BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS285

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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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. If there were any doubt that these measures, which are consistent with the GATS, are permitted, Article XIV removes any such doubt. 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. Antigua has not provided sufficient evidence and argumentation to overcome either of these initial hurdles. Since both of these issues have already been discussed elsewhere, the United States will offer only the following brief comments in this submission.

A. Antigua has failed to make a *prima facie* case as to the existence or meaning of the measure(s) that are the subject of its claims.

6. A complaining party in WTO dispute settlement must demonstrate, through evidence and argumentation, the existence and meaning of the measure(s) purportedly at issue.[1] Antigua is the party making claims about U.S. domestic law, and it therefore "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[2] An examination of relevant "specific provisions" of domestic law is essential to the assessment of such a claim,[3] and Antigua has not provided the evidence and argumentation necessary in order for the Panel to make such an assessment.

7. 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,[4] along with cursory descriptions of those laws.[5] 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 – a failure that Antigua continues to dismiss with the baseless excuse that it is sufficient merely to cite a "range" of measures.[6] 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.

8. To the extent that Antigua means to assert a "collective effect" claim, it is well-established that the party asserting such a claim must provide evidence and argumentation to enable the Panel to first examine the independent meaning of each specific measure that allegedly contributes to a combined effect.[7] Then that party bears the further burden of detailing how, under domestic law, the individual measures operate together to give rise to the cumulative effect that is alleged to be inconsistent with WTO obligations.[8] Antigua has not done such an analysis, and has instead explicitly denied any obligation on its part to piece together the "puzzle" of its own claim.

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[1] The United States has already pointed out that Antigua's mere assertion as to the collective effect of U.S. gambling laws – that they represent a "total prohibition" on cross-border gambling – cannot amount to proof of a violation of WTO obligations. *See* First Submission of the United States, paras. 40-41. The notion of a total prohibition is not itself a measure, nor is it a notion with any legal status as such under U.S. law. *See* U.S. Request for Preliminary Rulings, para. 20. In its oral statement at the first Panel meeting, Antigua misstates the U.S. position as saying that only statutes can be challenged in WTO dispute settlement. *See* Oral Statement of Antigua & Barbuda, para. 16. This is obviously not the U.S. position.

[2] *See United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* Appellate Body Report, WT/DS213/AB/R, adopted 19 December 2002, para. 157 (*"U.S. – German Steel"*); First Submission of the United States, paras. 44-46.

[3] *See India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, paras. 66-69 (*"India – Patents"*); First Submission of the United States, para. 48.

[4] Exhibits AB-82 and AB-99.

[5] Exhibits AB-81 and AB-88.

[6] *See e.g.,* Antigua's 19 December 2003 letter to the Panel.

[7] *See* First Submission of the United States, paras. 50-55.

[8] *See id.*

9. Antigua's claim is indeed a puzzle. 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.[9] As the complainant, Antigua itself formulated its broad claims, thus it alone must undertake the "exhausting exercise of plodding through hundreds of state and federal statutes" to make its *prima facie* case, and the Panel cannot disregard Antigua's failure or explicit refusal to do so.[10] 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.

B. Antigua has failed to prove the existence of a U.S. commitment relating to gambling measures.

10. The United States has addressed the absence of a U.S. commitment in its responses to the Panel's questions.[11] To summarize, this is again an issue on which Antigua bears the burden of proving that – notwithstanding the absence of any reference to gambling services in the U.S. schedule – the United States has made an implicit commitment for such services. Antigua has offered a series of arguments, none of which can be sustained according to the customary rules of interpretation of public international law. When the U.S. schedule is interpreted according to those rules, it becomes apparent that the United States has not made a commitment for gambling services.

11. 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.[12] The Secretariat note recording that discussion recounts the following statement by the United States:

> Time and resources should not be spent in exhaustive study of the CPC, which was inadequate not only for financial services and telecoms but more generally. That explained why some countries had chosen not to use the CPC as the basis for scheduling and why scheduling in some sectors had been done on a sui generis basis. . . . Attention should focus on the improvement of W/120. Delegations should indicate which sectors seem to them poorly defined in W/120 or elsewhere

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[9] *See Japan – Measures Affecting Agricultural Products,* Appellate Body Report, WT/DS76/AB/R, adopted 19 March 1999. paras. 125-131 (finding that a Panel cannot rule in favor of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it).

[10] *See* Oral Statement of Antigua & Barbuda, para. 24.

[11] *See* U.S. Responses to Panel Questions, responses to questions 1-8.

[12] *See* Committee on Specific Commitments, Report of the Meeting Held on 2 April 1998, Note by the Secretariat, S/CSC/M/5 (6 May 1998).

and the Committee should work on an understanding to improve these definitions.[13]

12. No Member expressed disagreement with the U.S. premise that "some countries had chosen not to use the CPC." In fact, 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."[14] In the same discussion, Hong Kong confirmed that "[t]he provisional CPC was merely an individual option for members."[15]

13. In sharp contrast to its position as a third party in the present dispute, the EC did not then assert that non-CPC schedules should be read according to the CPC (and thus in defiance of the intent of the parties). On the contrary, the EC stated that "[w]hen a schedule made no reference to the CPC, the interpretation of the extent of commitments was difficult.[16] In making this suggestion, the EC was acknowledging what the United States has argued from the outset of this dispute – that the CPC does not control the interpretation of the schedule of a Member that chose not to refer to it.[17]

14. These statements all confirm the basic premises of the U.S. position on this issue – *i.e.,* that a Member scheduling GATS commitments during the Uruguay Round was free to choose or not to choose to inscribe references to the CPC descriptions; that the result of not choosing to inscribe such references is that the CPC does not control the interpretation of that Member's commitment; and that any elaboration that may be desired by another Member must be achieved through negotiations, not through dispute settlement. In light of these considerations, to now read the U.S. schedule according to the CPC would only improperly "add to or diminish the ... obligations provided in the covered agreements," in direct contravention of Article 3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

15. 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 Part IV of this submission. In fact, in view of those concerns, and the numerous bans or restrictions and strict controls on gambling, it would be surprising to find that the United States did schedule such a commitment.

III. ALLEGED INCONSISTENCIES WITH THE GATS

[13] *Id.*, para. 4.

[14] *Id.*, para. 6.

[15] *Id.*, para. 10.

[16] *Id.* There was no mandatory requirement to take any such steps during or after the Uruguay Round negotiations.

[17] Moreover, as the United States has already pointed out, any elaboration that a Member may desire is a matter for negotiations, not dispute settlement. *See* First Submission of the United States at paras. 65-66.

16. The United States considers that the two threshold issues discussed above are sufficient to dispose of all of Antigua's claims. However, for the sake of argument, and without prejudice to the foregoing arguments, we will proceed to demonstrate Antigua's failure to prove each of its claims regarding alleged inconsistencies with the GATS.

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

17. 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).[18]

18. 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.

19. 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).

20. Antigua's claims appear to rely on sub-paragraph (a), which bars the maintenance or adoption of "limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test," and on sub-paragraph (c), which bars "limitations on the total number of service operations ... expressed in terms of designated numerical units in the form of quotas or the requirements of an economic needs test."[19] These provisions may be summarized as follows:

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[18] The United States has already explained that, to the extent that Antigua's claims rest on Article XVI:1, Antigua misconstrues that provision as a general rule requiring market access. Article XVI prohibits only the specific types of limitations on establishment listed in Article XVI:2. *See* First Submission of the United States, paras. 80-81.

[19] *See* First Submission of Antigua & Barbuda, paras. 184-185; Oral Statement of Antigua & Barbuda, para. 101.

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)

21. 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"[20] of the limitation or the manner in which it is "expressed"[21] must correspond to the detailed specifications reproduced in the column on the right. (Also, with respect to sub-paragraph (c), the numerical units in question must be "designated."[22]) Antigua has completely failed to offer the Panel the kind of precise statutory analysis necessary to apply these requirements to U.S. law.

22. 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." For example, 18 U.S.C. § 1084 applies to persons providing gambling services as a business.[23] It says that such persons may not use certain facilities for certain types of transmissions.[24] It does not purport to restrict the number of providers, operations, or quantity of output of services, much less do so in a form or manner of expression, or with a numerical designation, of the kind indicated in Article XVI:2 (a) or (c).

