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

WT/DS285

Executive Summary of the Oral Statements of the United States at the First Panel Meeting December 18, 2003

Opening Statement (December 10, 2003)

1. Mr. Chairman, members of the Panel, there are two sets of issues that we would like to explore today. The first relates to the failure of Antigua and Barbuda ("Antigua") to make its *prima facie* case. As the Appellate Body has pointed out, "mere assertions" are not enough for a complaining Member to make out a *prima facie* case. Antigua must provide persuasive evidence and argumentation on each of the elements of each of its claims. It has not done so. Indeed, Antigua's submission yesterday of over 2,000 pages of U.S. statutory text only serves to demonstrate the vastness of its unmet burden. The second set of issues concerns whether, hypothetically, Antigua *could* find a legal basis for its claims under the *General Agreement on Trade in Services* ("GATS"). In fact, there is no legal foundation on which Antigua can construct claims as to either the existence of relevant commitments or the inconsistency of specific U.S. gambling restrictions with particular provisions of the GATS.

2. Before exploring these two sets of issues, the United States would like to return very briefly to the factual framework for this dispute. Antigua's first submission paints a caricature of a United States where gambling is virtually omnipresent. The real picture, however, is very different. Gambling in the United States "is the target of special scrutiny by governments in every jurisdiction where it exists." The purpose of that regulatory scrutiny is to protect the public, not to protect domestic industry. Regardless of foreign or domestic origin, all providers of gambling services in the United States operate under severe restrictions. And when it comes to remote supply of gambling, those restrictions are particularly stringent. Remote supply of gambling is a special area of concern for all the reasons detailed in the U.S. first submission.

3. Against this factual background, I would like to turn to the issue of Antigua's failure of proof. Up to now, Antigua is apparently still asserting a proposition about the collective effect of U.S. domestic laws relating to the remote supply of gambling, without regard to individual measures and how they work. Antigua, without any basis, labels this effect a "total prohibition on the cross-border supply of gambling and betting services." While in one breath Antigua claims the United States has not conceded any ground in this dispute, Antigua rests its case in large part on a supposed U.S. "concession." No such concession was in fact ever made.

4. With respect to its burden of proof, Antigua has previously taken the position that it *only* needs to assert the alleged overall effect of U.S. domestic law, and that the particular causes of this alleged overall effect – the measures that supposedly result in this effect – are irrelevant. In essence, Antigua wants the Panel to assume the overall effect of U.S. domestic law without first

determining how the measures at issue operate and interact, and whether such interaction would in fact comprise the overall effect alleged by Antigua.

5. Antigua's assertion that a mere allegation is all it needs to meet its burden of proof is wrong. The Appellate Body has stated in its *German Steel* report that the burden of providing evidence and argumentation begins with providing the text of the measures at issue, and is then followed by the presentation of authorities and arguments as to the meaning of these measures. The Appellate Body has also explained in *India - Patents* that an examination of the meaning of relevant provisions of domestic legislation is not just helpful, it is essential to determining whether a Member has complied with its obligations. To borrow the Appellate Body's own phrase, a panel or the Appellate Body "must look at *the specific provisions"* of domestic law.

6. The same is true in this dispute. In order for the Panel to be able to discharge its duty to make an objective assessment of the collective effect of domestic law with all its significant nuances, Antigua must first provide sufficient evidence and argumentation to support its view of precisely how each individual measure at issue operates under U.S. domestic law. After assessing how each individual measure operates under U.S. law, Antigua must then – given its claim of a collective effect – bear the further burden of proving this collective effect through evidence and argumentation regarding how these alleged measures interact with one another in their implementation under U.S. domestic law. To borrow a phrase used by Antigua this morning, Antigua must piece together the "puzzle" of its *prima facie* case.

7. Turning now to the substance of Antigua's claims, much of the debate in this dispute thus far has centered on Antigua's claim as to the existence of a U.S. commitment for gambling. All parties to this dispute agree that the GATS schedules must be interpreted according to the customary international rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention. Those rules tell us to begin with the ordinary meaning of the terms. In this case the terms of the U.S. schedule indisputably say nothing about gambling as such. This means that Antigua bears the heavy burden of proving that the United States, *without explicitly saying so,* undertook an implicit commitment covering its system of regulations on gambling.

