BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS285

EXECUTIVE SUMMARY OF THE
SECOND WRITTEN SUBMISSION OF THE
UNITED STATES

January 16, 2004

I. INTRODUCTION

1. The claims advanced by Antigua and Barbuda ("Antigua") in this dispute can be summarized in a single proposition. Antigua seeks to convince the Panel that the United States has agreed, in the sensitive field of gambling services, to treat services and suppliers of other Members *more favorably* than its own domestic services and suppliers in respect of remote supply. Yet to date Antigua has not provided the Panel with evidence and argumentation to sustain such an extraordinary claim.

2. Antigua remains in denial about its two threshold burdens. First, in continuing to allege the empty notion of a "total prohibition," Antigua continues to ignore its fundamental obligations of making a *prima facie* case regarding specific measures and their interaction. Second, in trying to find a U.S. commitment for gambling under the *General Agreement on Trade in Services* ("GATS"), Antigua again continues to attempt to interpret the U.S. GATS schedule in ways that defy the customary rules of interpretation of public international law.

3. Notwithstanding its failure to meet these threshold burdens, Antigua is also wrong with respect to its substantive claims. In all of the hundreds of measures and non-measures it has cited, Antigua has yet to show the Panel any restriction in the form of a quota, or any other form of quantitative restriction inconsistent with the precise requirements of Article XVI. On the issue of national treatment under Article XVII, Antigua has offered virtually nothing to support its assertion that all gambling services and suppliers are "like," against a mountain of contrary evidence. And, on the same issue, Antigua has not and cannot overcome the fact that the treatment accorded Antiguan services and suppliers under the GATS is no less favorable than the treatment accorded U.S. services and suppliers with respect to the remote supply of gambling.

4. Despite providing no analysis supporting its claim of "total prohibition," Antigua has, however, made mention of three U.S. statutes in its oral presentation at the first Panel meeting. These statutes contain vitally important criminal laws that the United States needs to fight organized crime and protect other fundamental interests. Article XIV of the GATS illustrates this importance, since Article XIV recognizes the imperative of certain policy concerns. Although the United States discusses the same overriding policy concerns as though involved in Article XIV, the Panel need not resort to Article XIV to resolve this dispute. Nonetheless, the United States believes that this discussion will adequately convey the gravity of the issues at stake.

II. THRESHOLD ISSUES

5. The two threshold issues in this dispute are (1) Antigua's failure to make a *prima facie* case as to the existence and meaning of the measure(s) that it means to challenge; and (2) Antigua's failure to make a *prima facie* case as to the existence of a U.S. commitment applicable to gambling services.

6. After initially refusing to do so, Antigua has now given the Panel a "data dump" of nearly all the measures cited in its panel request, along with cursory descriptions of those laws. These descriptions are patently insufficient as argumentation. Most obviously, they fail to tell the Panel or the United States *precisely* which measures Antigua regards as relevant. Antigua's thumbnail descriptions also fail to allege the impact of each specific provision on remote supply of gambling. Finally – and most fundamentally – Antigua fails to explain how each specific measure relates to its argumentation regarding alleged violations of the GATS.

7. Antigua has explicitly denied any obligation on its part to piece together the "puzzle" of its own claim. It is neither the responsibility of the Panel nor that of the United States to guess which measures are relevant and which are not, nor to assemble Antigua's claim of collective effect. Based on Antigua's inactions, the Panel can only conclude that it is unable to proceed with an examination of any "measure" because Antigua has neglected to articulate its claims with sufficient precision.

8. The United States has addressed the absence of a U.S. commitment in its responses to the Panel's questions. Antigua's reliance on the UN provisional Central Product Classification ("CPC") as the basis for a U.S. commitment is badly misplaced. Members have unequivocally acknowledged the fact that the CPC does not define commitments made in a schedule that does not refer to the CPC. For example, this was repeatedly confirmed during a 1998 discussion in the Committee on Specific Commitments in which even the European Communities ("EC") *agreed* that "[d]issatisfaction with [CPC] descriptions was certainly one of the reasons why certain Members had chosen not to use the CPC as the basis for their schedules."

9. It should come as no surprise that the United States did not schedule commitments for gambling services, given the overriding policy concerns surrounding those services, which are reflected in the extremely strict limitations and regulation of these services. Those policy concerns are further discussed in this submission.

III. ALLEGED INCONSISTENCIES WITH THE GATS

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

10. Antigua fails to prove the inconsistency of any U.S. measure(s) with Article XVI of the GATS. As the United States has previously explained, Article XVI prohibits Members that have inscribed commitments from maintaining or adopting six types of measures referred to in its paragraph 2, sub-paragraphs (a) to (f).

