intend to treat the items listed in Section III as distinct and autonomous 'measures' but, essentially, will seek to rely upon them as evidence to illustrate the existence of a general prohibition against cross-border supply of gambling and betting services in the United States, we decline to rule out the relevance of such items. However, *as suggested by Antigua & Barbuda, during our substantive consideration of this dispute, we will not consider and examine them as separate, autonomous measures.*" (emphasis added)[762]

6.194 In other words, in accordance with what had been suggested by Antigua, we decided during preliminary ruling proceedings in this case that we would not consider and examine the items contained in Section III of the Annex to Antigua's Panel request as separate, autonomous measures but that they could be relevant in Antigua's demonstration that the legislative measures referred to in Sections I and II of the Annex to its Panel request result in a total prohibition on the cross-border supply of gambling and betting services.

6.195 Therefore, we conclude that Antigua is not challenging specific "applications" in the present dispute as separate, autonomous measures. We will, nonetheless, make reference if and where necessary to the court cases in which the relevant provisions of the Wire Act, Travel Act and Illegal Gambling Business Act were applied, the law enforcement actions against financial intermediaries and media companies and the statements by government officials advising national advertisers not to allow advertising for off-shore Internet gambling services as illustrative of the "practice" of US authorities regarding their interpretation and application of the relevant laws, which we discuss in greater detail below.

(ii) Practice

6.196 The panel in *US – Corrosion-Resistant Steel Sunset Review* stated that "practice" under WTO law is "a repeated pattern of similar responses to a set of circumstances".[763] The Appellate Body in the same case indicated that "practice" in the form, for example, of a policy bulletin, may be challenged "as such".[764] In *US – Countervailing Measures on Certain EC Products*, the Appellate Body issued a recommendation that the US bring its "practice" into conformity with the SCM Agreement. The Appellate Body in *US – Carbon Steel* indicated that "practice" may also be used to provide evidence of how laws are being interpreted and applied.[765]

6.197 On the basis of the foregoing, we consider that "practice" can be considered as an autonomous measure that can be challenged in and of itself or it can be used to support an interpretation of a specific law that is challenged "as such".

6.198 We consider that the three court cases in which the relevant provisions of the Wire Act, Travel Act and Illegal Gambling Business Act were applied, the examples of law enforcement action against financial intermediaries and media companies and the various statements by government officials advising national advertisers not to allow advertising for off-shore Internet gambling services could be considered to be "practices". However, Antigua is not challenging these practices "as such". Rather, in accordance with our reply to the United States' request for preliminary rulings[766], the Panel considers that Antigua is entitled to and has referred to these practices in its submissions to support its allegations and argumentation that certain laws are inconsistent with the United States' obligations under the GATS.

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[762] See the Response of the Panel to the US request for preliminary ruling contained in Annex B of this Panel report.

[763] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.31.

[764] Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 97.

[765] Appellate Body Report on *US – Carbon Steel*, para. 157.

[766] See para. 6.193 above.

(iii) Laws

6.199 Turning finally to the laws which Antigua claims result in a "total prohibition" that is contrary to the GATS, Antigua has listed 93 laws in its Panel request. At the Panel's first substantive meeting with the parties, Antigua submitted the texts of these laws together with general summaries of most of the measures cited in its Panel request.[767]

6.200 However, during the course of these proceedings, Antigua cast doubt on the extent to which the Panel should consider each of these laws in its determination of whether or not the United States is in violation of the GATS. Indeed, Antigua stated:

> "The measures listed in the Annex only come within the scope of this dispute *to the extent that these measures prevent* or *can prevent* operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."[768] (emphasis added)

6.201 In addition, as we noted above, Antigua stated that "*Most of the measures* cited in the Panel request are prohibition measures that *could arguably* be applied independently of each other against Antiguan gaming operators." (emphasis added) [769]

6.202 We recall again that when asked by the Panel which specific provisions of which specific legislative measures it is actually challenging, Antigua replied:

> "Antigua is in essence challenging *every* legislative provision that *could be construed* to form a piece of the United States' total prohibition on the cross-border supply of gambling and betting services. The statutory provisions that the United States *appears* to rely on most heavily in its law enforcement actions, *or are most likely* to form part of the total ban, were listed in the Annex to Antigua's Panel request and also have been submitted to the Panel, together with summaries."[770] (emphasis added)

6.203 The United States submits that, to the extent that Antigua fails to say precisely what provisions are or are not relevant, or to offer argumentation on specific provisions, it does not meet the basic elements of a prima facie case.[771] According to the United States, Antigua cannot sustain its burden by merely identifying laws that "could be construed" as relevant, or are "most likely" relevant. In order for the Panel to consider whether hundreds of US laws interact together so as to be inconsistent with the GATS and for the United States to defend its laws, it is both reasonable and necessary for Antigua to be very precise about the specific US measures it is challenging and their relevance, meaning, interaction, and interpretation under US domestic law. The United States submits that Antigua has not done any of this.[772]

6.204 It is evident from the foregoing that Antigua is effectively asking the Panel to identify for itself which of the listed measures and which provisions of those measures *could* be construed as imposing a prohibition on the cross-border supply of gambling and betting services. Even among the measures that could be described as imposing such a prohibition, Antigua states that *most of them could arguably* be applied independently to impose a prohibition on the cross-border supply of gambling and betting services. However, the Panel is left to determine for itself which measures

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[767] Exhibits AB-82, 89, 90, 91 and 99.
[768] Antigua's first written submission, para. 141.
[769] Antigua's first oral statement, para. 19.
[770] Antigua's reply to Panel question No. 10.
[771] United States' second oral statement, para. 12.
[772] United States' second oral statement, para. 2.

could be applied independently to impose such a prohibition. Antigua further indicates that the measures listed in the Annex only come within the scope of this dispute "to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States." Here again, the Panel is required to determine which measures actually prevent or can, in theory, prevent Antigua's operators from lawfully offering gambling and betting services in the United States.

6.205 Confronted with this ambiguity, we must decide which of the 93 laws listed in Sections I and II of the Annex to its Panel request we should consider. By way of context for this determination, we recall the following statement of the Appellate Body in *Canada – Autos* where, after reversing the panel, it wrote:

> "We are mindful of the importance of the GATS as a new multilateral trade agreement covered by the *WTO Agreement*. This appeal is only the second case in which we have been asked to review a panel's findings on provisions of the GATS. Given the complexity of the subject-matter of trade in services, as well as the newness of the obligations under the GATS, we believe that claims made under the GATS deserve close attention and serious analysis."[773]

6.206 This dispute is the fourth WTO case where the GATS has been at issue. In line with the above comments of the Appellate Body, we have done our utmost to examine the claims made by Antigua under the GATS despite the practical difficulties we encountered.

6.207 Antigua stated that it had "provided considerable evidence of ... the construction of the total prohibition [including] numerous references to and discussions of the principal federal statutes used by the United States to support its total prohibition; provision to the Panel of the actual text of the principal state and federal laws that underlie the total prohibition; discussions regarding the basic scheme of state and federal interaction in the area of gambling and betting and how the state and federal laws act to further the total prohibition."[774] However, in our view, Antigua has effectively left the Panel to search through the material that Antigua has submitted to identify which among the 93 measures identified in Antigua's Panel request result in violations of the GATS. We do not consider that it is permissible for us to search through the items listed in Antigua's Panel request for the purpose of identifying the laws upon which Antigua might have relied in order to support a case that Antigua has itself not articulated precisely.

6.208 Indeed, we note that there are limits to our ability to rely for our findings on the results of our own investigation and we are well aware of those limitations.[775] In *Japan – Agricultural Products,* the Appellate Body reversed the panel for effectively having made the complainant's case for it and stated that:

> "Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel [is not entitled] to make the case for a complaining party."[776]

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[773] Appellate Body Report on *Canada – Autos*, para. 184.

[774] Antigua's second written submission, para. 19.

[775] In *Thailand – H-Beams*, in response to an argument by Thailand that the panel had improperly made Poland's case for it, the Appellate Body stated that the panel had itself showed a clear appreciation of the limitations of its authority as well as its understanding of the role of Poland as the complaining party in this dispute. The Appellate Body concluded that the panel had not erred to the extent that it had asked questions of the parties that it deemed necessary "in order to clarify and distil the legal arguments": para. 136.

[776] Appellate Body Report on *Japan – Agricultural Products II*, para. 129.

6.209 Nevertheless, in light of the encouragement by the Appellate Body in *Canada – Autos* to pay close attention to and to undertake a serious analysis of Antigua's claims, we perused all of Antigua's submissions, including footnotes to those submissions and exhibits submitted by Antigua, with a view to identifying which of the 93 laws listed in its Panel request we should consider in determining whether or not the United States is in violation of its obligations under the GATS. We note that Annex E of this Panel Report contains a summary of what we found. In particular, the table lists the laws that Antigua apparently relies upon in claiming that the cross-border supply of gambling and betting services is prohibited and contrary to the United States' obligations under the GATS. The table indicates whether or not those laws are contained in Antigua's Panel request and where, if at all, in Antigua's submissions and exhibits Antigua refers to and/or discusses these laws. Set out below is a summary of the conclusions that we drew on the basis of our examination of Antigua's submissions.

6.210 As a starting point, we note that the factual premise for Antigua's claims of violation of Articles XVI, XVII and VI is the existence of a prohibition on the cross-border supply of gambling and betting services.[777] In particular, Antigua argues that federal and state laws prohibit or prevent the cross-border supply of gambling and betting services by Antigua in violation of Articles XVI, XVII and VI of the GATS. We recall that the United States has admitted the existence of a prohibition of the remote supply of certain gambling and betting services. However, the United States has not indicated pursuant to which laws and according to which provisions of those laws the prohibition is imposed.

6.211 Antigua's discussion of the various laws upon which it seeks to rely in this dispute may be grouped into three categories that are set out below:

(a) Laws that are referred to and/or discussed in Antigua's submissions but which are not contained in Antigua's Panel request;

(b) Laws that are contained in the Panel request but which are not discussed to an extent that could enable the Panel to identify according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services which would be inconsistent with the United States' obligations under the GATS; and

(c) Laws that are contained in the Panel request, which are discussed in Antigua's submissions and which indicate according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services.

6.212 We deal with each of these three categories in turn.

[777] With respect to its Article XVI claim, Antigua relies upon the existence of a "total prohibition" on the cross-border supply of gambling and betting services in its first written submission, paras. 183–184 and in its second written submission, paras. 35–36. In relation to its Article XVII claim, Antigua also relies upon the existence of a "total prohibition" on the cross-border supply of gambling and betting services in para. 39 of its second written submission. With respect to its Article VI claim, Antigua also relies upon the existence of "laws and regulations prohibiting the supply of gambling and betting services" in its first written submission, paras. 197 and 199 and in its first oral statement, para. 104.

Laws referred to and/or discussed in Antigua's submissions but not contained in Antigua's Panel request

6.213 Below is a list of laws and regulations that were discussed in Antigua's submissions in the context of its allegation that federal and state laws prohibit or prevent the cross-border supply of gambling and betting services but which are not contained in Antigua's Panel request:[778]

(a) California: Cal. Penal Code §§ 187-189, 240-241 and 518-527;

(b) Connecticut: Connecticut Division of Special Revenue, Administrative Regulations: Operation of Bingo Games, Rules 7-169-8a and 7-169-13a;

(c) Illinois: Illinois Riverboat Gaming Act § 230; Illinois Compiled Statutes § 10/7 (e);

(d) Indiana: Indiana Code §§ 4-33-1-2, 4-33-9-1, 4-33-9-10; Indiana Administrative Code § 2 1-4 (c) (1);

(e) Iowa: Iowa Racing and Gaming Commission Administrative Rules, Rules 491 – 1, 491 – 8.2 (4) (g) and 491 – 11.5 (4) (a) (4);

(f) Kansas: Kansas Consumer Protection Act; Kansas Crim. Code Ann. § 21-4302(e);

(g) Louisiana: Louisiana Gaming Control Law RS § 27 : 65;

(h) Massachusetts: Mass. Gen. Laws Ann. ch. 6, § 48; ch. 10, §§ 22-58;

(i) Mississippi: Mississippi Gaming Commission Regulations, Section II (B) (2);

(j) Nevada: Nev. Rev. Stat. §§ 463.0129, 463.750, 465.091- 465.094; Regulations of the Nevada Gaming Commission and State Gaming Control Board, Regulations 3.010 (5) and (7);

(k) New Jersey: N.J. Stat. §§ 5:5-159, 5:8-1 - 8–118, 5:9–1 *et seq*;

(l) New York: NY Penal Code §§ 120.00-.15 and 155.05 (2) (e); Gen. Mun. Law § 185 *et seq*; Rac., Pari-Mut Wag. & Breed Law §§ 101 and 1012;

(m) Oregon: Oregon Administrative Rules, Rules 462-220-0060;

(n) Utah: Ut. Const. Art. VI § 27.

6.214 The Panel request defines our terms of reference. Therefore, we have no jurisdiction to examine any laws or regulations that were discussed by Antigua in support of its allegation that US law prohibits the cross-border supply of gambling and betting services but which are not contained in Antigua's Panel request. Consequently, we will not consider any of the laws listed in paragraph 6.213 above in examining Antigua's claims.

[778] We note that Antigua referred to other federal and state laws that are also not contained in Antigua's Panel request but which are not listed here because they were not referred to by Antigua in the context of its allegation that US law prohibits the cross-border supply of gambling and betting services and/or because they have not yet been enacted.

Laws contained in the Panel request but not discussed to an extent that could enable Antigua to provide a prima facie demonstration

6.215 Below is a list of laws and regulations that were not discussed by Antigua to an extent that would enable the Panel to identify according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services:

(a) Federal laws:

(i) The Federal Aiding and Abetting Statute (18 USC § 2);

(ii) Interstate Horseracing Act (15 USC §§ 3001 – 3007);

(iii) Federal Lottery Statute (18 USC §§ 1301 – 1307);

(iv) Interstate Transportation of Wagering Paraphernalia (18 USC § 1953);

(v) The Professional and Amateur Sports Protection Act (28 USC §§ 3701 – 3704);

(vi) Postal Law Regarding Mailing Gambling Related Materials (39 USC § 3005).

(b) State laws:

(i) All laws listed in the Panel request for the states of Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Guam, Puerto Rico, US Virgin Islands;

(ii) Colorado: Colo. Const. art. XVIII, § 2; Col. Rev. Stat. §§ 18-10-101 - 18-10-102 and 18-10-104 - 18-10-108; Col. Rev. Stat. §§ 12-47.1-101 - 12-47.1-106;

(iii) Louisiana: La. Const. art. XII, § 6; La. Rev. Stat. Ann. §§ 14:90.0 - 14:90.2, 14:90.4;

(iv) Massachusetts: Mass. Gen. Laws Ann. ch. 271, §§ 1-50 except § 17A;

(v) Minnesota: Minn. Stat. Ann. §§ 609.76 - 609.754; 609.756 - 609.763;

(vi) New Jersey: N.J. Stat. Ann. §§ 2A:40-2 - 2A:40-9, 2C:37-1 - 2C:37-9, 5:5-63, 5:12-1 - 5:12-210;

(vii) New York: N.Y. Executive Law §§ 430 - 439a; N.Y. Penal Law §§ 225.00-225.40; N.Y. General Obligation Law §§ 5-402 - 5-423;

(viii) South Dakota: S.D. Codified Laws §§ 22-25-1 - 22-25-15; and

(ix) Utah: Utah Code Ann. §§ 76-10-1101, 76-10-1103 - 76-10-1109.

6.216 In its examination of Antigua's submissions, the Panel found that, in the context of a very general discussion regarding the existence of an alleged prohibition on the cross-border supply of gambling and betting services[779], Antigua included a footnote reference to exhibits containing what it itself described as a "huge number of American laws".[780] The exhibits cited in the footnote contain the texts[781] and very brief summaries of the laws that are referred to in paragraph 6.215 above.[782]

6.217 The summaries contained in these exhibits do not enable us to identify according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services that would be inconsistent with the United States' obligations under the GATS. Accordingly, we will not consider any of the above laws in examining Antigua's claims under Articles XVI, XVII and VI, which are premised upon the existence of a prohibition on the cross-border supply of gambling and betting services, because Antigua could not and did not make any prima facie demonstration that they are inconsistent with the GATS.

6.218 Additionally, in the case of one of the laws listed above, namely, the Interstate Horseracing Act ("IHA")[783], it is listed in Antigua's Panel request and is, thereby, identified as resulting in a prohibition on the cross-border supply of gambling and betting services. However, when referring to the IHA in its submissions, Antigua submits very clearly that the IHA *allows* gambling by the Internet.[784] Indeed, Antigua refers to the IHA to show that the United States does not prohibit the remote supply of gambling and betting services in the United States as it has suggested. Therefore, in relation to the IHA, we are still unclear as to how this Act results in a prohibition on the cross-border supply of gambling and betting services. Since Antigua's claims are premised upon the existence of a prohibition on the cross-border supply of gambling and betting services, we will not consider the IHA insofar as Antigua seeks to rely upon it as resulting in such a prohibition because Antigua could not and did not make any prima facie demonstration that it is inconsistent with the GATS.

Laws contained in the Panel request and discussed in Antigua's submissions

6.219 Below, we point to US laws contained in Antigua's panel request and for which Antigua has been able to identify one or several provisions and offer some discussion as to whether and how such provisions could be inconsistent with the GATS. We recall that we are not at this early stage assessing the legal validity of Antigua's arguments but we are only trying to identify which provisions of which US laws can be considered to have been sufficiently identified so as to warrant a substantive examination by the Panel.

Federal laws

6.220 In its first oral statement, Antigua refers to three US federal laws, which it says indicate that the cross-border supply of gambling and betting services is prohibited in the United States. More particularly, Antigua refers to:

(a) the Wire Act (18 USC § 1084);

(b) the Travel Act (18 USC § 1952); and

(c) the Illegal Gambling Business Act (18 USC § 1955).

6.221 Antigua provides the following discussion of each of these Acts:

[779] See Antigua's first oral statement, para. 25.
[780] Exhibits AB-81, 82, 88 and 89.
[781] Exhibits AB-82 and 99.
[782] Exhibits AB-81 and 88.
[783] Interstate Horseracing Act, 15 USC §§ 3001 – 3007.
[784] See, for example, Antigua's first written submission, para. 116.

> "The 'Wire Act' (18 U.S.C § 1084), which prohibits gambling businesses from knowingly receiving or sending certain types of bets or information that assist in placing bets over interstate and international wires;
>
> The 'Travel Act' (18 U.S.C. § 1952), which imposes criminal penalties for those who utilize interstate or foreign commerce with the intent to distribute the proceeds of any unlawful activity, including gambling considered unlawful in the United States;
>
> The 'Illegal Gambling Business Act' (18 U.S.C. § 1955), which makes it a federal crime to operate a gambling business that violates the law of the state where the gambling takes place (provided certain other criteria are fulfilled such as the involvement of at least five people and an operation during more than 30 days).
>
> Each of these three laws separately prohibits the cross-border supply of gambling and betting services from Antigua." [785]

6.222 The three federal Acts referred to above are listed in Antigua's Panel request. Antigua provided the full texts of the three Acts to the Panel in Exhibit AB-82. In the context of a broader discussion about the impact of US laws on the cross-border supply of gambling and betting services, Antigua refers to Exhibit AB-81, which contains, *inter alia*, an explanation of how these laws prohibit the cross-border supply of gambling and betting services.

6.223 With respect to Antigua's discussion of the Wire Act, the Travel Act and the Illegal Gambling Business Act, we consider that they have been discussed in Antigua's submissions, oral statements and replies to Panel questions and those discussions indicate according to which particular provisions and how the laws allegedly result in a prohibition on the cross-border supply of gambling and betting services.

State laws

Colorado

6.224 In its discussion of the legal position regarding the supply of gambling and betting services in the state of Colorado, Antigua states that "casino gambling may only be conducted in historic mining towns".[786] In a footnote to that statement, Antigua points to an excerpt from a website contained in Exhibit AB-131 entitled "Colorado Gaming Questions and Answers". At page 5 of that excerpt, the website states that:

> "There is no Colorado state law which expressly addresses Internet gambling. The violation under Colorado law is simply the crime of 'gambling', no different than any unlawful form of gambling in Colorado, prohibited by 18-10-103, Colorado Revised Statutes. A few states other than Colorado have recently passed specific state laws expressly prohibiting Internet gambling."

6.225 Section 18-10-103 of the Colorado Revised Statutes is referred to in the Panel request and the text of that section is contained in Exhibit AB-99. The text of § 18-10-103 of the Colorado Revised Statutes can be found in Annex F.

6.226 We consider that § 18-10-103 of the Colorado Revised Statutes has been discussed in Antigua's submissions and those submissions indicate according to which particular provision and how the law of Colorado allegedly results in a prohibition on the cross-border supply of gambling and betting services.

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[785] Antigua's first oral statement, para. 21.
[786] Antigua's second written submission, para. 26.

Louisiana

6.227 In its discussion of the federal and state laws applying to the cross-border supply of gambling and betting services[787], Antigua refers through a footnote to Exhibit AB-119.[788] Exhibit AB-119 contains an article which discusses, *inter alia*, "The Intersection of States' Rights and Federal Interest". In the context of that discussion, reference is made to US laws concerning Internet gambling. In particular, the article states:

> "In Louisiana, gambling by computer is illegal for operators, designers, and producers of related computer services unless the wagering takes place on the premises of a licensed river-boat, state lottery outlet or pari-mutuel facility. Therefore, the same Louisiana provision that generally prohibits Internet gambling does allow a very limited use of computer networks for gambling restricted to the premises of designated wagering facilities."[789]

6.228 A footnote to the excerpted paragraph refers to § 14:90.3 of La. Rev. Stat. Ann. Section 14:90.3 of the La. Rev. Stat. Ann. is referred to in the Panel request[790] and the text of that section is contained in Exhibit AB-99. The text of § 14:90.3 of La. Rev. Stat. Ann. can be found in Annex F.

6.229 We consider that § 14:90.3 of the La. Rev. Stat. Ann. has been discussed in Antigua's submissions and those submissions indicate according to which particular provision and how the law of Louisiana allegedly results in a prohibition on the cross-border supply of gambling and betting services.

Massachusetts

6.230 Antigua states in its submissions that the laws of five states prohibit "unauthorized" gambling.[791] In making this statement, Antigua points to Exhibit AB-84, which contains summaries of five state laws, including those of Massachusetts. In that Exhibit, as concerns Massachusetts, the only statement made that could be construed as relevant to Antigua's allegation that the cross-border supply of gambling and betting services is prohibited in Massachusetts is: "Massachusetts law makes it illegal to transmit any bet or wager over the telephone."[792] In making this statement, Antigua includes a footnote reference to Mass. Ann. Laws: chapter 271 § 17A.[793]

6.231 Section 17A of chapter 271 of Mass. Ann. Laws is referred to in the Panel request and the text of that section is contained in Exhibit AB-99. The text of § 17A of chapter 271 of Mass. Ann. Laws can be found in Annex F.

6.232 We consider that § 17A of chapter 271 of Mass. Ann. Laws has been discussed in Antigua's submissions and those discussions indicate according to which particular provision and how the law of Massachusetts allegedly results in a prohibition on the cross-border supply of gambling and betting services.

Minnesota

6.233 Antigua notes in its submissions that it included in its Panel request a "huge number of American laws" that together "create the total ban" of the cross-border supply of gambling and betting

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[787] See Antigua's second oral statement paras. 11–18.
[788] Footnote 4 of Antigua's second oral statement.
[789] Exhibit AB-119, p. 4.
[790] We note that the Panel request refers to "La. Rev. Stat. Ann. § 14:90.-4". We understand this reference to include §§ 14:90.0-14:90.4 and, therefore, encompasses § 14:90.3.
[791] Antigua's first oral statement, para. 20.
[792] Exhibit AB-84, p. 18.
[793] Exhibit AB-84, footnote 15.

services.[794] In making this submission, Antigua refers through a footnote to a number of exhibits, which it says contain "the text of all relevant laws listed in our Panel request, together with brief summaries of these laws." Antigua refers, *inter alia*, to Exhibit AB-88, which contains Antigua's summary of the state laws listed in its Panel request including those pertaining to Minnesota. Antigua also refers to Exhibit AB-99, which contains the text of those laws. These exhibits do not, in our view, indicate according to which particular provision and how the law of Minnesota results in a prohibition on the cross-border supply of gambling and betting services. However, in its reply to a question posed by the Panel, Antigua refers to legislative provisions, their application and relevant practice that Antigua submits are "all elements of the total ban".[795] In making this statement, Antigua includes a footnote reference to Exhibit AB-96. Exhibit AB-96 contains a statement by the Minnesota Attorney General on Internet jurisdiction, which states in relevant part that:

> "Minnesota residents should be aware that it is unlawful to make a bet through Internet gambling organizations. Minnesota law makes it a misdemeanour to place a bet unless done pursuant to an exempted, state-regulated activity, such as licensed charitable gambling or the state lottery. Minnesota Statute Sections 609.75, Subdivisions 2 – 3; 609.755(1) (1994). The Internet gambling organizations are not exempted. Therefore, any person in Minnesota who places a bet through one of these organizations is committing a crime."

6.234 Sections 609.75, Subdivisions 2-3 and 609.755(1) of Minn. Stat. Ann. are referred to in the Panel request and the text of those sections is contained in Exhibit AB-99. The text of §§ 609.75, Subdivisions 2-3 and 609.755(1) of Minn. Stat. Ann. can be found in Annex F.

6.235 We consider that §§ 609.75, Subdivisions 2-3 and 609.755(1) of Minn. Stat. Ann. have been discussed in Antigua's submissions and those discussions indicate according to which particular provisions and how the law of Minnesota allegedly results in a prohibition on the cross-border supply of gambling and betting services.

New Jersey

6.236 Antigua states in its submissions that the laws of five states prohibit "unauthorized" gambling.[796] In making this statement, Antigua points to Exhibit AB-84, which contains summaries of five state laws, including those of New Jersey. In that Exhibit, as concerns New Jersey, the only statements that can be construed as relevant to Antigua's allegation that the cross-border supply of gambling and betting services is prohibited are as follows:

> "In New Jersey, only gambling that has been authorized by public referendum is legal, and Internet gambling has not been authorized by public referendum. The New Jersey constitution prohibits the legislature from authorizing gambling unless the specific type of gambling, any restrictions on it, and control of it have been approved by public referendum. In addition, New Jersey's ... civil code bans any form of unauthorized gambling as well. As an unauthorized form of gambling, Internet gambling is prohibited under New Jersey law."[797]

6.237 In making these statements, Antigua includes a footnote reference to N.J. Const. Art. 4, Sec. VII, paragraph 2[798] and to N.J. Code § 2A:40-1.[799]

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[794] Antigua's first oral statement, para. 25.
[795] Panel question No. 10.
[796] Antigua's first oral statement, para. 20.
[797] Exhibit AB-84, pp. 19-20.
[798] Exhibit AB-84, Footnote 37.
[799] Exhibit AB-84, Footnote 39.

6.238 Paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code[800] are referred to in the Panel request and the text of those sections is contained in Exhibit AB-99. The text of paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code can be found in Annex F.

6.239 We consider that paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code have been discussed in Antigua's submissions and those discussions indicate according to which particular provisions and how the law of New Jersey allegedly results in a prohibition on the cross-border supply of gambling and betting services.

New York

6.240 Antigua states in its submissions that the laws of five states prohibit "unauthorized" gambling.[801] In making this statement, Antigua points to Exhibit AB-84, which contains summaries of five state laws, including those of New York. In that Exhibit, as concerns New York, the only statements that can be construed as relevant to Antigua's allegation that the cross-border supply of gambling and betting services is prohibited are as follows:

> "Unauthorized betting and gambling are illegal in New York. With certain exceptions, New York has expressly prohibited betting in both its constitution and its General Obligations Law."[802]

6.241 In making these statements, Antigua includes a footnote reference to N.Y. Const. Art. I § 9 and N.Y. Gen. Oblig. L. § 5-401. Both of these sections are listed in the Panel request and the text of both sections is contained in Exhibit AB-99.[803] The text of § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. can be found in Annex F.

6.242 We consider that § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. have been discussed in Antigua's submissions and those discussions indicate according to which particular provisions and how the law of New York allegedly results in a prohibition on the cross-border supply of gambling and betting services.

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[800] We understand that the N.J. Code is equivalent to "N.J. Stat. Ann.", which is the way in which the Code is referred to by Antigua in its Panel request.

[801] Antigua's first oral statement, para. 20.

[802] Exhibit AB-84, p. 21.

[803] We note that N.Y. Const. Art. I § 9 is listed in Antigua's Panel request but the revised request for consultations refers to N.Y. Const. Art. II § 9. We stated in our response to the US request for preliminary rulings that we would definitively determine whether or not the difference between the reference in the Panel request and the revised request for consultations is due to a typographical error after Antigua had completed making its prima facie case. Antigua has only provided us with the text of Art. I § 9 of N.Y. Const. and not Art. II § 9. On the basis of the text that is available to us, it appears that Antigua intended to refer to N.Y. Const. Art. I § 9 rather than Art. II § 9 in its revised request for consultations since the former clearly relates to gambling. We understand from Antigua that the latter concerns suffrage (see Antigua's first written submission, para. 150). The United States has not disputed this. Accordingly, we conclude that the discrepancy between the references in the Panel request and the revised request for consultations to the N.Y. Const. is merely typographical in nature. There are also differences between the references in the Panel request and the revised request for consultations in respect of the laws for Colorado and Rhode Island. However, the differences apply to provisions of the laws of these states that are not being considered further by the Panel because, as we concluded in paragraph 6.215(b) above, Antigua could not and did not make any prima facie demonstration that they are inconsistent with the GATS. Therefore, we do not need to decide whether or not the discrepancies between the references in the Panel request and the revised request for consultations to provisions of the laws of these states are merely typographical in nature. In any case, it is the Panel request and not the request for consultations that determines our jurisdiction.

South Dakota

6.243 In its discussion of the federal and state laws applying to the cross-border supply of gambling and betting services[804], Antigua refers through a footnote to Exhibit AB-119.[805] Exhibit AB-119 contains an article which discusses, *inter alia*, "The Intersection of States' Rights and Federal Interest". In the context of that discussion, reference is made to US laws concerning Internet gambling. In particular, the article states:

> "Laws concerning Internet gambling are as varied as the diverse gaming schemes in each state jurisdiction, and even states that prohibit Internet gambling may provide for exceptions for Internet gambling conducted by a state regulated and licensed gaming operators. In Nevada, Illinois[806] and South Dakota, it may be fairly stated that these states have enacted provisions that criminalize unregulated Internet gambling but leave a door open for regulated Internet gambling conducted by a gaming operator licensed by the respective state."[807]

6.244 A footnote to the excerpted paragraph refers to S.D. Codified Laws, §§ 22-25A-1 - 22-25A-15. Sections 22-25A-1 - 22-25A-15 of the S.D. Codified Laws are referred to in the Panel request and the text of these sections is contained in Exhibit AB-99. The text of §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws can be found in Annex F.

6.245 We consider that §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws have been discussed in Antigua's submissions and those submissions indicate according to which particular provisions and how the law of South Dakota allegedly results in a prohibition on the cross-border supply of gambling and betting services.

Utah

6.246 Antigua states in its submissions that the laws of five states prohibit "unauthorized" gambling.[808] In making this statement, Antigua points to Exhibit AB-84, which contains summaries of five state laws, including those of Utah. In that Exhibit, as concerns Utah, the only statement that can be construed as relevant to Antigua's allegation that the cross-border supply of gambling and betting services is prohibited is: "Internet gambling is prohibited in Utah, along with all other forms of gambling".[809] In making this statement, Antigua includes a footnote reference to Utah Code Ann. § 76-10-1102.

6.247 Section 76-10-1102 of the Utah Code Ann. is referred to in the Panel request and the text of that section is contained in Exhibit AB-99. The text of § 76-10-1102 of the Utah Code Ann. can be found in Annex F.

6.248 We consider that § 76-10-1102 of the Utah Code Ann. has been discussed in Antigua's submissions and those discussions indicate according to which particular provision and how the law of Utah allegedly results in a prohibition on the cross-border supply of gambling and betting services.

(iv) Summary

6.249 After making our utmost efforts to accord Antigua's claims "close attention and serious analysis", in light of our discussion above, we have concluded that, among the laws listed in Antigua's

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[804] See Antigua's second oral statement, paras. 11–18.
[805] Footnote 4 of Antigua's second oral statement.
[806] The laws cited in the Article for Nevada and Illinois are not contained in Antigua's Panel request.
[807] Exhibit AB-119, p. 4.
[808] Antigua's first oral statement, para. 20.
[809] Exhibit AB-84, p. 22.

Panel request, the following have been discussed in Antigua's submissions and those discussions indicate according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services:

(a) Federal laws:

(i) Wire Act (18 USC § 1084);

(ii) Travel Act (18 USC § 1952); and

(iii) Illegal Gambling Business Act (18 USC § 1955).

(b) State laws:

(i) Colorado: § 18-10-103 of the Colorado Revised Statutes;

(ii) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;

(iii) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;

(iv) Minnesota: §§ 609.75, Subdivisions 2 – 3 and 609.755(1) of Minn. Stat. Ann;

(v) New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of N.J. Code;

(vi) New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.;

(vii) South Dakota: §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws; and

(viii) Utah: § 76-10-1102 of the Utah Code Ann.

(d) "Measures ... affecting trade in services"

6.250 The threshold question that must be addressed in determining whether or not the GATS is applicable to the measures identified above in paragraph 6.249 is whether those measures "affect trade in services" within the meaning of Article I:1 of the GATS. This threshold question must be addressed regardless of the specific Article of the GATS that is being invoked in support of a claim that the GATS has been violated.

6.251 The Appellate Body in *EC – Bananas III* indicated that the expression "measures ...affecting trade in services" in Article I:1 is to be interpreted broadly.[810] Further, the Appellate Body in that case upheld the Panel's interpretation of that expression as meaning:

> "... no measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."[811]

[810] Appellate Body Report on *EC – Bananas III*, para. 220.
[811] Appellate Body Report on *EC – Bananas III*, para. 220 citing the Panel Report on *EC – Bananas III*, para. 7.285.

6.252 There is no reason why measures adopted by regional and local governments and authorities cannot *a priori* "affect the supply of a service" within the meaning of Article I:1 of the GATS, even if such measures cannot be enforced extraterritorially.

6.253 This being said, whether a measure "affecting trade in services" within the scope of the GATS in accordance with Article I:1 is inconsistent with one or more provisions of the GATS is a distinct matter which calls for a separate determination under the relevant GATS provisions.

6.254 In our view, the measures identified above in paragraph 6.249 necessarily affect trade in services within the meaning of Article I:1 of the GATS because, as we find below in paragraphs 6.360 - 6.418, they entail prohibitions on the supply of gambling and betting services.

6.255 We will consider in the following sections of our Report whether Antigua has met its prima facie burden in proving that each of the measures identified above in paragraph 6.249 are inconsistent with the various Articles of the GATS that Antigua has invoked. Where relevant and necessary, we will also make reference to the court cases in which the relevant provisions of the Wire Act, Travel Act and Illegal Gambling Business Act were applied, the law enforcement actions against financial intermediaries and media companies and the statements by government officials advising national advertisers not to allow advertising for off-shore Internet gambling services as illustrative of the "practice" of US authorities regarding their interpretation and application of the above laws.

D. CLAIMS OF VIOLATION OF THE UNITED STATES' MARKET ACCESS COMMITMENT UNDER ARTICLE XVI OF THE GATS

1. Claims and main arguments of the parties

6.256 Antigua argues that since the United States has scheduled a full market access commitment for the cross-border supply of gambling and betting services but maintains and enforces measures prohibiting the cross-border supply of gambling and betting services, and that those measure(s) are inconsistent with Article XVI:1 of the GATS.[812] Antigua submits that the United States' "total prohibition" on the cross-border supply of gambling and betting services also violates Article XVI:2(a) and 2(c)[813] because the "total prohibition" amounts to a zero quota. Antigua adds finally that the application of Article XVI:2(a) and (c) to a non-numerical quota, such as the alleged "total prohibition", is mandated by the principle of effective treaty interpretation and by the 1993 Scheduling Guidelines.[814]

6.257 According to the United States, contrary to the situation under Article XI of the GATT 1994, under the GATS, a "prohibition" is not *ipso facto* inconsistent with Article XVI.[815] The United States submits that the substance of Article XVI is contained in Article XVI:2, which deals with the subject-matter of restrictions and their precise form and/or manner of expression, and that it is a closed list.[816] The United States argues that the restrictions it maintains on the remote supply of some gambling and betting services are not restrictions of the type covered by Article XVI:2 of the GATS because the subject-matter of the US restrictions refers to the character of the activity involved rather than the "number of service suppliers" or the "total number of service operations or total quantity of service output", being the criteria listed under subparagraphs (a) and (c) of Article XVI:2 respectively.[817]

[812] Antigua's first written submission, para. 181.
[813] Antigua's first written submission, para. 184.
[814] See Antigua's second written submission, paras. 36-38 and Antigua's reply to Panel question No. 15.
[815] United States' reply to Panel question No. 15.
[816] United States first written submission, para. 81.
[817] United States' second written submission, paras. 21-25.

Finally, the United States submits that, in the United States, there is no "total prohibition" or any "zero quota" since the cross-border supply of some gambling and betting services is permitted.[818]

2. Relevant GATS provisions

6.258 Article XVI of the GATS provides as follows:

> "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 favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[819]
>
> 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 quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
> >
> > (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
> >
> > (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[820]
> >
> > (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
> >
> > (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
> >
> > (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

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[818] United States' second written submission, para. 26.

[819] (*original footnote*) If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

[820] (*original footnote*) Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

3. Assessment by the Panel

(a) Introduction

6.259 In light of the claims and arguments of the parties, it is necessary to determine the nature and scope of the obligations contained in Article XVI of the GATS. In order to do so, the Panel will need to examine whether Article XVI:1 contains obligations that are different from those contained in Article XVI:2 and whether Article XVI:2 exhaustively defines the types of restrictions that are prohibited by Article XVI. In the specific circumstances of the present dispute, the Panel will also need to ascertain the legal implications of the inscription by a Member of the word "None" in the market access column of its schedule for mode 1 for a specific sector or sub-sector.

6.260 In particular, the Panel will need to determine whether such a Member is entitled to maintain a measure which prohibits one, several or all means of delivery included in mode 1; whether such a measure is inconsistent with the first and the second paragraphs of Article XVI of the GATS; and whether a restriction on some services covered in a scheduled sector or sub-sector amounts to a violation of Article XVI.

6.261 In this dispute, Antigua claims that its market access rights under Article XVI for gambling and betting services in the United States are impaired by the US measures at issue. We examine the United States' obligations under Article XVI hereafter. To do so, the Panel will, in the light of Article 3.2 of the DSU and the Vienna Convention, interpret the text of Article XVI of the GATS in good faith, in accordance with the ordinary meaning to be given to the terms of this provision when read in their context and in the light of the object and purpose of the GATS and those of the WTO Agreement.

(b) Interpretation and scope of Article XVI

(i) The first paragraph of Article XVI

6.262 In the present dispute, Antigua claims that a blanket prohibition on the remote supply of gambling and betting services is contrary to the US Schedule, which contains the inscription "None" in the market access column for mode 1 in respect of the specific sub-sector 10.D. Therefore, according to Antigua, the measures at issue provide less favourable treatment than that provided for in the US Schedule in a manner inconsistent with the first paragraph of Article XVI. The United States responds that the second paragraph of Article XVI exhaustively defines the types of restrictions that are prohibited by Article XVI. We understand the United States' argument to imply that when a Member has inscribed the word "None" in its market access column for mode 1, it signifies that the Member has specified in its schedule none of the limitations or measures listed in subparagraphs (a) to (f) of Article XVI:2 and is, accordingly, prohibited from adopting or maintaining any such limitations or measures.

6.263 In the Panel's view, the *ordinary meaning of the terms* contained in the first paragraph of Article XVI imposes an obligation on Members to provide, with respect to market access, no less favourable treatment than that provided for in the Members' respective schedules. The standard of "no less favourable" treatment in Article XVI is established by reference to the specific commitments inscribed in the market access column of a Member's schedule. In particular, the first paragraph of Article XVI makes clear that Members are bound by the "terms, limitations and conditions" contained in the market access column of their respective schedules. A Member must abide by the "terms, conditions and limitations" contained in its schedule and cannot provide, in respect of services and services suppliers of other Members, treatment less favourable than the minimum treatment it is committed to in its schedule for market access.

6.264 The ordinary meaning of the terms used in the first paragraph of Article XVI also indicates that nothing would prevent a Member from providing to services and service suppliers of *all* Members treatment *more favourable* than that provided for in its schedule or that it provides to its own services and service suppliers.

6.265 The first paragraph of Article XVI also extends to Members the obligation to provide no less favourable treatment than that provided for in their respective schedules, to *any other Members*, i.e. to *all* WTO Members. In other words, the commitments undertaken pursuant to Article XVI are to be applied on a non-discriminatory basis. Therefore, the first paragraph of Article XVI contains a specific expression of the MFN principle of Article II of the GATS.[821]

6.266 When faced with an allegation of violation of Article XVI, a panel must first examine the schedule of the challenged Member. There are three possible inscriptions that can be made in the market access column of a Member's schedule: "Unbound"[822], "None" or limitations may be inscribed.

6.267 In the present dispute, the United States inscribed "None" in the market access column of its Schedule for mode 1 in respect of gambling and betting services. Since the first step in an analysis under the first paragraph of Article XVI is to have regard to the challenged Member's schedule, we believe that, with respect to the US Schedule, we must determine the legal significance under Article XVI of the inscription of the word "None" in the market access column for "mode 1".

"None" inscribed under "Market Access Limitations"

6.268 The terms of a schedule are to be interpreted as treaty terms.[823] All Members' schedules include three columns in their respective schedules: one entitled "sector or sub-sector", another "Limitations on market access" and the third "Limitations on national treatment".[824]

Sector or sub-sector	Limitations on market access	Limitations on national treatment
D. OTHER RECREATIONAL SERVICES (except sporting)	1) None 2) None 3) The number of concessions available for commercial operations in federal, state and local facilities is limited 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) None

[821] We note in passing that paragraph 5 of the "Listing of Article II exemptions – Explanatory Note by the Secretariat" (the so-called Scheduling Guidelines on MFN Exemptions) states that: "Therefore if a Member takes an MFN exemption in a sector where specific commitments are undertaken, the exemption would allow that Member to deviate from its obligations under paragraph 1 of Article II but not from its commitments under Articles XVI or XVII. Accordingly, a Member undertaking a market access or a national treatment commitment in a sector must accord the stated minimum standard of treatment specified in its schedule to all other Members.": Job No. 2061 dated 15 September 1993.

[822] S/L/92, para. 47, states that: "In some situations, a particular mode of supply may not be technically feasible. An example might be the cross-border supply of hair-dressing services. In these cases the term UNBOUND* should be used. The asterisk should refer to a footnote which states 'Unbound due to lack of technical feasibility'. The term may not be used as an entry in the national treatment column for modes 1 and 2 when, for the same service, there is a market access commitment. Where the mode of supply thought to be inapplicable is in fact applicable, or becomes so in the future, the entry means 'unbound'."

[823] Appellate Body Report on *EC – Computer Equipment*, para 84.

[824] The fourth column (Additional commitments) has not been reproduced here.

Source: The United States of America, Schedule of Specific Commitments, GATS/SC/90, 15 April 1994, p. 72 (extract).

6.269 As is evident from the above excerpt of the US Schedule, the word "None" is a treaty term since it is in its Schedule. Further, "None" is inscribed under "Limitations on market access". However, "None" is not defined in the GATS nor in any Members' schedules.

6.270 In the absence of any treaty definition of the word "None" when inscribed in a Member's schedule under "Limitations on market access", and pursuant to Articles 31.1 and 31.2 of the Vienna Convention, the Panel will, as a starting point, resort, to the dictionary definitions of these terms. In so doing, the Panel is well aware of the limitations of dictionary definitions to identify the ordinary meaning of the terms of a treaty.[825]

6.271 The term "none" is defined in the *New Shorter Oxford Dictionary* as "no one not any one of a number *of* persons or things".[826] The *Webster New Encyclopedic Dictionary* defines it as "not any such thing or person".[827] The *New Little Oxford Dictionary* defines it as "not any *of*...".[828] These definitions indicate that the Panel has to identify what an inscription of the word "None" in a Member's schedule relates or refers to.

6.272 In the context of the present dispute, the inscription of the word "None" refers to "Limitations on market access". Therefore, the inscription of the word "None" in the market access column of the US Schedule would appear to mean "none of the limitations on market access".

6.273 The ordinary meaning of "limitations", as defined in the *New Shorter Oxford Dictionary*, is "a point or a respect, in which a thing, and especially a person's ability, is limited".[829] The *Webster New Encyclopedic Dictionary* defines it as "something that limits"[830] and the *New Little Oxford Dictionary* as "limiting or being limited; lack of ability ...".[831]

6.274 The concept of "market access" was fundamental to GATT law and practice; it is still so under the WTO Agreement.[832] In the Dictionary of Trade Policy Terms, "market access" is defined as:

> "[O]ne of the most basic concepts in international trade. It describes the extent to which a good or a service can compete with locally-made products in another market. In the WTO framework it as [sic] a legalistic terms outlining the government-imposed conditions under which a product may enter a country under non-discrimination conditions".[833]

6.275 On the basis of the above dictionary definitions, "Limitations on market access" would appear to include provisions or conditions limiting the ability of services and service suppliers to gain access to the market of that Member. However, in light of the specific and specialized context where these

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[825] Appellate Body Reports on *EC – Asbestos*, para. 92; and *Canada – Aircraft*, para. 153.
[826] *New Shorter Oxford Dictionary*, 1993, p. 1936.
[827] *Webster New Encyclopedic Dictionary*, 1993, p. 681.
[828] *New Little Oxford Dictionary,* 1989, p. 364.
[829] *New Shorter Oxford Dictionary,*1993, p. 1592.
[830] *Webster New Encyclopedic Dictionary*, 1993, p. 580.
[831] *New Little Oxford Dictionary*, 1989, p. 313.
[832] Article XVI:1 of the WTO Agreement provides that: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."
[833] Dictionary of Trade Policy Terms (2nd ed.), Walter Goode, 1998, p. 176.

terms are used, the Panel believes that the dictionary definitions are not particularly enlightening or informative.[834]

6.276 Pursuant to Articles 31.1 and 31.2 of the Vienna Convention, we turn to the legal *context* of Article XVI in our effort to interpret the first paragraph of Article XVI and relevant inscriptions in a Member's schedule.

6.277 The 1993 Scheduling Guidelines, which are part of the context for the GATS Agreement[835], are also part of the context of Article XVI and shed light on the meaning of "None". Paragraphs 23 and 24 of the 1993 Scheduling Guidelines contain the following pertinent comments on the inscription of the term "None" in the market access column of a Member's schedule:

> "23. Since the terms used in a Member's schedule create legally binding commitments, it is important that those expressing presence or absence of limitations to market access and national treatment be uniform and precise. Depending on the extent to which a Member has limited market access and national treatment, for each commitment with respect to each mode of supply, four cases can be foreseen:
>
> (a) Full commitment
>
> 24. In this case the Member does not seek in any way to limit market access or national treatment in a given sector and mode of supply through measures inconsistent with Articles XVI and XVII. The Member in this situation should mark in the appropriate column: NONE. However, any relevant limitations listed in the horizontal section of the schedule will still apply."

6.278 According to paragraph 24 of the 1993 Scheduling Guidelines, by inscription of the word "None" in the market access column of a Member's schedule, a Member cannot adopt or maintain any measure inconsistent with Article XVI. The word "None" in the market access column means that the Member has undertaken a *full market access commitment*. "Full market access" is defined in paragraph 4 of the 1993 Scheduling Guidelines as follows:

> "A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI. The measures listed comprise four types of quantitative restrictions (subparagraphs a-d), as well as limitations on forms of legal entity (subparagraph e) and on foreign equity participation (subparagraph f). The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII). The quantitative restrictions can be expressed numerically, or through the criteria specified in subparagraphs (a) to (d); these criteria do not relate to the quality of the service supplied, or to the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier)."

6.279 Thus, when a Member has the inscription "None" in the market access column of its schedule, it must maintain "full market access" within the meaning of the GATS, i.e. it must not maintain any of the six limitations and measures listed in the second paragraph of Article XVI.

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[834] Appellate Body Reports on *EC – Asbestos*, para. 92; and *Canada – Aircraft*, para. 153.
[835] We recall our conclusion in para. 6.82 above.

"Mode 1" and its inherent "means of delivery"

6.280 In the present dispute, the Panel has to interpret the meaning of the word "None" when it has been inscribed under "Limitations on market access" *for mode 1*. The Panel is of the view that it must, therefore, consider the nature of a market access commitment for mode 1, since Antigua claims that the challenged US measures are contrary to the US market access commitment for mode 1 in respect of sub-sector 10.D.

6.281 Article I:2(a) of the GATS defines "mode 1", otherwise referred to as "cross-border", as the supply of a service "from the territory of one Member into the territory of any other Member". The definition does not contain any indication as to the means that can be used to supply services cross-border. This indicates, in our view, that the GATS does not limit the various technologically possible means of delivery under mode 1.

6.282 As for relevant context for identifying the means of delivery included under Article I:2(a), paragraph 18 of the Scheduling Guidelines states that:

> "The four modes of supply listed in the schedules correspond to the scope of the GATS as set out in Article I:2. The modes are essentially defined on the basis of the origin of the service supplier and consumer, and the degree and type of territorial presence which they have at the moment the service is delivered."

6.283 In respect of supply by mode 1, or "cross-border" supply, the chart entitled "Modes of Supply" contained in the 1993 Scheduling Guidelines states:

> "Service supplier not present within the territory of the Member
>
> Service delivered within the territory of the Member, from the territory of another Member"

6.284 Paragraph 19 of the Scheduling Guidelines defines "cross-border supply" as:

> "International transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (e.g. a computer diskette, or drawings) are all examples of cross-border supply, since the service supplier is not present within the territory of the Member where the service is delivered."

6.285 The Panel concludes that mode 1 under the GATS encompasses all possible means of supplying services from the territory of one WTO Member into the territory of another WTO Member. Therefore, a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule. We note that this is in line with the principle of "technological neutrality", which seems to be largely shared among WTO Members.[836] Accordingly, where a full market access commitment has been made for mode 1, a prohibition on one, several or all means of delivery included in this mode 1 would be a limitation on market access for the mode.

[836] *Work Programme on Electronic Commerce – Progress Report to the General Council*, adopted by the Council for Trade in Services on 19 July 1999, S/L/74, 27 July 1999. para. 4: "It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a services may be supplied." The United States seems to agree as is evident from the following comments made by it in a submission contained in WT/GC/16, p. 3: "there should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality."

6.286 In our view, if one, several or all means of delivery cross-border are prohibited, the opportunities for foreign suppliers using those means of delivery to supply services cross-border to gain access to foreign markets are clearly reduced, if not nullified. If a Member desires to exclude market access with respect to the supply of a service through one, several or all means of delivery included in mode 1, it should do so explicitly in its schedule. The Panel considers that any other interpretation would result in the nullification of benefits of a commitment made for mode 1, as Members could, through regulations, impose restrictions or prohibitions essentially on one, several or all means of delivery.

6.287 To sum up, we conclude that mode 1 includes all means of delivery. We are of the view that when a Member inscribes the word "None" in the market access column of its schedule for mode 1, it commits itself not to maintain measures which prohibit the use of one, several or all means of delivery under mode 1 in a committed sector or sub-sector. This is especially so in sectors and sub-sectors where cross-border supply is effected essentially if not exclusively through the Internet.

Restrictions with respect to certain services covered in a sector or sub-sector

6.288 In this dispute, the United States argues that it does not prohibit the cross-border supply of all "gambling and betting services" because it allows the cross-border supply of services such as "odds-making" or broadcasting of horse races. Antigua is of the view that a commitment in a given sector or sub-sector covers all services that come within that sector or sub-sector.

6.289 Article XXVIII(e) of the GATS defines "sector" to mean:

> "(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
>
> (ii) otherwise, the whole of that service sector, including all of its subsectors."

6.290 In our view, if a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that fall within the scope of that sector or sub-sector. A Member does not fulfil its GATS obligations if it allows market access for only some of the services covered by a committed sector or sub-sector while prohibiting all others. If a Member wishes to restrict market access with respect to certain services falling within the scope of a sector or sub-sector, it should set out the restrictions or limitations on access in the appropriate place in the Member's schedule. Indeed, a specific commitment in a given sector or sub-sector is a guarantee that the *whole* of that sector, i.e. *all* services included in that sector or sub-sector are covered by the commitment. Any other interpretation would make market access commitments under the GATS largely meaningless.

6.291 The *context* of the first paragraph of Article XVI includes the second paragraph of Article XVI. We proceed, therefore, to examine the second paragraph of Article XVI.

(ii) The second paragraph of Article XVI

6.292 Article XVI:2 provides in relevant part that:

> "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 ....
>
> (b) limitations on the total value of service transactions ...

(c) limitations on the total number of service operations ...

(d) limitations on the total number of natural persons ...

(e) measures which restrict or require specific types of legal entity ...; and

(f) limitations on the participation of foreign capital ..."

6.293 On the basis of the *ordinary meaning* of the terms contained in Article XVI:2, the purpose of the second paragraph of Article XVI is to define the types of limitations and measures which shall not be maintained or adopted in scheduled sectors or sub-sectors, unless otherwise indicated in the relevant Member's schedule. Paragraph 2 also informs Members of the manner in which they should schedule such limitations and measures.

6.294 We now turn to the *context for the interpretation of Article XVI:2*. First, confirmation of our interpretation is to be found in Article XX:1 of the GATS, which requires Members to set out in their schedules "terms, limitations and conditions on market access". This language, particularly the use of the word "limitations", denotes the limitations identified in Article XVI:2(a),(b),(c),(d) and (f). The words "terms" and "conditions" refer to the "measures" contemplated by Article XVI:2(e) and the chapeau of Article XVI:2 (i.e. the possibility to make a commitment on the basis of a regional subdivision of the territory).

6.295 Secondly, footnote 2 of the 1993 Scheduling Guidelines states that:

> "The term 'limitations' will be used throughout this Note to refer to the 'terms', 'conditions', 'limitations' and 'qualifications' used in Article XVI and XVII of the GATS."

6.296 Therefore, the 1993 Scheduling Guidelines would seem to indicate that no difference exists between the "terms, conditions and limitations" contained in a Member's schedule and the "limitations" and "measures" that it is entitled to maintain if scheduled, pursuant to the second paragraph of Article XVI.[837]

6.297 Thirdly, paragraph 4 of the 1993 Scheduling Guidelines provides in relevant part that:

> "A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI. The measures listed comprise four types of quantitative restrictions (subparagraphs a-d), as well as limitations on forms of legal entity (subparagraph e) and on foreign equity participation (subparagraph f). The *list is exhaustive* and includes measures which may also be discriminatory according to the national treatment standard (Article XVII)." (emphasis added)

6.298 It seems clear from the 1993 Scheduling Guidelines that the list of limitations in paragraph 2 of Article XVI is an exhaustive list. Thus, the types of measures listed in the second paragraph exhaust the types of market access restrictions prohibited by Article XVI, in particular by the first paragraph of Article XVI. Paragraph 4 of the 1993 Scheduling Guidelines therefore confirms that paragraph 2 of Article XVI exhaustively defines the limitations and measures that are prohibited by

[837] The footnote suggests that this understanding is a reading convention for the purpose of the Scheduling Guidelines. However, since the 1993 Scheduling Guidelines are context for the GATS, we believe that this understanding informs the interpretation of the term "limitation" in the GATS itself. In this regard, we note that this understanding also applies to GATS schedules which follow the format established in the 1993 Scheduling Guidelines and which refers to "limitations on market access".

Article XVI, unless scheduled. In that sense, paragraph 2 of Article XVI complements the first paragraph of that Article.

(iii) The scope of the first and second paragraphs of Article XVI

Ordinary meaning

6.299 As discussed previously, the ordinary meaning of the terms contained in the first and second paragraphs of Article XVI means that the only limitations and measures falling within the scope of Article XVI are those listed in the second paragraph of Article XVI.

6.300 We must, as required by Articles 31.1 and 31.2 of the Vienna Convention, continue our investigation for the interpretation of Article XVI by looking at the *context* of the first and second paragraphs of Article XVI, namely other provisions of the GATS. In particular, we will look at the relationship between Articles XVI, XVII, XVIII and paragraphs 4 and 5 of Article VI of the GATS, as this may assist the Panel in determining the nature and the scope of the obligations contained in Article XVI. We believe that these other provisions may give us indications as to the outer limits of Article XVI.

The context: the relationship between Articles XVI, XVII, XVIII, VI:4 and 5

6.301 Articles VI:4 and VI:5 provide that:

> "4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
>
> > (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
> >
> > (b) not more burdensome than necessary to ensure the quality of the service;
> >
> > (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.
>
> 5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
>
> > (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
> >
> > (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

> (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[838] applied by that Member."

6.302 The object of Article VI is to provide disciplines on domestic regulations or measures that regulate qualification requirements and procedures, technical standards and licensing requirements while the object of Article XVI is to prohibit market access limitations, as defined in Article XVI:2, unless scheduled.

6.303 Measures that constitute market access limitations within the meaning of Article XVI and which, unless scheduled *must be eliminated*, are to be distinguished from measures that impose qualification requirements and procedures, technical standards and licensing requirements, which *can be maintained* so long as they do not constitute "unnecessary barriers to trade in services", pursuant to the criteria contained in Article VI:5 or pursuant to the criteria to be developed by the Council for Trade in Services pursuant to Article VI:4.

6.304 Domestic regulations falling within the scope of Articles VI:4 or VI:5 of the GATS are, nonetheless, likely to have an effect on market access to the extent that services and service suppliers from other WTO Members which do not, or cannot, comply with such regulations will not have access to the relevant Member's market. Yet, non-discriminatory measures relating to, for instance, the quality of the service supplied or the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier) can be maintained provided that they conform to criteria to be developed by the Council for Trade in Services pursuant to Article VI:4 and, in the meantime, to the criteria contained in Article VI:5.

6.305 Under Article VI and Article XVI, measures are either of the type covered by the disciplines of Article XVI or are domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements subject to the specific provisions of Article VI. Thus, Articles VI:4 and VI:5 on the one hand and XVI on the other hand are mutually exclusive.

6.306 Therefore, qualification requirements and procedures, technical standards and licensing requirements covered by the disciplines of Article VI:4 and VI:5 could *not* be evidence that a Member is providing less favourable treatment than that provided in its schedule contrary to Article XVI, even when "None" has been inscribed in the market access column of a Member's schedule.

6.307 While the GATS does not explicitly address the relationship between Article XVI and VI, the 1993 Scheduling Guidelines, as part of the context for interpreting the GATS, contain some discussion on this issue:

> "4. [...] The quantitative restrictions can be expressed numerically, or through the criteria specified in subparagraphs (a) to (d); these criteria do not relate to the quality of the service supplied, or to the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier).
>
> 5. It should be noted that the quantitative restrictions specified in subparagraphs (a) to (d) refer to maximum limitations. Minimum requirements such as those common to licensing criteria (e.g. minimum capital requirements for the establishment of a corporate entity) do not fall within the scope of Article XVI. If such a measure is discriminatory within the meaning of Article XVII and, if it cannot be justified as an exception, it should be scheduled as a limitation on national treatment. If such a measure is non-discriminatory, it is subject to the disciplines of Article VI:5. Where

[838] (*original footnote*) The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

> such a measure does not conform to these disciplines, and if it cannot be justified as an exception, it must be brought into conformity with Article VI:5 and cannot be scheduled."[839]

6.308 The Revised Scheduling Guidelines of 2001[840] contain an Annex (4) entitled "Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector – Informal Note by the Chairman". Paragraphs 2 and 3 of this Annex shed light on the relationship between Articles XVI and VI of the GATS and seem to confirm our interpretation that, based on the ordinary meaning of their respective terms, Articles VI and XVI are mutually exclusive.

> "In the course of work to develop multilateral disciplines on domestic regulation in the accountancy sector, pursuant to paragraph 4 of Article VI of the GATS, the WPPS addressed a wide range of regulatory measures which have an impact on trade in accountancy services. In discussing the structure and content of the new disciplines, it became clear that some of these measures were subject to other legal provisions in the GATS, most notably Articles XVI and XVII. *It was observed that the new disciplines developed under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty.* For this reason, a number of the suggestions for disciplines were excluded from the text. [emphasis added]
>
> (...) A Member scheduling commitments under Articles XVI and XVII has the right to maintain limitations on market access and national treatment and inscribe them in its schedule. On the other hand, *the disciplines to be developed under Article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. They are therefore not subject to scheduling under Articles XVI and XVII*." (emphasis added)

6.309 The organization of the GATS and, in particular, the disciplines provided for in Part III of the GATS entitled "Specific commitments" cast light on the inter-relationship between Articles XVI, XVII and XVIII, the last of which can include measures falling within the scope of Articles VI:4 and VI:5.

6.310 In pursuing the progressive liberalization of trade in services, the GATS defines measures that constitute restrictions on such trade. In designing the structure of the GATS, it appears that the drafters aimed at liberalizing such restrictions through the provisions of Part III of the Agreement, which is comprised of Article XVI ("Market Access"), Article XVII ("National Treatment") and Article XVIII ("Additional Commitments"). In our view, these provisions aim at establishing legal obligations in relation to the use of (or rather the need to refrain from using) trade-restrictive measures.

6.311 In drafting Part III of the GATS, the aim seems to have been to capture all types of trade restrictions and to establish a mechanism for scheduling specific commitments in relation to them. In Articles XVI and XVII, specific commitments are defined in a way that allows the identification of trade restrictions (in other words, limitations). Therefore, if a Member undertakes a full market access or a full national treatment commitment, it must not apply any measure that would be inconsistent with the provisions of those articles. Nonetheless, the drafters seem to have realized that there may be other types of restrictions that would not be covered by the disciplines of Articles XVI and XVII. In other words, there could be restrictions that would not be discriminatory and, therefore,

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[839] 1993 Scheduling Guidelines, paras. 4-5.
[840] 2001 Scheduling Guidelines, S/L/92.

would escape the provisions of Article XVII; nor would they be one of the six types of measures referred to in subparagraphs 2(a) to (f) of Article XVI. Apparently, it was considered that such measures would mainly, but not exclusively, relate to qualifications, standards and licensing matters. At the same time, it appears that it may not have been possible to arrive at a clear definition of the restrictive nature of such measures so that disciplines similar to those of Articles XVI and XVII could be established. It seems, therefore, that it was considered best to simply provide a legal framework for Members to negotiate and schedule specific commitments that they would define, on a case-by-case basis, in relation to any measures that do not fall within the scope of Article XVI or XVII. That framework appears to have been provided in Article XVIII.[841]

6.312 It also appears that the conception of Article XVIII was linked to that of paragraph 4 of Article VI which establishes a work programme for the development of disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures do not constitute unnecessary barriers to trade in services.[842]

6.313 Apparently, these provisions are at the heart of the notion of progressive liberalization, which finds expression in the preamble of the GATS and in Article XIX, paragraphs 1 and 3. Progressive liberalization entails including more sectors in Members' schedules and reduction or elimination of limitations, terms, conditions and qualifications on market access and national treatment through successive rounds of negotiations.

Object and purpose of the GATS

6.314 Our interpretation of the scope of the first and second paragraphs of Article XVI based on the ordinary meaning of the words and the context of Article XVI is confirmed by the object and purpose of the GATS. The second, third and fourth paragraphs of the preamble to the GATS state that:

> "*Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of *transparency* and *progressive liberalization* and as a means of promoting the economic growth of all trading partners and the development of developing countries;
>
> *Desiring* the early achievement of progressively higher levels of liberalization of trade in services through *successive rounds of multilateral negotiations* aimed at promoting the interests of all participants on a mutually advantageous basis and at *securing* an overall balance of rights and obligations, while giving due respect to *national policy objectives*;
>
> *Recognizing* the *right of Members to regulate*, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right ..." (emphasis added)

6.315 These paragraphs confirm that Members intended to liberalize trade in services progressively. This implies that a progressive elimination of various restrictions would occur, including those restrictions covered by Article XVI:2. However, in the meantime, if they have made a market access

[841] Article XVIII reads: " Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule."

[842] It should be noted, however, that the scope of Article XVIII goes beyond that of Article VI:4. The former provides the possibility for negotiating commitments on matters other than qualifications, standards or licensing.

commitment in a particular sector or sub-sector, Members are entitled to maintain such restrictions, provided that they have been explicitly and transparently scheduled.

6.316 Articles XVI and XVII are obligations that apply only to scheduled sectors. Hence, Members can, but are not obliged to, undertake market access and/or national treatment commitments. In scheduled sectors, Members have the freedom to maintain limitations, terms, conditions and qualifications to these specific commitments. Moreover, Members maintain the sovereign right to regulate within the parameters of Article VI of the GATS. Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.

6.317 The preamble of the GATS, which sets out its object and purpose, confirms that the purpose of Article XVI is not to abolish all measures, whether numerical or non-numerical, that are liable to restrict freedom to provide services, but to take an early and significant step towards the *progressive liberalisation* of trade in services, acknowledging that this is to be achieved through *successive rounds* of negotiations designed to secure an overall balance of rights and obligations.

(iv) Conclusion

6.318 The ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article. We proceed now to consider the interpretation of the particular subparagraphs of Article XVI:2 that have been invoked by Antigua, namely Articles XVI:2(a) and XVI:2(c).

(c) Interpretation of Article XVI:2(a) and Article XVI:2(c)

(i) Article XVI:2, subparagraph (a)

6.319 Sub-paragraph (a) of Article XVI:2 provides that:

> "[L]imitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test"

6.320 There are four elements of Article XVI:2(a) that must be interpreted in order for us to determine whether the challenged measures violate Article XVI. First, the Panel must determine whether the challenged measures contain limitations on "service suppliers"; secondly, whether the list of limitations in Article XVI:2(a) is an illustrative or an exhaustive list; thirdly, whether a measure which prohibits one, several or all means of supply is to be considered as a limitation "in the form of [a] numerical quota"; and finally, in this case, we must also determine whether a limitation on some of the services covered by a committed sector or sub-sector, is to be considered as a limitation "in the form of [a] numerical quota".

Service suppliers

6.321 The term "service suppliers" is defined in Article XXVIII:(g) to mean "any person that supplies a service".[843] On the basis of Article XXVIII:(g), we consider that subparagraph (a) of

[843] The footnote to Article XXVIII:(g) states that: "Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied."

Article XVI:2 covers measures that are addressed to and drafted so as to impose limitations on "any person that supplies a service".

Illustrative or exhaustive list of limitations?

6.322 Antigua argues that the word "whether" in Article XVI:2(a) indicates that the list that follows is illustrative rather than exhaustive. More particularly, in Antigua's view, the enumeration in Article XVI:2(a) of four forms of limitation[844] is not meant to limit the application of Article XVI:2(a) to those four identified forms. Rather, in Antigua's view, the word "whether" makes it clear that the four forms of limitations explicitly mentioned are clearly caught by Article XVI:2(a). According to Antigua, in addition, there may be other forms of limitation that are also caught by Article XVI:2(a) but which are not explicitly listed.[845] We disagree.

6.323 Rather, we share the view expressed by the United States that the word "whether" does not automatically imply an illustrative list. Article XXVIII(a) of the GATS states that "'measure' means any measure by a Member, *whether* in the form of a law, regulation, rule, procedure, decision, administrative action, or *any other form*" (emphasis added). It is those three final words rather than the use of the word "whether" that establish the illustrative character of the list of instruments and actions in Article XXVIII(a) of the GATS.

6.324 Article XI of the GATT 1994 describes an illustrative list of "prohibitions or restriction ... *whether* made effective through quotas, import or export licenses or *other measures*" (emphasis added). It is not the word "whether" that qualifies Article XI as an illustrative list. Rather, the words "other measures" at the conclusion of the excerpted text have this effect. Had "other measures" been omitted from this text, the list of prohibitions and restrictions covered by Article XI would have been confined to the types of prohibitions and restrictions listed in the Article following the word "whether".

6.325 With respect to Article XVI:2(a), we note that there is no word or term at the conclusion of that subparagraph that could be construed as creating an illustrative list, such as "any other form" or "any other measure". In these circumstances, we consider that the word "whether" identifies an exhaustive list of limitations that are covered by Article XVI:2(a), namely, "limitations in the form of numerical quotas, monopolies, exclusive service suppliers or requirements of an economic needs test".

"Limitations on the number of service suppliers in the form of numerical quotas"

6.326 We note that Article XVI:2(a) applies, *inter alia*, to "limitations on the number of service suppliers in the form of numerical quotas". The parties disagree as to whether this language captures any measure not explicitly framed in quantitative or numerical terms.

6.327 The issue is not whether qualitative (as opposed to quantitative) restrictions should be caught under Article XVI; the parties agree that they should not and this is confirmed by the 1993 Scheduling Guidelines.[846] The issue is, rather, whether a measure prohibiting the supply of a service by remote means is caught by Article XVI:2(a).

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[844] Article XVI:2(a) refers to: limitations on the number of service suppliers "whether" (a) in the form of numerical quotas; (b) monopolies; (c) exclusive service suppliers; or (d) the requirements of an economic needs test.

[845] See Antigua's second oral statement, para. 31.

[846] "... these criteria [specified in subparagraphs (a) to (d)] do not relate to the quality of the service supplied, or to the ability of the supplier to supply the service (i.e. technical standard or qualification of the supplier)", *1993 Scheduling Guidelines*, para. 4 (id. in *2001 Scheduling Guidelines*, para. 8).

6.328 The United States submits that in maintaining and enforcing laws that prohibit the supply by remote means of the service of receiving bets and wagers, it does not contravene Article XVI:2 of the GATS since those laws prescribe a prohibition on the character of certain services and not on the number of service suppliers or the number of service operations. This submission cannot be accepted.

6.329 On the premise that the United States wished to maintain and enforce those laws, the proper course for it was to make an entry in its schedule of commitments against sub-sector 10.D, "Other Recreational Services (except sporting)" expressing a limitation on market access in respect of the supply by remote means of the service of gambling and betting services. Such an entry would have limited to zero the number of service suppliers and service operations in the sector to which the relevant market access commitment was made.

6.330 Having made no such entry, the United States, nevertheless, maintains and enforces laws that prohibit the supply by remote means of gambling and betting services.[847] By so doing, it limits to zero the number of service suppliers in the sector to which the relevant market access commitment had been made. In the words of Article XVI:2(a) of the GATS, it imposes a "limitation on the number of service suppliers in the form of [a] numerical quota". Any other reading of that subparagraph would be inconsistent with the commitment made by the United States when inscribing the word "None" in the market access column of its schedule of commitments for sub-sector 10.D.

6.331 It is true that the wording of Article XVI:2(a) covers numerical quotas other than zero. That is because the subparagraph is designed, in part, to indicate the limitations, short of total prohibition, that Members may specify in their schedules, on the number of service suppliers. The fact that the terminology embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero. Paragraph (a) does not foresee a "zero quota" because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or sub-sector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.

6.332 Moreover, the 1993 Scheduling Guidelines provide the following example of a limitation under subparagraph (a): "nationality requirements for suppliers of services (equivalent to zero quota)".[848] This suggests that a measure that is not expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a). To hold that only restrictions explicitly couched in numerical terms fall within Article XVI:2(a) would produce absurd results. It would, for example, allow a law that explicitly provides that "all foreign services are prohibited" to escape the application of Article XVI, because it is not expressed in numerical terms.

Limitation on all or part of a scheduled commitment

6.333 The United States argues that since it does not maintain a prohibition on the cross-border supply of *all* gambling and betting services, it does not maintain a zero quota and, therefore, does not contravene Article XVI:2(a).

6.334 We consider that, for the purposes of this dispute, we need to determine whether a prohibition on the supply of a number of services that fall within the scope of the US commitment on gambling and betting services can constitute a "limitation in the form of numerical quotas" within the meaning of Article XVI:2(a).

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[847] See paras. 6.161 - 6.164 above.

[848] See *1993 Scheduling Guidelines*, para. 6. The same example is contained in the 2001 Scheduling Guidelines, para. 12.

6.335 We recall that if a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that come within that sector or sub-sector. Therefore, we are of the view that a Member does not respect its GATS market access obligations under Article XVI:2(a) if it does not allow market access to the whole or part of a scheduled sector or sub-sector.

Limitation on one, several or all means of delivery under mode 1

6.336 Antigua argues that limitations on one or more means of delivery under mode 1 with respect to a committed sector fall within the scope of Article XVI:2(a). The United States argues that restrictions relating to the means of supply are concerned with the character of the activity involved and, therefore, fall outside the scope of Article XVI:2(a).

6.337 The Panel needs, therefore, to determine whether a prohibition on one, several or all means of delivery included in mode 1 that effectively limits the means of delivery that service suppliers can use in supplying a service is a limitation in the form of numerical quotas within the meaning of Article XVI:2(a).

6.338 We recall that the effect of a scheduled commitment for mode 1 is to allow services suppliers in other WTO Members for a committed sector to supply services cross-border via any means of delivery. As we stated above, if one, several or all means of delivery cross-border are prohibited, the opportunities for foreign suppliers using those means of delivery to supply services cross-border to gain access to foreign markets are clearly reduced. The Panel is of the view that such a prohibition is a "limitation on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1.

(ii) Article XVI:2, subparagraph (c)

6.339 Subparagraph (c) of Article XVI:2 provides that:

> "[L]imitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test"[849]

Limitations "expressed ... in the form of a quota"

6.340 Subparagraph (c) differs in its wording from subparagraph (a) in several respects.

6.341 Firstly, in subparagraph (a), the word "whether" precedes the expression "in the form of quotas". In subparagraph (c) that word is omitted. We do not consider this to be of present significance. For the reasons referred to above in paragraphs 6.322-6.325, we consider that the presence of the word "whether" in subparagraph (a) does not imply an illustrative list. Therefore, its omission from subparagraph (c) is without present significance.

6.342 Secondly, in subparagraph (c), as indeed in subparagraph (d), the word "number" is qualified by the adjective "total". This may be explained by the fact that subparagraph (c) relates to limitations on the aggregate of the service operations or output whereas subparagraph (a) contemplates that limits may be imposed on the number of suppliers by reference to a criterion other than the national or regional aggregate. However, when a Member's laws prohibit the supply of a certain service by a certain mode, the word "total" is without significance, since the number will always be zero.

