Before the Panel of the World Trade Organisation on

UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

WT/DS285

FIRST SUBMISSION OF ANTIGUA AND BARBUDA

EXECUTIVE SUMMARY

8 OCTOBER 2003

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1. INTRODUCTION

1. This dispute concerning trade in services is brought by the government of Antigua and Barbuda ("Antigua") against the United States of America (the "United States"). The United States is the world's largest consumer of gambling and betting services, with a massive domestic industry responsible for generating gross revenues of approximately US $68.7 billion in 2002.[1] To assist in the improvement of its small and developing economy, Antigua has sought to provide gambling and betting services to the United States, primarily through private Antiguan companies offering the services telephonically and by the internet.

2. The United States has taken the unequivocal position that the provision of gambling and betting services by operators in Antigua to persons located in the United States is illegal in all instances under United States law. The United States has further adopted a series of federal and state measures and taken a number of actions to prevent operators in Antigua from offering these services to persons in the United States (including imprisonment of at least one person related to an Antiguan service supplier).

3. These actions by the United States are directly and clearly in violation of the United States' commitments under the General Agreement on Trade in Services (the "GATS").

4. Antigua has brought this proceeding before the World Trade Organisation (the "WTO") to require the United States to recognise its commitments under the GATS and to cause the United States to remove or amend the protectionist measures adopted by it in order that Antiguan service suppliers may compete fairly in the offering of gambling and betting services in the United States.

5. The basis of Antigua's claim is simple. In its Schedule of Specific Commitments adopted under the GATS the United States has made a full commitment to market access and national treatment for gambling and betting services supplied on a cross-border basis. The United States allows numerous operators of domestic origin to offer such services throughout its territory. Simultaneously, it prohibits all cross-border supply of gambling and betting services. In doing so it violates its obligations under the GATS.

2. FACTUAL AND REGULATORY BACKGROUND

2.1 Terminology

6. There are three broad categories of gambling games: (i) betting on sport and other events; (ii) card games; and (iii) games based on the random selection of numbers or signs, e.g., lotto, scratch cards, slot machines and roulette. In this executive summary, the term "gaming industry" refers to the industry and the terms "gambling" and "betting" refer to the activity.

2.2 The gaming industry in Antigua

7. The Antiguan government has taken steps since the mid 1990s to build up a primarily internet-based, "remote-access" gaming industry as part of its economic development strategy. From a high of up to 119 licensed operators, employing around 3,000 and accounting for around ten percent of GDP in 1999, by 2003 the number of operators has declined to 28, employing fewer than 500. The government believes that material factors in

[1] Joe Weintert, "U.S. Gambling Losses Hit $68.7B. Last Year," *The Press of Atlantic City (New Jersey)* (17 August 2003), G3 (Antigua Exhibits, file 1, tab 1).

the decline of the industry are the increased standards of regulation in Antigua and an increasingly aggressive strategy on the part of the United States to impede the operation of cross-border gaming activities in Antigua.

8. Antigua's regulatory framework for the remote-access gaming industry has two components. The first is the Gaming Regulations,[2] adopted on 22 May 2001, which set out, *inter alia*, requirements for operators to have valid licences, the applications for which are subject to rigorous scrutiny by the Gaming Directorate. The Gaming Regulations also: (i) forbid under-age gaming; (ii) contain provisions aimed at promoting responsible gaming (including rules requiring warnings of the addictive effects of gambling on operator's websites); (iii) oblige operators to conduct full identity verification checks on prospective players; (iv) prohibit the receiving of payments in cash; and (v) provide that funds can only come from properly verified accounts in regulated financial institutions and that, if possible, winnings must be paid back to that same account.

9. Licensees are obliged to report all suspicious activities to the Directorate. The Directorate itself has investigatory powers under the Gaming Regulations, and oversees, supervises and monitors licensees, key personnel and games offered by licensees. In practice, these powers are regularly used. The Gaming Regulations also address standards in advertising, requiring, among other things, that advertising not be false, deceptive or misleading and not contain indecent, pornographic or offensive content.