[20] The ordinary meaning of "form" in this context clearly refers to the particular way in which the limitation is manifested, rather than its alleged effect. *See The New Shorter Oxford English Dictionary,* p. 1006 (defining "form" *inter alia* as "shape, arrangement of parts," or "[t]he particular mode in which a thing exists or manifests itself," or, in linguistics, "the external characteristics of a word or other unit as distinct from its meaning.").

[21] The ordinary meaning of the verb "express" in this context is "[r]epresent in language; put into words" or "manifest by external signs." *See id.*, p. 890.

[22] The ordinary meaning of the verb "designate" in this context is "[p]oint out, indicate, specify." *See id.*, p. 645.

[23] *I.e.,* persons "engaged in the business of betting or wagering." *See* 18 U.S.C. § 1084(a).

[24] Specifically, they may not "knowingly use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a).

23. Significantly,18 U.S.C. § 1084 does not prevent persons engaged in gambling businesses from using wire communications facilities for other purposes.[25] This confirms that the U.S. legislators drafting this provision accepted that a number of gambling service providers would continue to exist and operate without quantitative restraints.[26] Congress only wished to require such providers to observe restrictions on the character of their activities involving wire communications facilities.

24. The two other statutes mentioned in Antigua's Oral Statement, 18 U.S.C. §§ 1952 and 1955, also restrict the characteristics of gambling services without purporting to restrict the number of providers, operations, or quantity of output of gambling services. Both statutes make it a crime at the federal level for gambling service providers or other persons to engage in activities that violate certain state and/or federal laws.[27] In each case the restrictions take the form of, and are expressed as, limitations on the characteristics of an activity; they do not mention, much less impose, a "numerical quota," a "designated numerical unit," or any other prohibited form or manner of expression mentioned in Article XVI:2(a) and (c).

25. Finally, Antigua's *de facto* "zero quota" claim[28] 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.

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[25] *See* 18 U.S.C. § 1084(b) ("Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.").

[26] Antigua incorrectly asserts that "the United States' prohibition applies irrespective of the quality or specific characteristics of the service or the service supplier" and concludes on that basis that "the United States prohibition is a quantitative restriction and not a qualitative restriction." *See* Oral Statement of Antigua & Barbuda, para. 102. In fact, the application of U.S. restrictions clearly depends on non-quantitative characteristics of the service and/or supplier (*e.g.,* whether the services are supplied by wire communications facilities, whether they comply with sub-federal laws, etc.).

[27] 18 U.S.C. § 1952 essentially makes it a crime at the federal level of government for violators of certain state or federal laws (including, but not limited to, laws pertaining to business enterprises involving gambling, untaxed liquor, narcotics, or prostitution) to extend their activities into interstate or foreign commerce. Section 1952 thus restricts the character of legally authorized gambling services to the same extent as the underlying laws that it enforces. It does not, however, limit the number of providers, number of operations, or quantity of output of such services. Similarly, 18 U.S.C. §1955 makes it a crime at the federal level of government to conduct a gambling business that meets specified size, duration and/or revenue requirements and is in violation of the law of the U.S. state or other political subdivision in which it is conducted.

[28] *See* First Submission of Antigua & Barbuda, para. 184; Oral Statement of Antigua & Barbuda, para. 101.

26. 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.

27. As these examples demonstrate, the United States does not "prohibit" cross-border supply of gambling services.

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

28. 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: Antigua incorrectly asserts that "gambling and betting services offered from Antigua and those offered in the United States are virtually the same," and that these services and the entities that provide them are therefore "like services and service suppliers" – notwithstanding significant differences cited by the United States.[29]

- Less favorable treatment: Antigua incorrectly asserts that U.S. restrictions on remote supply of gambling do not apply to certain activities (an apparent claim of

[29] *See* First Submission of Antigua & Barbuda, para. 194; Oral Statement of Antigua & Barbuda, para. 36.

de jure discrimination).[30] It also asserts that restrictions on remote supply of gambling make it harder for Antiguan firms to compete in the U.S. market because of their cross-border remote location (an apparent claim of *de facto* discrimination).[31]

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.

29. After a cursory treatment of the issue of likeness of services and service suppliers in its first submission, Antigua has more recently adopted the strategy of trying to reverse its burden of proof by asserting that "the United States has not submitted arguments or evidence sufficient to support a conclusion that the United States and Antiguan gambling and betting services are 'unlike.'"[32] Antigua is again trying to ignore the complaining party's burden of proof in WTO dispute settlement proceedings. Antigua is the party asserting a violation of Article XVII, therefore Antigua alone bears the burden of providing evidence and argumentation proving likeness.

30. Past panel and Appellate Body reports provide little detailed discussion of the legal issues surrounding likeness of services and suppliers, but the basic framework for such an analysis is clear. 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.

31. To engage in this analysis, this Panel must first identify the services and suppliers it is comparing. Antigua has described the types of services and suppliers it licenses as Internet "virtual casinos" and Internet and telephone sports betting ("sportsbook") operators.[33] The Panel's task therefore appears to be to determine whether Antigua has in the first instance

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[30] The two activities cited by Antigua are lotteries and parimutuel horse race betting. *See* Oral Statement of Antigua & Barbuda, para. 92.

[31] *See* Oral Statement of Antigua & Barbuda, para. 91.

[32] *See* Oral Statement of Antigua & Barbuda at para. 51. Antigua's comments on the issue of likeness in its oral statement consisted of an attack on what it described as "claims" by the United States regarding the absence of likeness. *See* Oral Statement of Antigua & Barbuda at paras. 35, 39. Needless to say, the only "claims" at issue regarding likeness in this dispute are the unsubstantiated claims made by Antigua.

[33] Antigua seems to take issue with this characterization, but has offered no alternative description of its services and suppliers for purposes of a "likeness" analysis. *See* Oral Statement of Antigua & Barbuda at para. 35. Antigua's first submission clearly stated that Antigua offers an interactive gaming license, which is "for casino-type, random selection and card games" – also described by Antigua as "virtual casinos" – supplied by Internet; and an interactive wagering license, which is "for sports betting" supplied by Internet or telephone. *See* First Submission of Antigua & Barbuda, paras. 39-40. These services and their operators are the relevant Antiguan services and suppliers for purposes of a likeness analysis.

established that its Internet "virtual casino" services and suppliers are "like" U.S. non-remote gambling services and suppliers, and whether Antigua's Internet and telephone sportsbook services and suppliers are "like" sportsbook services and suppliers in the State of Nevada (the only part of the United States where such services are allowed).

a. Operational and consumer characteristics.

32. 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.

33. 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.

i. Remote gambling has different consumers.

34. Antigua's own evidence shows that Internet gambling services have different customer bases than other gambling services, as reflected by Bear Stearns' conclusion that "Internet gamers are generally not the same customer as land-based gamers."[34] Indeed, Internet gambling sites tend to attract gamblers who do not consume other forms of gambling, partly by virtue of the ability to indulge in gambling in seclusion without the stigma or effort required to go to a public gambling facility.[35] Most telling of all is the fact that Antigua's own consultants unequivocally state that Internet gamblers are different from other gamblers in terms of "financial stability, motivation, physiological effects, need for acknowledgement, and social facilitation."[36]

ii. Remote gambling operates differently.

35. Antigua itself concedes that a virtual casino is a *mere imitation* of a real casino.[37] The games operate differently; while designed to resemble real casino games, virtual games actually

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[34] *See* Bear Stearns, E-Gaming: A Giant Beyond Our Borders, p. 55 (September 2002), Exhibit AB-36 ("Bear Stearns Report"). This assessment plainly contradicts the four anecdotal statements relied on by Antigua (in footnote 317 of its first submission and paragraph 53 of its oral statement) for the proposition that its services are "virtually the same" as services offered in the United States..

[35] *See* Exhibit U.S.-10, p. 1 (discussing solitary nature of Internet gambling).

[36] *See* Exhibit AB-80, pp. 5-6.

[37] Antigua states that a virtual casino "is designed to mimic land-based casino settings" and provides "virtual imitations of video poker terminals, slot machines and other gambling machines." *See* First Submission of Antigua & Barbuda, para. 39.

consist of betting on software algorithms.[38] Antigua's own evidence shows that the environments virtual casino services operate are completely different from those of real casinos.[39]

36. As to other forms of remotely supplied gambling, Antigua still has not attempted to offer specific proof of likeness. The United States reiterates the point made in its first submission that particular forms of gambling have operational and supplier characteristics that sharply distinguish them from other forms of gambling. The two most clear-cut examples are lotteries and parimutuel wagering, which differ from other forms of gambling both in terms of their operation (for example, by a common pool in the case of parimutuel betting) and their suppliers.[40]

iii. Consumers perceive remote gambling differently.