[849] (*original footnote*) Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

6.343 Thirdly, subparagraph (c), in its English version, speaks of "limitations ... in terms of designated numerical units in the form of quotas". This might perhaps be taken to imply that any quota has to be expressed in terms of designated numerical units. The element of ambiguity on this point is resolved by comparison of the English version with the French and the Spanish ones, which are equally authentic. These read as follows:

> "c) limitations concernant le nombre total d'opérations de services ou la quantité totale de services produits, exprimées en unités numériques déterminées, sous forme de contingents ou de l'exigence d'un examen des besoins économiques[850];"

> "c) limitaciones al número total de operaciones de servicios o a la cuantía total de la producción de servicios, expresadas en unidades numéricas designadas, en forma de contingentes o mediante la exigencia de una prueba de necesidades económicas[851];"

As can be seen, in these versions, a comma appears after the equivalent in the English version of the words designated "numerical units". According to the French versions, there are three possible types of limitations that fall within the scope of subparagraph (c), namely: (i) limitations exprimées en unités numériques déterminées; (ii) limitations exprimées sous forme de contingents; and (iii) limitations exprimées sous forme de l'exigence d'un examen des besoins économiques. These three possibilities also exist under the Spanish version.

6.344 The comparison of these equally authentic texts thus discloses a difference of meaning. According to Article 33 of the Vienna Convention, a treaty interpreter must attempt to remove such differences through the application of Articles 31 and 32 thereof. In this regard, a reference to progressive liberalization as an object and purpose of the GATS appears to be useful. Interpreting Article XVI:2(c) premised on numerical expression of restrictions alone would open the possibility for Members to avoid their obligations and thereby deny and diminish the rights of other Members in cases where a sector or sub-sector has been committed, particularly in cases of a full market access commitment, as in this case. This would defeat the object and purpose of the GATS. Thus, the correct reading of Article XVI:2(c) is that the limitation may be either in the form of designated numerical units, in the form of quotas or the requirement of an economic needs test.

6.345 Unlike subparagraph (a), subparagraph (c) of Article XVI:2 contains a reference to "total" number of service operations and "total" quantity of service output. The 1993 Scheduling Guidelines state that: "It should be noted that the quantitative restrictions specified in subparagraphs (a) to (d) refer to maximum limitations." This suggests that the word "total" in Article XVI:2(c) serves the purpose of indicating that limitations covered by Article XVI:2(c) must impose maximum limits on services operation and/or service output.

6.346 Accordingly, such differences as there are between the wording of subparagraphs (a) and (c) of Article XVI:2 do not warrant a different conclusion as to the impact of the two subparagraphs in the present case.

6.347 The maintenance and enforcement of laws that prohibit the supply by remote means of a committed sector or sub-sector limits to zero the number of service operations in the sector or sub-sector for which the Member has made a commitment. It imposes a "limitation on the total number of service operations ... expressed ... in the form of quotas" contrary to Article XVI:2(c) of the GATS.

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[850] (*original footnote*) L'alinéa 2 c) ne couvre pas les mesures d'un Membre qui limitent les intrants servant à la fourniture de services.

[851] (*original footnote*) El apartado c) del párrafo 2 no abarca las medidas de un Miembro que limitan los insumos destinados al suministro de servicios.

Service operations or service output

6.348 Subparagraph (c) of Article XVI:2 concerns limitations on *service operations* or *service output*. As for how "service operations" and "service output" should be interpreted, we note that the GATS does not contain definitions of these terms.

6.349 However, relevant context for their meaning can be found in the 1993 Scheduling Guidelines, which provide the following example of a limitation on "service operations or quantity of service output" under Article XVI:2(c), namely restrictions on broadcasting time available for foreign films. On the basis of this example, we understand "service operations" to mean activities comprised in the production of a service. We understand "service output" to mean the result of the production of the service.

Limitation on all or part of a scheduled commitment

6.350 The United States argues that since it does not maintain a prohibition on the cross-border supply of *all* gambling and betting services, it does not maintain a zero quota and, therefore, does not contravene Article XVI:2(c).

6.351 Therefore, we need to determine whether a prohibition on the supply of a number of services that fall within the scope of the US commitment on gambling and betting services can constitute a "limitation expressed in the form of a quota" within the meaning of Article XVI:2(c).

6.352 We recall that if a Member makes a market access commitment in a sector or sub-sector, that commitment covers all services that come within that sector or sub-sector. Therefore, we are of the view that a Member does not respect its GATS market access obligations under Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector or sub-sector.

Limitation on one, several or all means of delivery under mode 1

6.353 Antigua argues that limitations on one, several or all means of delivery under mode 1 with respect to a committed sector fall within the scope of Article XVI:2(c). The United States argues that restrictions relating to the means of supply are concerned with the character of the activity involved and, therefore, fall outside the scope of Article XVI:2(c).

6.354 Thus, the Panel needs to determine whether a prohibition on one, several or all means of delivery included in mode 1 that effectively limits these means of delivery for service operations or service output is a limitation in the form of a quota within the meaning of Article XVI:2(c).

6.355 We examined above in the context of Article XVI:2(a), the means of delivery that are included in mode 1. We recall our conclusion in that context, which is equally applicable here, that the effect of a scheduled commitment for mode 1 is to allow service suppliers in other WTO Members for the relevant sector to supply services cross-border via any means of delivery. In our view, if one or several mean(s) of delivery cross-border are prohibited, services operated through one or more of these means of delivery or services that are outputted using one or more of these means of delivery will be limited. We consider that a prohibition on one, several or all of the means of delivery included in mode 1 constitutes a limitation on mode 1. The Panel is of the view that such a limitation is a limitation "on the total number of service operations or on the total quantity of service output ... in the form of quotas" within the meaning of Article XVI:2(c) because it totally prevents the services operations and/or service output through one or more or all means of delivery that are included in mode 1. In other words, such a ban results in a "zero quota" on one or more or all means of delivery include in mode 1.

(d) Application of the legal standard to the facts of this case

(i) US commitment on market access

6.356 The Panel recalls its finding above that the United States has made a specific commitment with respect to gambling and betting services in sub-sector 10.D of the US Schedule. In relation to sub-sector 10.D, the United States has inscribed the word "None" for mode 1 in the column entitled "Limitations on market access ".

(ii) Measures at issue

6.357 We refer to our conclusions in paragraph 6.249, where we decided that we would confine our consideration of violation of the GATS to three US federal laws (namely the Wire Act, the Travel Act and the Illegal Gambling Business Act) and to the laws of eight US states (namely, Colorado: § 18-10-103 of the Colorado Revised Statutes; Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; Minnesota: §§ 609.75, Subdivisions 2 – 3 and 609.755(1) of Minn. Stat. Ann; New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code; New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.; South Dakota: §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws; and Utah: § 76-10-1102 of the Utah Code Ann.)

6.358 Our task in examining these laws is to determine whether, in light of the fact that the United States has inscribed "None" in its market access column for mode 1 for gambling and betting services, these laws impose "limitations on the number of service suppliers in the form of numerical quotas" within the meaning of Article XVI:2(a) and/or "limitations on the total number of service operations or on the total quantity of service output ... in the form of quotas" within the meaning of Article XVI:2(c).

6.359 By way of context for this examination, we recall that the United States admits that federal and state laws are applied so as to prohibit what it describes as the "remote supply" of most gambling and betting services[852] and, as further discussed below, there is relevant evidence confirming the US practice in this regard.

Federal laws

The Wire Act

6.360 The Wire Act provides in relevant part that:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers shall be fined under this title or imprisoned not more than two years, or both."

6.361 The opening text of the Wire Act refers to "whoever being engaged in the business of ...". This language makes it clear to us that the Wire Act concerns *suppliers* of "betting and wagering" services. Therefore, we consider that this Act concerns "service suppliers" within the meaning of Article XVI:2(a). The Wire Act can also be read to concern the treatment of *services operations* or *service output* since the Act effectively prohibits the supply of betting or wagering services through

[852] See paras. 6.161-6.164.

the use of a wire communication facility. Therefore, we consider that this Act concerns "service operations" and "service output" within the meaning of Article XVI:2(c).

6.362 As is evident from the excerpted text of the Wire Act, the Act prohibits the use of a wire communication facility for, *inter alia*, the transmission in interstate or foreign commerce of bets or wagers. Therefore, in our view, the Wire Act prohibits the use of telephone given the explicit reference to wire communication. In addition, some US courts have interpreted the Wire Act to include communication by the Internet.[853] Further, the United States has acknowledged that the Wire Act covers the remote transmission in interstate or foreign commerce of bets or wagers.[854] Therefore, we consider that the Wire Act prohibits the use of at least one or potentially several means of delivery included in mode 1.

6.363 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. Under the Wire Act, *service suppliers* seeking to supply gambling and betting services through the telephone, Internet and other means of delivery using wire communication are prohibited from doing so. Further, *services operations* and *service output* through the telephone, Internet and other means of delivery using wire communication are prohibited under the Wire Act. Accordingly, the Panel considers that the Wire Act contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.364 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. The Wire Act concerns "betting or wagering", which is part of the services covered by the US commitment under sub-sector 10.D. Therefore, through the Wire Act, the United States restricts market access to part of a scheduled sector, namely, " betting or wagering".

6.365 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As the Wire Act contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that the Wire Act is inconsistent with Article XVI:1 and Article XVI:2.

The Travel Act

6.366 The Travel Act provides in relevant part that:

> "(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

[853] See *United States v Jay Cohen* (Exhibit AB-83) and *Vacco ex rel. People* v *World Interactive Gaming Corp*. (Exhibit AB-97). Exhibits AB-56, AB-73 and AB-98 also contain evidence indicating that the Wire Act covers communication by the Internet.

[854] United States' second written submission, paras. 22 and 78.

and thereafter performs or attempts to perform --

> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or of the United States."

6.367 The text of the Travel Act makes it clear that it prohibits travel in interstate or foreign commerce or the use of mail or any facility in interstate or foreign commerce, with the intent to: distribute the proceeds of any "unlawful activity"; commit any crime of violence to further any "unlawful activity"; or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any "unlawful activity". "Unlawful activity" is defined, *inter alia*, as any business enterprise involving gambling in violation of the laws of the state in which they are committed or of the United States. It may be the case that some state laws prohibit a "business enterprise involving gambling". In such cases, a "business enterprise involving gambling" in contravention of the relevant state laws would also be contrary to the Travel Act if such a business enterprise entails the supply of gambling and betting services by "mail or any facility" provided that the other requirements in subparagraph (a) of the Travel Act have been met.

6.368 The Travel Act refers to *service suppliers*, in particular, those who travel in interstate or foreign commerce or those who use the mail or any facility in interstate or foreign commerce with intent to distribute the proceeds of any unlawful activity, commit any crime of violence to further any unlawful activity or otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. The interpretation that the Act is targeted at suppliers is confirmed by the fact that "unlawful activity" is defined by reference to activities engaged in by a "business enterprise". Therefore, we consider that this Act concerns "service suppliers" within the meaning of Article XVI:2(a).

6.369 The Travel Act can also be read to concern the treatment of *services operations* or *service output* because it effectively prohibits the supply of gambling services through mail or "any facility". Facility may be interpreted to include the telephone and Internet.[855] Therefore, we consider that the Travel Act also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

6.370 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. As we stated above in paragraph 6.367, the Travel Act prohibits gambling activity that entails the supply of gambling and betting services by "mail or any facility" to the extent that such supply is undertaken by a "business enterprise involving gambling" that is prohibited under state law and provided that the other requirements in subparagraph (a) of the Travel Act have been met.

[855] There is evidence to indicate that the Travel Act covers supply of gambling services through the telephone and the Internet. See *Vacco ex rel. People* v *World Interactive Gaming Corp* (Exhibit AB-97). See also Exhibit AB-73.

6.371 Therefore, under the Travel Act (when read together with the relevant state laws)[856], *service suppliers* seeking to supply gambling and betting services through the mail and potentially all other means of delivery included in mode 1 are prohibited from doing so. Further, *services operations* and *service output* through the mail and perhaps all other means of delivery included in mode 1 are also prohibited under the Travel Act (when read together with the relevant state laws). Accordingly, the Panel considers that the Travel Act contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.372 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. The Travel Act concerns, *inter alia*, "gambling", which is part of the services covered by the US commitment under sub-sector 10.D. Therefore, through the Travel Act, the United States restricts market access to part of a scheduled sector, namely, "gambling".

6.373 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As the Travel Act contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that the Travel Act is inconsistent with Article XVI:1 and Article XVI:2.

The Illegal Gambling Business Act

6.374 The Illegal Gambling Business Act provides in relevant part that:

> "(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section –
>
> (1) 'illegal gambling business' means a gambling business which –
>
> > (i) is a violation of the law of a State or political subdivision in which it is conducted;
> >
> > (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
> >
> > (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

[856] That is, state laws that prohibit a "business enterprise involving gambling". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code, which we find below in paragraphs 6.381-6.418 together prohibit the supply of gambling and betting services by all means included in mode 1.

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."

6.375 In our view, the text of the Illegal Gambling Business Act makes it clear that the Act prohibits the conduct of businesses that fall within the definition of an "illegal gambling business". A gambling business is defined as "illegal" under the Act if it violates the law of a state (or political subdivision) of the United States. It may be the case that some state laws prohibit gambling businesses. In such cases, a "gambling business" that violates state law and that entails the conduct, finance, management, supervision, direction or ownership of all or part of such a business would also be contrary to the Illegal Gambling Business Act provided that the other requirements in subparagraph (b)(1) of the Illegal Gambling Business Act have been met. We consider that because the Illegal Gambling Business Act prohibits the conduct, finance, management, supervision, direction or ownership of all or part of a "gambling business" that violates state law, it effectively prohibits the supply of gambling and betting services through at least one and potentially all means of delivery included in mode 1 by such businesses.

6.376 The Illegal Gambling Business Act refers to *service suppliers*, in particular, those who conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business. Therefore, we consider that this Act concerns "service suppliers" within the meaning of Article XVI:2(a). The Illegal Gambling Business Act can also be read to concern the treatment of *services operations* or *service output* because it effectively prohibits businesses that fall within the definition of an "illegal gambling business". Therefore, we consider that the Illegal Gambling Business Act also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

6.377 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. As we stated above in paragraph 6.375, the Illegal Gambling Business Act prohibits gambling activity that entails the conduct, finance, management, supervision, direction or ownership of all or part of such a business to the extent that such supply is undertaken by a "gambling business" that is prohibited under state law and provided that the other requirements in sub-paragraph (b)(1) of the Illegal Gambling Business Act have been met.

6.378 Therefore, under the Illegal Gambling Business Act (when read together with the relevant state laws)[857], *service suppliers* seeking to supply gambling and betting services through at least one and potentially all means of delivery included in mode 1 are prohibited from doing so. Further, *services operations* and *service output* through all means of delivery included in mode 1 are also prohibited under the Illegal Gambling Business Act (when read together with the relevant state laws). Accordingly, the Panel considers that the Illegal Gambling Business Act contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.379 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. The Illegal Gambling Business Act concerns, "gambling", which is part of the services covered by the US commitment under sub-sector 10.D. Therefore, through the Illegal Gambling Business Act, the United States restricts market access to part of a scheduled sector, namely, "gambling".

[857] That is, state laws that prohibit a "gambling business". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code, which we find below in paragraphs 6.381-6.418 together prohibit the supply of gambling and betting services by all means included in mode 1.

6.380 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As the Illegal Gambling Business Act contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that the Illegal Gambling Business Act is inconsistent with Article XVI:1 and Article XVI:2.

State laws

Colorado

6.381 The text of § 18-10-103 of the Colorado Revised Statutes provides as follows:

> "(1) A person who engages in gambling commits a class 1 petty offense.
>
> (2) A person who engages in professional gambling commits a class 1 misdemeanor. If he is a repeating gambling offender, it is a class 5 felony."

6.382 In our view, the text of § 18-10-103 of the Colorado Revised Statutes indicates that is not directed at "service suppliers" for the purposes of Article XVI:2(a) nor to "service operations" and "service output" for the purposes of Article XVI:2(c). Rather, we consider that § 18-10-103 of the Colorado Revised Statutes is directed at persons who engage in gambling, that is, those who actually gamble. This appears to be confirmed by evidence before us regarding the interpretation of § 18-10-103 of the Colorado Revised Statutes, which indicates that § 18-10-103 is interpreted and applied to prohibit *gambling* by the Internet.[858] Antigua has not adduced any evidence to indicate that the *supply* of gambling services by the Internet or by any other means included in mode 1 is prohibited.

6.383 Therefore, we conclude that Antigua has not provided a prima facie demonstration that § 18-10-103 of the Colorado Revised Statutes contains a limitation that falls within the scope of Article XVI:2(a) and/or Article XVI:2(c). In particular, we are not convinced that that section is directed at "service suppliers" for the purposes of Article XVI:2(a) and/or to "service operations" and "service output" for the purposes of Article XVI:2(c). Accordingly, we find that Antigua has not provided a prima facie demonstration that § 18-10-103 of the Colorado Revised Statutes is inconsistent with Article XVI:1 and Article XVI:2.

Louisiana

6.384 Section 14:90.3 of the La. Rev. Stat. Ann. provides in relevant part that:

> "E. Whoever designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server providing a Home Page, Web Site, or any other product accessing the Internet, World Wide Web,[859] or any part thereof offering to any client for the primary purpose of the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit shall be fined not more than twenty thousand dollars, or imprisoned with or without hard labor, for not more than five years, or both.
>
> ...

[858] Exhibit AB-131, p. 5.

[859] The terms "client", "computer", "computer network", "computer services", "computer software", "computer system", "Home Page", "Internet", "Server" and "World Wide Web" are defined in § 14:90.3.C of the La. Rev. Stat. Ann. These definitions are set out in Annex F.

> I. ... The provisions of this Subsection shall not exempt from criminal prosecution any telephone company, Internet Service Provider, software developer, licensor, or other such party if its primary purpose in providing such service is to conduct gambling as a business."

6.385 Section 14:90.3 of the La. Rev. Stat. Ann. concerns *service suppliers*, in particular, those who design, develop, manage, supervise, maintain, provide, or produce any computer services, computer system, computer network, computer software, or any server providing a Home Page, Web Site, or any other product accessing the Internet or World Wide Web. Subparagraph I of § 14:90.3 of the La. Rev. Stat. Ann. makes it clear that § 14:90.3 of the La. Rev. Stat. Ann. is directed at service suppliers, including telephone companies, Internet Service Providers, software developers, licensors and other parties whose primary purpose is to conduct a gambling business. Therefore, we consider that § 14:90.3 of the La. Rev. Stat. Ann. concerns "service suppliers" within the meaning of Article XVI:2(a).

6.386 Section 14:90.3 of the La. Rev. Stat. Ann. can also be read to concern the treatment of *services operations* or *service output* because it effectively prohibits the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit. Therefore, we consider that § 14:90.3 of the La. Rev. Stat. Ann. also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

6.387 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. Under § 14:90.3 of the La. Rev. Stat. Ann., *service suppliers* seeking to conduct a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit through the Internet are prohibited from doing so. Further, *services operations* and *service output* involving a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit through the Internet are also prohibited under § 14:90.3 of the La. Rev. Stat. Ann. Accordingly, the Panel considers that § 14:90.3 of the La. Rev. Stat. Ann. contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.388 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. Section 14:90.3 of the La. Rev. Stat. Ann. concerns the conduct "as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit", which is part of the services covered by the US commitment under sub-sector 10.D. Therefore, through § 14.90.3 of the La. Rev. Stat. Ann., the United States restricts market access to part of a scheduled sector, namely, the "business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit".

6.389 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As § 14:90.3 of the La. Rev. Stat. Ann. contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that § 14:90.3 of the La. Rev. Stat. Ann. is inconsistent with Article XVI:1 and Article XVI:2.

Massachusetts

6.390 Section 17A of chapter 271 of Mass. Ann. Laws provides that:

> "Whoever uses a telephone or, being the occupant in control of premises where a telephone is located or a subscriber for a telephone, knowingly permits another to use

> a telephone so located or for which he subscribes, as the case may be, for the purpose of accepting wagers or bets, or buying or selling of pools, or for placing all or any portion of a wager with another, upon the result of a trial or contest of skill, speed, or endurance of man, beast, bird, or machine, or upon the result of an athletic game or contest, or upon the lottery called the numbers game, or for the purpose of reporting the same to a headquarters or booking office, or who under a name other than his own or otherwise falsely or fictitiously procures telephone service for himself or another for such purposes, shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year; provided, however, that this section shall not apply to use of telephones or other devices or means to place wagers authorized pursuant to the provisions of section 5C of chapter 128A."

6.391 Section 17A of chapter 271 of Mass. Ann. Laws concerns *service suppliers*, in particular, those who use a telephone or, being the occupant in control of premises where a telephone is located or a subscriber for a telephone, knowingly permit another to use a telephone for the purpose of, *inter alia*, accepting wagers or bets. Therefore, we consider that § 17A of chapter 271 of Mass. Ann. Laws concerns "service suppliers" within the meaning of Article XVI:2(a).

6.392 Section 17A of chapter 271 of Mass. Ann. Laws can also be read to concern the treatment of *services operations* or *service output* because it effectively prohibits the supply of services including the acceptance of wagers or bets through use of the telephone. Therefore, we consider that § 17A of chapter 271 of Mass. Ann. Laws also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

6.393 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. Under § 17A of chapter 271 of Mass. Ann. Laws, *service suppliers* seeking to conduct a business involving, *inter alia*, the acceptance of wagers or bets using the telephone are prohibited from doing so. Further, *services operations* and *service output* involving, *inter alia*, the acceptance of wagers or bets using the telephone are also prohibited under § 17A of chapter 271 of Mass. Ann. Laws. Accordingly, the Panel considers that § 17A of chapter 271 of Mass. Ann. Laws contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.394 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. Section 17A of chapter 271 of Mass. Ann. Laws concerns, *inter alia*, the acceptance of wagers or bets which are part of the services covered by the US commitment under sub-sector 10.D. Therefore, through § 17A of chapter 271 of Mass. Ann. Laws, the United States restricts market access to part of a scheduled sector, namely, the acceptance of wagers or bets.

6.395 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As § 17A of chapter 271 of Mass. Ann. Laws contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that § 17A of chapter 271 of Mass. Ann. Laws is inconsistent with Article XVI:1 and Article XVI:2.

Minnesota

6.396 Section 609.755(1) of Minn. Stat. Ann. provides that:

> "Whoever does any of the following is guilty of a misdemeanor:

> (1) makes a bet;
>
> (2) sells or transfers a chance to participate in a lottery;
>
> (3) disseminates information about a lottery, except a lottery conducted by an adjoining state, with intent to encourage participation therein;
>
> (4) permits a structure or location owned or occupied by the actor or under the actor's control to be used as a gambling place; or
>
> (5) except where authorized by statute, possesses a gambling device.
>
> Clause (5) does not prohibit possession of a gambling device in a person's dwelling for amusement purposes in a manner that does not afford players an opportunity to obtain anything of value."

Section 609.75, Subdivisions 2 – 3 of Minn. Stat. Ann., contains definitions of what are and what are not "bets" for the purposes of § 609.755(1) of Minn. Stat. Ann. The text of section 609.755(1), Subdivisions 2 – 3 of Minn. Stat. Ann. is contained in Annex F.

6.397 In our view, the text of the subparagraph of § 609.755(1) of Minn. Stat. Ann. that is relevant for this dispute, namely subparagraph (a), indicates that it is not directed at "service suppliers" for the purposes of Article XVI:2(a) nor to "service operations" and "service output" for the purposes of Article XVI:2(c). Rather, we consider that § 609.755(1) of Minn. Stat. Ann. is directed at persons who make a bet. This appears to be confirmed by evidence before us regarding the interpretation of §§ 609.75, Subdivisions 2 – 3 and 609.755(1) of Minn. Stat. Ann, which indicates that, under these sections, a "person in Minnesota who places a bet through [an Internet gambling organization] is committing a crime".[860] Antigua has not adduced any evidence to indicate that the *supply* of betting services by the Internet or by any other means included in mode 1 is prohibited under §§ 609.75, Subdivisions 2 – 3 and 609.755(1) of Minn. Stat. Ann.

6.398 Therefore, we conclude that Antigua has not provided a prima facie demonstration that § 609.755(1) of Minn. Stat. Ann. contains a limitation that falls within the scope of Article XVI:2(a) and/or Article XVI:2(c). In particular, we are not convinced that that section is directed at "service suppliers" for the purposes of Article XVI:2(a) or to "service operations" and "service output" for the purposes of Article XVI:2(c). Accordingly, we find that Antigua has not provided a prima facie demonstration that § 609.755(1) of Minn. Stat. Ann. is inconsistent with Article XVI:1 and Article XVI:2.

New Jersey

6.399 Paragraph 2 of N.J. Const. Art. 4, Sec. VII provides in relevant part that:

> "No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election, except that, without any such submission or authorization: [a list of lawful activities when authorized is provided]."[861]

[860] See a statement by the Minnesota Attorney General contained in Exhibit AB-96.
[861] For the full text see Annex F of our Report.

6.400 Section 2A:40-1 of N.J. Code further provides that:

> "All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."

6.401 In our view, the text of paragraph 2 of N.J. Const. Art. 4, Sec. VII and the text of § 2A:40-1 of N.J. Code, which appears to be the implementation of the relevant paragraph of the N.J. Const., indicate that these provisions are not directed at "service suppliers" for the purposes of Article XVI:2(a) nor to "service operations" and "service output" for the purposes of Article XVI:2(c). Rather, we consider that paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of N.J. Code are directed at persons who engage in gambling. Antigua has not adduced any evidence to indicate that the *supply* of wagering and betting services by the Internet or by any other means included in mode 1 is prohibited under paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of N.J. Code.[862]

6.402 Therefore, we conclude that Antigua has not provided a prima facie demonstration that paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of N.J. Code contain limitations that fall within the scope of Article XVI:2(a) and/or Article XVI:2(c). In particular, we are not convinced that those sections are directed at "service suppliers" for the purposes of Article XVI:2(a) or to "service operations" and "service output" for the purposes of Article XVI:2(c). Accordingly, we find that Antigua has not provided a prima facie demonstration that paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of N.J. Code are inconsistent with Article XVI:1 and Article XVI:2.

New York

6.403 The text of § 9 of Art. I of N.Y. Const. provides as follows:

> "1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section. [.... a list of lawful activities when authorized is listed]."[863]

6.404 The text of § 5-401 of the N.Y. Gen. Oblig. L. provides as follows:

> "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

6.405 In our view, the text of § 9 of Art. I of N.Y. Const. and the text of § 5-401 of the N.Y. Gen. Oblig. L., which appears to be the implementation of the relevant paragraph of the N.Y. Const., suggest that at least the latter provision is not directed at "service suppliers" for the purposes of

[862] We have seen the discussion of paragraph 2 of N.J. Const. Art. 4, Sec. VII in Exhibit AB-119 but we note that, in its submissions, Antigua did not refer to or elaborate on that discussion.

[863] For the full text see Annex F of our Report .

Article XVI:2(a) nor to "service operations" and "service output" for the purposes of Article XVI:2(c). Rather, we consider that § 9 of Art. I of N.Y. Const. when read together with § 5-401 of the N.Y. Gen. Oblig. L. is directed at persons who engage in gambling. Antigua has not adduced any evidence to indicate that the *supply* of wagering and betting services by the Internet or by any other means included in mode 1 is prohibited under § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.[864]

6.406 Therefore, we conclude that Antigua has not provided a prima facie demonstration that § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. contain limitations that fall within the scope of Article XVI:2(a) and/or Article XVI:2(c). In particular, we are not convinced that those sections are directed at "service suppliers" for the purposes of Article XVI:2(a) or to "service operations" and "service output" for the purposes of Article XVI:2(c). Accordingly, we find that Antigua has not provided a prima facie demonstration that § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. are inconsistent with Article XVI:1 and Article XVI:2.

South Dakota

6.407 The aspects of §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws that we consider to be relevant to Antigua's claim of violation under Article XVI are set out below:

> "22-25A-8 Establishment of internet gambling business prohibited.
>
> Except as provided in § 22-25A-15, no person may establish a location or site in this state from which to conduct a gambling business on or over the internet or an interactive computer service.
>
> 22-25A-9 Violation if gambling originates or terminates in state -- Each bet a separate violation.
>
> A violation of § 22-25A-7 or § 22-25A-8 occurs if the violation originates or terminates, or both, in this state. Each individual bet or wager offered in violation of § 22-25A-7 or from a location or site that violates § 22-25A-8 constitutes a separate violation."

6.408 Section 22-25A-8 of the S.D. Codified Laws concerns *service suppliers*, in particular, those who establish a location or site in the state of South Dakota from which to conduct a gambling business on or over the Internet or an interactive computer service, including suppliers whose services terminate in the state of South Dakota as provided for in § 22-25A-9. Therefore, we consider that § 22-25A-8 of the S.D. Codified Laws concerns "service suppliers" within the meaning of Article XVI:2(a).

6.409 Section 22-25A-8 of the S.D. Codified Laws can also be read to concern the treatment of *services operations* or *service output* because it effectively prohibits the supply of gambling services through the use, *inter alia*, of the Internet. Therefore, we consider that § 22-25A-8 of the S.D. Codified Laws also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

6.410 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. Under § 22-25A-8 of the S.D. Codified Laws, *service suppliers* seeking to conduct a gambling business through

[864] We have seen the discussion of § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L. in Exhibits AB-56, AB-57, AB-58, AB-83, AB-97 and AB-98 but we note that, in its submissions, Antigua did not refer to or elaborate on that discussion.

the Internet are prohibited from doing so. Further, *services operations* and *service output* involving a gambling business that uses the Internet are also prohibited under § 22-25A-8 of the S.D. Codified Laws. Accordingly, the Panel considers that § 22-25A-8 of the S.D. Codified Laws contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.411 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. Section 22-25A-8 of the S.D. Codified Laws concerns "gambling", which is part of the services covered by the US commitment under sub-sector 10.D. Therefore, through § 22-25A-8 of the S.D. Codified Laws, the United States restricts market access to part of a scheduled sector, namely, "gambling".

6.412 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As § 22-25A-8 of the S.D. Codified Laws contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that § 22-25A-8 of the S.D. Codified Laws is inconsistent with Article XVI:1 and Article XVI:2.

Utah

6.413 Section 76-10-1102 of the Utah Code Ann. provides as follows:

> "(1) A person is guilty of gambling if he:
>
> (a) participates in gambling;
>
> (b) knowingly permits any gambling to be played, conducted, or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part; or
>
> (c) knowingly allows the use of any video gaming device that is:
>
> (i) in any business establishment or public place; and
>
> (ii) accessible for use by any person within the establishment or public place.
>
> (2) Gambling is a class B misdemeanor, provided, however, that any person who is twice convicted under this section shall be guilty of a class A misdemeanor."

6.414 Section 76-10-1102(b) of the Utah Code Ann. concerns *service suppliers*, in particular, those who knowingly permit any gambling to be played, conducted, or dealt upon or in any real or personal property owned, rented, or under the control of that person, whether in whole or in part. Therefore, we consider that § 76-10-1102(b) of the Utah Code Ann. concerns "service suppliers" within the meaning of Article XVI:2(a).

6.415 Section 76-10-1102(b) of the Utah Code Ann. can also be read to concern the treatment of *services operations* or *service output* because it effectively prohibits the supply of gambling services. Therefore, we consider that §76-10-1102(b) of the Utah Code Ann. also concerns "service operations" or "service output" within the meaning of Article XVI:2(c).

6.416 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. Under § 76-

10-1102(b) of the Utah Code, *service suppliers* seeking to conduct a gambling business through all means included in mode 1 are prohibited from doing so. Further, *services operations* and *service output* involving a gambling business that uses any of the means included in mode 1 are also prohibited under § 76-10-1102(b) of the Utah Code. Accordingly, the Panel considers that § 76-10-1102(b) of the Utah Code contains a limitation "in the form of numerical quotas" within the meaning of Article XVI:2(a) and a limitation "in the form of a quota" within the meaning of Article XVI:2(c).

6.417 We also recall that a Member does not respect its GATS market access obligations under Article XVI:2(a) and Article XVI:2(c) if it does not allow market access to the whole or part of a scheduled sector. Section § 76-10-1102(b) of the Utah Code concerns "gambling", which is part of the services covered by the US commitment under sub-sector 10.D. Therefore, through § 76-10-1102(b) of the Utah Code, the United States restricts market access to part of a scheduled sector, namely, "gambling".

6.418 Since the United States has inscribed "None" in the market access column under sub-sector 10.D, it cannot maintain limitations referred to in Article XVI:2. As § 76-10-1102(b) of the Utah Code contains limitations that fall within the scope of Article XVI:2(a) and Article XVI:2(c), the United States is according less favourable treatment than that provided for in its Schedule contrary to Article XVI:1 and Article XVI:2. Therefore, we conclude that § 76-10-1102(b) of the Utah Code is inconsistent with Article XVI:1 and Article XVI:2.

> Cumulative Effect of the Wire Act, the Travel Act (when read together with relevant state laws) and the Illegal Gambling Business Act (when read together with the state laws of Louisiana, Massachusetts, South Dakota and Utah)

6.419 As noted above, the Wire Act, the Travel Act (when read together with the relevant state laws), the Illegal Gambling Business Act (when read together with the relevant state laws), § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and 76-10-1102(b) of the Utah Code concern "service suppliers" within the meaning of Article XVI:2(a) and "services operations" and "service output" within the meaning of Article XVI:2(c).

6.420 We recall that a ban on the use of one, several or all means of delivery included in mode 1 constitutes a "zero quota" for, respectively, one, several or all of those means of delivery. The Panel is of the view that § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code together prohibit the supply of gambling and betting services by all means of delivery included in mode 1. Moreover, the cumulative effect of the Wire Act, the Travel Act (when read together with the relevant state laws), the Illegal Gambling Business Act (when read together with the relevant state laws), is to prohibit all means of delivery included in mode 1 for all gambling and betting services that are sought to be supplied by Antigua.

(iii) Conclusion

6.421 In the Panel's view, the following laws are in violation of Article XVI:1 and Article XVI:2, subparagraphs (a) and (c) of the GATS:

(a) Federal laws

(i) the Wire Act;

(ii) the Travel Act (when read together with the relevant state laws); and

(iii) the Illegal Gambling Business Act (when read together with the relevant state laws).

(b) State laws:

(i) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;

(ii) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;

(iii) South Dakota: § 22-25A-8 of the S.D. Codified Laws; and

(iv) Utah: § 76-10-1102(b) of the Utah Code.

E. CLAIMS OF VIOLATION OF THE UNITED STATES' NATIONAL TREATMENT COMMITMENT UNDER ARTICLE XVII OF THE GATS

1. Claims and main arguments of the parties

6.422 Antigua submits that federal and state laws, applications thereof and related practices specifically prohibit or prevent the cross-border supply of gambling and betting services by Antigua to the United States whereas the domestic supply of such services, whether by remote means or otherwise, within US states by authorized domestic suppliers is permitted. Antigua submits that this results in less favourable treatment of Antiguan gambling and betting services and suppliers of such services in the United States in violation of Article XVII of the GATS.[865]

6.423 The United States argues that Antigua has failed to demonstrate that any US measure is inconsistent with Article XVII of the GATS. According to the United States, Antigua has failed to prove that remote gambling and betting services are "like" non-remote gambling services and suppliers.[866] The United States further argues that Antigua has failed to demonstrate that its services and service suppliers receive less favourable treatment. According to the United States, even if it were to be assumed that likeness could be established between some remotely supplied gambling and betting services and service suppliers and non-remote gambling and betting service and service suppliers, the United States may, nonetheless, maintain a regulatory distinction between remote and non-remote supply of such services given that such a distinction does not afford less favourable treatment to foreign suppliers on the basis of national origin.[867]

2. Assessment by the Panel

6.424 As a preliminary matter, the Panel is of the view that it needs to address the question of whether it should consider Antigua's Article XVII claim. This issue has arisen because, in its Panel request, Antigua claimed a violation, *inter alia*, of Article XVII of the GATS, noting that "the central, regional or local authorities of the United States allow numerous operators of United States origin to offer all types of gambling and betting services in the United States. ... There appears to be no possibility for foreign operators, however, to obtain an authorization to supply gambling and betting services from outside the United States."[868] In its submissions, however, Antigua has since questioned the need for the Panel to consider its Article XVII claim. Antigua submits that the relationship between Articles XVI and XVII of the GATS is one of "practical hierarchy" in which Article XVI concerns regulation that affects market access whereas Article XVII concerns regulation that distorts competition in favour of domestic suppliers in cases where market access has been

[865] Antigua's first written submission, para. 3; Antigua's second written submission, para. 39.
[866] United States' second written submission, paras. 28 *et seq*.
[867] United States' second written submission, paras. 59 *et seq*.
[868] Request for the Establishment of a Panel by Antigua and Barbuda, WT7DS285/2, p. 1.

granted. Antigua submits that, in this case, a finding by the Panel of violation of Article XVI obviates the need to assess whether Article XVII has also been violated.[869]

6.425 In deciding whether to exercise judicial economy over Antigua's Article XVII claim, the Panel recalls that the principle of judicial economy is recognized in WTO law.[870]

6.426 The Panel recalls that it has found that a number of the challenged US measures are in violation of Article XVI. We are of the view that the Panel does not need to examine whether the challenged measures are also inconsistent with the United States' national treatment obligations under Article XVII of the GATS in order to assist the parties in resolving the dispute at issue. We believe that the essence of Antigua's claims will be addressed by a finding on Article XVI alone. Therefore, the Panel exercises judicial economy with regard to Antigua's claim under Article XVII.

F. CLAIMS OF VIOLATION UNDER ARTICLE VI OF THE GATS

1. Claims and main arguments of the parties

6.427 Antigua argues that the United States has violated Article VI:1 of the GATS by failing to ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." The United States maintains numerous laws and regulations prohibiting the supply of gambling and betting services unless specific authorization has been granted. Antigua submits that it is impossible for foreign service suppliers to obtain authorization to supply services on a cross-border basis or even to apply for such an authorization. However, exemptions from these laws have been granted to gambling operators of US origin, but not to foreign operators. Antigua argues that this constitutes a violation of Article VI:1 of the GATS. Antigua further argues that Article VI:3 implies that a WTO Member is obliged to make authorization procedures that are open to domestic service suppliers also available to suppliers from other WTO Members that may want to supply services for which a commitment has been made. US domestic service providers can and do qualify for authorization to offer gambling and betting services, but Antiguan providers cannot. Antigua submits that given that the cross-border supply of gambling and betting services is prohibited, Antigua fails to see why Antiguan operators would have filed any applications for authorization, much less under what authority such a filing could have been made.[871]

6.428 The United States replies that Antigua's claim under Article VI of the GATS does not correspond to the text of this provision. In particular, Antigua has failed to meet its burden of proof under Article VI:1 to show that particular measures are not "administered in a reasonable, objective, and impartial manner". According to the United States, Antigua has provided no evidence about the alleged flaws in the administration of any of the measures identified in its Panel request. In fact, such measures apply equally to all services and service providers, regardless of origin, and are routinely applied against domestic as well as foreign law-breakers. The United States further argues that, as Antigua did not show that the United States has undertaken any commitments in gambling services in general and cross-border gambling services in particular, Antigua cannot demonstrate that Article VI:3 is relevant in this dispute. Moreover, Antigua has pointed to no occasions on which US authorities have failed to inform Antiguan suppliers regarding decisions on their applications for authorization. Indeed, Antigua has not demonstrated that its gambling and betting service suppliers have ever filed any relevant applications. According to the United States, Antigua appears to be seeking something that Article VI:3 on its face does not provide – namely, a requirement that the

[869] Antigua's reply to Panel question No. 6.
[870] See paras. 6.15 - 6.18 above.
[871] Antigua's first written submission, paras. 196-199; Antigua's first oral statement, paras. 104-106.

United States give foreign suppliers the right to provide services that even its domestic suppliers do not have a right to provide.[872]

2. Relevant GATS provisions

6.429 Article VI (Domestic Regulation) provides in relevant part as follows:

> "1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
>
> [...]
>
> 3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.
>
> [...]"

3. Assessment by the Panel

6.430 For the reasons mentioned in Section VI.C above of our Report, we will confine our consideration of Antigua's claims under Article VI to three US federal laws (namely the Wire Act, the Travel Act and the Illegal Gambling Business Act) and to the laws of eight US states (namely, Colorado: § 18-10-103 of the Colorado Revised Statutes; Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; Minnesota: §§ 609.75, Subdivisions 2–3 and 609.755(1) of Minn. Stat. Ann; New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code; New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.; South Dakota: §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws; and Utah: § 76-10-1102 of the Utah Code Ann.)

6.431 We will now turn to whether Antigua has met its prima facie burden that these laws are inconsistent with Article VI, paragraphs 1 and 3, of the GATS.

6.432 The Panel is of the view that Article VI:1 does not apply to measures of general application themselves but, rather, to the *administration* of these measures. Article VI:3 imposes transparency and due process obligations with respect to the processing of applications for authorization to supply in a sector where specific commitments have been undertaken. Therefore, Articles VI:1 and VI:3 contain disciplines of a procedural nature.

6.433 The Panel also notes the very vague and general nature of the arguments advanced by Antigua in regard to the alleged violation under Article VI. For instance, Antigua refers to the "numerous laws and regulations" maintained by the United States.[873] Antigua also asserts that the "United States domestic service providers can and do qualify for authorization to offer gambling and betting services.

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[872] United States' first submission, paras. 104-107. See also United States' first oral statement, para. 53 and United States' second written submission, para. 70.

[873] Antigua's first written submission, para. 197.

Yet, Antiguan service providers cannot."[874] The Panel also notes that Antigua did not refer to any violation of Article VI in its second written submission, nor in its second oral statement.

6.434 In relation to its claim under Article VI:1, the Panel asked Antigua to specify "what 'measures of general application' are not begin 'administered in a reasonable, objective and impartial manner' and why". Antigua responded

> "The general approach to gambling law in the United States is that all gambling and betting is prohibited unless a specific authorization has been given. Thus, the United States first maintains its "measures of general application"—the state and federal measures that act to prohibit the provision of gambling and betting services in the United States. Overlaying the general prohibitions are the state and federal measures that authorize certain persons to provide certain gambling and betting services under a wide and disparate variety of situations. [footnote omitted] By not providing a method by which Antiguan suppliers can obtain authorization to offer their services into the United States, the United States is in violation of Article VI:1."[875]

6.435 When asked by the Panel to identify and provide details of instances when "authorization to supply" in the United States was refused, Antigua replied that:

> "[...] What was meant here was not that Antiguan operators had applied to supply gambling and betting services into the United States and were refused — the point was that under United States law, it is impossible for Antiguan suppliers to meet any authorization criteria. [...]"[876]

6.436 The Panel also asked Antigua to specify what "authorization procedures" it was referring to in support of its claim of violation of Articles VI:1 and VI:3, Antigua replied:

> "The answer to this question is the same as [in paragraph 6.435 above]. It is not possible for Antiguan service suppliers to obtain authorization to provide gambling and betting services into the United States. This violates Article VI:1 of the GATS because the 'authorization procedures' by their very terms exclude Antiguan suppliers and thus cannot be considered 'administered in a reasonable, objective and impartial manner'. This violates Article VI:3 because the inability to apply for authorization makes it impossible for the United States to comply with the requirements of Article VI:3."[877]

6.437 Antigua's claims under Article VI:1 and under Article VI:3 are based on the premise that suppliers wishing to supply gambling and betting services in the United States require authorization to supply and that Antiguan suppliers are unable to obtain such authorization. The Panel notes, however, that Antigua has not specifically identified which "state and federal measures" and which provisions of those measures impose such authorization requirements. Nor has it demonstrated that its gambling and betting service suppliers have ever filed any applications to obtain such authorization. In fact, paragraph 6.435 indicates that Antiguan suppliers have never made such applications. Therefore, the Panel is of the view that Antigua has not made a prima facie demonstration that the measures at issue are inconsistent with Articles VI:1 and VI:3.

[874] Antigua's first oral statement, para. 106.
[875] Antigua's reply to Panel question No. 28.
[876] Antigua's reply to Panel question No. 11.
[877] Antigua's reply to Panel question No. 27.

G. CLAIM UNDER ARTICLE XI OF THE GATS

1. Claims and main arguments of the parties

6.438 Antigua submits that the United States maintains measures that restrict international money transfers and payments relating to the cross-border supply of gambling and betting services.[878] In particular, Antigua points to the laws of the state of New York that render contracts that are based on wagers or bets void[879] as well as an example of an "enforcement measure" taken by the New York Attorney General against a financial intermediary that provides Internet payment services.[880] In Antigua's view, the purpose of these measures is to prevent foreign suppliers of gambling and betting services from offering their services on a cross-border basis.[881] Antigua argues that, therefore, these measures violate Article XI:1 of the GATS.

6.439 The United States submits that both the laws and the enforcement measure in the form of an agreement between a state Attorney General and a financial intermediary upon which Antigua relies are neutral regarding the destination of payments.[882] With respect to Antigua's reliance upon an agreement between a state Attorney General and a financial intermediary, this "measure" is contained in Section III of Antigua's Panel request and, therefore, following the Panel's preliminary ruling, cannot be examined as a separate, autonomous measure.[883] Further, according to the United States, Antigua has provided no evidence that the provisions of the agreement in question result in restrictions on the movements of funds across borders. The United States submits that, on the contrary, by the terms of the agreement, it applies without regard to whether the payments in question are destined for further transfer to a domestic or international destination.[884] The United States further submits that, insofar as Antigua relies upon the agreement in question as evidence of the application of the laws of the state of New York, the agreement is not an application of those laws. Rather, it is a mutual settlement between the relevant contracting parties.[885]

2. Relevant GATS provisions

6.440 Article XI of the GATS (Payments and Transfers) provides that:

> "1. Except under the circumstances envisaged in Article XII [Restrictions to Safeguard the Balance of Payments], a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.
>
> 2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund."

[878] Antigua's first written submission, para. 200.
[879] Antigua's reply to Panel question No. 29.
[880] Antigua's first oral statement, para. 108; Antigua's reply to Panel question No. 29.
[881] Antigua's first oral statement, paras. 107–110.
[882] United States' second oral statement, para. 71.
[883] United States' second oral statement, para. 70.
[884] United States' first written submission, para. 110.
[885] United States' second oral statement, para. 71.

3. Assessment by the Panel

6.441 Article XI has not, as yet, been the subject of interpretation or application by either panels or the Appellate Body. In light of this and taking into account the limited facts and arguments submitted by the parties with respect to Antigua's claim under Article XI, we believe that there is not sufficient material on record to enable us to undertake a meaningful analysis of this provision and its specific application to the facts of this case. Moreover, in our view, the findings of violation under Article XVI in Section VI.D above of our Report should allow the parties to settle this dispute, even in the absence of a ruling on Antigua's Article XI claim. We will, therefore, exercise judicial economy and not rule on Antigua's claim under Article XI.[886]

6.442 However, the Panel wants to emphasize that Article XI plays a crucial role in securing the value of specific commitments undertaken by Members under the GATS. Indeed, the value of specific commitments on market access and national treatment would be seriously impaired if Members could restrict international transfers and payment for service transactions in scheduled sectors. In ensuring, *inter alia*, that services suppliers can receive payments due under services contracts covered by a Member's specific commitment, Article XI is an indispensable complement to GATS disciplines on market access and national treatment. At the same time, the Panel is of the view that Article XI does not deprive Members from regulating the use of financial instruments, such as credit cards, provided that these regulations are consistent with other relevant GATS provisions, in particular Article VI.

H. DEFENCE UNDER ARTICLE XIV OF THE GATS

1. Claims and main arguments of the parties

6.443 The United States submits that, because the measures that have been challenged by Antigua in this dispute serve important policy objectives that fall within Article XIV of the GATS, they benefit from the exceptions of Article XIV(a) and Article XIV(c). Moreover, they are applied in a way that complies with the requirements of the chapeau of Article XIV of the GATS.[887]

6.444 In relation to its defence under Article XIV(a), the United States argues that the Wire Act, the Travel Act and the Illegal Gambling Business Act are necessary to protect "public morals" and "public order" within the meaning of Article XIV(a) because, *inter alia*, remote gambling is particularly vulnerable to use by minors who are prohibited from gambling or can be used for laundering the proceeds of organized crime.[888] Antigua questions the United States' argument that the US measures prohibiting the remote supply of gambling and betting services are necessary to protect public morals and public order on the basis, *inter alia*, that the United States is a significant consumer of gambling and betting services and that state-sanctioned gambling opportunities are available in 48 states.[889]

6.445 With respect to its defence under Article XIV(c), the United States argues that the Wire Act, the Travel Act and the Illegal Gambling Business Act serve as law enforcement tools to secure compliance with other WTO-consistent US laws, in particular, state gambling laws and criminal laws relating to organized crime.[890] Antigua argues that the United States' defence under Article XIV(c) should fail because it has not submitted sufficient information on the laws upon which it seeks to rely for its defence under Article XIV(c). Antigua submits that the burden on a defending party to identify

[886] Concerning the lack of sufficient facts for carrying out a legal analysis, see, for instance, Appellate Body Report on *EC – Asbestos*, paras. 78-83. Concerning judicial economy, see our remarks in section 5 of the Introduction to this Report.

[887] United States' reply to Panel question No. 44.

[888] United States' second written submission, paras. 111-116.

[889] See Antigua's first written submission, paras. 80 and 108.

[890] United States' second written submission, paras. 95-106.

such laws is, at the least, similar to that of a complaining party who seeks to challenge a measure in dispute settlement proceedings; both must establish that "measures" with the alleged effect exist.[891] The United States responds that Members' legislation is presumed to be WTO-consistent, including all legislation invoked by the United States in support of its Article XIV defence.[892]

2. Relevant GATS provisions

6.446 Article XIV of the GATS provides in relevant part that:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> > (a) necessary to protect public morals or to maintain public order;[5]
> >
> > (footnote original) [5] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
> >
> > ...
> >
> > (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
> >
> > (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
> >
> > (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
> >
> > (iii) safety;
> >
> > [...]"

3. Assessment by the Panel

(a) Introduction

6.447 Since this is the first occasion on which Article XIV of the GATS has been invoked by a Member in a WTO dispute, the Panel is unable to avail itself of prior jurisprudence under the GATS for possible guidance.

6.448 However, in *EC – Bananas III*, the Appellate Body confirmed that jurisprudence under the GATT 1994 could be relevant for the interpretation of analogous provisions contained in the GATS.[893] Given the textual similarity between Article XX of the GATT 1994 and Article XIV of the GATS, and the similar purposes that both Articles are designed to serve, we consider that

[891] Antigua's comments on the United States' reply to Panel question No. 45.
[892] United States' reply to Panel question No. 44.
[893] Appellate Body Report on *EC – Bananas III*, para. 231.

GATT/WTO jurisprudence in relation to the former may be relevant and useful in the interpretation of the latter.

6.449 In accordance with the Appellate Body's guidance in *US – Gasoline*[894], *US - Shrimp*[895] and *Korea – Various Measures on Beef*[896] in respect of Article XX of the GATT 1994, we believe that a measure found to be inconsistent with one or several of the substantive obligations of the GATS must be subjected to a two-tiered analysis in order for it to be justified under Article XIV. Specifically, that a measure must:

(a) fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (e) of Article XIV in order to enjoy provisional justification; and

(b) meet the requirements of the introductory provisions of Article XIV, the so-called "chapeau".

6.450 In *US – Wool Shirts and Blouses*, the Appellate Body stated that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[897] Accordingly, a party seeking to invoke Article XIV of the GATS bears the burden of proof to demonstrate that the various elements comprising a defence under this Article have been fulfilled.

6.451 We also note that the Appellate Body in *EC – Hormones* stated that:

> "It is also well to remember that a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case."[898]

We consider that this statement is equally applicable in respect of a defence invoked by a Member under Article XIV of the GATS. More particularly, the Panel is of the view that, if a defending party in a case has made a prima facie demonstration that a measure fulfils the requirements of Article XIV, in the absence of "effective refutation" by the complaining party, a panel must rule in favour of the defending party.

6.452 Finally, we recall that the Appellate Body has indicated that, when applying Article XX of the GATT 1994 in a given case, a balance needs to be struck between the market access right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of other Members.[899] In our view, this statement is equally applicable to the application of Article XIV of the GATS.

(b) Measures at issue

6.453 The United States seeks to defend, under Article XIV of the GATS, three of the federal statutes that have been challenged by Antigua in this dispute, namely, the Wire Act, the Travel Act and the Illegal Gambling Business Act. The United States has not sought to defend the state laws challenged by Antigua independently of the Illegal Gambling Business Act. However, throughout the present proceedings the United States has argued that the prohibition in the United States against the remote supply of gambling and betting services, regardless of whether enforced through state or federal laws, is based on the same policy concerns discussed hereafter. We recall that, in this dispute,

[894] See Appellate Body Report on *US – Gasoline*, p. 22.
[895] See Appellate Body Report on *US – Shrimp*, paras. 115–119.
[896] See Appellate Body Report on *Korea – Various Measures on Beef*, para. 156.
[897] Appellate Body Report on *US – Wool Shirts and Blouse*, pp. 15-16.
[898] Appellate Body Report on *EC – Hormones*, para. 104.
[899] Appellate Body Report on *US – Shrimp*, para. 156.

we are examining the Travel Act (when read together with the relevant state laws) and the Illegal Business Gambling Act (when read together with the relevant state laws).

6.454 We have found above that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are inconsistent with US obligations under Article XVI of the GATS by virtue of specific commitments the United States has undertaken in its GATS Schedule. Accordingly, we will now examine whether these laws can be justified under Article XIV. More specifically, we will examine first whether these laws can be provisionally justified under Article XIV(a) and Article XIV(c), the two provisions specifically invoked by the United States. If provisionally justified, we will then consider whether the United States has successfully met the requirements of the chapeau of Article XIV with respect to these measures. In our view, if we find the Travel Act and the Illegal Gambling Business Act are justified under Article XIV, the relevant state laws that are otherwise inconsistent with US obligations under Article XVI shall also be deemed to be justified under Article XIV, to the extent that they are enforced by and through the Travel Act and/or the Illegal Gambling Business Act and for, *inter alia* the same policy concerns.

(c) Provisional justification under Article XIV(a)

(i) The legal standard under Article XIV(a)

6.455 Pursuant to the text of Article XIV(a), in determining whether a challenged measure is provisionally justified under that Article, the Member invoking that provision must demonstrate two elements, namely:

(a) the measure must be one designed to "protect public morals" or to "maintain public order"; and

(b) the measure for which justification is claimed must be "necessary" to protect public morals or to maintain public order.

6.456 The Panel will now proceed to examine these two elements in turn.

Measures ... to "protect public morals" or to "maintain public order"

6.457 The United States argues that the challenged measures are necessary to protect public morals and to maintain public order under Article XIV(a).[900] The United States submits that the remote supply of gambling and betting services raises significant concerns relating to the maintenance of public order and the protection of public morals. According to the United States, remote supply of gambling and betting services is, generally speaking, particularly vulnerable to various forms of criminal activity, especially organized crime. Maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of "public morals" and one of "public order".[901] Protecting children from uncontrolled gambling settings is certainly a matter of "public morals".[902]

6.458 The United States argues that the term "public order" refers to the familiar civil law concept denoted in French by the expression "ordre public" and its functional counterpart in common law systems, the concept of "public policy". The United States further submits that the term "public

[900] United States' second written submission, paras. 111 *et seq*.
[901] United States' second written submission, paras. 108-110.
[902] United States' second written submission, para. 114.

morals" refers to standards of right and wrong that can be described as "belonging to, affecting, or concerning the community or nation."[903]

6.459 The Panel will first examine the meaning of the terms "protect public morals" and "maintain public order" in an effort to understand their scope. The Panel will interpret Article XIV(a) of the GATS in accordance with the ordinary meaning of the words when read in their context and in light of the object and purpose of the GATS and the WTO Agreement

6.460 The term "public morals" is used in Article XX(a) of the GATT 1994 but not defined and it has not been interpreted by any panel or the Appellate Body. The term "public order" is likewise not specifically defined in the GATS, although the footnote to Article XIV(a) indicates that the "public order" exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

6.461 We are well aware that there may be sensitivities associated with the interpretation of the terms "public morals" and "public order" in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate.[904] Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XVI of the GATS. More particularly, Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.

6.462 This being said, the Panel considers that, despite the inherent difficulties and sensitivities associated with interpretation of the terms "public morals" and "public order" in the context of Article XIV(a), we must nonetheless give meaning to these terms in order to apply them to the facts of in this case.[905] Indeed, the principle of effective treaty interpretation requires us to do so .

6.463 In determining the ordinary meaning of the terms "public morals" and "public order", we turn to the *Shorter Oxford English Dictionary*. "Public" is defined therein as:

> "Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation."[906]

The Panel believes that a measure that is sought to be justified under Article XIV(a) must be aimed at protecting the interests of the people within a community or a nation as a whole. This is the case whether the measure is asserted to be necessary to "protect public morals" or to "maintain public order" since both terms contain the word "public".

6.464 The word "morals" (noun, pl.) is defined therein as:

> "[...] habits of life with regard to right and wrong conduct."[907]

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[903] United States' second written submission, para. 108.

[904] See Appellate Body Reports on *Korea – Various Measures on Beef* , para. 176 and *EC – Asbestos*, para. 168.

[905] We recall the Appellate Body's instructions in the context of the interpretation of Article XX of the GATT 1994 in *US – Shrimp*, para. 155

[906] *The Shorter Oxford English Dictionary*, 2002.

[907] *The Shorter Oxford English Dictionary*, 2002.

6.465 The Panel considers the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.

6.466 The dictionary definition of the word "order" that appears to be relevant in the context of Article XIV(a) reads as follows:

> "A condition in which the laws regulating the public conduct of members of a community are maintained and observed; the rule of law or constituted authority; absence of violence or violent crimes."[908]

6.467 We recall that drafters of the GATS clarified in footnote 5 that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society". Hence, in our view, the dictionary definition of the word "order", read together with footnote 5, suggests that "public order" refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, *inter alia*, to standards of law, security and morality.

6.468 Based on the dictionary definitions referred to above and taking into account the clarification added by the drafters of the GATS in footnote 5, we believe that "public morals" and "public order" are two distinct concepts under Article XIV(a) of the GATS. Nevertheless, to the extent that both concepts seek to protect largely similar values, some overlap may exist.

6.469 For example, in this case, it could be argued that the prevention of underage gambling and the protection of pathological gamblers relates to public morals, while the fight against organized crime is rather a matter of public order. The prevention of money laundering and of fraud schemes could arguably relate to both public morals and public order. However, we are of the view that, in this dispute, it is not necessary to qualify various policy considerations relied upon by the United States as relating either to "public morals" or to "public order".

6.470 The following supplementary means of interpretation may also be instructive. Judge Lauterpacht, the elder, referred to "public order" as the "fundamental national conceptions of law, decency and morality." He further stated that "the protection of the interest of minors ... falls naturally within the notion of ordre public."[909]

6.471 Examples of WTO Members that have relied on "public moral" grounds to justify certain restrictions include Israel and the Philippines. In this regard, the 1999 Trade Policy Review of Israel observed that Israel maintained an import prohibition on "[t]ickets or publicity items for lottery or gambling" and identified the reason for this prohibition as "[p]ublic morals."[910] Similarly, the 1999 Trade Policy Review of the Philippines listed limitations on foreign ownership of gambling operations (e.g., racetracks) under a heading that referred, *inter alia,* to limitations "for reasons of ... risk to health and morals."[911]

6.472 A historic example of the use of "moral" grounds to restrict certain activities was raised in the context of the Economic Committee of the League of Nations, where a draft convention had been put forward that included an exception for "[p]rohibitions or restrictions imposed for moral or humanitarian reasons or for the suppression of improper traffic, provided that the manufacture of and

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[908] *The Shorter Oxford English Dictionary*, 2002.

[909] Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55, 90 (Judgment of 28 November) (sep. op. of J. Lauterpacht).

[910] *Trade Policy Review - Israel - Report by the Secretariat*, WT/TPR/S/58, table III.8 (1999).

[911] *Trade Policy Review - The Philippines - Report by the Secretariat*, WT/TPR/S/59, table III.11 (1999). The document does not specify precisely which reason is associated with the gambling ownership restriction, but from the context of the document it is reasonable to infer that the restriction is based on "morals" or "health and morals."

trade in the goods to which the prohibitions relate are also prohibited or restricted in the interior of the country."[912] It is reported that in the debate over the proposed exception, the representative of Egypt asked whether a prohibition on the importation of foreign lottery tickets would be covered by the moral exception. The president of the conference stated that such prohibitions would be covered by the exception for measures adopted for "moral or humanitarian reasons."[913]

6.473 Other jurisdictions have accepted that gambling activities could be limited or prohibited for public policy considerations, in derogation of general treaty or legislative rules.[914]

6.474 In light of the above, the Panel concludes that measures prohibiting gambling and betting services, including the supply of those services by the Internet, could fall within the scope of Article XIV(a) if they are enforced in pursuance of policies, the object and purpose of which is to "protect public morals" or "to maintain public order".

Measures "necessary" to protect public morals or to maintain public order

6.475 With respect to the requirement, under Article XIV(a) of the GATS, that a measure be "necessary", the Panel notes that the Appellate Body in *Korea – Various Measures on Beef* established various parameters within which a determination of whether a measure is "necessary"

[912] See Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement drawn up by the Economic Committee of the League of Nations to serve as a Basis for an International Diplomatic Conference, League of Nations Doc. C.E.1.22. 1927 II.13. pp. 10, 15 (1927).

[913] International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference, p. 110, League of Nations Doc. C.21.M.12. 1928 II.7, p. 110 (1928).

[914] For instance, the European Court of Justice (ECJ) determined that national legislation which prohibits, subject to specified exceptions, the holding of lotteries in a Member State and which, thus, wholly precludes lottery operators from other Member States from promoting their lotteries and selling their tickets, whether directly or through independent agents, in the Member State which enacted that legislation, restricts the freedom to provide services, even though it is applicable without distinction. However, the court considered that the particular features of lotteries justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of profits they yield and to decide whether to restrict or prohibit them: Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, (24 March 1994). Further, in a more recent decision, the ECJ held that national legislation which authorized the operation and playing of games of chance or gambling solely in casinos, in permanent or temporary gaming areas created by decree-law and which was applicable without distinction to its own nationals and nationals of other Member States constituted a barrier to the freedom to provide services. However, the ECJ found that this legislation was compatible with the EC Treaty in view of the concerns of social policy and the prevention of fraud which justified it. The court noted, *inter alia*, that the considerations underlying the legislation at issue concerned "the protection of consumers, who are recipients of the services and the maintenance of order in society": Case C-6/01 – *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others* (11 September 2003). We also note that the The River City Group reported that in virtually all parts of the world, gambling activities, when not prohibited entirely, have traditionally been subject to strict regulation, involving civil and criminal laws. In view of technological developments, a number of countries have developed – or are in the process of developing – special legal framework for Internet gambling for instance, Australia, Austria, Belgium, Brazil, Denmark, Finland, Iceland, Italy, The Netherlands, Sweden, United Kingdom. Other countries currently apply to Internet gambling the laws and regulations developed for traditional gambling [for instance, Canada, France. The regulations targeting Internet gambling appear to us to be as stringent, if not more, that regulations applying to traditional forms of gambling. Some countries seem to restrict drastically or even prohibit entirely Internet gambling for instance, Estonia, Hong Kong, Iceland, Norway, Uruguay: See *Internet Gambling Report – Sixth Edition*, Mark Balestra (Ed.), The River City Group, United States, 2003.

within the meaning of Article XX(d) of the GATT 1994[915] must be made. Specifically, the Appellate Body noted that:

> "[T]he reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable'. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term 'necessary' refers, in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'." [original footnote omitted][916]

The Panel is of the view that these statements are equally applicable in the context of Article XIV of the GATS, including Article XIV(a).

6.476 The Appellate Body in the same case articulated a "weighing and balancing" test as the basis for making a determination as to whether a measure is "necessary" within the meaning of Article XX(d) of the GATT 1994. In particular, the Appellate Body stated that a determination of whether a measure is necessary within the meaning of Article XX(d) of the GATT 1994:

> "[I]nvolves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[917]

6.477 On the basis of the articulation of the guiding principles for the "weighing and balancing" test by the Appellate Body in *Korea – Various Measures on Beef* and, subsequently, in *EC – Asbestos*[918], we believe that, in the context of Article XIV(a), we must assess the following in determining whether a measure is "necessary" to protect public morals or to maintain public order:

(a) the importance of interests or values that the challenged measure is intended to protect. (With respect to this requirement, the Appellate Body has suggested that, if the value or interest pursued is considered important, it is more likely that the measure is "necessary".)[919]

(b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure. (In relation to this requirement, the Appellate Body has suggested that the greater the extent to which the measure contributes to the end pursued, the more likely that the measure is "necessary".)[920]

(c) the trade impact of the challenged measure. (With regard to this requirement, the Appellate Body has said that, if the measure has a relatively slight trade impact, the more likely that the measure is "necessary". The Appellate Body has also indicated

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[915] Article XX(d) of the GATT 1994 is textually analogous to Article XIV(c) of the GATS, which we consider below.

[916] Appellate Body Report on *Korea – Various Measures on Beef*, para. 161.

[917] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 164-166.

[918] Appellate Body Report on *Korea – Various Measures on Beef*, para. 178; Appellate Body Report on *EC – Asbestos*, para. 172.

[919] Appellate Body Report on *Korea – Various Measures on Beef*, para. 162.

[920] Appellate Body Report on *Korea – Various Measures on Beef*, para. 163.

> that whether a reasonably available WTO-consistent alternative measure exists must be taken into consideration in applying this requirement.)[921]

(ii) Applying the legal standard under Article XIV(a) to the facts of this case

6.478 The Panel will consider in this section whether the prohibition of the remote supply of gambling and betting services imposed by the three relevant US federal laws – namely, the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) – are "necessary" to "protect public morals" and/or to "maintain public order."

> Are the challenged measures so as to "protect public morals" or to "maintain public order" within the meaning of Article XIV(a)?

6.479 The United States argues that the remote supply of gambling and betting services raises significant concerns relating to the maintenance of public order and the protection of public morals.[922] According to the United States, the remote supply of gambling poses threats related to organized crime, money laundering, fraud and other criminal activities; risks to children given the availability of remotely supplied gambling and betting services to children; and particular health risks. The United States submits that it is for these reasons that it places stringent restrictions on the ability of any operator to offer gambling and betting services by remote supply, regardless of whether such services are supplied from the territory of another Member or from within the territory of the United States.[923]

6.480 Antigua points to a 2001 report prepared by the United States Department of Defense evaluating the social impact of readily available gambling machines, which concluded that the presence of military casinos did not have a negative effect on the morale or financial stability of the United States forces, their family members and other persons – including foreign nationals – who gambled at the government-owned facilities.[924] Antigua also submits that countries such as the United Kingdom have seen no insuperable public interest issues flowing from the move towards the online supply of gambling and betting services but, rather, have embraced it in a regulated context.[925]

6.481 In the Panel's view, the evidence adduced establishes that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are measures to protect "public morals or public order", for the following reasons.

6.482 A 1961 report by the House of Representative on the Wire Act issued shortly before its entry into force states that:

> "The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce."[926]

6.483 With respect to the Travel Act, during hearings before the Judiciary Committee regarding the Attorney General's Programme to Curb Organized Crime and Racketeering, the then Attorney

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[921] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 163 and 166.
[922] United States' second written submission, para. 111.
[923] United States' first oral statement, para. 10.
[924] Antigua's first written submission, para. 86.
[925] Antigua's first written submission, para. 19.
[926] House of Representatives Report No. 87-967, pp. 1-2 (1961) contained in Exhibit US-30.

General, Robert F. Kennedy, stated that his program, which included the Travel Act as well as the Wire Act, enabled the federal government to "take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety."[927]

6.484 We also note that during 2003 hearings before the Subcommittee on Crime, Terrorism and Homeland Security regarding the yet to be enacted Unlawful Internet Gambling Funding Prohibition Act, which , if passed, will prohibit Internet gambling in a similar way to the Wire Act and the Travel Act, reference was made to the threat of money laundering, organized crime, fraud and risks to children (i.e underage gambling) and health (i.e. pathological gambling) that are associated with Internet gambling.[928]

6.485 With respect to the Illegal Gambling Business Act, in the statement of findings made in advance of enactment of that Act, Congress articulated a number of reasons justifying its enactment. In particular, reference was made to the fact that gambling income is the "lifeline of organized crime" and the means by which other illegal activities are financed. Further, Congress stated that gambling "preys upon society", especially the poor. Finally, Congress stated that, from a law enforcement standpoint, "gambling is more susceptible than most organized crime activities to detection and prosecution."[929] The United States has also indicated that US courts have confirmed that the Illegal Gambling Business Act is a measure against organized crime.[930]

6.486 In our view, these Congressional statements regarding the respective purposes underlying the Wire Act, the Travel Act and the Illegal Gambling Business Act indicate that various arms of the government of the United States consider these Acts were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling. We consider that, insofar as the state gambling laws are enforced through the Illegal Gambling Business Act, those state laws may be considered to be enforced for, *inter alia*, the same purpose as the Illegal Gambling Business Act.

6.487 In light of the above, we conclude that the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of "public morals" and/or "public order" under Article XIV(a). In other words, we find that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are measures that are designed to "protect public morals" and/or "to maintain public order" in the United States within the meaning of Article XIV(a).

Are the challenged measures "necessary" to protect public morals or to maintain public order?

6.488 We now consider whether the Wire Act, the Travel Act and the Illegal Business Act (when read together with the relevant states laws) are "necessary" to protect public morals and/or to maintain public order. In this regard, we recall that we must assess taking into account the relevant jurisprudence of the Appellate Body referred to in paragraph 6.477 above:

(a) the importance of the interests or values that these Acts are intended to protect;

(b) the extent to which these Acts contribute to the realization of the ends respectively pursued by these Acts; and

(c) the respective trade impact of these Acts.

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[927] Testimony of Attorney General Robert Kennedy, Hearings Before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess., p. 4 (1961) p. 15, Exhibit US-24.

[928] Exhibit US-5. See, for example, pp. 1, 6, 10-11, 13.

[929] Congressional Record H9711contained in Exhibit US-32.

[930] See *United States v. Box*, 530 F.2d 1258, 1264-65 (5th Cir. 1976) contained in Exhibit US-31.

Importance of interests or values protected

6.489 The Congressional statements identified above in paragraphs 6.482-6.485 indicate that these Acts are intended to protect society against the threat of money laundering, organized crime, fraud and risks to children (i.e underage gambling) and to health (i.e. pathological gambling).

6.490 We again note comments made in 1961 by the then Attorney General Robert F. Kennedy to describe the overall intended effect of the Attorney General's Program to Curb Organized Crime and Racketeering, of which the Wire Act and the Travel Act were part:

> "These [hoodlums and racketeers who have become so rich and so powerful] use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size.
>
> Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime, all throughout the country.[931]

6.491 In the Congressional statement of findings prefatory to the Illegal Gambling Business Act, Congress described the threat posed by organized crime which was the impetus for the enactment of that Act, in the following terms:

> "(1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."[932]

6.492 On the basis of the foregoing, it is clear to us that the interests and values protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) serve very important societal interests that can be characterized as "vital and important in the highest degree" in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC – Asbestos*.[933]

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[931] Testimony of Attorney General Robert Kennedy, Hearings Before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess., p. 4 (1961), p. 11 contained in Exhibit US-24.

[932] Congressional Statement of Findings and Purpose, Note on 18 USC § 1961, p. 812 contained in Exhibit US-35.

[933] Appellate Body Report on *EC – Asbestos*, para. 172.

6.493 We accept that a Member may judge that strict controls may be needed to protect the above-mentioned societal interests. However, in the process of "weighing and balancing" this factor against the others to which we must have regard, we consider that it is important to bear in mind that these interests – to protect society against the threat of money laundering, organized crime, fraud and risks to children (i.e underage gambling) and health (i.e. pathological gambling) – also exist in the context of the non-remote supply of gambling and betting services. Neither party has disputed this.[934] Yet, in contrast to its treatment of the remote supply of gambling and betting services, the United States does not prohibit outright the non-remote supply of gambling and betting services. We acknowledge that there may be particular aspects associated with remote supply of gambling and betting services that may justify a difference in treatment as compared to the non-remote supply of such services. However, reference must be made to the evidence at hand to determine whether particular aspects associated with the remote supply of gambling and betting services will justify a prohibition, particularly in light of the tolerant attitude displayed in some parts of the United States to the non-remote supply of such services. We consider this issue in further detail below in our discussion of whether or not a WTO-consistent alternative is reasonably available to the United States.[935]

Contribution to ends pursued

6.494 As for the extent to which the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) contribute to the realization of the ends pursued by those laws, we recall our finding above that these laws seek to address concerns pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling.[936] Given that the Wire Act and the Travel Act *prohibit* the remote supply of gambling and betting services, which has been associated with each of these concerns[937], these Acts must contribute, at least to some extent, to addressing these concerns. Further, the Illegal Gambling Business Act *prohibits* conducting, financing, managing, supervising, directing or owning all or part of an "illegal gambling business" which is defined as a gambling business which violates the law of a state (or political subdivision) of the United States. We consider that the Illegal Gambling Business Act must contribute, at least to some extent, to addressing these concerns.

Trade impact

6.495 With respect to the trade impact of the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws), Antigua argues that the effect of these laws is total prohibition, which is the most trade-restrictive approach possible.[938] We have no doubt that these Acts have a significant restrictive trade impact. Indeed, the United States has admitted as much when arguing that a Member has "the right to

[934] The United States submits that it "maintains and applies a regulatory distinction between remotely supplied gambling services and other gambling services, with the former subject to even tighter restrictions than the latter. This distinction arises from numerous distinguishing law enforcement, consumer protection, and health concerns associated with the remote supply of gambling": United States' second written submission, para. 45. The United States implicitly acknowledges in this statement that law enforcement, consumer protection, and health concerns also exist in the context of the non-remote supply of gambling and betting services. Antigua also submits that underage gambling, pathological gambling, money laundering, crime, fraud and consumer protection concerns exist in the context of the non-remote supply of gambling and betting services: Antigua's first oral statement, paras. 70–87.

[935] See paras. 6.499-6.521 below.

[936] See para. 6.486 above.

[937] See paras. 6.499-6.521 below.

[938] Antigua's second oral statement, para. 71.

heavily restrict a highly risky service (in this case, gambling by remote supply) while allowing the use of a less risky service [in this case, gambling by non-remote means]".[939]

6.496 In the assessment of the trade impact, the Appellate Body in *Korea – Various Measures on Beef* referred to the GATT panel on *US – Section 337* where the panel made clear that a Member must first explore and exhaust all GATT/WTO compatible alternatives before resorting to WTO-inconsistent alternatives.[940] In examining whether a reasonably available WTO-consistent alternative measure existed, the Appellate Body in *Korea – Various Measures Affecting Beef* examined the means that had been used by Korea to address the prevention of fraudulent conduct in relation to the sale of other food products.

6.497 Recalling the Appellate Body's reasoning in *Korea – Various Measures Affecting* Beef, we need to consider whether the United States has, in other contexts, used measures other than a prohibition to address similar concerns to those that are alleged to be the basis for its justification in this case of the prohibition on the remote supply of gambling and betting services. The only other relevant context to which reference has been made in this dispute is gambling and betting services supplied by non-remote means.