10. The second component of the regulatory scheme in Antigua is the anti-money laundering efforts of the government, evidenced principally by the Money Laundering (Prevention) Act,[3] the Money Laundering Regulations,[4] the Money Laundering Guidelines[5] and the actions of the Office of National Drug and Money Laundering Control Policy ("ONDCP"). Antigua is a member state of the Caribbean Financial Action Task Force created under the auspices of the Financial Action Task Force on Money Laundering established by the G-7 in 1989. The Money Laundering Act is a comprehensive, up-to-date statute that criminalizes money laundering and sets up the regulatory authority and powers of the ONDCP.

11. For a variety of reasons, Antigua does not consider the cross-border gambling and betting industry in Antigua as particularly susceptible to money laundering or other forms of financial or organized crime. In particular, operators in Antigua are prohibited from taking cash from players and are required to establish their identity. This is in stark contrast to land-based casinos and other gaming outlets in the United States, where not only can players wager with complete anonymity but also gamble almost exclusively with cash.

2.3 The gaming industry in the United States

12. Commercial gambling is an enormous industry in the United States. In 1999 gamblers in the United States wagered more than US $630 billion in state-sanctioned gambling

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2 *Statutory Instruments Antigua and Barbuda,* 2001 No 16, "The Interactive Gaming and Interactive Wagering Regulations of 2001" (Antigua Exhibits, file 1, tab 6).

3 *Acts of Antigua and Barbuda,* No 9 of 1996.

4 *Statutory Instruments Antigua and Barbuda,* 1999 No 35.

5 "The Money Laundering Guidelines for Financial Institutions" issued by the ONDCP under Section 10 of the Money Laundering (Prevention) Act 1996, 9 September 2002 (Antigua Exhibits, file 1, tab 5).

activities and lost US $50 billion in the process.[6] In 1998, 68 percent of Americans gambled at least once and 86 percent of Americans have gambled at least once in their lifetime.[7] In 1999, a federal commission, the National Gambling Impact Study Commission (the "NGISC"), completed a lengthy detailed study on gambling in the United States. The NGISC Final Report concluded that:

> "Commercial gambling has become an immense industry. Governments are now heavily involved and increasingly active in pursuit of gambling revenues, either directly through state-owned lotteries and Native American tribal gambling or through the regulation and taxation of commercial operators."[8]

> "There was no single, overarching national decision to turn the United States into a world leader in gambling. Rather, games of chance spread across the map as a result of a series of limited, incremental decisions made by individuals, communities, states and businesses."[9]

> "In the next 25 years, gambling could, at its present rate of growth, become more and more like other common and legal, but somewhat restricted, business activities, such as the sale of alcohol or cigarettes. Of course, over time, the basic rules of our economic system would be expected to play a greater role in shaping the pattern of gambling, as the quasi-monopolistic circumstances of the present are replaced by more routine competition."[10]

13. Since 1999 state-sanctioned gambling in the United States has continued its expansion at an unprecedented rate, being available in 48 states and covering activities including bingo, horse race betting and other sports gambling, commercial casinos and state-operated lotteries. The omnipresence of fully lawful, state-sanctioned gambling makes the United States the largest national gambling market in the world.

14. The US $630 billion in total amount wagered reported by the NGISC in 1998 and 1999 excludes the most widespread and popular form of gambling in the United States: non-sanctioned or "illegal" sports betting. The NGISC estimated that as much as US $380 billion in illegal wagers are placed annually by American gamblers on professional and amateur sporting events.[11] Despite the enormous growth of this non-sanctioned gambling, the United States' efforts to crack down on illegal bookmakers in the United States have dwindled over the last 40 years. In the NGISC Final Report, the NGISC concluded that illegal sports betting in the United States is (emphasis added):

> "easy to participate in, widely accepted, very popular, and, at present, *not likely to be prosecuted*."[12]

15. Many of the largest gaming companies in the world are of United States origin and many have overseas interests. These companies use sophisticated remote computer technology to control and monitor overseas operations via the internet.[13]

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6 *National Gambling Impact Study Commission Final Report*, 18 June 1999, p. 7-1 (Antigua Exhibits, file 1, tab 10), and George Will, "Gambler Nation," *The Washington Post* (27 June 1999) (Antigua Exhibits, file 2, tab 12).

