**BEFORE THE**

**WORLD TRADE ORGANIZATION**

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

WT/DS285

**ANSWERS OF THE UNITED STATES**
**TO THE PANEL'S QUESTIONS**
**IN CONNECTION WITH THE FIRST SUBSTANTIVE MEETING**

**January 9, 2004**

*A. US SCHEDULE*

*For both parties:*

***Question 1:*** *What is the legal status and value of the 1993 Scheduling Guidelines and W/120 in WTO dispute settlement proceedings and to what extent are they relevant for the interpretation of GATS Schedules where no explicit reference to the CPC is contained in those Schedules?*

1. These negotiating history documents are "preparatory work" within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").[1] Insofar as these documents mention the CPC, the CPC is only relevant to the interpretation of a particular commitment if a Member included an explicit reference to the CPC in that commitment. This is confirmed by

- the text of the U.S. schedule (which does not include CPC references);
- the context of the U.S. schedule (which shows that other schedules did include CPC references for some or all commitments, thus confirming that they were optional);
- other negotiating history of the GATS (which confirms that the parties to the GATS negotiations did not intend to be bound by any specific nomenclature);
- the subsequent statements of Members reflected in discussions in the Committee on Specific Commitments (which confirm that a Member scheduling GATS commitments during the Uruguay Round was free to choose to refer or not refer to the CPC; and that the result of doing so is that CPC definitions do not control the interpretation of that Member's commitment(s)).[2]

***Question 2:*** *With respect to the USITC document contained in Exhibit AB-65:*
*(a) What is the legal status and value of this document in WTO dispute settlement proceedings?*
*(b) How does this document compare with the US Statement of Administrative Action?*
*(c) Can a statement by the USITC be attributed to, and bind, the United States?*
*(d) With reference to the previous question, please comment on whether Article 4 of the International Law Commission (ILC) Draft Articles on the Responsibility for States of Internationally Wrongful Acts annexed to the UN General Assembly Resolution of 12 December 2001 (A/RES/56/83), is of any relevance. Article 4 provides as follows:*

> *"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive,*

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[1] The 1993 scheduling guidelines expressly state that they "should not be considered as an authoritative legal interpretation of the GATS."

[2] *See* Second Submission of the United States, paras. 11-14.

> *judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*
> *2. An organ includes any person or entity which has the status in accordance with the internal law of the State."*

2. The document in question is merely an "explanatory" text prepared by an independent agency with no authority to negotiate or interpret agreements on behalf of the United States.[3] The document states that *"[t]o facilitate comparison* of the U.S. Schedule with foreign schedules, the USITC has developed a concordance...." This does not indicate that USITC was purporting to issue an interpretation.

3. [a]: Antigua and Barbuda ("Antigua") appears to assert that the United States International Trade Commission ("USITC") explanatory materials reproduced in Exhibit AB-65 represent "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.[4] Antigua is mistaken. The Appellate Body has referred to such "subsequent practice" as a "discernible pattern of acts or pronouncements implying an agreement among WTO Members."[5] Clearly explanatory materials prepared unilaterally by only one independent organ of one of the Members do not constitute such a pattern, and therefore have no particular status under the customary international rules of treaty interpretation as reflected in the Vienna Convention.

4. [b]: The Statement of Administrative Action ("SAA") of the U.S. Uruguay Round Agreements Act ("URAA") was prepared and submitted with the URAA. The function of this SAA is set forth in its preamble, as follows:

> This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

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[3] The USITC is an independent, quasi-judicial federal agency that administers U.S. trade remedy laws within its mandate and also provides non-binding, independent information and advice to the President and Congress on tariff and trade matters.

[4] The United States infers this from Antigua's reference to the document under the heading of "practice in the application of the treaty." *See* First Submission of Antigua & Barbuda, paras. 176-178.

[5] *See Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products,* Appellate Body Report, WT/DS207/AB/R, adopted 23 October 2002, para. 214.