6.498 In this dispute, and for the reasons discussed hereafter, the Panel considers that some of the concerns the United States has identified are specific only to the remote supply of gambling and betting services. Therefore, it would be inappropriate to attempt to compare that treatment of these specific concerns with the treatment of whatever concerns the United States has with the non-remote supply of these services. We examine below each concern invoked by the United States.

6.499 With respect to *money laundering*, the United States argues that the volume, speed and international reach of remote gambling transactions combined with the offshore locations of most remote suppliers and the virtual anonymity of such transactions mean that the "layering and integration" stages of money laundering are effectively facilitated. More particularly, the United States submits that the remote supply of gambling and betting services is particularly well-suited to concealing and disguising the true nature, source and ownership of the ill-gotten gains of crime.[941]

6.500 The United States General Accounting Office Report to Congressional Requestors entitled "Internet Gambling: An Overview of the Issues" refers to these concerns.[942]

6.501 In addition, we have before us a 2001 Report on Money Laundering Typologies prepared by the Financial Action Task Force on Money Laundering. That report tends to confirm the existence of the concerns identified by the United States in the context of the remote supply of gambling and betting services that relate to the audit trail of remote transactions. In particular, the report states:

> "Despite attempts to deal with the potential problems of Internet gambling by regulating it, requiring licences in order to operate, or banning such services outright, a number of concerns remain in addition to the inability to track ... Internet links ...

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[939] United States' second written submission, para. 93.

[940] The Appellate Body in *Korea – Various Measures on Beef* at para. 165 referred to the GATT panel *US – Section 337* which stated: "It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provision": Panel Report on *US – Section 337*, para. 5.26.

[941] United States' first written submission, paras. 12 *et seq*; United States' second oral statement, paras. 59-60.

[942] Exhibit AB-17, p. 35.

> For example, transactions are primarily performed through credit cards, and the offshore placement of many Internet gambling sites makes locating and prosecuting the relevant parties more difficult if not impossible. Furthermore, gambling transactions, the records of which might be needed as evidence, are conducted at the gambling site and are software-based; this may add to the difficulty of collecting and presenting such evidence."[943]

6.502 Along similar lines, in 2002, the Deputy Assistant Attorney General made the following statement in a special briefing on "Money Laundering and Payment Systems in Online Gambling":

> "The anonymous nature of the Internet and the use of encryption makes it difficult to trace the transactions. The gambling business may also not maintain the transaction records, in which case tracing may be impossible. While regulators in the United States can visit physical casinos, observe their operations, and examine their books and records to ensure compliance with regulations, this is far more difficult, if not impossible, with virtual casinos."[944]

6.503 Similar statements have been made during a 2003 Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary on the Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act.[945] The concern expressed by the United States regarding the anonymity of transactions is also reflected in several of the recommendations made in the 2001 Report on Money Laundering Typologies that are aimed at addressing the specific difficulties associated with remote gambling transactions. In particular, the report recommends that Internet Service Providers be required to maintain reliable subscriber registers with appropriate identification information.[946]

6.504 The concern expressed by the United States regarding the international reach of remote supply gambling and betting transactions appears to be confirmed in an example referred to in the 2001 Report on Money Laundering Typologies where money flows were detected in many parts of the world.[947]

6.505 Antigua has not pointed to any evidence that calls into question the specific concerns referred to above. Rather, Antigua points to evidence indicating that money laundering is at least as grave a concern in relation to the supply of non-remote gambling and betting services as in the case of the remote supply of such services.[948] The United States does not dispute that casino gambling can be used, among other things, to launder the cash proceeds of crime during the placement stage of money laundering.[949] In any event, it is our view that, the fact that money laundering may exist in the context of the non-remote supply of gambling and betting services does not mean that the United States is not entitled to address differently the aspects of this concern that are specific to the remote supply of gambling and betting services, namely, the volume, speed and international reach of remote gambling transactions combined with the offshore locations of most remote suppliers and the virtual anonymity of such transactions.

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[943] Exhibit US-7, p. 6.

[944] Exhibit AB-86, p. 4. A similar statement was made by the same Deputy Assistant Attorney General before the Subcommittee on Crime, Terrorism, and Homeland Security: Exhibit AB-85, p. 3.

[945] See Exhibit US-5.

[946] Exhibit US-7, p. 8.

[947] Exhibit US-7, Example 1, pp. 6-7.

[948] See, for example, Exhibit AB-79; Exhibit AB-147; Exhibit AB-149; Exhibit AB-150; Exhibit AB-154.

[949] United States' first written submission, paras. 12 *et seq*; United States' second oral statement, paras. 59-60.

6.506 With respect to ***fraud***, the United States submits that the risk of fraud is heightened in the case of the remote supply as compared to the non-remote supply of gambling and betting services because the barriers to establishing an online gambling operation are low so that unscrupulous operators can appear and disappear within minutes.[950]

6.507 We have seen evidence that tends to support the United States' concern that low barriers to entry in the context of the remote supply of gambling and betting services heightens the risk of fraud. Indeed, in 2002, the Deputy Assistant Attorney General made the following statement in a special briefing on "Money Laundering and Payment Systems in Online Gambling":

> "Although there are certainly legitimate companies who are either operating or who want to operate on-line casinos in an honest manner, the potential for fraud connected with casinos and bookmaking operations in the virtual world is far greater than in the physical realm. Start-up costs are relatively low and cheap servers and unsophisticated software are readily-available. On-line casinos and bookmaking establishments operate in many countries where effective regulation and law enforcement is minimal or non-existent. Like scam telemarketing operations, on-line gambling establishments appear and disappear with regularity, collecting from losers and not paying winners, and with little fear of being apprehended and prosecuted."[951]

6.508 Similar statements are contained in the National Gambling Impact Study Commission Final Report.[952]

6.509 Antigua has pointed to evidence indicating that the non-remote supply of gambling and betting services may be as susceptible to fraud as is the remote supply of these services.[953] However, we do not consider that this evidence refutes the existence of the specific fraud concerns that the United States maintains exist in the context of the remote supply of gambling and betting services, namely that because the barriers to establishing an online gambling operation are low, unscrupulous operators can appear and disappear within minutes.

6.510 The essence of the United States' ***health concerns*** in relation to the remote supply of gambling and betting services relate to the isolated environment in which gamblers may operate, which protects them from social stigma and enables them to gamble without interruption for extended periods of time.[954]

6.511 The evidence tends to support the existence of the United States' concerns regarding the isolated environment of consumers of remotely supplied gambling and betting services. In particular, in 2003, the Deputy Assistant Attorney General stated before the Subcommittee on Crime, Terrorism, and Homeland Security that:

> "Unlike on-site gambling, on-line gambling is readily available to anyone with an Internet connection at all hours of the day or night. This present a particular danger for compulsive gamblers. As was recently pointed out by the American Psychiatric Society: "Internet gambling, unlike many other forms of gambling activity, is a solitary activity, which makes it even more dangerous; people can gamble uninterrupted and undetected for unlimited periods of time." Indeed, the problems associated with pathological and problem gamblers, a frighteningly-large percentage

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[950] United States' second written submission, para. 51.
[951] Exhibit AB-86, p. 2.
[952] Exhibit AB-10, p. 5-11. See also Exhibit AB-159, p. 2.
[953] See Exhibit AB-156, which is a document prepared by Antigua entitled "Fraud within the United States gambling industry".
[954] United States' second oral statement, para. 30.

> of which are young people, are well-established and can be measured in the ruined lives of both the gamblers themselves and their families."[955]

6.512 Similar statements are contained in the National Gambling Impact Study Commission Final Report.[956]

6.513 The concern regarding the relative anonymity associated with remote gambling, which protects consumers from social stigma, is acknowledged in a statement made by two professors from the International Gaming Research Unit, Division of Psychology, in Nottingham Trent University, United Kingdom entitled "Is Internet gambling more addictive and/or problematic than other forms of gambling?", which is relied upon by Antigua. In particular, it states that "Another concern that has been noted concerns the relative anonymity of Internet gambling, which may lead to disinhibition and increased levels of gambling."[957] The authors of the statement conclude, *inter alia*, that:

> "There are a number of factors that make online activities like Internet gambling potentially seductive and/or addictive. Such factors include anonymity, convenience, escape, dissociation/immersion, accessibility, event frequency, interactivity, disinhibition, simulation, and asociability."[958]

6.514 Antigua has argued that there is no evidence that cross-border gambling results in higher levels of pathologies than non-remote gambling.[959] However, in our view, the United States is not submitting that remote gambling may result in a higher incidence of pathological gambling. Rather, the United States argues that remote gambling presents "special health risks"[960] associated with the isolated and anonymous environment in which such gambling takes place. We do not consider that Antigua's evidence disproves the existence of this specific concern.

6.515 With respect to ***underage gambling***, the United States argues that there is no means to prevent minors from gaining access to remotely supplied gambling and betting services comparable to the means available in connection with the non-remote supply of gambling services in the United States.[961]

6.516 The evidence tends to support the United States' assertion that age verification is a specific concern with respect to the remote supply of gambling and betting services. In particular, in 2003, the

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[955] Exhibit AB-85, p. 2.

[956] Exhibit AB-10, p. 5-5. See also Exhibit AB-159, p. 2.

[957] Exhibit AB-80, p. 8. The statement refers to a 2003 paper written by one of the co-authors of the statement that suggests that remote gamblers are, perhaps, not as anonymous as they would think because of, *inter alia*, the existence of the ability of Internet gambling operators to collect data about gamblers. However, nowhere does the statement point to evidence to suggest that gamblers are aware that their anonymity is being compromised by this facility.

[958] Exhibit AB-80, p. 12.

[959] In this regard, Antigua refers to a statement prepared by two of its consultants for this dispute, namely Professor Mark Griffiths and Dr Richard Wood, entitled "Is Internet gambling more addictive and/or problematic than other forms of gambling?" contained in Exhibit AB-80. The statement concludes that "there is no greater risk of a pathological response as a result of exposure to Internet-based gambling opportunities, than as a result of exposure to other forms of gambling opportunity": Exhibit AB-80, p. 2. Antigua also relies upon a statement by another of its consultants in this dispute, namely, Dr Howard Shaffer, who concludes that "health risks associated with Internet based gambling are not meaningfully different from other electronic gambling": Exhibit AB-185, p. 8.

[960] In para. 30 of its first oral statement, the United States submits that: "Remote gambling also presents *special health and youth protection risks* in part because it is available to anyone, anywhere – including compulsive gamblers and children – who can gamble 24 hours a day with a mere 'click of the mouse'. Isolation and anonymity compound the danger. In the words of a gambling addict interviewed on the videotape we have provided, 'nobody has to see you do it' and 'nobody has to know.'"

[961] United States' first written submission, para. 99.

Deputy Assistant Attorney General stated before the Subcommittee on Crime, Terrorism, and Homeland Security that:

> "On-line gambling also makes it far more difficult to prevent minors from gambling. Unlike traditional physical casinos and Off-Track-Betting parlors, the operators of gambling websites cannot look at their customers to assess their age and request photo identification. Currently, Internet gambling businesses have no reliable way of confirming that gamblers on their website are not minors who have gained access to a credit card. Although some companies are developing software to try to detect whether a player is old enough to gamble or whether that player is from a legal jurisdiction, such software has not been perfected and would, of course, be subject to the same types of flaws and vulnerabilities that could be exploited by hackers."[962]

6.517 Similar statements were made during a 2003 Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Judiciary Committee on the Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act[963] and are contained in the National Gambling Impact Study Commission Final Report.[964]

6.518 The evidence indicates that credit card gateways are the primary means of verifying age online.[965] However, despite suggestions to the contrary by Antigua[966], the evidence suggests that credit cards have proved to be an inadequate means to restrict children's access to Internet gambling and betting web sites. In particular, in his testimony before the Commission on Online Protection in 2000, the Senior Vice President for Public Policy of Visa USA stated:

> "The Child Online Protection Act ... is designed to prevent a person who is a minor from accessing materials that are 'harmful to minors' over the Internet. Under the Act, a defendant can assert an affirmative defense to prosecution under the Act by showing that the defendant has made a good faith effort to restrict access by persons under the age of 17 to obscene materials on the defendant's Internet site. One way for the defendant to assert this affirmative defense is to show that the defendant required use of a credit card or a debit card to access the Internet site. In providing so, the Act basically assumes that only adults have access to a credit card or debit card.
>
> To the contrary, it is important for the Commission to understand that this assumption simply is not correct. Access to a credit card or a debit card is not a good proxy for

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[962] Exhibit AB-85, p. 2. See also Exhibit AB-17, pp. 17 *et seq*, Exhibit AB-164 and Exhibit US-18.

[963] See Exhibit US-5, p. 1.

[964] Exhibit AB-10, p. 5-4.

[965] See, for example, the Article entitled "Why Online Age Checks Don't Work" contained in Exhibit US-28. The Article states that "The credit card gateway as age verification standard has been in place ever since the late 1990's." Antigua submits as much when it states that the US Congress has legislated to provide that the use of credit cards is an effective way to keep children from engaging in potentially harmful behaviour on the Internet: Antigua's second oral statement, para. 59.

[966] See Exhibit AB-158, which is a document prepared by Antigua entitled "Youth Gambling". This document states, *inter alia*, that "United States legislation recognizes that the use of credit cards is an effective means to prevent underage access". We also note that Antigua has submitted evidence in Exhibits AB-163, AB-165 and AB-166 to suggest that underage gambling and betting occurs when the relevant services are supplied through non-remote means in the United States. However, in our view, this does not indicate that the United States' concerns with respect to the remote supply of gambling and betting services do not exist. Antigua has also submitted evidence in Exhibits AB-167, AB-168, AB-169, AB-170 and AB-171 that "younger people" are the target of marketing strategies of non-remote suppliers of gambling and betting services. However, there is no indication that the reference to "younger people" in the exhibited documents means "minors" or "underage gamblers". Therefore, we will disregard this evidence.

> age. The mere fact that a person uses a credit card or a debit card in connection with a transaction does not mean that this person is an adult.
>
> Many individuals under the age of 17 have legitimate access to, and regular use of, credit cards and debit cards. For example, parents may designate their child as an 'authorized user' of the parent's credit card or debit card. This actually is quite common, particularly for credit cards. Whenever this occurs, the child will have access to the parent's credit card number or debit card number and can use that card number to access materials deemed "harmful to minors" on the Internet.
>
> In addition, many children under the age of 17 have their own deposit accounts and may have access to a debit card that accesses such account.
>
> ...
>
> Thus, although the [Child Online Protection] Act assumes that only adults have access to a credit card or a debit card, it is important for the Commission to understand that this assumption is simply not true. As a result, the Commission may want to focus its attention on more suitable methods of verifying age."[967]

6.519 In relation to ***organized crime***, in essence, the United States argues that the remote supply of gambling and betting services is cause for graver concern than is the case for the non-remote supply of such services because of the amount of money and manipulability inherent in Internet gambling; the opportunity to use gambling by remote means of supply as a clearinghouse through which organized crime bookmakers in the United States can "lay off" their bets; and the opportunity for organized criminals to more easily hide their involvement in gambling and evade law enforcement by operating beyond the intense scrutiny of regulators and law enforcement officials in the gambler's jurisdiction.[968]

6.520 The evidence we would have expected to see in proving the existence of the particular organized crime concerns referred to by the United States would have been evidence demonstrating, *inter alia*, that the "inherent manipulability" of the Internet makes it more attractive to participants in organized crime and that organized criminals find it easier to hide their bets, thereby evading the scrutiny of law-enforcement officers. We have not seen any concrete evidence of this nature. Rather, the United States has pointed us to instances of organized crime involvement and prosecution in connection with the remote supply of gambling and betting services.[969] The non-remote supply of gambling and betting services is permitted in much of the United States, although it also gives rise to concerns in respect of organized crime.[970] In the absence of evidence demonstrating the nature and extent of the risks of organized crime presented by remote gambling and betting, we are not fully satisfied that the United States has demonstrated that it could not guard against those risks through means that are WTO-consistent.

6.521 To sum up, the United States has certain concerns with respect to money laundering, fraud, health and underage gambling that, in our view, are *specific* to the remote supply of gambling and betting services. Therefore, the measures used by the United States to address its concerns with

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[967] Exhibit US-27, pp. 2-4. In addition, the United States General Accounting Office Report to Congressional Requestors entitled " Internet Gambling: An Overview of the Issues" indicates that efforts aimed at restricting the use of credit cards for Internet gambling have been hampered, *inter alia*, by Internet gambling sites that attempt to disguise their transactions to avoid them being blocked by banks: Exhibit AB-17, p. 4. See also Exhibit AB-159, p. 2.

[968] United States' second written submission, paras. 46 *et seq*.

[969] See, for example, Exhibit US-3; Exhibit US-4; Exhibit US-5; Exhibit US-6; Exhibit US-14; Exhibit US-22; Exhibit US-23.

[970] See, for example, Exhibit AB-145.

respect to money laundering, fraud, health and underage gambling in the context of the non-remote supply of gambling and betting services cannot be compared and examined as WTO-consistent alternatives that the United States could have used to address the specific concerns it has with regard to the remote supply of gambling and betting services.

6.522 In our consideration of whether the United States has explored and exhausted reasonably available WTO-consistent alternatives, we note, importantly, that *Antigua has asserted that it has in place a regulatory regime that is sufficient to address the specific concerns identified by the United States* with respect to the remote supply of gambling and betting services. These include measures aimed at countering money laundering that meet international standards[971], requirements for identity verification, fraud prevention and gambling addiction[972], and that under-age gambling is expressly prohibited by Antiguan law[973].

6.523 *Antigua further submits that it has offered to consult with the United States with a view to meeting any specific concerns that may remain, notwithstanding the Antiguan regulatory regime*. Antigua claims that the United States has refused to engage in such consultations. Antigua also points to lack of collaboration and consultation efforts by the United States through a Mutual Legal Assistance Treaty that exists between the two countries to address concerns of the type raised by the United States. Antigua submits that during consultations with the United States in the context of this dispute, Antigua again expressed its willingness to cooperate with the United States to find a mutually agreeable regulatory scheme. However, according to Antigua, the United States has on all occasions refused to engage in consultation or cooperation. Antigua claims that the United States' refusal to engage in consultations with Antigua is contrary to Article XIV of the GATS.[974]

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[971] Antigua's first written submission, paras. 34, 35, 43 and 45 *et seq*. See also Exhibit AB-5.

[972] Antigua's first written submission, para. 43. In particular Antigua refers to a CFATF Report (contained in Exhibit AB-8) which states that "the government of Antigua and Barbuda has shown a clear commitment to a regulatory anti-money laundering regime that meets international standards" and that "Antigua and Barbuda's new institutional anti money laundering framework is adequate and compliant with international standards and is being enforced." Antigua adds that in practice as well as by requirement of Antiguan law, winnings and the balance of deposits are transmitted back to the account from which the initial deposit came or, if the deposit was by credit card, sometimes by credit back to the same credit card. In some cases, amounts are paid to players by cheque. In addition to satisfying Antigua's regulatory requirements for identity verification, anti-fraud prevention motivates operators to ensure identification, a number of operators use commercially available databases where large amounts of information on persons can be found, including dates of birth and employment, criminal records, credit history and residential addresses. Antigua submits that each Antiguan operator maintains an "anti-fraud" department with the objective of preventing abuses of the gaming systems, collusion among players, financial fraud and credit card abuse, under-age playing and other occurrences which can result in financial losses to the operator. See also Exhibit AB-6.

[973] Antigua's first written submission, paras. 45 *et seq*. In particular Antigua submits that *under-age gambling is expressly prohibited by Antiguan law.* According to Antigua, experience has shown that under-age gambling with Antiguan operators is relatively rare for several reasons. The first obstacle to gambling and betting by minors is the age verification that forms a part of the identification process. A second material obstacle is the need to fund an account before any wagering can commence, which requires access to financial instruments such as cheques and a funded bank account, the ability to send funds by wire transfer from a funded bank account or access to a valid credit card. Also, in practice, many Antiguan operators provide direct links from their web sites to parental control providers such as "Cybersitter". Antigua submits that *it is a requirement of Antiguan law that operators display on their sites a warning of the addiction possibilities of gambling and information to assist compulsive gamblers*. Moreover, most operators appear to be able to detect patterns of problem gamblers either at the sign-up stage (where the operators refuse to authorize funding of or playing on an account) or later on during the course of the relationship with the player, in which event the person's account will often be closed and the balance returned to the player. See also Exhibit AB-6.

[974] Antigua's first oral statement, para. 4; Antigua's second oral statement, para. 81; Antigua's comments on the United States' reply to Panel question No. 43.

6.524 The United States submits that it has had significant interactions with Antigua on law enforcement issues. The United States also submits that it has made clear that it would welcome Antigua's continued assistance in the investigation and prosecution of money launderers and others who violate US law. The United States asserts that it was not aware of any effort by the government of Antigua to pursue such cooperation but, in any event, Antigua's position in this dispute has made it clear that Antigua is unwilling to recognize the existence of specific US regulatory concerns surrounding remote supply of gambling.[975] The United States adds that, while it is not true that the United States has "refused" to pursue international requests for assistance as suggested by Antigua, there is a basis for its reluctance to do so since this case involves Internet gamblers. For example, the United States points to the fact that Antigua publicly took a position contrary to the United States in the prosecution of an Antigua-based remote supplier of gambling and betting services, Jay Cohen, by filing an amicus brief in support of Mr. Cohen in the US Supreme Court. In addition, the United States is troubled by the fact that a convicted felon, William Scott, was licensed as an Internet supplier of gambling and betting services in Antigua. According to the United States, these matters suggest that requests for assistance would not be fruitful.[976]

6.525 *Antigua also claims that the United States' failure to respond to Antigua's invitation to engage in international cooperation as to how to deal with the specific concerns* the United States has with the remote supply of gambling and betting services is inconsistent with the United States' WTO obligations.[977] Antigua submits that international regulatory cooperation in the gambling sector is possible and is already taking place.[978] The United States responds that, as a legal matter, nothing in the text of the GATS requires such action. Further, as a factual matter, the absence of any US domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to seek negotiations to permit such a regime for its cross-border suppliers.[979]

6.526 We recall that Members are obliged to consider all reasonably available WTO-consistent alternatives before imposing a WTO-inconsistent measure (which may be justified by the relevant WTO exceptions provisions). In this regard, the Panel notes the following statements made by the panel in *US – Tuna (Mexico)* in its un-adopted report: "The United States had not demonstrated to the Panel – as required of the party invoking an Article XX exception – that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas."[980] We understand that the Appellate Body has recognized that there may be situations where unilateral measures are justified under Article XX of the GATT.[981] On the other hand, we note that the Appellate Body has also insisted that "'as far as possible', a multilateral approach is strongly "preferred".[982]

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[975] United States' reply to Panel question No. 43.

[976] United States' reply to Panel question No. 43; United States' closing statement at the Panel's second substantive meeting with the parties, para. 9.

[977] Antigua's second oral statement, paras. 81-82.

[978] Antigua's second oral statement, para. 82.

[979] United States' second written submission, para. 120.

[980] Panel Report on *US – Tuna (Mexico)*, para. 5.28. With regard to the legal value of an unadopted GATT panel report, we recall that the Appellate Body in *Japan – Taxes on Alcoholic Beverages* stated at page 15: "[W]e agree that a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant".

[981] Appellate Body Report on *US – Shrimp* (*Article 21.5 – Malaysia*), para. 124.

[982] The Appellate Body in *US – Shrimp* (*Article 21.5 – Malaysia*), at para. 124 of its Report added that: "[I]t is one thing to prefer a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the conclusion of a

6.527 During the course of these Panel proceedings, we have concluded that the United States has made a full market access commitment in its Schedule for gambling and betting services for mode 1.[983] The principle of effective treaty interpretation requires that meaning and effect be given to this commitment, regardless of the motivation behind that commitment (even if the commitment may have been undertaken inadvertently). In our view, a full commitment in respect of market access in a Member's schedule for a particular mode of supply creates legitimate trade expectations and, thus, obligations with respect to the committed sector.

6.528 Article XIV allows Members to derogate from their obligations under GATS (including any specific commitments they may have undertaken) subject to the conditions stipulated in that Article. Under Article XIV(a), the challenged measures must be "necessary" to protect public morals and/or public order. Based on Appellate Body decisions, we believe that a key element of the application of the "necessity" test of Article XIV in this dispute is whether the United States has explored and exhausted reasonably available WTO-consistent alternatives to the US prohibition on the remote supply of gambling and betting services that would ensure the same level of protection.

6.529 In our view, it is in the context of assessing whether or not reasonably available WTO-consistent alternatives exist and have been explored by the United States that Antigua's invitation to the United States to engage in consultations and/or negotiations on the particular concerns associated with the remote supply of gambling and betting services identified by the United States is relevant. Through bilateral and multilateral consultations and negotiations, Members may be able to determine whether their concerns can be adequately addressed in a WTO-consistent manner.[984] In this case, we note that a Mutual Legal Assistance Treaty exists between Antigua and the United States, that could be the framework within which such consultations could take place.

6.530 We do not overlook the possibility that, given the circumstances surrounding this case, the United States may have been convinced that its specific concerns could not have been adequately addressed through such consultations and/or negotiations. Indeed, with respect to the possibility of participating in international consultations and negotiations in this case, the United States suggested that consultations would not have been "fruitful".[985]

6.531 Even if the United States is of the view that no such alternative currently exists, the United States cannot prejudge that the situation will remain unchanged in the future.[986] The United States' obligation to consult with Antigua before and while imposing its prohibition on the cross-border

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multilateral agreement as a condition of avoiding 'arbitrary or unjustifiable discrimination' under the chapeau of Article XX. We see, in this case, no such requirement."

[983] We recall that Article XVI:4 of the WTO Agreement provides that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreement."

[984] The Panel recalls in this regard that Article 4.2 of the DSU states that: "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representation made by any Member concerning measures affecting the operation of any covered agreement taken within the territory of the former."

[985] In particular, the United States submitted that: "While it is not true that the United States has 'refused' to pursue international requests for assistance as suggested ... there is a basis for a reluctance to do so if the case involves Internet gamblers. For example, Antigua publically took a position contrary to the United States in the prosecution of Jay Cohen by filing an amicus brief in support of Mr. Cohen in the US Supreme Court. In addition, its licensing of William Scott, a convicted felon, is troubling. These matters suggest that requests for assistance would not be fruitful if the investigation involves or is related to an Internet gambler" : United States' closing remarks for the second oral statement, para. 9.

[986] In this regard, we note that a number of jurisdictions in the world have legalized Internet gambling. See, for example, Exhibit AB-2, p. 3; Exhibit AB-10, p. 5-10; Exhibit AB-17, p. 3 and 18 *et seq*, Exhibit AB-36, pp. 13 *et seq* and 42 *et seq*. We also note that suggestions have been made in US literature as to how the concerns that have been raised in the United States regarding the remote supply of gambling and betting services may be addressed: Exhibit AB-159, pp. 6–7 and Exhibit AB-160, p. 9.

supply of gambling and betting services derives from the fact that it has undertaken a specific market access commitment for mode 1. More specifically, it is because of the existence of this specific market access commitment with respect to cross-border trade of gambling and betting services that the United States remains obliged to consider WTO-consistent alternatives, including those that may be suggested by Antigua and other Members, before and while maintaining its prohibition on the cross-border supply of gambling and betting services. In rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative.[987]

"Weighing and Balancing"

6.532 Having identified and evaluated each of the elements that we must assess in determining whether the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) are "necessary" to protect public morals and/or to maintain public order, we must now "weigh and balance" those elements.

6.533 As stated above, we conclude that the interests protected by the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) protect very important societal interests in the United States. We also conclude that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) contribute to the realization of the ends pursued by those laws in the United States. On the other hand, as stated above in paragraph 6.495, we also find that the measures in question have a significant impact on trade. In this regard, we find that, while the United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, which suggests that the measures in question are "necessary" within the meaning of Article XIV(a), the United States has declined Antigua's invitation to engage in bilateral and/or multilateral consultations and/or negotiations to determine whether there is a way of addressing its concerns in a WTO-consistent manner.

6.534 We consider that, given the circumstance of this case and for the reasons explained above in paragraphs 6.526-6.530, the United States, before imposing a WTO inconsistent measure, was obliged to explore these options in a good faith manner with a view to exhausting WTO-consistent alternatives, even if it considered that the measures in question were "indispensable".

Overall conclusion on whether the Wire Act, the Travel Act and the Illegal Gambling Business Act are provisionally justified under Article XIV(a)

6.535 In sum, we conclude that, for the reasons explained above, the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the Wire Act, the Travel Act (when read together with the relevant state laws)[988] and the Illegal Gambling Business Act (when read

[987] We note that the United States has submitted that "the absence of any US domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to engage in international negotiations toward the establishment of such a regime for its cross-border suppliers": United States' reply to Panel question No. 43. Further as noted above in paragraph 6.524, the United States submitted that "while it is not true that the United States has 'refused' to pursue international requests for assistance [in the investigation and prosecution of money launderers and others who violate US law] ... there is a basis for a reluctance to do so if the case involves Internet gamblers. ... These matters suggest that requests for assistance would not be fruitful if the investigation involves or is related to an Internet gambler": United States' closing statement at the Panel's second substantive meeting with the parties, para. 9.

[988] We recall that the "relevant state laws" for the purposes of the Travel Act are state laws that prohibit a "business enterprise involving gambling". Such state laws would include but are not limited to § 14:90.3 of

together with the relevant state laws)[989] are necessary to protect public morals and/or public order within the meaning of Article XIV(a). We, nonetheless, acknowledge that such laws are designed so as to protect public morals or maintain public order.

(d) Provisional justification under Article XIV(c)

(i) The legal standard under Article XIV(c)

6.536 Pursuant to the text of Article XIV(c), in determining whether a challenged measure is provisionally justified under that Article, three elements must be demonstrated by the Member who invokes Article XIV(c), namely:

(a) the measure for which justification is claimed must "secure compliance" with other laws or regulations;

(b) those other "laws or regulations" must not be inconsistent with the WTO Agreement; and

(c) the measure for which justification is claimed must be "necessary" to secure compliance with those other laws or regulations.[990]

6.537 We note that, textually, Article XIV(c) is very similar to Article XX(d) of the GATT 1994. Accordingly, on the basis of the comments made by the Appellate Body to which we have referred above regarding the applicability of jurisprudence under the GATT 1994 to the GATS[991], we will refer to and rely upon such jurisprudence to the extent to which it is applicable and relevant in our interpretation of Article XIV(c).

Measures to "secure compliance" with laws or regulations

6.538 With respect to the first element, the Panel notes that, in determining whether a measure "secures compliance" with laws and regulations, the GATT panel in *EEC – Parts and Components* found that such phrase in Article XX(d) of the GATT 1994 is meant "to enforce obligations under laws and regulations" rather than "to ensure the attainment of the objectives of the laws and regulations".[992] We consider such a finding useful in the context of Article XIV(c) of the GATS in two respects. First, it indicates that the reference to "secure compliance" in Article XIV means that the measures for which justification is sought must "enforce" the relevant laws and regulations. Second, it indicates that the measures for which justification is sought must enforce "obligations"

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the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

[989] We recall that the "relevant state laws" for the purposes of the Illegal Gambling Business Act are state laws that prohibit a "gambling business ". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

[990] We recall that the Appellate Body in *Korea –Various Measures on Beef* framed the analysis under Article XX(d) of the GATT 1994 in terms of two requirements. Specifically, the Appellate Body stated that: "For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met." Appellate Body Report on *Korea – Various Measures on Beef*, para. 157. We believe that our findings hereafter, which follow a three stage analysis, are compatible with the Appellate Body's guidance in *Korea –Various Measures on Beef*.

[991] See para. 6.448 above.

[992] Panel Report on *EEC – Parts and Components*, paras. 5.14-5.18.

contained in the laws and regulations rather than merely ensure attainment of the objectives of those laws and regulations.

6.539 As for the degree to which a measure must "secure compliance" with obligations under other laws and regulations, we note that the panel in *Korea – Various Measures on Beef* recognized that a measure need not be designed *exclusively* to "secure compliance" with the justifying law. Rather, the panel in that case accepted that it was sufficient if a measure was put in place, at least *in part*, in order to secure compliance with the justifying legislation.[993]

"Laws or regulations which are not inconsistent with the provisions of this Agreement"

6.540 As for the second element, we note that Article XIV(c) provides a non-exhaustive list of laws or regulations "which are not inconsistent with the provisions of this Agreement". The list refers to laws and regulations for the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; the protection of the privacy of individuals in relation to the processing and dissemination of personal data; and the protection of confidentiality of individual records and accounts; and safety. Accordingly, laws and regulations other than those that fall within the list may be relied upon in justifying a GATS-inconsistent measure under Article XIV(c) provided that those other laws and regulations are WTO-consistent.

Measure "necessary" to secure compliance with laws or regulations

6.541 With respect to the third element, the Panel recalls the "weighing and balancing" test articulated by the Appellate Body in *Korea – Various Measures on Beef* as the basis for making a determination as to whether a measure is "necessary" within the meaning of Article XX(d) of the GATT 1994.

6.542 On the basis of the articulation of the "weighing and balancing" test by the Appellate Body in *Korea – Various Measures on Beef* and, subsequently, in *EC – Asbestos*[994], we believe that, in the context of Article XIV(c), we must assess:

(a) the importance of interests or values that the laws or regulations to be enforced are intended to protect.

(b) the extent to which the enforcement measure contributes to the realization of the end pursued, that is, to the securing of compliance with the laws or regulations to be enforced.

(c) the trade impact of the enforcement measure.

(ii) Applying the legal standard under Article XIV(c) to the facts of this case

What are the "laws and regulations" relied upon by the United States?

6.543 As noted above, the measure for which justification is claimed must secure compliance with "other laws or regulations". The United States submits that the US Congress designed the Wire Act, the Travel Act and the Illegal Gambling Business Act in large part to serve as law enforcement tools to secure compliance with other WTO-consistent US laws, namely, state gambling laws and criminal laws related to organized crime.[995]

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[993] Panel Report on *Korea – Various Measures on Beef*, para. 658.

[994] Appellate Body Report on *Korea – Various Measures on Beef*, para. 178; Appellate Body Report on *EC – Asbestos*, para. 172.

[995] United States' second written submission, paras. 95-106.

6.544 With respect to the *state gambling laws*, the United States argues that the Wire Act, the Travel Act and the Illegal Gambling Business Act secure compliance with state laws that prohibit or restrict gambling.[996] The United States notes that the substance of most of the relevant state laws are included in one of Antigua's exhibits.[997]

6.545 The United States argues that a Member's laws and regulations are presumed to be consistent with WTO rules unless proven to be otherwise. According to the United States, although Antigua challenges some of the state laws upon which the United States seeks to rely in its defence under Article XIV(c), Antigua has not shown that any are inconsistent with the GATS.[998] Antigua submits that, to the extent that US state gambling laws are inconsistent with the GATS, they cannot be invoked as the basis for a defence under Article XIV(c).[999]

6.546 The Panel recalls that the United States must demonstrate that the Wire Act, the Travel Act and the Illegal Gambling Business Act are necessary to secure compliance with the state gambling laws.[1000]

6.547 The United States has noted that most of the state gambling laws upon which it relies in justifying the Wire Act, the Travel Act and the Illegal Gambling Business Act under Article XIV(c) are those challenged by the Antigua in its Panel request. However, the United States has provided us with no specific discussion of why and how the various state laws are WTO-consistent other than to say that Antigua has failed to make out a prima facie case with respect to those laws and that, therefore, their WTO-consistency can be presumed.[1001] In the Panel's view, this assertion is not enough to discharge the United States' obligation to demonstrate that it complied with the requirements of Article XIV(c) .[1002] This failure is particularly significant in light of the fact that we have concluded above that, of the state laws upon which the United States seeks to rely, the state laws of Louisiana, Massachusetts, South Dakota and Utah are inconsistent with US commitments in its Schedule under Article XVI of the GATS. Accordingly, we conclude that the United States is not entitled to rely upon state gambling laws in its defence under Article XIV(c).

6.548 In relation to the *criminal laws related to organized crime*, the United States submits that the Wire Act, the Travel Act and the Illegal Gambling Business Act are measures "against organized crime". The United States argues that, as measures against organized crime, the Wire Act, the Travel Act and the Illegal Gambling Business Act secure compliance with US laws and regulations that define and/or prohibit organized crime, as well as laws and regulations that prohibit the criminal activity that, when committed in certain ways, constitutes organized crime. In this regard, the United States specifically refers to the Racketeer Influenced and Corrupt Organizations statute ("RICO

[996] United States' reply to Panel question No. 45.
[997] Namely, in Exhibit AB-99.
[998] United States' reply to Panel question No. 45.
[999] Antigua's second oral statement, para. 70.
[1000] See our discussion in paras. 6.448-6.451 above.
[1001] United States' second written submission, para. 98.
[1002] Despite a question from the Panel requesting the United States to "clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)", the United States merely referred in a footnote to the provisions of two state laws by way of example. The footnote did not contain the text of those provisions: United States' reply to Panel question No. 45. Specifically, the United States referred to Utah Code Ann. § 76-10-1102; Hawaii Rev. Statutes §§ 712-1221 through 712-1223. The text that accompanied this footnote was: "State laws restricting gambling include the laws by which a number of states prohibit some or all gambling." We note that, when discussing the relevant state gambling in its second written submission, the United States did refer the Panel through a footnote to Exhibit US-34. However, that Exhibit does not specifically identify obligations in the relevant state laws. Rather, it merely contains examples of state gambling policies for six US states.

statute"), the Organized Crime Control Act of 1970 findings that contain a definition of "organized crime", and Attorney General Order 1386-89, which also contains a definition of organized crime.[1003]

6.549 With respect to the criminal laws relating to organized crime upon which the United States also seeks to rely in making its defence under Article XIV(c), Antigua has not questioned their WTO-consistency. Therefore, since Members' laws are presumed to be WTO-consistent[1004], the Panel considers that we are entitled to assume that these laws are WTO-consistent.

6.550 Antigua has argued with respect to these laws, however, that the United States has not submitted sufficient information on them and that it merely cites a number of specific laws by way of example but does not try to give a comprehensive overview of the main state and federal laws at issue.[1005] We note that the United States has made specific reference to the RICO statute, the Organized Crime Control Act of 1970 "findings", and Attorney General Order 1386-89 in arguing that criminal laws relating to organized crime justify the Wire Act, the Travel Act and the Illegal Gambling Business Act. We consider that the United States has submitted sufficient information in relation to the RICO statute. In particular, it has named it, explained it and provided the text containing the relevant provisions.[1006] Accordingly, we will confine our attention to the RICO statute in considering the United States' defence under Article XIV(c) but will make reference to the Organized Crime Control Act of 1970 "findings" and Attorney General Order 1386-89 for the definition of organized crime to the extent that such reference is necessary.

6.551 In summary, the Panel finds that the United States may not rely upon state gambling laws in making its defence under Article XIV(c) because the laws of four US states upon which the United States seeks to rely have been found to be inconsistent with US obligations under the GATS in these proceedings. With respect to the other state laws, the Panel finds that the United States has not discharged its obligation to specifically identify the state gambling laws upon which it seeks to rely and the obligations contained therein. In relation to criminal laws relating to organized crime, we find that the United States may rely upon the RICO statute in asserting a defence under Article XIV(c).

Do the challenged measures secure compliance with the RICO statute?

Existence of a measure that "secures compliance" with the RICO statute

6.552 According to the United States, the Wire Act aids in the enforcement of the RICO statute. The Wire Act is part of an essential enforcement strategy insofar as it places restrictions on major sources of funds for organized crime.[1007] The United States submits that local law officials seeking to enforce such laws are often powerless to act without the aid and assistance of the federal government.[1008] The United States submits that the Travel Act, similarly, aids in the enforcement of the RICO statute. The United States argues more particularly that the Travel Act enables the federal government to "take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety."[1009] The United States also submits that US courts have confirmed that the Illegal Gambling Business Act provides an enforcement tool in cases where local officials fail to prosecute illegal gambling.[1010]

[1003] United States' reply to Panel question No. 45.
[1004] Appellate Body Report on *US – Carbon Steel*, para. 115
[1005] Antigua's comments on the United States' reply to Panel question No. 45.
[1006] See the United States' reply to Panel question No. 45, Exhibit US-35 and Exhibit US-42.
[1007] United States' second written submission, para. 103.
[1008] United States' second written submission, paras. 74 *et seq*.
[1009] United States' second written submission, para. 80.
[1010] United States' second written submission, para. 85.

6.553 The Panel notes that the United States has provided it with the text of the RICO statute[1011], which defines "racketeering activity" to include "any act or threat involving ... gambling ... which is chargeable under State law". The statute further provides in relevant part that:

> "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce ..."

6.554 Given that the Wire Act prohibits suppliers of betting and wagering services from using a wire communication facility for, *inter alia*, the transmission in interstate or foreign commerce of bets or wagers, we consider that it assists in enforcing, at least in part, the RICO statute. In particular, it helps to curb organized crime operations that might rely upon the use of wire communication technologies for the supply of gambling and betting services across state and international borders. Therefore, we find that the Wire Act "secures compliance" with the RICO statute.

6.555 The Travel Act prohibits the supply of gambling services through mail or "any facility" in interstate or foreign commerce. We consider that this Act assists in enforcing, at least in part, the RICO statute. In particular, it helps to curb organized crime operations that might rely upon the use of mail or other "facilities" for gambling across state and international borders. Thus, we find that the Travel Act "secures compliance" with the RICO statute.

6.556 Finally, we find that the Illegal Gambling Business Act assists in enforcing the RICO statute because it prohibits conducting, financing, managing, supervising, directing or owning all or part of an "illegal gambling business", which may have links to organized crime.

"Necessity" of the measure taken to secure compliance

6.557 Having found that the Wire Act, the Travel Act and the Illegal Gambling Business Act are all used to secure compliance with the RICO statute, we now turn to whether these measures are "necessary" to secure compliance with the RICO statute. In this regard, based on Appellate Body decisions, we must assess:

(a) the importance of the interests or values that the RICO statute is intended to protect;

(b) the extent to which the Wire Act, the Travel Act and the Illegal Gambling Business Act contribute to the realization of the end pursued, that is, to secure compliance with the RICO statute; and

(c) the trade impact of the Wire Act, the Travel Act and the Illegal Gambling Business Act.

6.558 With respect to the *importance of the interests or values protected by the RICO statute*, the United States argues that organized crime poses an "acute" danger to the United States and that the RICO statute seeks to address that danger.[1012] The Panel notes that the Congressional Statement of Findings and Purpose for the RICO statute refers to organized crime as a significant drain on the US economy, a source of interference with free competition and a threat to democratic processes, domestic security and the general welfare of the nation. The Congressional Statement also refers to links between organized crime and the illegal use of force, fraud, corruption and syndicated

[1011] Exhibit US-35.
[1012] United States' second written submission, paras. 74 *et seq*.

gambling.[1013] It is clear to us from this statement that the interests protected by the RICO statute are very important societal interests that can be characterized as "vital and important in the highest degree" in a similar way to the characterization of the protection of human life and health against a life-threatening health risk by the Appellate Body in *EC – Asbestos*.[1014]

6.559 *As for the extent to which the Wire Act, the Travel Act and the Illegal Gambling Business Act contribute to the realization of the end pursued*, namely to secure of compliance with the RICO statute, the United States argues that these Acts make an essential contribution to the enforcement of this law. The United States submits that the Wire Act aids in suppressing organized gambling in pursuance of the organized crime laws because, in its absence, the use of wire communications technologies for the dissemination of gambling information frustrate local law-enforcement efforts aimed at combating organized crime.[1015] The United States submits that, similarly, the Travel Act aids in suppressing organized gambling in pursuance of the organized crime laws because, in its absence, local law-enforcement efforts aimed at combating organized crime are frustrated.[1016] With respect to the Illegal Gambling Business Act, the United States refers to a statement by one legislator who observed that the Illegal Gambling Business Act provides "an impetus for effective and honest local law enforcement, but also by making available to assist local efforts the expertise, manpower, and resources of the Federal agencies which under existing Federal antigambling statutes have developed high levels of special competence for dealing with gambling and corruption cases."[1017]

6.560 The Panel does not consider that the issue of the possible of involvement of Antigua's gambling industry in organized crime is relevant in deciding whether or not the Wire Act, the Travel Act and the Illegal Gambling Business Act contribute to securing compliance with criminal laws dealing with organized crime, such as the RICO statute. Rather, it is our view that our examination should entail an objective assessment of whether and, if so, the extent to which, these Acts play a role in enforcing the laws and regulations in question. We find that, in fact, the Wire Act does make a significant contribution to ensuring that local law enforcement efforts to enforce criminal laws against organized crime, including the RICO statute, are not undermined, given that the Act applies to the supply of betting and wagering services by wire communication across interstate and international borders. The Panel also finds that the Travel Act makes a significant contribution to ensuring that local law enforcement efforts to enforce criminal laws against organized crime, including the RICO statute, are not undermined, given that it applies to the supply of betting and wagering services by mail and other "facilities" across interstate and international borders. Finally, the Panel finds that the Travel Act and the Illegal Gambling Business Act make a significant contribution in ensuring that local law enforcement efforts to enforce criminal laws against organized crime, including the RICO statute, are not undermined. In making certain gambling activity illegal under federal law by reference to what is illegal under state law, they allow federal resources to be used to combat organized crime.

6.561 *With respect to the trade impact of the Wire Act, the Travel Act and the Illegal Gambling Business Act*, Antigua argues that the effect of, *inter alia*, the Wire Act, the Travel Act and the Illegal Gambling Business Act is total prohibition, which is the most trade-restrictive approach possible.[1018] Indeed, the United States has admitted as much when arguing that a Member has "the right to heavily restrict a highly risky service (in this case, gambling by remote supply) while allowing the use of a less risky service [in this case, gambling by non-remote means]".[1019]

[1013] Exhibit US-35, pp. 812-813.
[1014] Appellate Body Report on *EC – Asbestos*, para. 172.
[1015] United States' second written submission, paras. 78 *et seq*.
[1016] United States' second written submission, paras. 78 *et seq*.
[1017] Congressional Record H9712 contained in Exhibit US-32.
[1018] Antigua's second oral statement, para. 71.
[1019] United States' second written submission, para. 93.

6.562 As to whether there are any WTO-consistent alternatives to the prohibition imposed by the Wire Act, the Travel Act and the Illegal Gambling Business Act that are reasonably available to the United States, we note the submission by the United States that the Wire Act, the Travel Act and the Illegal Gambling Business Act are "indispensable" to defeating organized crime.[1020] However, it cannot be enough that the United States believes and maintains that a measure is "indispensable". The onus lies on the United States to show that it has explored WTO-consistent alternatives. As we stated above in paragraphs 6.522-6.531, we believe that the United States should have engaged in good faith bilateral or multilateral consultations and/or negotiations with Antigua when invited to do so, with a view to exploring whether there were any ways of meeting its concerns with regard to organized crime in a WTO-consistent manner.

6.563 Having identified and evaluated each of the elements that we must assess in determining whether the Wire Act, the Travel Act and the Illegal Gambling Business Act are "necessary" to secure compliance with the RICO statute, we will now *"weigh and balance"* our assessment of those elements.

6.564 In the Panel's view, the interests protected by the RICO statute are important. Further, in our view, the Wire Act, the Travel Act and the Illegal Gambling Business Act make a significant contribution to ensuring that local law enforcement efforts to enforce criminal laws relating to organized crime, including the RICO statute are not undermined. On the other hand, the measures in question have a significant impact on trade and the United States has not explored and exhausted WTO-consistent alternatives in the form of consultations and/or negotiations to determine whether there is a way of ensuring that its organized crime concerns can be addressed in a WTO-consistent manner. In our view, the United States is required to do so in order to demonstrate that the challenged measures are "necessary" within the meaning Article XIV(c).

Overall conclusion on whether the Wire Act, the Travel Act and the Illegal Gambling Business Act are provisionally justified under Article XIV(c)

6.565 In sum, we conclude that, for the reasons explained above, the United States has not been able to provisionally justify that the Wire Act, the Travel Act (when read together with the relevant state laws)[1021] and the Illegal Gambling Business Act (when read together with the relevant state laws)[1022] are necessary within the meaning of Article XIV(c) of GATS to secure compliance with the RICO statute, but which we, nonetheless, acknowledge are important to enforce US criminal laws relating to organized crime.

(e) The chapeau of Article XIV

6.566 Given that the Panel has reached the conclusion that the United States has not been able to provisionally justify the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws) under Article XIV(a) nor under Article XIV(c) of the GATS, logically, it is not necessary for us to proceed to consider whether the requirements of the chapeau of Article XIV have been met. However, since important arguments have been made by the parties on key issues discussed below, we have decided to address them so as to assist the parties in resolving the underlying dispute in this case.

[1020] United States' second written submission, para. 105.

[1021] We recall that the "relevant state laws" for the purposes of the Travel Act are state laws that prohibit a "business enterprise involving gambling". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

[1022] We recall that the "relevant state laws" for the purposes of the Illegal Gambling Business Act are state laws that prohibit a "gambling business ". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

6.567 The United States claims that the Wire Act, the Travel Act and the Illegal Gambling Business Act meet the requirements of the chapeau of Article XIV, as none of these measures discriminate on the basis of nationality. The United States submits that these measures reflect authentic societal concerns and were enacted long before the existence of the Internet and before the GATS came into force. The United States further submits that this is evidence that protectionist motivations are absent.[1023]

6.568 Antigua argues that the manner in which the US measures are applied constitutes both "arbitrary and unjustifiable discrimination" and a "disguised restriction on trade in services" within the meaning of the chapeau of Article XIV.[1024]

(i) The legal standard under the chapeau of Article XIV

6.569 The chapeau of Article XIV reads as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures ..."

6.570 The chapeau requires that the measures in question are not *applied* in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.

6.571 The Panel notes that the chapeau of Article XIV is textually similar to the chapeau of Article XX of the GATT 1994. On the basis of the comments made by the Appellate Body referred to above regarding the applicability of jurisprudence under the GATT 1994 to the GATS[1025], we will refer to such jurisprudence to the extent to which it is applicable and relevant in interpreting and applying the chapeau to Article XIV in this case.

6.572 We begin by recalling several principles relevant to the interpretation and application of the chapeau of Article XIV of the GATS on the basis of jurisprudence in respect of Article XX of the GATT 1994.

6.573 First, we recall jurisprudence in which the Appellate Body identified some broad parameters within which exceptions under the GATT 1994 may be relied upon. In the specific context of Article XX of the GATT 1994, the Appellate Body in *US – Gasoline* stated that:

> "The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue."[1026]

6.574 The Appellate Body in *US – Gasoline* also stated that the chapeau to Article XX of the GATT 1994 has been worded to prevent the abuse of exceptions under that Article:

[1023] United States second written submission, para. 119.
[1024] Antigua's second oral statement, paras. 80-83.
[1025] See para. 6.448 above.
[1026] Appellate Body Report on *US – Gasoline*, p. 22.

> "The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied.[1027] It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX].'[1028] This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[1029]

6.575 The Appellate Body in *US – Shrimp* elaborated on the notion of preventing abuse or misuse of the exceptions under Article XX of the GATT 1994. The Appellate Body found that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members".[1030] The Appellate Body then linked the balance of rights and obligations under the chapeau of Article XX to the general principle of good faith:

> "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law."[1031]

6.576 It is on the basis of this obligation of good faith and because it had negotiated with some Members but not with others, that the Appellate Body concluded that the United States was acting inconsistently with the chapeau of XX of the GATT in that dispute.[1032]

[1027] (*original footnote*) This was noted in the Panel Report on *United States – Imports of Certain Automotive Spring Assemblies*, BISD 30S/107, para. 56; adopted on 26 May 1983.

[1028] (*original footnote*) EPCT/C.11/50, p. 7; quoted in Analytical Index: Guide to GATT Law and Practice, Volume I, p. 564 (1995).

[1029] Appellate Body Report on *US – Gasoline*, p. 22.

[1030] Appellate Body Report on *US – Shrimp*, para. 156.

[1031] Appellate Body Report on *US – Shrimp*, para. 158. In the following paragraph 159, the Appellate Body added: "The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."

[1032] Appellate Body Report on *US – Shrimp (Article 21.5 – Malaysia)*, paras. 119-123.

6.577 The Appellate Body has also provided certain guidance on the meaning of the terms "arbitrary or unjustifiable discrimination between countries where like conditions prevail" and "disguised restriction", which are used in the chapeau to both Article XX of the GATT 1994 and Article XIV of the GATS.

6.578 With respect to the meaning of "arbitrary or unjustifiable discrimination between countries where like conditions prevail", the Appellate Body in *US – Shrimp* stated that:

> "In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.[1033] Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned. Thus, the standards embodied in the language of the chapeau are not only different from the requirements of Article XX(g); they are also different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994."[1034]

6.579 The Appellate Body in *US – Gasoline* provided certain guidance on the term "disguised restriction" on international trade:

> "'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of 'disguised restriction'. We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[1035]

6.580 We understand from the Appellate Body's comments in *US – Gasoline* that there is a certain degree of overlap between, on the one hand, what may be considered as "arbitrary or unjustifiable discrimination" in the context of the chapeau and, on the other, what may be considered as a

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[1033] (*original footnote*) In *US – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

[1034] Appellate Body Report on *US – Shrimp*, para. 150.

[1035] Appellate Body Report on *US – Gasoline*, p. 25.

"disguised restriction on trade". This is so because a "disguised restriction" includes disguised *discrimination* in international trade and a "disguised restriction" may be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade. Accordingly, we consider that the manner in which a measure is applied may simultaneously lead to the conclusion that such an application constitutes arbitrary or unjustifiable discrimination and a disguised restriction on trade within the meaning of the chapeau of Article XIV.

6.581 To sum up these interpretive principles, the chapeau of Article XX of the GATT 1994 addresses not so much a challenged measure or its specific content, but rather the manner in which that measure is applied, with a view to ensuring that the exceptions of Article XX are not abused. In order to do so, the chapeau of Article XX identifies three standards which may be invoked in relation to the same facts: arbitrary discrimination, unjustifiable discrimination and disguised restriction on trade. In our view, these principles would also be applicable in relation to Article XIV of the GATS.

6.582 With these general interpretative principles in mind, the Panel now proceeds to consider the parties' arguments as to whether the US measures in question are consistent with the requirements of the chapeau of Article XIV. More particularly, in light of Antigua's challenge, we will consider whether there is evidence that the manner in which the United States applies the Wire Act, the Travel (when read together with the relevant state laws) Act and the Illegal Gambling Business Act (when read together with the relevant state laws) constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade".

(ii) Application of the legal standard under the chapeau of Article XIV to the facts of this case

6.583 The Panel notes that the United States did not argue and develop its defence under Article XIV until it made its second written submission. It only affirmatively invoked Article XIV during the Panel's second substantive meeting with the parties in response to a question posed by the Panel.

6.584 Antigua did not advance much argumentation in response to the submissions made and evidence adduced by the United States in support of its defence under Article XIV. However, we consider that a number of the factual arguments made by Antigua in the context of Article XVII are relevant in deciding whether or not the measures in question are applied in a manner that constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade". More particularly, we consider that they are relevant in determining whether or not the United States is consistent in prohibiting the remote supply of gambling and betting services. In our view, the absence of consistency in this regard may lead to a conclusion that the measures in question are applied in a manner that constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade". Below, we evaluate all the evidence presented to the Panel that we consider relevant in determining whether the United States has been applying and enforcing domestically its prohibition on the remote supply of gambling and betting services in a consistent manner.

Enforcement against local suppliers

6.585 Antigua submits that, although large-scale Internet operators in the United States are offering betting services via the Internet, the United States does not take enforcement action against them.[1036] Antigua submits that several US-based companies, namely, Youbet.com, TVG, Capital OTB and Xpressbet.com, have been providing telephone or online gambling and betting services for some time.[1037] Antigua argues that, in contrast, in the case of *United States v. Jay Cohen,* an operator of an Internet sportsbook service based in Antigua was prosecuted and ultimately convicted under the Wire

[1036] Antigua's first oral statement, para. 94.
[1037] Antigua's first written submission, para. 118; Antigua's reply to Panel question No. 19.

Act even though that operator had modelled his business on that of Capital OTB, a US company that has been offering interstate betting by telephone for more than 20 years as well as more recently by the Internet without prosecution under the Wire Act.[1038]

6.586 The United States submits that it applies its prohibition on the remote supply of gambling and betting services equally as regards domestic companies and those supplying such services from abroad.[1039] In support, the United States refers to statistics from the Organized Crime and Racketeering Section of the Department of Justice that show that it approved 90 racketeering prosecutions from 1992 to 2002 alleging violations of the Wire Act, the Illegal Gambling Business Act or both. The United States submits that the vast majority of these 90 cases involved purely domestic betting activity, not cross-border gambling. The United States also refers to statistics from the Department of Justice that show that 125 cases were filed under the Wire Act and 951 cases were filed under the Illegal Gambling Business Act between 1992 and September 2003. The Department of Justice confirmed that only a handful of these cases involved supply of gambling from outside the United States.[1040]

6.587 According to the United States, while Youbet.com states on its website that it is in "full compliance with all applicable state and federal law"[1041], Youbet.com disclosed in its 2002 annual report that "the United States Justice Department is in the process of taking action against selected companies that it deems to be operating without proper licensing and regulatory approval" and that Youbet.com "faces the risk" of criminal proceedings and penalties brought by the government, and the United States agrees with that risk assessment.[1042] The United States further submits that there have been many reported court cases representing just a small fraction of all prosecutions in which the Department of Justice used the federal gambling laws that are challenged by Antigua to prosecute illegal wagering on horseracing.[1043] The United States points to arrest figures for illegal gambling in support of its argument that the Department of Justice considers illegal gambling a serious crime meriting active investigation and prosecution.[1044]

6.588 In relation to the enforcement of the US prohibition on the remote supply of gambling and betting services against *domestic* suppliers of such services, the Panel notes indications by the United States that prosecution proceedings against Youbet.com[1045] are currently pending and, more generally,

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[1038] Antigua's reply to Panel question No. 12. In addition, we note that, while Antigua has submitted evidence in Exhibits AB-163, AB-165 and AB-166 to suggest that underage gambling and betting occurs when the relevant services are supplied through non-remote means in the United States, Antigua has not suggested that the United States does not enforce its laws to prohibit such underage gambling and betting in the United States. Therefore, we do not deal with this argument here.

[1039] United States' first written submission, para. 101.

[1040] United States' second oral statement, paras. 62–66.

[1041] United States' reply to Panel question No. 21.

[1042] United States' second oral statement, paras. 66–67. The United States refers to Youbet.com, Inc., U.S. Securities and Exchange Commission Form 10 K Annual Report under Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal Year Ended December 31, 2001, Commission File Number: 33 13789LA (April 15, 2002), available at http://www.sec.gov/Archives/edgar/data/814055/000102140802005310/0001021408 02 005310.txt.

[1043] United States' second oral statement, para. 65. The United refers in particular to Erlenbaugh v. United States, 409 U.S. 239 (1972);United States v. Southard, 700 F.2d 1 (1st Cir. 1983), cert. denied, 464 U.S. 823 (1987); United States v. Denton, 556 F.2d 811 (6th Cir.), cert. denied, 434 U.S. 892 (1977); United States v. O'Neill, 497 F.2d 1020 (6th Cir. 1974; United States v. Sacco, 491 F.2d 995 (9th Cir. 1974); United States v. Swank, 441 F.2d 264 (9th Cir. 1971); United States v. Bergland, 318 F.2d 159 (7th Cir. 1963), cert. denied, 375 U.S. 861 (1963);United States v. Athanas, 362 F. Supp. 411 (E.D. Mo. 1973); United States v. Yaquinta, 204 F. Supp. 276 (N.D.W.Va. 1962).

[1044] United States' first written submission, paras. 23 *et seq*; United States' closing remarks, second oral statement, para. 9.

[1045] Exhibit AB-42 indicates that Youbet.com supplies services by remote means relating to wagering on horse racing only.

that it applies and vigorously enforces its prohibition on the cross-border supply of gambling and betting services against domestic and foreign suppliers alike.[1046] We have no evidence as to the enforcement action, if any, that the United States is taking against other remote suppliers of gambling and betting services, including TVG, Capital OTB and Xpressbet.com.[1047] With respect to enforcement of the US prohibition on the remote supply of gambling and betting services against suppliers of such services from *other Members*, we have evidence of the prosecution of one Antiguan operator for having failed to abide by the prohibition against the remote supply of gambling and betting services under the Wire Act.[1048]

6.589 In our view, the foregoing evidence is inconclusive. We, therefore, find that the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau.

Video lottery terminals

6.590 Antigua refers to a number of US states where video lottery terminals are legal[1049] and notes that state lotteries market and sell their products through computers and electronic connections to the source of the lotteries.[1050] Antigua submits these operations involve "remote" gambling because the gambler does not need to physically go to the lottery to play.[1051] The United States argues that, with respect to the video lottery terminals, the service consumer must present himself or herself in person at an authorized lottery distribution location. Thus, the supply of the service by these means is non-remote.[1052]

6.591 The Panel recalls that the United States has defined the "remote" supply of gambling and betting services as follows:

> "By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. Non-remote supply means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc."[1053]

6.592 According to this definition, the United States defines non-remote supply as instances where the consumer presents himself or herself at a supplier's point of presence to facilitate, amongst other things, identification of the individual and age verification.

[1046] In addition to the evidence pointed to by the United States in paragraph 6.586 above, we note that the National Gambling Impact Study Commission Final Report states that "The federal government has been active in the area of Internet gambling. Thus far, DOJ has investigated and brought charges of violating the Wire Communications Act. All the defendants operated their businesses offshore and maintained that they were licensed by foreign governments": Exhibit AB-10, p. 5-9.

[1047] The Panel has evidence that indicates that at least TVG and Capital OTB are supplying services by remote means relating to wagering on horse racing only: Exhibits AB-43, AB-44 and AB-123. We note that Exhibit AB-44 indicates that Capital OTB supplies services relating to lotteries as well as wagering on horse racing but there is no suggestion in the evidence that these services are supplied remotely.

[1048] Exhibit AB-83.

[1049] Antigua's first written submission, para. 123.

[1050] Antigua's first oral statement, paras. 92-93.

[1051] Antigua's second oral statement, paras. 62-63.

[1052] United States' second written submission, para. 65.

[1053] United States' reply to Panel question No. 42.

6.593 In our view, Antigua has not effectively refuted the United States' submission that identification and age verification do not occur when lottery tickets are purchased through video lottery terminals. We note that the evidence suggests that the video lottery terminals are located on shop counters, suggesting that they are, in fact, manned.[1054] Consequently, the Panel is not convinced that the sale of lottery tickets through video lottery terminals can be categorized as "remote" supply.

6.594 Therefore, the Panel concludes that, based on the evidence presented to the Panel regarding video lottery terminals, the United States has demonstrated that the manner in which it applies the US federal prohibition on the remote supply of gambling and betting services domestically is not inconsistent with the requirements of the chapeau of Article XIV of GATS as regards video lottery terminals.

Interstate Horseracing Act

6.595 Antigua submits that the Interstate Horseracing Act ("IHA") permits the remote supply of gambling and betting services for horse races.[1055] Antigua argues that the federal laws that prohibit the use of remote communication to supply gambling and betting services do not apply to horse race betting because the IHA effectively "exempts" such betting from the application of the relevant federal laws.[1056] According to the United States, the IHA does not provide legal authority for any form of Internet gambling.[1057] The United States submits that the IHA did not repeal the pre-existing federal laws making such activity illegal.[1058]

6.596 The Panel recalls that the United States must submit evidence sufficient to substantiate its assertion that the provisions of the IHA do not authorize interstate pari-mutuel wagering over the telephone or other modes of electronic communication, including the Internet.

6.597 The United States has submitted that the IHA is a civil statute for which the federal government has no enforcement role. The United States also submits that, in December 2000, when the definition of the term "interstate off-track wager" in the IHA was amended, Congress, did not also amend pre-existing criminal statutes, which prohibit cross border gambling.[1059] Further, the United States refers us to a statement made by the then President William J. Clinton after the bill containing the amendment to the IHA was passed by Congress, which suggests that the amendment to the IHA was not intended to legalize common pool and interstate wagering, including "via telephone or other electronic media".[1060] The statement indicates that the IHA was not intended to repeal the Wire Act, the Travel Act and the Illegal Gambling Business Act, which are specifically referred to in the statement.

6.598 In its submissions, Antigua refers us to the definition of "interstate off-track wager" in the IHA, which was amended in December 2000 to provide as follows:

> "[T]he term ... 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and

[1054] See Exhibits AB-190 and AB-191. We note that Antigua has also made reference in its reply to Panel question No. 19 to interstate lottery games for which lottery tickets are purchased through retail terminals. However, in our view, in its reply, Antigua does not demonstrate that the terminals in question are not manned so as to facilitate identification and age verification.

[1055] Antigua's first written submission, para. 116.

[1056] Antigua's first oral statement, para. 92.

[1057] United States' first written submission, paras. 33-35; United States' second written submission, para. 63.

[1058] United States' reply to Panel question No. 21.

[1059] United States' reply to Panel question No. 21.

[1060] Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act (21 December 2000) contained in Exhibit US-17, pp. 3155-3156.

> includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools."

6.599 We agree with Antigua that the text of the revised statute does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states. Antigua also refers us to a statement made by a Member of the US Congress during the parliamentary debates regarding the amendment, which suggests that the amendment to the IHA has the effect of legalizing interstate horse race gambling over the Internet.[1061] In our view, even if the IHA did not repeal the Wire Act, the Travel Act and the Illegal Gambling Business Act as has been submitted by the United States, there is ambiguity as to the relationship between, on the one hand, the amendment to the IHA and, on the other, the Wire Act, the Travel Act and the Illegal Gambling Business Act. We consider this relationship to be critical in determining whether, in fact, the amendment to the IHA permits wagering on horse racing by means of electronic communication.

6.600 Given the conflicting interpretations put forward by Antigua and the United States regarding the interpretation of the IHA and since it is for the United States to demonstrate that it has complied with the requirements of the chapeau of Article XIV, we find that the evidence presented to the Panel is inconclusive and that the United States has not demonstrated that the IHA, as amended, does not permit interstate pari-mutuel wagering for horse racing over the telephone or using other modes of electronic communication, including the Internet.[1062]

Nevada

6.601 Antigua argues that Nevada bookmakers offer their services to home-users via the Internet and the telephone.[1063] The United States submits that the services provided by Nevada bookmakers that are referred to by Antigua are not offered on the publicly accessible Internet, but on a local private network.[1064] In response, Antigua submits that the so-called private network is a security technology used over the internet, not a separate local network.[1065] Further, in response to a question posed by the Panel relating to a reference in the Bear Stearns Report to proposals for Internet gambling in the state of Nevada, the United States submits that Nevada's plans for Internet gambling are on hold and that Nevada has been informed by the Department of Justice that US federal law does not permit Internet transmission of a bet or wager. According to the United States, Nevada officials have assured federal officials that no operation licensed in Nevada has been approved or authorized to use any wagering system that operates over the Internet.[1066]

6.602 The only evidence that we have before us with regard to Antigua's allegation that Nevada bookmakers currently offer their services to home-users via the Internet and the telephone is an advertisement for the supply of services by a Nevada bookmaker.[1067] On the basis of this evidence,

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[1061] Congressional Record H11230-03 contained in Exhibit AB-124, p. 5.

[1062] In forming this conclusion, we have also had regard to Exhibit AB-17, Appendix II, Exhibit AB-39, p. 5, Exhibit AB-54, pp. 7 and 29, Exhibit AB-70, p. 7, Exhibit AB-124 and Exhibit AB-125, page 3.

[1063] Antigua's first written submission, para. 122.

[1064] United States' first written submission, paras. 36-37.

[1065] Antigua's first oral statement, para. 7.

[1066] United States' reply to Panel question No. 23.

[1067] Exhibit AB-47. We note that we have also had regard to evidence that suggests that Internet gambling is currently legal or may be legalized in Nevada in the future: See, for example, Exhibit AB-10, p. 5-7, Exhibit AB-36, pp. 34-35, Exhibit AB-73 and Exhibit AB-199, p. 4. However, as noted previously, in response to question No. 23 posed by the panel, the United States indicated that Nevada's plans for Internet gambling are on hold and that Nevada officials have assured federal officials that no operation licensed in Nevada has been approved or authorized to use any wagering system that operates over the Internet.

the Panel is not convinced that Nevada bookmakers supply services to home-users via the Internet and the telephone.

6.603 Therefore, the Panel believes that, based on the evidence presented to the Panel regarding the situation in Nevada, the United States has demonstrated that the manner in which it applies the prohibition on the remote supply of gambling and betting services as regards Nevada is not inconsistent with the requirements of the chapeau of Article XIV of GATS.

Letters from the President of the North American Association of State and Provincial Lotteries

6.604 Antigua refers to two letters of the president of an association of state lotteries in the United States (the "NASPL"), noting that both letters state that the NASPL "does not take a position on Internet gambling, *per se*" but that it is the position of the NASPL "that each individual state should be permitted to legislate and regulate the forms of gaming conducted within its borders, as well as the methods by which gaming is offered to the citizens of the state." Antigua submits that these letters clearly indicate that US states fear that Internet gambling will undermine their ability to determine the conditions of competition in the gambling sector in view of the economic benefits accruing to the state and its local operators. Antigua submits that this demonstrates that the United States' "total ban" on the remote supply of gambling and betting services from Antigua is "a disguised restriction on trade in services."[1068]

6.605 The Panel has reviewed the letters in question.[1069] We note that both letters explicitly state that the NASPL "does not take a position on Internet gambling *per se*". Both letters go on to state that each individual US state should be permitted to legislate and regulate the forms of gaming conducted within its borders, as well as the methods by which gaming is offered to citizens of the state. We consider that these letters pertain primarily to the states' concerns regarding their ability to autonomously regulate Internet gambling within their borders and do not demonstrate the existence of an intent to restrict the remote supply of gambling and betting services from abroad.

6.606 Therefore, the Panel believes that the evidence adduced from these letters from the President of the North American Association of State and Provincial Lotteries does not indicate that the manner in which the United States applies its prohibition on the remote supply of gambling and betting services is inconsistent with the requirements of the chapeau of Article XIV of GATS.

Conclusion

6.607 In summary, on the basis of evidence provided to the Panel relating to the domestic enforcement of the US prohibition on the remote supply of wagering services for horse racing against TVG, Capital OTB and Xpressbet.com and in light of the ambiguity relating to the Interstate Horseracing Act, which pertains to wagering services for horse racing, we believe that the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

[1068] Antigua's second oral statement, para. 83
[1069] The letters are contained in Exhibit AB-207.

(f) Overall conclusion on Article XIV

6.608 In sum, in light of the particular circumstances of this case and for the reasons explained above, we find that the United States has not been able to provisionally justify the Wire Act, the Travel Act (when read together with the relevant state laws)[1070] and the Illegal Gambling Business Act (when read together with the relevant state laws)[1071] under the provisions of Article XIV(a) and Article XIV(c) of the GATS. While this conclusion did not require us to proceed further to an examination of the consistency of these measures with the requirements of the chapeau of Article XIV, we nonetheless did so to assist the parties in resolving the underlying dispute in this case**.** We conclude that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

VII. CONCLUSIONS, CONCLUDING REMARKS AND RECOMMENDATIONS

A. CONCLUSIONS

7.1 The Panel recalls that the following US laws were determined to be the measures at issue in this dispute:

(a) Federal laws:

(i) the Wire Act (18 USC § 1084);

(ii) the Travel Act (18 USC § 1952); and

(ii) the Illegal Gambling Business Act (18 USC § 1955).

(b) State laws:

(i) Colorado: § 18-10-103 of the Colorado Revised Statutes;

(ii) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;

(iii) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;

(iv) Minnesota: §§ 609.75, Subdivisions 2 – 3 and 609.755(1) of Minn. Stat. Ann;

(v) New Jersey: paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code;

(vi) New York: § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.;

(vii) South Dakota: §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws; and

(viii) Utah: § 76-10-1102 of the Utah Code Ann.

[1070] That is, state laws that prohibit a "business enterprise involving gambling". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

[1071] That is, state laws that prohibit a "gambling business ". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

7.2 For the reasons set out in this Report, the Panel concludes as follows:

(a) the United States' Schedule under the GATS includes specific commitments on gambling and betting services under sub-sector 10.D;

(b) by maintaining the following measures, which, on their face, prohibit one, several or all means of delivery included in mode 1, contrary to its specific market access commitments for gambling and betting services for mode 1, the United States fails to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS:

(i) Federal laws

(1) the Wire Act;

(2) the Travel Act (when read together with the relevant state laws); [1072] and

(3) the Illegal Gambling Business Act (when read together with the relevant state laws).[1073]

(ii) State laws:

(1) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;

(2) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;

(3) South Dakota: § 22-25A-8 of the S.D. Codified Laws; and

(4) Utah: § 76-10-1102(b) of the Utah Code.

(c) Antigua has failed to demonstrate that the measures at issue are inconsistent with Articles VI:1 and VI:3 of the GATS;

(d) The United States has not been able to demonstrate that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws):

(i) are provisionally justified under Articles XIV(a) and XIV(c) of the GATS; and

(ii) are consistent with the requirements of the chapeau of Article XIV of the GATS;

(e) The Panel decided to exercise judicial economy with respect to Antigua's claims under Articles XI and XVII of the GATS.

[1072] That is, state laws that prohibit a "business enterprise involving gambling". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

[1073] That is, state laws that prohibit a "gambling business ". Such state laws would include but are not limited to § 14:90.3 of the Louisiana Rev. Stat. Ann., § 17A of chapter 271 of Massachusetts Ann. Laws, § 22-25A-8 of the South Dakota Codified Laws, and § 76-10-1102(b) of the Utah Code.

B. CONCLUDING REMARKS BY THE PANEL

7.3 The Panel wishes to note that it is well aware of the sensitivities associated with the subject-matter of this dispute, namely gambling and betting services. Our conclusions are directly linked to the particular circumstances of this dispute. We note in this regard that the United States may well have inadvertently undertaken specific commitments on gambling and betting services. However, it is not for the Panel to second-guess the intentions of the United States at the time the commitment was scheduled. Rather, our role is to interpret and apply the GATS in light of the facts and evidence before us.

7.4 We also wish to emphasize what we have *not* decided in this case. We have not decided that WTO Members do not have a right to regulate, including a right to prohibit, gambling and betting activities. In this case, we came to the conclusion that the US measures at issue prohibit the cross-border supply of gambling and betting services in the United States in a manner inconsistent with the GATS. We so decided, not because the GATS denies Members such a right but, rather, because we found, *inter alia*, that, in the particular circumstances of this case, the measures at issue were inconsistent with the United States' scheduled commitments and the relevant provisions of the GATS.

C. RECOMMENDATIONS

7.5 The Panel **recommends** that the Dispute Settlement Body requests the United States to bring the measures identified in paragraph 7.2(b) above into conformity with its obligations under the GATS.