7 *Id*., p. 1-1, citing *National Opinion Research Center Gambling Impact and Behavior Study, Report to the National Gambling Impact Study Commission* (1 April 1999), p. 6.

8 *NGISC Final Report – Executive Summary*, p. 1 (Antigua Exhibits, file 2, tab 11).

9 *Id.*, p. 1.

10 *Id.,* pp.1-2.

11 *NGISC Final Report*, p. 2-14 (Antigua Exhibits, file 1, tab 10).

12 *NGISC Final Report*, p. 2-14. (Antigua Exhibits, file 1, tab 10).

16. United States gambling operators are allowed to advertise without restrictions throughout the United States. The NGISC described the advertising of lotteries in the United States as "deceptive", "misleading" and "manipulative."[14] United States casinos use sophisticated marketing techniques, including direct marketing based on electronically collected data on the gambling behaviour of individual players. Furthermore, casinos in the United States are specifically designed to induce gamblers to spend more on gambling. Most casinos are open 24 hours per day and use a number of techniques to diminish their customers' senses of responsibility, money and time. For instance, there are generally no clocks or views to the outside. Casinos also offer free alcohol to gamblers as well as low cost air fares or free accommodation.

17. The United States horse race betting industry has successfully used advances in communications technology to expand gambling opportunities. As a result, 85 percent of bets on horse races are made away from the track where the race is run by means of "simulcasting," or the live broadcasting of horse races via satellite communication or other remote means.[15] This includes broadcasting to the television in the home with an opportunity to gamble from home via the internet, the telephone or other means of communication. In 2000, the United States amended the Interstate Horseracing Act[16] to permit betting on horse races over the internet.[17]

3. THE UNITED STATES' MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES FROM ANTIGUA

3.1 Prohibition measures

18. Antigua's request for the establishment of a panel contains a large number of United States federal and state statutes adversely affecting the ability of Antiguan service suppliers to provide cross-border gambling and betting services to consumers in the United States. The Annex further includes references to a number of illustrative actions by United States federal and state authorities also constituting measures that inhibit the supply of cross-border gambling and betting services into the United States. The main statutes used by the United States to prosecute foreign gambling operators are the Wire Act,[18] the Travel Act[19] and the Illegal Gambling Business Act.[20] However the precise scope and meaning of these and other laws and regulations is far from clear, with a recent report by the United States General Accounting Office (an agency of the federal government) describing the legal framework for internet gambling in the United States as "complex".[21] This ambiguity makes it relatively

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13 Rod Smith, "Casino Industry Technology: Open Wide, New Progressive Slot System Lets Las Vegas Company Serve Russian Gamblers," *Las Vegas Review Journal* (2 September 2003) (Antigua Exhibits, file 2, tab 18).

14 *NGISC Final Report*, pp 3-15, 3-16.

15 *See* the chart "US Horseracing Statistics" (Antigua Exhibits, file 3, tab 41).

16 1978 15 U.S.C. §§ 3001-3007.

17 In December 2000, the definition of off-track wager was amended to include "pari-mutuel wagers, where lawful in each state involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools." *See*, United States Government Accounting Office, GAO – 03-89, *Internet Gambling: An Overview of the Issues,* (December 2002) p. 43 (Antigua Exhibits, file 2, tab 17).

18 18 U.S.C. § 1081, 1084, listed in Section I of the Annex to Antigua's panel request.

19 18 U.S.C. § 1952, listed in Section I of the Annex to Antigua's panel request.

20 18 U.S.C. § 1955, listed in Section I of the Annex to Antigua's panel request.

21 United States Government Accounting Office, GAO – 03-89, *Internet Gambling: An Overview of the Issues,* (December 2002), p. 3 (Antigua Exhibits, file 2, tab 17).

difficult to identify all laws and regulations of the United States that could be applied in the prohibition of the cross-border supply of gambling and betting services.

19. However, Antigua submits that there is no need to conduct a debate on the precise scope and nature of specific United States laws and regulations concerning gambling. The United States has stated that the provision of cross-border gambling and betting services into the United States from abroad is always unlawful in the entire territory of the United States. Antigua accepts this premise for the purpose of this dispute settlement procedure. The precise way in which this import ban is constructed under United States law should not affect the outcome of these proceedings.

