BEFORE THE

WORLD TRADE ORGANIZATION

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services

WT/DS285

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

November 7, 2003

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I. INTRODUCTION

1. Antigua and Barbuda ("Antigua") claims that one or more unspecified U.S. measure(s) within the scope of the Panel's terms of reference affect the remote supply of gambling services by Antiguan service suppliers to U.S. consumers in a manner inconsistent with certain alleged U.S. commitments or obligations relating to cross-border supply of those services under the *General Agreement on Trade in Services* ("GATS").

2. Antigua insists on targeting all its claims in this dispute exclusively against the notion of a "total prohibition" on cross-border supply of gambling. That notion has no legal status under U.S. law. Yet Antigua flatly refuses to explore the real measures that might give substance to that notion, and Antigua purposefully ignores anything those measures might say or mean.

3. The United States submits that Antigua thus fails to establish anything approaching a *prima facie* case that any specific U.S. measure applicable to the cross-border supply of gambling is inconsistent with U.S. WTO obligations. Antigua bears the burden of proving, through evidence and argumentation, the scope and meaning of specific U.S. measures. By flatly refusing to sustain that burden, it leaves the Panel with no choice but to reject Antigua's claims in their entirety.

4. The United States goes on to show, in as much detail as Antigua's vague allegations allow, that even if the Panel could set aside Antigua's overall failure of proof, Antigua fails in any event to make out claims as to the existence of relevant commitments or the inconsistency of specific U.S. measures with particular provisions of the GATS. But the United States stresses that Antigua's ill-conceived strategy of asking the Panel to ignore the actual content of U.S. law should prevent the Panel from reaching such issues.

II. PROCEDURAL BACKGROUND

5. On March 13, 2003, 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 GATS.[1] On April 1, 2003, Antigua submitted a revised request for consultations.[2] On April 30, 2003, the United States and Antigua held consultations

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[1] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Request for Consultations by Antigua and Barbuda*, WT/DS285/1, 13 March 2003.

[2] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Request for Consultations by Antigua and Barbuda: Addendum*, WT/DS285/1/Add.1, circulated 10 April 2003 ("request for consultations" or "consultations request"). The reasons for resubmitting the request for consultations are relevant only insofar as they show, contrary to assertions by Antigua in its response to the U.S. request for preliminary rulings in this dispute, that the United States has from the very earliest stages of this dispute stressed its view that the specific measures cited by Antigua define the scope of this proceeding. Specifically, on March 26, 2003, Antigua provided the United States with a "further version" of the annex to its March 13 request, which in Antigua's view rectified "small discrepancies in the references to the measures therein included." *See* Letter from Ambassador Sir Ronald Michael Sanders to Ambassador Linnet F. Deily, March 26, 2003. On March 28, 2003, the United States responded that the revised annex "changes the scope of the consultations in that it includes additional measures not

in Geneva. On June 12, 2003, Antigua requested establishment of a panel.[3] At its meeting on July 21, 2003, the Dispute Settlement Body established a panel in accordance with Article 6 of the DSU. On August 25, 2003, the Director-General composed this Panel.[4] Canada; the European Communities; Japan; Mexico; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu have reserved their rights to participate in the panel proceedings as third parties.

III. STATEMENT OF FACTS

A. Recent growth in the remote supply of gambling raises serious regulatory concerns for the Government of the United States.

6. 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.

7. Antigua refers to the supply of gambling services using communications technologies as "cross-border" supply.[5] 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."

1. Throughout its history, the United States has consistently imposed tight regulations on the remote supply of gambling.

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within the scope of the original request." *See* Letter from Ambassador Linnet F. Deily to Ambassador Sir Ronald Michael Sanders, March 28, 2003.

[3] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Request for the Establishment of a Panel by Antigua and Barbuda,* WT/DS285/2, circulated 13 June 2003 (hereinafter "panel request").

[4] *See United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Constitution of the Panel Established at the Request of Antigua and Barbuda: Note by the Secretariat,* WT/DS285/3, 26 August 2003.

[5] First Submission of Antigua & Barbuda, October 1, 2003, paras. 28-31.

8. Gambling has been regulated in the United States since the earliest years of the Colonial era.[6] Remote supply of gambling first emerged with the advent of a reliable postal service, and as early as 1827 the United States enacted legislation restricting it.[7] A century ago, in *The Lottery Case,*[8] the U.S. Supreme Court confirmed that the U.S. Congress possesses the power to regulate, and even prohibit, the supply of lottery tickets by mail. In the 20th century, the United States expanded the regulatory regime for remote supply of gambling so that it now addresses modern threats, including organized crime, and modern communications technologies, including the Internet. In addition to existing restrictions on gambling applicable to the Internet, Congress has considered, but not yet enacted, further legislation more narrowly aimed at the remote supply of gambling services over the Internet.

2. Gambling in general, and remote supply of gambling in particular, raises grave law enforcement and consumer protection concerns.

9. Criminal activities are linked to gambling in both physical and virtual forms. Such criminal activities include organized crime, money laundering, and fraud.

a. Organized crime has close ties to gambling services and has played a growing role in remote supply of gambling.

10. Gambling has been one of the staple activities of organized crime syndicates. In 1951, the Final Report of the Kefauver Commission stated that "[i]llegal gambling activities are the principal source of revenue for today's hoodlums and racketeers and the heart of illegal gambling is bookmaking."[9] The U.S. Department of Justice – the nation's chief law enforcement agency – continues to view gambling as a staple activity for organized crime. "Bookmaking and loansharking remain two of the fundamental money-generating enterprises of La Cosa Nostra, and as always, violence and the threat of violence are integral to the collection of illegal debts."[10]

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[6] Early groups of colonists opposed gambling and other activities associated with idleness. *See* National Institute of Law Enforcement and Criminal Justice, The Development of the Law of Gambling: 1776-1976, p. 41 (1977). By the time of the Revolution, all of the Northeastern colonies had banned public gaming and made such activity a public nuisance. *Id.*, p. 49. Exhibit U.S.-1.

