Before the Panel of the World Trade Organisation on

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

WT/DS285

COMMENTS ON THE UNITED STATES' REQUEST FOR PRELIMINARY RULINGS BY ANTIGUA AND BARBUDA

22 OCTOBER 2003

TABLE OF CONTENTS

I. Introduction

"[The] procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[1]

1. Antigua and Barbuda ("Antigua") has reviewed the Request for Preliminary Rulings by the United States of America (the "United States") dated 17 October 2003 (the "Request") in this proceeding, and submits the following comments. As will be discussed below, Antigua does not believe that it is necessary or appropriate for it to make a supplemental submission. Antigua has made its position and its arguments absolutely clear in its first submission. There is no compelling reason of law, procedure or policy why the United States should not now proceed to file its own first submission, as stipulated by the Panel, on 29 October 2003.

2. In the Request, the United States:

- complains that certain "items" listed in Section III of the Annex to Antigua's panel request are not "measures" that can be investigated under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU");
- complains that Antigua's panel request improperly includes measures that were not the subject of consultations; and
- asserts that Antigua has not, in its first submission, established a *prima facie* case regarding each specific law and that therefore the Panel should effectively dismiss this proceeding unless Antigua agrees to file a supplemental submission and the United States is given an extension of four weeks thereafter in which to file its own first submission.

3. Although the first two points made in the Request have been articulated to some degree by the United States on other occasions (and are dealt with at length in Antigua's first submission),[2] the third point is new, and particularly troubling given that it is being raised at this late stage—a mere 12 days before the United States' first submission is to be filed.

4. Overall the approach of the United States in the Request represents the starkest possible of contrasts to the principles of WTO dispute settlement as described in the Appellate Body quote above: the points raised at this stage by the United States are unfair, they are far from prompt and will, if accepted, lead to the most ineffective means of resolving this trade dispute.

5. In the following sections of these comments, Antigua addresses each of the arguments raised by the United States in the Request.

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[1] Appellate Body Report on *United States – Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, para. 166; and Appellate Body Report on *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, para. 97 (emphasis added).

[2] With respect to the first point, *see* paragraphs 145-148 of Antigua's first submission and with respect to the second point, *see* paragraphs 149-152 of Antigua's first submission.

II. The United States' argument that it cannot prepare its defence

6. In the view of Antigua, this is a transparent attempt by the United States to delay this proceeding and extend the timetable, while at the same time, it should be noted, the United States is aggressively attempting to destroy the Antiguan gambling and betting industry through a number of law enforcement and other actions.[3]

7. On 30 April 2003 the United States and Antigua held consultations in Geneva. The only explanation regarding United States' gambling law given by the United States at the consultations meeting was that, whilst a number of the laws listed in the request for consultations did not relate to the cross-border supply of gambling, such cross-border supply was in any event unambiguously prohibited by United States law. On 8 May 2003, Antigua sent a letter to the United States offering to enter into further consultations. Importantly, in the 8 May communication, Antigua stated, among other things:

> "In any event, the debate about the specific scope and nature of the individual measures has become much simpler, if not moot, because the U.S. team explained that the provision of cross-border gambling and betting services is always unlawful in the entire U.S. in whatever form. Thus we think it is no longer relevant to continue the debate about the impact or the applicability of specific measures. What matters in terms of WTO law is the effect of one or more measures and, in that regard, you have unambiguously told us that the provision of these types of services from Antigua and Barbuda to persons in the U.S. is unlawful in the U.S."

8. In May 2003 the United States apparently did not consider this point worthy of further discussion.[4] Since then Antigua has unambiguously repeated this approach to the United States' general prohibition.[5] During this same period the United States has unambiguously repeated that it prohibits all cross-border gambling.[6] Furthermore the United States has

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[3] At the end of September 2003 the United States subpoenaed so-called "internet portal sites" and other media companies because they carried advertisements for cross-border gambling services. Prior to doing so the United States Department of Justice had sent letters to media companies warning them not to cooperate with "offshore" gaming operators. A copy of such a letter is attached to these comments as Exhibit 73.