3.2 Measures restricting international money transfers and payments

20. The United States also maintains measures that restrict international money transfers and payments relating to the cross-border supply of gambling and betting services. United States authorities particularly seek to restrict payments and transfers relating to "unauthorised" gambling and betting services with businesses that "usually operate offshore in foreign locations."[22]

4. VIOLATION OF THE GATS

4.1 General

21. In *Canada – Autos* the Appellate Body found that a threshold question for the application of the GATS is whether the measure at issue is a measure "affecting trade in services."[23] In this dispute it is clear that this is the case. First, there can be no real argument that the offerings of the gaming industry of Antigua to consumers in the United States and elsewhere constitute "services". Second, it has been firmly established in WTO law that what constitutes "measures (…) affecting trade in services" is to be broadly construed.[24]

22. The services at issue are supplied from Antigua by means of distant communication (in particular through internet connection, telecommunications or postal or delivery services) into the territory of the United States. Antigua submits that this constitutes "mode 1" or "cross-border" supply of services, which is defined in Article I:2(a) of the GATS as:

> "supply of a service (…) from the territory of one Member into the territory of any other Member."[25]

4.2 The United States schedule of specific commitments under the GATS

23. In its schedule of commitments under the GATS[26] the United States has made a full commitment for the cross-border supply of services classified under Subsector 10.D "Other

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[22] "Financial giant joins fight against online gambling," Press Release from the Office of the New York State Attorney General (14 June 2002)(Antigua Exhibits, file 3, tab 57).

[23] *Canada – Certain Measures Affecting the Automotive Industry* (WT/DS139/AB/R, WT/DS142/AB/R) para. 152.

[24] Appellate Body Report on *EC –Regime for the Importation Sale and Distribution of Bananas*, (WT/DS27/AB/R), para. 220.

[25] This view is supported by the so-called "scheduling guidelines" circulated by the GATT Secretariat during the Uruguay Round negotiations (MTN.GNS/W/164) (3 September 1993) (Antigua Exhibits, file 3, tab 59), the purpose of which was to explain clearly how commitments should be set out in GATS schedules. These guidelines define cross border supply as including: "the supply of a service through telecommunications or mail."

[26] GATS/SC/90 (Antigua Exhibits, file 3, tab 61).

recreational services (except sporting)." In drafting its Schedule, the United States made use of the "Services Sectoral Classification List"[27] prepared by the GATT Secretariat during the multilateral negotiations that led to the establishment of the WTO and the GATS (this classification list is generally referred to as "W/120" after its document number).

24. Subsector 10.D of W/120 is headed "Sporting and other recreational services" and lists "964" as the "corresponding CPC." This "CPC" is the 1991 "Provisional Central Product Classification" of the United Nations. Its heading 964 "Sporting and other recreational services" is broken down as follows (emphasis added):

964 Sporting and other recreational services

9641 Sporting services
96411 Sports event promotion services
96412 Sports event organization services
96413 Sports facility operation services
96419 Other sporting services

9649 Other recreational services
96491 Recreation park and beach services
96492 *Gambling and betting services*
96499 Other recreational services n.e.c.

25. Subsector 10.D of the United States Schedule is headed "Other recreational services (except sporting)". Thus the United States has clearly excluded CPC category "9641 Sporting services" from the commitments it has made in Subsector 10.D of its Schedule. By the same token Subsector 10.D of the United States Schedule clearly includes CPC category "9649 Other recreational services" which encompasses CPC category "96492 Gambling and betting services".

26. The United States Schedule is made an integral part of the GATS by Article XX:3 of the GATS. By consequence it must be interpreted on the basis of the general rules of interpretation provided for in Article 31 of the *Vienna Convention on the Law of Treaties,*[28] according to which it is to be interpreted in accordance with:

a. the ordinary meaning of the words "other recreational services" (Article 31(1) of the Vienna Convention);

b. agreements and instruments connected to the conclusion of the GATS that are part of its context (Article 31(2) of the Vienna Convention); and

c. practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3) of the Vienna Convention).