[7] Act of Mar. 2, 1827, sec. 6, 4 Stat. 238 (restricting the participation of postmasters and assistant postmasters in the lottery business).

[8] *Champion v. Ames,* 188 U.S. 321, 356 (1903) ("Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.")

[9] Senate Report No. 82-725, Organized Crime in Interstate Commerce, Final Report of the Special Committee to Investigate Organized Crime in Interstate Commerce, p. 88, United States Senate (August 31, 1951), Exhibit U.S.-2.

[10] United States Attorney's Office for the Eastern District of New York, Press release: "Captain, Soldier and Four Associates of the Colombo Organized Crime Family Charged with Racketeering, Loansharking, Illegal Gambling and Witness Tampering" (June 17, 2003), Exhibit U.S.-3.

11. 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."[11] 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."[12] 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.[13]

b. Remote supply of gambling services provides particularly attractive opportunities for money laundering.

12. 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.

13. The National Gambling Impact Study Commission ("NGISC"), a body established by the U.S. Congress with a mandate to conduct a comprehensive study of the social and economic impacts of gambling, observed in 1999 that

> gambling 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 percent of the original funds, then cash out the

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[11] *See* Internet Gambling Prohibition Act, Senate Report No. 106-121, p. 16 (1999), Exhibit U.S.-4.

[12] 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), Exhibit U.S.-5.

[13] *See* Criminal Intelligence Service Canada, 2003 Annual Report on Organized Crime in Canada, pp. 16-17, excerpt at Exhibit U.S.-6.

remaining funds. Through the dual protection of encryption and anonymity, much of this activity can take place undetected.[14]

c. Remote gambling is closely associated with fraud schemes.

14. 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 U.S. 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.[15] In 2002, fraudulent prizes, sweepstakes, and lotteries were among the top ten consumer complaints to the FTC.[16] The FTC has found that most promotions for foreign lotteries are fraudulent.[17]

15. 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 favor. Computer hackers can also alter software to the detriment of consumers.[18]

3. 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.

16. U.S. 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 percent of 18- to 24-year-olds in the United States use computers for an average of four hours

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[14] National Gambling Impact Study Commission, Final Report, p. 5-6 (June 1999), Exhibit AB-10. *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..."), Exhibit U.S.-7.

[15] FTC Consumer Alert, International Lottery Scams, January 2000, Exhibit U.S.-8.

[16] Federal Trade Commission, A Positive Agenda For Consumers: The FTC Year in Review at p. 13, box 4 (April 2003), Exhibit U.S.-9.

[17] FTC Consumer Alert, International Lottery Scams, January 2000, Exhibit U.S.-8.

[18] *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, Exhibit U.S.-5.

per day.[19] Children make easy targets for remote suppliers of gambling: "Many of these gambling web sites have been designed to resemble video games, and therefore are especially attractive to children."[20] 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 underage gamblers."[21] 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."[22]

17. A U.S. 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 percent of student-athletes gambled on sports while attending college."[23] 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.[24]

18. The U.S. 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."[25] 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 is inherently more difficult to control.[26] 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

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[19] NGISC Final Report, p. 5-4, Exhibit AB-10.

[20] Senate Report No. 106-121, p. 13 (quoting testimony of Jeffrey Pash, executive vice president of the National Football League), Exhibit U.S.-4.

[21] NGISC Final Report, p. 5-4, Exhibit AB-10.

[22] American Psychiatric Association, *APA Advisory on Internet Gambling* (Jan. 16, 2001), Exhibit U.S.-10.

[23] Senate Report No. 106-121, p. 14, Exhibit U.S.-4.

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

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

[26] *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 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."), Exhibit U.S.-5.

citizens' concerns about their inability to control an activity as to which many individuals and groups harbor serious ethical and religious reservations.[27]

4. Supply of gambling into private homes, workplaces, and other environments creates additional health risks.

19. The Council on Compulsive Gambling reports that five percent 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."[28] In its Final Report, the NGISC warned that "the high-speed instant gratification of Internet games and the high level of privacy they offer may exacerbate problem and pathological gambling."[29] It also highlighted the grave consequences of problem and pathological gambling behaviors.[30]

20. A U.S. Senate committee concluded in 1999 that "Internet gambling threatens to expand the number of addicted gamblers because it can greatly expand the total number of gamblers in America. In addition, the committee believes that the anonymous nature of Internet gambling increases the likelihood that individuals will become addicted to gambling. . . . Strong social pressures that temper addictive gambling practices are removed by Internet gambling, including the stigma that may be attached to gambling in public. Internet gambling threatens to erode that stigma."[31]

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[27] 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), Exhibit U.S.-4.

[28] *Id.,* p. 15 ("As smoking crack cocaine changed the cocaine experience, I think electronics is going to change the way gambling is experienced.").

[29] NGISC Final Report, p. 5-5, Exhibit AB-10. *See also* George T. Ladd & Nancy M. Petry, Disordered Gambling Among University-Based Medical and Dental Patients: A Focus on Internet Gambling, 16 Psychol. Addictive Behav. 76, 77 (2002) (study finding that: "Only 22% of participants without any Internet gambling experience were Level 2 [problematic] or 3 [pathological] gamblers. In contrast, 74% of participants with Internet gambling experience were classified as Level 2 or 3 gamblers."), Exhibit U.S.-11.