37. In assessing "end use" or "consumer tastes and preferences," as Antigua urges, the Panel should begin from the premise repeatedly asserted by Antigua – that gambling is a recreational service. Assuming that to be the case for purposes of argument,[41] the "end use" of a gambling service would be to provide recreation. The characteristics shaping consumer perceptions of gambling services would therefore be primarily those characteristics that influence the recreational value of gambling activity.

38. Antigua's "end-use" and "consumer perception" arguments thus 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.

39. No one would dispute that, in terms of the consumer's experience, services providing graphical "virtual reality" simulations that mimic such recreational activities as horseback riding, participation in sports, etc., are unlike actual participation in those activities. 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 vastly greater importance than such a distinction might have in the context of other services.

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[38] Given the differences between goods and services, it may be more accurate to refer not only to "physical" characteristics, but also to "operational" or "functional" aspects of the service. Antigua dismisses the these issues as "superficial." Such characteristics cannot be dismissed as irrelevant, especially not in the gambling context, where they determine consumer's chances of win or loss (*i.e.,* the "price" of the gambling service).

[39] *See* First Submission of the United States, para. 98. Antigua attempts to respond to this point by simply claiming that a person sitting at a real slot machine is having the same experience as a person playing a virtual slot machine from a home, school, etc. As discussed below, Antigua's own evidence confirms that the consumer perception of the virtual setting differs greatly from the real setting.

[40] *See* First Submission of the United States, paras. 95-96.

[41] The United States reiterates that it is only assuming *arguendo* the existence of a commitment for such services for purposes of explaining the failure of Antigua's argument. As discussed above at paras. 10-15, gambling services are not "other recreational services (except sporting)" within the meaning of the U.S. specific commitments.

40. 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.[42] 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.

41. 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. For example, they observe that:

- "[T]he 'physical' transaction of collecting winnings ... can be highly rewarding" – and lack of this sensation creates a "barrier" between traditional gamblers and gambling on the Internet.[43]

- "Internet and traditional gamblers appeared to be different in terms of motivation to gamble. Traditional gamblers gambled for more expressive and affective reasons than Internet gamblers. Traditional gamblers enjoyed gambling as a means of escape. The 'real' gambling environment was more conducive to satisfying these needs than Internet gambling in the home."[44]

- "Traditional gamblers reported greater physiological effects (*e.g.,* increased heart rate) when gambling compared to Internet gamblers. For instance, traditional gamblers reported more feelings of nausea, dizziness and stomach contractions after experiencing a sizeable loss."[45]

- "Internet gambling sites may not satisfy a deeper psychological need – the need for self-esteem. Typically, gambling establishments have always operated in a social environment. An important aspect of such an environment has been the level of social reinforcement that exists. ... At first sight, it would appear that

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[42] First Submission of the United States, para. 97. Antigua tries to dismiss some of these differences as mere "marketing techniques" that have no impact on consumer perceptions. *See* Oral Statement of Antigua & Barbuda at 55-56. Antigua overlooks the fact that the entire point of a "marketing technique" is to influence consumer perceptions. Moreover, Antigua's assertion is further contradicted by its submission of a report stating that consumers in the U.S. perceive gambling as a diversion rather than a daily activity. *See* Bear Stearns Report at 45, Exhibit AB-36. If true, that would suggest that the qualitative difference in consumer experience between virtual and real casinos is especially pertinent to U.S. consumers.

[43] See Exhibit AB-80 at 5.

[44] *Id.*

[45] *Id.*

> social reinforcement is unavailable in Internet gambling, *i.e.,* if you win on an Internet gambling site, who is there to witness it?"[46]

All of these observations go directly to the issue of consumer perception. They confirm that consumer perceptions of Internet gambling are nothing like perceptions of real gambling.

42. Antigua's comparison between Internet gambling and Internet sale of music, or sale of goods (books, wine, etc.) reinforces the foregoing point.[47] In Antigua's examples, the consumer's end objective in using a particular service is to transact for the attainment of something – be it a song, a bottle of wine, etc. – that is identical or nearly identical to the product or service one could get by going to a physical facility. 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.

43. Antigua asserts that the regulatory and law enforcement risks inherent in a service are relevant to "likeness" only insofar as they shape consumer perceptions and competitive relationships in the marketplace for services.[48] Antigua also denies that virtual casinos or other forms of gambling by remote supply involve different regulatory and law enforcement risks than real casinos. The United States disagrees with both of these assertions.

44. 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. The GATS explicitly recognizes in its preamble the "right of Members to regulate" services. The "like services and suppliers" language of Article XVII must therefore be interpreted in light of that object and purpose of the GATS. Thus one must consider not only the different competitive characteristics of a service or supplier as such, but also the existence of regulatory distinctions between services in interpreting and applying the likeness analysis under Article XVII. Such issues have sometimes been addressed in the goods context under the rubric of consumer perceptions and their impact on competitive relationships,[49] but they merit independent

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[46] *Id.* at 5-6.

[47] *See* Oral Statement of Antigua & Barbuda at para. 54.

[48] *See* Oral Statement of Antigua & Barbuda, para. 48. In the same paragraph, Antigua quotes the Appellate Body's statement in *EC–Asbestos* that "Under Article III:4, evidence relating to health risks may be relevant in assessing the competitive relationship in the marketplace between allegedly 'like' products." In the services context, regulatory distinctions between services and suppliers have a significant impact on the "competitive relationship in the marketplace" between those services and suppliers, and could therefore be considered under that analysis.

[49] For example, the *EC–Asbestos* Panel considered health dangers in the context of consumer perceptions. *See European Communities–Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, para. 113.

consideration in the context of the GATS. They assume particular importance in this dispute because gambling is so heavily regulated.

45. As previously discussed, the United States maintains and applies a regulatory distinction between remotely supplied gambling services and other gambling services, with the former subject to even tighter restrictions than the latter. This distinction arises from the numerous distinguishing law enforcement, consumer protection, and health concerns associated with the remote supply of gambling.

i. Remote gambling poses a greater organized crime threat.

46. The United States has provided evidence showing that U.S. law enforcement authorities have seen organized crime playing a growing role in Internet gambling.[50] Antigua claims that any such concerns are indistinguishable from existing concerns about organized crime involvement in other forms of gambling. The comments of a Canadian law enforcement official show why Antigua is incorrect, and confirm the views of U.S. law enforcement. According to a Detective Inspector of the Ontario Illegal Gaming Enforcement Unit:

> Internet Gambling provides organized criminals with everything they could ever want from a criminal enterprise: anonymity, large amounts of cash, the ability to control the odds, very little chance of getting caught, and power. Criminals gravitate towards money and the more fast-moving the money is, the more appealing it is.[51]

47. The U.S. Federal Bureau of Investigation ("FBI") Racketeering Records and Analysis Unit provided the following assessment to Congress in 1999:

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[50] By asserting that U.S. claims about the involvement of organized crime in Internet gambling are "unsubstantiated," Antigua is apparently choosing simply to disbelieve the official statements of U.S. and Canadian authorities on this issue cited at paragraph 11 of the U.S. first submission. *See* Oral Statement of Antigua & Barbuda, para. 85. Nonetheless, these statements are clear. Moreover, at an October 3, 2001, Congressional hearing, Dennis M. Lormel, who was then chief of the Financial Crimes Section at the Federal Bureau of Investigation, had the following discussion with a U.S. legislator:

> Rep. Oxley: I won't ask you to discuss specifics, but is the Bureau pursuing any cases that involve a linkage between Internet gambling and money laundering?
> Mr. Lormel: Yes, sir. There are a minimum of two pending investigations, as we speak, that I'm aware of. It's more in keeping with our organized-crime site [sic] of the house, which is not my area of expertise. But I am -- from my prior assignment in Pittsburgh, I'm aware of a case that we actually worked in our shop out there.
> Rep. Oxley: And are you pursuing any cases linking organized crime to Internet gambling?
> Mr. Lormel: I believe so, sir, yes.

Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before House Committee on Financial Services, 107th Cong., p. 42 (2001), excerpt at Exhibit U.S.-20.

[51] L.D. Moodie, Detective Inspector, Ontario Illegal Gaming Enforcement Unit, Gambling Law Enforcement Systems Issues Conference, March 8, 2002, p.18, Exhibit U.S.-21.