> As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

5. The SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the U.S. system, however, is only in respect to its interpretive authority *vis à vis* the statute.

6. By contrast, the USITC "explanatory" document prefatory to the copy of the U.S. Schedule of Specific Commitments maintained by the USITC were prepared only "to facilitate comparison" for the reader. It is not, and does not purport to be, in any way binding or authoritative as a matter of U.S. law. Nor has it been approved by Congress. Moreover, the United States notes that facilitating "comparison" with other documents in no way implies identity of meaning between the U.S. schedule and such other documents.

7. [c]: Statements of the USITC cannot bind the United States with regard to the interpretation of a multilateral treaty. It is important to note that the issue here relates to the interpretation of a term of an annex to the GATS, not the meaning of U.S. law or the legal status of the USITC. Neither the United States (through the USITC or otherwise) nor any other Member may unilaterally adopt multilaterally binding interpretations of a term of the GATS, or any other WTO agreement.

8. [d]: The United States does not consider that Article 4 of the Draft Articles on the Responsibility for States of Internationally Wrongful Acts has any relevance to the interpretation of the U.S. Schedule, the issue in this dispute. First, the United States notes that it is not a "customary rule[] of interpretation of international law" within the meaning of Article 3.2 of the DSU. Second, it is inapplicable in any event because USITC is not purporting to interpret the U.S. schedule.

***Question 3:*** *Antigua and Barbuda as well as the European Communities (Exhibit AB-74 and paragraph 15 of the European Communities' oral statement to the first meeting of the Panel with the parties) have referred to the cover note of the Draft Final Schedule of the United States of*

*America concerning Initial Commitments, dated 7 December 1993, which contains a paragraph that reads as follows:*

> *"Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)."*

*(a) In which revision of the Uruguay Round Draft (Final) Schedule of the United States was that cover note omitted?*
*(b) What is the legal status and value of that cover note for the interpretation of the US GATS Schedule?*

9. [a]: A note substantially similar to the quoted text appeared in documents MTN.GNS/W/112/Rev.2 and MTN.GNS/W/112/Rev.3.[6] It does not appear in the final document.

10. [b]: These negotiating history documents are "preparatory work" within the meaning of Article 32 of the Vienna Convention. The value of these notes is minimal, since at most they only confirm what the United States has already stated – that it generally followed the W/120 structure in its schedule of specific commitments. The Panel should distinguish, however, between a Member's use of W/120 as a basis for scheduling, and the inscription of references to the CPC to further describe its commitments. Like other Members, the United States was free to choose to inscribe or not inscribe CPC references to further describe its commitments. The United States chose not to do so.

*For the United States:*

***Question 5:*** *Which classification system, if any, did the United States follow in establishing its GATS schedule of specific commitments? If the United States has followed a specific classification system, could the United States provide the Panel with a table of concordance between that system and W/120 for the entire schedule? In the absence of an explicit reference to the CPC in the US Schedule ,what is the definitional framework within which the US commitment in the first column of its Schedule should be interpreted?*

11. Subject to some changes (*e.g.,* "except sporting"), the United States generally followed the W/120 *structure* in its schedule of specific commitments. However, the United States did not refer to the CPC or any other particular nomenclature to describe the terms of the U.S. schedule,

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[6] *See* Communication from the United States of America, Draft Final Schedule of the United States of America Concerning Initial Commitments, 7 December 1993, MTN.GNS/W/112/Rev.3, para. 5; Communication from the United States of America, Revised Conditional Offer of the United States of America Concerning Initial Commitments, 7 December 1993, MTN.GNS/W/112/Rev.2, p. 1. The word "revised" in the text quoted by the Panel does not appear in the cited materials.

preferring instead that those terms be interpreted according to their ordinary meaning, in their context and in light of the object and purpose of the GATS. Those rules, reflected in Articles 31 and 32 of the Vienna Convention, provide the definitional framework within which the description of the U.S. commitment in the first column of its Schedule should be interpreted. Because the United States did not agree to any special meanings for the terms in its schedule, such as by agreeing to any particular nomenclature, there is no additional document that could be used as the basis for a concordance.