11. A close comparison between Article XVI:2 of the GATS and its goods counterpart, Article XI of the *General Agreement on Tariffs and Trade* ("GATT 1994"), demonstrates that Antigua's claim that its alleged "total prohibition" is *ipso facto* impermissible under Article XVI is incorrect. While Article XI of GATT 1994 states a general rule banning *any* import or export

"prohibition or restriction" except for a duty, tax, or charge, Article XVI:2 of the GATS establishes no such general rule. Instead, it defines, and carefully describes, precise types of limitations that Members shall not maintain or adopt in committed sectors. To prove its case as an initial matter, Antigua has the sole burden of proving that the United States maintains one of the precise types of limitations in Article XVI:2(a) to (f). Antigua's claims appear to rely on sub-paragraphs (a) and (c). These provisions may be summarized as follows:

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

12. As the table above clarifies, paragraphs (a) and (c) each involve two explicit criteria. First, the subject matter of the limitation must match the subject matter specified in the column on the left. Second, the "form" of the limitation or the manner in which it is "expressed" must correspond to the detailed specifications reproduced in the column on the right. In fact, the subject matter of the U.S. restrictions on gambling mentioned by Antigua is the *character of the activity involved,* without regard to the "number of service suppliers" or the "total number of service operations of total quantity of service output."

13. Antigua's *de facto* "zero quota" claim lacks both a legal and a factual basis. Legally, this claim incorrectly assumes that Antigua's alleged "total prohibition" is automatically inconsistent with Article XVI:2. As discussed above, while such an assertion might be tenable under GATT Art. XI, there is no automatic "prohibition on prohibitions" under the GATS. Moreover, Antigua's argument is untenable under the actual language of Article XVI:2, which requires that determinations as to the existence of a GATS-inconsistent quantitative restriction be based on the form, manner of expression, and designation of numerical quotas.

14. Factually, Antigua's "zero quota" claim relies entirely on its incorrect assertion of a "total prohibition" on cross-border supply of gambling services. In reality, U.S. restrictions do not preclude cross-border supply of all gambling services, and thus are not a "total prohibition." For example:

- Persons not involved in the business of gambling may transmit casual or social bets by any means, provided that the transmission is permissible under state law.

- Parimutuel betting services may exchange the accounting data and pictures necessary to permit a racetrack outside the United States to offer parimutuel betting on U.S. races (and

vice-versa), provided that such gambling is legal in both the sending and the receiving jurisdictions.

- Suppliers of oddsmaking and handicapping services (*e.g.,* handicappers of horse races) as well as other gambling informational services may supply such services, provided that the form of gambling that they facilitate is legal in both the sending and the receiving jurisdictions.

- Gambling websites may (and many do) provide so-called "free play" games in which no real money is wagered.

- Any other gambling service that does not consist of actual transmission of a bet or wager is legal to the extent stated in 18 U.S.C. § 1084(b), provided that it also does not violate state law in the U.S. consumer's jurisdiction.

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

15. Again, setting aside (for the sake of argument) the threshold issues of Antigua's failure to make its *prima facie* case, Antigua's claim under Article XVII appears to rest on two propositions – likeness of services and suppliers, and less favorable treatment. Antigua has not sustained, and cannot sustain, either of these arguments in the factual and legal context of this dispute.

1. Antigua has failed to prove that remote gambling services and suppliers are "like" non-remote gambling services and suppliers.

16. A panel assessing likeness must make a case- and fact-specific analysis of the particular services and suppliers at issue. In doing so, the panel must examine the characteristics of the allegedly like services and suppliers. These characteristics are not defined in the text of the GATS, and vary on a case-by-case basis.

a. Operational and consumer characteristics.

17. Antigua suggested in its oral statement that the Panel must examine characteristics that relate to the "end use" of a service or "consumer tastes and preferences" regarding that service, including consumer preferences and the "physical" characteristics of the service. Contrary to Antigua's argument, these are by no means the only factors to consider in a GATS likeness analysis. As discussed below, likeness in the context of this particular dispute depends more heavily on the regulatory characteristics of services and suppliers.

18. Assuming *arguendo* that consumer perceptions nonetheless play a role in a GATS likeness analysis, a full analysis of the characteristics relevant in shaping consumer perceptions

weighs strongly against a finding of likeness between virtual and real gambling. Antigua's own evidence shows that Internet gambling services have different customer bases than other gambling services. Also, Antigua itself concedes that a virtual casino is a *mere imitation* of a real casino. The games operate differently, and Antigua's own evidence shows that the environments virtual casino services operate are completely different from those of real casinos.