> Organized crime ["OC"] groups are heavily involved in offshore gambling. OC involvement is in four different areas. (1) Using offshore sportsbooks as layoff sources for U.S. based bookmaking operations, (2) Extending credit to finance offshore gambling operations, (3) Setting up offshore gambling operations temporarily for the purpose of ripping off customers, (4) Setting up offshore gambling operations as a permanent means of income for the organization.[52]

48. Looking ahead, the FBI stated that:

> Offshore gambling will become increasingly popular as it is legalized and accepted in more nations throughout the world. Despite it's appearance of legitimacy, organized crime has already infiltrated the industry.[53]

49. As the foregoing comments suggest, while the tentacles of organized crime clearly reach many forms of gambling, remotely supplied gambling, and Internet gambling in particular, raises uniquely grave concerns. These include, *inter alia,* the enticing new opportunities for organized crime presented by the amount of money and manipulability inherent in Internet gambling; the opportunity to use gambling by remote means of supply as a clearinghouse through which organized crime bookmakers in the United States can "lay off" their bets;[54] and the opportunity for organized criminals to more easily hide their involvement in gambling and evade law enforcement by operating beyond the intense scrutiny of regulators and law enforcement officials in the gambler's jurisdiction.[55]

ii. Remote gambling poses a greater money laundering threat.

50. 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 ("DEA") disagrees with Antigua's assertions. The DEA report concludes that "internet gambling in

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[52] Federal Bureau of Investigation, RRAU Analysis of Offshore Gambling, p.1 (1999), Exhibit U.S.-22.

[53] *Id.*, pp. 4-5.

[54] *See, e.g.,* Press Release, dated June 4, 2002, 17 Members and Associates of the Gambino Crime Family Indicted for Corruption on the New York Waterfront, United States Attorney's Office for the Eastern District of New York, Exhibit U.S.-23 ("The defendants allegedly used off-shore wire-rooms in Costa Rica to place tens of thousands of dollars in sports bets per week for approximately 30 bettors.").

[55] The latter concern was a major factor in the adoption of restrictions on the remote supply of gambling in the early 1960s. At the time, long before the Internet exacerbated the problem, U.S. Attorney General Robert F. Kennedy already testified that "our information reveals numerous instances where the prime mover in a gambling or other illegal enterprise operates by remote control from the safety of another State – sometimes half a continent away." Testimony of Attorney General Robert Kennedy, Hearings Before the Senate Judiciary Committee on the Attorney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess., p. 4 (1961) ("Kennedy testimony"), Exhibit U.S.-24.

Antigua and Barbuda is sometimes used for money laundering."[56] It also states that Internet gambling in three other Caribbean countries raises money laundering concerns.[57] Similarly, a U.S. State Department report, while praising changes in Antigua's statutes, nonetheless concluded that Antigua "remains susceptible to money laundering because of its loosely regulated offshore financial sectors and its Internet gaming industry."[58]

iii. Remote gambling poses a greater threat of fraud and other consumer crimes.

51. 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. It is true that many forms of gambling involve a high potential vulnerability to fraud and other crimes; that is a major reason why gambling services require the utmost regulatory scrutiny. But 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.[59] It also disregards the inherent manipulability of Internet gambling. The National Gambling Impact Study Commission ("NGISC") found that "the global dispersion of Internet gambling operations makes the vigilant regulation of the algorithms of Internet games nearly impossible."[60]

iv. Remote gambling poses a greater and broader threat to human health.

52. Antigua goes to great lengths to try to show that Internet gambling is no more addictive than other forms of gambling. Yet ultimately it only proves the obvious proposition that the precise mechanics of gambling addiction is a novel issue on which not all authorities agree. 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.[61]

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[56] Drug Enforcement Administration, The Drug Trade in the Carribean: A Threat Assessment, September 2003, DEA-03014, p. 3, Exhibit U.S.-25. *See also* Bear Stearns Report, p. 40, Exhibit AB-36, (discussing Antigua and five other jurisdictions, and concluding that "although these major markets provide for some of the most lucrative and popular gaming sites on the Internet, they also provide for the least amount of public information. . . . In our view, this lack of access to information increases the risk profile of the region tremendously.").

[57] *Id.* at 12, 19, and 31.

[58] *See* U.S. State Department, International Narcotics Control Strategy Report: Money Laundering and Financial Crimes, March 2003, p. XII-87, available at http://www.state.gov/documents/organization/18171.pdf.

[59] *See* First Submission of the United States, paras. 14-15.

[60] NGISC Report at 5-6, Exhibit AB-10. Putting the point more bluntly, the Senate Committee on the Judiciary stated that the Committee agreed with one of the NGISC commissioners, who stated that "anyone who gambles over the Internet is making a sucker bet." Exhibit U.S.-5, p. 6.

[61] For example, the American Psychiatric Association states that "Internet gambling, unlike many other types of gambling activity, is a solitary activity, which makes it even more dangerous: people can gamble uninterrupted and undetected for unlimited periods of time." Exhibit U.S.-10, p. 1. *See also* First Submission of the United States, paras. 19-20.

53. 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. Even if (*quod non*) Internet gambling is only equally addictive, or only half as addictive, opening the floodgates to legalized remote supply of gambling services into homes, schools, offices, etc., would clearly involve an enormous growth in the opportunity for gambling and, consequently, for gambling addiction.[62]

v. Remote gambling poses a greater threat to children and youth.

54. 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. Antigua specifically denies that any of the remotely supplied gambling games offered from Antigua are designed to resemble video games or be attractive to children.[63] Attached to this submission are images of a few of the numerous child-oriented games offered on gambling websites licensed by the Antiguan government.[64] The video game presentation, cartoon-like design, and childish iconography of such games such as "Haunted House," "Rock 'n Roller," "Dinosaur Slots," "Alien Alert," "Goblins Cave," and "Ocean Princess" speak for themselves.[65]

55. Antigua also denies that minors lack access to credit cards and other payment instruments.[66] The testimony of a senior executive of Visa (which describes itself as the world's largest consumer payment system)[67] before the U.S. Commission on Online Protection refutes Antigua's assertion in the clearest possible terms. After observing that the Child Online Protection Act "basically assumes that only adults have access to a credit card or a debit card," the Visa executive testified:

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[62] One of Antigua's own consultants has stated that "[r]esearch has consistently shown a positive relationship between the availability of gambling and both regular and problem gambling." *See* Mark Griffiths and Paul Delfabbro, The Biopsychosocial Approach to Gambling: Contextual Factors in Research and Clinical Interventions, eGambling: The Electronic Journal of Gambling Issues, issue 5, 2001, *available at* http://www.camh.net/egambling/archive/pdf/EJGI-issue5/EJGI-issue5-complete.pdf. *See also* NGISC Report at 4-19, Exhibit AB-10 (stating that "[a]s the opportunities for gambling become more commonplace, it appears likely that the number of people who will develop gambling problems also will increase.").

[63] *See* Oral Statement of Antigua & Barbuda, para. 77.

[64] Exhibit U.S.-26.

[65] In addition, the American Psychiatric Association states that "[o]ne significant hazard is that many online games sites – which target children and teens – have direct links to gambling sites. Many of these sites offer "freebies" and other supposed discounts to get young people started." *See* Exhibit U.S.-10, p. 2.

[66] *See* Oral Statement of Antigua & Barbuda, para. 72.

[67] Visa describes itself as "the world's leading payment brand and largest consumer payment system," with more than 396 million cards issued through U.S. financial institutions. *See* http://usa.visa.com/personal/newsroom/?it=ss_/index.html.

> To the contrary, it is important for the Commission to understand that this assumption simply is not correct. Access to a credit card or a debit card is not a good proxy for age. The mere fact that a person uses a credit card or a debit card in connection with a transaction does not mean that this person is an adult.
>
> Many individuals under the age of 17 have legitimate access to, and regular use of, credit cards and debit cards. For example, parents may designate their child as an"authorized user" of the parent's credit card or debit card. This actually is quite common, particularly for credit cards. Whenever this occurs, the child will have access to the parent's credit card number or debit card number and can use that card number to access materials deemed "harmful to minors" on the Internet.
>
> In addition, many children under the age of 17 have their own deposit accounts and may have access to a debit card that accesses such account.
>
> ...
>
> Thus, although the [Child Online Protection] Act assumes that only adults have access to a credit card or a debit card, it is important for the Commission to understand that this assumption is simply not true. As a result, the Commission may want to focus its attention on more suitable methods of verifying age.[68]

The same Visa executive also noted the danger of unauthorized use of credit cards by minors.[69] In addition, a 1999 survey conducted in the United States found that 28 percent of respondents between the ages of 16 and 22 had at least one major credit card, including seven percent of the younger high school students (age 16 to 18).[70] Since 1999, efforts to market credit cards to Americans under the age of 18 have only expanded.[71] Thus Antigua's assertion that "payment systems such as credit cards are not available to minors" is wrong; minors *do* have ever-increasing access to such instruments, therefore 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.