8. Antigua proposes that gambling is implicit in the ordinary meaning of "other recreational services (except sporting)," or perhaps within "entertainment services." However, the United States has shown that Antigua has failed to prove that the ordinary meanings of the words "recreational" or "entertainment" encompasses gambling. In fact, dictionary definitions point to a very different conclusion. Of the three key terms at issue here, "recreational," "entertainment," and "sporting," the only one that dictionaries associate with gambling is "sporting." And the U.S. schedule explicitly excludes sporting.

9. Customary rules of treaty interpretation further instruct the interpreter to look at the ordinary meaning of words "in context." The context for the U.S. schedule includes other Members' schedules. Accordingly, the proper context for the U.S. schedule includes the fact that some Members inscribed references to the UN provisional Central Product Classification

("CPC") in their schedules, while the United States and other Members did not. Indeed, if you leaf through all the schedules to the GATS, you will find thousands of numerical CPC references; you will find schedules without any such references; and you will find schedules in which some of the commitments refer to the CPC and others do not. In the schedule of the United States, you will find no reference to the CPC.

10. All of this makes clear that not all parties intended that their schedules refer to the CPC. This is not to say that the non-CPC Members have undertaken no commitments, nor is the United States suggesting that its obligations are defined by its own subjective expectations. To the contrary, non-CPC commitments are interpreted in exactly the same way as any normal term of a treaty is interpreted: They are to be given their ordinary meaning, in context, and in light of the object and purpose of the treaty.

11. Context reveals another significant fact for the interpretation of the U.S. schedule. The United States has shown that even among Members who generally referred to the CPC, restrictions on gambling were thought to belong in sectors other than "entertainment services" and "other recreational services." These schedules reveal that Members had difficulty with this issue even in the presence of CPC references. In their absence, Antigua has even less basis to assert that the United States undertook an implicit commitment for gambling.

12. Ultimately, the only piece of evidence that Antigua has to support its arguments is the CPC. The United States has explained that the CPC is negotiating history, not context. And in the view of other negotiating history recording the intent of the parties not to be bound by the CPC, or any other extra-agreement nomenclature, it is clear that the CPC was not intended to control the interpretation of a Member's commitments in the absence of an explicit reference to the CPC in a Member's schedule.

13. Without an explicit reference to the CPC in the U.S. schedule, Mr. Chairman, Antigua has no viable argument for a U.S. commitment. The most it can do is urge that, based on plain meaning, gambling somehow relates to recreation; that it somehow relates to entertainment; and that the Panel should therefore look for a way to fit it into the U.S. sector 10 commitments, notwithstanding the "sporting" exception. As the United States pointed out in its first submission, at best that argument would lead to the conclusion that gambling services fall in a sector 10.E "other" category, which the United States chose not to inscribe in its schedule.

14. At this point I want to turn to the substance of Antigua's assertions of a violation of the GATS. The only way to respond to these assertions is to assume, for the sake of argument, the existence of a relevant sectoral commitment with respect to some as-yet unspecified measure affecting the cross-border supply of gambling services. Even if we make that generous assumption, however, Antigua's descriptions of alleged inconsistencies with the GATS in its first submission fail to demonstrate any breach of U.S. obligations.

15. I'll begin with Article XVI of the GATS, covering market access. The only question

under Article XVI is whether the measure is in fact one of the ones listed in Article XVI:2. The list includes, in relevant part, measures identified by their particular "form" – such as "in the form of numerical quotas." Given the sparse argumentation in Antigua's first submission, the United States can only point out again that our restrictions on certain remote supply gambling activities are expressed as limitations on the character of the activity supplied, not as quantitative limits or other restrictions within the ambit of Article XVI:2. It has been suggested that an across-the-board prohibition on cross-border services could amount to the same thing as a zero quantitative restriction. The factual premise for this argument is completely absent. There is no across-the-board prohibition on the cross-border supply of gambling services in U.S. law. U.S. law certainly restricts the remote supply of gambling, but these restrictions are not so broad that they prohibit *all* cross-border supply of gambling services.