ANNEX A

Working Procedures for the Panel in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

1. The Panel will provide the parties with a timetable for panel proceedings and will work according to the normal working procedures as set out in the DSU and its Appendix 3 plus certain additional procedures, as follows:

2. The Panel shall meet in closed session. The parties to the dispute, and the third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the Panel shall ask the party which has brought the complaint to present its case. Subsequently, at the same meeting, the party against which the complaint has been brought shall be asked to present its points of view.

6. The third parties shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. The third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the Panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the Panel.

8. The Panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing. Written replies to questions shall be submitted at a date to be decided by the Panel in consultation with the parties.

9. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the other party a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, comments on the descriptive part of the report, and comments on the interim report, shall be made available to the other party.

11. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a party's first written submission. If the complaining party requests any such ruling, the respondent shall submit its response to such a request in its first written submission. If the respondent requests any such ruling, the complaining party shall submit its

response to such a request prior to the first substantive meeting of the Panel. The complaining party shall submit this response at a time to be determined by the Panel after receipt and in light of the respondent's request. Exceptions to this procedure will be granted upon a showing of good cause.

12. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

13. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the stages of the dispute.

14. The parties and third parties shall provide the Panel with an executive summary of the facts and arguments as presented to the Panel in their written submissions and oral presentations within one week following the delivery to the Panel of the written version of the relevant submission. The executive summaries of the written submissions to be provided by each party should not exceed 10 pages in length and the executive summaries of the oral presentations should not exceed 5 pages in length each. The summary to be provided by each third party shall summarize their written submission and oral presentation, and should not exceed 5 pages in length. The executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. However, the Panel may reproduce the executive summaries provided by the parties and third parties in the arguments section of its report, subject to any modifications deemed appropriate by the Panel. The parties' and third parties' replies to questions, and the parties' comments on each other's replies to questions will be attached to the Panel report as annexes.

15. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. In this regard, it is noted that the complainant has undertaken to ensure as far as possible that a government official be present at all meetings with the Panel. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. In particular, private lawyers acting on behalf of the complainant are bound by the same obligations and responsibilities as WTO Members. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel.

16. Following issuance of the interim report, the parties shall have no less than 10 days to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at the time the written request for review is submitted. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other parties' written requests for review. Such comments shall be strictly limited to commenting the other parties' written requests for review.

17. The following procedures regarding service of documents apply:

(a) Each party and third party shall serve its submissions directly on all other parties, including where appropriate the third parties, and confirm that it has done so at the time it provides its submission to the Panel.

(b) The parties and the third parties should provide their written submissions and written answers to questions by 5:30 p.m. on the deadlines established by the Panel,

unless a different time is set by the Panel. In this regard, the parties have agreed that they will exchange written submissions and written answers to questions, including all exhibits, electronically, in word processing format (Word or WordPerfect). Where necessary (for example, due to the nature and/or size of the document in question), exhibits may be submitted in .pdf format or by fax. In cases where the size of the exhibits is so large as to render it impracticable to send the documents in .pdf format or by fax by the stipulated deadlines, hard copies shall be sent by courier for receipt the day after the due date. Hard copies of all submissions and answers will be sent by courier within 24 hours of the deadlines. These procedures apply to the submission of documents to the Panel, to the other party and to third parties.

(c) Parties and third parties shall provide the Secretariat with copies of their oral submissions by noon of the first working day following the last day of the substantive meetings.

(d) The parties and third parties shall provide the Panel with 9 copies of all their submissions, including the written versions of oral statements and answers to questions. All these copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office number 3154).

(e) At the time they provide a hard copy of their submissions, the parties and third parties shall also provide the Panel with an electronic copy of all their submissions on a diskette or as an e-mail attachment in a format compatible with the Secretariat's software. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with a copy to Ms Mireille Cossy (e-mail: mireille.cossy@wto.org).

(f) Each party shall serve executive summaries mentioned in paragraph 14 directly on the other party and confirm that it has done so at the time it provides its submission to the Panel. Each third party shall serve executive summaries mentioned in paragraph 14 directly on the parties and confirm that it has done so at the time it provides its submission to the Panel. Subparagraphs (d) and (e) above shall be applied to the service of executive summaries.

ANNEX B

REQUEST FOR PRELIMINARY RULINGS

A. DECISION OF THE PANEL[*]

1. This communication from the Panel is in response to the United States request for preliminary rulings in respect of Antigua and Barbuda's request for establishment of a panel[1] and issues relevant to that request in Antigua and Barbuda's first written submission.[2] The request was received on Friday night, 17 October 2003.

2. On 20 October 2003, the Panel invited Antigua and Barbuda and the third parties to comment on the US request. Antigua and Barbuda submitted its response on 23 October 2003, the European Communities and Japan on 24 October 2003. Chinese Taipei, Mexico and Canada informed the Panel that they would not submit any comments to the US request for preliminary rulings.

1. Procedural background

3. On 13 March 2003, Antigua and Barbuda requested consultations with the United States regarding measures applied by central, regional and local authorities in the United States that (allegedly) affect the cross-border supply of gambling and betting services. In an Annex to its original request for consultations[3], Antigua and Barbuda identified a number of documents as "measures", indicating that "these measures and their application may constitute an infringement of the obligations of the United States under GATS".

4. Sections I and II of the Annex to the request for consultations contain a list of federal and state statutory measures. Section III lists other documents, categorised by Antigua and Barbuda in its Annex as "Other United States and State actions or measures." These documents include case law, Attorney Generals' opinions, press releases and pages from Internet websites.

5. With respect to the items identified in the Annex, Antigua and Barbuda claimed in its request for consultations that:

> "It is my Government's understanding that the cumulative impact of the Federal and State measures of the type listed in the Annex to this request is that the supply of gambling and betting services from another WTO Member (such as Antigua and Barbuda) to the United States on a cross-border basis is considered unlawful under United States law."[4]

6. On 10 April 2003, Antigua and Barbuda notified an addendum to its request for consultations.[5] That addendum purported to "clarify some of the references to US legislation in the original Annex".[6] Attached to the addendum was a new version of the Annex that had been attached to the original request for consultations. The addendum also reiterated Antigua and Barbuda's claim that a prohibition on the cross-border supply of gambling and betting services results from the

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[*] Sent to the parties on 29 October 2003. The arguments by the parties and third parties are found, respectively, in sections B and C of this Annex.

[1] WT/DS285/2, 13 June 2003.

[2] 1 October 2003.

[3] WT/DS285/1, 27 March 2003.

[4] WT/DS285/1, para. 2.

[5] WT/DS285/1/Add.1, 10 April 2003.

[6] WT/DS285/1/Add.1, para.1.

cumulative application of the measures listed in the Annex. In particular, the addendum provided that:

> "As explained in our request for consultations of 13 March 2003 it is our understanding that the prohibition on the cross-border supply of gambling and betting services in the United States arises from the cumulative impact of measures of the type listed in the Annex. The corrected Annex clarifies some of the references to United States legislation and replaces references to a few measures which are no longer in force with references to current measures."[7]

7. On 13 June 2003, Antigua and Barbuda submitted to the DSB its request for establishment of a panel (hereinafter referred to as the "Panel request").[8] As in the case of the request for consultations, the Panel request contained an Annex, the contents and structure of which is virtually identical to the Annex attached to the revised request for consultations.

8. The Panel request reiterates the claim made in Antigua and Barbuda's request for consultations that the laws referred to in Sections I and II of the Annex have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States. However, with respect to the items contained in Section III of the Annex, the Panel request states that:

> "Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services."[9]

9. Finally, the Panel request also states that:

> "The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."[10]

10. At the first and second meetings of the DSB at which Antigua and Barbuda's Panel request was considered, the United States alleged a number of inadequacies associated with Antigua and Barbuda's Panel request.[11] In particular, the United States stated that a number of items contained in the Annex to the Panel request were not "measures" that could be properly included within the scope of a panel request; that the Annex included several measures which appeared not to have been included in the revised request for consultations; and that not all of the measures cited in the Annex were related to the supply of cross-border gambling and betting services.[12] The United States raised the issue of these alleged inadequacies again at the Panel's organizational meeting held on 3 September 2003.

11. On 1 October 2003, as provided in the Panel's Working Procedures and timetable, Antigua and Barbuda made its first written submission to the Panel in which it addressed some of the concerns that had previously been raised by the United States regarding its Panel request.

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[7] WT/DS285/1/Add.1, para. 2.
[8] WT/DS285/2.
[9] WT/DS285/2, para.2.
[10] WT/DS285/2, para.2.
[11] First meeting held on 24 June 2003: WT/DSB/M/151; Second meeting held on 21 and 23 July 2003: WT/DSB/M/153.
[12] WT/DSB/M/151, p.11, para.9; WT/DSB/M/153, para. 47

12. According to the Panel's timetable for these proceedings, the United States was due to make its first written submission on 29 October 2003. However, as noted above, on 17 October 2003, the United States requested the Panel to make a number of preliminary rulings, which are the subject-matter of this communication.

2. The US request for preliminary rulings

13. We have been requested by the United States to issue preliminary rulings pursuant to paragraph 11 of the Panel's Working Procedures. Paragraph 11 of our Working Procedures reads as follows:

> "Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a party's first written submission. If the complaining party requests any such ruling, the respondent shall submit its response to such a request in its first written submission. If the respondent requests any such ruling, the complaining party shall submit its response to such a request prior to the first substantive meeting of the Panel. The complaining party shall submit this response at a time to be determined by the Panel after receipt and in light of the respondent's request. Exceptions to this procedure will be granted upon a showing of good cause."

14. The Panel understands the United States to seek preliminary rulings on four issues. According to the United States:

(a) Some of the measures listed in the Annex to the Panel request were not included in the request for consultations. Therefore, such measures were not consulted on and should not be considered by the Panel.

(b) Some of the items listed in the Annex to the Panel request are not "measures" within the meaning of Article 6.2 of the DSU and, therefore, are not within the Panel's terms of reference.

(c) Some of the measures listed in the Panel request are unrelated to cross border supply of gambling services.[13]

(d) Antigua and Barbuda has not made a *prima facie* case of violation and, therefore, its complaint should be rejected.

15. We deal with each of these issue in turn below.

3. The Panel's assessment of the US request for preliminary rulings

(a) General Considerations

16. We note as a starting-point that the jurisprudence confirms that, according to Article 6.2 of the DSU, a request for establishment of a panel must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief

[13] We note that in para. 14 of the US request for preliminary rulings, the United States raised this argument as part of its claim that Antigua's request for establishment of a panel improperly included certain measures that were not the subject of consultations. However, the Panel has decided to treat this argument as a separate issue.

summary of the legal basis of the complaint sufficient to present the problem clearly.[14] In *EC – Bananas III*, the Appellate Body made clear that:

> "It is important that a Panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the Panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[15]

17. In assessing the United States' request for preliminary rulings, the Panel considers that it is important to bear in mind what Antigua and Barbuda considers to be the measure(s) that it is challenging and in respect of which it requested consultations. In this regard, we note that in its Panel request, in its first written submission, and in its comments on the US request for preliminary rulings, Antigua and Barbuda emphasised that it is effectively challenging the overall and cumulative effect of various federal and state laws which, together with various policy statements and other governmental actions, constitute a complete prohibition of the cross-border supply of gambling and betting services.

18. In this regard, we recall the Appellate Body' s guidance in *Korea – Dairy*[16] and in *US – Carbon Steel* as to how a panel should approach challenges to the sufficiency of Panel requests under Article 6.2 of the DSU:

> "As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a Panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the Panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the Panel request as a whole, and in the light of attendant circumstances."[17]

19. It is also important to bear in mind that the measures(s) that have been challenged in a Panel request must be capable of enforcement under Article 19.1 of the DSU, which provides that:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[18] bring the measure into conformity with that agreement."

20. Finally, with regard to the timing of preliminary ruling requests, we recall the Appellate Body statement in *US – FSC*:

> "Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in

[14] Appellate Body Report on *Korea – Dairy*, para. 120.
[15] Appellate Body Report on *EC – Bananas III*, para. 142.
[16] Appellate Body Report on *Korea – Dairy*, paras. 120-128.
[17] Appellate Body Report on *US – Carbon Steel*, para. 127.
[18] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

> other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." (emphasis added)[19]

(b) Assessment of the US request

(i) Some of the measures listed in the Annex to the Panel request were not included in the request for consultations and should not be considered by the Panel

21. As indicated above, the issue here is whether the Panel is entitled to consider provisions of legislation referred to in the Panel request in cases where the request for consultations referred to the same legislation but contained references to different provisions of that legislation.

22. The concerned measures indicated by the United States in this regard are the state laws for Colorado, New York and Rhode Island. In particular:

> (1) With respect to Colorado, the revised request for consultations referred to COLO. REV. STAT. §§ 18-10-101 to 18-10-**08** (1999)" whereas the Panel request referred to " COLO. REV. STAT. §§ 18-10-101 to 18-10-**108** (1999)".
>
> (2) In relation to New York, the revised request for consultations refers to "N.Y. CONST. art. **II**, §9" whereas the Panel request refers to "N.Y. CONST. art. **I**, §9".
>
> (3) With respect to Rhode Island, the revised request for consultations refers to "R.I. CONST. art. **I**, § 22" whereas the Panel request refers to "R.I. CONST. art. **VI**, § 22".

23. The Panel notes that, pursuant to Article 6.2 of the DSU, it is incumbent upon complaining parties to, *inter alia*, indicate in their request for establishment of a panel whether consultations were held on the matter in dispute. This requirement seeks to ensure that parties have had an adequate opportunity to discuss the matter in dispute before a panel is established to adjudicate that dispute. Indeed, jurisprudence exists to indicate that a Member will be prevented "from requesting the establishment of a panel with regard to a dispute on which no consultations were requested".[20]

24. Given the discrepancies between the Panel request and the request for consultations, the United States argues that consultations were not conducted in relation to the measures for which references were amended in the Panel request. In deciding the significance and consequences associated with these discrepancies, we note that the Appellate Body stated in *Brazil – Aircraft* that:

> "We do not believe … that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[21]

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[19] Appellate Body Report on *US – FSC,* para.166.
[20] Panel Report on *Canada – Aircraft,* para. 9.12.
[21] Appellate Body Report on *Brazil –Aircraft,* para. 132.

25. We take this to mean that there may be differences between the measures listed in the request for consultations and those listed in the request for establishment of a panel. Indeed, we consider that such differences may well be justified given that facts may emerge during the course of consultations so as to "shape the substance and the scope of the subsequent panel proceedings".[22] However, we do recognize that a balance is needed between, on the one hand, the right of the complainant to alter the request for establishment of a panel in light of information that may become available during consultations and, on the other hand, the need to ensure that a Member does not request the establishment of a panel with regard to a dispute on which no consultations were requested.

26. As to whether or not, in this case, the differences between the Panel request and the revised request for consultations referred to above are such that the Panel is still entitled to consider the measures implicated by the US argument, we note that both the revised request for consultations and the Panel request contain references to the same *legislation* for each of the relevant states. However, the discrepancies that exist as between the two sets of requests relate to the *provisions* referred to. On the face of it, the discrepancies appear typographical in nature. Given that the jurisprudence anticipates alteration of Panel requests in certain circumstances referred to above, it would seem that alterations to Panel requests in cases of typographical errors should be accepted given their apparently less egregious nature.

27. However, we are unable at this stage to make a definitive assessment of whether the differences are purely typographical in nature given that Antigua and Barbuda has not yet completed establishing its *prima facie* case[23] and the legislation in question has not yet been adduced as evidence. In addition, the Panel considers that it will be better placed to make this assessment once it has heard the parties' substantive arguments. Therefore, for the time being, the Panel declines to rule on this aspect of the US request.

(ii) Some of the items listed in the Annex to the Panel request are not "measures" within the meaning of Article 6.2 of the DSU and, therefore, are not within the Panel's terms of reference

28. In its response to the United States' request for a preliminary ruling on this issue, we note that Antigua and Barbuda emphasised that the Panel need not determine whether the items contained in Section III of the Annex to the Panel request constitute separate and individual measures. Indeed, Antigua and Barbuda has stated that the items contained in Section III are based on the legislative provisions listed in Sections I and II.

29. As to the legal status that should be attributed to the items contained in Section III of the Annex to the Panel request, we recall the Appellate Body statement in *US – Carbon Steel*:

> "The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[24]

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[22] Appellate Body Report on *India – Patents US,* para. 94.

[23] In this regard, see the Panel's conclusions in paras. 38 to 40 below regarding the US claim that Antigua and Barbuda has failed to make a *prima facie* case.

[24] Appellate Body Report on *US – Carbon Steel*, para. 157.

30. Therefore, in light of the foregoing, a complaining Member is entitled to use various types of evidence to display how a measure violates a WTO provision.[25] Whilst the items listed by Antigua and Barbuda in Section III of the Annex to its Panel request may not (all) be measures[26], these items may, nevertheless, be relevant for Antigua's demonstration that the legislative measures referred to in Sections I and II of the Annex to its Panel request result in a complete prohibition on the cross-border supply of gambling and betting services.

31. Given that Antigua and Barbuda has indicated that it does not intend to treat the items listed in Section III as distinct and autonomous "measures" but, essentially, will seek to rely upon them as evidence to illustrate the existence of a general prohibition against cross-border supply of gambling and betting services in the United States, we decline to rule out the relevance of such items. However, as suggested by Antigua and Barbuda, during our substantive consideration of this dispute, we will not consider and examine them as separate, autonomous measures.

(iii) Some of the measures are unrelated to cross border supply of gambling services

32. In paragraph 14 of its request for preliminary rulings, the United States has identified some legislative provisions which it argues are "unrelated to cross-border gambling" and that, therefore, they should not be considered by the Panel in this dispute.[27]

33. Article 6.2 of the DSU provides that the request for the establishment of a panel "shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

34. We agree with the argument made by the European Communities that, since Article 6.2 of the DSU is a general provision regulating the content of requests for panel establishments, it must be read together with relevant provisions contained in the WTO agreements. In this regard, relevant provisions in the GATS include Article XXIII of the GATS Agreement, which effectively provides that the DSU governs disputes arising under the GATS. We note, in addition, that Articles I:3 and XXVIII(a) and (c) together broadly define the measures to which the provisions of the GATS apply.[28] To the extent that the GATS definition of a "measure" is broader than that contained in Article 6 of

[25] Appellate Body Report on *US – Carbon Steel*, paras. 156-157.

[26] We agree with Japan that the issue of what constitute a "measure" under WTO law is a sensitive matter that was recently debated before the panel on *US – Corrosion-Resistant Steel Sunset Review*.

[27] See Georgia Code § 16-12-37; Iowa Code § 725.11; Arkansas Statutes § 5-66-115; California Penal Code §§ 337b through 337e; Georgia Code §§ 16-12-33 and 16-12-34; Massachusetts General Laws, Chapter 271, §§ 39 and 39A; California Penal Code §§ 337u through 337z; Delaware Code §§ 1470 and 1471; Maryland Code, Criminal Law, § 12-109; Massachusetts General Laws, Chapter 271, §§ 12 and 32; Ohio Revised Code § 2915.05; Oregon Revised Statutes § 167.167; Virginia Code § 18.2-327; Washington Revised Code §§ 9.46.196 through 9.46.1962; California Penal Code §§ 337f through 337h; Vermont Statutes title 13, § 2153. Massachusetts General Laws, Chapter 271, § 46.

[28] Article I:3 of the GATS reads as follows: (a) "measures by Members" means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory. Article XXVIII(a) provides that "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. In addition, Article XXVIII(c) provides that "measures by Members affecting trade in services" include measures in respect of (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

the DSU, it would supplement the meaning of "measures" in Article 6.2 of the DSU,[29] as interpreted by the jurisprudence.

35. Recent jurisprudence has established that before the provisions of the GATS can be applied in determining whether or not a GATS inconsistency exists, a panel must in the normal course of its analysis determine whether the measure in question "affects trade in services".[30] The Appellate Body has emphasized further that "the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS".[31]

36. It seems to us that the majority of the laws challenged by the United States as being unrelated to the cross-border supply of services are concerned primarily with prohibiting bribery, cheating, etc. rather than regulating the supply of gambling services *per se*. Although it may be difficult at this stage to understand why Antigua and Barbuda is challenging such penal laws and how they violate the GATS, it is conceptually possible that these measures are measures affecting cross-border trade in gambling and betting services within the meaning of the GATS. In any event, the Panel notes that Antigua and Barbuda stated in its Panel request that "the measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."[32] As to whether these measures do, in fact, affect cross-border trade in gambling and betting services, this is to be answered during the Panel's proceedings and cannot, in our opinion, be the subject of a preliminary ruling at this early stage.

37. Moreover, since Antigua and Barbuda appears to be arguing that all laws listed in the Annex to the Panel request are to be read together in demonstrating that the United States generally prohibits the cross-border supply of gambling and betting services, the Panel is of the view that it would be more appropriate to abstain from reaching any definitive conclusion as to whether any of the listed laws, whether read in isolation or in conjunction with others, are "unrelated to cross border supply of gambling services" at this stage of the proceedings.

(iv) Antigua and Barbuda has not made a prima facie case of violation with the GATS and, therefore, its complaint should be rejected

38. We note that Appellate Body jurisprudence has established that a complainant has two sets of written submissions and two panel hearings within which to convince the Panel that it has established its *prima facie* case that the measure(s) at issue do(es) violate one or more WTO provisions.[33]

39. In addition, we recall the panel's conclusion in *Thailand – H-Beams*, which stressed the importance of the distinction between, on the one hand, the sufficiency of the Panel request and, on

[29] The Appellate Body has already determined (in *Guatemala –Cement I,* para. 75) that in a dispute under the Anti-dumping Agreement, the requirements of both the Anti-dumping Agreement and the DSU must be respected in determining what the "matter" referred to the DSB is: "The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the Anti-Dumping Agreement. In our view, there is no inconsistency between Article 17.5 of the Anti-Dumping Agreement and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A Panel request made concerning a dispute brought under the Anti-Dumping Agreement must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a "matter" is referred to the DSB by a complaining party under Article 17.4 of the Anti-Dumping Agreement, the Panel request must meet the requirements of Articles 17.4 and 17.5 of the Anti-Dumping Agreement as well as Article 6.2 of the DSU". (emphasis added)

[30] Appellate Body Report on *Canada – Autos*, paras. 150-155.

[31] Appellate Body Report on *EC – Bananas III*, para. 220

[32] WT/DS285/2, para. 2.

[33] Appellate Body Report on *EC – Bananas III,* paras. 145-147.

the other hand, the issue of whether or not the complaining party has established a *prima facie* case of violation:

> "Thailand argues that 'a panel may only accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings.' According to Thailand, "this would be the case only where (1) a panel found that the complainant had failed to present a prima facie case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request." We are concerned here that Thailand is blurring the distinction between, on the one hand, the sufficiency of the Panel request and, on the other, the issue of whether or not the complaining party establishes a *prima facie* case of violation of an obligation imposed by the covered agreements. We recall that "there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."[34] Article 6.2 DSU does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of the claims set out in the Panel request. Nor does it determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings. To the extent that the requests by Thailand under Article 6.2 DSU relates to whether or not Poland established a *prima facie* case of violation of the relevant provisions, we examine this below."[35] (emphasis added)

40. In accordance with this jurisprudence, the question of whether or not Antigua and Barbuda has established its *prima facie* case is independent of, and must be considered separately from, the question of whether the Panel request meets the requirements of Article 6.2 of the DSU. Given that Antigua and Barbuda has two sets of written submissions and two panel hearings to convince the Panel that it has established a *prima facie* case, we cannot accept the United States' request that we conclude at this early stage of the Panel's proceedings that Antigua and Barbuda has failed to make its *prima facie* demonstration that the measures listed in the Annex to its Panel request are inconsistent with the United States' obligations under the GATS Agreement.

41. The above rulings are without prejudice to the Panel's right to further elaborate and develop its findings on these issues having heard all parties and third parties on the substantive aspects of Antigua and Barbuda's claims.

[34] Appellate Body Report on *EC – Bananas III*, para. 141.
[35] Panel Report on *Thailand –H-Beams*, para. 7.43.

4. Adjustment of Panel's Timetable

42. In light of the above, we request that the United States file its first written submission by Friday, 7 November 2003 and its executive summary by Friday, 14 November 2003. Third parties' submissions will be due on Friday, 14 November 2003 with executive summaries of these submissions due on 21 November. As a consequence of the changes to the timetable that result from the US request for preliminary rulings, it is necessary to postpone the first substantive meeting with the parties. Due to the panelists' commitments, the first panel meeting with the parties will take place on 10, 11 and 12 December 2003. The rebuttals of the parties will be due on Friday, 9 January 2004 and the second panel meeting will take place on 26 and 27 January 2004. A revised calendar was attached.

[signed: B.K. Zutshi, Chairman of the Panel]

B. ARGUMENTS OF THE PARTIES

1. Arguments of the United States

43. Having reviewed the first submission of Antigua, the **United States** requests the Panel to make preliminary rulings on the following issues, pursuant to paragraph 11 of the Panel's working procedures: (i) the items cited as "measures" in Section III of the Annex to the panel request[36] are not in fact "measures" within the meaning of Article 6.2 of the DSU, and are therefore not within the terms of reference of the Panel; and (ii) Antigua's request for establishment of the Panel improperly included certain measures that were not the subject of consultations. In addition to these requests, the United States wishes to bring to the Panel's attention the fact that Antigua's first submission fails to establish a *prima facie* case of WTO inconsistency with respect to any specific US measure. Instead, Antigua bases its claim on a proposition about the effect of one or more unspecified measure(s) from among the hundreds of items listed in the Annex to its panel request. For the reasons explained below, this approach cannot form the basis for a *prima facie* case.

44. Concerning the first issue raised in paragraph 43, the United States argues that, among the numerous items challenged by Antigua are several items in Section III of the Annex to its panel request, labelled "other ... actions or measures," that do not constitute "measures." Consequently, the United States requests that the Panel find that these particular items are beyond its terms of reference. A "matter" referred to the DSB consists of one or more "specific" measure(s), together with one or more legal claims relating to such measures.[37] A panel with standard terms of reference may only examine this matter, i.e., claims relating to a "measure" in the panel request. For something to be a measure for purposes of WTO dispute settlement, it must "constitute an instrument with a functional life of its own" under municipal law – i.e., it must "*do* something concrete, independently of any other instruments."[38] For example, a Panel recently found that a US government "policy bulletin" did not constitute a measure that could be challenged in WTO dispute settlement proceedings because, in and of itself, it was not a legal instrument that operates on its own.[39]

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[36] WT/DS285/2.

[37] DSU Article 6.2. See also Appellate Body Report on *Guatemala – Cement I,* para. 72.

[38] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.119, citing *US – Export Restraints,* para. 8.85 ("In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations." (original emphasis)); *US – Steel Plate,* para. 7.23 (finding that a challenged practice "lacks independent operational status"; Panel Report on *US – Section 129(c)(1) URAA,* note 89 (discussing *US – Export Restraints*).

[39] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.125. See also Panel Report on *US – Section 301 Trade Act*, para. 7.133 (finding that the US Statement of Administrative Action

45. The United States notes that Antigua's panel request cites several press releases as measures.[40] These press releases are self-evidently informational in character and are merely designed to inform and educate the public about actions taken by officials. They do not in themselves have any force under US law,[41] and therefore do not constitute "measures" under the DSU. The same is true of a Michigan Gaming Control Board web page cited by Antigua.[42] This web page (consisting of a "Frequently Asked Question" section) conveys information to the public, but does not have any independent legal status under US law. The site provides an answer to a question designed to inform the public about laws relating to Internet gambling. The answer lacks any independent operational status under municipal law. On the contrary, it merely describes how state and/or federal law would operate. As such, this website does not constitute a measure under the DSU. The United States submits that Antigua's panel request also cites an opinion of the Kansas Attorney General[43] as a measure. This opinion is an interpretation of the law applicable to Internet gambling provided by the Attorney General and Deputy Attorney General in 1996 at the request of a State Senator. In Kansas, as in other states, Attorney General opinions are not legally binding.[44] The opinion states on its face that it is merely "our opinion" and does not presume to have any independent legal status under US municipal law. Therefore it does not constitute a measure under the DSU. The same reasoning applies with even greater force to the two web pages of Attorney Generals' offices in Kansas and Minnesota cited as measures by Antigua in its panel request.[45] The two documents are similar. Each one "sets forth the enforcement position" of the Attorney General. An "enforcement position" is at best a non-binding guide to the public about the attitude that state officials are likely to take in future prosecutions. The two statements are comparable in this respect to the "policy bulletin" that the panel in *US – Corrosion-Resistant Steel Sunset Review* found was not a "legal instrument" that could "operate independently from other legal instruments," and therefore could not be challenged in WTO dispute settlement proceedings.[46] As mere policy statements or position papers, these documents lack independent legal status beyond the laws upon which they rely, and therefore cannot be measures under the DSU.

46. The United States further notes that Antigua's panel request cites two judicial opinions as measures.[47] The operational status of a judicial opinion under US municipal law flows from the

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accompanying the Uruguay Round Agreements Act "could be considered not as an autonomous measure of the Administration determining its policy of implementing Section 304, but as an important interpretative element in the construction of the statutory language of Section 304 itself.").

[40] Florida Attorney General, *Press Release: Western Union Cuts Off Sports Betting Accounts* (December 23, 1997); New York Attorney General, *Press Release: Ten Banks End Online Gambling With Credit Cards-Spitzer Hails Establishment of New Banking Industry Standard* (February 11, 2003); New York Attorney General, *Press Release: Agreement Reached with Paypal to Bar New Yorkers from Online Gambling-Campaign Against Illegal Gambling Web Site in New York Continues* (August 21, 2002); New York Attorney General, *Press Release: Financial Giant Joins Fight Against Online Gambling- Leading Credit Card Issuer Agrees to Block Key Internet Transactions*, June 14, 2002.

[41] See Appellate Body Report on *US – Certain EC Products*, para.73 (finding that statements by US officials in a press release did not "in and of themselves" allow the Appellate Body to determine the legal relationship between two measures).

[42] Michigan Gaming Control Board, *Frequently Asked Questions: Is it Legal to Gamble Over the Internet in Michigan?* The site states that "all forms of gaming are illegal in Michigan except those specifically permitted under Michigan law" and directs the public to "[c]ontact the Michigan Attorney General's Criminal Division (517/334-6010) for more information."

[43] Kansas Op. Att'y Gen. No. 96-31 (25 March 1996).

[44] See *Kansas Ass'n of Public Employees v. Public Employee Rel. Bd.,* 13 Kan. App. 2d 657, 660; 778 P.2d 377, 379 (Court of Appeals of Kansas 1989) ("Attorney general opinions, of course, are not binding on the courts.").

[45] Kansas Attorney General, *Internet Gambling Warning*; Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction.*

[46] Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.125 and 7.126.

[47] *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001); *Vacco ex rel. People v. World Interactive Gaming Corp.,* 714 N.Y.S.2D 844, 854 (N.Y. Sup. Ct. 1999).

measure interpreted and applied, and from the scope of the court's authority. The opinions of a US court of competent jurisdiction are binding as to the parties to the dispute only. They may also have value as precedent in future decisions – but opinions of courts inferior to the US Supreme Court have such value only with respect to the same court and lower courts within the scope of the originating court's authority.[48] The United States submits that, while the Panel may consider the two opinions cited by Antigua in order to help determine the meaning of the US laws they interpret (to the extent that those laws are within the scope of this dispute), these opinions are not "measures" under the DSU for purposes of this dispute. In conclusion, the United States requests that the Panel make preliminary rulings finding that the items discussed above are not "measures" within the meaning of Article 6.2 of the DSU, and that therefore these items are not within the Panel's terms of reference.

47. With respect to the second issue raised in paragraph 43, the United States argues that Antigua requested establishment of a panel for three measures that were not the subject of consultations: Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. These provisions were not cited in Antigua's consultations request,[49] were not discussed during the consultations, and are unrelated to any of the measures and purported measures cited in the consultations request. A Member may not request the establishment of a panel with regard to just *any* measure; rather, it may only file a panel request with respect to a measure that was consulted upon.[50] Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request "including identification of *the measures at issue* and an indication of the legal basis for the complaint" (emphasis added). In this case, there is no dispute that Antigua failed to include the cited provisions in its request for consultations. Antigua did include different citations to the New York Constitution, the Rhode Island Constitution, and the Colorado Revised Statutes in its request for consultations, but those citations were, by Antigua's own admission, wholly irrelevant and/or nonsensical.

48. The United States notes that Antigua attempts to characterize the different citations in its request for consultations as "nothing but typographical errors" and argues that, based on the context and the subject matter of the erroneously cited provisions (voting rights and the right to bear arms), "it should have been clear" to the United States what the correct citations were. Contrary to Antigua's implication, many of the items listed in the Annex to Antigua's consultations request are unrelated to cross-border gambling, and have not been "corrected" in Antigua's panel request. They include, among others, laws against dogfighting[51] and bullfighting;[52] laws against bribery,[53] cheating,[54] and

[48] The United States notes that the *U.S. v. Cohen* case cited by Antigua was decided by the United States Court of Appeals for the Second Circuit. The Second Judicial Circuit, of which the United States Court of Appeals for the Second Circuit is the highest court, consists of only the federal courts within the states of New York, Connecticut and Vermont, including the federal district and bankruptcy courts for the Southern, Northern, Eastern and Western Districts of New York, the District of Connecticut and the District of Vermont. The *Vacco v. World Interactive Gaming* case cited by Antigua was decided by the Supreme Court of New York, New York County. Under New York's judicial system, the Supreme Courts are courts of original instance, not courts of appeal. Their opinions thus have very limited precedential value.

[49] WT/DS285/1/Add.1.

[50] See Appellate Body Report on *US – Certain EC Products,* para. 70 (finding that an action "not *formally* the subject of the consultations" was, for that reason, not a measure at issue in the dispute and not within the Panel's terms of reference (original emphasis)).

[51] See Georgia Code § 16-12-37.

[52] See Iowa Code § 725.11.

[53] See, e.g., Arkansas Statutes § 5-66-115 (prohibiting bribery of participants in sporting events); California Penal Code §§ 337b through 337e (same); Georgia Code §§ 16-12-33 and 16-12-34 (same); Massachusetts General Laws, Chapter 271, §§ 39 and 39A (same).

[54] See, e.g., California Penal Code §§ 337u through 337z; Delaware Code §§ 1470 and 1471; Maryland Code, Criminal Law, § 12-109; Massachusetts General Laws, Chapter 271, §§ 12 and 32; Ohio Revised Code § 2915.05; Oregon Revised Statutes § 167.167; Virginia Code § 18.2-327; Washington Revised Code §§ 9.46.196 through 9.46.1962.

drugging of racing animals;[55] and a state statute making it illegal to dispose of a refrigerator without first removing the door.[56] In any event, the ability of a party to predict changes in the measures cited in the request for consultations is irrelevant. The request for consultations is not a guessing game. Antigua indisputably failed to request consultations on Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. Therefore, the United States requests that the Panel find that the measures cited for the first time in Antigua's panel request are outside the Panel's terms of reference.

49. Finally, the United States argues that Antigua failed to offer a *prima facie* case regarding specific US measures. After listing hundreds of statutory provisions, and other items, as possibly being among the challenged measures in its panel request, Antigua states that, in its view, "[t]he subject of this dispute is the *total prohibition on the cross-border supply of gambling and betting services*." While appearing to accept that this "total prohibition" is comprised of particular "laws or regulations," Antigua has neither quoted, attached, nor argued the meaning of any such law or regulation. Instead, Antigua asserts that "there is no need to conduct a debate on the precise scope of specific United States laws and regulations." It further states that "[t]he precise way in which this import ban is constructed under United States law" – allegedly through one or more of the measures and purported measures listed in its panel request – "should not affect the outcome of this proceeding." So long as Antigua refuses to identify specific measures as the subject of its *prima facie* case, the United States submits that Antigua has established no *prima facie* case with respect to any measure. As explained above, it is well established that a "matter" referred to the DSB consists of one or more "specific" measure(s), together with one or more legal claims relating to such measures.[57] A panel with standard terms of reference may only examine this matter, i.e., claims relating to the "specific" measures included in a panel request.

50. The United States argues that Antigua, as the complaining party, bears the burden of identifying the specific measures as to which it asserts violations of WTO provisions. Even under the minimal requirements applicable to a panel request, a panel has recently found that "[d]ue process requires that the complaining party fully assume the burden of identifying the specific measures under challenge" so that the opposing party does not bear the burden of determining what measures are or are not at issue.[58] If this much is required of the panel request, due process clearly requires no less specificity with respect to identification of specific measures that are the subject of the complaining party's *prima facie* case.[59] The complaining party bears this burden, and cannot shift it to the responding party – as Antigua is explicitly seeking to do here.[60] Antigua must make it clear what specific measures are at issue in this dispute.

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[55] See, e.g., California Penal Code §§ 337f through 337h; Vermont Statutes title 13, § 2153.

[56] Massachusetts General Laws, Chapter 271, § 46 (imposing a fine for failure to remove doors from discarded refrigerators).

[57] DSU Article 6.2. See also Appellate Body Report on *Guatemala – Cement I,* para. 72.

[58] Panel Report on *Canada – Wheat Exports and Grain Imports,* para. 24.

[59] The United States notes that the Appellate Body clarified in *India – Patents (US)* that parties may not be deliberately vague regarding their claims and factual allegations, including what specific measures are at issue. ("All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims." Para. 94).

[60] The United States recalls that Antigua and Barbuda states that the United States is "better positioned than Antigua to coherently construe its own laws". The United States notes that, if necessary, it will address the burden of proof issue further in its first submission. For the moment, the United States simply notes that the Appellate Body has previously clarified that a party making a claim of WTO inconsistency regarding another party's municipal law "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." Appellate Body Report on *US – Carbon Steel*, para. 157.

51. United States submits that Antigua's proposition regarding a "total prohibition" is not itself a measure.[61] As explained above, the term "measure" refers to something that has a "functional life of its own" under municipal law.[62] Under US municipal law, Antigua's "total prohibition" assertion has no functional life. For example, US authorities could not prosecute a service provider by alleging a violation of the "total prohibition." Prosecutors must rely on some specific law, such as the federal statute relied upon in the *U.S. v. Cohen* case cited in Antigua's panel request.[63]

52. United States submits that it raised this concern many times with Antigua, including during consultations and at the DSB meetings at which Antigua requested establishment of a panel. The United States, and indeed the third parties, would suffer prejudice if Antigua were allowed to substitute a general proposition for specific measures in this dispute. Because Antigua has not identified the specific measures that are the subject of its *prima facie* case, the United States has not been able to prepare its defense; it simply does not know which specific US measures of the hundreds listed by Antigua are being challenged. Moreover, without knowing the specific measures at issue and how such measures are allegedly violating WTO rules, the third parties will confront the same difficulties as the United States in presenting their views to the Panel. Finally, Antigua must not be permitted to hide behind the excuse that US law is supposedly too complex and opaque; Antigua and its two outside law firms are certainly capable of identifying and attempting to establish a *prima facie* case as to specific measures if they choose to do so.[64]

53. In the interest of providing for a constructive first panel meeting and ensuring a full opportunity to respond to any claims that Antigua may wish to make regarding specific measures, the United States requests that the Panel invite Antigua to make a further submission, identifying the specific measures at issue from the Annex to its panel request and presenting arguments with respect to these measures, before 29 October 2003, the date the US first written submission is currently due. If the Panel agrees and if Antigua accepts this invitation, the United States requests that the Panel adjust its timetable so that the US first submission would be due four weeks after receipt of Antigua's supplemental submission (duplicating the time initially provided between Antigua's first written submission and that of the United States). This is because ample time will be required for the United States to respond to any arguments Antigua may wish to advance regarding specific measures in a supplemental submission. Moreover, there is potentially a large number of measures at issue, including sub-federal measures; as the United States noted during the Panel organizational meeting, consultations with sub-federal entities are required by US law in preparing the defence of specific sub-federal measures. Since Antigua has done nothing thus far to shed light on the specific measures that are the subject of its *prima facie* case, the United States will require sufficient time to prepare its submission, pursuant to Article 12.4 of the DSU.

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[61] The United States notes that Antigua makes much of the supposed agreement between the parties about the existence of a "total prohibition." It relies in this regard on the United States' statement at the 24 June DSB meeting, where the United States stated that it had "made it clear that cross-border gambling and betting services are prohibited under US law" and that such services "are prohibited from domestic and foreign service suppliers alike" (WT/DSB/M/151). The United States submits that this statement does not relieve Antigua of its responsibility, as the complaining party, to state which specific measures are at issue and to make a *prima facie* case of a WTO violation as to each measure identified.

[62] See above footnote 38.

[63] See *United States v. Cohen,* 260 F.3d 68, 71 (2nd Cir. 2001) ("Cohen was arrested in March 1998 under an eight-count indictment charging him with conspiracy and substantive offences in violation of 18 U.S.C. § 1084.").

[64] The United States recalls that an official of the US Department of Justice was flown in for consultations with Antigua in Geneva on 30 April 2003, for the purpose of explaining to Antigua and its outside counsel in some detail various US laws relating to gambling. In addition to this explanation, the United States notes that Antigua appears to have no shortage of other expertise on US gambling law, since it was able to devote more than 18 pages of its first written submission to explaining the various forms of gambling it alleges to be authorized under US law. The United States therefore finds it curious that Antigua should profess itself unable to cope with the supposed "complexity and opacity" of US laws restricting gambling.

54. The United States proposes that, should Antigua state that it does not intend to make any arguments with respect to any specific measures, there would be no need for the Panel to adjust the timetable to provide for a supplemental submission. In this regard, the United States further requests that Antigua be invited to state, no later than 24 October 2003, whether it will make a supplemental submission, so that the United States can know in advance if its first written submission will still be due on 29 October. In the event Antigua confirms that it will not file this further submission, the United States would request that the Panel make a preliminary ruling to find that all the measures and purported measures listed in the Annex to Antigua's panel request are no longer at issue in this dispute. This ruling would ensure that the United States is not prejudiced and deprived of due process by having the WTO-consistency of specific measures raised at some later stage of the proceedings, when the US and third parties will not have a full opportunity to respond to Antigua's claims with respect to these specific measures.[65]

55. In conclusion, he United States requests that the Panel make preliminary rulings finding that: (i) the items discussed above are not "measures" within the meaning of Article 6.2 of the DSU; and (ii) the measures cited for the first time in Antigua's panel request are outside the Panel's terms of reference. The United States also requests that the Panel invite Antigua to make a further submission presenting any arguments it wishes to advance with respect to specific measures listed in the Annex to its panel request; and that the Panel make a preliminary ruling – if Antigua chooses not to make this further submission – that all the items listed in the Annex are no longer at issue in this dispute.

2. Arguments of Antigua

56. Antigua argues that, overall the approach of the United States represents the starkest possible of contrasts to the principles of WTO dispute settlement as stated by the Appellate Body.[66] The points raised at this stage by the United States are unfair, they are far from prompt and will, if accepted, lead to the most ineffective means of resolving this trade dispute. The US argument that it cannot prepare its defence is a transparent attempt to delay this proceeding and extend the timetable, while at the same time, it should be noted, the United States is aggressively attempting to destroy the Antiguan gambling and betting industry through a number of law enforcement and other actions.[67]

57. On 30 April 2003 the United States and Antigua held consultations in Geneva. The only explanation regarding US gambling law given by the United States on that occasion was that, whilst a number of the laws listed in the request for consultations did not relate to the cross-border supply of gambling, such cross-border supply was in any event unambiguously prohibited by United States law. On 8 May 2003, Antigua sent a letter to the United States offering to enter into further consultations. Importantly, in the 8 May communication, Antigua stated, among other things:

> "In any event, the debate about the specific scope and nature of the individual measures has become much simpler, if not moot, because the US team explained that the provision of cross-border gambling and betting services is always unlawful in the entire US in whatever form. Thus we think it is no longer relevant to continue the debate about the impact or the applicability of specific measures. What matters in

[65] Panel Report on *US – Steel Plate*, para. 7.28 (finding that allowing a party to resurrect a claim after stating that it would not pursue the claim would "deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim").

[66] "[The] procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." Appellate Body Report on *US –FSC*, para. 166; and Appellate Report on *Thailand –H-Beams*, para. 97.

[67] Antigua notes that, at the end of September 2003, the United States subpoenaed so-called "internet portal sites" and other media companies because they carried advertisements for cross-border gambling services. Prior to doing so the United States Department of Justice had sent letters to media companies warning them not to cooperate with "offshore" gaming operators. (US Department of Justice, Letter to the National Association of Broadcasters, dated 11 June 2003).

> terms of WTO law is the effect of one or more measures and, in that regard, you have unambiguously told us that the provision of these types of services from Antigua and Barbuda to persons in the US is unlawful in the US."

58. Antigua notes that, in May 2003 the United States apparently did not consider this point worthy of further discussion.[68] Since then Antigua has unambiguously repeated this approach to the United States' general prohibition.[69] During this same period the United States has unambiguously repeated that it prohibits all cross-border gambling.[70] Furthermore the United States has prosecuted and incarcerated an individual for operating a licensed Antiguan gambling and betting company[71] and has taken a number of steps to prevent the use of credit cards and other financial instruments and transactions in connection with access by United States consumers to gambling and betting services located in other countries such as Antigua.[72] Clearly, the United States considers such services illegal and has made public statements and taken actions consistent with that. In that context, for the United States now to claim inability to respond to the arguments of Antigua based upon ignorance of its own measures is simply not credible.[73]

59. Antigua notes that the United States argues, with regard to the "specific measures" issue, that it "has raised this concern many times with Antigua, including during consultations and at the DSB meetings at which Antigua requested establishment of a panel." This is incorrect. The United States

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[68] On 28 May the United States (only on being asked by Antigua) confirmed that it was "in the process of drafting a response". On 5 June Antigua received the following two paragraph response from the United States:

> Thank you for your letter of May 8, 2003, suggesting a continuation of consultations in the matter of [US – Gambling].
>
> The United States appreciates the written explanation of your views on the issues referred to in your letter and the further explanation of your views on the interpretation of the United States services schedule. We recall that the United States provided its views on these issues during the consultations held with your delegation in Geneva on April 30, 2003. While the United States would be willing to meet again in Geneva with the representatives of your government, we believe that we have already presented our position on the points raised in your letter of May 8, 2003. We note that it is the consistent view of the US Justice Department that internet gambling is prohibited under US law.

[69] In Antigua's panel request of 12 June 2003, at the DSB meeting of 24 June 2003 (WT/DSB/M/151, para. 44), at the DSB meeting of 21 July 2003 (WT/DSB/M/153, para. 46), during the organisational meeting with the panel on 3 September 2003 and in Antigua's first submission of 1 October 2003. At the DSB meeting of 21 July 2003 Antigua also stated its willingness to "try to answer any specific questions that the United States might have, just as it would welcome a US detailed and written explanation of what it did not understand about its panel request." (WT/DSB/M/153, para. 46)

[70] At the DSB meeting of 24 June 2003 the United States' representative stated that "[j]ust as importantly, the United States had made it clear that cross-border gambling and betting services were prohibited under US law" (WT/DSB/M/151, paragraph 47); at the DSB meeting of 21 July 2003 the United States' representative stated that: "it was also clear that these services were prohibited under US law" (WT/DSB/M/153, para. 47). See also the letter dated 11 June sent by the US Department of Justice to the National Association of Broadcasters, dated 11 June 2003, referred to in footnote 67.

[71] See *United States v. Cohen,* 260 F.3d 68 (2nd Cir. 2001).

[72] See the discussion in para. 3.80 of this Report and Press Release by the New York Attorney General (dated 21 August 2002), at http://www.oag.state.ny.us/press/2002/aug/aug21a-02.html, visited on 23 September 2003 and the *Assurance of Discontinuance* signed between the New York Attorney General and Paypal Inc. dated 16 August 2002.

[73] Antigua notes that it is noticeable that, while the United States complains about the fact that some of the (deliberately misinterpreted – see para. II.B.2.65 below) references in the Annex to the panel request also regulate other matters than cross-border gambling services (such as refrigerator disposal), it makes no attempt to explain why exactly it is that the numerous references to laws that do clearly prohibit the provision of cross-border gambling and betting services, combined with the text of the panel request, Antigua's first submission and other communications by Antigua, do not allow it to prepare its defence. The only legal defence that the United States has raised with Antigua until now is that its GATS Schedule does not cover gambling and betting services. Antigua does not see how the issues raised in the Request could have an impact on the development of that argument.

has raised other procedural issues regarding the "measures" (see below paragraphs 3.78 to 3.80). Until submitting its request for preliminary rulings, the United States has at no point stated that it cannot understand Antigua's claim in the absence of further explanation of that claim as it relates to each individual law. If the United States had done so, Antigua would have addressed this issue in its first submission. With respect to the US assertion that Antigua has not submitted sufficient "proof" to establish a *prima facie* case that each individual law listed in the Annex to its panel request effectively prohibits the provision of cross-border gambling services, Antigua submits that the United States accepts that the total prohibition of cross-border gambling exists. In view of its explanation of *United States v. Cohen* applying the Wire Act,[74] the United States clearly also accepts that at least one specific law in the Annex to Antigua's panel request (i.e. the Wire Act) prohibits provision of cross-border gambling services. A report from the GAO confirms this for other specific United States laws mentioned in the Annex to the panel request.[75] Furthermore the United States has yet to dispute that most of the laws cited in the Annex to the panel request do in fact relate to the prohibition of cross-border gambling and betting services (it only claims that some do not, and only on the basis of a deliberate misreading of the references to these laws).[76] In this respect Antigua submits that to the extent that "proof" is an issue here, Antigua has in any event established a *prima facie* case with regard to the measures listed in its panel request that come within the scope of this dispute (i.e. those that do relate to the cross-border supply of gambling and betting services).[77]

60. Antigua submits that it is doubtful that anyone could compose a definitive list of all United States laws and regulations that could be applied against cross-border gambling. The reason for this is that United States law with regard to this issue is itself unclear and Antigua is certainly not the only party with some difficulty in understanding the US legal system as it relates to the provision of cross-border gambling and betting services. As the United States' own General Accounting Office has stated:

> "Internet gambling is an essentially borderless activity that poses regulatory and enforcement challenges. The legal framework for regulating it in the United States and overseas is complex. US law as it applies to Internet gambling involves both state and federal statutes."[78]

61. There is also significant debate within the United States legal community as to the exact nature of the United States' prohibition on the supply of cross-border gambling and betting services.[79] Further, there is even disagreement among courts in the United States on the precise interpretation of

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[74] See above para. II.B.1.51 and footnote 63.

[75] United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89), December 2002, page 11. See also the letter from the Department of Justice of 11 June 2003 to the National Association of Broadcasters, referred to in footnote 67.

[76] Antigua notes in this regard that the seemingly irrelevant statutes delineated in para. II.B.1.48 above are, in point of fact, included within a "range" of statutes that otherwise relate to gambling and betting activity. It is an accepted method of citation in United States law to include a "range" of related statutes even if the range includes repealed or irrelevant statutes as well.

[77] Antigua's panel request explicitly states that: "The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."

[78] United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89), (December 2002), p. 3.

[79] See Jeffrey R. Rodefer, *Internet Gambling in Nevada. Overview of Federal Law Affecting Assembly Bill 466* published on 18 March 2003 on the website of the Department of Justice of Nevada (www.ag.state.nv.us), pp. 8-13 in the context of the Wire Act. In the article the author notes "(…) there is a secondary debate ongoing about whether the definition of 'wire communication facility' is limited to telephone companies." Ibid., p. 13.

United States laws on this issue.[80] This lack of clarity of US law confronted Antigua with a dilemma when it drafted its panel request. If it were to have listed the Wire Act only there is little doubt that, at the stage when the United States needed to implement any recommendations and rulings resulting from this dispute, the United States would have taken the position that it needed only to disapply or adapt the Wire Act and could continue to apply other laws because these would have been outside the terms of reference of the Panel. This concern has been vindicated by the fact that the United States now adopts a very similar formalistic and obstructive approach in the request for preliminary rulings. It was for these reasons – as well as the oft-repeated statements by the United States that it prohibits all cross-border gambling and betting services – that Antigua determined to challenge the general prohibition of cross-border gambling and betting services that effectively exists in the United States whilst at the same time making a serious and good faith effort to identify specific measures after conducting a detailed investigation of an arcane area of United States law. In doing so Antigua has already done more than can reasonably be expected of a complainant in WTO dispute settlement proceedings.[81]

62. Antigua also rejects the US argument that, pursuant to its terms of reference, the Panel would be obliged to investigate separately the impact of each specific law listed in the Annex to Antigua's panel request.[82] Antigua finds it difficult to see how – much less why – the Panel would go about assessing "separately" the specific impact of each of the 93 legislative prohibition measures listed in the Annex to Antigua's panel request. Such an approach would be unnecessary, cumbersome, repetitive, time consuming and would not serve to enhance the legitimate rights of the defence (other than by simply frustrating the effectiveness of WTO dispute settlement). To require Antigua and the Panel to spend time and effort in analysing exactly how the US measures operate and interact in practice given the unambiguous legal position of the United States regarding the services at issue, would be patently absurd. In any event, the terms of reference for the Panel are determined by Antigua's panel request and Antigua is not aware of any provision or doctrine of WTO law that would prevent the Panel from investigating in aggregate the impact of a series of specific measures that all have the same effect, i.e. prohibition. The Panel should note that, in relation to this argument the United States incorrectly states that: "Antigua refuses to identify specific measures as the subject of its *prima facie* case." As stated in paragraph 61 above, notwithstanding the difficult nature of doing so, Antigua has made a serious and good faith effort to identify specific measures in the Annex to its panel request.[83]

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[80] See with regard to the Wire Act, the discussion in United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89) (December 2002), p. 13.

[81] Antigua is of the view that, putting the threshold even higher will make WTO dispute settlement virtually unmanageable for all but the largest WTO Members – for instance in cases involving a complex domestic legal background against a WTO Member the laws of which are not generally available in English (or another language that is widely understood across the world). In such a situation an obligation to first conduct a detailed investigation of all these laws, even when the WTO Member at issue does not deny the alleged impact of its legislation, could take years and would serve no purpose.

[82] See para. 49 above.

[83] For instance, Antigua's panel request identifies 18 U.S.C. §§ 1081, 1084. As the United States points out itself in footnote 63 above this statute was used to convict Mr Jay Cohen in the *United States v. Cohen* case also cited in the panel request. Mr Cohen was convicted because he worked for an Antiguan supplier of gambling and betting services. The panel request also mentions 18 U.S.C. § 1952 (the "Travel Act") and 18 U.S.C. § 1955 (the "Illegal Gambling Business Act") which according to the United States General Accounting Office "have been used to prosecute gambling entities that take interstate or international bets over the telephone and would likely be applicable to Internet gambling activity". With regard to these three laws, see also the letter of 11 June 2003 from the United States Department of Justice to the National Association of Broadcasters mentioning "Sections 1084, 1952 and 1955 of Title 18 of the United States Code". Antigua has further listed the specific measures of individual states that are described as follows by the GAO: "Some states have taken specific legislative actions to address Internet gambling, in some cases criminalizing it and in others relying on existing gambling laws to bring actions against entities engaging in or facilitating Internet gambling" GAO, *Internet Gambling,* op. cit., page 11.

63. With respect to the US argument that certain "items" listed in Section III of the Annex to Antigua's panel request are not "measures" that can be investigated under the DSU, Antigua maintains that, since the measures listed in Section III of the Annex are based on the legislative provisions listed in Sections I and II of the Annex,[84] they are in any event covered in that capacity. In Antigua's view it does not really matter whether the measures listed in Section III "do something concrete, independently of any other instruments" or whether these are taken into account by the Panel "to help determine the meaning of US laws." In fact, actions by criminal enforcement authorities (such as the ones listed in Section III of the Annex) could very well be classified under both categories. What matters is that the United States maintains and enforces a total prohibition on cross-border gambling (and this is clearly the case). In this respect Antigua suggests that the Panel utilise its discretion to exercise judicial economy and to decide this case without ruling whether measures such as the ones listed in Section III of the Annex are "measures" that can be the subject of WTO dispute settlement.

64. In case the Panel nevertheless wants to address this issue, Antigua refers back to the discussion in paragraph 3.77 of this report. Antigua would add only that the four press releases and related documents from Attorneys General are obviously not included in the panel request as press releases but because they describe the measures, i.e. the prosecution actions (on which little or no other official information is publicly available).

65. Antigua rejects the US argument that Antigua's panel request improperly includes measures that were not the subject of consultations and notes it has already responded to this argument in paragraph 3.78 of this report . The United States simply ignores these arguments and the Appellate Body ruling in *Brazil – Aircraft*[85] referred to by Antigua in its first submission. Antigua notes the United States' reference to the Appellate Body Report in *US – Certain EC Products*.[86] Antigua submits, however, that whether or not a measure that was not formally part of consultations can be included in a panel request depends on the specific circumstances of each case. In this instance Antigua believes this to be possible (as did the Appellate Body in the circumstances at issue in *Brazil – Aircraft*). As in *Brazil – Aircraft*, the parties in this instance have in fact consulted on the gambling prohibition in the New York Constitution, the Rhode Island Constitution and the Colorado Revised Statutes (because the parties consulted on the total prohibition of the provision of cross-border gambling and betting services of which these measures form a part). Antigua further submits that the typing errors that were corrected for the New York Constitution, the Rhode Island Constitution and the Colorado Revised Statutes are different from the allegedly incorrect references to laws against dog fighting and other irrelevant laws which the United States mentions in paragraph 14 of the Request. The latter are instances where these non-gambling related provisions are included within a "range" of statutes that otherwise relate to gambling and betting activity. It is an accepted method of citation in United States legal writing to include a "range" of related statutes even if the range includes repealed or irrelevant statutes. When the United States suggests that the references to these "range" statutes complicate its understanding of Antigua's claim it is merely being disingenuous.

66. In conclusion, Antigua believes it is not necessary to submit a supplemental submission as suggested by the United States. Nevertheless, were the Panel to decide that it would like a further submission from Antigua on the issues raised by the United States (or on other issues), Antigua requests that the Panel allow Antigua to submit this on a date to be determined by the Panel, but not to delay the 29 October 2003 due date for the United States' first submission.[87] Antigua further requests that the Panel dismiss the request for preliminary rulings on the three issues raised by the United States in the Request.

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[84] Antigua submits that this is explicitly confirmed by the United States in para. II.B.1.52.

[85] Appellate Body Report on *Brazil – Aircraft*.

[86] Appellate Body Report on *US – Certain EC Products*.

[87] Antigua notes that the United States cites as a justification for delay its need to hold "consultations with sub-federal entities (…) required by US law (…)." However, under the applicable federal statute, these state-federal consultations were to have been initiated no later than seven days, and to have been actually held within 30 days, after the request for consultations from Antigua was received. See 19 U.S.C. §3512(b)(1)(C).

C. ARGUMENTS OF THE THIRD PARTIES[88]

1. Arguments of the European Communities

67. The European Communities notes that the United States first challenges the qualification as "measures", within the meaning of Article 6.2 of the DSU, of certain documents referred to in Section III of Antigua and Barbuda's panel request. These are: press releases; the replies of a gaming control board of a State of the United States to "Frequently Asked Questions"; opinions and statements of Attorneys General of States part of the United States; and judicial decisions of US Courts. The European Communities recalls that in its request for panel establishment, Antigua and Barbuda distinguishes between, on the one hand, Section I and II of the Annex, and, on the other hand, Section III thereof. In respect of Section I and II, Antigua claims that "these laws (separately or in combination) have the effect of prohibiting all supply of gambling and betting services from outside the United States". By contrast, it qualifies the documents listed in Section III as "examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling". There is therefore some ambiguity as to whether the purpose of these references is more an exemplifying and clarifactory one than a list of further measures in their own right. Also, the issue raised by the United States is strictly connected with the substance of the case, which is legally and factually rather complex. As such, it is not suited for adjudication through a summary preliminary ruling proceeding brought under Article 6.2 of the DSU.

68. For the case the Panel considers that the US claim needs to be addressed at this stage, the European Communities would offer the following considerations. Article 6.2 of the DSU is a general provision regulating the content of requests for panel establishments for virtually the entirety of the WTO provisions.[89] As such, it must be able to be read in such a way that it does not restrict the content of any of the provisions in the covered agreements. The term "measure" in Article 6.2 cannot be read any narrower than covering any action that can amount to a violation of a WTO provision. Article 6.2 is meant to apply to the whole of the *WTO Agreement*. Otherwise, it would risk unduly reduce the scope of obligations in other provisions of the covered agreements. Thus, for example, several WTO provisions use the term "measure" or "requirement" and have been interpreted in previous reports. All those generally suggest a broad reading of the term "measure", in particular as to the form that measures can take. In particular, since there is a specific definition to measures for GATS purposes in Article XXVIII of the GATS any interpretation of the term "measure" that is narrower than the definition laid down therein would amount to restricting the scope of Article XXVIII, and of the entire GATS with it.[90] This would amount to diminishing the rights and obligations of the Members under the *WTO Agreement*, contrary to Article 3.2 of the DSU.

69. Moreover, the range of WTO Members' action that can come within the purview of dispute settlement review is even broader than that resulting from Article XXVIII of the GATS. For example, violations can result not only from a particular "instrument", but also from an omission (e.g. the failure to publish trade-related legislation, regulations, judicial decisions and administrative rulings of general application, contrary to Article X:1 of the GATT 1994). Also, Article XXIII:1(c) of the GATT 1994 allows complaints to be brought based on the existence of "any other situation" (that is, other than (a) the failure to comply with a WTO obligation and (b) nullification or impairment resulting from a measure whether or not in violation of the GATT). Such complaints are still possible and generally governed by the DSU, including Article 6.2, pursuant to Article 26.2 thereof. Therefore, any interpretation of the term "measure" in Article 6.2 would be overly restrictive if it would risk preventing examination of such type of complaints on grounds that it is not allowed by Article 6.2.

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[88] Canada, Mexico and Chinese Taipei informed that Panel that they would not submit their views on US request for preliminary rulings.

[89] According to the European Communities, a notable exception is Article 17.4 of the *Anti-Dumping Agreement* (see Appellate Body Report in *Guatemala – Cement I,* para. 14).

[90] Pursuant to its Article I:1, the GATS "applies to measures by Members affecting trade in services".

70. The European Communities argues that, in many of these cases, the standard the US proposes (i.e. that a measure within the meaning of Article 6.2 must "constitute an instrument with a functional life of its own" under municipal law – i.e., it must "*do* something concrete, independently of any other instruments."[91]) would not allow a panel to review the violation of these provisions. The US references to WTO "jurisprudence" under the *Anti-Dumping Agreement*[92] are in any way of no relevance, as they relate to a special and additional rule to the DSU (Article 17.4 of the *Anti-Dumping Agreement*) and not the general standard set out in Article 6.2.

71. The European Communities emphasizes that it is not arguing that the term "measure" in Article 6.2 is devoid of any autonomous meaning compared to, for example, the provisions of the covered agreements.[93] For one thing, Article 6.2 could be relied upon by a panel to decline full examination of a dispute in some manifest cases: where, for example, the alleged measure referred to in a panel request was not even attributable to a body of a WTO Member (e.g., a policy statement of a non-governmental organization). Furthermore, it is clear from Article 6.2 that it is necessary to identify a specific measure. Finally, should the Panel decide to review the documents that the US challenges under this claim and should it further conclude that some of them do not constitute "measures" within the meaning of Article 6.2 of the DSU, its conclusion should not have any bearing on the evidentiary relevance that they may have to review whether Antigua and Barbuda's claim is overall well founded. Indeed this activity pertains to the Panel's review of the substance of the case.

72. Turning to the US second claim that certain provisions of three US measures (New York Constitution; Rhode Island Constitution; Colorado Revised Statutes) are outside the Panel's terms of reference because they do not appear in Antigua and Barbuda's request for consultations under Article 4 of the DSU,[94] the European Communities understands that these measures and the specific provisions thereof referred to by the United States are properly referenced in Antigua and Barbuda's request for panel establishment, and that the references to those specific provisions in the request for panel establishment replaced references to other provisions of the same measures contained in the request for consultations. The issue raised by the United States must be appreciated in the light of the purpose of consultations and the request therefor, the purpose of Article 6.2 of the DSU, and more generally the nature and function of dispute settlement procedures.

73. The European Communities submits that, in connection with the first aspect, a very clear indication has been provided by the Appellate Body in *Brazil – Aircraft*:[95]

> "[W]e do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel."

74. The European Communities fully agrees with the approach and the conclusions of the Appellate Body and would add that they apply *a fortiori* in a case, like the present one, where the measures are the same in both the request for consultations and in the request for panel establishment. It appears to the European Communities that the only provisions of, e.g., the New York Constitution that could have been the subject of consultations are those relating to restrictions on betting and gambling. It would thus be absurd if, while Antigua and Barbuda continues to rely on the same

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[91] See above para. II.B.1.44.
[92] See above footnote 38.
[93] Appellate Body Report on *US – Gasoline*, p. 23.
[94] See above para. II.B.1.47.
[95] Appellate Body Report on *Brazil –Aircraft*, para. 132 (footnotes omitted).

measure as it indicated in its request for consultations, the Panel would be barred by Article 6.2 from reviewing the consistency of that measure with the WTO provisions relied upon by the claimant. Furthermore, the purpose of consultations has to be contrasted with that of the panel request, which is to define the scope of the Panel's terms of reference, and to notify the responding party and third parties of the complainant's case.[96] It is in view of that different function that "[d]efects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings".[97] But, again, Antigua and Barbuda's request for panel establishment does include not only the relevant specific measures, but also the specific provisions thereof referred to by the United States.

75. The European Communities also wishes to recall how the role of the parties in dispute settlement procedures was very effectively characterized by the Appellate Body in *US – FSC*:[98]

> "Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."

76. The European Communities notes in this connection that, whereas it must be acknowledged that the United States raised this issue before the DSB, it should be equally acknowledged that Antigua and Barbuda promptly offered to enter into further clarifactory contacts.[99] There is therefore no question that the United States was fully enabled to effectively defend itself.

77. With respect to the US assertion that Antigua did not make a prima facie case because "Antigua has neither quoted, attached, nor argued the meaning of any such law or regulation", the European Communities considers that this issue is concerned with the substance of the dispute and indeed the very core of dispute settlement proceedings. As such, it is not suitable for a preliminary ruling issued on a summary proceeding basis such as the present one, relying on Article 6.2 of the DSU, but needs to be addressed by the Panel throughout the (full) proceeding.[100] Otherwise, parties would be denied the benefit of full panel review of complex legal and factual matters such as the ones at issue in this dispute, with clear due process implications. A panel has a duty to make an objective assessment of the facts. That assumes a fully informed assessment. Accordingly, the European Communities reserves the right to further comment on this substantive aspect of the dispute in its third party submission and at the third party session of the Panel's first substantive meeting.

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[96] In this sense, Appellate Body Report on *Brazil – Desiccated Coconut*, page 22; Appellate Body Report on *US – Carbon Steel*, paras. 125-126.

[97] Appellate Body Report on *US – Carbon Steel*, para. 127.

[98] Appellate Body Report on *US – FSC*, para. 166.

[99] WT/DSB/M/153, paras. 43 and 46.

[100] The European Communities is of the view that the United States confuses the jurisdictional aspect, regulated by Article 6.2 of the DSU, with the substantive aspect for example in footnote 61 above. The European Communities agrees with the United States that Antigua and Barbuda is not relieved from its burden of making its *prima facie* case; but this is, precisely, the core substantive issue.

78. The European Communities submits that the US claim that Antigua and Barbuda has not made a *prima facie* case also seems to assume that a claimant is precluded from doing so beyond a particular point in time (presumably the filing of its first written submission, as in the present case). Such assumption would be clearly incorrect.[101] What is more, inasmuch as the United States relates its claim that Antigua and Barbuda has not made a *prima facie* case to the obligation to identify specific measures set out in Article 6.2 of the DSU, its argument is also incorrect and should be rejected. First of all, Antigua and Barbuda has claimed that there is a prohibition of all supply of gambling and betting services from outside the United States to consumers in the United States.[102] Second, in the Annex to its request for panel establishment it has identified a number of specific measures. There is therefore a possibility for the other parties to understand the substance and basis of the complaint, and for the responding party specifically to rebut the legal qualification of these measures made by Antigua and Barbuda.

79. The European Communities considers that the very fact that the United States is able to discuss the nature of the documents cited to in the Annex to Antigua and Barbuda's request for panel establishment shows that it is perfectly able to identify them. There is therefore no prejudice to the parties concerned, which is a factor that needs to be considered in appreciating whether a violation of Article 6.2 has been committed.[103] The fact that a violation of WTO provisions may result from multiple measures of a WTO Member – for example, a bundle of trade defence measures – may render litigation more complex, but is not a reason for a panel to decline jurisdiction under Article 6.2 of the DSU.

2. Arguments of Japan

80. Concerning the US claim that several items cited in the request for the establishment of a panel by Antigua and Barbuda do not constitute "measures" provided for in Article 6.2 of the DSU, and thus are beyond the Panel's terms of reference, Japan does not wish to prejudice the Panel's decision on the specific items in question, nor is in a position to comment on the factual aspects of the current proceeding. Nevertheless, Japan cannot agree with the argument presented by the United States that relies on the Panel's finding in *US – Corrosion-Resistant Steel Sunset Review*. Although the Panel in *US – Corrosion-Resistant Steel Sunset Review* found that the "Sunset Policy Bulletin" was not a measure that in and of itself gave rise to a WTO violation, this finding is now under review by the Appellate Body. Japan, as specified in its notice of appeal[104], is requesting the Appellate Body to reverse this finding of the Panel. Therefore, Japan reiterates its disagreement with the finding of the Panel in *US – Corrosion-Resistant Steel Sunset Review* on this issue, and submits that the Panel on *US – Gambling* should disregard this erroneous finding.

81. With respect to the US claim that Antigua and Barbuda's first submission states that the subject of the current proceeding is the total prohibition on the cross-border supply of gambling and betting services without specifying laws and regulations comprising such total prohibition, and that, because Antigua and Barbuda "refused" to identify specific measures as the subject of its *prima facie* case, it failed to establish a *prima fa*cie case with respect to any measure, Japan submits that the United States appears to be confusing two totally separate matters. Japan believes that the question of whether Antigua and Barbuda has successfully established a *prima facie* case is a substantive one, and thus, should not be subject to preliminary rulings of the Panel.

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[101] See e.g. Appellate Body Report on *Korea – Dairy*, para. 145, and the reference therein to Appellate Body Report on *India – Quantitative Restrictions*, para. 143.

[102] WT/DS285/2, para. 2.

[103] Appellate Body Report on *Korea – Dairy*, paras. 126-127 (referring to Appellate Body Report on *EC – Computer Equipment*, para. 70).

[104] "The Panel erred in its legal conclusions in paras. 7.145, 7.195, and 7.246 of the Panel Report, and the reasoning leading thereto, that the Sunset Policy Bulletin, … cannot, by itself, give rise to a WTO violation, and is therefore not a measure challengeable under the WTO Agreement as such." WT/DS/244/7, sub-para. 4.

82. Japan notes that, as the United States itself admits, a panel's preliminary rulings on the specificity of measures relate to due process rights of defence. In contrast, as the Appellate Body found in *US – Wool Shirts and Blouses*, the party asserting the affirmative of a particular claim or defence establishes a *prima facie* case by adducing evidence sufficient to raise a presumption that what is claimed is true, and "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[105] Panel's deliberations on this matter are of important substantive nature and form the basis of its findings of consistency/inconsistency of the measures in question with the WTO Agreement. Consequently, the question of whether or not Antigua and Barbuda has established a *prima facie* case is independent of, and must be separated from, the question of whether or not the United States' due process rights are affected by the alleged lack of specificity. Even if the Panel were to find that the identification of the measures by Antigua and Barbuda is not sufficiently specific, it would only be a finding of a violation of Article 6.2 of the DSU, and would not have any other legal effect.

[105] Appellate Body Report on *US –Wool Shirts and Blouses,* p. 14.

ANNEX C

PANEL'S QUESTIONS TO THE PARTIES

Note

This Annex contains the questions posed by the Panel and written answers provided by the Parties during the first (Section I) and second (Section II) substantive meetings, as well as the questions posed to the Third Parties during the first substantive meeting and their answers (Section IV).

The Panel expressly invited each Party to reply to questions posed to the other Party, if it so wished, as well as to questions posed to the Third Parties. At the first meeting, Third Parties were also invited to reply to questions posed to the Parties (Section I).

Moreover, with respect to the questions posed at second substantive meeting, each Party was invited to comment on the responses provided by the other Party. These comments are reproduced in Section III of this Annex.

I. PANEL'S QUESTIONS TO THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

A. US SCHEDULE

For both parties:

1. What is the legal status and value of the 1993 Scheduling Guidelines and W/120 in WTO dispute settlement proceedings and to what extent are they relevant for the interpretation of GATS Schedules where no explicit reference to the CPC is contained in those Schedules?

Antigua

Pursuant to Article 31 of the Vienna Convention, the 1993 Scheduling Guidelines circulated by the Secretariat during the Uruguay Round negotiations[106] and the W/120 represent important tools to the interpretation of Members' schedules under the GATS. Whether or not a GATS schedule contains explicit references to the CPC has no impact on the interpretative value of the 1993 Scheduling Guidelines and W/120 as determined pursuant to Article 31 of the Vienna Convention.

The 1993 Scheduling Guidelines are part of the *context* of the GATS and GATS schedules because they are an "instrument" made in connection with the conclusion of the treaty as per Article 31(2) of the Vienna Convention. Admittedly the 1993 Scheduling Guidelines were technically not "made" by "one or more parties" but by the then GATT Secretariat. However, the 1993 Scheduling Guidelines explicitly mention that they were "circulated by the Secretariat in response to requests by participants." At the time of the Uruguay Round negotiations they were also accepted by all parties as a basis for the drafting of services schedules. This was explicitly confirmed when the Council for Trade in Services unanimously adopted new scheduling guidelines in 2001 (the "2001 Scheduling Guidelines"[107]), footnote 1 of which states that: "[I]t should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and

[106] MTN.GNS/W/164 (3 September 1993).
[107] S/L/92 (28 March 2001).

MTN.GNS/W/164/Add.1). Against this background Antigua submits that the 1993 Scheduling Guidelines cannot be disqualified as "context" simply because their formal author is the GATT Secretariat and not a Member of the World Trade Organisation (the "WTO").[108] The purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to identify the common intention of the parties.[109] Articles 31 and 32 of the Vienna Convention should be applied with that objective in mind and not literally.[110] What is important in determining whether an instrument, such as the 1993 Scheduling Guidelines, expresses the *common* intention of the parties is whether it is accepted by *all* the parties, not whether its formal author is *one* of the parties. Antigua further submits that the 2001 Scheduling Guidelines comprise a *subsequent agreement* between the parties (as per Article 31(3) of the Vienna Convention) regarding the interpretation of existing schedules in the light of the 1993 Scheduling Guidelines. As mentioned above, footnote 1 of the 2001 Scheduling Guidelines (unanimously approved by the Council for Trade in Services) provides that: "It should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and MTN.GNS/W/164/Add.1."

