*****CHECK AGAINST DELIVERY*****

STATEMENT OF THE UNITED STATES
AT THE ORAL HEARING OF THE APPELLATE BODY

United States – Measures Affecting
the Cross-Border Supply of Gambling and Betting Services
(AB-2005-1)

February 21, 2005

1. Mr. Chairman and members of the Division, the United States appreciates this opportunity to present its views. We will limit ourselves to highlighting several of the arguments in our written submissions and addressing certain claims in the Appellee Submission of Antigua and Barbuda. We will be glad to address any specific points with the Division thereafter.

2. Mr. Chairman, this dispute raises extremely serious issues. The Panel's findings relate to certain long-standing criminal laws of the United States. The interests that those laws protect are, in the Panel's own words, "vital and important in the highest degree." Issues of how best to fight organized crime and other criminal behavior are critical and sensitive domestic concerns. So are the issues of protecting Americans within U.S. borders from the pernicious effects of having gambling opportunities constantly channeled into their homes, schools, and workplaces. Antigua would apparently have you believe that these issues are relics from another era. Let me assure you, however, that no matter how little priority Antigua may attach to them, these remain matters of great and immediate public concern in the United States.

3. We therefore find it disturbing that the Panel's findings in this dispute were deeply flawed. We respectfully look to the Appellate Body to reverse the Panel's findings, and to

conclude that any findings that the Appellate Body determines that it need not reach are also without legal effect.

4. We would like to begin today by focusing on the overall pattern of error that pervades this Panel Report. That pattern begins with the Panel making proper findings on some initial premises. On those points – that is, steps that preceded the Panel's wrong turns – the Panel should be affirmed. In spite of some initially correct findings, however, the Panel Report reveals a disturbing pattern in which the Panel repeatedly made subsequent legal errors in pursuit of contrary conclusions. For example, the Panel defied its own initial conclusion that it could not make the case for the complaining party. It relied on non-authentic languages to justify a departure from the text of the U.S. schedule. It read obligations into the text of Article XVI that simply are not there. And it created a non-existent consultation requirement to deny the United States the benefit of Article XIV exceptions. On these and many other findings and conclusions that contributed to or resulted from the Panel's wrong turns, the Panel should be reversed.

Burden of Proof

5. First among those concerns is an error in the application of the burden of proof. Antigua chose to argue its case based on the alleged "total prohibition." In doing so, it was essentially challenging not a measure, but a description of the purported effect of one or more particular measures. And in spite of the Panel's repeated attempts to have Antigua substantiate its assertion of a "total prohibition," Antigua refused to sustain its burden, and provided neither

evidence nor argumentation as to precisely which measures allegedly caused this purported effect.

6. It is perhaps revealing that Antigua has emphasized that it did not want the United States to be able to change any particular law that was challenged and be able to nonetheless restrict remote gambling.[1] In other words, Antigua sought an advisory opinion that any U.S. restriction on remote gambling would be inconsistent with the GATS, irrespective of through which measure or how the restriction was applied. Such an approach is directly at odds with the DSU, which explicitly limits panel or Appellate Body recommendations to those involving whether a particular measure is inconsistent with the WTO.[2]

7. Antigua's approach led the Panel initially to conclude, correctly, that "it is not 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." Unfortunately, and in spite of its proper initial conclusion, the Panel in this dispute seems in retrospect to have been eager to explore novel issues that *could have been presented* if Antigua met its burden of proof. The Panel thus turned its back on its initial conclusion, made the case for Antigua with regard to particular measures, and therefore erred by exceeding the scope of its authority. This error was so egregious that the

[1] Appellee Submission of Antigua and Barbuda, para. 21.

[2] Article 19.1 of the DSU.

Panel effectively became the complaining party, also in violation of its duty of objectivity under Article 11 of the DSU.