[4] On 28 May the United States (only on being asked by Antigua) confirmed that it was "in the process of drafting a response". On 5 June Antigua received the following two paragraph response from the United States:

> "Thank you for your letter of May 8, 2003, suggesting a continuation of consultations in the matter of *[US – Gambling]*.
>
> The United States appreciates the written explanation of your views on the issues referred to in your letter and the further explanation of your views on the interpretation of the United States services schedule. We recall that the United States provided its views on these issues during the consultations held with your delegation in Geneva on April 30, 2003. While the United States would be willing to meet again in Geneva with the representatives of your government, we believe that we have already presented our position on the points raised in your letter of May 8, 2003. We note that it is the consistent view of the U.S. Justice Department that internet gambling is prohibited under U.S. law."

[5] In Antigua's panel request of 12 June 2003, at the DSB meeting of 24 June 2003 (*see* WT/DSB/M/151, para. 44), at the DSB meeting of 21 July 2003 (*see*, WT/DSB/M/153, para. 46), during the organisational meeting with the panel on 3 September 2003 and in Antigua's first submission of 1 October 2003. At the DSB meeting of 21 July 2003 Antigua also stated its willingness to: " try to answer any specific questions that the United States might have, just as it would welcome a US detailed and written explanation of what it did not understand about its panel request." (WT/DSB/M/153, para. 46)

[6] At the DSB meeting of 24 June 2003 the United States' representative stated that "[j]ust as importantly, the United States had made it clear that cross-border gambling and betting services were prohibited under US law" (WT/DSB/M/151, para. 47); at the DSB meeting of 21 July 2003 the United States' representative stated that: "it was also clear that these services were prohibited under US law" (WT/DSB/M/153, para. 47). *See* also the letter dated 11 June sent by the United States Department of Justice to media companies, attached as Exhibit 73 to these comments.

prosecuted and incarcerated an individual for operating a licensed Antiguan gambling and betting company[7] and has taken a number of steps to prevent the use of credit cards and other financial instruments and transactions in connection with access by United States consumers to gambling and betting services located in other countries such as Antigua.[8] Clearly, the United States considers such services illegal and has made public statements and taken actions consistent with that. In that context, for the United States now to claim inability to respond to the arguments of Antigua based upon ignorance of its own measures is simply not credible.[9]

9. In paragraph 21 of its Request the United States writes, with regard to the "specific measures" issue, that it "has raised this concern many times with Antigua, including during consultations and at the DSB meetings at which Antigua requested establishment of a panel." This is incorrect. The United States has raised *other* procedural issues regarding the "measures" (which are addressed in paragraphs 144-154 of Antigua's first submission). Until submitting the Request, the United States has at no point stated that it cannot understand Antigua's claim in the absence of further explanation of that claim as it relates to each individual law. If the United States had done so, Antigua would have addressed this issue in its first submission, as it does now.

III. The United States' argument that Antigua has not established a *prima facie* case with regard to specific measures

10. The United States asserts in the Request that Antigua has not submitted sufficient "proof" to establish a *prima facie* case that each individual law listed in the Annex to its panel request effectively prohibits the provision of cross-border gambling services.

11. The United States accepts that the total prohibition of cross-border gambling exists. In view of its explanation of *United States v. Cohen* applying 18 U.S.C. § 1084 (the so-called "Wire Act") in paragraph 20 and footnote 36 of its Request, it clearly also accepts that at least one specific law in the Annex to Antigua's panel request (*i.e.* the Wire Act) prohibits provision of cross-border gambling services. A report from the United States General Accounting Office (an agency of the federal government (the "GAO")) quoted in Antigua's first submission confirms this for other specific United States laws mentioned in the Annex to the panel request.[10] Furthermore the United States has yet to dispute that *most* of the laws cited in the Annex to the panel request *do* in fact relate to the prohibition of cross-border gambling and betting services (it only claims that *some* do *not*, and only on the basis of a

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[7] *See United States v. Cohen,* 260 F.3d 68 (2nd Cir. 2001).