[30] *See* NGISC Final Report, p. 4-1, Exhibit AB-10 ("All seem to agree that pathological gamblers 'engage in destructive behaviors: they commit crimes, they run up large debts, they damage relationships with family and friends, and they kill themselves. With the increased availability of gambling and new gambling technologies, pathological gambling has the potential to become even more widespread.'")

[31] Senate Report No. 106-121, pp. 1-15, Exhibit U.S.-4.

21. A 2001 health advisory issued by the American Psychiatric Association warned that "Internet gambling, unlike many other types of gambling activity, is a solitary activity, which makes it even more dangerous: people can gamble uninterrupted and undetected for unlimited periods of time."[32]

B. Antigua's statement of facts contains misleading statements, inaccuracies, and irrelevant material

22. The statement of facts provided in Antigua's first submission[33] is misleading, inaccurate, or irrelevant in numerous respects.

1. The United States actively enforces its laws against illegal gambling.

23. Antigua falsely asserts that the United States makes "little effort" to effectively restrain domestic illegal gambling.[34] Antigua further asserts that "United States law enforcement efforts to crack down on non-sanctioned bookmakers have dwindled over the last 40 years" because the 15,000 arrests made for gambling in 1995 represented a decrease compared to 1960 figures.[35]

24. Illegal gambling activity is in no way sanctioned by the United States. Arrest figures for illegal gambling remain impressive, especially in view of the fact that U.S. authorities have limited resources to investigate and prosecute crime, including terrorism and other grave threats. In spite of these competing priorities, the Department of Justice continues to consider illegal gambling a serious crime meriting active investigation and prosecution.[36]

25. 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 brought against organized crime figures include gambling charges. Some recent examples are as follows:

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[32] American Psychiatric Association, *APA Advisory on Internet Gambling* (Jan. 16, 2001), Exhibit U.S.-10.

[33] Antigua First Written Submission, paras. 25-131.

[34] First Written Submission of Antigua & Barbuda, para.4.

[35] First Submission of Antigua & Barbuda, para. 128.

[36] For example, recent statistics on court approvals for wiretaps (*i.e.,* electronic listening devices) to investigate gambling cases provide evidence that federal law enforcement authorities continue actively investigating gambling crimes. The Administrative Office of the United States Courts reports that the number of wiretap approvals in which the major offense under investigation was gambling stood at 82 in 2002, 82 in 2001, 49 in 2000, 60 in 1999, 93 in 1998, and 98 in 1997. Administrative Office of the United States Courts, Wiretap Reports 1997-2002, Table 3: Major Offenses for Which Court-Authorized Intercepts Were Granted Pursuant to 18 U.S.C. 2519, Exhibit U.S.-12.

-- On October 16, 2003, an indictment against Luchese organized crime family boss Louis Daidone and three others in Brooklyn, New York was unsealed. It included allegations that Daidone profited from illegal "joker poker" gambling machines.[37]

-- On October 10, 2003, Joseph "Sonny" Juliano, a capo in the Gambino organized crime family, was sentenced to prison by a state judge in New York for attempted enterprise corruption, including promoting gambling.[38]

-- In June 2003, an indictment was unsealed against Colombo captain Ralph Lombardo and others, which alleged an illegal sports bookmaking operation.[39]

-- In December 2001, Joseph Merlino, the boss of the La Cosa Nostra organized crime family in Philadelphia, was sentenced on charges that included illegal gambling and extortion.[40]

-- In June 2000, Joseph Rotunno, a Colombo organized crime family associate, was indicted in Florida on charges that included illegal bookmaking.[41] Rotunno later enter into a guilty plea on several charges, including the illegal gambling.

2. Legalized gambling in the United States is confined to particular locations and operates under the most rigorous regulatory constraints.

26. 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."[42] Instead, gambling "is the target of special scrutiny by governments in every jurisdiction where it exists."[43] This regulatory scrutiny confines the industry in terms of its

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[37] Press release, dated October 16, 2003, Luchese Acting Boss and Three Others Charged with Racketeering, Violence in Aid of Racketeering, Loansharking and Gambling, United States Attorney's Office for the Eastern District of New York , Exhibit U.S.-13.

[38] Matt Smith, *Top suspects sentenced in gambling ring,* Associated Press (Fri. Oct. 10, 2003), Exhibit U.S.-14.

[39] Press release, dated June 17, 2003, Captain, Soldier and Four Associates of the Colombo Organized Crime Family Charged with Racketeering, Loansharking, Illegal Gambling and Witness Tampering, United States Attorney's Office for the Eastern District of New York, Exhibit U.S.-3.

[40] Michael Rubinkam, *Philadelphia Mob Takes Hit, But Officials Say It's Not Gone; Authorities Put Boss Behind Bars, But More Prosecutions Expected*, Akron Beacon Journal, December 20, 2001, at A20, Exhibit U.S.-15.

[41] John Holland, *South Florida Residents Face RICO Charges Loan Sharking, Extortion Cited, Sun-Sentinel,* June 22, 2000, at 6B, Exhibit U.S.-16.

[42] NGISC Final Report, p. 3-1, Exhibit AB-10.

[43] *Id.*

physical locations, offerings, business and customer relationships, and virtually every other facet of operations.

27. The United States 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 gambling and betting – "virtual casinos" and sports betting ("sportsbook") operators, with the former supplied by Internet and the latter by Internet and telephone.[44] These would therefore appear to be the only Antiguan services and service suppliers at issue in this dispute. Nonetheless, Antigua launches into detailed descriptions of U.S. services and service suppliers that offer nothing remotely resembling virtual casino or sportsbook services.