Antigua believes that W/120 qualifies as part of the context of the GATS and GATS schedules for two primary reasons: (i) W/120 is incorporated by reference in the Dispute Settlement Understanding ("the DSU") of the WTO (Article 31(2) of the Vienna Convention); and (ii) W/120 is an instrument made in connection with the conclusion of the treaty and accepted by all parties (Article 31(2)(b) of the Vienna Convention). Furthermore there exists a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention and subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention confirming the interpretative value of W/120.

According to Article II:2 of the Marrakech Agreement Establishing the World Trade Organization (the "WTO Agreement"), the GATS, the DSU and the other multilateral and plurilateral agreements are integral parts of the WTO Agreement. Article 31(2) of the Vienna Convention defines context as (amongst others) the text of the treaty, including its preambles and annexes. Thus the DSU qualifies as context for the interpretation of the GATS (and vice-versa) because they are both part of the same treaty—the WTO Agreement. Article 22(3)(f)(ii) of the DSU explicitly refers to W/120 to define "sector" of trade for purposes of suspension of concessions. In doing so it incorporates W/120 by reference in the DSU. As a part of the DSU, W/120 is context of the GATS and the US Schedule, which itself is an integral part of the GATS under Article XX:3 of the GATS.

W/120 further qualifies as "context" because, like the 1993 Scheduling Guidelines, it is an instrument made in connection with the conclusion of the GATS under Article 31(2)(b) of the Vienna Convention. The Montreal Ministerial of December 1988 explicitly requested the GATT Secretariat to compile a "reference list of sectors."[111] W/120 was the result of this exercise and it follows from the 1993 Scheduling Guidelines and the reference to W/120 in the DSU that all Members accepted W/120 as a starting point, a "reference list" for the drafting of their GATS schedules.[112] The common intention of the parties (expressed in the 1993 Scheduling Guidelines) allowed a party to depart from

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[108] Antigua is of the view that neither can the 1993 Scheduling Guidelines be disqualified because they state that they "should not be considered as an authoritative legal interpretation of the GATS" (See I. Sinclair, *The* Vienna Convention *on the Law of Treaties*, (Manchester University Press, 1984), pp. 129-130.

[109] Appellate Body Report on *EC – Computer Equipment*, para. 84.

[110] See, e.g., I. Sinclair, Vienna Convention, at pp. 117-118: "In their commentary the Commission refer to the rich variety of principles and maxims of interpretation applied by international tribunals. They point out that these are, for the most part, principles of logic and good sense which are valuable only as guides to assist in appreciating the meaning which parties may have intended to attach to the expressions employed in a document; and that recourse to many of these principles is discretionary rather than obligatory, interpretation being to some extent an art rather than an exact science."

[111] MTN.TNC/7(MIN), Part II.

[112] With regard to the issue that W/120 was "made" by the GATT Secretariat and not by a party, Antigua submits that the argumentation developed on this issue with regard to the 1993 Scheduling Guidelines equally applies to W/120.

that "reference list," provided it did so explicitly. Paragraph 5 of the US Draft Final Schedule confirms that the United States explicitly subscribed to this "common intention."

The 2001 Scheduling Guidelines comprise a subsequent agreement confirming the interpretative value of the 1993 Scheduling Guidelines. The 1993 Scheduling Guidelines explicitly establish W/120 as the "default" reference list for Uruguay Round Schedules. Thus, by confirming the interpretative value of the 1993 Scheduling Guidelines the 2001 Scheduling Guidelines have also confirmed the interpretative value of W/120.

A "subsequent practice," within the meaning of Article 31(3)(b) of the Vienna Convention, exists establishing the agreement of the WTO Members regarding the interpretative value of W/120. Since the entry into force of the GATS, Members have consistently referred to W/120 as the classification used for GATS purposes and as the main point of reference for any discussion on the classification of services. This includes the United States' own communication to the WTO on Classification of Energy Services[113] and the USITC Document.

As explained above, the reasons why the 1993 Scheduling Guidelines and W/120 qualify as important interpretative factors within the meaning of Article 31 of the Vienna Convention for *all* GATS schedules, are not related to references to the CPC. Thus the absence or presence of explicit references to the CPC in a specific schedule can have no impact on the legal status and interpretative value of the 1993 Scheduling Guidelines or W/120.

United States

These negotiating history documents are "preparatory work" within the meaning of Article 32 of the Vienna Convention.[114] Insofar as these documents mention the CPC, the CPC is only relevant to the interpretation of a particular commitment if a Member included an explicit reference to the CPC in that commitment. This is confirmed by: (i) the text of the US Schedule (which does not include CPC references); (ii) the context of the US Schedule (which shows that other schedules did include CPC references for some or all commitments, thus confirming that they were optional); (iii) other negotiating history of the GATS (which confirms that the parties to the GATS negotiations did not intend to be bound by any specific nomenclature); and (iv) the subsequent statements of Members reflected in discussions in the Committee on Specific Commitments (which confirm that a Member scheduling GATS commitments during the Uruguay Round was free to choose to refer or not refer to the CPC; and that the result of doing so is that CPC definitions do not control the interpretation of that Member's commitment(s)).[115]

Canada

Canada recalls the arguments made in its Third Party written submission to the Panel.[116]

At the outset, Canada submits that the issue before the Panel is to determine, in accordance with the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention, the common intention of the Members with respect to the specific commitments undertaken by the United States and inscribed in the latter's Schedule. That common intention must be ascertained by interpreting the US Schedule in good faith, in accordance with the ordinary meaning to be given to the terms of the Schedule in their context and in the light of the object and purpose of the GATS and the WTO

[113] Communication from the United States: Classification of Energy Services. S/CSC/W/27. 18 May 2000.

[114] The 1993 Scheduling Guidelines expressly state that they "should not be considered as an authoritative legal interpretation of the GATS."

[115] See Section III.B.2 of this Report.

[116] See Section IV.A. of this Report.

Agreement more generally. To the extent appropriate, recourse may also be had to supplementary means of interpretation.

The United States clearly used and followed the structure of the W/120 to schedule its specific commitments. However, its Schedule does not include explicit references to the CPC numbers that, in the W/120, are associated with a particular services sector or sub-sector. This does not mean, as the United States suggests, that the CPC numbers associated with a particular services sector or sub-sector in the W/120 are irrelevant, inapplicable or to be ignored when interpreting the United States' specific commitments. Rather, they form part of the ***context***, or, alternatively, constitute a ***supplementary means of interpretation***, which, in accordance with Articles 31 and 32 of the Vienna Convention, is relevant to interpreting and ascertaining the meaning of the specific commitments of the United States.

When the US Schedule is interpreted in accordance with Articles 31 and 32 of the Vienna Convention, and all the elements that are relevant to ascertaining the common intention of the Members with respect to the United States' specific commitments are taken into consideration, there is only one reasonable conclusion: where the US Schedule mirrors the W/120, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments were meant and are to be interpreted in the light of the W/120 and the CPC numbers associated with it.

When the United States scheduled its specific commitments, it was free to clearly reject the W/120 and the corresponding CPC numbers. It did not. On the contrary, it expressly indicated to its trade partners that except where specifically noted in its Schedule, the scope of the United States' specific commitments corresponds to the sectoral coverage in the W/120.[117] Since the W/120 defines sectoral coverage by referring to relevant CPC numbers, this means that, except where specifically noted in the US Schedule, the scope of the United States' specific commitments corresponds to the scope of relevant CPC numbers (setting out the scope of particular services sectors or sub-sectors) referred to in the W/120. This was and is the common understanding of the Members with respect to the specific commitments undertaken by the United States under the GATS, and it must be respected.

As regards more specifically the W/120, Canada recalls its conclusion that the W/120 and the corresponding CPC numbers form part of the ***context*** that, pursuant to Article 31 of the Vienna Convention, must be taken into account by the Panel when interpreting the specific commitments of the United States under the GATS. In Canada's view, the W/120 (and by implication the CPC numbers referred to in it) at least qualifies as an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" under Article 31(2) of the Vienna Convention.[118] Indeed: (i) the W/120 is an instrument; (ii) the W/120 was prepared by the GATT Secretariat at the request and for the benefit of Uruguay Round participants. It was reviewed and commented upon by these countries.[119] Uruguay Round participants used the W/120 as the general benchmark for the scheduling of specific commitments, thereby incorporating into their Schedules the W/120's nomenclature, except where specifically noted. These same countries also agreed to the use of the W/120 in the DSU.[120] The W/120 was in effect made by Uruguay Round participants acting through the then GATT Secretariat – quite possibly the only practical and effective way to work in a concerted manner on such a complex matter. In these circumstances, the W/120 can be considered to have been "made by the parties"

[117] Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.3, 7 December 1993, para. 5.
[118] See Section IV.A of this Report.
[119] Ibid.
[120] DSU, Article 22(3)(f)(ii).

within the meaning of Article 31(2)(b) of the Vienna Convention[121]; (iii) the W/120 was finalized in July 1991 and used by Uruguay Round participants until the end of the market access negotiations. It was also specifically referred to in the DSU. It was thus made in connection with the conclusion of the GATS; and (iv) the notable fact that the W/120 is specifically referred to in the DSU,[122] which is one of the Multilateral Trade Agreements binding on all Members,[123] necessarily establishes that it was accepted by all Uruguay Round participants as an instrument related to the GATS and the WTO Agreement. This, in itself, invalidates the United States' assertion that the W/120 is only part of the negotiating history of the GATS and therefore cannot constitute anything more than a supplementary means of interpretation under Article 32 of the Vienna Convention.[124]

In the event that the W/120 and the corresponding CPC numbers are found not to qualify as "context" within the meaning of Article 31(2) of the Vienna Convention, Canada submits, alternatively, that they do qualify, and should be referred to by the Panel, as *supplementary means of interpretation* of the US Schedule under Article 32 of the Vienna Convention.[125]

In the end, what is certain is that the W/120 and the corresponding CPC numbers are relevant and ought to be considered by the Panel when interpreting the specific commitments in the US Schedule in accordance with the applicable rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. When the US Schedule is interpreted in accordance with these rules of interpretation, and all the elements that are relevant to ascertaining the meaning of the United States' specific commitments are taken into consideration, the only reasonable conclusion is that where the US Schedule mirrors the W/120, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments are to be interpreted consistently with the W/120 and the CPC numbers associated with it.[126]

As regards the 1993 Scheduling Guidelines *per se*, they constitute a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. Canada recalls that it does not challenge the fact that these Guidelines do not constitute an authoritative legal interpretation of the GATS.[127] Indeed, they specifically state that they are not such an authoritative legal interpretation of the GATS. In any case, the authority to adopt interpretations of the WTO agreements, including the GATS, is reserved exclusively to the Ministerial Conference and the General Council.[128] This is beside the point, however. The fact that the 1993 Scheduling Guidelines do not consist of formal legal interpretations of the GATS does not mean that they cannot be used to shed light on the general understanding of the Uruguay Round participants as regards the scheduling of specific commitments. While there is no question that the 1993 Scheduling Guidelines are not an authoritative legal interpretation of the GATS, there is also no question that, in accordance with their stated purpose, they assisted all Members in the preparation of their Schedules and the listing of their specific

[121] Canada in no way suggests that any document from, or involving the participation of, the Secretariat may qualify as an "instrument" or "agreement" under Article 31(2) of the Vienna Convention. Canada argues that the W/120 qualifies as relevant "context" for the interpretation of the US Schedule based on the specific and unique characteristics and circumstances pertaining to that document.

[122] DSU, Article 22(3)(f)(ii).

[123] WTO Agreement, Article II:2.

[124] See Section III.B.2. of this Report. This may also support the argument that the W/120 qualifies as an "agreement" within the meaning of Article 31(2)(a) of the Vienna Convention.

[125] Canada wrote that the United States does not contest that the W/120 may qualify as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention (see United States' first written submission, para. 63). In its argumentation, however, the United States simply ignores the relevance and application of the W/120 as such a supplementary means of interpretation of its Schedule, and does not address its effect on the interpretation of its specific commitments in the present case.

[126] See Section IV.A of this Report.

[127] Ibid.

[128] WTO Agreement, Article IX:2.

commitments. As such, they may be used as an element that confirms other evidence of what the United States has done in its Schedule.

In the present case, the 1993 Scheduling Guidelines constitute one element among others that refutes, rather than supports, the United States' argument that the W/120 and the corresponding CPC numbers are irrelevant and should be ignored. They are concordant with other factors demonstrating that, in its Schedule, the United States espoused the W/120, and by implication the corresponding CPC numbers, except where specifically noted. These factors are: (i) the US Schedule generally mirrors the W/120; (ii) in a number of instances, the United States did depart from the W/120 and the corresponding CPC numbers in a clear and unambiguous manner, that is, in the manner suggested in the 1993 Scheduling Guidelines (and the revised 2001 Scheduling Guidelines); (iii) in elaborating upon how Members may suspend concessions with respect to services sectors, Article 22 of the DSU relies on the W/120 to define these sectors; (iv) the cover note in draft schedules circulated by the United States indicating that specific commitments are scheduled in accordance with the W/120's nomenclature; and (v) the USITC concordance. Notwithstanding how much the United States wishes that it be otherwise, all these factors point to the conclusion that the US Schedule follows the W/120 and the corresponding CPC numbers except where it explicitly diverges from them.

European Communities

As already pointed out by the European Communities in its third party submission and oral statement, both the 1993 Scheduling Guidelines (W/164) and the 1991 Sectoral classification (W/120) are documents relevant to the interpretation of the US Schedule of specific commitments. Specifically, in the EC view they constitute supplementary means of interpretations under Article 32 of the Vienna Convention.[129]

It is not necessary, for a document to be relevant to treaty interpretation, that it be specifically mentioned, referred to or reprinted in the text of the treaty to be interpreted. The Vienna Convention (Article 32) gives specific relevance to other documents too. The United States contends that since there is no express reference to the CPC codes in its Schedule, these are essentially irrelevant to the interpretation of its specific commitments. However, if only documents expressly referred to were relevant in interpreting a treaty provision, the very category of "preparatory works" and "circumstances of conclusion" would virtually disappear. This would mean rendering certain customary rules of treaty interpretation redundant. Although neither the 1991 Sectoral classification nor the 1993 Scheduling Guidelines are meant to be a legally binding agreement or an authoritative interpretation, they provide important guidance on how the WTO Members understood the commitments that they were negotiating. Both documents were referred to or used extensively by negotiators. The United States admits as much in its draft Schedules it tabled until the final phase of the Uruguay Round.[130]

[129] See Section IV.B of this Report. The European Communities notes that reference has been made in this dispute to the Panel Report on *US – Section 110(5) Copyright Act* WT/DS160/R, adopted 27 July 2000 to support the proposition that the 1991 Sectoral classification constitutes "context" within the meaning of Article 31(2) of the Vienna Convention. In that report (footnote 55) the panel refers to explanatory reports drawn up in parallel to conventions within the framework of the Council of Europe. Unlike such explanatory reports, which are adopted by representatives of the Council of Europe Members, the 1993 Scheduling Guidelines did not form the subject of adoption by the contracting parties to the GATT.

[130] *Communication from the United States of America, Draft Final Schedule of the United States of America to the members of the Group of Negotiations on Services*, MTN.GNS/W/112/Rev.3, 7 December 1993; *Communication from the United States of America, Revised Conditional Offer of the United States of America concerning initial commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993; *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993; See also Section IV.B of this Report.

Mexico

The 1993 Scheduling Guidelines and the W/120 constitute part of the preparatory work of the GATS and the WTO Agreement. At the very least, both thus qualify as "supplementary means of interpretation" pursuant to Article 32 of the Vienna Convention. As such, both documents can always be used to confirm the meaning of the United States' specific commitments resulting from the application of the general rule of interpretation in Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves that meaning ambiguous or obscure. Accordingly, both documents are highly relevant to the interpretation of the GATS Schedule of Specific Commitments of the United States on the basis of the Vienna Convention in this dispute. The fact that no explicit reference to the CPC is contained in the US Schedule has no bearing on this issue. The relevant question is rather whether the 1993 Scheduling Guidelines and document W/120 support the conclusion that sub-sector 10.D of the US Schedule includes a commitment on gambling and betting services.

Chinese Taipei

The 1993 Scheduling Guidelines and the W/120 do not have independent legal status within the WTO in the sense that they do not have any formal binding legal authority on Members. In fact, the introduction to the Guidelines clearly states that the explanatory answers contained in it "should not be considered as an authoritative legal interpretation of the GATS.[131] Nevertheless, the documents do constitute part of the tools for the interpretation of Members' GATS Schedules, even where no explicit reference to the CPC is contained in the Schedules. To the extent that Members, in general, have relied on the Guidelines and the W/120 to shape their own GATS Schedules and to understand other Members' Schedules, they are relevant in WTO dispute settlement proceedings. With regard to how the Panel should use the 1993 Scheduling Guidelines and the W/120 as interpretative tools, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with the third party written submission and the oral statement made by Canada. The Appellate Body reasoning in *EC – Computer Equipment*[132] that a GATT schedule is a integral part of the GATT 1994 and is thus subject to the rules of treaty interpretation set out in the Vienna Convention is equally applicable in the GATS context. The 1993 Scheduling Guidelines and the W/120, among other documents, therefore form part of the context pursuant to Article 31 of the Vienna Convention, to be considered when interpreting Members' GATS Schedules, and in this case, the specific GATS commitments of the United States.

2. With respect to the USITC Document contained in Exhibit AB-65[133]:

(a) What is the legal status and value of this document in WTO dispute settlement proceedings?

(b) How does this document compare with the US Statement of Administrative Action?

(c) Can a statement by the USITC be attributed to, and bind, the United States?

(d) With reference to the previous question, please comment on whether Article 4 of the International Law Commission (ILC) Draft Articles on the Responsibility for States of Internationally Wrongful Acts annexed to the UN General Assembly Resolution of 12 December 2001 (A/RES/56/83), is of any relevance. Article 4 provides as follows:

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[131] 1993 Scheduling Guidelines, para. 1.
[132] Appellate Body Report on *EC – Computer Equipment*, para. 84.
[133] Exhibit AB-65 is the USITC Document submitted by Antigua, see Section III.B.2. of this Report.

> **"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.**
>
> **2. An organ includes any person or entity which has the status in accordance with the internal law of the State."**

Antigua

[a]& [c]: The USITC is an agency of the United States federal government, created by Act of Congress[134] and given a number of powers and responsibilities under a number of federal statutes,[135] including the power to make rules and regulations.[136] The USITC Document consists of "explanatory materials" produced by the USITC in connection with the US Schedule. The USTR is also an agency of the United States federal government, created by Act of Congress[137] and given a variety of powers and responsibilities under a number of federal statutes,[138] including the power to make rules and regulations,[139] the power to "utilize, with their consent, the services, personnel, and facilities of other Federal agencies,"[140] the power and responsibility for the conduct of all international trade negotiations, including "any matter considered under the auspices of the World Trade Organization"[141] and, in particular, to "develop (and coordinate the implementation of) United States policies concerning trade in services."[142] By letter dated April 18, 1994, the USTR requested that the USITC take responsibility for compiling and maintaining the US Schedule, and it has done so since then to the present.[143]

As agencies of the United States government with specific responsibilities and powers, actions taken pursuant to those responsibilities and powers *are* acts of the United States. While the USITC Document is an "explanation" and not specifically rulemaking or regulations, nonetheless under United States law it is binding on the government unless contrary to "governing statutes and regulations of the highest or higher dignity (…)."[144] In the case of *Fiorentino v. United States* the United States Court of Claims was confronted with the issue of an internal agency policy manual that contained terms contrary to federal law. In that case, the court noted that the United States "government is not bound by pronouncements purportedly made in its behalf by persons not having actual authority,"[145] but in the case of "informal" publications it is necessary to examine the publication to "see if it was really written to fasten legal consequences on the government."[146] Under this standard, the plain language of the USITC Document demonstrates that it was intended to "facilitate comparison of the US Schedule with foreign schedules (…)" as well as to "[demonstrate] the relationships between sectors found in the US Schedule, sectors identified in the GATT Secretariat's Services Sectoral Classification List, and sectors defined and numbered in the United Nations' Provisional Central Product Classification (CPC) System." As such, it cannot be

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[134] 19 U.S.C. §1330.
[135] See, e.g., 19 U.S.C. §§1331-1339; 19 U.S.C. §2151.
[136] 19 U.S.C. §1335.
[137] 19 U.S.C. §2171(a).
[138] See, e.g., 19 U.S.C. §§ 2171(c)-(f).
[139] 19 U.S.C. §2171(e)(3).
[140] 19 U.S.C. §2171(e)(4).
[141] 19 U.S.C. §2171(c)(1)(C).
[142] 19 U.S.C. §2114c(1)(A).
[143] In the period from 1994 to December 2003, the USITC has maintained, revised, amended or supplemented the US Schedule on at least three occasions.
[144] *Fiorentino v. United States,* 607 F.2d 963, 968 (Ct. Cl. 1979), *cert. denied,* 444 U.S. 1083 (1980).
[145] Ibid., at 967.
[146] Ibid., at 968.

contested that the USITC Document serves as an interpretative aid to the US Schedule and, as an official pronouncement of an agency of the United States government with the power to exercise authority in connection with the United States' relationships with the WTO, the statement has significant value in this proceeding.[147]

Under general principles of international law the USITC Document, made on behalf of the United States by an organ of government expressly delegated powers to act in the area, is binding upon the United States. The USITC has, at the request of the USTR, assumed responsibility for "maintaining" the US Schedule.[148] In the USITC Document, a public document clearly intended to explain the US Schedule to the world at large, the USITC has indicated that sub-sector 10.D of the US Schedule corresponds to CPC category 964. The United States has not disputed the USITC's interpretation until the emergence of this dispute. It is a fundamental rule of international law that a state party to a treaty has a right to designate the organ or organs of its government that are responsible for the carrying out of its responsibilities under that treaty.[149] Some treaties provide for this expressly.[150] Other treaties rely implicitly on this rule.[151] The USTR designated the USITC to (emphasis added): "[I]nitiate an ongoing program to compile and maintain the *official* US Schedule of Services Commitments."[152] This entails: "[T]he compilation of an initial US Schedule reflecting the final services commitments in the Uruguay Round."[153]

In "maintaining," "compiling" and "explaining" the US Schedule, the USITC was acting on behalf of the United States and engaging its responsibility under international law. Therefore, in interpreting the US Schedule in accordance with applicable international law rules, the statements of the USITC as to the meaning of its provisions are of fundamental importance. In addition to the jurisprudence under WTO law,[154] other rules of international law also support this conclusion, particularly: (i) the interpretation of treaties in the light of subsequent practice in the application of the treaty; (ii) the international law principle of estoppel; and (iii) the international law concept of the binding unilateral declaration.

The USITC Document is highly relevant subsequent practice. It is a fundamental rule of international law that, whenever there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties in the application of the treaty has a "high probative value" as to the intention of the parties at the time of its conclusion.[155] The

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[147] See, e.g., Panel Report on *US – Section 301 Trade Act.* para. 7.112, where the panel stated with respect to the United States Statement of Administrative Action "[t]his official statement in the SAA (…) is a major element in our conclusion (…)."

[148] USITC Document, p. vii and footnote 6 and Letter from USTR to USITC (18 April 1994).

[149] McNair, *The Law of Treaties* (Clarendon Press, 1961), at p. 345.

[150] See e.g, Article 25(1) of the 1965 Convention on the Settlement of Investment Dispute between Contracting States and Nationals of Other Contracting States.

[151] Bilateral investment treaties, for example, provide for standards of treatment that will apply to investments embodied, *inter alia*, in "concession contracts" or "investment agreements." Once such contracts or agreements are concluded at any level of government, the state party will be bound to observe the treaty standards as regards the investments embodied in those contracts or agreements (see *e.g. Azurix Corp. v Argentine Republic* (ICSID Case No ARB/01/12); and *Lanco International Inc. v. Argentine Republic* (ICSID Case No ARB/97/6)).

[152] Letter from USTR to USITC (18 April 1994).

[153] Ibid.

[154] See the discussion at footnote 147 above.

[155] McNair, *The Law of Treaties* at p. 424. Similarly, Rousseau has commented that:

> "Il arrive assez fréquemment que la jurisprudence internationale procède à l'interprétation d'un traité d'après l'application qui en a été faite par les Parties contractantes, cette attitude relevant l'interprétation qui en fait a été effectivement suivie par les auteurs du traité". (*Principes Généraux du Droit International Public* (1944), pp. 704-707.)

Permanent Court of International Justice has applied this rule widely.[156] This rule has also been applied by the International Court of Justice, even prior to the Vienna Convention, in its Advisory Opinion on the *International Status of South-West Africa*,[157] where the Court stated that: "[I]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." This conclusion is consistent with Article 31.3(b) of the Vienna Convention which provides that, in interpreting a treaty, account shall be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

This approach should be particularly relevant to the interpretation of a text, such as the schedules established under the GATS, that originates from only one of the contracting parties.[158] Furthermore, special credence should be given to subsequent practice of state organs that, like the USITC in this instance, have been given a specific role in relation to the treaty obligation at issue.[159] In the USITC Document the USITC explained how the US Schedule corresponds to the CPC. No other agency, organ or official of the United States has taken a different view prior to the advent of this proceeding and no WTO Member has objected to the USITC interpretation. This absence of protest indicates that the WTO Members, and Antigua in particular, have acquiesced in the USITC's interpretation.[160]

Further support for the binding character of the USITC interpretation of the US Schedule can be found in the international law principle of estoppel. The doctrine of estoppel has been recognized and applied in many contexts by international courts and tribunals.[161] The United States, acting through the USITC, has consistently stated that sub-sector 10.D of the US Schedule corresponds to CPC category 964. It has done so by means of a public document intended to clarify the United States' obligations under the GATS. The USITC's central role in the compilation and maintenance of

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[156] See, e.g., Advisory Opinion on the *Competence of the International Labour Organization with respect to Agricultural Labour* (1922), Series B, Nos. 2 and 3, pp. 40, 41; Advisory Opinion on the *Interpretation of Article 3(2) of the Treaty of Lausanne* (1925), Series B, No. 12 at p.24; and Advisory Opinion on the *Jurisdiction of the Courts of Danzig* (1928), Series B, No. 15 at p. 18.

[157] I.C.J. Reports, 1950, at pp. 128, 135.

[158] See Appellate Body Report on *EC – Computer Equipment*, para. 93: "In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."

[159] This approach has been endorsed by the United States Supreme Court, which has stated that: " … the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight" (*Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-5 (1982), 101 ILR 570, at 576-7, citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), 32 ILR 203, at 207).

[160] See the *Case Concerning the Territorial Dispute (Libya/Chad)*, I.C.J. Reports 1994, Judgment of 13 February 1994, separate opinion of Judge Ajibola, para. 96. McNair has stated that "when one party in some public document … adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal" (*The Law of Treaties*, at p. 427).

[161] See, e.g., the *Eastern Greenland* case, P.C.I.J. (1933), Series A/B, No. 53 at pp. 22 and 68, where the Permanent Court of International Justice held that Norway could not object to the Danish claim to sovereignty over Greenland because the Norwegian Minister of Foreign Affairs had previously made a statement consistent with the Danish claim. See also the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Reports 1962 at p. 6; *El Salvador-Honduras Land, Island and Maritime Frontier*, I.C.J. Reports 1990 at pp. 92, 118; the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* I.C.J. Reports 1997 at p. 7 (separate opinion of Judge Weeramantry at pp. 88, 115-6); the *Cameroon v. Nigeria (Preliminary Objections)* case, I.C.J. Reports 1998 at pp. 275, 303; *Amco Asia Corporation and Others v. The Republic of Indonesia* (Rectification), ICSID Case No ARB/81/1 (resubmitted case), 89 ILR 366 at pp. 400-401, where the concept was described as being based on the fundamental requirement of good faith; and general discussion of the doctrine of estoppel at international law by Judge Ajibola in the *Case Concerning the Territorial Dispute (Libya/Chad)*, I.C.J. Reports 1994, Judgment of 13 February 1994, at pp. 77-83.

the "official" US Schedule indicates the intention of the United States that it should be bound by the USITC's statement. Trade in gambling and betting services has in fact taken place from Antigua to the United States consistent with the USITC interpretation. A binding estoppel has therefore arisen under international law to prevent the United States from unilaterally abandoning the public interpretation made by the USITC to the detriment of other WTO Members that may have relied on the interpretation.

It is further submitted that the USITC Document constitutes a unilateral declaration by the United States to the effect that sub-sector 10.D of the US Schedule corresponds to CPC category 964 that is binding on, and engages the responsibility of, the United States. As such, it creates enforceable rights for other WTO Members. In the *Nuclear Tests* cases,[162] the International Court of Justice concluded that statements made by the French government, intended to be relied upon by other states as an expression of future French conduct, constituted an undertaking possessing legal effect. As such, they were binding on, and engaged the responsibility of, France.[163] Similarly, in the present case, the statement of the USITC constitutes a binding unilateral declaration in which other WTO Members are entitled to place confidence.

Antigua concludes that, considering the role of the USITC as the agency of the United States government given the responsibility for the compilation and maintenance of the US Schedule, the consistency of its interpretation,[164] the lack of any inconsistent interpretations or statements from any other agency of the United States government and the absence of any protest from other WTO Members, the USITC Document represents an authoritative interpretation by the United States of the US Schedule in accordance with applicable rules of customary international law and Article 31 of the Vienna Convention. That interpretation is binding on, and engages the responsibility of, the United States. The USITC Document also comprises a binding unilateral declaration upon which other WTO Members are entitled to rely. The United States is estopped, in its relations with WTO Members, from now adopting an interpretation of the US Schedule inconsistent with that of the USITC.

[b]: Antigua assumes the Panel's question refers to the SAA accompanying the Uruguay Round Agreements Act ("URAA").[165] According to the URAA, the SAA constitutes "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application."[166] According to the SAA itself:

> … this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements,

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[162] I.C.J. Reports 1974 at pp. 253, 267; paras. 43 and 46 (*Australia v. France*) and pp. 457, 472-473; paras. 46 and 49 (*New Zealand v. France*).

[163] On the subject of binding unilateral declarations at international law, see further: *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* I.C.J. Reports 1986 at pp. 554, 573-4; and *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, I.C.J. Reports 1984, at pp. 392, 418.

[164] The USITC repeated its interpretation in August 1998 when it published a second edition of the USITC Document.

[165] H.R. 5110, H.R. Doc 316, Vol 1, 103d Congress, 2nd Session, 656 (1994).

[166] 19 U.S.C. § 3512(d).

> the interpretations of those agreements included in this Statement carry particular authority.[167]

Thus the SAA qualifies as binding under international law because it explicitly states it is "an authoritative expression" of the United States' views "for purposes of US international obligations." Such an explicit statement, however, is not a requirement for an interpretation to become binding on a country under international law.[168] In fact, countries will rarely make such explicit statements and even the SAA was primarily produced as a guide to the interpretation of domestic legislation[169] and has mainly, if not exclusively, been used for that purpose by the Appellate Body and various WTO panels.[170] The SAA explicitly states that it was "designed to describe *changes* in US laws and regulations proposed to implement the Uruguay Round agreements." (original emphasis).[171] Before doing that it "briefly summarizes the most important provisions of the [WTO Agreements]."[172]

The concordance of industry classifications contained in the USITC Document, however, is exclusively concerned with the explanation and clarification of the international obligations assumed by the United States in the US Schedule:

> To facilitate comparison of the US Schedule with foreign schedules, the USITC has developed a concordance that demonstrates the relationships between sectors found in the US Schedule, sectors identified in [W/120] and sectors defined and numbered in the [CPC].
>
> The concordance developed by the USITC clarifies how the service sectors referenced in [W/120], the CPC system, and the US Schedule correspond.[173]

In this respect Antigua submits that the USITC Document has even higher interpretative value than the SAA.

[d]: The ILC Draft Articles are relevant to the question of whether or not a statement by the USITC can be attributed to, and bind, the United States.[174] They confirm with clarity, in relation to a specific context, the conclusions reached above in relation to questions 2(a) and 2(c). The ILC Draft Articles concern the premises for establishing the responsibility of states for their internationally wrongful acts. They do not concern responsibility for conduct that does not constitute an international wrong. However, although they represent an attempt to codify one branch of the law of state responsibility, many of the principles referred to are of broader application. Chapter II of Part One of the ILC Draft Articles, entitled "Attribution of conduct to a State," which includes Article 4, reflects general principles of international law capable of transposition and application to the present context. Article 4 of the ILC Articles concerns the attributability of the conduct of state organs. It reflects a

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[167] SAA, p. 656.

[168] See, e.g., Advisory Opinion on the International Status of South-West Africa (I.C.J. Reports, 1950, at pp. 128, 135), cited above; and the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Reports 1962 at p. 6.

[169] See also the Panel Report on *US – Section 301 Trade Act*, para. 7.114.

[170] See, e.g., the Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review,* the Panel Report on *US – Export Restrains,* and the Panel Report on *US – Section 301 Trade Act.*

[171] SAA, p. 657.

[172] Ibid., p. 656.

[173] USITC Document, p. viii.

[174] The International Law Commission is a subsidiary organ of the United Nations General Assembly. Although the ILC Draft Articles have no binding force *per se* at international law, they do reflect agreement reached by leading publicists from a variety of political and regional backgrounds. Given the ILC's mandate to codify international law, the ILC Draft Articles thus constitute weighty evidence of customary international law.

rule of customary international law[175] that a sovereign state is responsible for the conduct of all of its organs, acting in that capacity, as part of the principle of the unity of the state at international law. The reference to a state organ in Article 4 is extremely wide, extending beyond organs of central government to all kinds of state organ, whatever its functions, position or character and whatever its level in the state hierarchy. The conduct of any state organ is therefore capable of giving rise to state responsibility and to this extent can bind the state to the consequences flowing therefrom. Applying these general statements about the rules of state responsibility and attribution to the present case, the USITC is an organ of the United States tasked with, *inter alia*, the compilation and maintenance of the US Schedule. Its statements of interpretation of the US Schedule therefore represent acts carried out in its capacity as an organ of the United States and in relation to which the United States can be held responsible at international law.[176]

United States

The document in question is merely an "explanatory" text prepared by an independent agency with no authority to negotiate or interpret agreements on behalf of the United States.[177] The document states that *"[t]o facilitate comparison* of the US Schedule with foreign schedules, the USITC has developed a concordance...." This does not indicate that USITC was purporting to issue an interpretation.

[a]: Antigua appears to assert that the USITC Document represents "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.[178] Antigua is mistaken. The Appellate Body has referred to such "subsequent practice" as a "discernible pattern of acts or pronouncements implying an agreement among WTO Members."[179] Clearly explanatory materials prepared unilaterally by only one independent organ of one of the Members do not constitute such a pattern, and therefore have no particular status under the customary international rules of treaty interpretation as reflected in the Vienna Convention.

[b]: The SAA of the URAA was prepared and submitted with the URAA. The function of this SAA is set forth in its preamble, as follows:

> This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and

[175] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 121 ILR 405, at p.432, para. 62, referring to Article 6 of the previous version ILC Draft Articles, now Article 4.

[176] Antigua states that for the purposes of the ILC Draft Articles, even if the USITC were not an organ of the United States, its statements of interpretation of the US Schedule would still be attributable to the United States by virtue of Article 5 of the ILC Draft Articles. Article 5 deals with the conduct of bodies that are not state organs so as to be covered by Article 4, but that are nonetheless authorised to exercise elements of governmental authority. The USITC has been explicitly authorised by the United States federal government to compile and maintain the US Schedule. That role clearly involves the exercise of an element of governmental authority in relation to the United States' WTO obligations. The USITC's statements about the interpretation to be given to the US Schedule were made in that capacity and would thus be attributable to, and bind, the United States by virtue of Article 5 even if the USITC were not an organ of the United States.

[177] The USITC is an independent, quasi-judicial federal agency that administers U.S. trade remedy laws within its mandate and also provides non-binding, independent information and advice to the President and Congress on tariff and trade matters.

[178] The United States infers this from Antigua's reference to the document under the heading of "practice in the application of the treaty." See Section III.B.2 of this Report.

[179] See Appellate Body Report on *Chile – Price Band System*, para. 214.

> proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.
>
> As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

The SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the US system, however, is only in respect to its interpretive authority *vis-à-vis* the statute.

By contrast, the USITC "explanatory" document prefatory to the copy of the US Schedule of Specific Commitments maintained by the USITC were prepared only "to facilitate comparison" for the reader. It is not, and does not purport to be, in any way binding or authoritative as a matter of US law. Nor has it been approved by Congress. Moreover, the United States notes that facilitating "comparison" with other documents in no way implies identity of meaning between the US schedule and such other documents.

[c]: Statements of the USITC cannot bind the United States with regard to the interpretation of a multilateral treaty. It is important to note that the issue here relates to the interpretation of a term of an annex to the GATS, not the meaning of US law or the legal status of the USITC. Neither the United States (through the USITC or otherwise) nor any other Member may unilaterally adopt multilaterally binding interpretations of a term of the GATS, or any other WTO agreement.

[d]: The United States does not consider that Article 4 of the Draft Articles on the Responsibility for States of Internationally Wrongful Acts has any relevance to the interpretation of the US Schedule, the issue in this dispute. First, the United States notes that it is not a "customary rule of interpretation of international law" within the meaning of Article 3.2 of the DSU. Second, it is inapplicable in any event because USITC is not purporting to interpret the US schedule.

Canada

[a]: The United States says that the USITC Document has no legal significance since the explicit purpose of the concordance in the document is only to "facilitate comparison of the US Schedule with foreign schedules."[180] This statement is factually incomplete and legally incorrect. The relevant part of the USITC Document reads:

> To facilitate comparison of the US Schedule with foreign schedules, the USITC has developed a concordance that demonstrates the relationships between sectors found in the US Schedule, sectors identified in the GATT Secretariat's Services Sectoral Classification List, and sectors defined and numbered in the United Nations' Provisional Central Product Classification (CPC) System. In preparing national schedules, countries were requested to identify and define sectors and sub-sectors in

[180] See Section III.B.2. of this Report.

> accordance with the GATT Secretariat's list [the W/120], which lists sectors and their respective CPC numbers. Accordingly, foreign schedules frequently make explicit references to the CPC numbers. The US Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list.
>
> The concordance developed by the USITC clarifies how the service sectors referenced in the GATT Secretariat's list, the CPC system, and the US Schedule correspond. […][181]

Such a statement by the United States federal agency that, "[a]t the request of the Office of the United States Trade Representative[,] […] assumed responsibility for maintaining and updating, as necessary, the [US Schedule]"[182] has probative value and is a factor confirming other evidence that there is a close correspondence between the United States' specific commitments, the W/120 and the CPC numbers referred to in it.

In *Chile – Taxes on Alcoholic Beverages*, the Panel found that statements by a government against WTO interests are most probative.[183] The USITC Document is such a statement to the extent that, in this dispute, the United States is taking the position that there is no close correspondence between the United States' specific commitments, the W/120 and the CPC numbers referred to in it.

[b]: The conclusion in [a] above is not affected by the fact that, unlike the United States' Statement of Administrative Action, the USITC Document does not specifically state that it represents an "authoritative" expression by the United States government concerning its views regarding the interpretation and application of the Uruguay Round agreements.[184] The probative value of a statement made by an organ of a State (Member) needs to be assessed on a case-by-case basis. This may depend, for instance, on the identity of the organ making the statement, and the nature and circumstances of that statement.

In the present case, the organ of the United States that made pronouncements concerning the structure and content of the US Schedule is not just any agency. It is the United States federal agency that, at the request of the Office of the USTR assumed responsibility for maintaining and updating, as necessary, the US Schedule.[185] The nature of the pronouncements, and the circumstances of their making, are also formal, explicit and unequivocal. In the circumstances of this case, Canada is of the view that the USITC Document can legitimately be considered to be probative of the United States' interpretation of its own Schedule under the GATS. That document (concordance) undermines any argument by the United States that its Schedule has no relation whatsoever with the W/120 and the corresponding CPC numbers, and thus that the latter should be ignored or considered irrelevant when ascertaining the meaning of the specific commitments undertaken by the United States. Rather than supporting the United States' position, the USITC Document confirms other evidence that there is a

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[181] USITC Document, p. viii.

[182] Ibid., p. vii.

[183] Panel Report on *Chile – Alcoholic Beverages*, para. 7.119.

[184] The United States' Statement of Administrative Action states: As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority. Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Volume 1, 103d Congress, 2nd Session, 1994, p. 656. See Panel Report on *US - Exports Restraints*, paras. 8.93-8.100, where interpretive value was given to the United States' Statement of Administrative Action.

[185] USITC Document, p. vii.

close correspondence between the United States' specific commitments, the W/120 and the CPC numbers referred to in it.

[c]: As indicated above, in the circumstances of this case, the pronouncements of the USITC can legitimately be attributed to the United States, and thus be considered to be evidence of the United States' interpretation of its own Schedule under the GATS. It has probative value in that it is a statement of the United States that is contrary to the position taken by the United States in the present case. It is one credible element among others that undermines, and refutes, the position advocated by the United States in this case. It is a unilateral statement of the United States made spontaneously, and it can be used for the "purpose of throwing light on a disputed question of fact," namely, the intention of the United States to adopt and maintain a Schedule that corresponds closely with the W/120 and the corresponding CPC numbers.[186]

[d]: Canada notes that the attribution, in this case, of the USITC Document to the United States is in line with Article 4 of the International Law Commission's Articles on State Responsibility,[187] which expresses the well-known and general international law principle of the unity of the State at international law.[188] Another expression of that principle of the unity of the State at international law can be found in Article 27 of the Vienna Convention. That principle also finds its expression in the GATS itself, in that the measures of a Member that are subject to the GATS are those taken by central, regional or local governments and authorities, as well as those taken by non-governmental bodies in the exercise of powers delegated by such governments or authorities.[189] Any measure taken by such governments or authorities, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, is covered.[190] Just as a measure of the USITC can be a measure for which the United States is responsible under the GATS, a pronouncement by the USITC, such as in the document containing the concordance, may be attributed to the United States when considering the obligations of the United States under the GATS.

European Communities

[a]: The document of the USITC contained in Exhibit AB-65 is a document from a WTO Member – the United States – providing indications as to the content of its Schedules of specific commitments, compared to the W/120 and the CPC. The attributability of this document to the United States as a WTO Member is beyond doubt as discussed below, in the reply to question 2(c). The USITC Document contained has to be seen together with other documents issued by different US authorities during and after the conclusion of the Uruguay Round and addressing the issue of GATS Schedules. These documents include, in the first place, the various versions of the US Schedule tabled by the United States in the final phase of the Uruguay Round, referred to above in the reply to question 1. They further include other documents referred to by the European Communities at the Third Party session of the Panel's first substantive meeting with the parties. These are the 1998 version of the

[186] See *Anglo-Iranian Oil Co. Case*, 1952 *ICJ* 93, at p. 107.

[187] The Draft Articles on Responsibility of States for Internationally Wrongful Acts were adopted by the International Law Commission on 9 August 2001. The General Assembly of the United Nations has taken note of the Draft Articles adopted by the International Law Commission: Resolution of the General Assembly of the UN, A/RES/56/83, Responsibility of States for internationally wrongful acts, adopted on 12 December 2001.

[188] For instances where the Articles on State Responsibility have been referred to for additional interpretive guidance, see: Appellate Body Report on *US – Line Pipe*, paras. 259-262; Appellate Body Report on *US – Cotton Yarn*, para. 120; *US – FSC (Article 22.6 – US)*, paras. 5.58-5.60; *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44. See also In the Matter of an Arbitration under Chapter Eleven of the North American Free Trade Agreement Between ADF Group Inc. and United States of America, ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003, Judge Florentino P. Feliciano (President), para. 166, where it was determined that Article 4 of the Articles on State Responsibility reflects an established rule of customary international law.

[189] GATS Article I:3(a).

[190] GATS Article XXVIII(a).

document contained in Exhibit AB-65 and two annual USITC reports on trends in US service trade for 1996 and 2003.[191]

The 1998 version of the USITC Document reproduces the table of concordance already contained in such exhibit.[192] The 2003 Annual Report, when mentioning the classification issues arising in the area of utility services, considers that[193]

> [i]ndustry classification issues present a central challenge to negotiations on utility services, principally because utilities are poorly defined in the classification system used by WTO members in negotiating commitments under the Uruguay Round. This classification system is based on the UN Provisional Central Product Classification (Provisional CPC), a product and service classification intended to provide a general framework for international comparison of data. Because the Provisional CPC was developed during the 1980s and published in 1991, it does not reflect the major changes in the structure of the utility industries brought about by the privatization and regulatory reform programs that proliferated during the 1990s. As a result, the CPC does not contain categories that adequately describe markets where production, transmission, distribution, and commercialization activities have been unbundled into discrete functions that are open to private participation and, to some degree, competition.[38]
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> [38] The Provisional CPC was updated in 1998 with the publication of CPC Version 1, which does reflect some of the industry changes more accurately. However, because GATS commitments are based upon the Provisional CPC, shifting to Version 1 could alter the legal standing of existing commitments.

For its part, the 1996 Annual Report refers to W/120 "[f]or a complete list of service industries addressed during the Uruguay Round."[194]

It is noteworthy that these statements are absolutely unqualified and do not distinguish either between the United States and other Members, or between WTO Members that included express references to the CPC in their Schedules and those that did not. In other words, the United States itself does not seem to see a fundamental difference between Members' Schedules that include express references to the CPC and those not including such references. Taken together, these documents show a consistent position, on the part of the United States, that GATS specific commitments, including its own commitments for recreational services, follow the CPC categories but for express departures.

As to the legal status of the USITC Document contained in Exhibit AB-65, in the EC view it constitutes practice of the United States in the application of the *WTO Agreement* subsequent to its conclusion. As such, it is a relevant instrument of interpretation of the US WTO obligations, within the meaning of Article 31.3(b) of the Vienna Convention. As noted in the EC Third party submission

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[191] USITC, *U.S. Trade Shifts in Selected Industries: Services*, Investigation No, 332-345, June 1996, Publication No. 2969 (available at the Internet address: http://www.usitc.gov/wais/reports/arc/w2969.htm); USITC, *Recent Trends in U.S. Services Trade*, 2003 Annual Report, Investigation No. 332-345, May 2003, Publication No. 3599 (available at the Internet address: ftp://ftp.usitc.gov/pub/reports/studies/PUB3599.PDF).

[192] Compare p. xxv of Exhibit AB-65 and p. xxiv of the 1998 version.

[193] USITC, *Recent Trends in U.S. Services Trade*, 2003 Annual Report, Investigation No. 332-345, May 2003, Publication No. 3599, p. 12-9 (emphasis added).

[194] USITC, *U.S. Trade Shifts in Selected Industries: Services*, Investigation No, 332-345, June 1996, Publication No. 2969, p. 4-4, footnote 14.

and Oral statement, this document merely confirms what already results from the 1993 Scheduling Guidelines and the W/120, as well as from the cover note to the US draft final schedule.

The European Communities is aware of the objection raised by the United States as to the value of "unilateral practice" of one party to a treaty.[195] The relevance of unilateral practice has to be evaluated in the light of the obligation to be implemented. In particular, implementation of a Schedule of specific commitments is incumbent upon the WTO Member concerned. Therefore, the practice of that Member is particularly relevant to interpret that part of the WTO Agreement. The "implementing practice" of other Members in respect of such Schedule appears to be limited to either acceptance of or objections to the way in which the Member concerned applies its Schedule. To the best of the EC knowledge no WTO Member has objected to the concordance provided by the USITC in its document. Also, in its Report in *EC – Computer Equipment* the Appellate Body referred to practice of one Member, the European Communities, in order to review the EC Schedule.[196] The documents issued by US authorities after the Uruguay Round, and the lack of objections, by other WTO Members, to the position that GATS commitments, and specifically US commitments for sub-sector 10.D, are based on the CPC but for express departures, constitute a "discernible pattern" of a concordant sequence of acts implying an agreement of the various WTO Members on this interpretative issue.[197]

[b]: The relevance for interpretation of treaty obligations in accordance with the Vienna Convention of each instrument must be evaluated on its own merits, irrespective of the status and value of other possible documents and instruments.

The SAA is one document in which the United States indicated what it believes to be the interpretation of the Uruguay Round texts and the obligations of the United States. As noted by the Panel in *US – Section 301 Trade Act*, the SAA provides, in its own terms,[198] "[…] this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law." Based on this, in the words of the Panel, "[T]he SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely."[199] Of course, the fact that the SAA is a document in which the US Administration position was set out does not exclude that other documents also express positions attributable to the United States. The US authorities are subject to the international customary rules on attributability of acts to a State just as authorities of all other Members are.

The European Communities also notes that the SAA contains no general interpretation of the US Specific commitments. Nor was the US obliged to do so, since paragraph 16 of the 1993 Scheduling Guidelines clarifies that in the absence of express departures, reference should be made to the CPC codes. Instead, the SAA refers to a specific instance in which the United States decided to depart from the CPC system:

> [s]ome commitments made in the financial services sector, including those made by the United States, have been scheduled according to the Understanding on Commitments in Financial Services, which formed part of the Uruguay Round

[195] See Section III.B.2. of this Report.
[196] Appellate Body Report on *EC – Computer Equipment,* para. 93.
[197] Appellate Body Report on *Chile – Price Band System*, paras. 213-214, quoting Appellate Body Report on *Japan – Alcoholic Beverages II,* p. 11.
[198] Panel Report on *US – Section 301 Trade Act*, para. 7.110; see also Panel Report on *US – Export Restraints*, para. 2.4 and Panel Report on *US – Section 129(c)(1) URAA*, para. 6.36.
[199] Panel Report on *US – Section 301 Trade Act*, para. 7.111.

> package. The Understanding describes certain commitments that differ from, and in some cases are more detailed than, those found in the GATS.[200]

This specific indication in the SAA confirms that when so needed, the United States was able to indicate a departure from the general CPC system. No other such departure is indicated in the Statement of Administrative Action. Given that the SAA contains no general explanation of the scope of the US Schedules, the US authorities must presumably have considered it useful to provide such explanation elsewhere, also for the benefit of business operators. This was done, *inter alia*, in the USITC Document. Providing such clarifications is indeed one of the missions of the USITC[201] and the information contained in the USITC Document is presumably correct – witness the fact that the same concordance table was reproduced in the 1998 version of Exhibit AB-65. Otherwise, one might infer that the USITC has not fulfilled the task it was entrusted with by the USTR (see reply to question 2(d) below). Of course, the USITC Document itself does not "create" or "determine" the scope of the US obligations under the US Schedule (nor does, for that matter, the SAA). A WTO Member does not have a right to determine unilaterally and subsequently the content of its international obligations. Rather, the USITC Document confirms what can already be gleaned from the 1993 Scheduling Guidelines and what was stated by the United States when it submitted its Draft Final Schedule, also containing an offer for sub-sector 10.D.

[c]: Yes. It should be noted that the "statement" to which the Panel presumably refers – that is, the concordance between the US Schedule, the W/120 and the CPC is not a incidental or spontaneous one. It is one rendered by the USITC at the request of the USTR, in turn acting under legal authority delegated to it by the US President under Section 332 of the Tariff Act of 1930.[202] The position expressed by the USITC in Exhibit AB-65 is also not an isolated one. As already noted above in reply to question 2(a), the USITC has, for several purposes, taken the general position that GATS commitments were negotiated on the basis of the CPC. As to the legal value of the USITC Document, such document confirms the position consistently taken by the United States as to the way in which its Schedule is structured and the scope of the US specific commitments. It does not create a legal obligation to interpret the US Schedule consistently with the 1993 Scheduling Guidelines and the W/120 (and thus the CPC). That obligation already flows from the value of the 1993 Scheduling Guidelines and W/120 as interpretative tools within the meaning of the Vienna Convention. It also results from the express indication, in the explanatory note to the drafts and final version of the US Schedule, that "Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)." [203] This matter is further addressed below in reply to question 2(d).

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[200] Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Congress, 2nd Session, p. 976 (1994).

[201] See, e.g., the USITC strategic plan (available at the Internet address: http://www.usitc.gov/webabout.htm), p. 21, whereby it is stated:

> Stable mission. The Commission maintains an extensive repository of trade data and trade-related expertise and provides information services relating to U.S. international trade and competitiveness.

[202] 19 U.S.C. 1332(g) (the provisions governing the organization and functioning of the USITC are available at the Internet address: http://www4.law.cornell.edu/uscode/19/ch4stIIpII.html).

[203] *Communication from the United States of America, Draft Final Schedule of the United States of America to the members of the Group of Negotiations on Services*, MTN.GNS/W/112/Rev.3, 7 December 1993; *Communication from the United States of America, Revised Conditional Offer of the United States of America concerning initial commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993; *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993.

[d]: State responsibility is not the only context in which the issue of attributability of an act to a State (or other subject of public international law) arises. For example, the same issue arises – as an implied threshold question – in treaty-making. Thus, it is submitted that Article 4 of the *Draft Articles on the Responsibility for States of Internationally Wrongful Acts*[204] is relevant in that it codifies the customary law principle of attribution, concerning attributability of actions to a State generally – not just with a view to establishing international responsibility. In fact, the act of the USITC is not a wrongful act. Chapter II of Part I of the International Law Commission Articles on the Responsibility of States defines the circumstances in which a certain conduct is attributable to the State, the latter being an essential requirement for the establishment of international responsibility of a State. In particular Article 4, on the basis of the principle of the unity of the State, lays down the rule that the conduct of an organ of a State is attributable to that State. As the International Law Commission points out in its commentary on the Articles on State Responsibility the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognised in international judicial decisions." [205] Furthermore, the International Court of Justice has recently confirmed the above rule as well as its customary character. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* the Court held that "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility … ".[206]

As the International Law Commission explains, the term "state organ" is to be understood in the most general sense.[207] It extends to organs from any branch of the State, exercising legislative, executive, judicial *or any other functions*. It should be noted that it has been held that these functions might involve the giving of administrative guidance to the private sector.[208] Article 5 of the International Law Commission Articles on the Responsibility of States goes further to attribute to the State the conduct of a person or entity which is not a State organ in the sense of Article 4, but which is nevertheless authorised by the law of that State to exercise governmental authority. As the ILC explains in its commentary to Article 5, the generic term 'entity' covers a wide variety of bodies which may include public corporations, semi-public entities, *public agencies* of various kinds, "provided that the entity in question is empowered by the law of the State to exercise functions of a public character normally exercised by State organs".[209]

The members of the USITC are appointed by the President, with the consent of the Senate.[210] Furthermore, the Commission acts at the request of the USTR, being obliged to carry out investigations and reports as requested by the President or the Congress.[211] The USITC is clearly entrusted with special powers, which are normally exercised by State organs. For example, it is empowered to "prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country".[212] Equally, the USITC has the authority to obtain information by, among others,

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[204] The text of the Draft Articles is reflected in a resolution adopted on 12 December 2001 by the UN General Assembly (A/RES/56/83).

[205] *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2; J. Crawford, *The International Law Commission's Articles on State Responsibility- Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, commentary to Article 4 at p. 94, para. 3 and footnote 108.

[206] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* I.C.J. Reports 1999, p. 62, at p. 87, para. 62, referring to then Draft Article 6, now embodied in Article 4.

[207] *The International Law Commission's Articles on State Responsibility,* p. 85, para. 6.

[208] Panel Report on *Japan – Semi-conductors*, BISD 35S/116; Panel Report in *Japan – Film*.

[209] *The International Law Commission's Articles on State Responsibility,* p. 100, para. 2.

[210] 19 U.S.C. 1330 (a).

[211] 19 U.S.C. 1332 (g).

[212] 19 U.S.C. 1331 (d).

having access to any documents pertaining in its investigations, summoning witnesses, and requesting any person to provide it with the required information.[213] The letter by which the USTR requested the USITC to undertake responsibility for maintaining the US Schedule of specific commitments[214] is absolutely clear in this respect:

> [u]nder the GATS, the US Government is obligated to develop and maintain a US Schedule of Services Commitments. I believe that the maintenance of the US Schedule and list is a task that is most appropriately performed by the US International Trade Commission. The Commission has significant experience in maintaining our GATT Schedule XX, reflecting US tariff concessions in the goods area. I therefore request, pursuant to authority delegated by the President under Section 332 of the Tariff Act of 1930, that the Commission initiate an ongoing program to compile and maintain the official US Schedule of Services Commitments.

Furthermore, domestic law, though relevant, is however not decisive in determining what constitutes a State organ. Otherwise, a State would be in a position to escape responsibility for the conduct of its own organs, acting in that capacity, simply by denying them that status under its own law. Therefore, as the International Law Commission points out, certain institutions performing public functions and exercising public powers (e.g. the police) are to be considered State organs even if they are regarded in internal law as autonomous and independent of the executive government.[215] Specifically, the fact that that the USITC is termed as an "independent agency" has no impact on the attributability of its actions to the United States. What is relevant is of course not the formal qualification of the body concerned, but the activity at issue in a particular case. Indeed, several actions of the USITC have been reviewed by panels and the Appellate Body in the past – for example, safeguard investigations and injury investigations in anti-dumping proceedings.[216]

Mexico

[a]: At the very least, that document constitutes relevant evidence on the USITC's position and practice with respect to the definition and scope of the United States' GATS commitments. Such evidence must be assessed by the Panel when applying Articles 31 and 32 of the Vienna Convention as part of its analysis of Antigua and Barbuda's claims.

[b]: Mexico notes that Exhibit AB-65 and the SAA do not appear to have been published for the same purposes. While the purpose of Exhibit AB-65 appears to be to provide a comprehensive explanation of the US Schedule of Specific Commitments, the SAA constitutes an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the *Uruguay Round Agreements Act*] in any judicial proceeding in which a question arises concerning such interpretation or application."[217]

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[213] 19 U.S.C. 1333.

[214] Letter from M. Kantor, United States Trade Representative, to D. E. Newquist, Chairman of the U.S. International Trade Commission, 18 April 1994 (emphasis added).

[215] *The International Law Commission's Articles on State Responsibility,* p. 92, para. 6 and p. 98, para. 11.

[216] See. e.g., for safeguards, Appellate Body Report on *US – Steel Safeguards*; for anti-dumping, e.g. Appellate Body Report on *US – Hot-Rolled Steel*. The acts of other independent agencies of the United States have also been reviewed by international jurisdictions: for example, actions of the Environmental Protection Agency (EPA) (e.g. Appellate Body Report, *US – Gasoline*, or of the Central Intelligence Agency (CIA) *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14). Both entities share with the USITC the qualification of "independent agencies" (see Official US Executive Branch Web Sites, with Internet address http://lcweb.loc.gov/global/executive/fed.html, visited on 17 December 2003).

[217] Panel Report on *US – Export Restraints*, para. 2.3.

[c]: In the context of this dispute, the issue is whether the statement by the USITC can be used to interpret the US Schedule of Specific Commitments within the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. See Mexico's response to question 2(a) above.

[d]: See the response to the previous question.

3. Antigua and Barbuda as well as the European Communities (Exhibit AB-74 and paragraph 15 of the European Communities' oral statement to the first meeting of the Panel with the parties) have referred to the cover note of the Draft Final Schedule of the United States of America concerning Initial Commitments, dated 7 December 1993, which contains a paragraph that reads as follows:

"Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)."

(a) In which revision of the Uruguay Round Draft (Final) Schedule of the United States was that cover note omitted?

(b) What is the legal status and value of that cover note for the interpretation of the US GATS Schedule?

Antigua

[a]: To Antigua's knowledge document MTN.GNS/W/112/Rev.3 is the final schedule submitted by the United States and the sentence from the cover note was never omitted. During the first substantive meeting with the Panel the United States pointed out that this cover note was not part of the actual schedule as annexed to the GATS. This is not because it was omitted or withdrawn by the United States but simply because such a cover note is not formally part of a GATS schedule as it is attached to the GATS by Article XX:3.

[b]: The cover note is part of the preparatory work of the US Schedule. Article 32 of the Vienna Convention provides that such a document may be used as a supplementary means of interpretation to confirm the meaning resulting from the application of Article 31 of the Vienna Convention. As mentioned above the cover note also confirms the acceptance by the United States of the scheduling method set out in the 1993 Scheduling Guidelines and W/120, thus confirming the status of these two documents as instruments accepted by all parties (per Article 31(2)(b) of the Vienna Convention).

United States

[a]: A note substantially similar to the quoted text appeared in documents MTN.GNS/W/112/Rev.2 and MTN.GNS/W/112/Rev.3.[218] It does not appear in the final document.

[b]: These negotiating history documents are "preparatory work" within the meaning of Article 32 of the Vienna Convention. The value of these notes is minimal, since at most they only confirm what the United States has already stated – that it generally followed the W/120 structure in its schedule of specific commitments. The Panel should distinguish, however, between a Member's use of W/120 as a basis for scheduling, and the inscription of references to the CPC to further describe its

[218] See Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, 7 December 1993, MTN.GNS/W/112/Rev.3, para. 5; Communication from the United States of America, Revised Conditional Offer of the United States of America Concerning Initial Commitments, 7 December 1993, MTN.GNS/W/112/Rev.2, p. 1. The word "revised" in the text quoted by the Panel does not appear in the cited materials.

commitments. Like other Members, the United States was free to choose to inscribe or not inscribe CPC references to further describe its commitments. The United States chose not to do so.

Canada

[a]: The *Draft Final Schedule of the United States of America Concerning Initial Commitments* ("Draft Final Schedule"), dated 7 December 1993, contains the following cover note:

> Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991) [the W/120].[219]

The Draft Final Schedule is the fourth and, as its name indicates, final, draft schedule circulated by the United States in the context of the market access negotiations under the GATS. The third draft schedule circulated by the United States contains a cover note identical to the cover note in the Draft Final Schedule.[220] Such a cover note does not appear in the first and second draft schedules circulated by the United States.[221]

[b]: The cover note contained in the last two draft schedules circulated by the United States forms part of the circumstances of the conclusion of the market access negotiations under the GATS. As such, it qualifies as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. Pursuant to that provision, the Panel may have recourse to such a supplementary means of interpretation in order, *e.g.*, to confirm the meaning of the United States' specific commitments resulting from the application of the general rule of interpretation set out in Article 31 of the Vienna Convention, or to determine that meaning when the interpretation according to Article 31 leaves it ambiguous or obscure. Canada has already demonstrated in its submission that the only reasonable conclusion, when ascertaining the common intention of the Members with respect to the United States' specific commitments, is that where the US Schedule mirrors the W/120, without any clear and explicit departure from it and the corresponding CPC numbers, the specific commitments at issue are to be interpreted in the light of the W/120 and the CPC numbers associated with it. The cover note contained in the last two draft schedules of the United States is yet another factor confirming, or clarifying, that this is the correct meaning to be given to the specific commitments of the United States. The Panel is justified in having recourse to that additional element under Article 32 of the Vienna Convention.

While the cover note does not appear in all four draft schedules circulated by the United States, the fact that it is contained in the last two is significant and gives it particular probative value. It clearly indicates that as the negotiations progressed and were finalized, the understanding of the Members with respect to the United States' specific commitments was, as Canada has already argued, that the United States followed the W/120 (and by implication the corresponding CPC numbers), except where specifically noted.[222]

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[219] Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.3, 7 December 1993, para. 5.

[220] Communication from the United States of America, *Revised Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993, para. 4.

[221] Communication from the United States of America, *Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112, 13 November 1990. Communication from the United States of America, *Revised Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.1, 21 January 1992.

[222] Ibid. Canada notes that the mere fact that the first two draft schedules do not specify explicitly that they are based on the W/120 does not necessarily mean that that was not the case. The specification, or clarification, included in the last two draft schedules tends to show otherwise.

Canada recalls that in *EC – Computer Equipment*, the Panel, when interpreting the European Communities' Schedule under the GATT, did not consider the *Harmonized System* and its *Explanatory Notes*. The Appellate Body reacted as follows:

> We are puzzled by the fact that the Panel, in its effort to interpret the terms of [the] Schedule […], did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, *it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the Harmonized System's nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature.* […] We believe […] that a proper interpretation of [the] Schedule […] should have included an examination of the *Harmonized System* and its *Explanatory Notes*.[223]

The inclusion of the cover note in the last two draft schedules circulated by the United States constitutes evidence that through to the end of the market access negotiations between the United States and other Uruguay Round participants, these negotiations were held on the basis of the W/120's nomenclature. In other words, it constitutes evidence of what the common intention of the Uruguay Round participants was (and still is) with respect to the United States' specific commitments.[224] That common intention must now be respected. It cannot be changed *a posteriori*, as suggested by the United States, by relying almost exclusively on definitions of dictionaries that result in reading the United States' specific commitments out of their context and without regard to the object and purpose of the GATS and the *WTO Agreement*.[225]

European Communities

[a]: In addition to the documents referred to by the EC in its oral statement, there was another revised final schedule of commitments of the United States, circulated as MTN.GNS/W/112/Rev.4 on 15 December 1993.[226] This was only distributed in paper format in the very last weeks of the negotiations, when the United States decided to withdraw some of its proposed commitments (e.g. in the maritime transport sector). Such document only includes a few amendments related to some entries in the US Schedule, but does not modify the cover note to the previous final draft (MTN.GNS/W/112/Rev3). On the contrary, it contains the very same statement as quoted by the Panel from the previous revision. It thus does not change in any way the conclusion on the issue at stake. The only further activity was a process of "technical verification of schedules", which did not modify at all the scope of the results of negotiations.[227] Thus, never before the end of the negotiations

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[223] Appellate Body Report on *EC – Computer Equipment*, para. 89.

[224] Appellate Body Report on *EC – Computer Equipment*, paras. 84 and 109.

[225] In any case, Canada agrees with the European Communities that the definitions of dictionaries referred to by the United States do not support the conclusion that the specific commitments taken by the United States under sub-sector 10.D – Other Recreational Services (except sporting) exclude as such gambling and betting services. One may refer to the Preamble of the GATS for guidance on the object and purpose of that treaty. The Preamble of the GATS emphasizes, e.g., the wish of the Members to "establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade *under conditions of transparency* […]." [emphasis added] The United States' approach to the interpretation of its Schedule, which leaves its specific commitments ambiguous and unclear, is the antithesis of this objective expressed by the Members in the Preamble of the GATS.

[226] *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993.

[227] See GATT/AIR/3544, 15 January 1994, para. 1:

> [i]l est signalé que, les négociations sur les services étant terminées, l'objet de ce processus est de confirmer l'exactitude des listes sur le plan technique et non d'en modifier la teneur.

did the United States contradict its position that the scope of its commitments is based on the 1991 Sectoral Classification W/120 and the CPC.[228]

[b]: The legal status and value of the cover note is the same as that of its attachment. It is a preparatory document where the United States explained the scope of its final offer and thus of the obligations it was offering to undertake. As such, it is part of the supplementary means of interpretation of the US Schedules of specific commitments. It is the document which the other [then] GATT contracting parties had available in order to evaluate the US services final offer. If the United States had meant, after the issuance of documents. MTN.GNS/W/112/Rev.3 and MTN.GNS/W/112/Rev.4, to depart from the 1991 Sectoral Classification and thus from the corresponding CPC categories, good faith in the conduct of international negotiations would have required it to warn the other contracting parties of its changed position before the end of the negotiations. Since the United States failed to do so, its Schedules, as finally adopted, are to be read in the light of W/120 and the corresponding CPC numbers since their entry into force.

Mexico

[a]: To Mexico's knowledge, the cover note appears in the Final Draft of the US Schedule of Specific Commitments (Communication from the United States of America, *Draft Final Schedule of the United States of America to the Members of the Group on Negotiations on Services*, MTN.GNS/W/112/Rev.3, December 1993) and in the introduction to the US Revised Conditional Offer tabled during the Uruguay Round negotiations (Communication from the United States of America, Revised Conditional Offer of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.2, 1 October 1993).

[b]: The United States Draft Final Schedule, which contains the cover note, constitutes a part of the preparatory work of the GATS and the WTO Agreement. At the very least, these documents thus qualify as "supplementary means of interpretation" pursuant to Article 32 of the Vienna Convention.

For Antigua and Barbuda:

4. What is the legal status and value of the other Members' Schedules in interpreting the US GATS Schedule?

Antigua

Article XX:3 of the GATS provides that schedules form an integral part of the Agreement. Consequently, the other Members' GATS schedules provide "context" for the interpretation of the US Schedule as per Article 31(2)(a) of the Vienna Convention. In paragraphs 41-60 of its Third Party Submission the European Communities has shown that an interpretation of the US Schedule in the context of other Member's schedules confirms the conclusion that the United States has made full modes 1 and 2 market access and national treatment commitments with regard to gambling and betting services.

Canada

It is striking that when addressing the context of the specific commitments at issue in this case, the United States, instead of referring to its own Schedule, e.g. its structure and the fact that it generally mirrors the W/120, seeks to rely on a few entries in a very limited and selective number of

[228] As it was clear to all (future) WTO Members that the United States had, until the finalization of its Schedule, followed the 1993 Scheduling Guidelines and the 1991 Sectoral classification and CPC codes but for express departures, there was no need to repeat in doc. GATS/SC/90 what already flows, for all Members, from para. 16 of the 1993 Scheduling Guidelines.

other Members' Schedules in order to interpret its own Schedule. As the European Communities has shown, these entries referred to by the United States do not clearly support the United States' position. In any case, what a very few Members out of a hundred and forty-six[229] may have done in their Schedules with respect to specific services is not relevant for purposes of determining what the United States has done in its own Schedule. Canada has made clear that a Member may, in certain cases, have departed from the W/120 and the corresponding CPC numbers associated with it. No Member was obliged to schedule specific commitments in accordance with the W/120 and the corresponding CPC numbers. The fact that a few Members may have scheduled specific commitments on gambling and betting services differently than the United States simply reflects that fact. The task of a panel is to look at what the United States has done in its Schedule, not at what a few other Members may have done.

For the United States:

5. Which classification system, if any, did the United States follow in establishing its GATS schedule of specific commitments? If the United States has followed a specific classification system, could the United States provide the Panel with a table of concordance between that system and W/120 for the entire schedule? In the absence of an explicit reference to the CPC in the US Schedule, what is the definitional framework within which the US commitment in the first column of its Schedule should be interpreted?

United States

Subject to some changes (*e.g.,* "except sporting"), the United States generally followed the W/120 *structure* in its schedule of specific commitments. However, the United States did not refer to the CPC or any other particular nomenclature to describe the terms of the US Schedule, preferring instead that those terms be interpreted according to their ordinary meaning, in their context and in light of the object and purpose of the GATS. Those rules, reflected in Articles 31 and 32 of the Vienna Convention, provide the definitional framework within which the description of the US commitment in the first column of its Schedule should be interpreted. Because the United States did not agree to any special meanings for the terms in its schedule, such as by agreeing to any particular nomenclature, there is no additional document that could be used as the basis for a concordance.

6. What is the relevance of the US industry classification system for interpreting the US GATS schedule? How are gambling and betting services classified in that system?

United States

The North American Industry Classification System (NAICS 2002) is intended for classifying types of establishments for statistical purposes. It is the result of trilateral negotiations among three WTO Members (Canada, Mexico, and the United States). Accordingly it is not negotiating history for the US GATS Schedule, but does provide evidence that there are internationally accepted, alternative ways to classify services other than the CPC. The NAICS supports the US view that gambling is not part of "other recreational services (except sporting)." NAICS 2002 includes the two-digit heading 71, "Arts, Entertainment, and Recreation." Within that heading, three-digit heading 713, "Amusement, Gambling, and Recreation Industries," includes four-digit heading 7132 "Gambling Industries." Significantly, "Gambling Industries" is a stand-alone heading, and is not part of the separate four-digit heading 7139, covering "Other Amusement and Recreation Industries" (7139). "Internet game sites" falls under separate NAICS 2002 heading 516110, "Internet Publishing and

[229] As of 4 April 2003.

Broadcasting." Definitions of these categories may be found on the US Census Bureau website "2002 NAICS Codes and Titles" by clicking on the hyperlinks for individual codes.[230]

Antigua

At the time of the Uruguay Round negotiations the United States used the Standard Industrial Classification system (the "SIC"), introduced in 1987. Although this classification has since been reorganised (in 1997), to the current North American Industry Classification System (the "NAICS"), only the SIC system could possibly be relevant for any examination of United States commitments agreed in the Uruguay Round as the NAICS postdates the Uruguay Round Agreements. The SIC contained a broad category, "79 – Amusement and Recreation Services."[231] This in turn contained a subcategory "7999 - Amusement and Recreation Services [not elsewhere classified]." This last subcategory included "casinos" and "lottery, bingo, bookie and other gaming operations." Thus, under the SIC gambling and betting services were classified in *precisely the same way* as they are under the CPC and W/120 in a "residual" subcategory of a general category for recreational services.

7. Could the United States provide a breakdown of the services sub-sectors that are covered under:

(a) Sub-sector 10.D of the US Schedule, entitled *Other recreational services (except sporting)*?

(b) Sub-sector 10.A of the US Schedule, entitled *Entertainment services*?

United States

No such breakdown was provided by the GATS negotiators in regard to the US Schedule, therefore it is not possible to provide an *a priori* list of the contents of 10.A and 10.D based on the text of the GATS and its annexes. The meaning of each of these sub-sectors must be discerned in the same manner as that of any other term of a treaty – through application of the customary rules of treaty interpretation. Even a Member that referred to the CPC in its schedule would be unable to provide a complete breakdown of 10.A and 10.D, inasmuch as the CPC categories are no less subject to interpretation than the W/120 headings. (Indeed, this observation is implicit in the Panel's question regarding the meaning of "gambling and betting services" (question 13)).

Subject to the foregoing observations, the United States believes that an interpreter could find, consistent with customary rules of treaty interpretation, that: (i) "Other recreational services (except sporting)" (10.D) includes services that fall squarely within the plain meaning of "recreation" and are distinguishable from either "sporting" or "entertainment." Such activities could include, *inter alia,* the operation of such recreational facilities as marinas, beaches, and parks, as well as the organization and/or facilitation of non-sporting recreational activities; and (ii) "Entertainment services" (10.A) includes services that fall squarely within the plain meaning of "entertainment" and are distinguishable from either "sporting" or "recreation." Such activities could include, *inter alia,* services consisting of the operation of entertainment facilities, such as theaters, dance halls, music halls, and other performing arts venues; and the organization and/or facilitation of such entertainment activities.

To the extent that other services fall within sector 10 but do not fall within sub-sectors 10.A through 10.D, those services reside by default in sector 10.E, "other."

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[230] See http://www.census.gov/epcd/naics02/naicod02.htm.

[231] See 1987 Standard Industry Classification ("SIC") system matched to 1997 North American Industry Classification System.

8. The United States argues, *inter alia*, that (i) "except sporting" is meant to exclude gambling and betting from its commitment under 10.D and, (ii) had the US undertaken a commitment on gambling and betting, it would have done it under 10.E (*Other*). Why would the United States feel the need to exclude "sporting" (including, in its view, gambling and betting) from sub-sector 10.D if it considered that gambling and betting are included under 10.E? How can this be reconciled with the principle that entries in a classification system are mutually exclusive?