56. 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. The United States does not assert that such concerns would *always* establish a regulatory distinction between remotely supplied services and non-remote services. Likeness is a case-by-case analysis. Gambling is a special case because it is a service that is "the target of special

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[68] Testimony of Mark MacCarthy, Senior Vice President for Public Policy, Visa U.S.A., Before the Commission on Online Protection, pp. 3-4 (June 9, 2000), Exhibit U.S.-27.

[69] *Id.* at 3.

[70] American Savings Education Council, *1999 Youth and Money Survey, available at* http://www.asec.org/youthsurvey.pdf, pp. 4, 11.

[71] *See* Amit Asaravala, Why Online Age Checks Don't Work, *Wired News* (Oct. 10, 2002) ("Since [1999], credit card companies have been making it even easier for minors to get cards in their names."), Exhibit U.S.-28.

scrutiny by governments in every jurisdiction where it exists."[72] Remote supply of gambling poses a far greater danger of eluding that scrutiny, causing the various problems described above and therefore requiring a regulatory distinction between remote supply and other forms of supply.

c. International classifications distinguish on-line gambling from other forms of gambling.

57. To the extent that international classifications bear on the issue of likeness, the explanatory notes to recent services classifications support the finding of a "likeness" distinction between remote supply of gambling and other forms of gambling. For example, the most recent version of the CPC, version 1.1, identifies four distinct components of CPC subclass 96920, "Gambling and betting services." They are (1) "organisation and selling services of lotteries, lottos, off track betting," (2) "casino and gambling house services," (3) "gambling slot-machine services," and (4) *"on-line gambling"* (emphasis added).[73]

58. Antigua asserts that W/120 and the CPC both provide a single category for gambling services. Of course, this is incorrect with respect to the W/120 categories, which do not mention gambling services. With respect to the CPC, it is hardly surprising the provisional document referenced in the GATS negotiating history, unlike its more recent successor, did not address the new phenomenon of on-line gambling. These sources should not play a significant role in any likeness analysis that the Panel might undertake in this particular dispute.

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

59. In the preceding section, the United States discussed the significance of regulatory distinctions in determining that two gambling services or suppliers are not "like." Turning now to the issue of less favorable treatment, it is equally important to recall that even within a group of like services or like suppliers, nothing in the GATS prevents the maintenance of *nationality-neutral* regulatory distinctions.[74]

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[72] *See* NGISC Final Report, p. 3-1, Exhibit AB-10.

[73] Central Product Classification Version 1.1, ST/ESA/STAT/SER.M/77/Ver.1.1, E.03.XVII.3, code 96920, Exhibit U.S.-29. *See also* International Standard Industrial Classification of all Economic Activities, ST/ESA/STAT/SER.M/4/Rev.3.1, E.03.XVII.4, code 9249, (with explanatory note breaking down "gambling and betting activities" into five distinct categories, consisting of (1) "sale of lottery tickets," (2) "operation (exploitation) of coin operated gambling machines," (3) "operation (exploitation) of coin operated games," (4) "operation of gambling cruises," and (5) *"operation of virtual gambling websites"* (emphasis added)), Exhibit U.S.-29.

[74] *See* Robert E. Hudec, GATT/WTO Constraints on National Treatment: Requiem for an "Aim and Effect" Test, 32 International Lawyer 619-649 (1998), available at: http://www.worldtradelaw.net/articles/hudecrequiem.pdf, p. 30-31 ("[A] government is permitted to distinguish between otherwise "like" service providers by imposing regulatory distinctions based on some other characteristic of the service provider or service transaction.").

60. Thus, 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.[75] 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 (Article XVII:1 and XVII:2). 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" (Article XVII:3). U.S. restrictions on remote supply of gambling services comply with these requirements.

a. Antigua has not identified any U.S. gambling law that discriminates on the basis of national origin.

61. One pair of commentators has observed that "a foreign crook who is subject to a nation's criminal laws is still receiving 'national treatment.'"[76] That observation applies equally in this dispute. As the United States has repeatedly pointed out, U.S. restrictions on remote supply of gambling apply regardless of national origin.

62. Nonetheless, 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.[77] Once again, Antigua's assertions are factually incorrect.

i. Parimutuel betting on horseracing.

63. The United States has addressed the issue of remote supply of parimutuel wagering on horseracing in its responses to the Panel's questions.[78] To briefly summarize, Antigua claims that U.S. federal law in the form of the Interstate Horseracing Act creates an "exemption" that permits remote supply of parimutuel wagering on horseracing by domestic suppliers.[79] This is incorrect. U.S. federal criminal statutes continue to prohibit the transmission of bets or wagers

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[75] This distinction is not, contrary to Antigua's assertion at paragraph 42 of its oral statement, an intermodal distinction between cross-border supply and supply by local presence. A U.S. domestic remote supplier is no less subject to U.S. restrictions on remote supply of gambling than a remote supplier operating on a cross-border basis.

[76] Don Wallace, Jr. and David B. Bailey, *The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions,* 31 Cornell Int'l L.J. 615, 627 (1998).

[77] As noted above, Antigua still has not shown, and cannot show, that it offers "like services" through "like suppliers" with respect to either of these services.

[78] *See* U.S. Responses to Panel Questions, responses to questions 21-22.

[79] *See* Oral Statement of Antigua & Barbuda, para. 92.

on horse races to the same extent that they prohibit other forms of remote supply of gambling services. The 2000 amendment to the IHA did not alter pre-existing federal criminal law.[80]

64. In fact, contrary to Antigua's claims, the IHA actually provides *more favorable* treatment to foreign suppliers of gambling services. As noted in the U.S. response to the Panel's question 22, U.S. laws do not prohibit remote supply of information assisting in the placing of parimutuel wagers on horseracing (or any other form of gambling) as long as the information is being transmitted from a place where that betting is legal to a place where that betting is legal. In the parimutuel horseracing context, the IHA imposes special requirements on the supply of such gambling services domestically (*e.g.,* requiring certain written consent agreements), but does not impose any requirements on cross-border supply of the same services.[81] Foreign services and suppliers thus get a better deal under the IHA than their domestic counterparts.

ii. Lotteries.

65. Antigua asserts that lottery games are offered by remote supply in the United States, apparently because, unsurprisingly, state lotteries use computers and other electronic devices to communicate with their various offices and distributors.[82] Each of the distribution mechanisms that Antigua identifies (stores, gas stations, pharmacies, newsstands, bars and restaurants, and vending machines) requires the service consumer to present himself or herself in person at an authorized lottery distribution location. Thus the supply of the service by these means is non-remote. In other words, Antigua simply confuses the fact that lotteries often have many retail points of presence with the entirely different concept of remote supply.

b. Antigua's theory that U.S. laws alter the "conditions of competition" for gambling services is unfounded.

66. Overshadowing Antigua's *de jure* national treatment claims regarding lotteries and parimutuel betting on horseracing is a much more ambitious claim about *de facto* national treatment. Antigua argues that although U.S. law provides "formally identical" treatment to

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[80] In its oral statement, Antigua suggested in connection with this issue that it might "withdraw its suggestion to the Panel not to examine the actions listed in Section III of the Annex to its panel request as separate measures," apparently for the purpose of asserting a new claim of *de facto* less favorable treatment. *See* Oral Statement of Antigua & Barbuda at para. 94. Antigua cannot "withdraw" its clarification regarding the measures at issue here. The Panel's terms of reference are what they are; they are established by the complaining Member's panel request, not by how a responding party defends itself. Antigua has already clarified, in the Panel's words, that "it does not intend to treat the items listed in Section III as distinct and autonomous 'measures' but, essentially, will seek to rely upon them as evidence to illustrate the existence of a general prohibition against cross-border supply of gambling and betting services in the United States." *See* Communication from the Panel, 29 October 2003, para. 31. The Panel has therefore already determined that it "will not consider and examine [the items in Section III of the panel request] as separate, autonomous measures." *Id*. Any attempt by Antigua to retract its clarification of its panel request would amount to an improper attempt to expand the Panel's terms of reference.