28. It would be difficult to catalog every single exaggeration, inaccuracy, or questionable statistic in Antigua's description of the U.S. gambling market. It would also be pointless to do so, since many of the disputable facts appear to have little bearing on the substance of this proceeding.[45] For the sake of brevity and clarity, the United States focuses on the most broadly misleading elements of Antigua's statement, including its overall claim regarding the alleged "omnipresence" of gambling in the United States[46] and specific assertions relating to remote supply of gambling.

a. Casino gambling

29. 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 U.S. locations exercise regulatory control over gambling. For example, the United States Supreme Court has observed that laws applicable to Atlantic City, where organized crime was viewed as a particular threat, provide for "a comprehensive statutory scheme that authorizes casino gambling and establishes a rigorous system of regulation for the entire casino industry."[47] The Court further observed that

> In order to promote "public confidence and trust in the credibility and integrity of the regulatory process and of casino operations," the Act "extend[s] strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries.". . . The Act imposes strict licensing requirements on any business seeking to own and

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[44] First Submission of Antigua & Barbuda, paras. 39-40.

[45] For example, Antigua states that many of the largest gaming companies in the world are U.S.-based multinationals. First Submission of Antigua & Barbuda, para. 82. This is beside the point, but for the sake of clarification, the leading gaming industry companies include businesses from all over the world. Along with U.S.-based multinationals, Australian, Canadian, and European companies are especially prominent.

[46] First Submission of Antigua & Barbuda, para. 81.

[47] *See Brown v. Hotel and Restaurant Employees,* 468 U.S. 491, 495 (1984).

> operate a casino hotel; on suppliers of goods and services to casino hotels; on all supervisory employees involved in casino operations; and on all employees with access to the casino floor.[48]

30. It is fair to say that the foregoing description is characteristic of the intensity of regulation the U.S. authorities apply to gambling.[49] Moreover, Antigua fails to note that in most cases, casino gambling is restricted to one or only a few locations within a state – often tourist or resort facilities.[50]

31. Antigua fails to cite any example of a "virtual casino" operating legally anywhere in the United States. In light of U.S. restrictions on remote supply of gambling, this is hardly surprising.

b. Lotteries

32. 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,[51] 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, (for example, Powerball), they are not offered by remote supply.

c. Parimutuel wagering

33. Antigua's description of parimutuel wagering mistakenly states that the Interstate Horseracing Act ("IHA") permits betting on horse races over the Internet.[52] As authority for this proposition, Antigua cites certain December 2000 amendments to the statute, and the incorrect characterization of those amendments in a U.S. General Accounting Office report.

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[48] *Id.*, 495-496 (internal citations and indentations omitted).

[49] In Nevada, to cite another example, Nevada gaming authorities are empowered to adopt gaming regulations, grant or deny licenses, and take disciplinary action against licensees, including revocation of licenses. The authorities monitor compliance with regulations and perform audits, inspections, and investigations. They approve all new games and gaming devices, and issue work permits to employees following security checks. The authorities also deal with patron disputes, and have been particularly active in dealing with enforcement of laws prohibiting gambling by minors.

[50] For example, in a number of states along the Mississippi River, casino gambling is confined to riverboats. In addition, Antigua's assertion that casino ships in international waters form part of the U.S. gaming market, First Written Submission of Antigua & Barbuda at para. 131, is plainly incorrect, since such activity by definition occurs outside the United States.

[51] The figure will grow to 40 with the addition of Tennessee in early 2004.

[52] First Submission of Antigua & Barbuda, para. 118.

34. The IHA 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.[53]

35. The Department of Justice has repeatedly affirmed the view that the IHA does not override preexisting criminal laws applicable to Internet gambling and other forms of remote gambling. Indeed, Antigua's own evidence confirms this.[54] While it is the policy of the Department not to comment on any pending or planned investigation, the United States notes that Antigua's allegation that some entities are engaged in such activity does not make such activity legal.

d. Sports wagering

36. Antigua identifies no examples of the legal offering of sportsbook services outside Nevada. Within Nevada, Antigua asserts that "Nevada bookmakers offer their services to home users via the internet and the telephone."[55] Antigua's own exhibit reproducing an advertisement for one of the alleged services shows that in fact this service is not offered on the publicly accessible Internet, but on a local "Private Network."[56] Antigua also overlooks an important qualification in the same advertisement, immediately following a listing of the physical locations where customers may go, in person, to open an Internet or telephone account:

> Driver's license, Social Security card, Boarding Pass and proof of Las Vegas Valley residency required at time of enrollment. . . . **Enrollment and wagers accepted only within the Las Vegas Valley.**[57]

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[53] 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.

[54] *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."), Exhibit AB-39.

[55] First Submission of Antigua & Barbuda, para. 122.

[56] *See* Exhibit AB-47.

[57] *Id.* (original emphasis).

37. In fact, in an effort to comply with U.S. law applicable to remote supply of gambling services by Internet and other means, Nevada regulators have imposed stringent precautions to ensure that sportsbook 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. Antigua's attempts to regulate gambling and money laundering cannot address basic concerns relating to remote supply of gambling.

38. 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.[58] We comment on these statements briefly even though we note that Antigua fails to link these assertions to its substantive arguments.

39. Antigua asserts that Antiguan operators "undertake some form of identity verification" of persons who register to use Antiguan gambling services.[59] 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.[60] In fact, such regulation is infeasible. Children 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.[61]

IV. ARGUMENT

A. Antigua has failed to make a *prima facie* case that any specific U.S. measure is inconsistent with WTO obligations.

40. Rather than providing an analysis of specific U.S. 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.

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[58] First Submission of Antigua & Barbuda, paras. 29-31.