19. Antigua's "end-use" and "consumer perception" arguments also require the Panel to determine whether the recreational experience provided by a virtual casino is similar enough to that of a real casino to make them "like services." The United States submits that it is not. In the context of recreational services, where the consumer's purpose is to purchase the recreational experience itself, the qualitative difference between the consumer's experience in a real setting as compared to a virtual setting assumes greater importance than such a distinction might have in the context of other services.

20. The United States has already shown in its first submission that real casinos offer a vastly different consumer experience than virtual casinos, and that the virtual games do not involve the use of traditional gaming paraphernalia. This evidence demonstrates that the sensations and environmental attributes likely to shape consumer perceptions of recreational value of an Internet virtual casino are no more "like" those of a real casino than the attributes of participation in a football video game are like those of participation in a real football game. And the factors that shape the recreational value of a virtual casino are worlds apart from the characteristics of a real casino. Antigua's own consultants, Prof. Griffiths and Dr. Wood, appear to agree. They cite a litany of differences that distinguish the allegedly recreational experience of Internet gambling from that of traditional gambling, and thus confirm that consumer perceptions of Internet gambling are nothing like perceptions of real gambling.

21. Antigua's comparison between Internet gambling and Internet sale of music, or sale of goods (books, wine, etc.) reinforces the foregoing point. In such a case, whether the shopping is done in a real or a virtual environment may be immaterial to the likeness of the service supplied. In a case where the consumer is buying the experience of engaging in recreation, however, one must recognize that consumers will inevitably perceive the simulation of a recreational activity in a virtual environment as vastly different from actually experiencing such activity in the real world.

b. Regulatory characteristics.

22. Regulatory distinctions are directly relevant under GATS Article XVII, and should be considered in their own right – not solely through the lens of consumer perceptions. Such issues assume particular importance in this dispute because gambling is so heavily regulated.

- **Remote gambling poses a greater organized crime threat.** The United States has provided evidence showing that U.S. law enforcement authorities have seen organized crime playing a growing role in Internet gambling. The U.S. Federal Bureau of

Investigation ("FBI") Racketeering Records and Analysis Unit provided an assessment to Congress in 1999 stating that "[o]rganized crime groups are heavily involved in offshore gambling" and concluding that "[d]espite it's appearance of legitimacy, organized crime has already infiltrated the industry."

- **Remote gambling poses a greater money laundering threat.** Antigua asserts that it has enacted laws to deal with money laundering. Whatever the impact of Antigua's legislation, it is not relevant to the issue of the concerns regarding the susceptibility of remote supply of gambling to money laundering in the United States. Moreover, a September 2003 report by the U.S. Drug Enforcement Administration concludes that "internet gambling in Antigua and Barbuda is sometimes used for money laundering."

- **Remote gambling poses a greater threat of fraud and other consumer crimes.** Antigua denies that the potential for fraud is heightened when gambling is supplied from remote locations, and again asserts that there are no special concerns regarding fraudulent Internet gambling. Here again Antigua disregards the even greater threat when fraudulent gambling services operate far away from their victims, through anonymous media, and in some cases subject to at best uncertain law enforcement scrutiny. It also disregards the inherent manipulability of Internet gambling.

- **Remote gambling poses a greater and broader threat to human health.** The United States has already demonstrated that the respected American Psychiatric Association views Internet gambling as posing a special health threat, and other evidence corroborates that threat. Whether the health threat comes from the nature of Internet play itself or simply from the added population of potential victims – including youth – reached by a medium as pervasive as the Internet is an interesting question for scientific debate, but it is not relevant to this dispute.

- **Remote gambling poses a greater threat to children and youth.** Antigua admits that the United States imposes age restrictions on non-remote gambling, but argues that Internet gambling poses no greater risk of child and youth gambling. Attached to this submission are images of a few of the numerous child-oriented games offered on gambling websites licensed by the Antiguan government, including "Haunted House," "Rock 'n Roller," "Dinosaur Slots," "Alien Alert," "Goblins Cave," and "Ocean Princess." Antigua also denies that minors lack access to credit cards and other payment instruments. The testimony of a senior executive of Visa refutes Antigua's assertion. The anonymity of Internet gambling does in fact create a significant opportunity for underage gambling as compared to other forms of gambling that can be controlled through in-person supervision.