[81] *See* 15 U.S.C. § 3002(3) (defining an "interstate off-track wager" to include only domestic wagers between U.S. states); § 3004(a) (requiring a consent agreement as a condition precedent to acceptance of an interstate off-track wager).

[82] *See* Oral Statement of Antigua & Barbuda, para. 93.

foreign and domestic services and suppliers, the fact that it restricts remote supply of gambling more severely than non-remote supply alters the "conditions of competition" in the market for gambling services in a way that disfavors Antiguan suppliers.[83]

67. The basis for Antigua's argument is difficult to discern. As a factual matter, one can only assume that the abolition of U.S. restrictions on the remote supply of gambling would pose an enormous new competitive threat to Antiguan services and suppliers, as major U.S.-based gambling service providers would begin offering their services in competition with those of Antiguan websites.

68. Nonetheless, Antigua complains that it is disadvantaged because U.S. domestic suppliers can still supply their services by means that are not remote.[84] 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.

69. 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:

> Specific 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.

Consistent with footnote 10, even if one assumes, contrary to fact, that the United States made a national treatment commitment for gambling services, the United States would be under no obligation to make up for the fact that Antiguan services and their suppliers are from somewhere other than Nevada, New Jersey, etc., and by reason of that fact may find it inherently more difficult to offer non-remote gambling services in the United States than would be the case for some domestic suppliers. Through footnote 10, the negotiators of the GATS anticipated and rejected precisely this kind of argument.

B. Antigua has failed to prove the inconsistency of any U.S. measure with GATS Article VI (domestic regulation).

70. Antigua alleges an "obvious violation of Article VI:1" the premises of which remain totally obscure.[85] 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

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[83] *See* Oral Statement of Antigua & Barbuda, para. 91 (citing GATS Art. XVII:3).

[84] *See* Oral Statement of Antigua & Barbuda, para. 91.

[85] *See* Oral Statement of Antigua & Barbuda, paras. 104-106.

reassert that Antigua has failed to offer anything approaching a *prima facie* case of violation of Article VI.[86]

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

71. 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,[87] yet it has already been established that the PayPal agreement is not a measure within the Panel's terms of reference.[88] 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

72. 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.

73. The fact that these measures so clearly fall within Article XIV also serves to confirm that it would have been incomprehensible for the United States to make them the subject of a specific commitment.

A. Factual background on U.S. measures.

74. Antigua mentioned three statutes in its oral statement: 18 U.S.C. § 1084, 18 U.S.C. § 1952; and 18 U.S.C. § 1955. Since the "total prohibition" asserted by Antigua is not a notion capable of any independent existence under U.S. law, an examination of Article XIV can only take place in the context of these specific measures. The United States therefore addresses the following discussion to the origins, operation, and purpose of the three statutes that Antigua has deigned to mention in the course of its arguments.

1. The Attorney General's Program to Curb Organized Crime and Racketeering – §§ 1084 and 1952.

75. Following the inauguration of President John F. Kennedy, the U.S. Department of Justice launched an all-out assault on organized crime in the United States. As part of that effort,

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[86] *See* First Submission of the United States, paras. 104-106.

[87] *See* Oral Statement of Antigua & Barbuda, paras. 107-110.

[88] *See supra* n.80 (discussing Antigua's suggestion that it might attempt to redefine the Panel's terms of reference).

Attorney General Robert F. Kennedy proposed the Attorney General's Program to Curb Organized Crime and Racketeering. Sections 1084 and 1952 of Title Eighteen, United States Code, formed part of that program. Congress enacted them in 1961.

76. Explaining the overall effect of his program, including the portions that would become §§ 1084 and 1952, Attorney General Kennedy observed that organized crime posed an "acute" danger to the United States, and that "the need for action is clear."[89] The question, in his words, was "what can be done effectively to curtail these hoodlums and racketeers who have become so rich and so powerful." His answer:

> These people use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we could curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size.
>
> Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime, all throughout the country.[90]

77. Attorney General Kennedy emphasized that the goal of his package would not be to displace state laws restricting gambling, but to aid in their enforcement.[91] Noting that federal law enforcement work in other areas had been "effective" and "helpful to local law enforcement," he urged that similar enforcement cooperation between federal and state authorities was "essential in getting action against organized crime, which is so well organized and so well entrenched on a multistate basis that local law enforcement often is virtually powerless to act without aid and assistance of the federal government."[92]

a. Operation and purpose of § 1084.

78. 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. As previously noted, this statute does not prevent the cross-border supply of gambling information so long as the information assisting in the placing of certain types of bets or wagers is being transmitted from a state or foreign country where such wagering is legal to a state or foreign country where wagering on the same event is legal, or if the information is being transmitted for news reporting.[93]

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[89] Kennedy testimony, p. 11.

[90] *Id. See also id.* at 2 ("Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling. From huge gambling profits flow the funds to bankroll the other illegal activities I have mentioned including the bribery of local officials.").

[91] *See id.*

[92] *See id.*

[93] *See* 18 U.S.C. § 1084(b).

79. 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. The legislative history describes them in the following terms:

> The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.[94]

According to Attorney General 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.[95]

b. Operation and purpose of § 1952.

80. Section 1952 of Title 18, United States Code, 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."

81. 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."[96] In his words, "[t]he target clearly is organized crime."[97] Government investigations made it clear that "only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials."[98]

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[94] House of Representatives Report No. 87-967, pp. 1-2 (1961), Exhibit U.S.-30. *See also* Kennedy testimony, p. 6 ("It cannot be overemphasized that this bill is designed, first to assist the States and territories in enforcement of their laws pertaining to gambling and like offenses. Second, the bill would in that regard help suppress organized gambling...") (original emphasis omitted). Attorney General Kennedy emphasized that the legislation was not aimed at "a social wager between friends." *Id.* U.S. court decisions have confirmed these purposes. For example, a 1983 decision of a federal appellate court found that § 1084 was enacted to assist the states in enforcing their own laws against gambling. *See United States v. Southard*, 700 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1983), Exhibit U.S.-31.

[95] *See* Kennedy testimony, p. 5.

[96] Kennedy testimony, p. 15

[97] *Id.*, p. 16.

[98] *Id.*

2. The Organized Crime Control Act of 1970 and the operation and purpose of § 1955.

82. 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. In the Statement of Findings prefatory to that Act, Congress described the threat posed by organized crime in grave terms:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.[99]

83. Section 1955 prohibits conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business. Section 1955(b) defines the term "illegal gambling business" as "a gambling business which – (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2000 in any single day."

84. 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.[100] Second, Congress and the President expressed concern that gambling "preys upon society," especially the poor.[101] Third, from a law enforcement standpoint, "gambling is more susceptible than most organized

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[99] *See* 18 U.S.C. § 1961 note.

[100] *See* 116 Congressional Record H9711 (daily ed. Oct. 7, 1970) (Statement by Rep. Poff), Exhibit U.S.-32.

[101] *See id. See also* House of Representatives Rep. No. 91-1549, p. 53 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4029, Exhibit U.S.-33 ("The provisions of this title [referring to 18 U.S.C.§ 1955] do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function.").

crime activities to detection and prosecution."[102] Commenting on the law enforcement purpose in particular, a legislator observed that:

> [T]itle VIII's expansion of the Federal jurisdiction over large scale gambling cases will improve local efforts [to enforce antigambling laws], not merely by providing an impetus for effective and honest local law enforcement, but also by making available to assist local efforts the expertise, manpower, and resources of the Federal agencies which under existing Federal antigambling statutes have developed high levels of special competence for dealing with gambling and corruption cases.[103]

85. Several U.S. courts have confirmed and elaborated on these purposes.[104] For example, the courts have confirmed that § 1955 is a measure against organized crime,[105] and that it provides an enforcement tool in cases where local officials fail to prosecute illegal gambling.[106]

3. State laws.

86. Because all of the foregoing measures operate in part as measures to enforce state restrictions on gambling, it may be useful for the United States to elaborate on the policy concerns that underlie state-level restrictions. Generally speaking, state laws prohibiting or restricting various forms of gambling rest on state policies relating to public health, safety, welfare, and the preservation of good order. Exhibit U.S.-34 provides further elaboration on these state policies.

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

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[102] *See* 116 Congressional Record H9711 (Statement by Rep. Poff), Exhibit U.S.-32].

[103] *Id.* at H9712.