[59] *Id.*, para. 43.

[60] *Id.,* paras. 45-46.

[61] 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 (June 26, 2002), Exhibit U.S.-18. *See also* NGISC Final Report at 5-4, Exhibit AB-10. ("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. Underage 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.).

41. 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.[62]

42. 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.

43. This approach cannot form the basis for a *prima facie* case in a WTO dispute settlement proceeding. As the United States pointed out in its request for a preliminary ruling, 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.

1. Antigua bears the burden of proof.

44. 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.[63] If the complainant succeeds in establishing such a presumption, the respondent may rebut this presumption.[64] 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.[65] If the balance of evidence is inconclusive with respect to a particular claim, Antigua must be found to have failed to establish that claim.[66]

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[62] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

[63] *See, e.g., 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,* Appellate Body Report, WT/DS103/AB/RW2, adopted 17 January 2003, para. 66 (*"Canada – Dairy II"*); *EC Measures Concerning Meat and Meat Products (Hormones),* Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 98 (*"EC–Hormones"*).

[64] *Id.*

[65] *Id.; United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* Appellate Body Report, WT/DS213/AB/R, adopted 19 December 2002, para. 157 (*"U.S. – German Steel"*).

[66] *See, e.g., EC–Hormones,* Appellate Body Report, para. 109.

45. Antigua claims that one or more U.S. measure(s) are inconsistent with WTO treaty obligations;[67] Antigua therefore bears the burden of providing evidence and argumentation in support of this claim. In *U.S. – German 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."[68]

46. 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."[69] Antigua has failed to provide such evidence.

2. Antigua has failed to sustain its burden of proof as to the scope and meaning of any specific U.S. measure.

47. 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 U.S. laws or regulations.

48. Antigua is mistaken. As the Appellate Body found in *India - Patents,* 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.[70] Conducting such an examination necessarily means that a panel or the Appellate Body "must look at *the specific provisions"* of domestic law.[71]

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[67] *See* First Submission of Antigua & Barbuda, section 5.4 and para. 137.

[68] *See U.S. – German Steel,* Appellate Body Report, WT/DS213/AB/R para. 157.

[69] *Id.*

[70] *See India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 66 (*"India – Patents"*) ("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 *U.S. – Section 301* applied the same principle, stating that "We 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." *United States – Sections 301-310 of the Trade Act of 1974,* Panel Report, WT/DS152/R, adopted 27 January 2000, para 7.18.

[71] *See India – Patents,* Appellate Body Report, paras. 68-69 (emphasis added).

49. 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 U.S. laws or regulations. Consistent with *India – Patents* and *U.S. – German 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 U.S. law or regulation restricting gambling.[72] This represents a total failure of proof.

50. Antigua misunderstands the U.S. 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."[73] 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 measure that allegedly contributes to a combined effect.[74] 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.

51. The panel in *U.S.–Export Restraints* confronted a similar claim regarding the combined effect of several U.S. 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* panel report, the documents in this dispute 'must' be analysed

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[72] Antigua provides a single discrete example in support of its claim that certain law enforcement actions applying U.S. 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. *See* First Submission of Antigua & Barbuda, note 275, para. 200, and Exhibit AB-56.

[73] Comments on the United States' Request for Preliminary Rulings by Antigua and Barbuda, October 22, 2003, heading VI and para. 17.

[74] For instance, in *U.S. – 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 United States – Tax Treatment for "Foreign Sales Corporations,"* Panel Report, WT/DS108/R, adopted 20 March 2000, paras. 7.94-7.97 ("*U.S. – FSC*"). 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 United States – Tax Treatment for "Foreign Sales Corporations,"* Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, note 23 and paras. 16-18. Similarly, in *Argentina – Bovine Hides,* 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 Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,* Panel Report, WT/DS155/R, adopted 16 February 2001, at n. 319 (stating that measures "taken together" gave rise to inconsistencies) and paras. 1.108-11.115 (evaluating each measure individually).

> 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 analysed together', but on the status of the cited documents, and how they relate to each other, under the responding Member's domestic law.[75]

52. 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."[76]

53. 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 U.S. municipal law.

54. Antigua then bears the further burden of detailing how, under U.S. municipal law, these individual measures operate together to give rise to the cumulative effect that Antigua is alleging is inconsistent with the GATS. The *Japan – Film* panel described this further burden. It found that,

> to 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.[77]

55. 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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[75] *United States – Measures Treating Export Restraints As Subsidies,* WT/DS194/R, Panel Report, adopted 23 August 2001, para. 8.83 (*"U.S. – Export Restraints"*) (quoting an argument made by the United States).

[76] *Id.,* para. 8.84.

[77] *See Japan - Measures Affecting Consumer Photographic Film and Paper,* Panel Report, WT/DS44/R, adopted 22 April 1998, para. 10.353 (*"Japan–Film"*).

3. Antigua has also failed to sustain its burden of bringing forward argumentation explaining how any specific U.S. measure allegedly violates provisions of the GATS.

56. In subsequent sections, the United States will address discrete failures of proof relating to Antigua's substantive allegations. But at this point the United States would simply stress that it is Antigua's burden to provide argumentation explaining what aspect of specific U.S. measure(s) in Antigua's view renders the measure(s) inconsistent with specific U.S. 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.

4. There is no basis for reversing Antigua's burden of proof.

57. Antigua explicitly seeks to shift its burden of proof onto the United States.[78] It offers no basis for doing so except the complexity of U.S. law[79] – 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."[80]

58. In its first submission, 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."[81] 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.