***Question 6:*** *What is the relevance of the US industry classification system for interpreting the US GATS schedule? How are gambling and betting services classified in that system?*

12. The North American Industry Classification System (NAICS 2002) is intended for classifying types of establishments for statistical purposes. It is the result of trilateral negotiations among three WTO Members (Canada, Mexico, and the United States).

13. Accordingly it is not negotiating history for the U.S. GATS schedule, but does provide evidence that there are internationally accepted, alternative ways to classify services other than the CPC.

14. The NAICS supports the U.S. view that gambling is not part of "other recreational services (except sporting)." NAICS 2002 includes the two-digit heading 71, "Arts, Entertainment, and Recreation." Within that heading, three-digit heading 713, "Amusement, Gambling, and Recreation Industries," includes four-digit heading 7132 "Gambling Industries." Significantly, "Gambling Industries" is a stand-alone heading, and is not part of the separate four-digit heading 7139, covering "Other Amusement and Recreation Industries" (7139). "Internet game sites" falls under separate NAICS 2002 heading 516110, "Internet Publishing and Broadcasting." Definitions of these categories may be found on the U.S. Census Bureau website "2002 NAICS Codes and Titles" by clicking on the hyperlinks for individual codes.[7]

***Question 7:*** *Could the United States provide a breakdown of the services sub-sectors that are covered under:*

*(a) Sub-sector 10.D of the US Schedule, entitled Other recreational services (except sporting)?*

*(b) Sub-sector 10.A of the US Schedule, entitled Entertainment services?*

15. No such breakdown was provided by the GATS negotiators in regard to the U.S. schedule, therefore it is not possible to provide an *a priori* list of the contents of 10.A and 10.D based on the text of the GATS and its annexes. The meaning of each of these subsectors must be discerned in the same manner as that of any other term of a treaty – through application of the customary rules of treaty interpretation.

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[7] *See* http://www.census.gov/epcd/naics02/naicod02.htm.

16. Even a Member that referred to the CPC in its schedule would be unable to provide a complete breakdown of 10.A and 10.D, inasmuch as the CPC categories are no less subject to interpretation than the W/120 headings. (Indeed, this observation is implicit in the Panel's question regarding the meaning of "gambling and betting services" (Question 13)).

17. Subject to the foregoing observations, the United States believes that an interpreter could find, consistent with customary rules of treaty interpretation, that:

- "Other recreational services (except sporting)" (10.D) includes services that fall squarely within the plain meaning of "recreation" and are distinguishable from either "sporting" or "entertainment." Such activities could include, *inter alia,* the operation of such recreational facilities as marinas, beaches, and parks, as well as the organization and/or facilitation of non-sporting recreational activities.

- "Entertainment services" (10.A) includes services that fall squarely within the plain meaning of "entertainment" and are distinguishable from either "sporting" or "recreation." Such activities could include, *inter alia,* services consisting of the operation of entertainment facilities, such as theaters, dance halls, music halls, and other performing arts venues; and the organization and/or facilitation of such entertainment activities.

18. To the extent that other services fall within sector 10 but do not fall within subsectors 10.A through 10.D, those services reside by default in sector 10.E, "other."

***Question 8:*** *The United States argues, inter alia, that (i) "except sporting" is meant to exclude gambling and betting from its commitment under 10.D and, (ii) had the US undertaken a commitment on gambling and betting, it would have done it under 10.E (Other). Why would the United States feel the need to exclude "sporting" (including, in its view, gambling and betting) from sub-sector 10.D if it considered that gambling and betting are included under 10.E? How can this be reconciled with the principle that entries in a classification system are mutually exclusive?*

19. The two assertions to which the Panel refers respond to two alternative arguments advanced by Antigua (which bears the burden of proving the existence of a U.S. commitment):