23. Whether the foregoing law enforcement, health, and consumer protection concerns are viewed separately or together, it is clear that significantly different regulatory issues arise in connection with the remote supply of gambling by virtue of the fact that it is supplied remotely.

2. Antigua has failed to demonstrate that its services and suppliers receive less favorable treatment.

24. Even if one assumes for the sake of argument that Antigua could show likeness between some remotely supplied gambling service and supplier and a non-remote gambling service and supplier (which it cannot), the United States may nonetheless maintain a regulatory distinction between remote and non-remote supply of gambling services. The GATS only requires that such distinctions, whether *de jure* or *de facto,* must afford no "less favorable treatment" to foreign suppliers on the basis of national origin. It also provides that treatment that "modifies the conditions of competition" in favor of domestic like services or suppliers "shall be considered to be less favorable." U.S. restrictions on remote supply of gambling services comply with these requirements.

25. Antigua appears to make a claim of *de jure* discrimination based on its assertion that U.S. law authorizes two domestic gambling services – parimutuel betting on horseracing and state lottery services – to operate by remote supply. Once again, Antigua's assertions are factually incorrect. The United States has addressed the issue of remote supply of parimutuel wagering on horseracing in its responses to the Panel's questions. U.S. federal criminal statutes continue to prohibit the transmission of bets or wagers on horse races to the same extent that they prohibit other forms of remote supply of gambling services. Antigua also asserts that lottery games are offered by remote supply in the United States, but each of the distribution mechanisms that Antigua identifies requires the service consumer to present himself or herself in person at an authorized lottery distribution location. Antigua confuses the fact that lotteries often have many retail points of presence with the entirely different concept of remote supply.

26. Overshadowing Antigua's *de jure* national treatment claims is a much more ambitious claim about *de facto* national treatment. Antigua complains that it is disadvantaged because U.S. domestic suppliers can still supply their services by means that are not remote. This argument fails because Antigua has not offered evidence of any restriction that would stop its suppliers from supplying their services by the same non-remote means available to domestic suppliers. Hence there is no national treatment violation. Moreover, if what Antigua really means to argue is that it is inherently harder for foreign suppliers to supply non-remote services in the United States, then its argument is precluded by Article XVII, footnote 10, which states that "[s]pecific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers."

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

27. Antigua alleges an "obvious violation of Article VI:1" the premises of which remain totally obscure. Antigua appears to believe, mistakenly, that by alleging an inconsistency with Article XVI or XVII, it has automatically proven, without evidence or argumentation, an

inconsistency with Article VI. The United States can only refer back to its first submission and reassert that Antigua has failed to offer anything approaching a *prima facie* case of violation of Article VI.

28. The United States also remains perplexed by Antigua's claims under Article XI:1 of the GATS. Antigua continues to rely exclusively on the PayPal agreement, yet it has already been established that the PayPal agreement is not a measure within the Panel's terms of reference. To the extent that Antigua means to rely on items cited in the PayPal agreement, it bears the burden of providing evidence and argumentation concerning such items.

IV. ARTICLE XIV

29. As explained above, Antigua has failed to make out its case. Indeed, it is unable to make out a case for the simple reason that there is no breach of any U.S. GATS obligation. It is therefore unnecessary for the Panel to examine Antigua's claims in light of Article XIV of GATS ("General Exceptions"). Nonetheless, the United States believes that, in order to develop the fullest possible appreciation of the scope and gravity of the issues at stake in this dispute, it is important to understand the vital policy objectives served by U.S. measures restricting gambling. In so doing, these U.S. measures would easily meet the requirements of Article XIV.

A. Factual background on U.S. measures.

30. Antigua mentioned three statutes in its oral statement: 18 U.S.C. § 1084; 18 U.S.C. § 1952; and 18 U.S.C. § 1955. Sections 1084 and 1952 of Title Eighteen, United States Code, were enacted in 1961 as part of the Attorney General's Program to Curb Organized Crime and Racketeering.

31. Section 1084 prohibits a person in the business of betting or wagering from knowingly using a wire communication facility to transmit in interstate or foreign commerce bets or wagers or information assisting in the placing of bets or wagers. The main purposes of § 1084, as articulated at the time of its consideration by Congress, are to aid in the enforcement of state and local laws and, in so doing, to suppress organized gambling. According to Attorney General Robert F. Kennedy, the restrictions on remote supply of gambling reflected in § 1084 were needed as an additional enforcement tool because the use of wire communications technologies for the dissemination of gambling information frustrated local law-enforcement efforts.