27. Even an interpretation exclusively based on the ordinary meaning of the words "other recreational services" in the United States Schedule leads to the plausible conclusion that gambling and betting services fall within this broadly worded category. It could perhaps be argued that, if only taking into account the "ordinary meaning" of the words, gambling and betting services might be classified under "Entertainment services" (Subsector 10.A of the

[27] MTN.GNS/W/120 (dated 10 July 1991) (Antigua Exhibits, file 3, tab 62).

[28] *See*, *by analogy*, the Appellate Body Report in *EC – Customs Classification of Certain Computer Equipment*, (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R) at para. 84 (concerning the interpretation of a GATT 1994 Schedule).

United States Schedule). However, that would not change the conclusion because the United States also made a full commitment for cross-border supply of services under that category.

28. The two most important agreements and instruments connected to the conclusion of the GATS that are relevant for the interpretation of the GATS schedule are the W/120 list and the GATT Secretariat's 1993 scheduling guidelines.[29] Paragraph 16 of the 1993 scheduling guidelines provides as follows:

> "The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on [W/120]. Each sector contained in [W/120] is identified by the corresponding Central Product Classification (CPC) number. Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex)."

29. As to practice in the application of the GATS, WTO Members have consistently referred to W/120 (and its cross-references to the CPC) as the classification used for GATS purposes and as the main point of reference for any discussion on such a classification.[30] Even the United States International Trade Commission (the "USITC") uses W/120 and its cross-references to CPC as a tool to interpret the United States Schedule.[31]

4.3 Violation of specific GATS provisions

30. Article XVI:1 of the GATS provides as follows

> "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."

31. In its Schedule the United States has made a full commitment to the cross-border supply of gambling and betting services. Simultaneously, the United States totally impedes cross-border market access by prohibiting all cross-border supply of gambling and betting services. This constitutes a manifest violation of Article XVI:1 of the GATS.

32. The complete ban on cross-border supply maintained by the United States qualifies as a "limitation on the number of service suppliers" prohibited by Article XVI:2(a) of the GATS. It also qualifies as a "limitation on the total number of service operations" prohibited by Article XVI:2(c) of the GATS.

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[29] *See* footnote 25 above (Antigua Exhibits, file 3, tab 59).

[30] *See, e.g.*, paras. 23-24 of the 2001 scheduling guidelines (Antigua Exhibits, file 3, tab 60); *see also* the United States' own communication to the WTO on "Classification of Energy Services", dated 18 May 2000 (S/CSC/W/27) (Antigua Exhibits, file 3, tab 64).

[31] In 1997 the USITC published a document explaining the United States Schedule. On page viii of that document it is stated that: "The U.S. Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list." The USITC document also contains a table entitled "Concordance of Industry Classifications," according to which Subsector 10.D of the United States Schedule corresponds to Subsector 10.D of W/120 and CPC code 964. Nowhere does the table state that gambling and betting services, which are covered by CPC code 964, are excluded from the Schedule. In the same document the USITC states that it has "assumed responsibility for maintaining and updating as necessary, the United States' Schedule of Commitments" (at p. vii).

33. Article XVII of the GATS provides that each Member shall accord "treatment no less favourable than that it accords to its own like services and service suppliers" to services offered by any other Member. The United States maintains a total prohibition on all cross-border gambling while allowing operators of domestic origin to provide gambling services. This clear disfavouring of foreign operators needs no further explanation.

34. The only question that merits consideration is whether the services and service suppliers of Antigua are "like" those of the United States. In this respect Antigua submits, by way of general consideration, that the issue of "likeness" plays a less significant role in the context of trade in services than in the context of trade in goods. This is because, unlike in the case of goods, the characteristics of a specific service or service supplier are often not inherently "locked in" to the product and are often easily adaptable. Thus, even if services and service suppliers are "unlike" it will often be relatively simple to adapt them in order to make them "like" their domestic counterparts. Of course, the regulatory system of the importing WTO Member must offer the foreign services and suppliers an opportunity to be or become "like". A WTO Member can not close its regulatory system for foreign services and suppliers and then argue that these are "unlike" because they are unregulated. Such an approach would be inherently discriminatory. In the light of these general considerations Antigua does not believe it necessary for the Panel to investigate the specific characteristics of various gaming services of Untied States and Antiguan origin. Even an Antiguan service that is identical to (and therefore undoubtedly "like") a United States service would have no access to the United States market simply because it is provided from a foreign location.