- In response to Antigua's assertion that Sector 10.D of the U.S. Schedule is defined by the CPC and includes gambling services, the United States has pointed out that (1) the U.S. schedule is not and cannot be defined by the CPC; and (2) even if 10.D did include

gambling services (*quod non*), the words "except sporting" exclude gambling, which is within the ordinary meaning of "sporting."[8]

- In response to Antigua's assertion that gambling is within the ordinary meaning of "entertainment" and also within the ordinary meaning of "recreational," the United States has pointed out that (1) Antigua fails to prove this; and (2) even if it were true (*quod non*), the logical consequence would be that gambling really fits neither of these categories, and thus belongs in "10.E Other." The latter point is even more persuasive if the Panel finds that W/120 entries for "entertainment" and "other recreational services" are mutually exclusive.

20. Regarding why the United States would find it useful to exclude "sporting" (including gambling) if it belongs in 10.E in any event, the United States considers that the exclusion provides an added assurance against misinterpretation of the U.S. commitments, while at the same time clarifying the status of other (non-gambling) forms of sporting.

*B. THE MEASURES AT ISSUE*

*For both parties:*

***Question 9:*** *What is the legal status and value of comments made by the US representative at meetings of the DSB to the effect that the supply of cross-border gambling and betting services is prohibited under US law?*

21. At the June 24, 2003, DSB meeting, the United States stated that it had "made it clear that cross-border gambling and betting services are prohibited under U.S. law" and that such services "are prohibited from domestic and foreign service suppliers alike." The United States stands by these statements. Two clarifications may be helpful.

22. First, the United States did not say at the time that this prohibition was "total," and has repeatedly clarified that it is not. At the time of the DSB meeting, such a clarification was unnecessary because we were speaking in the context of claims that we then understood to relate

[8] With respect to the meaning of "sporting," the United States attaches for the Panel's examination copies of the following definitions: *New Shorter Oxford English Dictionary,* p. 3000 (1993) ("Now *esp[ecially]* pertaining to or interested in betting or gambling"); *Merriam-Webster's Collegiate Dictionary,* p. 1134 (10th ed. 2001) ("of or relating to dissipation *and esp[ecially] gambling*"); *Webster's Third New International Dictionary,* p. 2206 (1986) ("of, relating to, or preoccupied with dissipation and esp[ecially] gambling"); *The American Heritage Dictionary,* p.1681 (4th ed., 2000) ("Of or associated with gambling."); *The Random House Dictionary of the English Language,* p. 1844 (2d ed. 1987) ("interested in or connected with sports or pursuits involving betting or gambling: *the sporting life of Las Vegas.*"); *Webster's II New Riverside University Dictionary,* p. 1124 (1988) ("Of or having to do with gambling."); *Encarta World English Dictionary, available at* http://encarta.msn.com/dictionary_/sporting.html (2004) ("of gambling: relating to gambling, or taking an interest in gambling"). *See* Exhibit U.S.-37.

to transmission of bets by Internet or telephone from Antiguan suppliers – actions which are indeed prohibited under U.S. law.

23. Second, our remark about the applicability of this prohibition to domestic service suppliers should have made it clear that the prohibition we were referring to was not a restriction on cross-border supply *per se;* rather, we were referring to laws of general application that apply equally to cross-border supply and supply of the like services (*i.e.,* remote supply) within the United States.

24. Both of these points were implicit in our remarks at the DSB meeting. Antigua is incorrect to read these remarks as a "concession" of, or even as support for, the existence of its alleged "total prohibition" on cross border supply of all gambling services. As we have repeatedly stated, there is no such "total prohibition" in U.S. domestic law. More importantly, since the concept of a "total prohibition" is devoid of any legal meaning or consequences under either U.S. law or the GATS, Antigua's assertions about it contribute nothing to its *prima facie* case.