B. Antigua has failed to prove the existence of a U.S. commitment relating to gambling measures.

59. Antigua has failed to explain why any particular U.S. 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 U.S. schedule to the GATS. Instead, Antigua simply asserts that all gambling falls within "other recreational services," or possibly within "entertainment services,"

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[78] First Submission of Antigua & Barbuda, para. 133 (stating that the United States is "better positioned than Antigua to coherently construe its own laws").

[79] *See id.*, paras. 133-135, 140.

[80] *See European Communities – Trade Description of Sardines,* Appellate Body Report, WT/DS231/AB/R, adopted 23 October 2002, para. 281.

[81] First Submission of Antigua & Barbuda, para. 133.

and that the United States has made commitments in its schedule under "other recreational services" and "entertainment services."[82]

60. 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."

61. In order to establish the relevance of any commitment that the United States may have made, Antigua must therefore make a *prima facie* case: (1) that the United States has adopted or maintained some specific measure(s); (2) 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; (3) that the United States has inscribed a commitment in the relevant sector of its schedule to the GATS for measures affecting those services; and (4) 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 (1) or (2). This in turn makes it impossible to carry out steps (3) and (4).

62. Had Antigua argued the existence and meaning of particular measures, the United States would have been prepared to examine under step (3) whether the measures affect services subject to one or more U.S. 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.

1. Antigua has incorrectly interpreted the U.S. schedule to the GATS.

63. Antigua alleges that a U.S. commitment for gambling can be found within sector 10 of the U.S. Schedule (Recreational, Cultural, and Sporting Services). Even assuming *arguendo* the possible relevance of sector 10, Antigua's claims to find there a U.S. commitment for cross-border supply of gambling services rely on the Services Sectoral Classification List ("W/120")[83] and its references to the UN Provisional Central Product Classification ("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 on the Law of Treaties*.[84] In fact W/120 is part of the negotiating history of the GATS, which is at best a supplementary

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[82] *Id.*, paras. 160-178.

[83] *See Services Sectoral Classification List: Note by the Secretariat,* MTN.GNS/W/120 (10 July 1991).

[84] *See* First Submission of Antigua & Barbuda, paras. 167-171; *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679 (Jul. 1969) ("Vienna Convention"), Articles 31 and 32.

means of interpretation pursuant to the customary rules of interpretation of public international law reflected in Article 32 of the Vienna Convention.[85]

64. The context for the U.S. schedule includes other Members' schedules.[86] Accordingly, the proper context for the U.S. 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 U.S. 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.[87] 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, it was never meant to bind Members to the CPC definitions, nor to any other "specific nomenclature."[88] 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 U.S. schedule.

65. 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 *European Communities–Customs Classification of Certain Computer Equipment ("EC–LAN"),* 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

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[85] While not saying so explicitly, the *EC–Bananas* panel appears to have regarded W/120 as part of the negotiating history of the GATS. *See European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Panel Report, WT/DS27/R/USA, adopted 25 September 1997, para. 7.289 (*"EC–Bananas"*) (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 United States – Section 110(5) of the US Copyright Act,* Panel Report, WT/DS160/R, adopted 27 July 2000, para. 6.45. This is confirmed by the fact that some parties referred to it in their schedules and others did not.

[86] 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."

[87] Moreover, 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.

[88] *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.").

> 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.[89]

66. The reasoning in *EC–LAN* is equally applicable to negotiations over services schedules. The terms of the U.S. 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.[90]

67. The significance of the presence or absence of explicit CPC references in a commitment was confirmed by the panel in *EC–Bananas*. The panel observed that "in scheduling commitments on 'wholesale trade services', the EC inscribed the CPC item number (622) in its services schedule."[91] It was on the basis of this text that the panel reasoned that: "Therefore, 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."[92]

2. A proper interpretation of the U.S. schedule, without recourse to the CPC, would show that the United States made no commitment for measures affecting gambling services.

68. 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* panel addressed interpretation of CPC commitments,[93] but no panel has yet

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[89] *European Communities–Customs Classification of Certain Computer Equipment,* Appellate Body Report, WT/DS62/AB/R, adopted 22 June 1998, paras. 109-110 (*"EC-LAN"*).

[90] *See id.* ("while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members."). Antigua's CPC argument also improperly relies on a document by the United States International Trade Commission, which it refers to under the heading of "practice in the application of the treaty." First Submission of Antigua & Barbuda, paras. 176-178. If Antigua means to argue that this document constitutes practice by parties to a treaty for purposes of the customary rule of interpretation reflected in Article 31(2)(b) of the *Vienna Convention,* it is mistaken. *See Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products,* Appellate Body Report, WT/DS207/AB/R, adopted 23 October 2002, 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 U.S. Schedule with foreign schedules." *See* Exhibit AB-65, p. viii.

[91] *See EC–Bananas,* Panel Report, para. 7.289.

[92] *Id.*

[93] *Id.*

addressed the interpretation of non-CPC commitments. 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.

69. Antigua's allegations regarding a possible U.S. commitment for gambling services rely on sectors 10.A and 10.D of the U.S. schedule to the GATS. The relevant text makes no explicit reference to gambling services. It reads as follows:

10.	RECREATIONAL, CULTURAL, & SPORTING SERVICES				
A.	ENTERTAINMENT SERVICES (INCLUDING THEATRE, LIVE BANDS AND CIRCUS SERVICES)	1)	None	1)	None
		2)	None	2)	None
		3)	None	3)	None
		4)	Unbound, except as indicated in the horizontal section	4)	None
...					
D.	OTHER RECREATIONAL SERVICES (except sporting)	1)	None	1)	None
		2)	None	2)	None
		3)	The number of concessions available for commercial operations in federal, state and local facilities is limited	3)	None
				4)	None
		4)	Unbound, except as indicated in the horizontal section		

70. The ordinary meaning of "recreational" is "[o]f or pertaining to recreation; used for or as a form of recreation; concerned with recreation."[94] Recreation is "[a]n activity or pastime pursued, esp. habitually, for the pleasure or interest it gives."[95] Recreation is also defined as "refreshment of strength and spirits after work" or "a means of refreshment or diversion."[96] 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."[97] It is also defined as "the act of entertaining" or "something diverting or engaging."[98]

71. With regard to the "except sporting" notation in sector 10.D of the U.S. 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

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[94] *See New Shorter Oxford English Dictionary,* p. 2508 (1993).