United States

The two assertions to which the Panel refers respond to two alternative arguments advanced by Antigua (which bears the burden of proving the existence of a US commitment). In response to Antigua's assertion that sub-sector 10.D of the US Schedule is defined by the CPC and includes gambling services, the United States has pointed out that (1) the US Schedule is not and cannot be defined by the CPC; and (2) even if 10.D did include gambling services (*quod non*), the words "except sporting" exclude gambling, which is within the ordinary meaning of "sporting."[232] In response to Antigua's assertion that gambling is within the ordinary meaning of "entertainment" and also within the ordinary meaning of "recreational," the United States has pointed out that (1) Antigua fails to prove this; and (2) even if it were true (*quod non*), the logical consequence would be that gambling really fits neither of these categories, and thus belongs in "10.E Other." The latter point is even more persuasive if the Panel finds that W/120 entries for "entertainment" and "other recreational services" are mutually exclusive.

Regarding why the United States would find it useful to exclude "sporting" (including gambling) if it belongs in 10.E in any event, the United States considers that the exclusion provides an added assurance against misinterpretation of the US commitments, while at the same time clarifying the status of other (non-gambling) forms of sporting.

B. THE MEASURE(S) AT ISSUE

For both parties:

9. What is the legal status and value of comments made by the US representative at meetings of the DSB[233] to the effect that the supply of cross-border gambling and betting services is prohibited under US law?

Antigua

In the context of this dispute the United States has twice before the DSB unequivocally stated that "cross-border gambling and betting services are prohibited under US law,"[234] confirming earlier statements made to Antigua during consultations. It has also made the same statement on a number of

[232] With respect to the meaning of "sporting," the United States attaches for the Panel's examination copies of the following definitions: *New Shorter Oxford English Dictionary,* p. 3000 (1993) ("Now *esp[ecially]* pertaining to or interested in betting or gambling"); *Merriam-Webster's Collegiate Dictionary,* p. 1134 (10th ed. 2001) ("of or relating to dissipation *and esp[ecially] gambling*"); *Webster's Third New International Dictionary,* p. 2206 (1986) ("of, relating to, or preoccupied with dissipation and esp[ecially] gambling"); *The American Heritage Dictionary,* p.1681 (4th ed., 2000) ("Of or associated with gambling."); *The Random House Dictionary of the English Language,* p. 1844 (2d ed. 1987) ("interested in or connected with sports or pursuits involving betting or gambling: *the sporting life of Las Vegas.*"); *Webster's II New Riverside University Dictionary,* p. 1124 (1988) ("Of or having to do with gambling."); *Encarta World English Dictionary, available at* http://encarta.msn.com/dictionary_/sporting.html (2004) ("of gambling: relating to gambling, or taking an interest in gambling").

[233] WT/DSB/M/151, para. 47 and WT/DSB/M/153, para 47.

[234] WT/DSB/M/151, para. 47; WT/DSB/M/153, para. 47.

other occasions not directly related to this proceeding.[235] Although at the first Panel session in this matter the United States appeared initially to have withdrawn that statement, during the final Panel meeting of the session the United States once more made clear its position that the cross-border provision of gambling and betting services from Antigua to the United States was illegal under United States law.[236]

The discussion contained in *US – Section 301 Trade Act* is very helpful in assessing the effect of the United States statements before the DSB as well as before the Panel in this proceeding. In *US – Section 301 Trade Act* the United States had "explicitly, officially, repeatedly and unconditionally confirmed [a United States] commitment (…)"[237] both at a meeting of the panel and in response to questions from the panel. While observing that "[a]ttributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions,"[238] the panel found that the statements made before it "were a reflection of official US policy (…)" and

> "were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel's second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect."[239]

The panel concluded that:

> "We are satisfied that the representatives of the US appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. (…) It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSB, the legal position of a Member as regards its domestic law read in the light of its WTO obligations. The panel system would not function if such a power could not be presumed."[240]

Turning to the facts in this proceeding, the first statement of the United States to the DSB regarding the "total prohibition" was made by the United States Ambassador to the WTO, Mrs. Linnet F. Deily at the 24 June 2003 meeting of the DSB. It was read aloud to the DSB membership at that meeting and was unequivocal. The same statement was repeated virtually verbatim by the United States representative at the DSB meeting of 23 July 2003. And at the Panel meeting of

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[235] See, e.g, Letter from the United States Department of Justice to the National Association of Broadcasters entitled "Advertising for Internet Gambling and Offshore Sportsbooks Operations"; Statement of John G. Malcolm before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives (29 April 2003); Statement of John G. Malcolm at the Special Briefing: Money Laundering and Payment Systems in Online Gambling Sponsored by World Online Gambling Law Report (20 November 2002).

[236] In the final Panel meeting of the session, the United States explained its apparent reversal of position by claiming that not *all* gambling and betting services were prohibited, going on to reference odds-making services and other activities only tangentially related to gambling and betting as permissible, but reaffirming that all cross-border wagering—placing and taking of bets—was illegal under United States law. While it is unclear why the United States at this late juncture chose to modify its original statements regarding the "total prohibition" of cross-border gambling and betting services, it is Antigua's belief that this change in tactics is an attempt by the United States to avoid the snare of GATS Article XVI. See Second Submission of Antigua and Barbuda, WT/DS285, para. 38.

[237] Panel Report on *US – Section 301 Trade Act,* para. 7.115.

[238] Ibid., at para. 7.118.

[239] Ibid., at para. 7.122.

[240] Ibid., at para. 7.123.

11 December 2003, the United States head of delegation, while ostensibly narrowing the scope of earlier United States declarations on the subject, still clearly stated that the placing and taking of bets—"gambling and betting"—on a cross-border basis was illegal under United States law. Under the reasoning adopted by the panel in *US – Section 301 Trade Act*, the Panel is entitled to rely on these statements by the United States.[241] Given these clear declarations by the United States of "its legal position (…) as regards its domestic law"[242] at the heart of this dispute, it is untenable for the United States to assert that Antigua has argued the "total prohibition" based upon a "mere assertion" or that, indeed, Antigua has not made its *prima facie* case regarding the measures of the United States at issue in this proceeding.

The panel in *US – Section 301 Trade Act* referred to the judgment of the ICJ in the *Nuclear Test* case (Australia v. France).[243] In that case the ICJ found that France had imposed on itself an obligation of international law by making repeated public statements that it would cease the conduct of atmospheric nuclear tests. The panel in *US – Section 301 Trade Act* pointed out that the legal effect of the United States statement at issue un *US – Section 301 Trade Act* did not go as far as creating a new legal obligation but it nonetheless applied the same and perhaps even more stringent conditions that the ones unused by the ICJ in the *Nuclear Test* case.[244] In the *Nuclear Test* case the ICJ based its finding primarily on statements by the French President and the French Defence Minister at two press conferences.[245] The statements by the United States at issue in this case were not made at press conferences but, as in *US – Section 301 Trade Act,* were made in the context of a specific dispute settlement procedure. Furthermore the statements at issue in this case do not create a new legal obligation for the United States but only describe the effect of extant United States' domestic legislation. This results in a statement of fact upon which not only the Panel, but also Antigua and the third parties, are entitled to rely. With reference to the panel report in *US – Section 301 Trade Act,* Antigua submits that the dispute settlement system would not function if a complainant could not rely on such statement when bringing and formulating its case under the WTO dispute settlement procedures. At the very least a defendant should only be allowed to "withdraw" such a statement if it submits compelling evidence that its earlier statement about the effects of its domestic laws is incorrect—which the United States has not attempted to do. Otherwise a defendant would be encouraged to make incorrect statements about its own domestic laws simply to complicate the complainant's case and the panel's work.

Although this dispute settlement procedure is not governed by United States law, Antigua believes that United States law on the effect of statements such as those made by the United States regarding the total prohibition is helpful in assessing, to the extent relevant, the intention or *mens* of the United States in making its statements before the DSB and the Panel. If this matter were pending in a United States court, the United States representatives' statements would, standing alone, be sufficient evidence upon which a court could make a final determination on the issue of whether Antiguan operators face a total prohibition against providing cross-border gambling and betting services. In other words, the United States' own words before the DSB and the Panel would be sufficient, without the offer of any other evidence whatsoever, for a United States court to conclude that Antigua had carried the burden to prove the existence of a measure which interferes with the provision of betting and gambling services in contravention of the GATS.

Under United States law, the United States statements would be considered a stipulation as to the existence of a total prohibition of remote cross-border gambling services. A "stipulation" in a United States legal proceeding is defined as:

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[241] Ibid., at paras. 7.123 and 7.124.
[242] Ibid., at para. 7.123.
[243] I.C.J. Reports 1974 at p. 253.
[244] Panel Report on *US – Section 301 Trade Act* at footnote 692.
[245] See para. 40 of the judgment reported at I.C.J. Reports 1974 at p. 253.

> "[A]n agreement, admission, or *other concession* made in a judicial proceeding by the parties or their attorneys. The essence of a stipulation is an agreement between the parties or between counsel with respect to business before a court (…). A stipulation is a time-saving device used to admit necessary, but foundational or peripheral evidence which both parties to the litigation concede the truth of and which is not a point of contention between the parties. A stipulation is a confessory pleading negating the need to offer evidence to prove the fact, and the party is not permitted to later attempt to disprove the fact.[246]

The circumstances surrounding the United States' statement strongly suggests that it would be considered a stipulation under United States law. During consultations, Antigua proposed its position that the lengthy measures cited in its Annex, either singularly or in combination, were best described as a total prohibition of remote cross-border betting and gambling services by the United States. Antigua's proposal reflected its belief that the "total prohibition" concept was not in dispute and, further, would serve to expedite the review of this matter by allowing the Panel and parties to avoid expending the time and resources necessary to describe and define the numerous federal and state laws which constitute the total prohibition. In response to a letter from Antigua[247] raising the merits of proceeding under this theory, the United States responded in writing by confirming its position that the cross-border gambling services offered by Antiguan operators were prohibited by United States law.[248] The United States then proceeded to repeat the "total prohibition" concept in statements to the DSB and to the Panel. Under circumstances in which the United States knowingly and willingly propounded its position that there is a total prohibition after the concept was raised by Antigua as an efficiency measure, and then when the United States repeated and clarified the total prohibition concept before the DSB and this Panel, it is clear and unambiguous that the United States concedes that one or more its measures serve to prohibit remote betting and gambling services offered by Antiguan operators.[249] This concession qualifies as a stipulation under United States law.[250] The effect of this stipulation would be to put an end to the United States' contention that Antigua has failed to meet its burden with regard to explaining or describing the complained of measures. As a general rule under United States law, stipulations are conclusive as to all matters properly contained, and necessarily included within them, and to all matters which are an essential part of the stipulation.[251] Ordinarily a party will not be permitted to contradict a stipulation,[252] even though it is contrary to fact, and even though the stipulation affects the statutory and constitutional rights of the parties thereto.[253]

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[246] 83 Corpus Juris Secundum ("C.J.S.") Stipulations §2 (emphasis supplied) (internal citations omitted).

[247] Letter from Antigua and Barbuda to United States (8 May 2003). See Antigua's comments on the United States' request for preliminary rulings, para. 7.

[248] Letter from United States to Antigua and Barbuda (5 June 2003). See Antigua's comments on the United States' request for preliminary rulings, footnote 4.

[249] Under United States law, a stipulation need not follow any particular form other than having terms which are definite and certain, with it being essential that the stipulation be assented to by the parties or their representatives. C.J.S Stipulations., §13 (internal citations omitted).

[250] Under United States law, the issue of whether the statement constitutes a stipulation would be a matter for a court to decide. In doing so, the court would give the stipulation a liberal construction, or one which will render it reasonable and just to both parties. C.J.S. Stipulations, § 47. A stipulation admitting, or agreeing on the existence of, designated facts for the purpose of trial is to be fairly and reasonably construed as a whole in order to effectuate the parties' intention, and in the light of the whole record and the surrounding circumstances. Ibid., § 84. A primary rule of construction is to ascertain and give effect to the intention of the parties. Ibid. § 46 (internal citations omitted).

[251] Ibid., § 6 (internal citations omitted).

[252] A stipulation cannot be disregarded or set aside at will, however, a stipulation can be set aside by a court. The question whether a stipulation shall be set aside rests in the discretion of the court, and requires an extraordinary exercise of its powers, which can be allowable and proper only when it is made clear that it is necessary to prevent injustice. This discretion generally will not be exercised to set aside a stipulation unless good cause be shown for doing so, and unless such action may be taken without prejudice to either party.

[253] *C.J.S. Stipulations,* § 6 (internal citations omitted).

Under United States law, the United States' statements to the DSB that United States law prohibits the services in question would represent compelling evidence of the existence of matter asserted — that United States law prohibits Antiguan operators from providing remote cross-border betting and gambling services to consumers in the United States. This significant piece of evidence by itself would be sufficient to support a finding in a United States court that the United States totally prohibits cross-border gambling and betting services. Although Antigua does not believe the United States denies the existence of its total prohibition, if the United States sought to do so a United States court would consider the formal statements of the United States before the DSB an "admission by a party opponent." Relevant admissions of a party, whether consisting of oral or written assertions or nonverbal conduct,[254] are admissible in evidence in United States courts when offered by an opponent.[255] Admissions in the form of an opinion are competent evidence, even if the opinion is a conclusion of law.[256] As such, the statements made by the United States before the DSB would be allowed into evidence by a United States court as an admission by the United States.

It is a general principle under United States law that a party who has knowingly and deliberately assumed a particular position in a proceeding is generally not allowed to assume a position inconsistent therewith to the prejudice of the adverse party. As a simple illustration, a party who breaches a contract for reasons specified at the time will not be permitted afterwards, when sued for damages, to offer other and different reasons for breaching the contract.[257] In United States legal parlance, the breaching party in this example would be "estopped" from changing its position.[258]

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[254] Wright and Miller, 30B Federal Practice and Procedure §7015, Exhibit AB-109, *citing United States v. Nakaladski*, 481 F.2d 289 (5th Cir.1973), *cert. denied,* 414 U.S. 1064 (1973) (a smile found to constitute an admission) and 4 Weinstein's Evidence ¶ 801(d)(2)(A)[01] at 801-239 (1990) (Rule 801(d)(2) "makes no attempt to categorize the myriad ways in which a party * * * may make an admission. Admissions can be made expressly or may be inferred from conduct.").

[255] This doctrine is based upon Federal Rule of Civil Procedure 801(d)(2), which states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if [...]

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

[256] Wright and Miller, 30B Federal Practice and Procedure § 7015, citing *Owens v. Atchison, Topeka & Santa Fe Ry. Co*., 393 F.2d 77, 79 (5th Cir.1968), cert. denied 393 U.S. 855, 89 S.Ct. 129, 21 L.Ed.2d 124 (1968) ("It is well settled that the opinion rule does not apply to party's admissions."); see also McCormick, Evidence § 256 at 141-42 (5th ed. 1999).

[257] David J. Joseph Co. v. United States, 82 F.Supp. 345 (Ct.Cl. 1949), (holding that where the United States cancelled a contract to receive scrap iron from a company for a single stated reason, it was barred by estoppel from claiming as a defence to breach of contract at trial that it cancelled the contract for another reason).

[258] See, e.g., *United States v. Smith,* 781 F.2d 184 (10th Cir. 1986). ("[N]otwithstanding the position previously taken by the United States Attorney, the government now seeks to contend that it is immaterial whether [a government official complied with certain procedures]. It is this belated and dramatic shift of position we decline to permit."). Ibid., at 185.

Because the United States made the statements regarding the total prohibition in the course of this proceeding, were this matter pending in a United States court, the United States would be "judicially estopped" from contending now that there is no total prohibition. The doctrine of "judicial estoppel" arises under United States jurisprudence when a party attempts to assert, in a judicial or quasi-judicial proceeding, a position contrary to a position taken by that party in a prior judicial or quasi-judicial proceeding.[259] United States courts have recognized that it is wrong to allow a person to abuse the judicial process by advocating one position, then later advocating a different position at a time when the changed position becomes beneficial.[260] If the doctrine is applied, the court in the subsequent proceeding will "estop," or prevent, the party from asserting a factual or legal position contrary to that asserted in the earlier action.[261] The United States government is, like any other litigant, subject to judicial estoppel whenever that doctrine is properly invoked.[262]

United States

At the June 24, 2003, DSB meeting, the United States stated that it had "made it clear that cross-border gambling and betting services are prohibited under US law" and that such services "are prohibited from domestic and foreign service suppliers alike." The United States stands by these statements. Two clarifications may be helpful. First, the United States did not say at the time that this prohibition was "total," and has repeatedly clarified that it is not. At the time of the DSB meeting, such a clarification was unnecessary because we were speaking in the context of claims that we then understood to relate to transmission of bets by Internet or telephone from Antiguan suppliers – actions which are indeed prohibited under US law. Second, our remark about the applicability of this prohibition to domestic service suppliers should have made it clear that the prohibition we were referring to was not a restriction on cross-border supply *per se*; rather, we were referring to laws of general application that apply equally to cross-border supply and supply of the like services (i.e., remote supply) within the United States.

Both of these points were implicit in our remarks at the DSB meeting. Antigua is incorrect to read these remarks as a "concession" of, or even as support for, the existence of its alleged "total prohibition" on cross border supply of all gambling services. As we have repeatedly stated, there is no such "total prohibition" in US domestic law. More importantly, since the concept of a "total prohibition" is devoid of any legal meaning or consequences under either US law or the GATS, Antigua's assertions about it contribute nothing to its prima facie case.

For Antigua and Barbuda:

10. Is Antigua and Barbuda challenging: (i) specific *legislative and regulatory provisions* that are claimed to amount to a prohibition on the cross-border supply of gambling and betting services *as such*; and/or (ii) the specific *application* of such provisions; and/or (iii) the US *practice vis-a-vis* the foreign cross-border supply of gambling and betting services? Please identify all relevant legislative and regulatory provisions.

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[259] T. Scott Belden, "Judicial Estoppel in Civil Action Arising from Representation or Conduct in Prior Administrative Proceeding," 99 American Law Reports 5th 65 (2002). See also 31 C.J.S. Estoppel and Waiver, §140 (stating that "[g]enerally, a party is estopped to assume inconsistent positions in the course of the same judicial proceeding.").

[260] 99 A.L.R. 5th, 65, § 2.

[261] Ibid.

[262] *United States v Levasseur,* 699 F Supp 965 (D. Mass, 1988). (stating "[a]t its essence, this doctrine forbids a party from asserting inconsistent positions in judicial proceedings. The doctrine is borne of "a universal judicial reluctance to permit litigants to 'play fast and loose' with courts of justice according to the vicissitudes of self-interest" as well as a desire "to protect ... the judicial process from abuse." 1B J. Moore & J. Lucas, Moore's Federal Practice ¶ 0.405[8] (2d ed. 1984) (*citing Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 [3d Cir.1953] [Hastie, J.])").

Antigua

Antigua is challenging all three aspects which are intrinsically linked and are all elements of the total ban that Antigua seeks to challenge in this case. *Legislative and regulatory provisions* are given a practical effect by their *application* to specific cases. If, for example, the United States maintained its prohibition but did not enforce it, then the impairment of Antigua's GATS benefits would be much less substantial and Antigua would probably not have started this proceeding. The United States *practice* vis-à-vis the foreign cross-border supply of gambling and betting services is also based on or at least purported to be based on legislative and regulatory provisions.[263] In Antigua's view it would not be logical or effective to challenge some of these elements and not others.

In Antigua's Panel request, it is said that: "[T]he total prohibition of gambling and betting services offered from outside the United States appears to conflict with the United States' obligations under GATS and its Schedule of Specific Commitments annexed to the GATS (and in particular Sector 10.D thereof) (…)." The objective of this statement was to bring the "total prohibition" itself before the Panel. While not denying the total prohibition, the United States insists that Antigua must explain to the United States and the Panel exactly how the total prohibition is constructed under United States law. Antigua has consistently taken the position that to force it to do so – in the words of the United States "an impossible task in our view"[264] – is wasteful and would deflect the efforts of the Panel to an exercise in understanding the minute details of the American legal system when such details should not affect the outcome of this proceeding.

Antigua believes that it is logical and efficient to challenge the United States' total prohibition, as a measure in and of itself, composed of specific legislative and regulatory provisions, applications and practices that both separately and jointly impair Antigua's GATS benefits. The Appellate Body's recent report in *US – Corrosion-Resistant Steel Sunset Review* [265] confirms that is legally possible to challenge such a total ban, and that while the Panel must, as a matter of substance, establish the impairment of Antigua's GATS benefits by the total ban it is not obliged, as a preliminary jurisdictional matter, to examine all domestic laws, regulations, applications and practices that may contribute to the impairment of those benefits.

The purpose of this dispute settlement proceeding is to address the impairment of Antigua's GATS benefits. In this respect Antigua is in essence challenging every legislative provision that could be construed to form a piece of the United States' total prohibition on the cross-border supply of gambling and betting services. The statutory provisions that the United States appears to rely on most heavily in its law enforcement actions, or are most likely to form part of the total ban, were listed in the Annex to Antigua's Panel request and also have been submitted to the Panel, together with summaries. The fact that the total prohibition is comprised of a large number of different statutory provisions does not mean that the United States would have to abolish or amend all of these individual legislative provisions in order to bring its laws in conformity with its obligations under the GATS. As noted in Antigua's opening statement at the first Panel meeting, the United States federal government possesses the power to legislate in the area of international commerce in a manner that would pre-empt all contradictory state laws and regulations.[266] Furthermore a considerable number of the laws that can currently be applied against Antiguan gambling and betting services because these services are currently considered "illegal" would no longer be applicable because, once "authorized," the Antiguan services would be "legal." In any event, what matters to Antigua, and what matters for WTO dispute settlement, is that the United States ceases the impairment of its treaty obligations by

[263] See, e.g.,. the "Assurance of Discontinuance" entered into in August 2002 between the Attorney General of the State of New York and Paypal, Inc. and the discussion of that document in Antigua's response to Panel's question 29.

[264] See Section III.B.3 of this Report.

[265] See Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review.*

[266] See Section III.B.3 of this Report.

providing market access for cross-border gambling and betting services from Antigua in accordance with its GATS obligations. How this is formally structured under United States law does not matter.

United States

Setting aside issues concerning Antigua's failure to make a *prima facie* case, as to which the United States has already commented, the Panel's question points to a distinct issue concerning the scope of Antigua's Panel request. The United States considers that the only claims within the scope of Antigua's Panel request (and, therefore, the Panel's terms of reference) would be "as such" claims against specific legislative and regulatory provisions and/or the collective effect of two or more such provisions. The Panel request does not articulate any claim against particular applications of these measures, and Antigua's clarification, as accepted by the Panel, would appear to confirm that no such claim is within the scope of the Panel request.[267] To the extent that Antigua raised the application of laws or regulations in its Panel request, it pointed to instances of such application only in an attempt to illustrate the existence of a "general prohibition against cross-border supply of gambling and betting services in the United States" as such.[268]

11. What "authorisation to supply" is Antigua and Barbuda referring to in paragraph 88 of its first oral statement? Please identify and provide details of instances when "authorisation to supply" in the United States was refused.

Antigua

In its opening statement to the Panel at the first substantive meeting of the parties, Antigua stated that "it is not possible for Antiguan suppliers to obtain an authorization to supply gambling services on a cross-border basis." What was meant here was not that Antiguan operators had applied to supply gambling and betting services into the United States and were refused — the point was that under United States law, it is impossible for Antiguan suppliers to meet any authorisation criteria. There are two reasons for this. First is the obvious, that the United States government considers the provision of cross-border gambling and betting services illegal, and thus it would be illegal under United States law as it currently exists for Antiguan suppliers to gain authorisation. At the first Panel meeting Antigua asked the United States to explain how Antiguan service providers could lawfully provide gambling and betting services into the United States. In response, the United States confirmed that this was not possible.

Second, under the laws or practice of every state that provides for state-sanctioned gambling in one form or another, the conditions attached to obtaining the right to supply gambling services in the state by definition preclude Antiguan operators from qualifying on a cross-border basis. Thus, even if the United States did not maintain its total prohibition, Antiguan operators could still not lawfully offer their services under the authorization schemes of the various states.[269]

12. In paragraph 3 of its first oral statement, Antigua and Barbuda illustrates its allegation that it is illegal for Antigua and Barbuda operators to provide gambling and betting services in the United States by noting that the United States has imprisoned the operator of an Antiguan company. Could Antigua and Barbuda provide more details with respect to its example. Are there other instances that illustrate Antigua and Barbuda's point? If so, please provide details?

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[267] See Communication from the Panel, 29 October 2003, para. 31, reproduced in Annex B of this Report.

[268] Ibid.

[269] See examples of state authorization schemes contained in the Second Submission of Antigua and Barbuda, WT/DS285, paras. 26 - 29.

Antigua

The case referred to is the *United States v. Jay Cohen* case.[270] The *Cohen* case involves the prosecution under the Wire Act[271] of an American citizen who had moved to and established a company in Antigua to offer gambling and betting services into, among other places, the United States on a cross-border basis. In 1996, Mr. Cohen, then a 29 year old options trader on the Pacific Stock Exchange with a degree in nuclear engineering from the University of California at Berkeley, moved to Antigua with a number of colleagues and formed an Antiguan company, World Sports Exchange Limited ("WSE"), to operate an Internet sports book. WSE was initially licensed by the government of Antigua to provide those services in 1996 and has been licensed and operating continuously since then. In 1998 Mr. Cohen was among approximately 20 operators of Antiguan and other foreign companies engaged in the cross-border supply of gambling and betting services charged by the United States government for violating the Wire Act simply by providing these services to consumers in the State of New York.

Although most of the individuals charged either entered into some kind of plea arrangements with the United States or have simply remained outside of the United States and beyond prosecution, Mr. Cohen returned to the United States from Antigua solely for purposes of contesting the charges against him. Mr. Cohen was convinced that he could not be found guilty of violating the Wire Act because he had expressly modelled WSE's business on that of Capital OTB, a United States domestic company that has been offering interstate betting by telephone for more than 20 years—as well as more recently by the Internet—without prosecution under the Wire Act.[272] When Mr. Cohen attempted to assert in his defence his belief in the legality of WSE's business under United States law and his efforts to comply with United States law in the organisation and operation of WSE, the presiding judge deemed those beliefs and efforts irrelevant. In this respect it is, to say the least, remarkable that during Mr. Cohen's trial the United States Department of Justice represented to the trial court that the comparison with Capital OTB was irrelevant because Capital OTB's interstate operations were not prohibited by the Wire Act, whereas the operations of WSE were.[273] This representation to the court in the Cohen case about the legality of Capital OTB's activities is expressly contrary to what the United States has told the Panel in this case.[274] Mr. Cohen was ultimately convicted and his sentence upheld by the United States Court of Appeals for the Second Circuit. The presiding judge sentenced Mr. Cohen to 21 months in federal prison and two additional years of supervised probation. As of the date of these responses, Mr. Cohen is incarcerated in a federal prison facility located, with not an insignificant amount of irony, in Las Vegas, Nevada.

The United States also undertakes law enforcement action against financial intermediaries and media companies carrying advertising for foreign gambling and betting services. Such action is considered a more effective impediment for foreign cross-border gambling than the prosecution of individuals that are not physically present in the United States.[275] Examples of these kinds of actions can be found in various exhibits submitted by Antigua. Other examples of actions taken by United States federal and state authorities to prevent the provision of cross-border gambling and betting

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[270] *United States v. Jay Cohen,* 260 F.3d 68 (2nd Cir. 2001), *cert. denied* 122 S.Ct. 2587 (2002).

[271] 18 U.S.C. §1084.

[272] One of Mr. Cohen's statements in his defence was that he had modelled the business of WSE on the Capital OTB model described in the first submission of Antigua. See Cohen Trial Transcript, pp. 838, 859 – 869 (testimony of Mr. Cohen dated 22 February 2000 at his trial in New York).

[273] Cohen Trial Transcript, at p. 857 (statement by Ms. Pesce representing the United States Department of Justice).

[274] At the meeting of the Panel and the parties of 10 December 2003, the United States representative stated that the operations of companies such as Capital OTB were contrary to federal law.

[275] See Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Congress 10 (2003), p. 70.

services include the proceeding brought by the New York Attorney General under state criminal statutes, the Wire Act and the Travel Act in the *World Interactive Gaming Corp.* case[276] and the unsuccessful prosecution in the case of *United States v. Truesdale*[277] of an Internet gambling service provider based in the Dominican Republic under the "Illegal Gambling Business Act."[278] In addition, state authorities continue to take action to prohibit or impede the offering of cross-border betting and gambling services. Like the United States' recent letter advising national advertisers not to allow advertising for offshore Internet gambling services,[279] states have followed suit and taken similar action. An example of such state action was recently reported in Alabama.[280]

In Alabama, state law provides that a person commits the state crime of "promoting gambling" if he knowingly advances or profits from unlawful gambling activity otherwise than as a player.[281] In November 2003, the Alabama state attorney general's office instructed WJOX-AM in Birmingham, Alabama, a sports-talk radio station, to cease broadcasting commercials for Internet gambling operations or risk criminal prosecution. The warning was issued in a letter by Richard Allen, chief deputy to Alabama Attorney General Bill Pryor. In the letter, Allen informed the radio station that the Alabama Attorney General's office had reviewed advertisements broadcast by the radio station for Internet and telephone gambling operations. "If the ads are discontinued immediately, this office contemplates no further action. This is, however, the second time we have communicated with you about these kinds of activities," Allen wrote. Promoting gambling is a misdemeanour that carries a maximum penalty of a year in jail and a fine of $2,000. Allen warned that each airing of a commercial would be considered a separate crime. As a result of the Attorney General's letter, radio hosts on WJOX-AM have informed listeners they can no longer call in and discuss gambling or betting lines - a frequent topic during college football season.[282]

United States

Antigua appears to be referring to the case of Jay Cohen, a US citizen who ran an Internet gambling operation from Antigua. Cohen was arrested in March 1998 and convicted after a ten-day trial in February 2000. The facts of the case are described on appeal in *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001) (affirming Cohen's conviction).[283]

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[276] *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 854 (N.Y. Sup. Ct. 1999. While the *Vacco* case involved elements not present in the *Cohen* case, such as allegations of fraud against investors, the New York Attorney General in the *Vacco* case did assert the Wire Act as prohibiting the cross-border provision of gambling and betting services from Antigua into the United States

[277] 152 F.2d 443 (5th Cir. 1998). Contrary to the determination of the court in the *Cohen* case, the *Truesdale* court held that the gambling and betting services were provided from and occurred outside of the United States and thus were not illegal under United States law.

[278] 18 U.S.C. §1955.

[279] Letter from the United States Department of Justice to the National Association of Broadcasters entitled "advertising for Internet Gambling and Offshore Sportsbooks Operations" (11 June 2003)

[280] Several states in addition to Alabama have warned advertisers not to accept business from foreign-based gambling operators. In 1997, the Florida Attorney General advised advertisers that they were unlawfully promoting illegal gambling under Florida law by promoting offshore gambling enterprises. Florida Attorney General, Press Release: Western Union Cuts off Sports Betting Accounts (23 December 1997). See also statement of John Malcolm (20 November 2002). (Noting that, in 2001, the Colorado Attorney General warned advertisers not to advertise for foreign Internet gambling operators and, in 2000, the California Horse Racing Board sent notices to all California radio stations to stop running advertisements for foreign gambling operators.)

[281] Ala. Code §13A-12-22.

[282] "State Warns All Sports Station About Gambling Ads," *Gadsden Times* (Alabama) (8 Nov. 2003), (http://www.gadsdentimes.com/apps/pbcs.dll/article?AID=/20031107/APN/311071052 &cachetime=5).

[283] *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert denied*, 122 S. Ct. 2587.

For the United States:

13. How does the United States reconcile its statement in paragraph 46 of its first oral statement that "there is no across-the-board prohibition on cross-border supply of gambling services in US law" with its statements in paragraphs 47 of WT/DSB/M/151 and WT/DSB/M/153 respectively that the supply of cross-border gambling and betting services is prohibited under US law? Please provide a list of the transactions that would be included in "gambling and betting services"?

United States

The United States has addressed the first part of the Panel's question in its response to question 9 above. As to a list of the transactions that would be included in "gambling and betting services," as the United States has previously noted, "gambling and betting services" appears neither in the US Schedule nor in W/120. And the provisional CPC (the only document that refers to this term) does not include such a list. The United States can conceive of no basis, however, on which Antigua could possibly assert that "gambling and betting services" excludes services that involve the organization and/or facilitation of gambling, but do not involve the actual transmission of bets or wagers.[284]

14. What is the legal status of the Internet Gambling Prohibition Act (referred to in Exhibit US-4), the Unlawful Internet Gambling Funding Prohibition Act (referred to in Exhibit US-5) and the Internet Gambling Licensing and Regulation Commission Act (referred to in Exhibit US-5)? Please provide copies of these documents.

United States

These are bills (i.e., proposed measures) that were debated in Congress. None of them have been enacted.[285] The United States has provided the Panel with key elements of the testimony presented to Congress during its consideration of these bills as evidence of various contemporary issues and concerns surrounding Internet gambling. Copies of the unadopted bills are attached.

C. ARTICLE XVI

For the United States:

15. Where a Member has made full market access commitments on the cross border supply of gambling and betting services, could a prohibition on the remote supply of gambling and betting services within that Member allow the same Member to contend that there is no violation of Article XVI of the GATS? Please comment.

United States

Yes. As discussed in the US second submission, a "prohibition" is not *ipso facto* inconsistent with Article XVI of the GATS. A panel must examine whether the alleged prohibition constitutes a limitation that matches the precise criteria in Article XVI:2. Those criteria relate both to the subject matter of the limitation and its precise form and/or manner of expression. Any limitation that does not correspond to these criteria does not violate Article XVI:2.

[284] Examples of such services are listed in Section III.B.3.

[285] The use of the word "Act" in the titles of the proposals reflects a U.S. legislative convention for naming proposed bills; it does not signify enactment.

Antigua

Article XVI is not a non-discrimination or national treatment clause. Whether or not a measure that violates Article XVI (in this case a prohibition on cross-border supply) also applies within a Member has no relevance for the application of Article XVI Paragraph 6 of the 1993 Scheduling Guidelines lists four examples of limitations on market access caught by Article XVI:2(a): (i) license for a new restaurant based on an economic needs test; (ii) annually established quotas for foreign medical practitioners; Government or privately owned monopoly for labour exchange; and nationality requirements for suppliers of services (equivalent to zero quota). These clearly include examples of measures applying to foreign and domestic services and services suppliers alike. These measures are nevertheless caught by Article XVI:2(a). The last example, the nationality requirement, further confirms that, contrary to what is argued by the United States, a total ban that is not expressed in numerical terms is caught by Article XVI:2(a) as being equivalent to a zero quota (despite the fact that, nominally, a nationality requirement also applies to service suppliers of the Member concerned). Likewise, a total prohibition on remote supply results in a total denial — equivalent to a zero quota — of market access in cross-border mode, as cross-border supply is not possible if remote supply is unlawful.

In the response to question 1 above Antigua explained that the 1993 Scheduling Guidelines are highly relevant for the interpretation of the US Schedule because the 1993 Scheduling Guidelines are part of the context of all GATS schedules. The 1993 Scheduling Guidelines are also highly relevant for the interpretation of the GATS itself and Article XVI in particular.

Article XVI can only be applied through specific commitments in schedules. Consequently the approach taken by the Members when drafting Article XVI commitments in their Uruguay Round schedules is a good indicator of the common intention of the parties regarding the meaning of Article XVI. That common intention is described in the 1993 Scheduling Guidelines (as was unanimously and explicitly confirmed by all Members in the 2001 Scheduling Guidelines). The 2001 Scheduling Guidelines contain precisely the same examples as the 1993 Scheduling Guidelines.[286] With regard to the specific point that a non-numerical total ban is caught by Article XVI:2(a) as equivalent to a zero quota, the 2001 Scheduling Guidelines therefore qualify as a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the Vienna Convention. As mentioned in the response to question 1, the 2001 Scheduling Guidelines were unanimously approved by the Members. The Panel should further note that the United States has itself recognised the value of the 2001 Scheduling Guidelines for the interpretation of Article XVI.[287]

European Communities

No. The European Communities understands the Panel's hypothetical to assume that, besides "a prohibition on the remote supply of gambling and betting services within [the] Member" that has committed market access, the Member in question also maintains a measure falling within one of the items of Article XVI:2 of the GATS (such as, in the EC view, a prohibition on cross-border supply of gambling services). Once it is concluded that a measure (such as a prohibition on cross-border supply of gambling services) falls within one of the items of Article XVI:2, the fact that the same Member simultaneously maintains a prohibition on remote supply domestically is irrelevant and does neither eliminate nor *ipso facto* justify a violation of Article XVI.

Mexico

To the extent and assuming that the term "remote supply" means the cross-border supply of gambling and betting services, it appears that under the scenario described in the question, suppliers

[286] 2001 Scheduling Guidelines, para. 12.
[287] See Section III.B.2. of this Report.

of other WTO Members would, in fact, be denied any market access under mode 1 (cross-border). Thus, service suppliers of other WTO Members could accord treatment less favourable than that provided for under the terms, limitations and conditions agreed and specified in the Schedule of a Member that has made "full market access commitments".

D. ARTICLE XVII

For both parties:

16. If there is "total prohibition" in the United States on the cross-border supply of gambling and betting services, as claimed by Antigua and Barbuda, can there be a violation of Article XVII at all?

Antigua

In Antigua's view the most appropriate interpretation of the relationship between Articles XVI and XVII is that a determination that a total prohibition on cross-border supply violates Article XVI obviates the need to assess whether the prohibition also violates Article XVII. Antigua acknowledges, however, that the text of Articles XVI, XVII and XX:2 of the GATS also allows the conclusion that Articles XVI and XVII can apply simultaneously to a total prohibition on cross-border supply. In this respect Antigua submits that the resolution of the debate on the precise relationship between Articles XVI and XVII has no practical significance for the outcome of this case. To Antigua it does not really matter whether the United States' total prohibition violates Article XVI without reaching Article XVII or whether it violates both Articles.

The question of the overlap between Articles XVI and XVII appears to be one of the most controversial legal questions surrounding the application of the GATS. However, the overlap question only creates a practical problem if a Member has made different commitments for market access and national treatment with regard to the same sector.[288] That is not the case for the sub-sectors of the US Schedule at issue or possibly at issue in this case: sub-sector 10.D and sub-sector 10.A. Consequently, in the specific context of this dispute, the question of overlap is merely a technical one – irrespective of whether the United States' total prohibition violates Article XVI only or both Articles XVI and XVII, the United States is under an obligation to remedy the breach of its GATS obligations by the total ban. This is not an instance in which different aspects of the United States measures are caught by Article XVI or XVII respectively. It is simply a matter of "double usage" of Article XVI and XVII. There are undoubtedly circumstances where Article XVI may apply to a situation and Article XVII not, and vice versa. The fact that in this dispute the United States measures violate both provisions does not undermine the usefulness of either provision. Antigua believes, however, that when looked at in isolation, the wording of Article XVII is sufficiently broad to capture almost all market access restrictions caught by Article XVI, in particular because it covers *de facto* as well as *de jure* discrimination.[289]

The broader problem of the overlap between Article XVI and XVII has been described as one of "Text versus Context."[290] The text of Article XVII allows for it to be applied to almost all market

[288] See Informal Note by the Secretariat, "Technical Review of GATS Provisions," JOB(01)/17, dated 16 February 2001; see also Informal Note by the Secretariat, "Proposals for a Technical Review of GATS Provisions – Article XX:2", JOB(02)/153, dated 24 October 2002.

[289] A Member may, for instance, maintain a quantitative limitation of five suppliers in a certain sub-sector that is equally applicable to foreign and domestic suppliers. In many circumstances this will result in a *de facto* discrimination in favour of the, for instance, three suppliers already operating in that market.

[290] A. Mattoo, "National Treatment in the GATS," 31 *Journal of World Trade* 1997, 107-135, at p. 113. Mr. Mattoo is one of the most distinguished commentators on the GATS and worked in the Trade in Services Division of the WTO Secretariat at the time he wrote the article.

access restrictions covered by Article XVI. On the other hand the structure of the GATS (*i.e.* the fact that Article XVI exists and is given an equally prominent place as Article XVII in the GATS and in GATS schedules) indicates that there must be meaningful distinction between the two. Although Antigua has not been able to review the negotiating history of these provisions, Antigua has come across what appears to be contradictory commentary on the negotiating history. Some suggest that negotiators worked on the basis of a dividing line between Article XVI and XVII;[291] others suggest that negotiators were well aware of the overlap.[292] In Antigua's view the most appropriate interpretation of the relationship between Articles XVI and XVII is one of "practical hierarchy" in which: (i) Article XVI concerns "the key to the door," i.e. regulation that affects an operator's ability to access a market; and Article XVII concerns regulation that distorts competition in favour of domestic suppliers once an operator has gone "through the door" and is operating on the market.

Under that approach the scope of Article XVII is negatively defined by the scope of Article XVI—if a measure is covered by Article XVI it is not covered by Article XVII. This interpretation does not lead to an unacceptable result in a situation involving a Member that has no commitments in the market access column and a full commitment in the national treatment column, a situation which is perceived to be the most important practical problem posed by the overlap of Articles XVI and XVII.[293] In such a situation, Antigua's proposed interpretation would imply that to the extent that a Member does not maintain measures contrary to Article XVI (meaning that it allows market access even though it goes beyond the commitments in its schedule), it must grant national treatment. Of course, the value of that national treatment commitment will be limited because traders will know that WTO law allows the Member to restrict market access and ban them from the market. However, as long as they are allowed access to the market, they would have to be given national treatment.

Antigua submits that this "practical hierarchy" interpretation is supported by: (i) the structure of the GATS; (ii) the equally prominent place that Article XVI and XVII have in GATS schedules; (iii) the rule that an interpretation must give meaning and effect to all terms of a treaty; and the parallelism between GATT and GATS which was one of the working premises of the negotiators. The situation is complicated, however, by Article XX:2 of the GATS. This appears to confirm that measures can be caught both by Articles XVI and XVII. Simultaneously, however, it excludes the possibility that Article XVII can be used to undermine the effectiveness of restrictions on the application of Article XVI (as in the example described above of the Member that made no commitments for market access and a full commitment for national treatment).[294] In Antigua's view this confirms that, even if the text of Articles XVI and XVII allows overlapping application or "double usage," it was the common intention of the parties that this would not be the case and that the provisions would be applied separately. On the other hand Article XX:2 could be interpreted as supporting the text-based interpretation that Articles XVI and XVII can be applied to the same measure. In Antigua's view this is not the most appropriate interpretation but it is not an inappropriate

[291] Ibid., at pp. 115-116.

[292] Informal Note by the Secretariat, "Proposals for a technical review of GATS provisions – Article XX:2," JOB(02)/89, dated 16 July 2002.

[293] An expansive, strictly text-based interpretation of Article XVII would be problematic in the situation of the example (no commitment to market access and a full commitment to national treatment): if Article XVII would also cover measures caught by Article XVI, the restriction on market access in the schedule would be without effect because the measure would violate Article XVII and could not be maintained. It cannot have been the common intention of the parties to nullify limitations on market access specifically made by Members in their schedules.

[294] Article XX:2 does not deal with the situation where a Member makes a full commitment under Article XVI and no commitment under Article XVII. In Antigua's view this situation is not problematic. It simply means that a Member cannot maintain measures caught by Article XVI but it can still maintain measures which are beyond the scope of Article XVI and that would be prohibited by Article XVII had the Member made a commitment under that Article.

interpretation and the Panel may adopt it. Whatever the Panel decides, Antigua holds the strong view that the decision on this issue will have no material effect on the practical outcome of this dispute.

United States

In this dispute, where the restrictions at issue apply to both cross-border suppliers and domestic suppliers of the "like" service, the United States does not see how there could be a violation of Article XVII. That said, the United States notes that the analysis of an alleged "prohibition" under Article XVI would appear to be important to answering the Panel's question. Article XVI (in contrast to Article XI of the GATT) does not automatically bar any "prohibition." The Panel should therefore examine whether the alleged prohibition meets the precise criteria articulated in Article XVI:2.

17. In determining whether services are "like" is it relevant to have regard to differences in regulation between the place from which the service is supplied and the place into which it is supplied? To what extent, if at all, is Antigua and Barbuda's regulatory regime for the supply of Internet gambling and betting services relevant in determining "likeness" with the supply of those services in the United States?

Antigua

Article XVII of the GATS concerns likeness of services, not of "services regulation." Thus differences in regulation cannot, as such, play a role in determining likeness for the purposes of Article XVII. In particular, regulation in the importing Member cannot normally play a role in determining "likeness" because this regulation is entirely within the control of that importing Member which could manipulate it in such a way that foreign services are regulated differently, or not at all, which would then make them unlike. In *EC – Bananas* the Appellate Body explicitly ruled on this point when rejecting an argument by the European Communities that it did not discriminate in favour of bananas originating from the group of African, Caribbean and Pacific region countries known as "ACP" because it maintained two separate regulatory regimes for the importation of bananas: one for ACP bananas and one for bananas originating in other Members, which allegedly removed the possibility of discrimination. The Appellate Body found that:

> The issue here is not whether the European Communities is correct in stating that two separate import regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.[295]

Regulation in the exporting Member may play an indirect role because it can determine one or more specific characteristics of the service, which may be important to determine likeness of the service itself. This could be relevant in a dispute where an importing Member claims the imported

[295] Appellate Body Report on *EC – Bananas III*, para. 190.

service is "unlike" because of one or more specific features determined by the regulation of the exporting Member. In the current instance, however, this is not the case because the United States' prohibition does not relate to specific characteristics of Antiguan services determined by Antiguan regulation. Furthermore Antigua has pointed out on a number of occasions that it is willing to change its regulatory regime in order to address any specific concerns the United States might have. Thus, in the circumstances of this case, the regulatory regimes of the importing and the exporting Member play no role, not even an indirect one, in the determination of likeness of the services.

As set out in Antigua's opening statement at the first Panel meeting, Antigua's view that regulation is not relevant for the determination of likeness is confirmed by the view taken by the Appellate Body in *EC - Asbestos* with regard to Article III:4 of GATT 1994.[296] In *EC – Bananas III (US)*, the panel interpreted Article II of the GATS (an MFN provision) in the light of Article XVII of the GATS and Article III of the GATT (both national treatment provisions). The Appellate Body criticised this approach, pointing out that the appropriate comparison was between Article II of the GATS and MFN-type obligations in the GATT 1994.[297] Thus the panel was criticised for not interpreting a provision of the GATS in the light of a corresponding provision in the GATT 1994. Neither the United States nor any of the Third Parties have convincingly explained why this Panel should adopt a different approach to the one set out by the Appellate Body in *EC – Bananas III*, and not draw an analogy between the national treatment provisions of the GATT and the GATS. In the absence of such an explanation the Panel should, *mutatis mutandis*, adopt the approach of the Appellate Body in *EC – Asbestos* when applying Article XVII. If follows from *EC – Asbestos* that Antigua's regulatory regime for the supply of gambling and betting services *could* be relevant for this dispute in the context of an Article XIV defence raised by the United States—for instance, to determine whether a total ban on cross-border, remote-access gaming is necessary to protect the sort of public interest concerns outlined by the United States in its first submission.

Contrary to the Appellate Body's approach in *EC – Asbestos*, the United States and Japan appear to suggest that such a public interest debate should also take place in the context of Article XVII. Under that approach a service could be declared "unlike" because it raises different public interest concerns, justifying different regulation. In this respect Antigua submits, *arguendo*, that if public interest concerns could play a role in the likeness debate, other elements of the Article XIV debate, such as the necessity test, should also be taken into account. Not every difference in public interest concerns raised by domestic and foreign services is capable of justifying radically different treatment. That is not the case under Article XIV and it should not be the case under Article XVII – difference in treatment is only justified to the extent that it is necessary to address different risks. However, transplanting the conditions for the application of Article XIV to the context of Article XVII inevitably results in a situation in which an identical test is applied in two different contexts, once in the context of the debate on like services and once in the context of Article XIV. In Antigua's view this will only lead to confusion and Antigua therefore questions the need or even usefulness for the GATS legal system of replicating the regulatory debate of Article XIV in the context of Article XVII. In *EC – Asbestos* the Appellate Body clearly did not see the wisdom of such an approach either.

United States

In certain circumstances it may be important to have regard to differences in regulation between the place from which the service is supplied, and the place into which it is supplied. For

[296] That is that the determination of "likeness" is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products" (Appellate Body Report in *EC – Asbestos*, para. 99), and that regulatory concerns of the authorities of a Member (as opposed to concerns of a consumer) have to be dealt with in the context of Article XX of the GATT 1994, not in the context of the likeness assessment.

[297] Appellate Body Report on *EC – Bananas III*, para. 231.

example, theoretically, if the United States permitted domestic gambling by remote supply subject to particular regulatory requirements, there might be "like services and service suppliers" issues regarding the extent to which services supplied from Antigua meet the same requirements. However, that is not the case. The more relevant likeness factor in this dispute is therefore not differences in regulation *per se,* but differences in the characteristics of services and suppliers that influence the manner in which they are regulated. Specifically, the greater susceptibility of gambling by remote supply to various threats (organized crime, money laundering, health risks, child and youth gambling, etc.) makes it unlike other, non-remote forms of gambling.

18. With respect to paragraph 63 of Antigua and Barbuda's first oral statement, which states in relevant part that the "'likeness of service providers has little functional relevance in this case":

(a) Is there always a need to assess likeness for both "services" and "service suppliers" under Article XVII of the GATS?

(b) Is there a difference in the relevance of the "likeness" of service suppliers for modes 1 and 2 as compared to for modes 3 and 4? In other words, should the likeness of *service suppliers* as well as the likeness of *services* be considered in the case of modes 1 and 2?

Antigua

[a]: In Antigua's view this is not the case. In paragraph 95 of its first submission the United States suggests that Article XVII can only apply if like services are supplied by like service suppliers. Thus the reference to "service suppliers" in Article XVII:1 would function as a limitation on the scope of Article XVII:1: less favourable treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers. However, the text of Article XVII:1 does not support that conclusion at all. The text of Article XVII provides that:

> each Member shall accord to services and service suppliers of any other Member, (…), treatment no less favourable than that it accords to its own like services and service suppliers.

Thus Article XVII mandates treatment "no less favourable" for "like services" *and* "like service suppliers," without limiting that obligation to situations in which both the services and the services suppliers are "like." The text does *not* refer to "like services supplied by like service suppliers." Indeed, it would be difficult to see why the drafters of the GATS would have wanted to limit the scope of Article XVII in such a way. Presumably, in adding the "like service supplier" concept the drafters wanted to extend rather than limit the scope of Article XVII. This is because, in the area of trade in services, much more than in the area of trade in goods, the conditions of competition in the market place can be affected by measures applicable to the service suppliers rather than to the services themselves. This is particularly the case when services are supplied in mode 3 or 4. For instance a Member could impose discriminatory taxes on a foreign service supplier "commercially present" on its territory. In Antigua's view the purpose of the extension of the national treatment obligation to service suppliers in Article XVII is to capture such measures. It is not intended to somehow limit the scope of Article XVII.

[b]: In modes 3 and 4, arguably the *identity* of the service supplier might be more relevant, given that both modes involve the actual, physical presence of businesses or natural persons located in the territory of the Member. In such circumstances it is perhaps more likely that denial of national treatment may occur on the basis of the identity of the service supplier without regard to the actual services being provided. Further, the actual presence of businesses or natural persons may invoke the many concerns that may arise in that context, such as immigration, use of public resources and

services and a host of other issues raised by actual physical presence. But whether or not identity can or should be synonymous with "likeness" is questionable.

United States

[a]: Yes. Article XVII requires likeness of both services and service suppliers. As the panel in *Canada – Autos* observed, "in the absence of 'like' domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS."[298] The same panel also emphasized that the burden of proving this element rested on the complaining party.[299]

[b]: Antigua bears the burden of proving likeness of service suppliers regardless of the mode of supply concerned. The United States is unable to find any basis in Article XVII or elsewhere in the GATS for disregarding likeness in particular modes of supply.

European Communities

[a]: No, because it is e.g. sufficient, for a violation of Article XVII to occur, that discrimination is made between foreign and domestic services. Article XVII:1 requires Members to grant national treatment to both foreign services and foreign service providers.

[b]: Given the answer to question (a) above, this question becomes moot. This being said, there is nothing in the text of the Agreement that would suggest that a difference between modes should be made.

Mexico

[a]: The extent of the assessment required will depend on the specific claims of violation in any given dispute and the facts and circumstances of each case.

[b]: See Mexico's response to question (a) above.

19. Is Internet/remote gambling and betting authorized between states within the United States?

Antigua

Antigua has not been able, for the purposes of this question, to conduct an exhaustive review of all the circumstances in which interstate gambling and betting is authorised within the United States. The examples which follow provide, however, the clearest possible indication that there is remote, state-sanctioned interstate gambling and betting within the United States: this, in turn, shows that the United States' statement that such activities are illegal is contradicted by the practice. Because the Panel's question specifically refers to betting services between states, Antigua does not include in this answer information about Internet/remote gambling authorized *within* a state in the United States.[300]

The United States has a longstanding policy of permitting interstate telephone account wagering on horse races which is authorized by state and local laws. In 1973, the State of New York

[298] Panel Report in *Canada – Autos*, para. 10.289.
[299] Ibid.
[300] For example, Nevada has created a special exemption under its state laws for intrastate account wagering on sporting events such as horse races and professional and amateur contests. Nevada Revised Statutes §465.094.

legalised and began to operate its own pari-mutuel account wagering system, New York Capital OTB.[301] Over the next 15 years, three other states sanctioned account wagering on horse races: Connecticut in 1976, Maryland in 1984 and Pennsylvania in 1987.[302] By the 1990s, sanctioned operators were offering remote account wagering from the 12 states[303] that enacted licensing schemes for such wagering. The operators in the 12 states that permit remote wagering, in turn, accept cross-border wagers by means of electronic communications from residents of 37 other states.[304] The proliferation of betting from anywhere resulted in an increase in total wagers in the pari-mutuel industry, despite a modest decline in racetrack attendance and the number of races run during the same period. By 1999, almost one-half of all wagers placed on horse races in the United States are by off-track or telephone wager[305] and, as of 2003, 85 per cent of the US$15 billion in annual wagers on horse races in the United States is generated away from the track where the race is actually being run by means of remote gambling.[306]

United States operators which offer cross-border account wagering do so under United States legal precedents which hold that states retain the discretion to determine the legal effect of in-coming communications into the state.[307] These court opinions found gambling takes place at the location where the money changes hands, not necessarily where the person placing the bet is located.[308] This concept is codified in Oregon's remote gambling regulation, which states that "any wager that is made from an account maintained by an Oregon operator in Oregon is considered to have been made in the State of Oregon" is legally valid.[309] While there is debate about the exact status of cross-border gambling in the United States,[310] it is undisputed that state sanctioned remote gambling services like

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[301] *2003 North American Gaming Almanac*, p. 558.

[302] Ibid.

[303] Antigua referenced eight states which permit operators to accept remote wagers from within the state or from outside the state. Upon further review, there are at least 12 states which offer account wagering on horse racing, with additional states to come. A leading Nevada gaming law firm, Lionel Sawyer & Co., reports that, as of 2002, 12 states - Connecticut, Ohio, Kentucky, Maryland, New York, Oregon, California, Louisiana, Massachusetts, New Hampshire, North Dakota and Pennsylvania - have adopted state legislation authorizing the acceptance of account wagering in interstate off- track pari-mutuel racing. See Nevada Pari-Mutuel Association, Las Vegas Dissemination Co. and Lionel Sawyer & Collins, An Overview of Off-Track Wagering (25 July 2002), p. 27 (presented to the Nevada Gaming Commission and State Gaming Control Board). Bear Stearns & Co. reports that, as of 2003, 14 states permit gambling operators to accept remote wagers on horse races. *2003 North American Gaming Almanac*, p. 558.

[304] See, e.g., www.Youbet.com and www.CapitalOTB.com.

[305] 2003 *North American Gaming Almanac*, p. 560, (chart entitled "Exhibit 3: The Numbers Don't Lie," indicating that 46.3 percent of all pari-mutuel wagers – the largest component of the pari-mutuel handle – was placed by using an off-track or telephone account).

[306] See also the chart "US Horseracing Statistics".

[307] Antonia Z. Cowan, *The Global Gambling Village: Interstate and Transnational Gambling*, 7 Gambling Law Review 251 (August 2003), pp. 259 – 260, *citing Lescallet v. Commonwealth*, 89 Va. 878, 17 S.E. 546, 547-48 (Va. 1893) and *United States v. Truesdale*, 152 F. 3d 443 (5th Cir. 1998).

[308] Cowan, *The Global Gambling Village*, p. 260, *citing* Jeffrey A. Modisett, *A Brief Look at The Past, Present and Future through The Eyes of A Former Attorney General*, 6 Gaming Law Review 198 (2002), p. 203 *and* Memorandum from Gregory C. Avioli, National Thoroughbred Horseracing Association (on the issue: "Whether Account Wagering may be lawfully conducted by a state-licensed pari-mutuel facility with account holders located in a state other than the state where the account is located") (August 3, 1999), pp. 2-8.

[309] See Oregon Administrative Rule 462-220-0060.

[310] As an illustration of this extreme uncertainty, during February 2000, the United States Department of Justice itself made contradictory statements as to whether cross-border pari-mutuel wagering services such as Capital OTB were regulated by the Wire Act. At Jay Cohen's trial, on 22 February 2000, the Department of Justice attorneys convinced the trial judge that Capital OTB was not regulated by the Wire Act. Cohen Trial Transcript, p. 839 – 859. Three weeks earlier, however, a Department of Justice representative instructed the New York State Racing and Wagering Board that wagering services such as Capital OTB were probably regulated by the Wire Act and, therefore, unlawful under United States law. Letter of Kevin DiGregory, Assistant Attorney General, United States Department of Justice to Nicole Thuillez of the New York State

Youbet.com and Capital OTB have been accepted for over 30 years in the United States without any known federal prosecution of major service providers. The United States National Thoroughbred Racing Association has been reported as stating that state-licensed and regulated entities in over 30 states have been conducting interstate pari-mutuel wagering for more than 20 years with the full knowledge of the United States Department of Justice.[311]

While some of the state-sanctioned pari-mutuel wagering services, such as Youbet.com and Capital OTB currently accept both Internet and telephone wagers, there are other state-sanctioned services which accept only telephone wagers. Autotote Enterprises, Inc., for instance, is a licensed pari-mutuel operator in Connecticut which provides 12 off-track venues for patrons to watch and bet on horse racing.[312] The company maintains a telephone account wagering system called "On the Wire," which is accessible to residents of 27 states.[313] The longstanding and uninterrupted policy of acceptance by the United States of remote wagering by off-track and telephone accounts was codified into law in December 2000, when the United States Congress amended the Interstate Horseracing Act (the "IHA")[314] and specifically expanded the definition of "interstate off-track wager" to include pari-mutuel wagers transmitted between states by way of telephone or other electronic media. The added statutory language reads as follows:

> [T]he term –. . . 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools;[315]

The plain language of the revised statute clearly appears on its face to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, including the Internet, so long as such wagering is legal in both states. The legislative history of the amendment supports this conclusion. As part of the underlying legislative debate surrounding the passage of the amendment, Representative Frank R. Wolf of the State of Virginia expressed his understanding of the effect of this new language:

> I want Members of this body to be aware that section 629 ... would legalize interstate pari-mutuel gambling over the Internet. Under the current interpretation of the Interstate Horse Racing Act in 1978, this type of gambling is illegal, although the Justice Department has not taken steps to enforce it. This provision would codify legality of placing wagers over the telephone or other electronic media like the Internet.[316]

As a result of this legislative amendment to the IHA, account wagering has begun to spread into additional states. In 2003, Nevada approved account wagering on horse racing but the account wagering system has not commenced operations until its regulation system is being finalized.[317] In

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Racing and Wagering Board (1 February 2000). The states which have reviewed this issue have reached contradictory conclusions as well.

[311] Letter by Greg Avioli, counsel for the National Thoroughbred Racing Association to Congressman W.J. Tauzin.

[312] See http://www.autobet.com/.

[313] See www.ctotb.com/wire.asp and www.ctotb.com/open.asp. Autotote Enterprises is a subsidiary of Scientific Games Corporation, a United States-based publicly traded company which is a global technology leader in the pari-mutuel and lottery industries. See www.scigames.com/sgcorp/index.asp.

[314] See DC Appropriations, Pub. L. No. 106-553, § 629, 114 Stat. 2762A-108 (2000).

[315] 15 U.S.C. § 3002(3).

[316] 146 Cong. Rec. H 11230, 11232, 106th Cong. 2nd Sess. (2000).

[317] Cowan, *The Global Gambling Village*, p. 259, footnote 61.

addition, during 2003 Virginia amended its pari-mutuel wagering laws to grant the Virginia Racing Commission the authority to regulate account wagering, by "which an individual may establish an account with an entity, approved by the Commission, to place pari-mutuel wagers in person or electronically."[318]

Under the Indian Gaming Regulatory Act (the "IGRA"), gamblers at Native American gaming establishments are permitted to gamble against each other by using remote electronic player stations.[319] In two separate rulings issued in 2000, *United States v. 162 MegaMania Gambling Devices*[320] and *United States v. 103 Electronic Gambling Devices*,[321] federal appellate courts affirmed the sanctioned use of electronic player stations that allowed players at various Indian locations to play bingo-type gambling games against each other. Both of these cases involved the legality of a bingo-style gambling game called MegaMania, which is played on a machine called an "electronic player station."[322] These player stations are located on Native American lands in Oklahoma, California and elsewhere.[323] A person playing MegaMania begins the game by electronically selecting up to four cards with randomly generated numbers. The player must pay US$0.25 per card to begin the game. A game will commence once at least 12 players nationwide purchase at least 48 cards. A random selection machine located on Native American land in Oklahoma selects three numbered balls, and a human operator transmits the numbers on the balls by computer to Multimedia's headquarters, where they are sent through a computer network to each player station. The player then touches the corresponding space or spaces on the player's card appearing on the MegaMania station screen. To continue playing the game, a player must pay an additional US$0.25 per card in exchange for the numbers on the next three balls. These numbers are transmitted in roughly ten second intervals. Consequently, the player must continue to pay US$0.25 to US$1.00 every ten seconds to stay in the game. A player wins by being the first player among all those who are playing throughout the country to obtain a set of numbers which match a certain arrangement on his electronic card. On average, Multimedia and the participating Native American tribes retain 15 percent of the amount taken in by the machines and the winning players receive 85 per cent.[324]

In both the *162MegaMania Gambling Devices* and *103 Electronic Gambling Devices* cases, the federal courts held that the cross border electronic MegaMania gambling game was lawful under the IGRA. The analysis applied in these cases suggests that IGRA allows the use of technology, including the Internet, to expand player participation in a common game if the game and all the players are participating from terminals located on Native American land.[325]

United States lotteries are played across state lines in the cases of the Powerball and Mega Millions lottery games. Powerball is a multi-state, mega-jackpot lotto game that is played in 24 states, the District of Columbia and the United States Virgin Islands. The game is administered by the Multi-State Lottery Association (the "MUSL"), a multi government-benefit association owned and operated by its member lotteries.[326] For each drawing, five white balls are picked out of a drum containing 53 balls and one red ball out of another drum containing 42 red balls.[327] Mega Millions is a multi-state lottery game played in 11 states, including Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas, Virginia and Washington.[328] Mega Millions drawings are held

[318] James R. Kibler, Jr., "Annual Survey of Virginia Law: Administrative Law, 38 University of Richmond Law Review 39 (2003), p. 44-45, *citing* Va. Code Ann. § 59.1-369(5) (Cum. Supp. 2003).
[319] Cowan, *The Global Gambling Village*, p. 258 (internal citations omitted).
[320] 231 F.3d 713 (10th Cir. 2000).
[321] 223 F.3d 1091 (9th Cir. 2000).
[322] *U.S. v. 162 MegaMania Gambling Devices,* 231 F.3d at 716 – 717.
[323] Ibid.
[324] Ibid.
[325] Cowan, *The Global Gambling Village*, p. 258 (internal citations omitted).
[326] See www.powerball.com/pb_about.asp.
[327] *S*ee www.nmlottery.com/PowerBall/AboutPowerball.htm.
[328] See www.megamillions.com/aboutus/lottery_faq.asp.

Tuesday and Friday nights. The drawings are conducted by the Georgia Lottery in Atlanta, Georgia.[329] In both of these multi-state gambling games, players in participating states purchase lottery tickets from retail terminals which are linked to the Powerball or Mega Millions multi-state computer network.

United States

The gambling services described in paragraph 20 of the United States' second written submission may be transmitted between US states or on a cross-border basis. Other forms of Internet/remote gambling services are not authorized between US states or on a cross-border basis.

For Antigua and Barbuda:

20. Could Antigua and Barbuda please elaborate on its comment in paragraph 43 of its first oral statement that "We agree that in *certain specific circumstances* a service could be considered unlike only because it is supplied on a cross-border basis"? (emphasis added)

Antigua

The debate in this proceeding may have suffered from a possibly confusing use of the terms "cross-border" and "remote supply." Antigua has used these terms as follows: (i) c*ross-border* is defined by Article I(2)(a) of the GATS: "from the territory of one Member into the territory of any other Member." This implies that "the service supplier is not present within the territory of the Member where the service is delivered," and includes "the supply of the service through telecommunications or mail"[330] (but only when service supplier and consumer are physically located on the territory of different Members); and (ii) r*emote supply* includes the supply of services through telecommunications or mail or any other means when service supplier and consumer are not physically together irrespective of whether they are located within the same or within different countries.

Thus cross-border supply is necessarily remote supply but remote supply is only cross-border supply when service supplier and consumer are physically located in different Members. In its statement Antigua compared foreign services supplied on a cross-border basis (*i.e.* remote), with domestic services supplied via physical presence (*i.e.* non-remote)[331]. Antigua was not comparing cross-border remote supply with domestic remote supply. A more accurate wording is the following:

> Antigua and Barbuda submits therefore that, in the context of a commitment by a Member to national treatment of cross-border supply, there must at least be a presumption that the fact that the services are provided remotely cannot, standing alone, make a service "unlike" a service provided via physical presence. We agree that in certain specific circumstances a service *could* be considered "unlike" only because it is supplied remotely. However, in line with our reasoning discussed above, and the position expressed by Japan in its third party submission, Antigua and Barbuda believes that it is for the United States to rebut what should be an assumption of *prima facie* "likeness" of services supplied remotely.

United States

The United States wishes to clarify that it is not alleging that services supplied from Antigua are unlike because they are supplied on a cross-border basis. In principle, remote supply can occur

[329] See www.megamillions.com/aboutus/lottery_faq.asp.
[330] 1993 Scheduling Guidelines, para. 19.
[331] See Section III.B.5 of this Report.

either on a cross-border basis or on a purely domestic basis. US restrictions on remote supply apply equally regardless of national origin.

For the United States:

21. Exhibit AB-42[332] indicates that Youbet.com provides its subscribers the ability to wager "in most states" on horse races. US legal residents above 21 years old can become a member and place bets online or on the telephone once they have opened an account. Youbet.com states that it "is in full compliance with all applicable state and federal laws". Could the United States comment on this case, especially in view of its statement (in paragraph 33 of its first written submission) that the *Interstate Horseracing Act* "does not provide legal authority for any form of Internet gambling"?

United States

While Youbet.com states that they are in "full compliance with all applicable state and federal law," the US Department of Justice (the nation's chief law enforcement agency) does not agree with this statement. The Interstate Horseracing Act of 1978 is a civil statute in which the federal government has no enforcement role. In December 2000, the definition of the term "interstate off-track wager" in the IHA was amended. Congress, however, did not amend preexisting criminal statutes. When President William J. Clinton signed the bill containing the amendment to the IHA after the bill was passed by Congress, the Presidential Statement on Signing stated as follows:

> Finally, section 629 of the Act amends the Interstate Horseracing Act of 1978 to include within the definition of the term "interstate off-track wager," pari-mutuel wagers on horse races that are placed or transmitted from individuals in one State via the telephone or other electronic media and accepted by an off-track betting system in the same or another State. The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular sections 1084, 1952, and 1955, of Title 18, United States Code.[333]

After hearings on Internet gambling in 2003, the Department of Justice reiterated its view that current federal law prohibits all types of Internet gambling, including gambling on horse races, dog racing, or lotteries. The Department of Justice maintains this view because the 2000 amendment to the IHA did not repeal the preexisting federal laws making such activity illegal. Under the principles of statutory interpretation applicable in United States courts, "[i]t is a cardinal principle of construction that repeals by implication are not favoured ... . The intention of the legislature to repeal must be clear and manifest."[334]

[332] Extract from the website of Youbet.com, at www.youbet.com/faq/, submitted by Antigua as exhibit.

[333] Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, 2001, 36 Weekly Comp. Pres. Doc. 3153,3155-3156 (25 December 2000).

[334] *United States v. Borden Co.,* 308 U.S. 188, 188 (1939).

22. How does the United States treat Internet services provided by Youbet.com, TVG, Capital OTB and Xpressbet.com, referred to by Antigua and Barbuda in paragraph 118 of its first written submission?

United States

Antigua discussed account wagering on horse races via the Internet and telephone.[335] The United States does not agree that the 2000 amendment to the IHA permits the interstate transmission of bets or wagers on horse races because pre-existing criminal statutes prohibit such activity.[336] It should be noted, however, that these Internet services provide additional services beyond just accepting wagers on horse races. They provide access to information about the horses, the odds on the horse races, simulcasting of horse races, etc. While US law does not permit interstate transmission by a wire communication facility of bets or wagers on horse races, the interstate transmission by a wire communication facility of information assisting in the placing of bets or wagers on horse races would not be prohibited, pursuant to 18 U.S.C. § 1084(b), as long as the information is being transmitted from a place where betting on that event is legal to a place where betting on the same event is legal.

23. Could the United States comment on a statement made in the Gaming Industry Report by Bear Stearns (Exhibit AB-36[337]) that a number of operators in Nevada have established Internet gambling websites?

United States

The Bear Stearns report discussed proposals for Internet gambling in the State of Nevada. The report indicated that Nevada's plans for Internet gambling are on hold, and that Nevada has been informed by the Department of Justice that US federal law does not permit Internet transmission of a bet or wager. Nevada officials have assured federal officials that no operation licensed in Nevada has been approved or authorized to use any wagering system that operates over the Internet. In the discussion on Internet gambling businesses located in Alderney and the Isle of Man, the report stated on page 18 that Venetian Casino Resort Athens LLC, a subsidiary of Las Vegas Sands, Inc., had applied for an e-gaming license from Alderney. On page 19, the report stated that MGM Mirage had been awarded a license from the Isle of Man. The United States understands that MGM Mirage formerly operated an Internet gambling website from the Isle of Man, but has ceased operation. Further, when this website was operating, our information indicated it did not accept wagers from individuals located in the United States. The United States does not have specific information on whether or when the Venetian Casino Resort began operating its Internet gambling website. While the United States is not in a position to provide an analysis of the operation of any specific website from the Isle of Man or Alderney, we can categorically state that as long as such websites do not accept bets or wagers from individuals located in the United States and do not provide information assisting in the placing of bets or wagers to individuals located in the United States where such wagering is illegal, then the operation of such websites from Alderney or the Isle of Man by "operators from Nevada" does not violate US federal gambling laws.

[335] The United States submits that Antigua incorrectly states that "[i]n order to accommodate this new form of account wagering, in 2000, the United States expanded the IHA [Interstate Horseracing Act of 1978] to permit betting on horse races over the Internet. Today, United States residents can lawfully gamble on horse races by telephone or online with several United States-based companies." See Section III.B.5. of this Report.

[336] See US response to Panel's question 21.

[337] Michael Tew and Jason Ader, Bear Stearns & Co. Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders,* submitted by Antigua as exhibit.

24. What is the status of the New Jersey bill referred to in the Gaming Industry Report by Bear Stearns (Exhibit AB-36) that would allow existing land-based casino facilities in New Jersey to operate Internet gaming sites from their own casino floors?

United States

On page 35 of Exhibit AB-36, a bill introduced in 2001 in the State of New Jersey legislature is discussed. That bill was not passed by the State of New Jersey legislature. Another bill, AB 568, is discussed on page 36. That bill was introduced in the 2002-2003 session but it was not passed during that session. We have no information on whether that bill or any similar legislation has been or will be reintroduced in the New Jersey legislature.

25. With respect to Exhibit AB-18[338], could the United States indicate how it treats the services provided by Alliance Gaming Corp?

United States

Exhibit AB-18 is an article from the *Las Vegas Review-Journal* about a progressive slot system in casinos in Moscow that is monitored by operators in a control room in Las Vegas. This article appears to concern a progressive slot machine system that involves physical slot machines located in casinos, and does not concern on-line slot machines. The article does not contain sufficient factual allegations on the operation of this system to allow the United States to draw any conclusions about the legality of this system. Generally, progressive slot machines are slot machines that are linked together in the same or multiple casinos in order to increase the jackpot. The United States understands that the player must travel to a participating casino where the progressive slot machine is located, physically deposit the wager in the slot machine, and play the slot machine inside the participating casino. Under this scenario, the bet is placed in the casino where the player is located. Thus, the wager is not placed remotely.

26. Could the United States comment on the following excerpt from WT/GC/16 (referred to in paragraph 42 of Antigua and Barbuda's first oral statement) and the relevance, if any, of the comments contained therein to the present dispute:

"there should be no question that where a market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality".

United States

The United States concurs with the view that electronic delivery, in and of itself, does not cause a service to be excluded from a Member's commitments. The United States is not arguing for such an exclusion in this dispute. The quoted statement does not say, and should not be taken to mean, that delivery of a service by electronic means, or other means of remote supply, for that matter, automatically makes that service "like" any domestic service that is subject to the same commitment for purposes of the Article XVII likeness analysis. Remote supply does not mean that the service thus supplied (or its supplier) gets a "free pass" on likeness. As the United States points out in its second written submission, Antigua has failed to prove that its remotely supplied gambling services are like non-remote US gambling services.

[338] Rod Smith, "Casino Industry Technology: Open Wide, New Progressive slot System Lets Las Vegas Company Serve Russian Gamblers," *Las Vegas Review Journal* (2 September 2003), submitted by Antigua as exhibits.

E. ARTICLE VI

For Antigua and Barbuda:

27. Could Antigua and Barbuda specify what "authorization procedures" it is referring to in its claim of violation of Articles VI:1 and VI:3 of the GATS Agreement?

Antigua

The answer to this question is the same as question 11. It is not possible for Antiguan service suppliers to obtain authorisation to provide gambling and betting services into the United States. This violates Article VI:1 of the GATS because the "authorisation procedures" by their very terms exclude Antiguan suppliers and thus cannot be considered "administered in a reasonable, objective and impartial manner." This violates Article VI:3 because the inability to apply for authorisation makes it impossible for the United States to comply with the requirements of Article VI:3.