8. Both parties to this dispute agree that a panel errs if it makes the case for a complaining party. The United States has pointed out that Antigua never argued that any one of the particular laws as to which the Panel ultimately made adverse findings violated Article XVI of the GATS. Significantly, Antigua does not appear to disagree. It has pointed to nothing in the Panel record where Antigua even once argued that these particular statutes were inconsistent with Article XVI. The reasoning applied in past disputes, including *Japan – Varietals* and *Canada – Wheat,* demonstrates that it was error for the Panel to make the case for the complaining party in the face of such a lack of argumentation and supporting evidence.

9. Antigua submits that the Panel did not make the case for Antigua because what Antigua did was to provide "the Panel with extensive resources that enabled the Panel to assess the dispute on the basis that the Panel, itself, finally adopted."[3] First of all, Antigua has already conceded that the Panel "apparently determined for itself whether the evidence in front of it was sufficient to consider the various federal and state laws." Second, the extent of the "resources" provided by Antigua is beside the point. The question is whether a panel has the authority to find a measure inconsistent with Article XVI when the complaining party (1) fails to parse out the relevant evidence from the supposedly "extensive resources" it provided, (2) fails to construct argumentation on the basis of the evidence, and (3) fails to even – as an initial matter –

[3] Appellee Submission of Antigua and Barbuda, para. 33.

assert that the measure is inconsistent with Article XVI. As the Appellate Body clarified in *Canada – Wheat,* a complaining party cannot simply dump masses of material about a purported measure on a panel and expect the panel to extract relevant evidence. The Appellate Body also observed in *Japan – Varietals* that a panel's 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." In short, it is Antigua's burden to put together its case. The Panel erred by assuming that burden.

10. Antigua attempts to avoid its burden by suggesting that there is "no disagreement" about the alleged total prohibition. Once again, no matter how many times Antigua states the contrary, there is significant disagreement about the alleged "total prohibition." That conclusory label used by Antigua neither embodies nor accurately describes U.S. law.

11. Moreover, Antigua would presumably concede that there is genuine disagreement in this dispute about whether any particular U.S. law is inconsistent with Article XVI of the GATS. The question is, how should a Panel resolve that disagreement? May it treat a description of the alleged effect of a responding party's law as if it were the measure at issue, without considering what the particular statutes actually say, as Antigua suggests? Clearly not. A panel "must look at the specific provisions" of domestic law.[4] It must require the complaining party to meet its burden of proof with respect to those provisions. The Panel was thus correct to reject the notion that Antigua's description of U.S. law could ever be the measure at issue in this dispute.

[4] Appellate Body Report, *India – Patents,* paras. 68-69.

U.S. Schedule

12. Let me turn now to the U.S. Schedule of Specific Commitments annexed to the GATS. The issue in this appeal is whether the schedule must be interpreted as including a commitment for gambling. Antigua has pointed to the U.S. inscription of "other recreational services (except sporting)" in the U.S. schedule as the source of the purported commitment for gambling.

13. The Panel was initially correct to find that its interpretation of this entry in the U.S. schedule must proceed according to the customary rules of interpretation of international law. Application of those rules starts with the ordinary meaning of the text. Looking to dictionary definitions as a starting point, no fewer than eight separate English dictionaries cited in the Panel Report confirm that the ordinary meaning of "sporting" includes gambling. That means that the ordinary meaning of "except sporting" includes "except gambling".

14. But here again, the Panel made a wrong turn and reached for highly implausible grounds to turn its back on this ordinary meaning. A notable example is a point that Antigua does not attempt to defend in its Appellee Submission: the Panel's erroneous decision to determine for itself how to translate "sporting" in French and Spanish, and then to rely on the meaning of *sportifs* and *deportivos*, in spite of the fact that the U.S. schedule is authentic in English only.[5]

[5] Panel Report, para. 6.60.

15. As for Antigua's defense of the Panel's approach in its Appellee Submission, it misses the point. Antigua asserts that one entry in a schedule cannot have "different meanings." Yet Antigua simultaneously concedes that terms often have a general meaning that encompasses multiple activities. Likewise, the word "sporting" is a general term. Its ordinary meaning includes a range of activity. That range includes gambling.