35. Antigua further submits that, an investigation of the specific characteristics of gaming services and suppliers of United States and Antiguan origin must result in a conclusion that these are indeed "like." The types of games are the same and all involve the winning or losing of money. The only differences are (i) the origin of the services and the suppliers and (ii) the mode of supply (cross-border as opposed to commercial presence). These differences, however, are not relevant in the context of a commitment to national treatment of cross-border supply under the GATS.

36. The United States has violated Article VI:1 of the GATS by failing to ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." As explained above the United States maintains numerous laws and regulations prohibiting the supply of gambling and betting services unless a specific authorisation has been granted. These are "measures of general application affecting trade in services" caught by Article VI:1 of the GATS. Many service suppliers of United States origin have been given an authorisation to supply gambling and betting services. It is impossible, however, for foreign service suppliers to obtain an authorisation to supply services on a cross-border basis or even to apply for such an authorisation. Antigua submits that this constitutes a violation of Article VI:1 of the GATS.

37. The United States measures restricting international money transfers and payments violate Article XI:1 of the GATS which prohibits such restrictions for current transactions relating to its specific commitments. Furthermore "legally authorized gaming transactions" are exempt from these measures.[32] Consequently, these measures also violate Articles XVI:1, XVII, and VI:1 of the GATS.

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[32] "Agreement reached with Paypal to bar New Yorkers from online gambling," Press Release from the Office of the New York State Attorney General (21 August 2002) (Antigua Exhibits, file 3, tab 55). On 10 June 2003, the United States House of Representatives adopted legislation known as H.R.2143, the "Unlawful

5. ARTICLE XIV OF THE GATS

38. It is possible that the United States may try during the course of this proceeding to invoke one or more of the general exceptions of Article XIV of the GATS, although it would be inconsistent for the United States to do so given its principal position during consultations that it has made no commitment in relation to gambling and betting services.

39. Article XIV of the GATS allows Members to adopt measures "necessary" to protect *inter alia*, public morals, human life or health and prevent deceptive and fraudulent practices, provided such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."

40. Article XIV of the GATS is an affirmative defence and it is therefore for the United States to make its case under Article XIV and for Antigua to respond. If the defence is raised, Antigua believes that Article XIV of the GATS (which has not yet been interpreted by a panel or the Appellate Body) should be construed consistently with Appellate Body interpretations of Article XX of the GATT 1994. This requires a two-tiered analysis of (i) whether the measures are "necessary" to protect a covered interest under Article XIV of the GATS and, if that is the case, (ii) whether the measures respect the "balance" between rights and obligations that must be struck under the chapeau of Article XIV. [33]

6. CONCLUSIONS

41. In the light of the considerations set out above, Antigua respectfully requests the Panel to find that the United States prohibition on the cross-border supply of gambling and betting services and its measures restricting international money transfers and payments relating to gambling and betting services are inconsistent with the United States Schedule of Specific Commitments and Articles XVI:1, XVI:2, XVII:1, XVII:2, XVII:3, VI:1, VI:3 and XI:1 of the GATS. Antigua further requests the Panel to recommend that the DSB request the United States to bring the measures at issue into conformity with the GATS.

Internet Gambling Funding Prohibition Act" (Antigua Exhibits, file 3, tab 70). This is designed to unambiguously prohibit banks and other financial service providers from engaging in financial transactions involving gambling and betting services from non-United States based gambling operators (Section 4(2)(E)(ix) excludes "any lawful transaction with a business licensed or authorized by a State" thus exempting United States gambling operators from the prohibition to facilitate payment of internet gambling services). The second component of the United States Congress, the Senate, has yet to adopt this legislation.

[33] In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/AB/R), para. 166 the Appellate Body found that a measure is not "necessary" when: "a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'." In its report on *US – Import Prohibition of Certain Shrimp and Shrimp Products,* (WT/DS58/AB/R), para. 156 the Appellate Body described the chapeau of Article XX of the GATT 1994 as requiring the following: "(…) a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members."