[8] *See* the discussion in paragraphs 137-138 of Antigua's first submission and the documents attached as Exhibits 55 and 56 (Antigua Exhibits, file 3, tabs 55 and 56).

[9] It is noticeable that, while the United States complains about the fact that some of the (deliberately misinterpreted – *see* paragraph 26 below) references in the Annex to the panel request also regulate other matters than cross-border gambling services (such as refrigerator disposal), it makes no attempt to explain why exactly it is that the numerous references to laws that *do* clearly prohibit the provision of cross-border gambling and betting services, combined with the text of the panel request, Antigua's first submission and other communications by Antigua, do not allow it to prepare its defence. The only legal defence that the United States has raised with Antigua until now is that its Schedule of Specific Commitments under the GATS does not cover gambling and betting services. Antigua does not see how the issues raised in the Request could have an impact on the development of that argument.

[10] United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89) (December 2002) (Antigua Exhibits, file 2, tab 17), p. 11 quoted in paragraph 134 of Antigua's first submission. *See also* the letter from the Department of Justice of 11 June 2003 to the National Association of Broadcasters, attached to these comments as Exhibit 73.

deliberate misreading of the references to these laws).[11] In this respect Antigua submits that to the extent that "proof" is an issue here, Antigua has in any event established a *prima facie* case with regard to the measures listed in its panel request that come within the scope of this dispute (*i.e.* those that do relate to the cross-border supply of gambling and betting services).[12]

12. It is doubtful that anyone could compose a definitive list of all United States laws and regulations that could be applied against cross-border gambling. Antigua has consistently made clear its position in this respect.[13] The reason for this is that United States law with regard to this issue is itself unclear and Antigua is certainly not the only party with some difficulty in understanding the United States' legal system as it relates to the provision of cross-border gambling and betting services. As the United States' own General Accounting Office has stated:[14]

> "Internet gambling is an essentially borderless activity that poses regulatory and enforcement challenges. The legal framework for regulating it in the United States and overseas is complex. U.S. law as it applies to Internet gambling involves both state and federal statutes."

13. There is also significant debate within the United States legal community as to the exact nature of the United States' prohibition on the supply of cross-border gambling and betting services.[15] Further, there is even disagreement among courts in the United States on the precise interpretation of United States laws on this issue.[16]

14. This lack of clarity of United States law confronted Antigua with a dilemma when it drafted its panel request. If it were to have listed the Wire Act only there is little doubt that, at the stage when the United States needed to implement any recommendations and rulings resulting from this dispute, the United States would have taken the position that it needed only to disapply or adapt the Wire Act and could continue to apply other laws because these would have been outside the terms of reference of the Panel. This concern has been vindicated by the fact that the United States now adopts a very similar formalistic and obstructive approach in the Request.

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[11] Antigua notes in this regard that the seemingly irrelevant statutes delineated in paragraph 14 of the Request are, in point of fact, included within a "range" of statutes that otherwise relate to gambling and betting activity. It is an accepted method of citation in United States law to include a "range" of related statutes even if the range includes repealed or irrelevant statutes as well.

[12] Antigua's panel request explicitly states that: "The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."

[13] *See*, *for instance*, the second paragraph of the panel request.

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

[15] *See, e.g.*, Jeffrey R. Rodefer, "Internet Gambling in Nevada. Overview of Federal Law Affecting Assembly Bill 466" published on 18 March 2003 on the website of the Department of Justice of Nevada (www.ag.state.nv.us) (Antigua Exhibits, file 3, tab 54), pp. 8-13 in the context of the Wire Act. In the article the author notes "(…) there is a secondary debate ongoing about whether the definition of 'wire communication facility' is limited to telephone companies." *Id.* at p. 13.