32. Section 1952 prohibits traveling in interstate or foreign commerce, or using the mails or any facility in interstate or foreign commerce, with intent to, *inter alia,* "distribute the proceeds of any unlawful activity" or "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter perform[] or attempting to perform" such act. The term "unlawful activity" is defined to include "any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States." The primary purpose of § 1952, as articulated by

Attorney General Kennedy, is to enable the Federal Government to "take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety."

33. Section 1955 of Title 18, United States Code, was enacted by Congress as part of Title VIII of the Organized Crime Control Act of 1970. It prohibits conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business. Congress articulated three broad reasons for including § 1955 in the Organized Crime Control Act. First, the Congress and the President viewed gambling income as the "lifeline of organized crime" and the means by which it financed other activities. Second, Congress and the President expressed concern that gambling "preys upon society," especially the poor. Third, from a law enforcement standpoint, "gambling is more susceptible than most organized crime activities to detection and prosecution."

B. Article XIV of the GATS removes any doubt that the United States may maintain Sections 1084, 1052, and 1955.

34. Article XIV of the GATS is clear that "nothing" in the GATS "shall be construed to prevent the adoption or enforcement by any Member of measures" falling within the terms of that article. Accordingly, there can be no doubt that the United States may maintain sections 1084, 1052, and 1955 since they meet the requirements of Article XIV, over and above the fact that they are also consistent with the remainder of the GATS.

35. Article XIV(c) protects measures that are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS]." Congress designed §§ 1084, 1952, and 1955 in large part to serve as law enforcement tools to secure compliance with other WTO-consistent U.S. laws. Most obviously, these statutes "secure compliance" with state laws restricting gambling and other like offenses by enhancing the enforcement of such measures. Before these federal laws existed, violators of state gambling laws often avoided prosecution by supplying their services remotely, from locations out of reach of state and local law enforcement authorities. Sections 1084 and 1952 address that problem by enabling federal law enforcement authorities to pursue remote suppliers of illegal gambling who violate state law, even if those violators are beyond the reach of state or local authorities. Section 1955 similarly furthers enforcement of state laws by enabling federal authorities to pursue large gambling businesses that violate state law, especially in cases where state authorities are unable or unwilling to address the problem. As to the substance and WTO-consistency of the state laws with which these measures are designed to secure compliance, it suffices to note that most of them are among the many measures included in Antigua's Exhibit AB-99, yet Antigua has failed to make out a *prima facie* case with respect to any of these measures. Therefore their WTO consistency can be presumed.

36. As measures against organized crime, §§ 1084, 1952, and 1955 are also necessary to secure compliance with all the various WTO-consistent U.S. criminal laws violated by organized

crime activities. The WTO consistency of these U.S. criminal laws is not in question, nor could Antigua seriously dispute the importance of the interests that they serve. Nor can it seriously question the importance of combating organized crime. As discussed above, legislative history and subsequent interpretations confirm that §§ 1084, 1952, and 1955 are clearly measures against organized crime,.

37. Article XIV(a) also provides an exception for measures "necessary to protect public morals or to maintain public order." The concepts of public order and public morals are closely associated with restrictions on gambling, and remote supply of gambling raises significant concerns relating to the maintenance of public order and the protection of public morals. The United States has shown that gambling by remote supply is particularly vulnerable to various forms of criminal activity, especially organized crime. Maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of "public morals" and one of "public order." In addition, the United States has shown that remote supply greatly expands gambling opportunities into settings – such as homes and schools – where it has not traditionally been present and is not subject to the controls present in other settings, making it easy for children to gamble. Taken together, these public order and public morals concerns should lead a panel to conclude that remote supply of gambling poses a grave threat to the maintenance of public order and the protection of public morals in the United States – certainly enough so to justify the maintenance and enforcement of origin-neutral restrictions on gambling such as those found in §§ 1084, 1952, and 1955.

38. The chapeau of Article XIV imposes an additional requirement that any measure provisionally justifiable under (a) through (e) not be "applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services." The restrictions in §§ 1084, 1952, and 1955 meet the requirements of the chapeau. None of these measures introduces any discrimination on the basis of nationality. Therefore the only question with respect to the chapeau is whether these laws constitute "a disguised restriction on trade in services." As the foregoing discussion of the legislative history of §§ 1084, 1952, and 1955 amply illustrates, these measures were enacted long before Internet gambling was even thought possible, and for reasons having nothing to do with protection of domestic industry. There is simply no basis on which to assert that they constitute "a disguised restriction on trade in services."

V. CONCLUSION

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