[95] *See id.*

[96] *See Merriam-Webster's Collegiate Dictionary,* p. 975 (10th ed. 2001).

[97] *See New Shorter Oxford English Dictionary,* p. 829 (1993).

[98] *See Merriam-Webster's Collegiate Dictionary,* p. 386 (10th ed. 2001).

concerned in sport; . . . a person interested in sport from purely mercenary motives . . . [n]ow *esp[ecially]* pertaining to or interested in betting or gambling" (original emphasis).[99] "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*" (emphasis added).[100] The ordinary meaning of "sporting" in "except sporting" thus encompasses gambling.

72. 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 sector 10.A "entertainment" or sector 10.D "recreational" services in the U.S. schedule. Moreover, Antigua has not explained why it thinks gambling services should fall within the "ordinary meaning" of those terms.[101]

73. An examination of the U.S. 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 sector 10.D "recreational services."[102] However, notwithstanding references to the CPC, others included gambling restrictions under sector 10.A "entertainment services,"[103] others inscribed them under tourism services,[104] and at least one Member scheduled such restrictions under sector 10.E "other."[105]

74. 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 (sector 10.E). Two Members made commitments in sector 10.E;[106] 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.

75. Scheduling of the 10.E residual category would have provided a default location in the U.S. schedule for services that could not be classified elsewhere in sector 10. As shown above, gambling is one such service. Without textual evidence placing gambling services elsewhere in

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[99] *See New Shorter Oxford English Dictionary,* p. 3000 (1993).

[100] *See Merriam-Webster's Collegiate Dictionary,* p. 1134 (10th ed. 2001).

[101] *See* First Submission of Antigua & Barbuda, para. 166.

[102] 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.

[103] 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.

[104] Egypt, Indonesia, Jordan, and Peru exclude or restrict gambling activities under the tourism sector.

[105] Senegal.

[106] Iceland and Senegal.

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.

76. Thus, in the event that the Panel, in spite of Antigua's failure to make a *prima facie* case, 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 U.S. schedule. This finding would be consistent with the finding by the Appellate Body in *EC-LAN* 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."[107]

3. The U.S. schedule to the GATS does not apply to measures of Guam, Puerto Rico and the U.S. Virgin Islands.

77. The United States notes that the U.S. Schedule of Specific Commitments does not apply to measures of Guam, Puerto Rico and the U.S. Virgin Islands challenged by Antigua. The United States is defined in the text of the U.S. schedule as "encompassing the 50 states of the United States, plus the District of Columbia."[108] Guam, Puerto Rico and the U.S. Virgin Islands are not part of the 50 states and the District of Columbia. As a result, commitments in the U.S. schedule do not apply to measures of Guam, Puerto Rico and the U.S. Virgin Islands.

C. Assuming *arguendo* the existence of a relevant commitment, Antigua has failed to prove the inconsistency of any U.S. measure with any GATS obligation.

78. Even aside from the fact that the United States has no sectoral commitment with respect to some as-yet unspecified measure affecting the cross-border supply of gambling services, Antigua's nonspecific and often cursory descriptions of alleged inconsistencies with the GATS fail to demonstrate any breach of U.S. obligations.

1. Antigua has failed to prove that any U.S. measure is inconsistent with GATS Article XVI (market access)

79. Antigua fails to prove the inconsistency of any U.S. 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).

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[107] *EC–LAN,* Appellate Body Report, para. 110 (original emphasis).

[108] *See* Exhibit AB-61.

a. Article XVI:1

80. Antigua's first written submission 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.[109] 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."

81. In fact, Article XVI does not enshrine a general rule prohibiting measures that impede "market access" in whole or part. Instead, it prohibits only those measures falling within the specific categories listed in Article XVI:2.[110] 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 U.S. measures fall within the particular types of measures listed in Article XVI:2.

b. Article XVI:2

82. In its argument under Article XVI, 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 U.S. law. Without some evidence – aside from the mere assertion of a "total prohibition" – as to the scope and meaning of U.S. law, Antigua's argument fails.

83. 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."

84. The United States submits that these provisions require a Panel to examine the "form" of the U.S. measure(s) at issue and the way in which such measures are "expressed" – something it

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[109] First Submission of Antigua & Barbuda, paras. 181, 183.

[110] *See 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, 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.") ("2001 Scheduling Guidelines").

cannot do without evidence from Antigua as to the specific measures alleged to be inconsistent with Article XVI:2.

85. Even if Antigua had attempted to make a *prima facie* case as to how any U.S. measure is inconsistent with Article XVI, which it has not, it could not have done so. The United States can find no U.S. 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.

86. As far as the United States is aware, the gambling-related U.S. 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 U.S. measures would appear to fall within the ambit of Article XVI:2.[111]

87. In its argument under Article XVI, Antigua asserts that Antiguan suppliers cannot obtain authorization from regulators in the United States to supply gambling services on a cross-border basis. This statement by itself has no relevance 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.[112]

2. Antigua has failed to demonstrate that any U.S. measure is inconsistent with GATS Article XVII (national treatment)

88. The panel in *EC–Bananas* 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 favorable than that it accords to (its) own like service suppliers."[113]

89. 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

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[111] 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." *Id.*

[112] *See id.,* 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").