*For Antigua and Barbuda:*

***Question 10:*** *Is Antigua and Barbuda challenging: (i) specific legislative and regulatory provisions that are claimed to amount to a prohibition on the cross-border supply of gambling and betting services as such; and/or (ii) the specific application of such provisions; and/or (iii) the US practice vis-a-vis the foreign cross-border supply of gambling and betting services? Please identify all relevant legislative and regulatory provisions.*

25. Setting aside issues concerning Antigua's failure to make a *prima facie* case, as to which the United States has already commented, the Panel's question points to a distinct issue concerning the scope of Antigua's panel request. The United States considers that the only claims within the scope of Antigua's panel request (and, therefore, the Panel's terms of reference) would be "as such" claims against specific legislative and regulatory provisions and/or the collective effect of two or more such provisions. The panel request does not articulate any claim against particular applications of these measures, and Antigua's clarification, as accepted by the Panel, would appear to confirm that no such claim is within the scope of the panel request.[9] To the extent that Antigua raised the application of laws or regulations in its panel request, it pointed to instances of such application only in an attempt to illustrate the existence of a "general prohibition against cross-border supply of gambling and betting services in the United States" as such.[10]

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[9] *See* Communication from the Panel, 29 October 2003, para. 31.

[10] *See id.*

***Question 12:*** *In paragraph 3 of its first oral statement, Antigua and Barbuda illustrates its allegation that it is illegal for Antigua and Barbuda operators to provide gambling and betting services in the United States by noting that the United States has imprisoned the operator of an Antiguan company. Could Antigua and Barbuda provide more details with respect to its example. Are there other instances that illustrate Antigua and Barbuda's point? If so, please provide details?*

26. Antigua appears to be referring to the case of Jay Cohen, a U.S. citizen who ran an Internet gambling operation from Antigua. Cohen was arrested in March 1998 and convicted after a ten-day trial in February 2000. The facts of the case are described on appeal in *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001) (affirming Cohen's conviction).[11]

*For the United States:*

***Question 13:*** *How does the United States reconcile its statement in paragraph 46 of its first oral statement that "there is no across-the-board prohibition on cross-border supply of gambling services in US law" with its statements in paragraphs 47 of WT/DSB/M/151 and WT/DSB/M/153 respectively that the supply of cross-border gambling and betting services is prohibited under US law? Please provide a list of the transactions that would be included in "gambling and betting services"?*

27. The United States has addressed the first part of the Panel's question in its response to Question 9 above. As to a list of the transactions that would be included in "gambling and betting services," as the United States has previously noted, "gambling and betting services" appears neither in the U.S. schedule nor in W/120. And the provisional CPC (the only document that refers to this term) does not include such a list. The United States can conceive of no basis, however, on which Antigua could possibly assert that "gambling and betting services" excludes services that involve the organization and/or facilitation of gambling, but do not involve the actual transmission of bets or wagers. Examples of such services are listed at paragraph 20 of the U.S. second submission.

***Question 14:*** *What is the legal status of the Internet Gambling Prohibition Act (referred to in Exhibit US 4), the Unlawful Internet Gambling Funding Prohibition Act (referred to in Exhibit US-5) and the Internet Gambling Licensing and Regulation Commission Act (referred to in Exhibit US-5)? Please provide copies of these documents.*

28. These are bills (*i.e.,* proposed measures) that were debated in Congress. None of them have been enacted.[12] The United States has provided the Panel with key elements of the

[11] Exhibit AB-83.

[12] The use of the word "Act" in the titles of the proposals reflects a U.S. legislative convention for naming proposed bills; it does not signify enactment.

testimony presented to Congress during its consideration of these bills as evidence of various contemporary issues and concerns surrounding Internet gambling. Copies of the unadopted bills are attached.[13]

*C. ARTICLE XVI*

***Question 15:*** *Where a Member has made full market access commitments on the cross border supply of gambling and betting services, could a prohibition on the remote supply of gambling and betting services within that Member allow the same Member to contend that there is no violation of Article XVI of the GATS? Please comment.*

29. Yes. As discussed in the U.S. second submission, a "prohibition" is not *ipso facto* inconsistent with Article XVI of the GATS.[14] A panel must examine whether the alleged prohibition constitutes a limitation that matches the precise criteria in Article XVI:2. Those criteria relate both to the subject matter of the limitation and its precise form and/or manner of expression. Any limitation that does not correspond to these criteria does not violate Article XVI:2.