[104] *See, e.g., United States v. Scavo*, 593 F.2d 837, 841 (8th Cir. 1979) (In enacting § 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was "intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern.." (quoting House of Representatives Rep. No. 1549, 91st Cong. 2d. Sess. (1970)); *United States v. Hawes*, 529 F.2d 472, 478 (5th Cir. 1976) (It is not the purpose of § 1955 to prohibit gambling, but only to prohibit "illegal" gambling of such a size as would affect interstate commerce. Organizers of illegal gambling activities are among the organized criminal elements targeted by Congress.). Exhibit U.S.-31.

[105] *See United States v. Box,* 530 F.2d 1258, 1264-65 (5th Cir. 1976) (Clearly, the dominant concern motivating Congress to enact § 1955 was that large-scale gambling operations in this country have been closely intertwined with large-scale organized crime, and indeed may have provided the bulk of the capital needed to finance the operations of organized crime. The target of the statute was large-scale gambling operations – local "mom and pop" bookmaking operations were to be left to state law.). Exhibit U.S.-31

[106] *See United States v. Nugent*, 389 F. Supp. 817, 819 (W.D. La. 1975) (The legislative history of 18 U.S.C. § 1955 indicates Congress' intention to place in the hands of the prosecutor a weapon with which to attack the corruption of local law enforcement personnel and public officials by persons involved in illegal gambling operations.). Exhibit U.S.-31.

87. 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. In order to meet the requirements of Article XIV, a measure must fall within the scope of paragraphs (a) to (e) of Article XIV, and it must meet the requirements of the introductory provisions in the *chapeau* of Article XIV.[107]

88. Article XIV has not been interpreted through dispute settlement. Some of its provisions are similar to provisions of Article XX of the GATT, while others differ in certain respects.

1. The measures are necessary to secure compliance with GATS-consistent laws or regulations.

89. The operative language in the opening phrases of Article XIV(c) of the GATS is virtually identical to Article XX(d) of the GATT 1994. 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]." The text states that these measures include, *inter alia,* laws or regulations relating to "the prevention of deceptive and fraudulent practices"[108] and laws or regulations relating to "safety."[109]

90. The text indicates that this GATS provision applies to laws that are (1) designed to "secure compliance" with laws or regulations not themselves inconsistent with some provision of the GATS, and (2) "necessary" to that end.[110]

91. First, a panel must determine whether the measure in question is designed to ensure compliance with other WTO-consistent measures.[111] Article XIV(c)(i)-(iii) provides examples of these types of measures – examples that are intended to be illustrative rather than exhaustive, as indicated by the use of the word "including."

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[107] *See United States – Standards for Reformulated and Conventional Gasoline,* Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, p. 22 (*"U.S.–Gasoline"*) (interpreting Article XX of the GATT).

[108] Article XIV(c)(i).

[109] Article XIV(c)(iii).

[110] *See Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* Appellate Body Report, WT/DS161/AB/R – WT/DS169/AB/R, adopted 10 January 2001, para. 157 (*"Korea–Beef"*) ("For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance.")

[111] *Canada–Periodicals,* Panel Report, para. 5.9 (interpreting Article XX of the GATT).

92. Second, a panel must examine whether a measure is "necessary."[112] In doing so it should apply the ordinary meaning of the term, which has been described in the following manner by the Appellate Body:

> The word "necessary" normally denotes something "that cannot be dispensed with or done without, requisite, essential, needful". We note, however, that a standard law dictionary cautions that:
>
> > [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity".[113]

93. This ordinary meaning indicates that "the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable.'"[114] Moreover, the concept of necessity is a continuum that may extend, depending on the nature of the interest served, all the way to measures that "make a contribution" to compliance.[115]

94. In the services context, a panel should also bear in mind the particular objects and purposes of the GATS, including recognition of the "right of Members to regulate." This includes the right of a Member to heavily restrict a highly risky service (in this case, gambling by remote supply) while allowing the use of a less risky service.[116]

a. 18 U.S.C. §§ 1084, 1952, and 1955 are measures for the enforcement of state laws on gambling and like offenses.

95. 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.

96. Sections 1084, 1952, and 1955 make an essential contribution to the enforcement of state law. Before these federal laws existed, violators of state gambling laws often avoided

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[112] The views expressed here regarding the term "necessary" under Article XIV of the GATS are restricted to that context, and are do not necessarily apply to the same term in other provisions of the GATS, or in other WTO agreements.

[113] *Korea – Beef,* Appellate Body Report, para. 160 (interpreting Article XX of the GATT).

[114] *Korea – Beef,* Appellate Body Report, para. 161 (interpreting Article XX of the GATT).

[115] *Id.* (interpreting Article XX of the GATT).

[116] *See EC–Asbestos,* para. 168 (interpreting Article XX of the GATT) ("Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place.")

prosecution by supplying their services remotely, from locations out of reach of state and local law enforcement authorities.[117] 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.

97. The design of §§ 1952 and 1955 confirms their role as enforcement measures, inasmuch as a violation of state law is an express element of the offense described in each of those statutes. In the case of § 1084, the same characteristic is reflected in the fact that the statute includes an exception in § 1084(b) the scope of which depends on the extent to which gambling activity is lawful under state law. Moreover, as described above, the legislative history of these measures is painstakingly explicit in recording the fact that they were designed in large part as measures to aid in the enforcement of state restrictions on gambling in situations where such compliance was doubtful.

98. 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,[118] 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.[119] Section 1952 also secures compliance with other state laws not challenged by Antigua, including laws relating to liquor, narcotics, and prostitution.[120]

99. The state gambling laws, which §§ 1084, 1952, and 1955 help to enforce, protect fundamentally important state policies relating to public health, safety, welfare, and the preservation of good order.[121] Prominent among these is society's interest in remaining free from crime, and organized crime in particular. More generally, these policies protect the public from the law enforcement, consumer protection, health, and other concerns associated with gambling and more fully described elsewhere in this submission.[122]

b. 18 U.S.C. §§ 1084, 1952, and 1955 are measures for the enforcement of the criminal laws violated by organized crime.

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[117] *See* discussion supra at paras. 74-85.

[118] One relevant group of statutes not included in that selection is are the statutory age limits on participation in gambling activities established by every U.S. state. Antigua has acknowledged the existence of these restrictions. *See* Oral Statement of Antigua & Barbuda, para. 70 & n.12. As with other state-level restrictions, §§ 1084, 1952, and 1955 are necessary to secure compliance with these laws.

[119] *See* First Submission of the United States, para. 44.

[120] *See* 18 U.S.C. § 1952(b) (defining "unlawful activity" for purposes of § 1952).

[121] *See* Exhibit U.S.-34.

[122] *See* discussion *supra* at paras. 46-56.

100. As measures against organized crime, §§ 1084, 1952, and 1955 are necessary to secure compliance with all the various WTO-consistent U.S. criminal laws violated by organized crime activities. As discussed above, §§ 1084, 1952, and 1955 are clearly measures against organized crime, and legislative history and subsequent interpretations confirm that purpose.

101. Inherent in the concept of "organized crime" are certain types of criminal activity in which organized crime groups typically engage.[123] The specific crimes most closely associated with organized crime include, in addition to gambling offenses, such crimes as loansharking (*i.e.,* illegal lending), prostitution, the sale and distribution of drugs and/or pornography, the fencing (*i.e.,* illegal purchase) and distribution of stolen property, money laundering, and labor racketeering (*i.e.,* the use of force or threats to obtain money for ensuring jobs or labor peace).[124] In addition, the pursuit of these organized crime activities often entails acts or threats of murder, kidnapping, arson, robbery, bribery, and extortion, not to mention lesser crimes such as assault, fraud, and larceny.[125] The Panel will not be surprised to learn that all of the foregoing offenses are crimes under the federal and/or state laws of the United States.

102. 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.

103. To effectively enforce these underlying criminal laws against organized criminals, law enforcement authorities require special statutory tools that are adapted to the challenges posed by sophisticated, well-financed criminal groups. Sections 1084, 1952, and 1955 are three such tools.[126] As with terrorist groups and other criminal groups, one essential enforcement strategy for pursuing organized crime is to place restrictions on its major sources of funds.[127] Gambling has long been recognized as a major source of funds for organized crime, and clearly a major purpose behind the enactment of §§ 1084, 1952, and 1955 was to restrict that source of funds and ensure that it would not escape the scrutiny of law enforcement officials.[128]

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[123] In the words of one commentator, every organized crime activity is made up of "more specific crimes, which constitute what we know as organized crime." *See* Jay S. Albanese, The Prediction and Control of Organized Crime: A Risk Assessment Instrument for Targeting Law Enforcement Efforts, p. 19, *available at* http://www.ojp.gov/nij/international/programs/ukr_pred_paper.pdf (2002).