[113] *EC – Bananas,* Panel Report, para. 7.314.

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" U.S. services and service suppliers nor how specific U.S. measures accord Antiguan services and service suppliers less favorable treatment.

a. "Like services and service suppliers"

90. The burden rests on Antigua to provide evidence demonstrating that Antiguan services and service suppliers are "like" particular U.S. services and suppliers for purposes of GATS Article XVII.[114] Antigua states that it licenses only two types of gambling services – "virtual casino" services and sportsbook services, with the former supplied by Internet and the latter by Internet and telephone.[115]

91. Antigua approaches its burden by first dismissing the likeness inquiry as hardly important in the context of services.[116] Antigua essentially urges the Panel to find that in the context of Article XVII of the GATS it is sufficient to merely assume likeness.

92. 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.

93. Antigua itself identified, in its statement of facts, several different forms of gambling services with different characteristics.[117] Yet it 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."[118]

94. 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

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[114] *See Canada – Autos,* Panel Report, para. 10.289.

[115] First Submission of Antigua & Barbuda, paras. 39-40.

[116] First Submission of Antigua & Barbuda, paras. 189-191.

[117] First Submission of Antigua & Barbuda, para. 25.

[118] First Submission of Antigua & Barbuda, para. 194.

habits."[119] 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.

95. Antigua also ignores potentially relevant differences in service suppliers.[120] For example, Antigua states that U.S. 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 parimutuel wagering services on horseracing in the United States, or any other special type of supplier in the U.S. market.

96. 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 sportsbook services and gambling services provided in the United States. Indeed, Antigua actually provides evidence that sports betting is unlike parimutuel 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."[121]

97. 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.[122] 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 gambling paraphernalia.[123]

98. 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

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[119] *See* National Research Council, *Pathological Gambling: A Critical Review,* pp. 7-5 to 7-7 (1999), excerpt at Exhibit U.S.-19.

[120] First Submission of Antigua & Barbuda, para. 195.

[121] *Id.,* para. 121.

[122] *See* The Future Regulation of Remote Gambling: A DCMS Position Paper, paras. 90, 93, Exhibit AB-2.

[123] 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.

casino.[124] Its own evidence indicates that consumer perceptions are influenced by the physical surroundings, layout, amenities, and real-world stimuli of a real casino.[125] Moreover, Antigua concedes that U.S. 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.

99. Antigua further disregards significant differences in scope of availability of different services, particularly availability to minors. As stated above, 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, as demonstrated above, 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.

100. Likewise, Antigua fails to address the law enforcement, addiction, and other risks associated with remote supply of gambling, which are detailed above in Section IV.A. 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."[126] 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.

b. "Less favorable treatment"

101. On the "less favorable 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

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[124] First Submission of Antigua & Barbuda, para. 91.

[125] *See* Bill Friedman, *Designing Casinos to Dominate the Competition: The Friedman International Standards of Casino Design,* Exhibit AB-22.

[126] *See European Communities–Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, para. 113.

cross-border basis) apply equally within the United States. Antigua fails to provide evidence or argumentation pointing to any U.S. 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.

102. 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 U.S. 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."[127]

103. 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 U.S. suppliers. Such an outcome would afford Antiguan companies treatment vastly *more favorable* than domestic suppliers – something that Article XVII clearly does not require.

3. Antigua has failed to prove the inconsistency of any U.S. measure with GATS Article VI (domestic regulation)

104. Antigua alleges violations of Article VI of the GATS, but again fails to meet is burden of proving a *prima facie* case.

a. Article VI:1

105. Antigua's Article VI:1 claim relates to "numerous [U.S.] laws and regulations prohibiting the supply of gambling and betting services unless a specific authorisation has been granted." Here again, Antigua's claim fails both because of Antigua's failure to prove the existence of relevant U.S. 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 and service providers, regardless of origin, and are routinely applied against domestic as well as foreign lawbreakers.[128]

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[127] S*ee Informal GNS Meeting – 10 December 1993, Chairman's Statement,* MTN.GNS/49, circulated 11 December 1993, section 1.

[128] Since Antigua does not even purport to challenge specific U.S. 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.

b. Article VI:3

106. Article VI:3 contains certain transparency requirements relating to the processing of applications to supply a service in a committed sector. As amply demonstrated above, 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 U.S. 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.

107. Rather, Antigua asserts that Article VI:3 "implies" something that it does not say – that "a WTO Member is obliged to make authorisation 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.

4. Antigua has failed to prove the inconsistency of any U.S. measure with GATS Article XI:1

108. Antigua asserts, again without any argument, that U.S. measures to prohibit money transfers relating to gambling violate Article XI:1 of GATS. Article XI:1 provides that, except under circumstances involving 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."

109. 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.

110. In asserting its claim, Antigua refers to "measures discussed in paragraphs 137 and 138" of its first written submission. Those paragraphs make 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."[129] 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

[129] *See United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Communication from the Panel, 29 October 2003, para 31.

gaming not expressly authorized under U.S. law.[130] 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.[131] 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 without regard to whether the payments in question are destined for further transfer to a domestic or international destination.

V. CONCLUSION

111. For the reasons set forth above, the United States requests that the Panel reject Antigua's claims in their entirety.

[130] Exhibit AB-56, para. 20 (emphasis added).

[131] Exhibit AB-56, para. 21 (emphasis added).