16. The United States has further shown that it did not inscribe references to the CPC in its schedule, and therefore, contrary to the Panel's findings, the United States cannot be presumed to have relied on CPC meanings.[6] The other classifications cited by Antigua are neither referenced in the U.S. schedule nor discussed by the Panel, and therefore beside the point.

17. With respect to W/120 and the CPC, the Panel elevated these negotiating history documents to the status of "context." It lacked any basis to do so under customary rules of interpretation of international law. For example, it is pure fiction that Uruguay Round participants were "intellectual authors" of GATT secretariat documents.[7] Moreover, Antigua's assertion that use of the W/120 structure automatically means use of the CPC is incorrect.[8] The schedules themselves confirm that Members who wished to refer to the CPC did so explicitly.

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[6] Appellant Submission of the United States, para. 75.

[7] Panel Report, para. 6.80.

[8] Appellee Submission of Antigua and Barbuda, para. 52.

18. Finally, Antigua has incorrectly asserted that the U.S. arguments regarding its schedule imply that all electronic commerce would be excluded from GATS commitments.[9] As Antigua has observed, the United States believes that *where market access and national treatment commitments do exist,* they encompass delivery through electronic means. Conversely, where there is no commitment for a service – as in this case – it stands to reason that there is no commitment for electronic delivery of that service.

Article XVI

19. Turning to Article XVI of the GATS, we would first note the detrimental consequence of the Panel's error in making the case for the complaining party on the Panel's Article XVI findings. We find ourselves here today discussing hard questions about particular measures of the United States, such as whether they impose numerical quotas and whether they impose limitations on service suppliers or on someone else entirely. To properly answer these questions, one must examine the text of particular U.S. measures. That never happened in the proceedings below until the Panel made a case for Antigua in the Panel Report.

20. If the Appellate Body reaches Article XVI, which we believe is not necessary given that Antigua did not itself make a prima facie case of a GATS inconsistency, we respectfully request that the Appellate Body consider that Article XVI contains particular, well-defined obligations setting forth the precise limitations listed in Article XVI:2. It does not by its terms guarantee the

[9] Appellee Submission of Antigua and Barbuda, para. 57.

unlimited ability to supply a service. Both the Panel and Antigua have incorrectly suggested that Article XVI must be expanded to cover limitations not addressed in its text, such as limitations that have the effect of a "zero quota," but do not take that form. Unless they match the precisely drawn requirements of the text of Article XVI:2, however, these types of limitations are not covered in the text of Article XVI.

21. Turning to the interpretation of that text, what is most clearly missing from the Panel's and Antigua's analysis is careful attention to the words actually used in Article XVI – including such key words as "form," "quotas," "expressed," "designated," and "numerical." The Panel and Antigua both ignore or minimize the ordinary meaning of these terms.

22. With respect to Article XVI:2(a), Antigua states that it "appreciates" that the text of Article XVI:2(a) uses the word "form" and not "effect," but that "form" must nonetheless be read as including "effect." In making this assertion, Antigua is, like the Panel, failing to "read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used."[10] Antigua has without basis sought to de-emphasize the text by urging that "the emphasis is put on the first part." The only asserted textual basis for this argument is the word "whether." However, as the Panel correctly found, the use of that word does not by itself indicate an illustrative list. This is confirmed, as the Panel

[10] Appellant Submission of the United States, para. 109 (quoting Appellate Body Report, *EC – Hormones,* para. 181.

observed, by the fact that other provisions of the GATS use further words to indicate an illustrative list of forms, such as the words "or in any other form."[11]

23. With respect to Article XVI:2(c), Antigua offers little response to the extensive U.S. argumentation that this provision only covers, in relevant part, "limitations expressed in terms of designated numerical units in the form of quotas." Antigua's cursory assertions that this text "makes no sense" or "is simply a typographical error" are simply baseless.