*D. ARTICLE XVII*

*For both parties:*

***Question 16:*** *If there is "total prohibition" in the United States on the cross-border supply of gambling and betting services, as claimed by Antigua and Barbuda, can there be a violation of Article XVII at all?*

30. In this dispute, where the restrictions at issue apply to both cross-border suppliers and domestic suppliers of the "like" service, the United States does not see how there could be a violation of Article XVII. That said, the United States notes that the analysis of an alleged "prohibition" under Article XVI would appear to be important to answering the Panel's question. Article XVI (in contrast to Article XI of the GATT) does not automatically bar any "prohibition." The Panel should therefore examine whether the alleged prohibition meets the precise criteria articulated in Article XVI:2.

***Question 17:*** *In determining whether services are "like" is it relevant to have regard to differences in regulation between the place from which the service is supplied and the place into which it is supplied? To what extent, if at all, is Antigua and Barbuda's regulatory regime for the supply of Internet gambling and betting services relevant in determining "likeness" with the supply of those services in the United States?*

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[13] *See* Exhibit U.S.-38.

[14] *See* Second Submission of the United States, para. 18.

31. In certain circumstances it may be important to have regard to differences in regulation between the place from which the service is supplied, and the place into which it is supplied. For example, theoretically, if the United States permitted domestic gambling by remote supply subject to particular regulatory requirements, there might be "like services and service suppliers" issues regarding the extent to which services supplied from Antigua meet the same requirements. However, that is not the case.

32. The more relevant likeness factor in this dispute is therefore not differences in regulation *per se,* but differences in the characteristics of services and suppliers that influence the manner in which they are regulated. Specifically, the greater susceptibility of gambling by remote supply to various threats (organized crime, money laundering, health risks, child and youth gambling, etc.) makes it unlike other, non-remote forms of gambling.

***Question 18:*** *With respect to paragraph 63 of Antigua and Barbuda's first oral statement, which states in relevant part that the "likeness of service providers has little functional relevance in this case":*
*(a) Is there always a need to assess likeness for both "services" and "service suppliers" under Article XVII of the GATS?*
*(b) Is there a difference in the relevance of the "likeness" of service suppliers for modes 1 and 2 as compared to for modes 3 and 4? In other words, should the likeness of service suppliers as well as the likeness of services be considered in the case of modes 1 and 2?*

33. [a] Yes. Article XVII requires likeness of both services and service suppliers. As the panel in *Canada – Certain Measures Affecting the Automotive Industry* observed, "in the absence of 'like' domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS."[15] The same panel also emphasized that the burden of proving this element rested on the complaining party.[16]

34. [b] Antigua bears the burden of proving likeness of service suppliers regardless of the mode of supply concerned. The United States is unable to find any basis in Article XVII or elsewhere in the GATS for disregarding likeness in particular modes of supply.

***Question 19:*** *Is Internet/remote gambling and betting authorized between states within the United States?*

35. The gambling services described in paragraph 20 of the U.S. second written submission may be transmitted between U.S. states or on a cross-border basis. Other forms of

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[15] *Canada – Certain Measures Affecting the Automotive Industry,* Panel Report, WT/DS142/R, adopted 19 June 2000, para. 10.289.

[16] *Id.*

Internet/remote gambling services are not authorized between U.S. states or on a cross-border basis.