[16] *See, e.g.,* with regard to the Wire Act, the discussion in United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89) (December 2002), (Antigua Exhibits, file 2, tab 17), at p. 13.

15. It was for these reasons—as well as the oft-repeated statements by the United States that it prohibits all cross-border gambling and betting services—that Antigua determined to challenge the general prohibition of cross-border gambling and betting services that effectively exists in the United States whilst at the same time making a serious and good faith effort to identify specific measures after conducting a detailed investigation of an arcane area of United States law. In doing so Antigua has already done more than can reasonably be expected of a complainant in WTO dispute settlement proceedings.[17]

IV. The United States' argument that the Panel cannot investigate in aggregate the impact of a series of individual laws

16. In paragraphs 16 and 17 of its Request the United States submits that the Panel's terms of reference oblige it to investigate separately the impact of each specific law listed in the Annex to Antigua's panel request.

17. Antigua finds it difficult to see how—much less why—the Panel would go about assessing "separately" the specific impact of each of the 93 legislative prohibition measures listed in the Annex to Antigua's panel request. Such an approach would be unnecessary, cumbersome, repetitive, time consuming and would not serve to enhance the legitimate rights of the defence (other than by simply frustrating the effectiveness of WTO dispute settlement). To require Antigua and the Panel to spend time and effort in analysing exactly how the United States' measures operate and interact in practice given the unambiguous legal position of the United States regarding the services at issue, would be patently absurd. In any event, the terms of reference for the Panel are determined by Antigua's panel request and Antigua is not aware of any provision or doctrine of WTO law that would prevent the Panel from investigating in aggregate the impact of a series of specific measures that all have the same effect, *i.e.* prohibition.

18. The Panel should note that, in relation to this argument the United States incorrectly states that: "Antigua refuses to identify specific measures as the subject of its *prima facie* case." As stated in paragraph 15 above, notwithstanding the difficult nature of doing so, Antigua *has* made a serious and good faith effort to identify specific measures in the Annex to its panel request.[18]

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[17] Putting the threshold even higher will make WTO dispute settlement virtually unmanageable for all but the largest WTO Members—for instance in cases involving a complex domestic legal background against a WTO Member the laws of which are not generally available in English (or another language that is widely understood across the world). In such a situation an obligation to first conduct a detailed investigation of all these laws, even when the WTO Member at issue does not deny the alleged impact of its legislation, could take years and would serve no purpose.

[18] For instance: Antigua's panel request identifies 18 U.S.C. §§ 1081, 1084. As the United States points out itself in footnote 36 of its Request this statute was used to convict Mr Jay Cohen in the *United States v. Cohen* case also cited in the panel request. Mr Cohen was convicted because he worked for an Antiguan supplier of gambling and betting services.

The panel request also mentions 18 U.S.C. § 1952 (the "Travel Act") and 18 U.S.C. § 1955 (the "Illegal Gambling Business Act") which according to the United States General Accounting Office "have been used to prosecute gambling entities that take interstate or international bets over the telephone and would likely be applicable to Internet gambling activity" (*see* paragraph 134 of Antigua's First submission).

With regard to these three laws, *see also* the letter from the United States Department of Justice of 11 June 2003 mentioning "Sections 1084, 1952 and 1955 of Title 18 of the United States Code" (attached to these comments as Exhibit 73).

Antigua has further listed the specific measures of individual states that are described as follows by the GAO: "Some states have taken specific legislative actions to address Internet gambling, in some cases criminalizing it

V. The Panel does not need to address the United States' argument that certain "items" in Section III of the Annex to Antigua's panel request are not "measures"

19. The United States submits that certain "items" listed in Section III of the Annex to Antigua's panel request are not "measures" that can be investigated under the DSU.