24. Antigua also states that GATS Article XVI:2 must be interpreted to "prohibit *de facto* violations" because Article II of the GATS and Article 3.1(b) of the SCM Agreement have previously been found to apply to situations of *de facto* inconsistency. However, Antigua overlooks the fact that neither of these other provisions includes an explicit form or manner-of-expression requirement like those in Article XVI:2(a) and (c). Contrast that with Articles XVII:2 and 3, both of which refer to "formally identical or formally different treatment." The Appellate Body's analysis of Article II in *EC – Bananas,* cited by Antigua, shows why this difference matters. The Appellate Body asked in that dispute: If the drafters of the GATS intended that a formal standard should apply in Article II, "why does Article II not say as much?" Observing that "the obligation imposed by Article II is unqualified," the Appellate Body concluded that "[t]he ordinary meaning of this provision does not exclude *de facto* discrimination."[12] The converse of that same rationale is relevant here: Article XVI of the GATS

[11] Panel Report, para. 6.323.

[12] Appellate Body Report, *EC – Bananas,* para 233.

does *explicitly* state that a formal standard should apply by use of the qualifying words "in the form of" and "expressed in terms of." It thus expressly excludes limitations that are not in the form required by Article XVI:2(a) or expressed in the terms required by Article XVI:2(c).

25. Finally, Antigua is incorrect to suggest that the scope of the text of the six categories in Article XVI:2 should be expanded to encompass limitations in the market access columns of Members' schedules. In embarking upon this new agreement, many Members cautiously inscribed limitations in the market access column that they felt might or might not actually be covered by Article XVI:2. Those inscriptions should not be read as expanding the obligation. For example, the fact of two Members' having inscribed commitments on passenger transport by air in their schedules should not be read as eliminating the exclusion of certain measures from the GATS under the Annex on Air Transport Services. Moreover, it is not surprising that some surplus entries exist in schedules. Members had little incentive to negotiate for the removal of entries with respect to limitations that would not violate Article XVI in any event.

Article XIV

26. Turning now to Article XIV of the GATS, let me briefly note again how the consequences of the Panel's burden of proof error pervade this dispute. In raising Article XIV in this dispute, the United States had to guesses what to defend. This amounted to denial of a full and fair opportunity to defend the particular measures that the Panel ultimately targeted.

27. In its Article XIV analysis, the Panel identified only one basis for finding that the Wire Act, the Travel Act (together with the relevant state laws) and the Illegal Gambling Business statute (together with the relevant state laws) are not justified under Articles XIV(a) and XIV(c) of the GATS. That sole basis on was its erroneous finding that "the United States, before imposing a WTO inconsistent measure, was obliged to explore these options [of bilateral and/or multilateral consultations and/or negotiations] in a good faith manner with a view to exhausting WTO-consistent alternatives, even if it considered that the measures in question were 'indispensable'.[13] This was error for the simple reason that, as the United States and all of the third parties filing written submissions have pointed out, there is no such requirement.

28. Significantly, even Antigua in its Appellee Submission makes no attempt whatsoever to defend the Panel's erroneous extrapolation of an "explore and exhaust" requirement and a consultation requirement from the *Section 337* GATT panel report, the *Tuna Dolphin I* GATT panel report, and the *Shrimp Turtle* Appellate Body reports. Those reports provide no support for the Panel's analysis. The Panel clearly erred by grafting procedural requirements onto a provision that does not contain such requirements.

29. Rather than defend the Panel's misguided approach, Antigua in its Appellee Submission attempts to gloss over this error by simply asserting that the Panel "did not ... impose a procedural requirement to negotiate."[14] Antigua then attempts to shift the focus away from the

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[13] Panel Report, para. 6.534. *See also* Panel Report, paras. 6.533, 6.564.

[14] Appellee Submission of Antigua and Barbuda, para. 78.

Panel's error by claiming instead that the United States provided "no evidence at all" that its measures were necessary to protect public morals and public order or to secure compliance with the RICO statute.[15] The Panel could not be clearer, however, in its sole reliance on this purported obligation to consult to justify its conclusion.

30. Moreover, the record shows that the United States provided ample evidence and argumentation. The record is filled with reports, testimony, and other sources documenting the "study and debate" engaged in by U.S. authorities to determine that U.S. restrictions on remote supply of gambling services are "necessary" to address the problems associated with remote supply of gambling. The United States explicitly relied on this evidence of extensive study and debate in its Article XIV argumentation,[16] and the Panel cited it extensively.