*For Antigua and Barbuda:*

***Question 20:*** *Could Antigua and Barbuda please elaborate on its comment in paragraph 43 of its first oral statement that "We agree that in certain specific circumstances a service could be considered unlike only because it is supplied on a cross-border basis"? (emphasis added)*

36. The United States wishes to clarify that it is not alleging that services supplied from Antigua are unlike because they are supplied on a cross-border basis. In principle, remote supply can occur either on a cross-border basis or on a purely domestic basis. U.S. restrictions on remote supply apply equally regardless of national origin.

*For the United States:*

***Question 21:*** *Exhibit AB-42 indicates that Youbet.com provides its subscribers the ability to wager "in most states" on horse races. US legal residents above 21 years old can become a member and place bets online or on the telephone once they have opened an account. Youbet.com states that it "is in full compliance with all applicable state and federal laws". Could the United States comment on this case, especially in view of its statement (in paragraph 33 of its first written submission) that the Interstate Horseracing Act "does not provide legal authority for any form of Internet gambling"?*

37. While Youbet.com states that they are in "full compliance with all applicable state and federal law," the U.S. Department of Justice (the nation's chief law enforcement agency) does not agree with this statement.

38. The Interstate Horseracing Act of 1978 is a civil statute in which the federal government has no enforcement role. In December 2000, the definition of the term "interstate off-track wager" in the IHA was amended. Congress, however, did not amend preexisting criminal statutes.

39. When President William J. Clinton signed the bill containing the amendment to the IHA after the bill was passed by Congress, the Presidential Statement on Signing stated as follows:

> Finally, section 629 of the Act amends the Interstate Horseracing Act of 1978 to include within the definition of the term "interstate off-track wager," pari-mutuel wagers on horseraces that are placed or transmitted from individuals in one State via the telephone or other electronic media and accepted by an off-track betting system in the same or another State. The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various

> States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular sections 1084, 1952, and 1955, of Title 18, United States Code.[17]

40. After hearings on Internet gambling in 2003, the Department of Justice reiterated its view that current federal law prohibits all types of Internet gambling, including gambling on horse races, dog racing, or lotteries. The Department of Justice maintains this view because the 2000 amendment to the IHA did not repeal the preexisting federal laws making such activity illegal. Under the principles of statutory interpretation applicable in United States courts, "[i]t is a cardinal principle of construction that repeals by implication are not favored. . . . The intention of the legislature to repeal must be clear and manifest."[18]

***Question 22:*** *How does the United States treat Internet services provided by Youbet.com, TVG, Capital OTB and Xpressbet.com, referred to by Antigua and Barbuda in paragraph 118 of its first written submission?*

41. Paragraph 118 of Antigua's first written submission discussed account wagering on horse races via the Internet and telephone.[19] The United States does not agree that the 2000 amendment to the IHA permits the interstate transmission of bets or wagers on horse races because pre-existing criminal statutes prohibit such activity.[20]

42. It should be noted, however, that these Internet services provide additional services beyond just accepting wagers on horse races. They provide access to information about the horses, the odds on the horse races, simulcasting of horse races, etc. While U.S. law does not permit interstate transmission by a wire communication facility of bets or wagers on horse races, the interstate transmission by a wire communication facility of information assisting in the placing of bets or wagers on horse races would not be prohibited, pursuant to 18 U.S.C. § 1084(b), as long as the information is being transmitted from a place where betting on that event is legal to a place where betting on the same event is legal.

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[17] Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, 2001, 36 Weekly Comp. Pres. Doc. 3153,3155-3156 (Dec. 25, 2000).

[18] *United States v. Borden Co.,* 308 U.S. 188, 188 (1939).

[19] Paragraph 118 incorrectly states that "[i]n order to accommodate this new form of account wagering, in 2000, the United States expanded the IHA [Interstate Horseracing Act of 1978] to permit betting on horse races over the internet. Today, United States residents can lawfully gamble on horse races by telephone or online with several United States-based companies."

[20] *See* U.S. response to question 21, *supra*.