20. In paragraph 148 of its first submission Antigua has already explained its view that, since the measures listed in Section III of the Annex are based on the legislative provisions listed in Sections I and II of the Annex,[19] they are therefore in any event covered in that capacity. In Antigua's view it does not really matter whether the measures listed in Section III "do something concrete, independently of any other instruments"[20] or whether these are taken into account by the Panel "to help determine the meaning of U.S. laws."[21] In fact, actions by criminal enforcement authorities (such as the ones listed in Section III of the Annex) could very well be classified under both categories. What matters is that the United States maintains and enforces a total prohibition on cross-border gambling (and this is clearly the case).

21. In this respect Antigua suggests that the Panel utilise its discretion to exercise judicial economy and to decide this case without ruling whether measures such as the ones listed in Section III of the Annex are "measures" that can be the subject of WTO dispute settlement.

22. In case the Panel nevertheless wants to address this issue, Antigua refers back to the discussion in paragraphs 146-147 of its first submission. Antigua would add only that the four press releases and related documents from Attorneys General are obviously not included in the panel request as press releases but because they describe the measures, *i.e.* the prosecution actions (on which little or no other official information is publicly available).

VI. The United States' argument that certain relevant measures should be excluded because they were not the subject of consultations is unfounded

23. The United States argues that Antigua's panel request improperly includes measures that were not the subject of consultations.

24. Antigua has already responded to this argument in paragraphs 149-152 of its first submission. The United States simply ignores these arguments and the Appellate Body ruling in *Brazil-Aircraft*[22] referred to by Antigua in its first submission.

25. Antigua notes the United States' reference to the Appellate Body Report in *United States – Import Measures*.[23] Antigua submits, however, that whether or not a measure that was not *formally* part of consultations can be included in a panel request depends on the specific circumstances of each case. In this instance Antigua believes this to be possible (as

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and in others relying on existing gambling laws to bring actions against entities engaging in or facilitating Internet gambling" (*see* paragraph 134 of Antigua's first submission).

19 This is explicitly confirmed by the United States in paragraph 20 of its Request.

20 *See* paragraph 4 of the United States' Request.

21 *See* paragraph 9 of the United States' Request.

22 Appellate Body Report on *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R.

23 Appellate Body Report on *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R.

did the Appellate Body in the circumstances at issue in *Brazil – Aircraft*). As in *Brazil – Aircraft*, the parties in this instance have in fact consulted on the gambling prohibition in the New York Constitution, the Rhode Island Constitution and the Colorado Revised Statutes (because the parties consulted on the total prohibition of the provision of cross-border gambling and betting services of which these measures form a part).

26. Antigua further submits that the typing errors that were corrected for the New York Constitution, the Rhode Island Constitution and the Colorado Revised Statutes are different from the allegedly incorrect references to laws against dog fighting and other irrelevant laws which the United States mentions in paragraph 14 of the Request. The latter are instances where these non-gambling related provisions are included within a "range" of statutes that otherwise relate to gambling and betting activity. It is an accepted method of citation in United States legal writing to include a "range" of related statutes even if the range includes repealed or irrelevant statutes. When the United States suggests that the references to these "range" statutes complicate its understanding of Antigua's claim it is merely being disingenuous.

VII. Conclusion

27. For the foregoing reasons, Antigua believes it is not necessary to submit a supplemental submission as suggested by the United States. Nevertheless, were the Panel to decide that it would like a further submission from Antigua on the issues raised by the United States (or on other issues), Antigua respectfully requests that the Panel allow Antigua to submit this on a date to be determined by the Panel, but not to delay the 29 October 2003 due date for the United States' first submission.[24]

28. Antigua further requests that the Panel dismiss the request for preliminary rulings on the three issues raised by the United States in the Request.

[24] In paragraph 23 of the Request, the United States cites as a justification for delay its need to hold "consultations with sub-federal entities (…) required by U.S. law (…)." However, under the applicable federal statute, these state-federal consultations were to have been initiated no later than seven days, and to have been actually held within 30 days, after the request for consultations from Antigua was received. *See* 19 U.S.C. §3512(b)(1)(C).

List of Exhibits

73	Letter dated 11 June 2003 from the United States Department of Justice to the National Association of Broadcasters