28. In respect of its claim of violation of Article VI:1, could Antigua and Barbuda indicate what "measures of general application" are not being "administered in a reasonable, objective and impartial manner" and why?

Antigua

The general approach to gambling law in the United States is that all gambling and betting is prohibited unless a specific authorisation has been given. Thus, the United States first maintains its "measures of general application"—the state and federal measures that act to prohibit the provision of gambling and betting services in the United States. Overlaying the general prohibitions are the state and federal measures that authorise certain persons to provide certain gambling and betting services under a wide and disparate variety of situations.[339] By not providing a method by which Antiguan suppliers can obtain authorisation to offer their services into the United States, the United States is in violation of Article VI:1.

F. ARTICLE XI

For Antigua and Barbuda:

29. In paragraph 108 of its first oral statement, Antigua and Barbuda refers to "legal provisions" that formed the basis of the New York Attorney General's action against Paypal.

(a) Which legal provisions is Antigua and Barbuda referring to?

(b) Is Antigua and Barbuda challenging these legal provisions and/or the application of these provisions?

Antigua

[a]: Paragraphs 14-18 of the "Assurance of Discontinuance" entered into in August 2002 between the Attorney General of the State of New York and PayPal, Inc,[340] refer to the two legal provisions and two cases (each of which was included in the Annex to Antigua's Panel request). In his discussion

[339] See Section III.B.7. of this Report.

[340] Attorney General of the State of New York, Internet Bureau, *In the Matter of Paypal, Inc.*, Assurance of Discontinuance (16 August 2002).

of the two cases the New York Attorney General further refers to two other legal provisions that are also included in the Annex to the Panel request. Antigua refers to all these legal provisions. The provisions and cases at issue are:

– **N.Y. General Obligation Law §§ 5-401 and 5-411 (McKinney 2001).** Section 5-401, makes all wagers on races and games of chance unlawful. Section 5-411 renders void all contracts based on wagers or bets.

– **N.Y. Const. art. I, §9.** Article I, section 9 of the New York Constitution states, in its pertinent part:

> "except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offences against any of the provisions of this section."

– ***U.S. v. Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).** This case involves the United States' prosecution of Jay Cohen discussed in Antigua's answer to question 12. The New York Attorney General cited Mr. Cohen's case as evidence that federal law – the Wire Act[341] – prohibits "offshore sports betting operations used by persons located in New York State."[342]

– ***The People of the State of New York v. World Interactive Gaming Corp.*, 185 Misc. 2d 852 (Sup. Ctr. N.Y. Co. 1999).** [343] The New York Attorney General cited this case for the proposition that New York's criminal laws regarding unlawful gambling[344] allow the State of New York to enjoin a licensed Antiguan gaming enterprise from providing gambling services to Internet users in New York.

[b]: As was the case in Antigua's answer to question 10, Antigua is challenging the statutes (*and* their application as demonstrated by the cited cases) to the extent they are used by the United States to prevent Antiguan service suppliers from providing gambling and betting services to consumers in the United States.

[341] 18 U.S.C. §1084.

[342] "Assurance of discontinuance" signed between the New York Attorney General and Paypal Inc., dated 16 August 2002, para. 16.

[343] Antigua cites to this same case in Section III of the Annex to its Panel request. Antigua's citation, although to the same case, is to a different reporting service.

[344] N.Y. Penal Law §225 (general gambling prohibition laws, included in the Annex to Antigua's Panel request).

II. PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

B. US SCHEDULE

For the United States:

30. In its reply to Panel question No. 3 to third parties, the European Communities refers to the last revision of the Revised Final Schedule of the United States Concerning Initial Commitments, circulated as MTN.GNS/W/112/Rev4 on 15 December 1993. The European Communities notes that this revision contained a cover-note that read as follows:

> **Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991).**
>
> **The European Communities notes that the only further activity to be undertaken following circulation of this document by the United States was a process of "'technical verification of schedules' which did not modify at all the scope of the results of negotiations" (as provided for in GATT/AIR/3544 , which, in turn, refers to a decision of the GNS dated 11 December 1993 providing the same).**
>
> **(a) Could the United States comment on the European Communities' reply?**
>
> **(b) How does** the **United States define the term "scope" in this cover-note?**

United States

[a]: The document MTN.GNS/W/112/Rev.4 cited by the European Communities includes a sentence, substantially identical to that which appeared in MTN.GNS/W/112/Rev.3, stating that "[e]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)." The EC has incorrectly described the cover note to draft versions of the US Schedule as indicating a US position "that the scope of [US] commitments is based on the 1991 Sectoral Classification (W/120) and the CPC."[345] The addition of the words "and the CPC" at the end of that sentence misrepresents the content of the cover note. The United States did not refer to the CPC in that note. Also, the United States has previously explained that the ordering of a schedule according to W/120 and the use of the CPC were distinct issues. Using W/120 did not bind a Member to the CPC, and this is confirmed by the fact that Members wishing to refer to the CPC inscribed CPC numbers in their schedules.

Regarding the discussions taking place in late 1993 and early 1994, those discussions provided ample opportunity for other participants in the GATS negotiations to request that the United States place CPC references in its schedule. A statement by the chairman of the Group of Negotiations on Services at an informal meeting on October 29, 1993 confirms this. The Chairman stated that:

> I also intend to organise consultations, possibly on a fairly large scale and probably on 16 November, on drafting of schedules of commitments. I should stress that it would not be the purpose of this exercise to consider the economic content or value of offers, but rather, in the interest of all participants, to identify possible improvements

[345] European Communities' reply to Panel question No. 3.

> in the presentation of offers, based on actual examples. The organisation of this discussion would be greatly assisted if participants informed the secretariat in advance of any common errors in scheduling which in their view affect the clarity or the legal security of commitments. This would enable the secretariat to prepare a working document for the discussion.[346]

The Chairman's instructions strongly imply that any participant that desired the insertion of CPC references in the US schedule was free to raise the issue at that time.

The GATT Secretariat subsequently asked that parties to the GATS negotiations submit their questions on others' schedules of commitments and MFN exemptions by 27 January 1994. Meetings were scheduled in early February 1994 at which interested parties were invited to discuss the draft schedules of individual participants as part of a "rectification" process, with final schedules requested by early March, 1994. While this period was mainly intended to address technical matters, a number of substantive issues remained outstanding as well.[347] Thus the United States would not agree with the assertion that the "scope of the results of the negotiations" was fully settled by December 1993.

[b]: The note relates the "scope" of US commitments to the "sectoral coverage" in W/120, from which one may infer that "scope of commitments" and "sectoral coverage" were being used as roughly synonymous terms. Contrary to the EC's assertions, participants in the negotiations could not reasonably have read this note as an endorsement of the CPC classification. The United States was already on record as not wishing to be bound by any particular nomenclature. Moreover, as the United States noted in response to part (a) of this question, W/120 and the CPC were recognized to be distinct issues. While many favoured the CPC, others did not wish to refer to it. The texts of the schedules reflect that Members wishing to refer to the CPC so indicated by the inscription of numerical CPC references.

31. In the European Communities' reply to Panel question No. 2 to the parties, the European Communities stated that "the relevance of unilateral practice has to be evaluated in the light of the obligation to be implemented." Could the United States comment on the European Communities' view of the relevance of unilateral practice of a Member in interpreting that Member's GATS Schedule.

United States

This statement was made in the context of the USITC Document. In view of the limitations of that document already described at length by the United States,[348] the United States fails to see how it could constitute a "practice" in the application of GATS – even a unilateral one.

The United States disagrees with the argument advanced by the EC that unilateral practice is relevant to the interpretation of the US schedule in this dispute. The EC cites no customary rule of interpretation of public international law that gives weight to unilateral practice. The EC refers to *EC - Computer Equipment*, but ignores key aspects of that report that demonstrate that it supports the US view, including the following: (i) The Appellate Body in that dispute criticized the panel for looking at the classification practice of one Member while failing to look at that of another.[349] (ii) The

[346] Informal GNS Meeting – 29 October 1993: Chairman's Statement, MTN.GNS/48 (29 October 1993).

[347] For example, participants continued to debate the scope of the GATS and the need to schedule certain types of measures. Participants were also given until June 1994 to complete the scheduling of certain sub-central measures. See Statement by the Chairman: Scheduling of Subsidies and Taxes at the Sub-Central Level, MTN.GNS/50 (13 December 1993).

[348] See Section III.B.2. of this Report; response to Panel question No. 2.

[349] Appellate Body Report on *EC – Computer Equipment*, para. 93

Appellate body in *EC - Computer Equipment* found that "classification practice" was only a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention, not context within the meaning of Article 31.3(b).[350] In that respect, *EC - Computer Equipment* once again directly contradicts the arguments of the EC and Antigua. (iii) *EC - Computer Equipment* dealt exclusively with "classification practice" – i.e., the practical application of customs classifications to goods.[351] The USITC Document, by contrast, does not represent the practical application of classifications under the GATS; its purpose is only to "facilitate comparison." It therefore does not reflect substantive implementation of US GATS commitments in the way that classification practice reflects implementation of goods commitments.

The United States further notes that, notwithstanding the fact that the USITC Document does not represent the implementation, interpretation, or application of any US commitment, the EC's comments on "unilateral practice" contain a number of surprising, and ultimately untenable, propositions.

First, the EC appears to suggest that implementation of a commitment is "particularly relevant" to the interpretation of a commitment. This is somewhat startling. In the first place, the EC cites no basis for this proposition in the customary rules of treaty interpretation. Indeed, it is hard to reconcile that position with the basic principle codified in Article 31(1) of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Furthermore, the EC appears to ignore completely the fact that many specific commitments were the subject of request-offer or other bi- or plurilateral negotiations. The EC's approach would no doubt surprise many Members who thought that other Members' GATS schedules record the results of their negotiations, and not just a set of words that the scheduling Member can "implement" and thereby interpret.

Second, the EC appears to suggest that the absence of an objection by other Members to the way one Member applies a specific commitment can be determinative of the meaning of that commitment. It is not entirely clear what the consequences of the EC's approach would be, whether for the schedule of the United States or that of any other Member. (The suggestion that the GATS had led to that sort of outcome would no doubt also startle many Members who participated in the negotiations but lack the resources to monitor implementation of other Members' every commitment.) In any case, the EC's position fundamentally rests on a principle that was rejected under the GATT 1947. As a GATT 1947 panel rejecting a similar argument by the European Communities made clear, "... it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties."[352]

[350] Ibid., para. 92.
[351] Ibid., paras. 92-93.
[352] Panel Report on *EEC – Import Restrictions*, para. 28. Another panel pointed out that "[t]he decision of a contracting party not to invoke a right vis-à-vis another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement." Panel Report on *EEC (Member States) – Bananas I,* para. 3.62.

C. THE MEASURE(S) AT ISSUE

For Antigua and Barbuda:

32. In its first oral statement (para. 21), in arguing that a prohibition on the cross-border supply of gambling and betting services exists, Antigua points to three federal laws, namely the Wire Act (18 USC § 1084), the Travel Act (18 USC § 1952) and the Illegal Gambling Business Act (18 USC § 1955). In its first oral statement (para. 20), Antigua also refers, through Exhibit AB-84, to five state laws that prohibit Internet gambling. Could Antigua indicate whether or not these are the only specific laws it seeks to rely on in substantiating its allegation that a prohibition on the cross-border supply of gambling and betting services exists. If not, could Antigua identify and explain the other laws or measures upon which it seeks to rely in this regard?

Antigua

All the specific laws contained in Antigua's Panel request form part of the total prohibition that effectively exists in the United States (and is recognized by the United States). Through paragraph 25 of our oral statement of 10 December 2003 and Exhibits AB-81 and –88, Antigua has provided further explanation of all these specific laws, the texts of which can be found in Exhibits AB-82, -89, -90, -91 and -99. All this material concerning specific laws further substantiates the existence of a total prohibition. It is important to note, however, that Antigua has cited all these laws in its Panel request in order to be as comprehensive as possible, *not* because it believes that each law is an essential part of a "puzzle" without which there would be no total prohibition. Most of the laws cited in the Panel request are prohibition laws that could be applied independently of each other to prohibit cross-border supply from Antigua.

Antigua submits its response to this question in advance of the deadline of 2 February because this question could also be interpreted as an invitation to submit more detailed explanation about the federal and state laws that were not discussed in paragraph 20-21 of the oral statement of 10 December and Exhibit AB-84. In Antigua's view this is probably not the purpose of question 32 because the documents submitted as Exhibits AB-81 and -88 already contain an explanation of all the federal and state laws listed in the Panel request that is similar to the explanation given for the three federal laws in our oral statement of 10 December 2003 and for the laws of the five states summarized in Exhibit AB-84. Antigua is of course prepared to submit further explanation of the laws at issue if that is what the Panel is seeking, but we do not want to burden the Panel with further written material if that is not what the Panel is looking for. If we have understood question 32 wrongly, we respectfully request the Panel to clarify it so that we may respond in the most helpful manner before the deadline of 2 February.

United States

The United States wishes to reserve its right to respond to any new arguments and/or evidence put forward by Antigua in response to the Panel's additional questions. Consistent with the views expressed in the US request for preliminary rulings, the United States would request that the Panel permit the United States a minimum of four weeks to respond to any new arguments or comment on any new evidence advanced by Antigua concerning measures that it has not addressed in its previous submissions and statements.

33. Could Antigua provide a list of the gambling and betting services they seek to supply cross-border to the United States and that they claim are subject to a prohibition?

Antigua

Antigua seeks to supply all types of services that involve the making of a bet or wager to consumers in the United States, subject to services that are prohibited by Antiguan law, such as those involving the use of pornographic, indecent or offensive material. It is difficult to cover every possible permutation in a list, but the product offerings encompassed by the gambling and betting services that Antigua seeks to offer include: (i) Random selection games (in whatever form and including games that are traditionally described as "lotteries" or "casino-type games" in their probably endless permutations). (ii) Event-based gambling. (iii) Card games and other games of skill involving monetary stakes. (iv) Person-to-person gambling (so-called "betting exchanges").

For the United States:

34. How is paragraph 20 of the United States' second written submission relevant to Panel question No. 19? Is Internet/remote gambling and betting authorized between US states?

United States

In response to Panel question 19, the United States stated that gambling services described in paragraph 20 of the US second written submission could be transmitted between US states or on a cross-border basis, but other forms of Internet/remote gambling services were not authorized between US states or on a cross-border basis. The reference to "paragraph 20" in that response was erroneous; the United States intended to refer to paragraph 26 of the US second written submission, in which the United States stated that US restrictions do not preclude cross-border supply of all gambling services, and listed several examples. The Internet/remote gambling services described in paragraph 26 are permitted between US states and on a cross-border basis, but other forms of Internet/remote gambling service (i.e., those involving transmission a bet or wager using a wire communications facility) are not. The United States thanks the Panel for bringing this error to its attention.

The United States wishes to note that paragraph 20 of the US second written submission does, however, bear a relationship to question 19. The table provided in paragraph 20 clarifies that in order to violate Article XVI:2(a), on which Antigua now bases its Article XVI:2 arguments, a limitation must restrict the "number of service suppliers," and must be "in the form of numerical quotas," etc. Under US law, whether a service is permissible between states and cross-border depends on the character of the activity involved. This type of restriction does not limit the number of suppliers (indeed, there can be an indefinite number of suppliers of permissible cross-border gambling services), and it does not take the "form" of "numerical quotas."

35. In paragraph 17 of its second oral statement, the United States submits that "We have very forthrightly told both the DSB and this Panel that the United States does not permit certain services, such as Internet betting, either domestically or on a cross-border basis." Could the United States identify the "certain services" for which supply is prohibited both domestically and on a cross-border basis?

United States

Yes. The United States is referring principally to services involving the transmission of a bet or wager by a wire communication facility across state or US borders, such as Internet and telephone betting. Other gambling services that are similarly restricted both domestically and cross-border

include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events.

36. With respect to the reference to the "very few exceptions limited to licensed sports book operations in Nevada" in the second paragraph of Exhibit AB-73[353], could the United States identify these exceptions, even on an illustrative basis?

United States

Exhibit AB-73 is a letter from Deputy Assistant Attorney General John Malcolm to the National Association of Broadcasters. The sentence in that letter referred to by the Panel states that "[w]ith very few exceptions limited to licensed sports book operation in Nevada, state and federal laws prohibit the operation of sports books and Internet gambling within the United States, whether or not such operations are based offshore." Nevada is the only state where sports book services are legal in the United States. This exception results from the historical fact that Nevada had already authorized such services at the time when the US federal government decided to prohibit the further authorization of sports gambling by US states.[354] Sports book services are limited to Nevada, and sports books in Nevada cannot accept wagers from individuals located in other states.

Antigua

Antigua would like to point out that the statement made on behalf of the United States in the letter attached as Exhibit AB 73 is not completely accurate when it says "[w]ith very few exceptions limited to licensed sport book operations in Nevada, state and federal laws prohibit the operation of sports books and Internet gambling within the United States (…)." Under the legislation known as the "PASPA,"[355] the United States federal government expressly exempted four states, Nevada, Oregon, Delaware and Montana, from its general prohibition on sports betting other than horse racing, greyhound racing and jai alai. Presently, only Nevada has full-scale sports betting, although Oregon has a number of sports betting opportunities through the state-owned lottery.[356] There is nothing in the PASPA or other federal laws restricting the ability of these states to engage in the full range of sports betting services on a commercial or state-owned basis. Further, while the United States appears to distinguish in several ways between horse racing and other forms of sports betting, Antigua believes that there is really no logical basis for the distinction. Horse race betting *is* sports betting and is widely sanctioned throughout the United States, whether delivered "in person", over the telephone or via the Internet.

[353] Letter from the United States Department of Justice to the National Association of Broadcasters entitled "Advertising for Internet Gambling and Offshore Sportsbooks Operations," (11 June 2003), Submitted by Antigua as exhibit.

[354] 28 U.S.C. §§ 3701-3704. This law was enacted in 1991 to "stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248, reprinted in 1992 U.S.C.C.A.N. 3553, 3555. Congress believed that "[s]ports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports." Ibid. Nevada was the only state that had authorized sports books at the time of the enactment of this federal statute (or within a year thereafter), thus under the terms of the statute it became the only state permitted to continue doing so.

[355] 28 U.S.C. §§ 3701-3704.

[356] www.oregonlottery.com.

D. ARTICLE XVI

For the United States:

37. Assuming, arguendo, that the United States has made a commitment in its GATS Schedule in relation to gambling and betting services, what is the purpose of evaluating consistency with paragraph 2 of Article XVI in addition to making that evaluation with respect to paragraph 1 given that the United States has inscribed a "none" in its Schedule in relation to market access commitments?

United States

The word "none" appears under the heading of "limitations on market access." In order to determine whether a Member has violated the commitment reflected by inscription of the word "none," one must therefore determine what it means to have a "limitation on market access." Article XVI:2 provides the closed list of carefully-described quantitative restrictions and other limitations that are considered "limitations on market access" under the GATS. Thus one is logically bound to look to Article XVI:2 to determine whether a Member has maintained or adopted a measure inconsistent with Article XVI.

38. What is the United States' reaction to Antigua's arguments in paragraph 31 of Antigua's second oral statement regarding the significance of the word "whether" in Article XVI:2(a)?

United States

Antigua relies on the word "whether" to assert that Article XVI:2(a) is, internally speaking, an open list rather than a closed one. The word "whether" does not automatically imply an open list. In fact, the WTO agreements are replete with contrary examples where the drafters understood this, and therefore added some catch-all term such as "any other form." The particular example using that phrase is Article XXVIII(a) of the GATS, which states that "'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form" (emphasis added). Another example more functionally analogous to Article XVI of the GATS is Article XI of the GATT, which describes an open list by reference to "prohibitions or restriction ... whether made effective through quotas, import or export licenses or other measures". Indeed, that example further confirms the previous US arguments on the important differences between Article XI of the GATT and Article XVI of the GATS.

There is another example in the GATS Annex on Financial Services, which uses the phrase "whether on an exchange, in an over-the-counter market or otherwise". Indeed, the WTO Agreements contain a number of other examples. Together they confirm that since Article XVI:2(a) includes no catch-all phrase, it is properly read as a closed list.

Antigua

Antigua would like to emphasise that the word "whether" must have *some* meaning. If Article XVI:2(a) were to be interpreted as the United States desires—an express recital of the only "forms" that denial of market access can take in order to result in a violation of Article XVI—the word "whether" is meaningless. If "whether" is taken out of the text, then the text reads as the United States summarised in paragraph 20 of its second written submission. Yet, the United States would have the *actual* text of Article XVI:2(a) read exactly the same way, despite the inclusion of the word "whether." In this respect the Panel should note that in *EC – Hormones*, the Appellate Body stated

that: "[T]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination (…)."[357]

The United States' argument that the broad purposes expressed in Article XVI:1 are then negated by a formalistic reading of Article XVI:2 is patently illogical and violates the basic rule of treaty interpretation described by the first paragraph of Article 31 of the Vienna Convention, i.e. that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." According to its preamble the object and purpose of GATS is the "progressive liberalization" of trade in services "as a means of promoting the economic growth of all trading partners and the development of developing countries." Market access commitments are obviously one of the main mechanisms through which this "progressive liberalisation" is put into effect. To allow a country to evade full commitments to market access expressed in its schedule simply by adopting a barrier in the "form" of a total, outright prohibition would render those commitments ineffective. This clearly cannot have been the intention of the drafters of the GATS.

39. Could the United States comment on Antigua's arguments in paragraph 32 of Antigua's second oral statement regarding the significance of the 1993 and 2001 Scheduling Guidelines insofar as they state that a nationality requirement for service suppliers would be caught by Article XVI:2(a) of the GATS? Could the 2001 Scheduling Guidelines constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention or "subsequent practice" under Article 31(3)(b) of the Vienna Convention?

United States

In paragraph 32 of its second oral statement, Antigua asserts that the 1993 and 2001 scheduling guidelines "state unequivocally that a nationality requirement for service suppliers would be caught by Article XVI:2(a) as equivalent to a zero quota despite the fact that it does not have the form of a numerical quota." Antigua bases this assertion on a list of examples of limitations on market access provided in the scheduling guidelines. That list includes, under "[l]imitations on the number of service suppliers," the entry "[n]ationality requirements for suppliers of services (equivalent to zero quota)."

The United States disagrees with Antigua's broad assertions based on this line in the scheduling guidelines for the following reasons: (i) nothing in the text of Article XVI supports the theory of an implied "zero quota." The text of Article XVI:2(a) relied upon by Antigua refers in relevant part to "limitations on the number of service suppliers ... in the form of numerical quotas." Under the ordinary meaning of this text, the "form" of the limitation is the legally relevant fact, not its alleged implication or effect. The quoted language requires that this form be "numerical" (which means "of, pertaining to, or characteristic of a number or numbers") and a "quota" (which means a "quantity … which under official regulations must be … imported").[358] US restrictions on remote supply of gambling do not take the form of numerical quotas on service suppliers; (ii) the scheduling guidelines themselves state elsewhere that "[n]umerical ceilings should be expressed in defined quantities in either absolute numbers or percentages."[359] This statement is more consistent with the text of Article XVI; (iii) the scheduling guidelines state on their face that they "should not be considered as an authoritative legal interpretation of the GATS"[360]; (iv) the example of a nationality requirement is inapposite because such a requirement theoretically precludes all cross-border supply, whereas – as the United States has repeatedly stressed – US restrictions on remote supply of gambling

[357] Appellate Body Report on *EC – Hormones*, para. 181.
[358] The *New Shorter Oxford English Dictionary*, pp. 1955, 2454 (4th ed. 1993).
[359] Addendum to 1993 Scheduling Guidelines; response to question 3; 2001 Scheduling Guidelines, para. 9.
[360] 1993 Scheduling Guidelines, para. 1; 2001 Scheduling Guidelines, para. 1.

do not prohibit all cross-border supply of gambling services, and they apply regardless of nationality; (v) unlike nationality requirements, US restrictions on remote supply of gambling are restrictions on the attributes of a service, not limitations on market access. In a 1997 paper discussing (among other things) the "zero quota" line in the Scheduling Guidelines, the WTO Secretariat observed that although a nationality requirement might be considered a zero quota (*quod non*), "[a] restriction on the composition of management of a commercial presence cannot be construed as a direct restriction on market access for a foreign services supplier."[361] The Secretariat thus distinguished between restrictions on the "attributes" of a service, which belonged in the national treatment column, and restrictions on "natural persons actually supplying the service," which belonged in the market access column.[362] Consistent with this analysis, US restrictions on the attributes of a service are not limitations on market access.

The Panel asks whether the 2001 Scheduling Guidelines constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention. They do not. The United States has already pointed out that the text of the document states that it should not be considered as a legal interpretation of the GATS. It would therefore be inconsistent with the terms of the document itself to construe it as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Also, the General Council and the Ministerial Conference have the "exclusive authority" to adopt legal interpretations of the WTO agreements.[363] Finally, the 2001 Scheduling Guidelines do not relate to the "interpretation" or "application" of the GATS; rather, they represent preparatory work for the negotiation of new commitments. For all of these reasons, the 2001 Scheduling Guidelines do not constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention.

The Panel asks whether the 2001 Scheduling Guidelines constitute "subsequent practice" under Article 31(3)(b) of the Vienna Convention. They do not. Article 31(3)(b) of the Vienna Convention refers to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The 2001 Scheduling Guidelines constitute non-binding guidance for the negotiation of treaty provisions, and as such represent preparatory work for future commitments, not practice "in the application of the treaty." Moreover, the 2001 Scheduling Guidelines do not "establish[] the agreement of the parties regarding" the interpretation of the GATS. On the contrary, these "guidelines" expressly state that they are not an interpretation, and were drafted with great care to suggest or recommend, rather than require, particular approaches, nomenclatures, or interpretations. Therefore one cannot conclude that the 2001 Guidelines represent a practice of Members reflecting a common understanding by Members on the interpretation of any provisions of the GATS.

The positions expressed in the two preceding paragraphs are further confirmed by the text of the Decision by which the Council for Trade in Services adopted the 2001 scheduling guidelines. The Council decided:

> 1. To adopt the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services contained in document S/CSC/W/30 *as a non-binding set of guidelines*.
>
> 2. Members are invited to follow these guidelines *on a voluntary basis* in the future scheduling of their specific commitments, in order to promote their precision and clarity.

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[361] Revision of Scheduling Guidelines – Note by the Secretariat, S/CSC/W/19, para. 20 (5 March 1999).

[362] Ibid.

[363] Article IX:1 of the Marrakesh Agreement Establishing the World Trade Organization.

3. These guidelines *shall not modify any rights or obligations* of the Members under the GATS.[364]

The italicized language demonstrates that the 2001 Scheduling Guidelines were intended neither to bind Members nor to alter the extent of any right or obligation under the GATS (including the extent of commitments). Moreover, it was understood that the revised guidelines did not constitute an authoritative interpretation of GATS provisions, since such an interpretation would have to be based on Article IX of the WTO Agreement. Rather, they constituted preparatory work for "future scheduling" of specific commitments.

E. ARTICLE XVII

For Antigua and Barbuda:

40. Does Antigua have any market-based/economic evidence to support its assertion in paragraph 36 of its second oral statement that "Internet-based" and "land-based" gambling and betting services compete and that consumers switch from one to the other?

Antigua

In 2001, a survey was undertaken by some industry participants in order to determine the "consumer market" among gamblers world-wide. A summary of the report on their findings[365] contains some interesting material regarding the demographics of gamblers.[366] The River City Study found considerable overlap in the use of gambling services by regular gamblers. In particular, it found that "[l]and-based and pay-online players, those who gamble for real money both online and offline, are the market's true gambling enthusiasts. (…). [T]hey are the greatest gambling spenders in the market."[367] The study also found that gamblers who only play for real money on-line but do not gamble at land-based facilities "are a unique sliver of the total e-gaming consumer market."[368]

A number of academic studies in the United States and the United Kingdom have found a high degree of substitutability between different forms of gambling. To Antigua's knowledge there are no such studies that specifically investigate substitutability of "Internet-based" gambling vis-à-vis "land-based gambling." However, Antigua has asked the opinion with respect to substitutability in the gambling markets of two leading economists in this field (Professor Donald Siegel of the Rensselaer Polytechnic Institute of Troy, New York and Professor Leighton Vaughan Williams from Nottingham Trent University). Both conclude that "Internet based" gambling is a strong substitute for "land-based" gambling.[369]

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[364] Decision on the Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS) – Adopted by the Council for Trade in Services on 23 March 2001, S/L/91 (29 March 2001) (emphasis added).

[365] "The River City Gambler Monitor," The River City Group, Reymer & Associates (2001).

[366] "Internet Gambling Report, Sixth Edition," River City Group, LLC (2003) (the "River City Study").

[367] Ibid., p. 57.

[368] Ibid.

[369] The statement by Professor Donald Siegel and Professor Leighton Vaughan Williams and the additional statement by Professor Leighton Vaughan Williams submitted by Antigua as exhibits. Some of the literature to which the first opinion refers is also submitted as evidence: D. Siegel and G. Anders, "The Impact of Indian Casinos on State Lotteries: A Case Study of Arizona," *Public Finance Review*, Vol. 29, No. 2, March 2001, pp. 139-147; D.S. Elliott and J.C. Navin, "Has Riverboat Gambling Reduced State Lottery Revenue?" *Public Finance Review*, Vol. 30, No. 3, May 2002, pp. 235-247.

With its first submission, Antigua also provided the Panel with anecdotal evidence of competition between Internet-based and domestic gambling services in the United States.[370] There is considerable further anecdotal evidence of competition between Internet and other gambling.[371]

With regard to the general proposition that "Internet-based" commerce competes with "land-based" commerce Antigua refers to the initiative of the United States' Federal Trade Commission ("the FTC") to promote competition over the Internet.[372] The FTC has found, however, "that many state regulations favor local suppliers over out-of-state competitors and that others ban online competition for particular goods and services altogether." In relation to an investigation of Internet wine sales the FTC found that: "E-commerce can offer consumers lower prices, greater choices, and increased convenience. In wine and other markets, however, anticompetitive barriers to e-commerce are depriving consumers of those benefits." The FTC further found that: "State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." In relation to the states' concern of underage drinking the FTC concluded that "states can limit sales to minors through less-restrictive means than an outright ban."

41. With respect to Antigua's arguments in paragraph 38 of its second oral statement, is Antigua now arguing that all gambling and betting activities that involve the experience of winning and losing money are necessarily "like" and that this would constitute the main criterion in deciding "likeness" under Article XVII?

Antigua

From the beginning of this dispute, Antigua has maintained that all gambling and betting services involving the placing of a wager are "like" for purposes of Article VXII of the GATS. Due to the lack of WTO jurisprudence on "likeness" under the GATS, as was discussed at some length in Antigua's oral statement of 10 December, Antigua believes that an appropriate context for assessing "likeness" is found in the leading GATT 1994 case on the topic, that of *EC – Asbestos*.[373]

In *EC – Asbestos,* the Appellate Body found that the two most important criteria for the determination of "likeness" were: (i) the extent to which the products are capable of serving the same or similar end-uses; and (ii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand. In this respect Antigua submitted in paragraph 38 of its opening statement of 26 January 2004 that the experience of winning or losing money is the *sine quo non* of gambling and betting services which could equally well be delivered locally or "remotely." This is not the case with a comparison the

[370] This evidence can be found in "The Handle: Thursday Roundup," *The Spokesman Review* (Spokane Washington) (2 February 2001); David Bennett, "Lottery's pot for schools ends up short," *Crain's Cleveland Business* (23 July 2001); Jim Saunders, "Video-gambling debate spins in soft economy," *The Florida Times-Union* (29 December 2002); and Michael Kaplan, "Gambling in America: A Special Report," *Cigar* Aficionado, (October 2002).

[371] See, e.g., Rod Smith, "Online Betting Growth Called Threat to Nevada," *Las Vegas Review-Journal* (24 January 2003), D1 (http://www.reviewjournal.com/lvrj_home/2004/Jan-24-Sat-2004/business/23006933.html) (Nevada gambling industry experts view on-line betting growth as a threat to the Nevada gambling industry's standing as the centre of the world gaming industry) Ed DeRosa, "NYRA, Magna Withhold Simulcast Signal From Attheraces," *Thoroughbred Times.com,* 13 January 2004 (http://www.thoroughbredtimes.com/todaysnews/newsview.asp?recno=41340&subsec=) (Internet betting sites adversely impacting horse race betting). In its 2002 Equity Research paper on the Gaming Industry, "E-Gaming: a giant beyond our borders," (September 2002) the investment banking firm of Bear Stearns & Co., Inc. cites a number of competitive concerns of the United States domestic gaming industry over Internet-based gambling. See Michael Tew and Jason Ader, Bear Stearns & Co, Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders*, pp. 32-39.

[372] FTC, "E-commerce lowers prices, increases choices in wine market".

[373] Appellate Body Report on *EC – Asbestos.*

United States tries to make in paragraph 39 of its second written submission in which it seeks to draw an analogy with the difference between participation in actual horseback riding compared to participation in "virtual reality" horseback riding—a situation in which the main feature of the two activities is clearly different (physical as opposed to non-physical activity).

In view of the criteria put forward by the Appellate Body in *EC – Asbestos*, Antigua believes that the most important criterion for the determination of "likeness" in WTO law is product (or service) substitutability. There are, of course, various levels of substitutability. For instance, economic evidence existing in the United States shows that, at one level, gambling activities serve as a broad substitute for other "entertainment and recreation services."[374] Antigua does not suggest, however, that any level of substitutability necessarily makes two services "like." On the other hand the level of substitutability required for two services to be viewed as "like" should not be set at a level which is unduly high and should be considered in the context of the other "competition component" of Article XVII: the requirement of "conditions of competition" that are not less favourable. In other words, services with a low substitutability will bear a considerable level of different treatment without effect on the "conditions of competition" and without violation of Article XVII. In the case of two services with a high substitutability, a low level of different treatment will modify conditions of competition and, consequently, violate Article XVII.[375] The available economic evidence suggests that there is a high or relatively high degree of substitutability between the various traditional forms of gambling services as well as substitutability between the various methods of distribution of gambling services.[376] In this respect Antigua submits that a radically different treatment of one form of gambling, or one distribution method, compared to another necessarily violates Article XVII.

For the United States:

42. In its submissions, the United States has introduced a distinction between, on the one hand, remote supply of gambling and betting services and, on the other, the non-remote supply of such services. Could the United States clarify how it defines "remote" and "non-remote" supply of such services, making reference to the specific application of this distinction in the United States. For instance, if a lottery ticket for a New York State lottery is purchased through a licensed vendor in Florida, does this amount to remote supply, given the definition of this term referred to by the United States in paragraph 7 of its first written submission?

United States

By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. Non-remote supply means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc. The United States wishes to add

[374] D. Siegel and G. Anders, op. cit., pp. 140.

[375] See also, A. Mattoo, "MFN and the GATS," in T. Cottier and Petros C. Mavroidis, Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, (The University Of Michigan Press, 2000), 51-99, at p.73-75.

[376] Statement by Professor Donald Siegel and Professor Leighton Vaughan Williams in response to the question:"does Antigua have any market-based/economic evidence to support its assertion that "Internet-based" and "land-based" gambling and betting services compete and the consumers switch from one to the other?" submitted to the Panel by Antigua; D. Siegel and G. Anders, "The Impact of Indian Casinos on State Lotteries: A Case Study of Arizona," *Public Finance Review,* Vol. 29, No. 2 (March 2001); D.S. Elliott and J.C. Navin, "Has Riverboat Gambling Reduced State Lottery Revenue?" *Public Finance Review,* Vol. 30, No. 3 (May 2001).

a brief comment on the New York/Florida example. In practice, that example would not occur because the state lotteries operate on an exclusive territorial basis.[377] Setting that aside for the sake of discussion, the United States considers that if the consumer must go to a local vendor point of presence to purchase the gambling service, it is non-remote. In the Panel's example, the New York supplier needs to contract with a vendor in Florida, rather than supplying the service directly by means of distance communication.

43. What is the United States' reaction to statements made by the representative of Antigua during the Panel's second substantive meeting that there has been no communication between Antiguan and US authorities regarding the concerns that the United States has pointed to as justifying the drawing of a regulatory distinction between remote gambling and non-remote gambling?

United States

The United States fails to see how Antigua's assertions bear on a likeness analysis under Article XVII. Nothing in Article XVII indicates that likeness depends on the degree of communication between Members' authorities concerning differences between services. The United States has already observed that it has had significant interactions with Antigua and Barbuda on law enforcement issues. To the extent that the Panel's question refers to Antigua's assertions concerning requests for law enforcement assistance, the United States refers the Panel to paragraphs 7 through 10 of the US second closing statement. Regarding other forms of regulatory cooperation, the United States welcomes inquiries and fact-finding missions from governments wishing to learn about US regulation of gambling services. The United States is not aware of any effort by the government of Antigua to pursue such cooperation. As explained in the US second submission and second opening statement, the absence of any US domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to engage in international negotiations toward the establishment of such a regime for its cross-border suppliers. Moreover, Antigua's positions in this dispute make it clear that Antigua is unwilling to recognize the existence of specific US regulatory concerns surrounding remote supply of gambling.

F. ARTICLE XIV

For the United States:

44. Is the United States formally invoking Article XIV and expecting a determination on the same, if necessary?

United States

The United States maintains its strongly-held view that it is not necessary to reach the issue. There is no requirement that a measure be inconsistent with the GATS in order for Article XIV to apply (although the US would recognize that a panel would normally not want to reach Article XIV unless it had found an inconsistency). Article XIV thus applies in this dispute with or without a finding of an inconsistency with the GATS. Because the measures discussed in the US second submission serve important policy objectives that fall within Article XIV, the United States invokes Article XIV in this dispute and would expect a determination on the same, if necessary. However, in

[377] U.S. states could in theory permit businesses to procure for a person in one state a ticket, chance, share or interest in a lottery conducted by another state (without actually transmitting the ticket out of the state where it was purchased) pursuant to an agreement between the two states authorizing such activity. But the United States is not aware of any states that have entered into the agreements that would be necessary to permit such activity. Even if states did enter into such agreements, local presence in the consumer's state would be required, as the tickets could not be mailed between states.

view of the express language of Article XIV ("nothing in the agreement shall prevent..."), the United States views the primary role of Article XIV in this dispute as further confirming the absence of any inconsistency.

45. In the case of an affirmative answer to the previous question, could the United States clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)?

United States

The United States would like to first note that a Member's laws and regulations are presumed to be consistent with WTO rules unless proven to be otherwise. A defending party's burden of proof regarding measures enforced under Article XIV(c) therefore differs from the burden imposed on a party seeking to prove that laws or regulations are inconsistent with the GATS. The defending party under Article XIV(c) need only show that such laws exist and have not been found inconsistent with the GATS. Such laws do exist in this case, and although Antigua challenges some of these laws (alleged state restrictions on gambling), Antigua has not shown that any (much less all) are inconsistent with the GATS.

Sections 1084, 1952, and 1955 secure compliance with state laws restricting gambling and like offences. State laws restricting gambling include the laws by which a number of states prohibit some or all gambling.[378] With respect to this issue, Antigua stated in paragraph 30 of its second submission that "[t]he existence of federal legislation facilitates the prosecution of suppliers of 'unauthorized' gambling" under state law." Thus Antigua itself recognizes that US federal gambling laws serve as enforcement measures for state laws.

The United States argued in paragraphs 100-101 of its second submission that §§ 1084, 1952, and 1955 are measures against organized crime, and that inherent in the concept of "organized crime" are certain types of criminal activity in which organized crime groups typically engage. Thus, the United States submits that as measures against organized crime, §§ 1084, 1952, and 1955 secure compliance with the US laws and regulations that define and/or prohibit organized crime, as well as laws and regulations that prohibit the criminal activity that, when committed in certain ways, constitutes organized crime. These laws and regulations include the following:

(i) Racketeer Influenced and Corrupt Organizations statute: Organized crime is a subset of the broader category of "racketeering." The predominant US law defining and prohibiting racketeering is the Racketeer Influenced and Corrupt Organizations statute, or, more commonly, the "RICO" statute;[379]

(ii) Organized Crime Control Act of 1970 findings: While the term "organized crime" has no legal definition as such under US law, the statutory findings of Congress in the Organized Crime Control Act of 1970 refer to "a highly sophisticated, diversified, and widespread activity" involving "unlawful conduct and the illegal use of force, fraud, and corruption" and which "derives a major portion of its power through money obtained from such illegal endeavours as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation";[380]

(iii) Attorney General Order 1386-89: "Organized crime" is defined for operational purposes at the US federal level in the Appendix to Attorney General Order 1386-89. That document

[378] See, e.g., Utah Code Ann. § 76-10-1102; Hawaii Rev. Statutes §§ 712-1221 through 712-1223.
[379] RICO Statute, 18 U.S.C. §§ 1961-1968.
[380] See Section III.B.5. of this Report.

states that: "[T]he definition of "organized crime" … refers to those self-perpetuating, structured and disciplined associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption." According to this definition, organized crime groups possess certain characteristics which include but are not limited to the following: (i) Their illegal activities are conspiratorial; (ii) In at least part of their activities, they commit or threaten to commit acts of violence or other acts which are likely to intimidate; (iii) They conduct their activities in a methodical, systematic, or highly disciplined and secret fashion; (iv) They insulate their leadership from direct involvement in illegal activities by their intricate organizational structure; (v) They attempt to gain influence in government, politics, and commerce through corruption, graft, and legitimate means; (vi) They have economic gain as their primary goal, not only from patently illegal enterprises such as drugs, gambling and loan sharking, but also from such activities as laundering illegal money through and investment in legitimate business;[381]

(iv) Underlying criminal activities: As the above descriptions make clear, organized crime ultimately consists of the commission in a given manner of a combination of underlying crimes. A measure against organized crime is therefore also a measure against the commission of such underlying crimes. Key examples of underlying crimes that are often committed as organized crime include the following: (i) violent crimes. US state laws forbid the illegal use of force. For example, all of the states prohibit murder and assault.[382] Federal laws also apply to such acts when they occur within federal jurisdiction.[383] State and federal laws also prohibit acts involving the threat of force, such as extortion;[384] (ii) property crimes: US state laws also forbid acts of larceny and fraud,[385] and other property crimes. Federal laws also apply to such acts when they occur under certain circumstances, such as fraud schemes using the US mails or interstate wire transmissions, or where stolen property is taken across state lines[386]; (iii) corruption and conspiracy crimes: US state and federal laws prohibit various forms of corruption and conspiracy.[387] One such law, the federal RICO statute, is mentioned above. Another is the federal conspiracy statute;[388] (iv) money laundering. US federal and state law also prohibits money laundering.[389]

[381] Order Directing Realignment of Organized Crime Program Resources, Attorney General Order 1386-89, appendix (26 December 1989).

[382] Examples of such laws from two of the larger U.S. states are Cal. Penal Code §§ 187-89 (murder) and §§ 240-41 (assault); N.Y. Penal Code §§ 120.00-.15 (assault).

[383] See, e.g., 18 U.S.C. § 1111 (federal crime of murder).

[384] An example of such laws at the federal level is 18 U.S.C. § 875. Examples from two of the larger U.S. states are Cal. Penal Code §§ 518-527 (extortion) and N.Y. Penal Law § 155.05(2)(e) (larceny by extortion).

[385] Examples from two of the larger U.S. states are Cal. Penal Code § 484 (theft) and N.Y. Penal Law § 190.40-.83 (criminal usury, scheme to defraud, criminal use of an access device, identity theft, and unlawful possession of personal identification information).

[386] 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 2314 (interstate transportation of stolen property).

[387] See, e.g., N.Y. Penal Law Arts. 180, 200 (bribery and bribery of public servants).

[388] 18 U.S.C. § 371.

[389] 18 U.S.C. §§ 1956-1957; N.Y. Penal Law Art. 470.

III. COMMENTS BY THE PARTIES ON THE RESPONSES PROVIDED IN SECTION II

A. COMMENTS BY ANTIGUA AND BARBUDA ON THE UNITED STATES' RESPONSES TO PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

Question 36 (for the United States)

With respect to the reference to the "very few exceptions limited to licensed sportsbook operations in Nevada" in the second paragraph of Exhibit AB-73[390], could the United States identify these exceptions, even on an illustrative basis?

In its response to this question, the United States answered that Nevada was the only state in which "sports book" services are legal in the United States. This is not accurate. As Antigua has pointed out previously, there are four states in the United States that are exempt from the application of the 1992 federal legislation that restricted certain forms of sports-related betting in the United States.[391] Although effected somewhat cryptically, the exemptions are found in Section 3704 of the statute.[392] Oregon maintains state-sponsored betting on certain sporting events on the basis of this exemption and Delaware has considered adopting extensive sports betting.

A proper analysis of the market for sports betting in the United States should take into account the non-sanctioned, or "illegal," sports betting industry, which comprises a huge segment of the United States gambling market and is, despite protests of the United States to the contrary, as stated by the United States NGISC, "*not likely to be prosecuted*."[393]

Question 42 (for the United States)

In its submissions, the United States has introduced a distinction between, on the one hand, remote supply of gambling and betting services and, on the other, the non-remote supply of such services. Could the United States clarify how it defines "remote" and "non-remote" supply of such services, making reference to the specific application of this distinction in the United States. For instance, if a lottery ticket for a New York State lottery is purchased through a licensed vendor in Florida, does this amount to remote supply, given the definition of this term referred to by the United States in paragraph 7 of its first written submission?

In its response to this question, the United States for the first time presents a clear, concise definition of what it has called "remote supply" — what it considers to be the "unlike" gambling and betting service that it may prohibit from being supplied on a cross-border basis without being in violation of its commitments under the GATS.[394] The response deserves to be set out in its entirety (emphasis added):

> By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. *Non-remote supply*

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[390] See above footnote 353.

[391] 28 U.S.C. §§ 3701-3704.

[392] Anthony N. Cabot and Robert D. Faiss, "Sports Gambling in the Cyberspace Era," 5 *Chapman Law Review* 1, Spring 2002, p.7, footnote 31.

[393] NGISC Final Report, pp. 2-4, See generally the discussion and sources in Section III.B.2.of this Report.

[394] And which, apparently, it also believes is subject to exclusion under Article XIV of the GATS.

means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc.

This statement is important in a number of respects. First, it unambiguously establishes the United States' position that the only actual difference between "remote" and "non-remote" gambling and betting services is the ability of the consumer to make an actual physical appearance before (or in proximity to) another person or a vending machine. It also implicitly clarifies that the only arguable societal concern that might be better addressed by the "non-remote" gambling and betting service is under age gambling.[395] Antigua is aware of no form of gambling in the United States that requires verification of identity to simply place a wager, whether at a casino, at a vending machine, at a retail outlet or otherwise. Further, there is nothing inherent in a personal appearance before a gambling service provider or vendor that precludes organised crime participation or money laundering—at least nothing that the United States has produced in this proceeding. Indeed, rather than unsubstantiated allegations, the United States has produced nothing in this proceeding to either (i) challenge the efficacy of the Antiguan regulatory scheme with respect to organised crime or money laundering or (ii) demonstrate that organised crime or money laundering exists at all in the Antiguan gambling and betting industry, much less at levels in excess of those pervading the gambling industry in the United States.

If under age gambling is then the primary concern of the United States, again the United States has produced nothing in this proceeding: (i) demonstrating that under age gambling has ever occurred in connection with the Antiguan gambling and betting industry, much less at levels in excess of those pervading the gambling industry in the United States; (ii) demonstrating the insufficiency of the Antiguan regulatory schemes to prevent under age gambling; (iii) to explain why the United States Congress considers use of credit cards sufficient to prevent under age access to the clear dangers of pornography and paedophilia on the Internet but not sufficient to prevent under age access to gambling and betting services on the Internet; or (iv) countering the assertions of Antigua that enhanced inter-governmental cooperation or use of other means of age verification could further reduce the risk of under age gambling.

With respect to the statements made in the United States' response to this question, Antigua would refer the Panel to Antigua's answer to question 19 of the Panel, in which it was pointed out that there are multi-state lotteries currently operating in the United States.[396] The largest of these, the "Powerball" lottery, is played in 24 states.

Question 43 (for the United States)

What is the United States' reaction to statements made by the representative of Antigua during the Panel's second substantive meeting that there has been no communication between Antiguan and US authorities regarding the concerns that the United States has pointed to as justifying the drawing of a regulatory distinction between remote gambling and non-remote gambling?

In its response to this question, the United States says that it "fails to see how Antigua's assertions bear on a likeness analysis under Article XVII." The United States misunderstands the point of Antigua's statement. Antigua has made clear its belief that regulatory schemes cannot be relevant for purposes of assessing "likeness" under Article XVII. Rather the purpose of the statement was to indicate that although the United States would have this Panel believe that money laundering is

[395] The United States has already conceded that "adults can be expected to exercise their own moral judgment (…)." Further, the United States has adduced no evidence to establish that what it calls "remote" gambling provides greater "health" risks than "non-remote" gambling, while Antigua has produced reports of three noted experts to the contrary.

[396] Antigua's reply to Panel question No. 1.

endemic in the Antiguan gambling and betting industry, the United States has *not even once* contacted the Antiguan government in this regard. Antigua was therefore simply refuting the baseless allegations made by the United States.

Two additional points made by the United States in its response to this question bear further comment. The United States says (emphasis added):

> [T]he absence of any US domestic regulatory regime that permits the remote supply of gambling services *makes it unreasonable for Antigua to expect the United States to engage in international negotiations* toward the establishment of such a regime for its cross-border suppliers. Moreover, Antigua's positions in this dispute make it clear that Antigua is unwilling to recognize the existence of specific US regulatory concerns surrounding remote supply of gambling.

Antigua considers the first point made astonishing for a number of reasons, but particularly in the context of the requirements of the "chapeau" of Article XIV. With respect to the second point made in the paragraph, it is patently untrue. Antigua recognizes the regulatory concerns associated with gambling and betting services – that is why Antigua has its own, thorough set of regulations. More to the point, however, Antigua believes that any remaining regulatory concerns that the United States may have can and should be the subject of discussion and negotiations between the parties. As was pointed out by Antigua, there may well be existing technologies and methods of cooperation that could obviate any concerns that the United States may have in respect of the provision of cross-border gambling and betting services. Antigua has offered to consult with the United States in this respect on numerous occasions, but the United States has refused to do so – as it makes clear in its answer to this question.

Question 44 (for the United States)

Is the United States formally invoking Article XIV and expecting a determination on the same, if necessary?

The United States position on this issue remains unclear. Its statements contained in its response to this question can be construed to mean that the United States does not invoke Article XIV as a defence, but simply as a method of "further confirming the absence of any inconsistency" of its laws with the GATS, apparently. Antigua disagrees with the United States position that Article XIV can apply in the absence of a determination of inconsistency of other domestic measures with the GATS. It is clear under WTO jurisprudence that defences such as those contained in Article XIV are "exceptions to substantive obligations" of the parties.[397] In the absence of a "substantive obligation," the "exceptions" of Article XIV have no application.

Question 45 (for the United States)

In the case of an affirmative answer to the previous question, could the United States clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)?

The part of Article XIV(c) on which the United States relies in its response to question 45 refers to measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (…)."

The Panel asked the United States to (emphasis added) "*clearly and specifically* identify the provisions of laws and regulations with which it says the challenged measures secure compliance

[397] Appellate Body Report on *US – Shrimp*, para. 121.

under Article XIV(c)." In its response the United States recognizes that it is the task of a defending party that seeks to invoke Article XIV(c) to "show that such laws exist." The United States then discusses two categories of laws: "state gambling laws and regulations" and "organized crime laws and regulations."

With regard to the category of "State gambling laws and regulations," the United States submits the following:

> State laws restricting gambling include the laws by which a number of states prohibit some or all gambling.[20]

[20] See, *e.g.,* Utah Code Ann. § 76-10-1102; Hawaii Rev. Statutes §§ 712-1221 through 712-1223.

In doing so the United States clearly confirms that the states' gambling prohibition laws apply to gambling and betting services supplied on a cross-border basis from Antigua — if the state laws would not apply to such supply the United States could not argue that the three federal prohibition laws[398] are necessary to secure compliance with these state laws. The Panel should note that the two specific state laws cited in the United States' footnote 378 are listed in Antigua's Panel request. Thus, the United States' response to question 45 confirms that the state prohibition laws identified by Antigua are part of and contribute to the United States total prohibition. Consequently they are themselves GATS-inconsistent and cannot form the basis of an Article XIV(c) defence.

With regard to the actual argument that the United States seeks to run on the basis of the state gambling prohibitions, Antigua has the following observations. The United States' argument apparently rests on a hypothetical situation in which the Panel were to find that three federal laws violate the GATS but that the state laws do not, presumably on the basis of the formalistic view that Antigua has submitted sufficient "provision specific" information with regard to these three federal laws but not with regard to the state laws. In Antigua's view, this is in any event not the case, if only because the level of "provision specific" information that Antigua has submitted for these three federal laws is the same as it has submitted regarding other state and federal laws — the actual texts of the statutes, summaries of each and discussion regarding how they operate.

In any event, if the Panel were nevertheless to adopt such a position, the United States defence would fail regardless because, on any analysis, it suffers from a lack of "provision specific" information. In Antigua's view the level of "measure identification" a defending party that invokes the affirmative defence of Article XIV(c) must meet is at the very least similar to that of a complaining party who seeks to challenge a measure in WTO dispute settlement: both have to establish that "measures" with the alleged effect exist. With regard to the category of "state gambling laws and regulations," the only "provision specific" information that the United States submitted in response to the request of the Panel is one sentence, accompanied by one footnote that merely cites, and only by way of example, statutory provisions of two states, i.e. Utah and Hawaii.

Antigua's Panel request alone already contains more information than the United States attempt to invoke Article XIV(c) because it lists the main gambling prohibition laws of *all* states and territories and not just two. And of course, Antigua has done more than merely cite references, amongst others in response to question 10 from the Panel to Antigua which was coined in similar terms as question 45 to the United States: "please identify all relevant legislative and regulatory provisions."

[398] 18 U.S.C. § 1084, 18 U.S.C. §§ 1952, 1955

Antigua also disagrees with the United States' argument that a defending party who seeks to invoke Article XIV(c) must not establish a *prima facie* case that the law for whose compliance the inconsistency with GATS is necessary, is itself consistent with GATS (particularly so if that law essentially has the same effect as the law that has already been found to be GATS-inconsistent). Article XIV is an affirmative defence and it is therefore up to the United States to make a *prima facie* case that the conditions of Article XIV(c) are fulfilled, including the presence of laws that are "not inconsistent" with GATS.

With respect to organized crime laws and regulations, the United States does not meet the high "measure identification" standard that it says exists in WTO dispute settlement. It cites a number of specific laws by way of example[399] but does not even try to give a comprehensive overview of the main state and federal laws at issue. To the extent that it explains these laws, it does so in a summary way that is less extensive than the explanation Antigua has given for all major gambling prohibition laws at both the federal and state level. Furthermore the United States includes in its brief recital of "laws and regulations" an "Attorney General Order" and "statutory findings of Congress" which, in its own view, cannot be classified as "laws and regulations."[400]

That being said, Antigua does not suggest that the United States' level of "measure identification" of the "organized crime laws and regulations" is necessarily insufficient for the purposes of Article XIV(c) or WTO dispute settlement in general. Antigua only submits that, if the standard of "measure identification" is as high as the United States has argued that it is throughout this dispute, the United States' Article XIV(c) defence concerning organized crime laws and regulations does not meet that standard.

As a final point Antigua submits that nothing in the United States' response to this question of the Panel or in the materials submitted with that response establishes that the total prohibition of cross-border supply of gambling services from Antigua is "necessary" to secure compliance with the GATS-consistent aspects of its laws against organised crime. In fact, there is no evidence at all of any involvement of organised crime in Antiguan suppliers of gambling and betting services, nor is there evidence of any of the other criminal activities mentioned in the United States' response to Question 45 in the Antiguan gambling and betting industry.

B. COMMENTS BY THE UNITED STATES ON ANTIGUA AND BARBUDA'S RESPONSES TO PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

Question 40 (for Antigua)

Does Antigua have any market-based/economic evidence to support its assertion in paragraph 36 of its second oral statement that 'Internet-based' and 'land-based' gambling and betting services compete and that consumers switch from one to the other?

Antigua asserted that "there is competition between" Internet-based and land-based gambling services "because consumers switch from one to the other – just like a gambler can switch from one land based casino to another." The Panel asked for market-based/economic "evidence" to support this

[399] See, e.g., the Racketeer Influenced and Corrupt Organizations Statute ("RICO"), Cal. Penal Code §§ 187-189 and §§ 240-241, NY Penal Code §§ 120.00-.15, 18 U.S.C. § 1111, 18 U.S.C. § 875, Cal. Penal Code §§ 518-527 and NY Penal law § 155.05 (2) (e)

[400] The Attorney General Order 1386-89 is used by the United States to illustrate its definition of "organized crime." Similarly the Organized Crime Control Act 1970 findings are also used to explain what is meant by "organized crime" as this phrase "has no legal definition as such under U.S. law." Of course, the United States has argued a number of times that a "measure" must be in essence be a discrete law in and of itself. See, e.g., Request for Preliminary Rulings by the United States of America, WT/DS285 (17 October 2003), paras. 3-10.

assertion. Antigua's response provides none. Instead, Antigua offers a series of baseless assertions that assume, rather than prove, such competition.

In the first paragraph of its response to question 40, Antigua asserts that there is "considerable overlap in the use of gambling services by regular gamblers." In fact, Antigua has not provided any evidence approaching "considerable overlap" between the users of Internet-based remote gambling services and users of non-remote gambling services.

Antigua cites a summary of a River City Group "study," but fails to provide the study itself.[401] Moreover, the summary cited by Antigua actually contradicts Antigua's "overlap" argument. Specifically, it states that only 28 per cent of all gamblers gamble online for real money. Another source, the Online Gambling Market Research Handbook, indicates that the overlap in customers is much smaller – possibly less than 5 per cent.[402]

In the second paragraph of its response to question 40, Antigua asserts that "academic studies in the United States and the United Kingdom have found a high degree of substitutability between different forms of gambling." Based on such literature, Antigua and its economic consultants assert the existence of substitution between Internet gambling and land based gambling. This reasoning is seriously flawed.

First of all, Antigua overstates the limited conclusions of its own consultants regarding substitutability of Internet and land-based gambling. Antigua states that its consultants "conclude that 'Internet based' gambling is a strong substitute for 'land-based' gambling." By contrast, the consultants themselves actually concluded that "there is strong substitutability *among gaming choices*" – a generalization that does not specifically compare Internet and land-based gambling. When trying to compare Internet and land-based gambling specifically, however, Antigua's consultants could only draw the weaker conclusion that there was "substantial evidence to support the assertion that 'land-based' gambling and betting services compete and that consumers switch from one to the other."[403] Yet upon examination, the alleged "substantial evidence" for this "assertion" appears to consist only of literature related to non-remote gambling.[404]

Antigua and its consultants are making an unsupported leap of logic. They cite no empirical studies actually addressing the relationship between Internet gambling and land-based gambling. Instead, they merely allege, without foundation, that literature finding that the revenue of established

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[401] The summary cited by Antigua (and authored by the chairman of the Interactive Gaming Council, a group dedicated to promoting Internet gambling) provides neither a full data set nor an explanation of its methodology, so its validity, if any, is impossible to discern.

[402] Online Gambling Market Research Handbook, p. 8 (2003) ("Many industry analysts estimate less then [sic] 5% of the players on the Internet are 'real gamblers.' This is attributed to the following reasons:

- Online generation is younger
- Different experience
- From areas where land-based gaming is not legal
- Consist of non-core gamblers, but who like a little flutter."

[403] Statement by Professor Donald Siegel and Professor Leighton Vaughan Williams submitted by Antigua to the Panel.

[404] Ibid. The United States has examined as many of these sources as could be located in the time available and found no empirical evidence comparing Internet and land-based gambling.

In addition, the separate statement by Professor Williams reaches an even weaker conclusion. Professor Williams relies on studies "looking at other sectors of the gambling industry" and "gambling products which in some respects mimic the Internet gambling experience," not Internet gambling itself, to support "a conclusion that Internet gambling is likely to substitute *in some degree* for land-based gambling" (emphasis added). One need hardly point out that Professor Williams is making an unsupported leap of logic from other sectors and products to Internet gambling, and that "some degree" is a carefully-chosen term that does not exclude a slight or minuscule degree.

land-based gambling options changed with the introduction of other new land-based gambling options somehow demonstrates that substitutability exists between Internet and land-based gambling.[405]

Furthermore, the argument put forward by Antigua and its consultants rests on the implicit assumption that individuals budget a specific amount of money for gambling that must be redistributed with the introduction of a new gambling option. Based on results discussed in the submitted studies, however, this does not appear to be the case.[406] The relatively rapid growth of the gambling industry is more consistent with the hypothesis that increasing the available forms of gambling increases total expenditures on gambling, rather than merely shifting expenditures among gambling options.

In short, Antigua and its consultants have not explained why they think Internet gambling would be highly substitutable with land based gambling. Nor have they accounted for unique variables that would be likely to impact substitutability in the case of Internet gambling, such as availability of Internet access[407] and the different nature of the Internet gambling environment.[408]

Tellingly, Antigua provides no direct economic data on cross-price elasticities of demand between Internet and land-based gambling, in spite of the fact that one of Antigua's consultants acknowledges that it is "common practice to assess substitution through studies that estimate 'cross-price elasticities of demand.'"[409] Past panel reports reviewing an economic substitution argument have relied on high-quality statistical evidence of the existence of cross-price elasticities of demand (in this case, it would be between Internet and land-based gambling or remote and non-

[405] Not surprisingly, Antigua ignores aspects of this literature that appear to contradict its own conclusions. For example, Paton, Siegel and Williams (2003a), cited by Antigua, found "no evidence of substitution from machines or casino gambling to betting," which would seem to disprove the hypothesis that all forms of gambling inherently display a high degree of substitutability. Also, the studies show contradictory results for "substitution" between lotteries and Native American casinos. Antigua's consultants rely heavily on the results from Siegel and Anders, who found that increased numbers of slots at Native American casinos in Arizona reduced state lottery revenues. But they ignore the results of Elliott and Navin, who failed to find any impacts for Native American reservations in a much broader sample than the Siegel and Anders study. Nor do they attempt to explain the apparent contradiction between Elliot and Navin's findings for riverboat casinos and their findings for Native American casinos.

[406] Elliot and Navin reported that Gulley and Scott (1989) found that "[e]ach additional dollar bet on the state lottery is estimated to lead to a decline of three cents in thoroughbred racing handle." David O. Gulley and Frank A. Scott Jr, "Lottery Effects On Pari-Mutuel Tax Revenues", *National Tax Journal*, vol. 42, 1989, 89-93 as cited in Elliott and Navin.. Even Elliott and Navin's results on the impact of riverboats found that for each $5 in additional gross outlays at the boats, state lottery revenues fell by only $1.38. Thus, it appears that the greater impact of the addition of gambling options was to increase overall expenditures on gambling.

A study by Kearney (2003) similarly indicates that increasing gambling options results in increased gambling expenditures. Kearney found that in the United States, total household expenditures on gambling increased after the introduction of a state lottery. *See* Melissa Schettini Kearney, "State Lotteries and Consumer Behaviour" draft Sept. 2003, p. 30, available at http://www.wellesley.edu/Economics/kearney/mskearney-lotteries-9-03.pdf ("Data from micro-level surveys of gambling behaviour corroborate the claim that household lottery gambling is financed by a reduction in non-gambling expenditures, not by substitution away from alternative forms of gambling.").

[407] Internet gambling requires access to a computer and the Internet, whereas the land-based forms of gambling analyzed in the literature cited by Antigua did not require the participant to own any special equipment. As some studies have indicated, many lottery players tend to be from lower income households and may be less likely to own a computer.

[408] Other forms of gambling require much more active engagement on the part of the participant to reach, with specific intent to gamble, the point of sale. On the Internet, however, pop-up ads and other inducements may cause the potential gambler to reach the gambling opportunity without any specific intent to gamble, and then encourage gambling in an environment of unmatched ease and privacy. This very different environment for gambling on the Internet is likely to result in individuals gambling through Internet use who would not otherwise be involved in gambling activity.

[409] Additional Statement by Professor Leighton Vaughan Williams submitted by Antigua to the Panel.

remote gambling), not the unsupported speculation and "stylized facts" offered by Antigua and its consultants.[410]

Moreover, evidence from the United Kingdom, relied upon heavily by Antigua and its consultants, has little weight in an assessment of consumer behaviour in the United States.[411] Nonetheless, it is noteworthy that Antigua's own consultant stated in that context that Internet betting exchanges were complementary to, rather than substitutes for, existing betting on bookmakers.[412] Together with the foregoing analysis, this statement further confirms that Antigua's assertions of substitutability between Internet and land-based gambling rest on questionable and unsupported assumptions, rather than on facts.

In the third paragraph of its response to Question 40, Antigua asserts that there is "considerable further anecdotal evidence of competition between Internet and other gambling," but the sources it cites provide no support for this view.[413] Indeed, in some cases the sources contradict

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[410] Panel Report on *Japan – Alcoholic Beverages II,* para. 6.31 (noting that elasticity of substitution is measured through "[f]ormal statistical methods" and "based on actual observations," and criticizing a party's failure to examine particular variables). See also Panel Reportoin *Chile – Alcoholic Beverages*, paras. 7.63-64 (treating studies regarding cross-price elasticity of demand with caution because they lacked supply side data and used small statistical samples, and stating that "a high estimated coefficient of elasticity would be important evidence to demonstrate that products are directly competitive or substitutable *proved that the quality of the statistical analysis is high.*" (emphasis added)). In this dispute, Antigua has provided no statistical analysis whatsoever comparing Internet and land-based gambling.

[411] Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 20 (quoting the observation in the Report of the Working Party on *Border Tax Adjustments* that "consumers' tastes and habits ... change from country to country"). See also Minutes of Evidence Taken before Joint Committee on the Draft Gambling Bill, Thursday, 8 January 2004, Q250, available at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-iii/uc13902.htm (response of Dr. Mark Griffiths, Antigua's consultant in the present dispute, testifying that "[E]very country has a different culture of gambling. ... Every country I have looked at that has de-regulated in a big way has seen an increase in problem gambling, and I do not see why that should not occur here, but there will be a different culture in terms of what people will enjoy gambling on."); David Paton, Donald S. Siegel, and Leighton Vaughan Williams, "A Policy Response to the E-Commerce Revolution: The Case of Betting Taxation in the U.K.," *Economic Journal,* Vol. 111, Issue 480, F296-F314 (2002) ("It is clear, then, that there are major differences in the nature of gambling activity and how it is perceived and regulated in UK and the USA.").

[412] Minutes of Evidence Taken before Joint Committee on the Draft Gambling Bill, Tuesday, 13 January 2004, Q324, available at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-iv/uc13902.htm (response of Professor Williams, stating that "the turnover that is going through betting exchanges is complementary not substitute for existing betting on bookmakers"). A gambling industry representative testifying before the same committee alongside Professor Williams stated that "we are in the business of providing destination leisure opportunities through which gaming is delivered. That is a very, very different market from somebody betting at a betting exchange or on Internet gaming." See Ibid., Q326 (response of Mr. John Kelly, Cross-Industry Group on Gaming Deregulation).

In the same hearing, Professor Williams also qualified his own conclusions regarding substitutability of gambling generally by stating that "I have found only weak evidence, however, of substitution between casino and gaming spend and betting and only weak evidence to date of a substitution effect between gaming activity and bingo activity." Ibid. at Q315 (response of Professor Williams). This statement confirms that any belief that substitutability may exist between land-based forms of gambling is by no means universal, and therefore substitutability cannot simply be assumed to exist between Internet and land-based gambling.

[413] The Article "Online Betting growth called threat to Nevada" cited in above footnote 371 of Antigua's response to question 40 reports on assertions that Nevada and Nevada-based casinos are losing moneymaking opportunities because U.S. law prevents them from taking their "fair share" of Internet gambling revenues. Nowhere does this article state or imply that Internet gambling is competing for revenues with non-remote forms of gambling. It merely confirms the U.S. position that Internet gambling is illegal for domestic operators as well as cross-border operators. Similarly, the article "NYRA, Magna Withhold Simulcast Signal From Attheraces" cited in footnote 371 of Antigua's response explains that the concern in that case was not

this view by suggesting that Internet gambling is a complement to, rather than a substitute for, land-based gambling.[414]

Much stronger "anecdotal" evidence comes from industry leaders from both the Internet and land-based gambling industries who contradict Antigua's assertions that these two different services are in competition with one another. For example, American Gaming Association President Frank Fahrenkopf has testified before the US Congress that Internet gambling is not a competitive threat to US commercial casinos.[415]

Prominent companies in the Internet gambling industry appear to share this view. For example, Boss Media, one of a handful of major suppliers of Internet gambling technology, states on its website that "Boss Media considers that Internet casinos do not compete with land-based casinos."[416] Similarly, a 2002 industry report funded by Microgaming, another major supplier of Internet gambling technology, concluded that Internet gambling and land-based gambling are actually complementary products, rather than competitors.[417]

In its response to question 40, Antigua refers to "the general proposition that 'Internet-based' commerce competes with 'land-based' commerce" and cites a press release concerning a United States Federal Trade Commission staff report on sales of wine over the Internet. The United States fails to see how this discussion of an unrelated industry is relevant in any way to Antigua's specific burden of proof regarding gambling services. As the United States pointed out, the issue in this dispute is not whether remotely supplied services are *always* like non-remote services. Likeness is a case-by-case

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Internet competition; it was the failure by certain providers to direct betting data into the common pool used in all pari-mutuel wagering.

[414] For example, in footnote 371 of its response to question 40, Antigua cites the Bear Stearns report. Once again, an examination of that report shows that it supports the U.S. position. The cited pages of the report provide no evidence of direct competition between Internet and land-based gambling. On the contrary, the Bear Stearns analysts theorize that Internet gambling is a complement to land-based gambling in that it allows land-based operators to "cross-market to a different customer base." Michael Tew and Jason Ader, Bear Stearns & Co, Inc., Equity Research, *Gaming Industry: E- Gaming: A Giant Beyond Our Borders*, p. 33. This is consistent with the same report's conclusion that "Internet gamers are generally not the same customer as land-based gamers." See ibid., p. 55.

[415] Mr. Fahrenkopf stated that:

There is simply no comparison between the social, group-oriented entertainment experience of visiting a casino resort and the solitary experience of placing a bet or wager using a personal computer. Visiting a casino today is about much more than legal wagering opportunities. Whether measured by how people spend their time or how they spend their dollars, guests of U.S. commercial casinos are increasingly attracted as much or more by restaurants, shows, retail, recreation, and other non-gaming amenities.

The view that Internet gambling is not a competitive threat to U.S. commercial casinos is shared by financial analysts at major Wall Street firms, whose job it is to analyze the competitive impact of market developments on the industries and firms they cover, including the major publicly traded gaming companies the AGA represents.

Testimony of Frank J. Fahrenkopf, Jr., President and CEO, American Gaming Association, Before the Senate Banking Committee, March 18, 2003, *available at* http://www.senate.gov/~banking/_files/fahrenkopf.pdf. *See also* Net Gambling Bills Protect Established Gambling Interests, Tech Law Journal *available at* http://www.techlawjournal.com/Internet/19991025b.htm (October 25, 1999) (quoting Mr. Fahrenkopf as stating that "We are not concerned about losing business to Internet gambling. There is simply no comparison between playing at home on a computer and the broad entertainment experience our destination resorts offer. Wall Street analysts confirm that view.")

[416] http://www.bossmedia.se/about/risk_analysis.asp, Exhibit US-45.

[417] Internet Gaming: An Industry Survey, Internet Gaming & Wagering Business, p. 7, *available at* http://www.microgaming.com/themes/microgaming/brochure/survey.pdf (August 2002) ("[C]ontrary to earlier fears from within the terrestrial gaming industry, online gambling is not expected to detract from the total amount wagered offline. In fact, pundits now believe that online gambling will help develop the land-based casino market by educating future gamblers virtually.")

analysis. In the case of gambling, Antigua has failed to support its assertions of likeness with economic evidence or with any other credible evidence.

Question 33 (For Antigua)

Could Antigua provide a list of the gambling and betting services they seek to supply cross-border to the United States and that they claim are subject to a prohibition.

The United States is surprised by the list of services in Antigua's response to question 33. This new taxonomy of services is difficult to reconcile with Antigua's previous statement identifying Internet "virtual casinos" and Internet and telephone sports betting ("sports book") operators as the types of services and suppliers it licenses. If the items in Antigua's response to question 33 are now to be considered as the services sought to be provided by Antigua, then the United States submits that in addition to its many other failures to make a *prima facie* case, Antigua has failed to relate its argumentation and evidence to this particular list of services, or show how any specific US measure(s) affect the supply of the newly listed services.

The United States also finds it ironic that after consistently seeking to diminish or dismiss the serious regulatory concerns reflected in US law, Antigua now asserts its own right to prohibit services that it considers "offensive." Antigua asserts such a right while at the same time attempting to deny the United States the authority to restrict services that the United States views (on firm evidence) as posing serious law enforcement, consumer protection, and health risks – not to mention threats to public order and morals.

Question 36 (For the United States)

With respect to the reference to the 'very few exceptions limited to licensed sports book operations in Nevada' in the second paragraph of Exhibit AB-73, could the United States identify these exceptions, even on an illustrative basis?

Antigua's comments on question 36 incorrectly describe the Professional and Amateur Sports Protection Act, codified at 28 USC. §§ 3701-3704. Antigua's comment on question 36 states that:

> Under the legislation known as the "PASPA," the United States federal government expressly exempted four states, Nevada, Oregon, Delaware, and Montana, from its general prohibition on sports betting other than horse racing, greyhound racing and jai alai. ... *There is nothing in the PASPA or other federal laws restricting the ability of these states to engage in the full range of sports betting services on a commercial or state-owned basis*. (emphasis added)

Both of the quoted sentences are incorrect.

The purposes of the Professional and Amateur Sports Protection Act (PASPA) were described in the US response to question 36. Essentially, the PASPA halted all sub-federal authorization of sports-related gambling in the United States.

The PASPA permitted the continuation of certain previously authorized sports betting activity in some states (although, contrary to Antigua's description, such states are not "expressly" mentioned in the legislation). However, the statute did not provide that those states had unlimited ability to add new forms of sports wagering.

As it happens, Nevada, Oregon, Delaware and Montana[418] had authorized particular forms of sports-related gambling during the time periods specified in the legislation, and these particular forms of gambling were therefore permitted to be authorized in the future under the terms of the statute. Of these states, only Nevada allowed sports book services. The others allowed sports-related lottery games.[419]

The PASPA does not permit the future authorization of sports betting in these states in any form beyond that which existed at the time of the enactment of PASPA. Thus, Oregon, Delaware and Montana may not now enact legislation authorizing sports book services, and Nevada may not now enact legislation authorizing sports-related lottery games.[420] As a result, Nevada is the only place in the United States where sports book services may be authorized.