31. Prominent among this evidence is a document submitted by Antigua – the 1999 report of a National Gambling Impact Study Commission set up by the U.S. Congress.[17] That report, relied upon in the U.S. Article XIV argumentation, recommended that current regulatory concerns associated with Internet gambling required that it be prohibited.[18] For example, the United States quoted the report's observation that the position of U.S. state attorneys general on

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[15] Appellee Submission of Antigua and Barbuda, para. 87.

[16] Second Submission of the United States, para. 122.

[17] Exhibit AB-10.

[18] Exhibit AB-10, pp. 5-12.

Internet gambling "is a rare stance ... in support of increased federal law enforcement and regulation and is a clear indication of the regulatory difficulties posed by Internet gambling."[19]

32. In light of this and other evidence on the record, Antigua's assertion that the United States failed to meet its burden of proof is without basis. The Panel weighed the evidence presented by both sides and, as the United States has pointed out, it was not able to conclude that any alternative measure was reasonably available, as required under the analysis of the word "necessary" that the Panel was purporting to apply.

33. Finally, turning to the Article XIV chapeau, Antigua makes no attempt to defend the Panel's legal error of requiring the United States to demonstrate "that it applies its prohibition on the remote supply of these services in a consistent manner" in order to meet the requirements of the Article XIV chapeau. Nor does Antigua attempt to defend the Panel's legal error of finding "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade" based on an analysis of three domestic suppliers and one foreign supplier, rather than examining evidence of overall application of the relevant measures that was before it.

34. As to the evidence itself, Antigua does not contest the fact that the uncontroverted evidence before the Panel showed many examples of domestic enforcement, against a finding of one case of enforcement against suppliers from other Members. Instead, Antigua makes the new

[19] Second Written Submission of the United States, para. 122 and note 149 (citing NGISC Report).

factual assertion on appeal that all of the domestic enforcement cases related to "underground" illegal gambling, which Antigua views as somehow distinct from the illegal gambling offered in the United States by its suppliers. There is no basis for this distinction, and Antigua cannot rely on new purported facts on appeal. As to the facts concerning the legal effect of the Interstate Horseracing Act (or "IHA"), Antigua points to nothing on appeal that contradicts the uncontroverted evidence before the Panel that the IHA did not repeal or amend preexisting U.S. criminal laws. Thus it should be clear that, by reaching conclusions at odds with this uncontroverted evidence, the Panel breached its obligations under Article 11 of the DSU.

35. Finally, Antigua essentially admits that the Panel made the case for it under the Article XIV chapeau. Its main response, therefore, is to assert that the United States failed to prove the consistency of its measures with the chapeau. But Antigua ignores the fact that the United States, in addition to making arguments based on the legislative history of the relevant measures, explicitly made reference to its repeated prior observations that its relevant measures "apply equally regardless of national origin." Antigua, by contrast, made no effort to incorporate any of its Article XVII argumentation under the Article XIV chapeau, leaving that task to the Panel. Moreover, the U.S. argumentation as to the total absence of discrimination was legally sufficient to establish that there is no inconsistency with the Article XIV chapeau. Antigua's assertion of a national treatment violation, by contrast, was not enough to show that the alleged discrimination was "arbitrary or unjustifiable" or a "disguised restriction on trade."

36. In closing, Mr. Chairman, we would like to make a brief observation about the broad significance of this dispute. This dispute appears to have been inspired by the felony conviction under the Wire Act of just one American citizen operating from Antigua. That is the one conviction of a foreign supplier referenced in paragraph 6.588 of the Panel Report. Unfortunately, the Panel's erroneous findings and conclusions in this dispute will have broad and grave implications far beyond the crimes of one individual. It is in view of those concerns, and the vital public interests served by the U.S. criminal statutes at issue in this dispute, that the United States respectfully requests that the Appellate Body conclude that the findings of the Panel challenged by the United States in this appeal are in error, and reject the other appeal by Antigua in its entirety. Thank you for your kind attention.