16. Turning to the national treatment rule in Article XVII of the GATS, Antigua has failed to meet its burden of proving that its services and service suppliers are "like" U.S. services and service suppliers, and it has not shown how specific U.S. measures accord Antiguan services and service suppliers less favorable treatment. A cross-border commitment for national treatment entitles the provider of another Member to offer services only to the extent that like domestic suppliers can offer the like services. In this respect, the United States has already described in detail the significant differences that distinguish different gambling services and service suppliers, including very significant differences between remote supply of gambling and the limited forms of terrestrial gambling permitted in the United States. The burden also rests on Antigua to provide evidence and argumentation showing that its services and suppliers receive "less favorable treatment." The United States again points out that U.S. restrictions applicable to Internet gambling and other forms of gambling services that Antiguan firms seek to supply on a cross-border basis apply equally to those remote supply activities within the United States.

17. Turning to Article VI of the GATS, Antigua's claim simply does not correspond to the text of this provision. Antigua cites portions of Article VI relating to the *administration* of U.S. measures, but it identifies no flaws in the administration of U.S. gambling laws. Instead, its arguments seek to convert Article VI into an implicit obligation of better-than-national-treatment. Under Antigua's view, Article VI effectively means that Members must let cross-border suppliers supply services that are beyond the scope of activities permissible for suppliers with a local presence. The text of Article VI simply does not bear that interpretation.

18. Finally, Antigua's assertion that some U.S. measure or measures violates Article XI of the GATS, which deals with "restrictions on international transfers and payments," was completely unsubstantiated in its first submission. Antigua offered no theory as to how or why a particular measure might violate Article XI.

19. In summary, Mr. Chairman, Antigua's additional submission yesterday gives the Panel hundreds of measures and non-measures to look at, but Antigua has yet to prove the meaning of each of these items; what part, if any, each one plays in relation to gambling; or how they interact to produce the particular collective effect incorrectly asserted by Antigua. As to that alleged

effect, Antigua has failed to prove that it violates any U.S. commitment or obligation under the GATS. In fact, Antigua cannot meet these burdens; the facts and the law will not sustain them. Thus, the United States respectfully submits that Antigua leaves the Panel with no choice but to reject Antigua's claims in their entirety.

Closing Statement (December 11, 2003)

20. Mr. Chairman, you have observed that this dispute raises a number of significant systemic issues. We agree that many of the issues are potentially significant. However, the most significant systemic issue, one which has been squarely joined and which obviates the need to reach other potential issues, is one that should not be in doubt. And that is that a complaining party must through evidence and argumentation make a *prima facie* case that a responding party's measures are inconsistent with its WTO obligations.

21. Yesterday Antigua gave you an apt metaphor for that task when it rejected the notion that it must assemble the "measure-by-measure 'puzzle'" of U.S. gambling restrictions. That "puzzle" *is* Antigua's *prima facie* case; it presently lies in disarray in hundreds of pieces of unknown shape and relevance. The task of assembling this into a *prima facie* case – an impossible task in our view – belongs to Antigua alone.

22. On the issue of the existence of U.S. commitments, Antigua and the third parties seek to modify the text of the U.S. schedule through dispute settlement. Here again, we are not confronting a novel issue. On this point, the Appellate Body in *EC–LAN* has already given us an unambiguous answer. The task of clarifying commitments in a GATS schedule, like the tariff schedule in *EC–LAN*, is one for all interested parties to achieve *through negotiations*.

23. I want to emphasize again these two points: first, that Antigua has presented a tapestry of mere assertions, and not the required *prima facie* case built brick-by-brick on evidence and argumentation as to real measures; and second, that it is clear that the United States made no commitment on gambling services in its GATS schedule when the actual text of that schedule is examined, rather than the text as Antigua would rewrite it.