***Question 23:*** *Could the United States comment on a statement made in the Gaming Industry Report by Bear Stearns (Exhibit AB-36) that a number of operators in Nevada have established Internet gambling websites?*

43. The Bear Stearns report discussed proposals for Internet gambling in the State of Nevada. The report indicated that Nevada's plans for Internet gambling are on hold, and that Nevada has been informed by the Department of Justice that U.S. federal law does not permit Internet transmission of a bet or wager. Nevada officials have assured federal officials that no operation licensed in Nevada has been approved or authorized to use any wagering system that operates over the Internet.

44. In the discussion on Internet gambling businesses located in Alderney and the Isle of Man, the report stated on page 18 that Venetian Casino Resort Athens LLC, a subsidiary of Las Vegas Sands, Inc., had applied for an e-gaming license from Alderney. On page 19, the report stated that MGM Mirage had been awarded a license from the Isle of Man.

45. The United States understands that MGM Mirage formerly operated an Internet gambling website from the Isle of Man, but has ceased operation. Further, when this website was operating, our information indicated it did not accept wagers from individuals located in the United States. The United States does not have specific information on whether or when the Venetian Casino Resort began operating its Internet gambling website.

46. While the United States is not in a position to provide an analysis of the operation of any specific website from the Isle of Man or Alderney, we can categorically state that as long as such websites do not accept bets or wagers from individuals located in the United States and do not provide information assisting in the placing of bets or wagers to individuals located in the United States where such wagering is illegal, then the operation of such websites from Alderney or the Isle of Man by "operators from Nevada" does not violate U.S. federal gambling laws.

***Question 24:*** *What is the status of the New Jersey bill referred to in the Gaming Industry Report by Bear Stearns (Exhibit AB-36) that would allow existing land-based casino facilities in New Jersey to operate Internet gaming sites from their own casino floors?*

47. On page 35 of Exhibit AB-36, a bill introduced in 2001 in the State of New Jersey legislature is discussed. That bill was not passed by the State of New Jersey legislature. Another bill, AB 568, is discussed on page 36. That bill was introduced in the 2002-2003 session but it was not passed during that session. We have no information on whether that bill or any similar legislation has been or will be reintroduced in the New Jersey legislature.

***Question 25:*** *With respect to Exhibit AB-18, could the United States indicate how it treats the services provided by Alliance Gaming Corp?*

48. Exhibit AB-18 is an article from the *Las Vegas Review-Journal* about a progressive slot system in casinos in Moscow that is monitored by operators in a control room in Las Vegas. This article appears to concern a progressive slot machine system that involves physical slot machines located in casinos, and does not concern on-line slot machines. The article does not contain sufficient factual allegations on the operation of this system to allow the United States to draw any conclusions about the legality of this system.

49. Generally, progressive slot machines are slot machines that are linked together in the same or multiple casinos in order to increase the jackpot. The United States understands that the player must travel to a participating casino where the progressive slot machine is located, physically deposit the wager in the slot machine, and play the slot machine inside the participating casino. Under this scenario, the bet is placed in the casino where the player is located. Thus, the wager is not placed remotely.

***Question 26:*** *Could the United States comment on the following excerpt from WT/GC/16 (referred to in paragraph 42 of Antigua and Barbuda's first oral statement) and the relevance, if any, of the comments contained therein to the present dispute:*

> *"there should be no question that where a market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality".*

50. The United States concurs with the view that electronic delivery, in and of itself, does not cause a service to be excluded from a Member's commitments. The United States is not arguing for such an exclusion in this dispute.

51. The quoted statement does not say, and should not be taken to mean, that delivery of a service by electronic means, or other means of remote supply, for that matter, automatically makes that service "like" any domestic service that is subject to the same commitment for purposes of the Article XVII likeness analysis. Remote supply does not mean that the service thus supplied (or its supplier) gets a "free pass" on likeness. As the United States points out in its second written submission, Antigua has failed to prove that its remotely supplied gambling services are like non-remote U.S. gambling services.[21]

[21] *See* Second Written Submission of the United States, paras. 29-58.