In the context of the present dispute, it is also important to note that nothing in the PASPA creates an exception for any domestic or foreign operator from the application of 18 U.S.C. § 1084. Thus the PASPA does not permit the authorization in any state of Internet sports gambling in violation of 18 U.S.C. § 1084, or of any other interstate or cross-border transmission of a bet or wager using a wire communications facility. Moreover, Antigua has advanced no theory on which the PASPA could be found to violate any provision of the GATS.

On the issue of pari-mutuel betting on horse races, Antigua's comment on question 36 that "[f]urther, while the United States appears to distinguish in several ways between horse racing and other forms of sports betting, Antigua believes that there is really no logical basis for the distinction" is baseless. Indeed, while Antigua has made a number of assertions concerning pari-mutuel betting on horse races, the fact remains that Antigua has offered no specific evidence demonstrating that any Antiguan gambling services and suppliers are "like" US pari-mutuel horse race betting services and their suppliers.

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[418] During the Congressional debate on the PASPA, "calcutta" wagering in Wyoming and pari-mutuel bicycle wagering in New Mexico were also mentioned at one point as previously authorized forms of gambling.

[419] No state enacted new legislation allowing covered sports betting before expiration of the time periods specified in the legislation, thus the scope of permissible activity remains as it was as of the enactment of the legislation.

[420] A Senate Committee report discussed how the PASPA would apply to those states that had authorized some form of sports wagering. This report stated that:

Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those States prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting. ...

Under paragraph (2), casino gambling on sports events may continue in Nevada, to the extent authorized by State law, because sports gambling actually was conducted in Nevada between September 1, 1989, and August 31, 1990, pursuant to State law. Paragraph (2) is not intended to prevent Nevada from expanding its sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. Furthermore, sports gambling covered by paragraph (2) can be conducted in any part of the State in any facility in that State, whether such facility currently is in existence. At the same time, paragraph (2) does not allow a State sports lottery to be established in any State in which such a lottery was not in operation prior to August 31, 1990.

The narrowness of subsection (a) reflects the committee's policy judgment that sports gambling should be strictly contained.

Senate Report No. 102-248 (1992), reprinted in 1992 U.S.C.C.A.N. 3553,3561. Thus, Nevada, Oregon, Delaware, and Montana do not possess unlimited ability to add new forms of sports wagering.

Question 41 (For Antigua)

With respect to Antigua's arguments in paragraph 38 of its second oral statement, is Antigua now arguing that all gambling and betting activities that involve the experience of winning and losing money are necessarily 'like' and that this would constitute the main criterion in deciding 'likeness' under Article XVII?

Antigua states that "the experience of winning or losing money is the *sine quo non* of gambling and betting services which could equally well be delivered locally or 'remotely.'"

Further to the arguments that the United States has already made rebutting this argument, we note the recent testimony of Professor Griffiths, Antigua's consultant in this dispute, who stated before a Joint Committee of the British Parliament that:

> My guess is that for 99 per cent of the people who go to a destination to gamble, like myself when I go to Las Vegas or wherever, it is because I think I am going to have a fun time. I do not go there to win money. If I win, that is a bonus. When I go to my local casino in Nottingham, I go there to have a meal, be with friends, have a talk or whatever and the gambling is incidental. My guess is that for most people who go to destination resorts that would be their aim, just to have a fun time out. Yes, they may win some, they may lose some, but the point is that this is not being done in isolation.[421]

IV. PANEL'S QUESTIONS FOR THE THIRD PARTIES ONLY

For all Third Parties:

B. ARTICLE XVI

1. Do the third parties agree with the EC's submission in paragraph 84 of its written submission that a blanket prohibition on the provision of cross-border gambling and betting services amounts to a quantitative restriction within the meaning of Article XVI:2(a)?

European Communities

The European Communities confirms its position. It would like to add that the position expressed does not exclude such a blanket prohibition, if existing, may also be relevant under different items of Article XVI:2 of the GATS. For example, depending on the way in which the prohibition is drafted, it might also be relevant under items (b) or (c). Also, a blanket prohibition that only applied, *de jure* or *de facto*, to services supplied cross-border could be relevant under Article XVII.

Japan

Japan shares the point that a complete prohibition on the provision in a service sector where specific commitments are undertaken amounts to a quantitative restriction within the meaning of Article XVI:2(a), when that complete prohibition is provided in express terms by one or combination of domestic laws and regulations. It reserves its views on such cases where supplying services in a specific sector is not prohibited in express terms by one or combination of domestic laws and regulations, but is made in effect extremely difficult by one or combination of domestic laws and

[421] Minutes of Evidence, Thursday, 8 January 2004, *supra* footnote 11, Q257 (response of Dr. Mark Griffiths).

regulations which respectively do not constitute measures covered by Article XVI:2(a) to (f) and therefore are not reserved in a Members' schedule. It considers that the consistency of such situation with Article XVI needs to be addressed on a case-by-case basis, while the situation could simultaneously might as well raise a question of Article VI:5 consistency.

Mexico

Mexico's view is that where there is a blanket prohibition on the provision of a service through mode 1 (cross-border supply), the number of service suppliers that can supply a service through that mode is zero. Thus, a blanket prohibition on the provision of a service through mode 1 amounts to a quantitative restriction within the meaning of Article XVI:2(a).

C. ARTICLE XVII

2. To what extent is the competitive relationship between, on the one hand, services and service suppliers in the territory from which the service is being supplied and, on the other hand, services and service suppliers in the territory into which the service is being supplied relevant in assessing "likeness"?

European Communities

At the outset, the European Communities wishes to point out that to establish a violation of Article XVII of the GATS there is no need to consider the relationship between both services and service suppliers (see reply to question 9 below). As clarified by the Appellate Body in *Korea – Alcoholic Beverages*,[422] "like" products are always a subset of "directly competitive" products. Therefore, to some extent the competitive relationship (actual or potential) will always be relevant in a "likeness" analysis. The extent will depend on the particular case. In that context, the European Communities also notes that if the competitive relationship is distorted (or absent) owing to a measure applied in the territory into which the service is being supplied, the relevant benchmark is the *potential* competitive relationship that would exist if the services supplied were not subject to that measure. The European Communities would also refer the Panel to its Third party submission and Oral statement where this matter is further addressed.

Mexico

In Mexico's view, it is the nature and characteristics of the services at issue that are directly relevant to the question of whether those services are "like". With respect to service suppliers, where the services supplied are "like", the suppliers of those services are also "like".[423] Mexico further notes that paragraph 3 of Article XVII provides that formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member (i.e., of the Member implementing the measure at issue) as compared to like services or service suppliers of any other Member. Thus, the competitive relationship between services in the territory from which the service is being supplied and services in the territory into which the service is being supplied is highly relevant to the question of whether services and service suppliers of another Member are treated in a manner "no less favourable" than services and service suppliers of the WTO Member implementing the contested measure.

[422] Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.
[423] Panel Report on *EC – Bananas III (US),* para. 7.322.

3. Do the third parties consider that regulatory circumstances in the territory where the service is being supplied and/or in the territory from which the service is being supplied should be taken into consideration under Article XVII in the "likeness" analysis and/or the "less favourable treatment" analysis? If so, what are the parameters within which the regulatory circumstances should be considered?

European Communities

The European Communities provides its answer based on two different assumptions as to the meaning of the term "regulatory circumstances". If the Panel, by referring to "regulatory circumstances", means to refer to the applicable regime, as explained in its Third party submission and its Oral statement, the European Communities takes the view that regulatory circumstances as such are not relevant in determining whether two services are "like". Specifically, the mere fact that different regulations apply to services provided from within and from outside the territory of a Member or even the particular enforcement problems that the latter may create, cannot make foreign and domestic service "unlike". It is the very objective of Article XVII to protect *inter alia*, services provided from outside the territory of a Member against regulations that are less favourable than those applicable to services provided from whiten that territory. The place, if any, to address special regulatory circumstances of foreign services in Article XVII is the notion of "less favourable treatment", discussed below.

Alternatively, the Panel, by referring to "regulatory circumstances", may mean to refer to the factual circumstances that are the subject of regulation. The European Communities would also note that the "territory where the service is being supplied" will in principle differ from the "territory from which the service is being supplied" only in case of supply through mode 1. If differences in the factual circumstances had an impact e.g. on the characteristics of the services themselves, as they are provided in the territory of the WTO Member whose measure is at issue, they could have an impact on the "likeness" of the domestic and foreign service. The "less favourable treatment" standard has been the subject of numerous GATT and WTO panel and Appellate Body reports, particularly in connection with Article III of the GATT. Longstanding GATT practice has clarified that "treatment no less favourable" requires effective equality of competitive opportunities for foreign and domestic goods.[424] This approach, developed for the goods sector, is now codified in Article XVII:2-3 of the GATS.

While the underlying objective of the "no less favourable treatment" standard is to guarantee equality of treatment, there may be cases in which application of formally identical treatment would in practice result in according less favourable treatment to foreign goods or services. This may be the case where the differences in regulatory circumstances in the territory from which the service is being supplied and the territory in which it is being supplied have an impact on the provision of the service in the Member whose measure is under dispute. Applying Article XVII of the GATS entails a comparison between two "treatments" granted by the same WTO Member in the territory of which the service is supplied – the treatment of domestic and the treatment of foreign services. Attainment of the objective of the "no less favourable treatment" standard might thus require a WTO Member to apply a different regime to foreign goods or services so as to ensure that the treatment accorded is in fact no less favourable. It may also allow formally different treatment where identical treatment would result in more favourable treatment of the foreign service, provided that the treatment of foreign services remains "no less favourable". Of course, this would not allow an outright prohibition on foreign services where domestic services are allowed. Last, formally different treatment based on different circumstances in the Member from which the service is provided, inasmuch as those circumstances had an impact on the market of the Member whose measure is at issue, might also be relevant under Article XIV of the GATS.

[424] Panel Report on *US – Section 337*, BISD 36S/345.

Mexico

At the very least, the regulatory circumstances would be relevant to the "less favourable treatment" analysis. See Mexico's response to question 6 above.

4. With respect to paragraph 9 of Japan's written submission, does the mere fact that services are supplied through different modes of supply (as defined in the GATS Agreement) mean that the regulatory circumstances are different and that, therefore, different treatment as between those modes of supply is justified? Do the third parties agree with Japan's appraisal in paragraph 11 of its written submission of the possible consequences for coverage under the GATS Agreement if "likeness" across modes is permitted under Article XVII?

European Communities

The European Communities does not share the view, expressed in paragraph 9 of Japan's Third party submission, that differences in regulatory circumstances may affect *per se* the "likeness" of a domestic and a foreign service. Inasmuch as "differences in regulatory circumstances" means "differences in applicable regimes", this point is already addressed in paragraph 96 of the EC Third party submission. Inasmuch as it means "differences in factual circumstances which may be the subject of legal regulation", such differences might affect likeness only in case they made the characteristics of the two services different, as explained above in reply to question 3. The European Communities also considers that the issue raised in paragraph 11 of Japan's written submission does not need to be addressed in order to solve the present dispute, which is only concerned with Article XVII of the GATS.[425]

Japan[426]

What Japan meant in this paragraph is that there should be some room for arguing for denying likeness of services, when the necessity of differentiated treatment in light of regulatory requirements, the difference in regulatory circumstances, etc. are sufficiently proven on a particular case by a defending Member. In some cases, the difference in regulatory circumstances are effectively represented in the difference of modes, but as is clear in its submission, Japan does not make a categorical statements that difference in modes always makes services unlike. On the contrary, when it is found on specific cases that difference in regulatory circumstances does not suffice to establish the un-likeness of services in certain service sectors, or when that argument is not sufficiently substantiated by a Party concerned, difference in supplying mode itself would not decline the likeness of services.

Paragraph 11 of Japan's written submission is not in fact Japan's appraisal. It is meant to be a factual description of discussion in the Council for Trade in Services, which in Japan's view might have some relevance to the interpretation of likeness of services. Therefore Japan introduced this discussion for a deliberation by this panel if appropriate.

[425] Appellate Body Report on *EC – Bananas III*, para. 231, where the Appellate Body considered that provisions relating to national treatment are not necessarily relevant to the interpretation of the GATS most-favoured-nation clause.

[426] The Panel notes that, when commenting on the descriptive part of the Report, Japan requested the deletion of various elements contained in the initial response.

Mexico

With respect to the first issue, pursuant to paragraph 3 of Article XVII, formally different treatment between modes of supply is possible under the GATS. Such a difference in treatment will only violate Article XVII to the extent that it modifies the conditions of competition in favour of services or service suppliers of the Member (i.e. of the Member implementing the measure at issue) as compared to like services or service suppliers of any other Member. With respect to the second issue, see Mexico's response to question 3 above.

Antigua

Do the third parties agree with Japan's appraisal in paragraph 11 of its written submission of the possible consequences for coverage under the GATS Agreement if "likeness" across modes is permitted under Article XVII?

In paragraph 11 of its written submission Japan submits that, if likeness across modes is permitted, limitation on national treatment for a particular mode of supply will be rendered meaningless through the effect of Article II of the GATS. In essence, this theory would oblige the Panel to choose between: (i) making national treatment commitments on cross-border supply meaningless (because cross-border supply would by definition be "unlike"); or (ii) making limitations on cross-border supply meaningless (because the "likeness" provision of Article II of the GATS would undermine the effectiveness of such a limitation in case a Member has made national treatment commitments for other modes of supply). This, in itself, shows that this theory cannot be a correct interpretation of Articles II and XVII of the GATS because, whichever of the two options is chosen, an important part of a Member's schedules of commitments is made redundant.

Furthermore the theory put forward by Japan presupposes that "likeness" and "less favourable treatment" in Article II and Article XVII must always be interpreted in precisely the same way. In *EC – Bananas III*, however, the Appellate Body has already stated that there is no such analogy between Articles II and XVII and that Article II of the GATS should be interpreted in the light of the MFN provisions of the GATT 1994, and not in the light of Article XVII of the GATS.[427] In view of the above Antigua and Barbuda submits that, in the situation described by Japan in paragraph 11 of its third party submission, Member A would not be obliged to extend "treatment b" to cross-border services of Member C. If Member A were obliged to do that, it would be obliged to give the services of Member C better treatment than the services of Member B and the purpose of Article II is precisely to prohibit this, not to require it. The Article XVII context is obviously completely different when a Member has made a specific commitment to give treatment "no less favourable" to services supplied on a cross-border basis.

For Japan:

5. In paragraph 9 of its written submission, Japan has stated that in *some* service sectors and for *certain* services, it could be argued that regulatory circumstances should be taken into account in assessing "likeness" of services. Could Japan indicate what criteria should apply in determining for which sectors/ for which services regulatory circumstances should be taken into account?

Japan

Japan as a third party is in no position to categorically identify specific service sectors requiring consideration of regulatory circumstances at this juncture, where there is a view widely shared among Members that likeness of goods and services needs to be identified on a case-by-case

[427] Appellate Body Report on *EC – Bananas III*, para. 231.

basis. It is not in a position to state either that the service sector central to this particular case categorically requires consideration of regulatory circumstances. It is of the view that differences in regulatory circumstances should not be categorically excluded as a factor to be taken into consideration in identifying likeness of services, but it is at the liberty of a Party to this and future panel to argue on that aspect, as necessitated.

ANNEX D

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY ANTIGUA AND BARBUDA

WORLD TRADE ORGANIZATION

WT/DS285/2
13 June 2003

(03-3174)

Original: English

UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

Request for the Establishment of a Panel by Antigua and Barbuda

The following communication, dated 12 June 2003, from the Permanent Delegation of Antigua and Barbuda to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The Government of Antigua and Barbuda considers that certain measures of central, regional or local governments and authorities of the United States are inconsistent with the United States' commitments and obligations under the General Agreement on Trade in Services (GATS) with respect to the cross-border supply of gambling and betting services.

The rules applying to the cross-border supply of gambling and betting services in the United States are complex and comprise a mixture of state and federal law. The relevant laws are listed in Sections I and II of the Annex attached to this request. Although this is not always clear on the face of the text of these laws, relevant United States authorities take the view that these laws (separately or in combination) have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States. Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services. The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations.

The total prohibition of gambling and betting services offered from outside the United States appears to conflict with the United States' obligations under GATS and its Schedule of Specific Commitments annexed to the GATS (and in particular Sector 10.D thereof) for the following reasons:

(a) The central, regional or local authorities of the United States allow numerous operators of United States origin to offer all types of gambling and betting services in the United States (sometimes via exclusive rights or monopolistic structures). There

appears to be no possibility for foreign operators, however, to obtain an authorization to supply gambling and betting services from outside the United States. This appears to conflict with the United States' commitments and obligations under GATS, including Articles VI:1, VI:3, VIII:1, VIII:5, XVI:1, XVI:2, XVII:1, XVII:2 and XVII:3 and its Schedule of Specific Commitments.

(b) The United States authorities also restrict international transfers and payments relating to gambling and betting services offered from outside the United States. Some of the non-legislative measures listed in Section III of the Annex are examples thereof: the measures described in the documents released by the Florida Attorney General and the New York Attorney General. These restrictions appear to violate Articles VI:1, XI:1, XVI:1, XVII:1, XVII:2 and XVII:3 of GATS and the United States' Schedule of Specific Commitments.

On 13 March 2003, the Government of Antigua and Barbuda requested consultations with the Government of the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII of the GATS regarding measures affecting the cross-border supply of gambling and betting services. The United States, and Antigua and Barbuda held such consultations in Geneva on 30 April 2003 but these consultations did not resolve the dispute.

Accordingly, Antigua and Barbuda respectfully requests the Dispute Settlement Body to establish a panel pursuant to Article 6 of the DSU to examine this matter with the standard terms of reference as set out in Article 7.1 of the DSU.

ANNEX

I. UNITED STATES FEDERAL LEGISLATION

The measures taken by the United States Congress which infringe on the obligations of the United States under the GATS include, without limitation, the following:

15 U.S.C. §§ 3001 to 3007
18 U.S.C. § 2
18 U.S.C. §§ 1081, 1084
18 U.S.C. §§ 1301 to 1307
18 U.S.C. § 1952
18 U.S.C. § 1953
18 U.S.C. § 1955
28 U.S.C. §§ 3701 to 3704
39 U.S.C. § 3005

II. STATE AND TERRITORIAL LEGISLATION

The measures taken by the various States and Territories of the United States which infringe on the obligations of the United States under the GATS include, without limitation, the following:

Alabama

ALA. CODE §§ 13A-12-20 to 13A-12-31 (1977).

Alaska

ALASKA STAT. § 05.15.180 (1997).
ALASKA STAT. §§ 11.66.200 to 11.66.280 (1978).

Arizona

ARIZ. REV. STAT. ANN. §§ 13-3301 to 13-3312 (2001).

Arkansas

ARK. STAT. ANN. §§ 5-66-101 to 5-66-119 (1987).

California

CAL. PENAL CODE §§ 319-337z (West Supp. 2003).
CAL. BUS. & PROF. CODE § 19800-19807 (West. Supp. 2003).

Colorado

COLO. CONST. art. XVIII, § 2.
COLO. REV. STAT. §§ 18-10-101 to 18-10-108 (1999).
COLO. REV. STAT. §§ 12-47.1-101 to 12-47.1-106 (1996).

Connecticut

CONN. GEN. STAT. §§ 53-278a to 53-278g (2001).

Delaware

DEL CONST. art. 2, §17.
DEL. CODE ANN. tit. 11, §§ 1401-32, 1470-73 (2002).

District of Columbia

D.C. CODE ANN. §§ 22-1701 to 22-1712 (2001).

Florida

FLA. STAT. §§ 849.01 to 849.46 (2000).

Georgia

GA. CONST. art. 1, § 2.
GA. CODE ANN. §§16-12-20 to 16-12-62 (2003).

Hawaii

HAW. REV. STAT. ANN. §§ 712-1220 to 712-1231 (Michie 1973).

Idaho

IDAHO CONST. art. III, § 20.
IDAHO CODE §§ 18-3801 to 18-3810 (1992).

Illinois

ILL. REV. STAT. ch. 720, §§ 5/28-1 to 5/28-9 (1993).

Indiana

IND. CODE §§ 35-45-5-1 to 35-45-5-8 (1998).

Iowa

IOWA CODE §§ 725.5 to 725.16 (1993).

Kansas

KAN. CRIM. CODE ANN. § 21-4303 to 21-4308 (1995).

Kentucky

KY. REV. STAT. ANN. §§ 528.010 to 528.120 (Baldwin's 1974).

Louisiana

LA. CONST. art. XII, § 6.
LA. REV. STAT. ANN. § 14:90.- .4 (West 1986).

Maine

ME. REV. STAT. ANN., tit. 17, §§ 330-347 (1983).
ME. REV. STAT. ANN., tit. 17, §§ 2305-2306 (1983).

Maryland

MD. CODE ANN., CRIM. LAW, §§12-101 to 12-307 (2002).

Massachusetts

MASS. GEN. LAWS ANN. ch. 271, §§ 1-50 (West 2000).

Michigan

MICH. COMP. LAWS ANN. §§ 750.301-750.315a (West 1990).

Minnesota

MINN. STAT. ANN. §§ 609.75-609.763 (Supp. 2003).

Mississippi

MISS. CODE ANN. §§ 97-33-1 to 97-33-203 (1999).

Missouri

MO. ANN. STAT. §§ 572.010-572.125 (West 1995).

Montana

MONT. CONST. art. III, §9.
MONT. CODE ANN. §§ 23-5-101 to 23-5-810 (1993).

Nebraska

NEB. REV. STAT. §§ 28-1101 to 28-1117 (1995).

Nevada

NEV. REV. STAT. § 202.450 (1999).
NEV. REV. STAT. § 463.160 (2001).

New Hampshire

N. H. REV. STAT. ANN. § 647:2 (1999).

New Jersey

N.J. CONST. art. IV, § 7.
N. J. STAT. ANN. §§ 2A:40-1 to 2A:40-9 (2000).
N. J. STAT. ANN. §§ 2C:37-1 to 2C:37-9 (1995).
N. J. STAT. ANN. § 5:5-63 (1996).
N. J. STAT. ANN. §§ 5:12-1 to 5:12-210 (1996).

New Mexico

N.M. STAT. ANN. §§ 30-19-1 to 30-19-15 (1978).

New York

N.Y. CONST. art. I, §9.
N.Y. EXECUTIVE LAW §§ 430-439a (McKinney 1996).
N.Y. PENAL LAW §§ 225.00-225.40 (McKinney 1999).
N.Y. GENERAL OBLIGATION LAW §§ 5-401 to 5-423 (McKinney 2001).

North Carolina

N. C. GEN. STAT. §§ 14-289 to 14-309.4 (1994).

North Dakota

N.D. CONST. art. 11, § 25.
N.D. CENT. CODE § 12.1-28-01 to 12.1-28-02 (1987).

Ohio

OHIO CONST. art. XV, § 6.
OHIO REV. CODE ANN. §§ 2915.01-2915.06 (1996).

Oklahoma

OKLA. STAT. ANN. tit. 3A, § 205.6 (West 1993).
OKLA. STAT. ANN. tit. 21, §§ 941-993 (West 2002).

Oregon

OR. REV. STAT. §§ 167.108-167.170 (2001).

Pennsylvania

PA. STAT. ANN. tit. 18, § 911 (Purdon 1998).
PA. STAT. ANN. tit. 18, § 5513 (Purdon 2000).
PA. STAT. ANN. tit. 66, § 2902 (Purdon 2000).

Rhode Island

R.I. CONST. art. VI, § 22.
R. I. GEN. LAWS §§ 11-19-1 to 11-19-45 (1993).
R. I. GEN. LAWS § 11-51-1 to 11-51-2 (1979).

South Carolina

S.C. CODE ANN. §§ 16-19-10 to 16-19-160 (Law Co-op. 1996).

South Dakota

S.D. CODIFIED LAWS §§ 22-25-1 to 22-25-51 (Michie 1976).

S.D. CODIFIED LAWS § 22-25A-1 to 22-25A-15 (Michie 2000).

Tennessee

TENN. CONST. art. XI, § V.
TENN. CODE ANN. §§ 39-17-501 to 39-17-509 (1989).

Texas

TEX. PENAL CODE ANN. §§ 47.01 to 47.10 (West 2003).

Utah

UTAH CODE ANN. §§ 76-10-1101 to 76-10-1109 (1998).

Vermont

VT. STAT. ANN. tit. 13, §§ 2133-2156 (1957).

Virginia

VA. CODE ANN. §§ 18.2-325 to 18.2-340 (Michie 1992).

Washington

WASH. REV. CODE ANN. § 4.24.070 (West 1988).
WASH. REV. CODE ANN. §§ 9.46.010 to 9.46.903 (West 1998).

West Virginia

W. VA. CODE §§ 61-10-1 to 61-10-5 (1970).

Wisconsin

WIS. CONST. art. IV, § 24.
WIS. STAT. ANN. §§ 945.01-945.13 (West 2001).

Wyoming

WYO. STAT. §§ 6-7-101 to 6-7-104 (1996).

Guam

9 GUAM CODE ANN. §§ 64.10 to 64.22A (2003).

Puerto Rico

P.R. LAWS ANN. tit. 33, §§ 1241 to 1259 (1949).

U.S. Virgin Islands

V.I. CODE ANN. tit. 14, §§ 1224-1226 (1985).
V.I. CODE ANN. tit. 32, §§ 602-646 (2001).

III. OTHER UNITED STATES FEDERAL AND STATE ACTIONS OR MEASURES

Other actions or measures taken by United States Federal and State administrative agencies, officials and judiciary which infringe on the obligations of the United States under the GATS include, without limitation, the following:

United States

United States v. Cohen, 260 F.3d 68 (2nd Cir. 2001), *cert. denied*, 122 S. Ct. 2587 (2002).

Florida

Florida Attorney General, *Press Release: Western Union Cuts Off Sports Betting Accounts* (December 23, 1997).

Kansas

Op. Att'y Gen. No. 96-31 (March 25, 1996).

Kansas Attorney General, *Internet Gambling Warning* (visited March 13, 2003) <www.accesskansas.org/ksag/contents/consumer/internetwarning.htm>

Michigan

Michigan Gaming Control Board, *Frequently Asked Questions: Is it Legal to Gamble Over the Internet in Michigan* <www.michigan.gov/mgcb/0,1607,7-120-7863-19182--F,00.html>

Minnesota

Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction* (visited March 13, 2003) <www.jmls.edu/cyber/docs/minn-ag.html>

New York

Vacco ex rel. People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 854 (N.Y. Sup. Ct. 1999).

New York Attorney General, *Press Release: Ten Banks End Online Gambling With Credit Cards + Spitzer Hails Establishment of New Banking Industry Standard* (11 February 2003).

New York Attorney General, *Press Release: Agreement Reached with Paypal to Bar New Yorkers from Online Gambling + Campaign Against Illegal Gambling Web Site in New York Continues* (21 August 2002).

Attorney General of the State of New York, Internet Bureau, *In the matter of PayPal, Inc.*, Assurance of Discontinuance (16 August 2002).

New York Attorney General, *Press Release: Financial Giant Joins Fight Against Online Gambling + Leading Credit Card Issuer Agrees to Block Key Internet Transactions* (14 June 2002).

Attorney General of the State of New York, Internet Bureau, *In the matter of Citibank (South Dakota), N.A.*, Assurance of Discontinuance (21 June 2002).

ANNEX E

LAWS RELIED UPON BY ANTIGUA IN CLAIMING THAT THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES IS PROHIBITED IN THE UNITED STATES

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
I. UNITED STATES FEDERAL LEGISLATION			
U.S. Const. art. I, § 8, cl. 3	No	No exhibit	Antigua's second written submission, paragraph 20, footnote 19.
Interstate Horseracing Act (15 USC §§ 3001 – 3007)	Yes	Text in exhibits 82, 99 Discussion in exhibits 17, 39, 54, 81, 122	- Antigua's first written submission, paragraph 116, footnote 224 - Antigua's second written submission, paragraph 21, footnote 21 - Panel's 1st set of questions, question Nos. 10 and 19 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 2nd set of questions, question No. 32.
The Federal Aiding and Abetting Statute (18 USC § 2)	Yes	Text in exhibits 82, 99 Discussion in exhibit 81	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 2nd set of questions, question No. 32
Wire Act (18 USC § 1081 and 1084)	Yes	Text in exhibits 82, 99 Discussion in exhibits 10, 17, 39, 45, 54, 81, 94, 119, 122	- Antigua's first written submission, paragraph 134, footnote 268 - Antigua's first oral statement, paragraph 21, footnote 2 - Panel's 1st set of questions: *question No. 10; *question No. 12; *question No. 21; and *question No. 29 - Antigua's second oral statement, paragraph 16, footnote 4 and paragraph 69, footnote 47 - Panel's 2nd set of questions, question Nos. 32 and 45

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
I. UNITED STATES FEDERAL LEGISLATION (CONTD.)			
Federal Lottery Statute (18 USC § 1301 – 1307)	Yes	Text in exhibits 82, 99 Discussion in exhibits 81, 94	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Travel Act (18 USC § 1952)	Yes	Text in exhibits 82, 99 Discussion in exhibits 17, 54, 81, 119, 122	- Antigua's first written submission, paragraph 134, footnote 269 - Antigua's first oral statement, paragraph 21, footnote 3 - Panel's 1st set of questions, question No. 21 - Antigua's second oral statement, paragraph 16 footnote 4 and paragraph 69, footnote 48 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question Nos. 32 and 45
Interstate Transportation of Wagering Paraphernalia (18 USC § 1953)	Yes	Text in exhibits 82, 99 Discussion in exhibits 54, 81	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 2nd set of questions, question No. 32.
'Racketeering Act' or 'Illegal Gambling Business Act' (18 USC § 1955)	Yes	Text in exhibits 82, 99 Discussion in exhibits 17, 54, 81, 119, 122	- Antigua's first written submission, paragraph 134, footnote 270 - Antigua's first oral statement, paragraph 21, footnote 4 - Panel's 1st set of questions: * question No. 10; * question No. 12; and * question No. 21 - Antigua's second oral statement, paragraph 16, footnote 4 and paragraph 69, footnote 49 - Panel's 2nd set of questions, question Nos. 32 and 45.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
I. UNITED STATES FEDERAL LEGISLATION (CONTD.)			
19 USC §§ 1330-1339, §2151, §§ 2171 (a)-(f), 2114 (c) 19 USC § 3512 (d)	No	Texts in exhibits 100, 101, 102 Text in exhibit 106	- Panel's 1st set of questions, question No. 2 - Panel's 1st set of questions, question No. 2.
Indian Gaming Regulatory Act (25 USC §§ 2701-2721)	No	Discussion in exhibits 10, 17, 39, 54, 119	Antigua's first written submission, paragraph 99, footnotes 166, 167, 168.
The Professional and Amateur Sports Protection Act (28 USC §§ 3701 – 3704)	Yes	Text in exhibits 82, 99 Discussion in exhibits 45, 48, 54, 81	- Antigua's first written submission, paragraph 124, footnote 248 - Antigua's second written submission, paragraph 21, footnote 21 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question Nos. 32 and 36.
Postal Law Regarding Mailing Gambling Related Materials (39 USC § 3005)	Yes	Text in exhibits 82, 99 Discussion in exhibit 81	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
(47 USC § 231)	No	Text in exhibit 76	
The Unlawful Internet Gambling Funding Prohibition Act, H.R. 2143, adopted 10 June 2003	No	Text in exhibit 70	- Antigua's first written submission, paragraph 200, footnote 321

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION			
Alabama ALA. CODE §§ 13A-12-20 to 13A-12-31 (1977).	Yes	Text in exhibit 99[1] Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Panel's 2nd set of questions, question No. 32 - Panel's 1st set of questions, question Nos. 10 and 12.
Alaska ALASKA STAT. § 05.15.180 (1997). ALASKA STAT. §§ 11.66.200 to 11.66.280 (1978).	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Arizona ARIZ. REV. STAT. ANN. §§ 13-3301 to 13-3312 (2001).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

[1] Exhibit 99 is the CD containing all the US state laws that are mentioned in the Panel request. It is referred in Antigua's first oral statement, paragraph 25, footnote 5.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Arkansas ARK. STAT. ANN. §§ 5-66-101 to 5-66-119 (1987).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
California CAL. PENAL CODE §§ 319-337z (West Supp. 2003). CAL. BUS. & PROF. CODE § 19800-19807 (West. Supp. 2003).	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Cal. Penal Code §§ 187-189, §§ 240-241 and §§ 518-527	No	No	Comments on US responses to the Panel's 2nd set of questions, question No. 45.
Colorado COLO. CONST. art. XVIII, § 2.	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Col. Rev. Stat. § 18-10-101 to 18-10-108	Yes	Text in exhibits 89, 99 Discussion in exhibits 88, 131	- Antigua's first written submission, paragraph 149 - Antigua's second written submission, paragraph 26, footnote 28. Paragraph 26 does not explicitly mention legislation. It states: "Casino gambling may only be conducted in three historic mining towns". Then, footnote 28 refers to exhibit 131[2] - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Col. Rev. Stat. §§ 12-47.1-101 to 12-47.1-106 (1996)	Yes	Text in exhibits 89, 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Connecticut CONN. GEN. STAT. §§ 53-278a to 53-278g (2001).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Connecticut Division of Special Revenue, Administrative Regulations: Operation of Bingo Games, Rule, 7-169-8a	No	Texts in exhibit 133 Discussion in exhibit 132 (website pages)	Antigua's second written submission, paragraph 26, footnotes 29 and 30, and paragraph 29, footnote 40.

[2] Exhibit AB-131 contains pages from a website : "Colorado Gaming Questions and Answers", the latter document referring to § 18-10-101 (page 2) and § 18-10-103 (page 5) of the Colorado Revised Statute.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Connecticut Division of Special Revenue, Administrative Regulations: Operation of Bingo Games, Rule, 7-169-13a	No	Text in exhibit 133 Discussion in exhibit 132 (website pages)	Antigua's second written submission, paragraph 26, footnotes 29 and 30, and paragraph 29, footnote 40.
<u>Delaware</u> DEL CONST. art. 2, §17. DEL. CODE ANN. tit. 11, §§ 1401-32, 1470-73 (2002).	 Yes Yes	 Text in exhibit 99 Discussion in exhibits 48, 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question Nos. 32 and 36
<u>District of Columbia</u> D.C. CODE ANN. §§ 22-1701 to 22-1712 (2001).	 Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
<u>Florida</u> FLA. STAT. §§ 849.01 to 849.46 (2000).	 Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Georgia GA. CONST. art. 1, § 2. GA. CODE ANN. §§16-12-20 to 16-12-62 (2003).	 Yes Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Hawaii HAW. REV. STAT. ANN. §§ 712-1220 to 712-1231 (Michie 1973).	 Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32 - Comments on US responses to the Panel's 2nd set of questions, question No. 45.
Idaho IDAHO CONST. art. III, § 20. IDAHO CODE §§ 18-3801 to 18-3810 (1992).	 Yes Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Illinois ILL. REV. STAT. ch. 720, §§ 5/28-1 to 5/28-9 (1993).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32
Illinois Riverboat Gaming Act, 230 Illinois Compiled Statutes 10/7 (e)	No	Text in exhibit 139	Antigua's second written submission, paragraph 27, footnote 35.
Indiana IND. CODE §§ 35-45-5-1 to 35-45-5-8 (1998)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Indiana Code 4-33-1-2 Indiana Code 4-33-9-1 Indiana Code 4-33-9-10 Indiana Administrative Code 2-1-4 (c) (1)	No	Text in exhibits 134, 135, 136	Antigua's second written submission : *paragraph 26, footnotes 31 and 32; and *paragraph 29, footnote 41.
Iowa IOWA CODE §§ 725.5 to 725.16 (1993).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Iowa Racing and Gaming Commission, Administrative Rules, 491 – 1 Iowa Racing and Gaming Commission, Administrative Rules, 491 – 8.2 (4) (g) Iowa Racing and Gaming Commission, Administrative Rules, 491 – 11.5 (4) (a) (4)	No	Text in exhibits 141, 142, 144	Antigua's second written submission : *paragraph 27, footnote 37; *paragraph 28, footnote 38; and *paragraph 29, footnote 42.
Kansas KAN. CRIM. CODE ANN. (KSA) § 21-4303 to 21-4308 (1995).	Yes	Text in exhibit 99 Discussion in exhibits 88, 93, 94	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
KAN. CRIM. CODE ANN. (KSA) § 21-4302(C)	No	Discussion in exhibit 94	No
Kansas Consumer Protection Act	No	Discussion in exhibit 94	No
Louisiana LA. CONST. art. XII, § 6. LA. REV. STAT. ANN. § 14:90.- .4 (West 1986).	Yes Yes	Text in exhibit 99 Discussion in exhibits 88, 119	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Louisiana Gaming Control Law RS 27:65	No	Text in exhibit 140	Antigua's second written submission, paragraph 27, footnote 36.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Maine ME. REV. STAT. ANN., tit. 17, §§ 330-347 (1983). ME. REV. STAT. ANN., tit. 17, §§ 2305-2306 (1983).	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Maryland MD. CODE ANN., CRIM. LAW, §§12-101 to 12-307 (2002).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Massachusetts Mass. Gen. Laws Ann. ch. 271, §§ 1-50 (West 2000)	Yes	Text in exhibit 99 Discussion in exhibits 84[3], 88	- Antigua's first oral statement, paragraph 20 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Mass. Gen. Laws Ann. ch. 6, § 48; ch. 10, §§ 22-58 (West 2000)	No	No text Discussion in exhibit 84	- Panel's 2nd set of questions, question No. 32.

[3] Para 20 of Antigua's first oral statement refers to Exhibit AB-84, which contains a document that is an extract from a report prepared by the US General Accounting Office explaining how the laws of 5 States prohibit unauthorized Internet gambling: Massachusetts, Nevada, New-Jersey, New-York, Utah.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Michigan MICH. COMP. LAWS ANN. §§ 750.301-750.315a (West 1990).	Yes	Text in exhibit 99 Discussion in exhibits 88, 95	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Minnesota MINN. STAT. ANN. §§ 609.75-609.763 (Supp. 2003).	Yes	Text in exhibit 99 Discussion in exhibits 88, 96	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Mississippi MISS. CODE ANN. §§ 97-33-1 to 97-33-203 (1999).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Mississippi Gaming Commission Regulations, Section II (B) (2)	No	Text in exhibit 138	Antigua's second written submission, paragraph 26, footnote 34.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Missouri MO. ANN. STAT. §§ 572.010-572.125 (West 1995).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Montana MONT. CONST. art. III, §9. MONT. CODE ANN. §§ 23-5-101 to 23-5-810 (1993).	Yes Yes	Text in exhibit 99 Discussion in exhibits 88, 119	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Nebraska NEB. REV. STAT. §§ 28-1101 to 28-1117 (1995).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Nevada Nev. Rev. Stat. § 202.450 (1999) Nev. Rev. Stat. § 463.160 (2001)	Yes Yes	Texts in exhibit 99 Discussion in exhibits 84 and 88	- Antigua's first oral statement, paragraphs 19, 20 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Nev. Rev. Stat. § 463.0129; § 463.750	No	No text Discussion in exhibit 84	- Antigua's first written submission, paragraph 87, footnote 133 - Panel's 2nd set of questions, question No. 32.
Nev. Rev. Stat. § 465.091-465.094	No	Text in exhibit 117 Discussion in exhibit 119	Panel's 1st set of questions, question No. 19
Regulations of the Nevada Gaming Commission and State Gaming Control Board, Regulation 3.010 (5) and (7)	No	Text in exhibit 143	Antigua's second written submission, paragraph 28, footnote 39.
<u>New-Hampshire</u> N. H. REV. STAT. ANN. § 647:2 (1999).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
<u>New-Jersey</u> N.J. Const. art. IV, § 7 N.J. Stat. Ann. §§ 2A:40-1 to 2A:40-9 (2000) N.J. Stat. Ann. §§ 2C:37-1 to 2C:37-9 (1995) N.J. Stat. Ann. § 5:5-63 (1996) N.J. Stat. Ann. §§ 5:12-1 to 5:12-210 (1996)	Yes Yes Yes Yes Yes	Text in exhibit 99 Discussion in exhibits 84, 88, 119	- Antigua's first oral statement, paragraph 20 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
N.J. Stat. §§ 5:5-159 N.J. Stat. §§ 5:8-1 to 8–118 N.J. Stat. §§ 5:9–1 *et seq.*	No No No	No text Discussion in exhibit 84	- Panel's 2nd set of questions, question No. 32.
2002 New Jersey Assembly Bill No 568	No	No text Discussion in exhibit 84	- Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
New-Mexico N.M. STAT. ANN. §§ 30-19-1 to 30-19-15 (1978)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
New-York N.Y. CONST. art. I, §9	Yes	Text in exhibits 90 and 99 Discussion in exhibits 84 and 88	- Antigua's first written submission, paragraphs. 149-150 - Antigua's first oral statement, paragraph 20 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, questions No. 10, 29 - Panel's 2nd set of questions, question No. 32.
N.Y. EXECUTIVE LAW §§ 430-439a (McKinney 1996) N.Y. PENAL LAW §§ 225.00-225.40 (McKinney 1999) N.Y. GENERAL OBLIGATION LAW §§ 5-401 to 5-423 (McKinney 2001)	Yes	Text in exhibits 90 and 99 Discussion in exhibits 84 and 88	- Antigua's first oral statement, paragraph 20 - Panel's 1st set of questions, questions No. 10, 29 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 2nd set of questions, question No. 32.
NY Penal Code §§ 120.00-.15 and § 155.05 (2) (e)	No	No	- Comments on US responses to the Panel's 2nd set of questions, question No. 45.
Gen. Mun. Law § 185 *et seq* (McKinney) Rac., Pari-Mut Wag. & Breed Law § 101; § 1012 (McKinney)	No	No text Discussion in exhibit 84	- Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
North Carolina N. C. GEN. STAT. §§ 14-289 to 14-309.4 (1994).	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
North Dakota N.D. CONST. art. 11, § 25. N.D. CENT. CODE § 12.1-28-01 to 12.1-28-02 (1987).	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, questions No. 10 - Panel's 2nd set of questions, question No. 32.
Ohio OHIO CONST. art. XV, § 6. OHIO REV. CODE ANN. §§ 2915.01-2915.06 (1996).	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, questions No. 10 - Panel's 2nd set of questions, question No. 32.
Oklahoma OKLA. STAT. ANN. tit. 3A, § 205.6 (West 1993). OKLA. STAT. ANN. tit. 21, §§ 941-993 (West 2002).	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Oregon OR. REV. STAT. §§ 167.108-167.170 (2001)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, questions Nos. 32 and 36.
Oregon Administrative Rule 462-220-0010 / 462-220-0080	No	Text in exhibit 121	Panel's 1st set of questions, question No. 19
Pennsylvania PA. STAT. ANN. tit. 18, § 911 (Purdon 1998) PA. STAT. ANN. tit. 18, § 5513 (Purdon 2000) PA. STAT. ANN. tit. 66, § 2902 (Purdon 2000)	Yes Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Rhode Island R.I. CONST. art. VI, § 22	Yes	Text in exhibits 91 and 99 Discussion in exhibit 88	- Antigua's first written submission, paras. 149-150 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32 (general reference).
R. I. GEN. LAWS §§ 11-19-1 to 11-19-45 (1993) R. I. GEN. LAWS § 11-51-1 to 11-51-2 (1979)	Yes Yes	Text in exhibits 91 and 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
South Carolina S.C. CODE ANN. §§ 16-19-10 to 16-19-160 (Law Co-op. 1996)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32
South Dakota S.D. CODIFIED LAWS §§ 22-25-1 to 22-25-51 (Michie 1976). S.D. CODIFIED LAWS § 22-25A-1 to 22-25A-15 (Michie 2000).	Yes Yes	Text in exhibit 99 Discussion in exhibits 88, 119, 137	Antigua's second written submission, paragraph 26, footnote 33. However, paragraph 26 does not explicitly mention a legislation. It states: "In South Dakota, casino gambling (black jack, poker, slot machines) is permitted only in the city of Deadwood and nine Indian casinos located in the state." Then, footnote 33 only refers to the website of the Commission on Gaming (Frequently Asked Questions), cf. [AB - 137], which does not refer to any legislation. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel 2nd set of questions, question No. 32.
Tennessee TENN. CONST. art. XI, § V TENN. CODE ANN. §§ 39-17-501 to 39-17-509 (1989)	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Texas TEX. PENAL CODE ANN. §§ 47.01 to 47.10 (West 2003)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Utah UTAH CODE ANN. §§ 76-10-1101 to 76-10-1109 (1998)	Yes	Text in exhibit 99 Discussion in exhibit 84	- Antigua's first oral statement, paragraph 20 - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, questions Nos. 32 and 45.
Ut. Const. Art. VI § 27	No	No text Discussion in exhibits 84, 119	- Panel's 2nd set of questions, question No. 32.
Vermont VT. STAT. ANN. tit. 13, §§ 2133-2156 (1957)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Virginia VA. CODE ANN. §§ 18.2-325 to 18.2-340 (Michie 1992)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10. - Panel's 2nd set of questions, question No. 32.

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Washington WASH. REV. CODE ANN. § 4.24.070 (West 1988) WASH. REV. CODE ANN. §§ 9.46.010 to 9.46.903 (West 1998)	 Yes Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
West Virginia W. VA. CODE §§ 61-10-1 to 61-10-5 (1970)	 Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Wisconsin WIS. CONST. art. IV, § 24 WIS. STAT. ANN. §§ 945.01-945.13 (West 2001)	 Yes Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32.
Wyoming WYO. STAT. §§ 6-7-101 to 6-7-104 (1996)	 Yes	 Text in exhibit 99 Discussion in exhibit 88	 General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32

MEASURES	CONTAINED IN PANEL REQUEST?	CONTAINED IN ANTIGUA'S EXHIBIT	CONTAINED IN SUBMISSION
II. STATE AND TERRITORIAL LEGISLATION (CONTD.)			
Guam 9 GUAM CODE ANN. §§ 64.10 to 64.22A (2003)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32
Puerto Rico P.R. LAWS ANN. tit. 33, §§ 1241 to 1259 (1949)	Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32
US Virgin Islands V.I. CODE ANN. tit. 14, §§ 1224-1226 (1985) V.I. CODE ANN. tit. 32, §§ 602-646 (2001)	Yes Yes	Text in exhibit 99 Discussion in exhibit 88	General reference: - to "a huge number of American laws" in paragraph 25 and footnote 5 of Antigua's first oral submission. - Antigua's second oral statement, paragraph 16, footnote 4 - Panel's 1st set of questions, question No. 10 - Panel's 2nd set of questions, question No. 32

ANNEX F

TEXT OF STATE LAWS THAT THE PANEL WILL CONSIDER IN EXAMINING ANTIGUA'S CLAIMS

1. Colorado

1. The text of § 18-10-103 of the Colorado Revised Statutes provides as follows:

"(1) A person who engages in gambling commits a class 1 petty offense.

(2) A person who engages in professional gambling commits a class 1 misdemeanor. If he is a repeating gambling offender, it is a class 5 felony."

2. Louisiana

2. The text of § 14:90.3 of the La. Rev. Stat. Ann. provides as follows:

"A. The Legislature of Louisiana, desiring to protect individual rights, while at the same time affording opportunity for the fullest development of the individual and promoting the health, safety, education, and welfare of the people, including the children of this state who are our most precious and valuable resource, finds that the state has a compelling interest in protecting its citizens and children from certain activities and influences which can result in irreparable harm. The legislature has expressed its intent to develop a controlled well-regulated gaming industry. The legislature is also charged with the responsibility of protecting and assisting its citizens who suffer from compulsive or problem gaming behavior which can result from the increased availability of legalized gaming activities. The legislature recognizes the development of the Internet and the information super highway allowing communication and exchange of information from all parts of the world and freely encourages this exchange of information and ideas. The legislature recognizes and encourages the beneficial effects computers, computer programming, and use of the Internet resources have had on the children of the state of Louisiana by expanding their educational horizons. The legislature further recognizes that it has an obligation and responsibility to protect its citizens, and in particular its youngest citizens, from the pervasive nature of gambling which can occur via the Internet and the use of computers connected to the Internet. Gambling has long been recognized as a crime in the state of Louisiana and despite the enactment of many legalized gaming activities remains a crime. Gambling which occurs via the Internet embodies the very activity that the legislature seeks to prevent. The legislature further recognizes that the state's constitution and that of the United States are declarations of rights which the drafters intended to withstand time and address the wrongs and injustices which arise in future years. The legislature hereby finds and declares that it has balanced its interest in protecting the citizens of this state with the protection afforded by the First Amendment, and the mandates of Article XII, Section 6 of the Constitution of Louisiana and that this Section is a product thereof.

B. Gambling by computer is the intentional conducting, or directly assisting in the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit when accessing the Internet, World Wide Web, or any part thereof by way of any computer, computer system, computer network, computer software, or any server.

C. For purposes of this Section the following definitions apply:

(1) "Client" means anyone using a computer to access a computer server.

(2) "Computer" includes an electronic, magnetic, optical, or other high-speed data processing device or system performing logical, arithmetic, and storage functions, and includes any property, data storage facility, or communications facility directly related to or operating in conjunction with such device or system. "Computer" shall not include an automated typewriter or typesetter, a machine designed solely for word processing, or a portable hand-held calculator, nor shall "computer" include any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended.

(3) "Computer network" means a set of related, remotely connected devices and communication facilities including at least one computer system with capability to transmit data through communication facilities.

(4) "Computer services" means providing access to or service or data from a computer, a computer system, or a computer network.

(5) "Computer software" means a set of computer programs, procedures, and associated documentation concerned with operation of a computer system.

(6) "Computer system" means a set of functionally related, connected or unconnected, computer equipment, devices, or computer software.

(7) "Home Page" means the index or location for each computer site on the World Wide Web.

(8) "Internet" means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol or its subsequent extensions, is able to support communications using the Transmission Control Protocol/Internet Protocol suite or its subsequent extensions, and other Internet Protocol compatible protocols, and provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.

(9) "Server" means a computer that listens for and services a client.

(10) "World Wide Web" means a server providing connections to mega lists of information on the Internet; it is made up of millions of individual web sites linked together.

D. Whoever commits the crime of gambling by computer shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

E. Whoever designs, develops, manages, supervises, maintains, provides, or produces any computer services, computer system, computer network, computer software, or any server providing a Home Page, Web Site, or any other product accessing the Internet, World Wide Web, or any part thereof offering to any client for the primary purpose of the conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit shall

be fined not more than twenty thousand dollars, or imprisoned with or without hard labor, for not more than five years, or both.

F. The conducting or assisting in the conducting of gaming activities or operations upon a riverboat, at the official gaming establishment, by operating an electronic video draw poker device, by a charitable gaming licensee, or at a pari-mutuel wagering facility or the operation of a state lottery which is licensed for operation and regulated under the provisions of Chapter 4 of Title 4, Chapters 4, 5, and 6 of Title 27, or Part V-A of Chapter 14 of Title 33 or Subtitle XI of Title 47 of the Louisiana Revised Statutes of 1950, shall not be considered gambling by computer for the purposes of this Section, so long as the wagering is done on the premises of the licensed establishment.

G. The conducting or assisting in the conducting of pari-mutuel wagering at licensed racing facilities under the provisions of Chapter 4 of Title 4 of the Louisiana Revised Statutes of 1950, shall not be considered gambling by computer for the purposes of this Section so long as the wagering is done on the premises of the licensed establishment.

H. Nothing in this Section shall prohibit, limit, or otherwise restrict the purchase, sale, exchange, or other transaction related to stocks, bonds, futures, options, commodities, or other similar instruments or transactions occurring on a stock or commodities exchange, brokerage house, or similar entity.

I. The providing of Internet or other on-line access, transmission, routing, storage, or other communication related services, or Web Site design, development, storage, maintenance, billing, advertising, hypertext linking, transaction processing, or other site related services, by telephone companies, Internet Service Providers, software developers, licensors, or other such parties providing such services to customers in the normal course of their business, shall not be considered gambling by computer even though the activities of such customers using such services to conduct a prohibited game, contest, lottery, or contrivance may constitute gambling by computer for the purposes of this Section. The provisions of this Subsection shall not exempt from criminal prosecution any telephone company, Internet Service Provider, software developer, licensor, or other such party if its primary purpose in providing such service is to conduct gambling as a business."

3. Massachusetts

3. The text of § 17A of chapter 271 of Mass. Ann. Laws provides as follows:

"Whoever uses a telephone or, being the occupant in control of premises where a telephone is located or a subscriber for a telephone, knowingly permits another to use a telephone so located or for which he subscribes, as the case may be, for the purpose of accepting wagers or bets, or buying or selling of pools, or for placing all or any portion of a wager with another, upon the result of a trial or contest of skill, speed, or endurance of man, beast, bird, or machine, or upon the result of an athletic game or contest, or upon the lottery called the numbers game, or for the purpose of reporting the same to a headquarters or booking office, or who under a name other than his own or otherwise falsely or fictitiously procures telephone service for himself or another for such purposes, shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year; provided, however, that this section shall not apply to use of telephones or other devices or means to place wagers authorized pursuant to the provisions of section 5C of chapter 128A."

4. Minnesota

4. The text of § 609.75, Subdivisions 2-3 of Minn. Stat. Ann. provides as follows:

"Subd. 2. Bet.

A bet is a bargain whereby the parties mutually agree to a gain or loss by one to the other of specified money, property or benefit dependent upon chance although the chance is accompanied by some element of skill.

Subd. 3. What are not bets.

The following are not bets:

(1) A contract to insure, indemnify, guarantee or otherwise compensate another for a harm or loss sustained, even though the loss depends upon chance.

(2) A contract for the purchase or sale at a future date of securities or other commodities.

(3) Offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, endurance, or quality or to the bona fide owners of animals or other property entered in such a contest.

(4) The game of bingo when conducted in compliance with sections 349.11 to 349.23.

(5) A private social bet not part of or incidental to organized, commercialized, or systematic gambling.

(6) The operation of equipment or the conduct of a raffle under sections 349.11 to 349.22, by an organization licensed by the gambling control board or an organization exempt from licensing under section 349.166.

(7) Pari-mutuel betting on horse racing when the betting is conducted under chapter 240.

(8) The purchase and sale of state lottery tickets under chapter 349A."

5. The text of § 609.755(1) of Minn. Stat. Ann. provides as follows:

"Whoever does any of the following is guilty of a misdemeanor:

(1) makes a bet;

(2) sells or transfers a chance to participate in a lottery;

(3) disseminates information about a lottery, except a lottery conducted by an adjoining state, with intent to encourage participation therein;

(4) permits a structure or location owned or occupied by the actor or under the actor's control to be used as a gambling place; or

(5) except where authorized by statute, possesses a gambling device.

Clause (5) does not prohibit possession of a gambling device in a person's dwelling for amusement purposes in a manner that does not afford players an opportunity to obtain anything of value."

5. New Jersey

6. The text of paragraph 2 of N.J. Const. Art. 4, Sec. VII provides as follows:

"No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election, except that, without any such submission or authorization:

A. It shall be lawful for bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, senior citizen associations or clubs, volunteer fire companies and first-aid or rescue squads to conduct, under such restrictions and control as shall from time to time be prescribed by the Legislature by law, games of chance of, and restricted to, the selling of rights to participate, the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, five or more in one line, the holder covering numbers as objects, similarly numbered, are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers on such a card, when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or public-spirited uses, and in the case of senior citizen associations or clubs to the support of such organizations, in any municipality, in which a majority of the qualified voters, voting thereon, at a general or special election as the submission thereof shall be prescribed by the Legislature by law, shall authorize the conduct of such games of chance therein;

B. It shall be lawful for the Legislature to authorize, by law, bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, senior citizen associations or clubs, volunteer fire companies and first-aid or rescue squads to conduct games of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kinds of games of chance sometimes known as raffles, conducted by the drawing for prizes or by the allotment of prizes by chance, when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or public-spirited uses, and in the case of senior citizen associations or clubs to the support of such organizations, in any municipality, in which such law shall be adopted by a majority of the qualified voters, voting thereon, at a general or special election as the submission thereof shall be prescribed by law and for the Legislature, from time to time, to restrict and control, by law, the conduct of such games of chance;

C. It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net proceeds of any such lottery shall be for State institutions and State aid for education; provided, however, that it shall not be competent for the Legislature to borrow, appropriate or use, under any pretense whatsoever, lottery net proceeds for the confinement, housing, supervision or

treatment of, or education programs for, adult criminal offenders or juveniles adjudged delinquent or for the construction, staffing, support, maintenance or operation of an adult or juvenile correctional facility or institution;

D. It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith. Any law authorizing the establishment and operation of such gambling establishments shall provide for the State revenues derived therefrom to be applied solely for the purpose of providing funding for reductions in property taxes, rental, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents of the State, and for additional or expanded health services or benefits or transportation services or benefits to eligible senior citizens and disabled residents, in accordance with such formulae as the Legislature shall by law provide. The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof;

E. It shall be lawful for the Legislature to authorize, by law, (1) the simultaneous transmission by picture of running and harness horse races conducted at racetracks located within or outside of this State, or both, to gambling houses or casinos in the city of Atlantic City and (2) the specific kind, restrictions and control of wagering at those gambling establishments on the results of those races. The State's share of revenues derived therefrom shall be applied for services to benefit eligible senior citizens as shall be provided by law; and

F. It shall be lawful for the Legislature to authorize, by law, the specific kind, restrictions and control of wagering on the results of live or simulcast running and harness horse races conducted within or outside of this State. The State's share of revenues derived therefrom shall be used for such purposes as shall be provided by law."

7. The text of § 2A:40-1 of N.J. Code provides as follows:

"All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."

6. New York

8. The text of § 9 of Art. I of N.Y. Const. provides as follows:

"1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or

allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section."

9. The text of § 5-401 of the N.Y. Gen. Oblig. L. provides as follows:

"All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."

7. South Dakota

10. The text of these sections provides as follows:

"22-25A-1 "Bet or wager" defined.

For the purposes of this chapter, the term, bet or wager, means to directly or indirectly take, receive, or accept money or any valuable thing with the understanding or agreement that the money or valuable thing will be paid or delivered to a person if the payment or delivery is contingent upon the result of a race, contest, or game or upon the happening of an event not known to be certain. Bet or wager does not include the purchase, sale, or trade of securities or commodities under state or federal law.

22-25A-2 "Gambling business" defined.

For the purposes of this chapter, the term, gambling business, means a business that is conducted at a gambling establishment or involves the placing, receiving, or making of bets or wagers or offers to engage in the placing, receiving, or making of bets or wagers.

22-25A-3 "Internet" defined.

For the purposes of this chapter, the term, internet, means the international computer network of both federal and nonfederal interoperable packet switched data networks.

22-25A-4 "Interactive computer service" defined.

For the purposes of this chapter, the term, interactive computer service, means a service, system, or network or access software provider that uses public communication infrastructure or operates to provide or enable computer access by multiple users to a computer server, including a service or system that provides access to the internet.

22-25A-5 "Person" defined.

For the purposes of this chapter, the term, person, means an individual, association, partnership, joint venture, corporation, or a director, executive, or officer of an association, partnership, joint venture, or corporation, a political subdivision of this state, or a department, agency, or instrumentality of this state, or any other government, organization, or entity, including an Indian tribe.

22-25A-6 "State" defined.

For the purposes of this chapter, the term, state, means this state, including a territory, possession, county, and land owned, occupied, or held in trust for an Indian tribe, whether or not federally recognized as an Indian tribe.

22-25A-8 Establishment of internet gambling business prohibited.

Except as provided in § 22-25A-15, no person may establish a location or site in this state from which to conduct a gambling business on or over the internet or an interactive computer service.

22-25A-9 Violation if gambling originates or terminates in state -- Each bet a separate violation.

A violation of § 22-25A-7 or § 22-25A-8 occurs if the violation originates or terminates, or both, in this state. Each individual bet or wager offered in violation of § 22-25A-7 or from a location or site that violates § 22-25A-8 constitutes a separate violation.

22-25A-10 Violation a felony.

Any person who violates § 22-25A-7 or § 22-25A-8 is guilty of a felony as follows:

(1) For a first offense, a Class 6 felony;

(2) For a second or subsequent offense, a Class 5 felony.

22-25A-11 Prosecution of violations.

The attorney general or the state's attorney for the county in which a violation under this chapter occurred, may prosecute violations of this chapter.

22-25A-12 Notification of illegal web site and penalties.

The attorney general may notify a gambling business that its web site is illegal in this state and list the penalties for violating this section.

22-25A-13 Preliminary restraining order available as condition of bond.

The attorney general or state's attorney may seek, and the court may enter, a preliminary restraining order enjoining a person from transmitting bets or wagers or information to assist in the placing of bets or wagers as a condition of bond pending trial or other disposition of the case.

22-25A-14 Permanent injunction available against guilty party.

If a person is found guilty or pleads guilty to a charge brought under this chapter, the attorney general or states attorney may seek, and the court may enter, a permanent injunction against the person or gambling business enjoining the person or gambling business from transmitting bets or wagers or information to assist in the placing of bets or wagers.

22-25A-15 Inapplicability of chapter to state lottery or commission on gaming.

This chapter does not apply to the South Dakota Lottery and its licensees, who are engaged in conduct in furtherance of activity expressly authorized, licensed, and regulated under the provisions of chapter 42-7A or to the South Dakota Commission on Gaming and its licensees, who are engaged in conduct in furtherance of activity expressly authorized, licensed, and regulated under the provisions of chapters 42-7 and 42-7B."

8. Utah

11. The text of § 76-10-1102 of the Utah Code Ann provides as follows:

"(1) A person is guilty of gambling if he:

(a) participates in gambling;

(b) knowingly permits any gambling to be played, conducted, or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part; or

(c) knowingly allows the use of any video gaming device that is:

(i) in any business establishment or public place; and

(ii) accessible for use by any person within the establishment or public place.

(2) Gambling is a class B misdemeanor, provided, however, that any person who is twice convicted under this section shall be guilty of a class A misdemeanor."

ANNEX G

LIST OF EXHIBITS SUBMITTED BY THE PARTIES

ANTIGUA

Exhibit No.	Title
AB-1	Joe Weinert, "U.S. Gambling Losses Hit $68.7B Last Year", *The Press of Atlantic City (New Jersey)* (17 August 2003)
AB-2	United Kingdom Department for Culture, Media & Sport, *The Future regulation of remote gambling: a DCMS position paper* (April 2003)
AB-3	United Kingdom Department for Culture, Media & Sport, *A safe bet for success – modernising Britain's gambling laws*, para. 4.48
AB-4	Examples of scratch card games
AB-5	"The Money Laundering Guidelines for Financial Institutions" issued by the ONDCP under Section 10 of the MLPA (9 September 2002)
AB-6	*Statutory Instruments Antigua and Barbuda, 2001 No 16*, "The Interactive Gaming and Interactive Wagering Regulations of 2001"
AB-7	Schedules A to E to the Gaming Regulations
AB-8	*Mutual Evaluation Report on Antigua & Barbuda, Second Round September 2002*, endorsed by the CFATF Plenary XVII (18 March 2003)
AB-9	Electronically accessed complaint form on Antigua Gaming Directorate Website: http://www.antiguagaming.gov.ag/complaints.asp
AB-10	*National Gambling Impact Study Commission Final Report* ("NGISC"), (18 June 1999)
AB-11	*NGISC Final Report - Executive Summary* (18 June 1999)
AB-12	George Will, "Gambler Nation," *The Washington Post* (27 June 1999)
AB-13	American Gaming Association, *State of the States: The AGA Survey of Casino Entertainment* (2003)
AB-14	Chart entitled "Overview of gambling in the United States"
AB-15	Jason N. Ader, *Bear Stears & Co, Inc, North American Gaming Almanac 2002-2003* [Extracts]
AB-16	United States Government Accounting Office, GAO/GCD – 96-28 *Money Laundering: Rapid Growth of Casinos Makes them Vulnerable*, Appendix III (4 January 1996)
AB-17	United States Government Accounting Office, GAO – 03-89, *Internet Gambling: An Overview of the Issues* (December 2002)
AB-18	Rod Smith, "Casino Industry Technology: Open Wide, New Progressive Slot System Lets Las Vegas Company Serve Russian Gamblers," *Las Vegas Review Journal* (2 September 2003)
AB-19	United States Department of Defense, *Report on the Effect of the Ready Availability of Slot Machines on Members of the Armed Forces, Their Dependents, and Others* (2001)
AB-20	David G. Schwartz, *Suburban Xanadu: The Casino Resort on the Las Vegas Strip and Beyond* (Routledge 2003) [Extracts]
AB-21	John M. Findlay, *People of Chance: Gambling in American Society from Jamestown to Las Vegas* (OUP 1986) [Extracts]
AB-22	Bill Friedman, *Designing Casinos to Dominate the Competition: The Friedman International Standards of Casino Design* (University of Nevada 2000) [Extracts]
AB-23	American Gaming Association, "Fact Sheet: Casino Alcohol Policies"
AB-24	American Gaming Association, "Fact Sheet: ATMS/Credit in Casinos"

Exhibit No.	Title
AB-25	Examples of "Total Rewards," from the website of Harrah's Casino http://www.harrahs.com/e-totalrewards.overview.html
AB-26	James Rutherford, "Lifetime Achievement Award: Phil Satre," *Casino Journal* (January 2003)
AB-27	"Casino Player Awards Record 251 Honors to Harrah's," *Gambling Magazine* (5 July 2001)
AB-28	Liz Benston, "Mandalay Bay, Conn. Casino in deal for marketing," *Las Vegas Sun* 29 August 2003
AB-29	David Schwartz, *Statistical Summary of Atlantic City Casino Market: 1978 to 2002* (Las Vegas, 2003)
AB-30	William Sokolic, "Borgata averages $1.6 million per day in July," *Atlantic City Courier-Post* (4 August 2003)
AB-31	Alan Meister, "The Economic Impact of Indian Gaming: 2nd Annual Report" (Analysis Group, Economic Financial and Strategy Consultants, May 2003)
AB-32	"Gaming at Foxwoods," Information on Gaming Facilities at Foxwood's Casino from its website, www.foxwoods.com
AB-33	Kurt van Kuller, *Indian Casino boom enters the Bond Market* (Merrill Lynch, 12 May 2003)
AB-34	Michael Kaplan, "Gambling in America: A Special Report," *Cigar Aficionado* (October 2002)
AB-35	American Gaming Association, *State of the States: The AGA Survey of Casino Entertainment* (2002), p2
AB-36	Michael Tew and Jason Ader, Bear Stearns & Co, Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders*
AB-37	*La Fleur's 2001 World Lottery Almanac*
AB-38	"Match Made in heaven-Lotteries and tracks have proven to be a great partnership with VLTs," *International Gaming and Wagering Business*, July 2003
AB-39	M. Shannon Bishop, "And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry," 89 *Kentucky Law Journal* 711 (2001)
AB-40	Chart entitled "United States Horse Racetracks"
AB-41	Chart entitled "US Horseracing Statistics: 1996-2002"
AB-42	Extract from the website of Youbet.com, at: www.youbet.com/faq/
AB-43	Extract from the TVG website at: www.tvgnetwork.com/about/faq.asp
AB-44	Extract from the website of Capital OTB at: www.capitalotb.com/NewWeb/about.otb.content.htm
AB-45	Anthony N. Cabot and Robert D. Faiss, "Sports Gambling in the Cyberspace Era," 5 *Chapman Law Review* (Spring 2002)
AB-46	Nevada State Gaming Control Board, *Gaming Revenue Report for the year ending 31 December 2002*
AB-47	Examples of advertisements by Nevada bookmakers offering services to home users via the internet
AB-48	*Report of the Committee to Study the Feasibility of Instituting Sports Gaming Activities at Existing Gaming Venues in Delaware: To the House of Representatives of the 142nd General Assembly of Delaware* (30 May 2003)
AB-49	Koleman Strumpf, *Illegal Sports Bookmakers*, Department of Economics, University of North Carolina at Chapel Hill (February 2003) [Extracts]
AB-50	Liz Benston, "Technology Boosting Traditional, 'Net Bingo'," Las Vegas Sun (March 13 2003)
AB-51	California Gaming Control Commission, List of Licensed Cardroom establishments

Exhibit No.	Title
AB-52	Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, *71st Annual Report: 1 July 2001 to 30 June 2002*, p 23
AB-53	American Gaming Association, "AGA Fact Sheet: Gaming Revenue: Current Year Data"
AB-54	Jeffrey Rodefer, "Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466", published on 18 March 2003 on the website of the Department of Justice of Nevada
AB-55	Press Release dated 21 August 2002 from the New York Attorney General, headed "Agreement Reached with Paypal to Bar New Yorkers from Online Gambling"
AB-56	"Assurance of Discontinuance" signed between the New York Attorney General and Paypal Inc., dated 16 August 2002
AB-57	Press Release dated 14 June 2002 from the New York Attorney General, headed "Financial Giant Joins Fight Against Online Gambling"
AB-58	Press Release dated 11 February 2003 from the New York Attorney General, headed "Ten Banks end online Gambling with Credit Cards"
AB-59	GATT Secretariat, "Scheduling of initial commitments in trade in services: explanatory note" (MTN.GNS/W/164) (3 September 1993)
AB-60	"Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS)" (S/L/92) (28 March 2001)
AB-61	"The United States of America Schedule of Specific Commitments" GATS/SC/90 (15 April 1994)
AB-62	"Services Sectoral Classification List," prepared by the GATT Secretariat, MTN.GNS/W/120 (10 July 1991)
AB-63	"Statistical Papers Series M No. 77, Provisional Central Product Classification," Department of International Economic and Social Affairs, Statistical Office of the United Nations, (New York, 1991)
AB-64	"Communication from the United States: Classification of Energy Services" (S/CSC/W/27) (18 May 2000)
AB-65	United States International Trade Commission, "US Schedule of Commitments under the General Agreement on Trade in Services – with explanatory materials prepared by the US International Trade Commission" (May 1997)
AB-66	"The Handle: Thursday Roundup," *The Spokesman Review* (Spokane Washington) (2 February 2001)
AB-67	David Bennett, "Lottery's pot for schools ends up short," *Crain's Cleveland Business* (23 July 2001)
AB-68	Jim Saunders, "Video-gambling debate spins in soft economy," *The Florida Times-Union* (29 December 2002)
AB-69	CPC Classification, Version 1.0 (1997) and Version 1.1 (2002)
AB-70	"The Unlawful Internet Gambling Funding Prohibition Act," H.R. 2143, adopted 10 June 2003
AB-71	Chart entitled "Selected US Lottery Statistics: 1964 to 2003"
AB-72	Chart entitled "U.S. Lottery Sales (in millions)"
AB-73	Letter from the United States Department of Justice to the National Association of Broadcasters entitled "Advertising for Internet Gambling and Offshore Sportsbooks Operations," (11 June 2003)
AB-74	"Draft Final Schedule of the United States of America concerning Initial Commitments" MTN.GNS/W/112/Rev. 3 (7 December 1993)
AB-75	Committee on the Social and Economic Impact of Pathological Gambling, Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council, *Pathological Gambling: A Critical Review* (1999)

Exhibit No.	Title
AB-76	"The Chile Online Protection Act," 47 United States Code Ann. §231
AB-77	Howard J. Shaffer, Mark Dickerson, Jeffrey Derevensky, Kenneth Winters, Elizabeth George, Marvin Karlins, Walter Bethune (eds) "Considering the Ethics of Public Claims: An Appeal for Scientific Maturity," Journal of Gambling Studies Vol. 17, No. 1, 2001
AB-78	FinCEN Advisory No. 11 (April 1999)
AB-79	Rod Smith, "Las Vegas casinos named in arrest," Las Vegas Review Journal (14 November 2003)
AB-80	Professor Mark Griffiths & Dr Richard Wood, "Is Internet gambling more addictive and/or problematic than other forms of gambling?" (Curriculum Vitaes of Prof. Griffiths and Dr Wood included)
AB-81	Summary of United States Federal Legislation
AB-82	Copies of United States Federal Legislation listed in part I of the Annex to the Panel Request – 15 U.S.C. §§3001 to 3007 (pp1-9) – 18 U.S.C. § 2 (p10); 18 U.S.C. §§ 1081, 1084 (pp11-12) – 18 U.S.C. §§ 1301 to 1307 (pp13-19) – 18 U.S.C. § 1952 (p20) – 18 U.S.C. § 1953 (p21) – 18 U.S.C. § 1955 (p22) – 28 U.S.C. §§ 3701 to 3704 (pp23-26) – 39 U.S.C. § 3005 (pp27-28)
AB-83	*United States v Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert denied,* 122 S. Ct. 2587 (2002)
AB-84	Gambling Law in Five States and Their Effect on Internet Gambling, Enclosure 1 to the GAO Interim Report on Internet Gambling (23 September 2002)
AB-85	Statement of John G. Malcolm before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives (29 April 2003)
AB-86	Statement of John G. Malcolm at the Special Briefing: Money Laundering and Payment Systems in Online Gambling Sponsored by World Online Gambling Law Report (20 November 2002)
AB-87	"Casinos in the United States," *Bear Stearns 2002-2003 North American Gaming Almanac*
AB-88	Summary of the United States State and Territorial Legislation
AB-89	Colorado State Laws – Colo. Const. Art. XVIII, §2 – Colo. Rev. Stat. §§ 18-10-101 to 18-10-108 (1999) – Colo. Rev. Stat. §§ 12-47.1-101 to 12-47.1-106 (1996)
AB-90	New York State Law – NY Const. Art. I § 9 (correctly cited in Panel Request) – NY Const. Art. II § 9 (incorrectly cited in Consultations Request)
AB-91	Rhode Island State Laws – R.I. Article IV § 22 (correctly cited in Panel Request) – R.I. Art. I § 22 (incorrectly cited in Consultations Request) – R.I. Gen. Laws §§ 11-19-1 to 11-19-45 (1993) – R.I. Gen. Laws § 11-51-1 to 11-51-2 (1979)
AB-92	Florida Attorney General, *Press Release: Western Union Cuts Off Sports Betting Accounts* (23 December 1997)
AB-93	Opinion Attorney General of Kansas No. 96-31 (25 March 1996)
AB-94	Kansas Attorney General, *Internet Gambling Warning*

Exhibit No.	Title
AB-95	Michigan Gaming Control Board, *Frequently Asked Questions: Is it Legal to Gamble Over the Internet in Michigan?*
AB-96	Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction* (visited 13 March 2003)
AB-97	*Vacco ex rel People v World Interactive Gaming Corp.,* 714 N.Y.S. 2d 844, 854 (NY Sup. Ct. 1999)
AB-98	Attorney General of the State of New York, Internet Bureau, *In the matter of Citibank (South Dakota), N.A.*, Assurance of Discontinuance (21 June 2002)
AB-99	CD-ROM containing copies of State and Territorial Legislation listed in part II of the Annex to the Panel Request
AB-100	19 U.S.C. §§ 1330-1339
AB-101	19 U.S.C. § 2151
AB-102	19 U.S.C. §§ 2171(a)-(f), 2114 (c)
AB-103	Letter from the United States Trade Representative to the United States International Trade Commission (18 April 1994)
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