[124] *See id.* at 19-20.

[125] *See* 18 U.S.C. § 1961(1)(A) (defining "racketeering activity" in part to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical .. which is chargeable under State law and punishable by imprisonment for more than one year.").

[126] *See* discussion *supra* at paras. 74-85.

[127] *See* United States Attorney' Bulletin, June 1999, p. 27, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4703.pdf ("Most crimes have some type of financial gain as the primary motive. Curtailing or eliminating the proceeds of criminal activity can have a substantial impact on reducing crime overall. ...Taking the profit out of crime is also an important step in eliminating the operating capital needed to fund ongoing criminal activity.").

[128] *See* discussion *supra* at paras. 74-85.

104. Congress further confirmed the association between these specific measures and enforcement in the field of organized crime when it enacted Title IX of the Organized Crime Control Act of 1970, known as the Racketeer Influenced and Corrupt Organizations Statute, or, more commonly the "RICO" statute.[129] In the RICO statute, Congress defined "racketeering activity" as including, *inter alia,* acts indictable under §§ 1084, 1952, and 1955.[130]

105. In addition, §§ 1084, 1952, and 1955 were all enacted out of the firmest possible conviction that they were indispensable to defeating organized crime.[131] The Senate Report for the Organized Crime Control Act of 1970 thus stressed that:

> What is needed here ... are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.[132]

106. As this quotation suggests, a major goal of U.S. law enforcement efforts against organized crime is to attack its sources of money and power.

2. These measures are "necessary to protect public morals or to maintain public order".

107. Article XIV(a) provides a general exception for measures that are "necessary to protect public morals or to maintain public order." The text does not elaborate on these provisions except to note, with respect to public order, that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[133]

a. Meaning of public order and public morals.

108. Article XIV(a) provides an exception for measures "necessary to protect public morals or to maintain public order." The term "public order" refers to the familiar civil-law concept denoted in French by the expression "*ordre public*" and its functional counterpart in common-

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[129] codified at 18 U.S.C. §§ 1961-1968. Exhibit U.S.-35.

[130] *See* 18 U.S.C. § 1961(1)(B).

[131] For example, Attorney General Kennedy testified before the U.S. Senate that there was an "acute need" for §§ 1084 and 1952. Kennedy testimony at 17, Exhibit U.S.-24. *See also* id at 5 (§ 1952: "[T]his bill is vital. We need it. Local law enforcement officials need it. The country needs it.").

[132] *See* Senate Rep. No. 91-617, 91st Cong.,1st Sess., p. 79 (1969). President Nixon similarly noted in his Message on Organized Crime that organized crime's "economic base is principally derived from its virtual monopoly of illegal gambling, the numbers racket, ... the importation of narcotics," and certain other crimes. *Id.* at 35. The Senate Report also incorporated the American Bar Association's conclusion that "[t]he magnitude of the [organized crime] problem makes it clear that all legitimate methods of combating organized crime must be utilized." *Id.* at 76.

[133] Article XIV, footnote 5.

law systems, the concept of "public policy" (although the latter term is also used in other contexts with a broader meaning). In the words of Judge Lauterpacht, the concept of "public order" refers to the "fundamental national conceptions of law, decency and morality."[134] "Public morals" in turn refers to standards of right and wrong that can be described as "belonging to, affecting, or concerning the community or nation."[135]

109. The concepts of public order and public morals are closely associated with restrictions on gambling. For example, the original use of "public morals" in the GATT followed prior multilateral trade negotiations in which it was well-understood that restrictions on the importation of lottery tickets – the forerunner of modern restrictions on cross-border gambling – would fall within the public morals exception.[136] Indeed, Members continue to maintain similar restrictions for similar reasons.[137] As to Internet gambling in particular, Antigua has correctly

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[134] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden),* 1958 I.C.J. 55, 90 (Judgment of Nov. 28) (sep. op. of Lauterpacht, J.).

[135] "Public" means "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation," and "moral" means "Of or pertaining to human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong...." *See New Shorter Oxford English Dictionary,* pp. 1827, 2204.

[136] The Economic Committee of the League of Nations put forward a draft convention that included an exception for "[p]rohibitions or restrictions imposed for moral or humanitarian reasons or for the suppression of improper traffic, provided that the manufacture of and trade in the goods to which the prohibitions relate are also prohibited or restricted in the interior of the country." *See* Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement drawn up by the Economic Committee of the League of Nations to serve as a Basis for an International Diplomatic Conference, League of Nations Doc. C.E.1.22. 1927 II.13. pp. 10, 15 (1927), Exhibit U.S.-36. Commenting on this draft, the U.S. State Department observed that the moral exception was "necessary" because of "American prohibitions or restrictions imposed for moral or humanitarian reasons or to suppress improper traffic relate inter alia to intoxicating liquors, smoking opium and narcotic drugs, *lottery tickets,* obscene and immoral articles, ...[etc.]." Department of State, The Secretary of State to the Minister in Switzerland (Wilson), *in* Papers Relating to the Foreign Relations of the United States, 1927, p. 257 (1942) (emphasis added), Exhibit U.S.-36. In the debate over the proposed exception, the representative of Egypt asked whether a prohibition on the importation of foreign lottery tickets would be covered by the moral exception. The president of the conference stated that such prohibitions would be covered by the exception for measures adopted for "moral or humanitarian reasons." International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference, p. 110, League of Nations Doc. C.21.M.12. 1928 II.7., p. 110 (1928), Exhibit U.S.-2R.

[137] For example, the 1999 Trade Policy Review of Israel observed that Israel maintained an import prohibition on "[t]ickets or publicity items for lottery or gambling" and identified the reason for this prohibition as "[p]ublic morals." Trade Policy Review - Israel - Report by the Secretariat, WT/TPR/S/58 at table III.8 (1999). Similarly, the 1999 trade policy review of the Philippines listed limitations on foreign ownership of gambling operations (*e.g.,* racetracks) under a heading that referred, *inter alia,* to limitations "for reasons of ... risk to health and morals." Trade Policy Review - The Philippines - Report by the Secretariat, WT/TPR/S/59 at table III.11 (1999) (The document does not specify precisely which reason is associated with the gambling ownership restriction, but from the context of the document it is reasonable to infer that restriction is based on "morals" or "health and morals."). Numerous countries prohibit imports of gambling paraphernalia on GATT Article XX grounds, although it is not always possible to discern whether these restrictions are attributed to public morals or to some other Article XX exception. To cite just one example, El Salvador "operates import prohibitions on a limited number of products, generally on grounds of health, security, morality or environmental protection," and includes gambling paraphernalia on the list of such products. *See Trade Policy Review - El Salvador - Report by the Secretariat,* WT/TPR/S/111 at para. 50 and table III.5 (2003).

noted that the WTO Secretariat in 1998 observed, with regard to the protection of public morals and the maintenance of public order under Article XIV, that "[m]easures to curb obscenity or to prohibit internet gambling might well be justified on these grounds."[138]

110. In the GATS, invocation of the "public order" portion of this exception is limited to measures necessary to respond to "genuine and sufficiently serious" threats to a fundamental interest of society.

b. Sections 1084, 1952, and 1955 are necessary to maintain public order and protect public morals.

111. 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.[139] 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."

112. As Congress found when it enacted the Organized Crime Control Act, the specific threats posed by organized crime include, among others, social exploitation; corruption and subversion of the democratic processes; economic losses and instability; and diminution of the domestic security and general welfare of the United States and its people.[140] These grave concerns meet the high standard for "genuine and sufficiently serious" threats to a fundamental interest of society, as required in the case of "public order" by footnote 5 of the GATS.

113. Antigua's own evidence dispels any possible doubt about the gravity of such concerns in the specific context of remote supply of gambling. The first paragraph of the Bear Stearns report submitted by Antigua states that:

> Many offshore jurisdictions, particularly those in the Caribbean, exert little or no regulatory control over gambling site operators, who are for the most part unknown. More importantly, they are beyond the control of the U.S. Justice Department. Still, these sites generate up to 60% of their revenues from the vast American market. They are a direct pipeline of dollars out of the U.S. into virtually unknown hands. In addition, such sites fall under loose offshore reporting requirements, so it is unclear how these funds are spent. *In our view,*

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[138] The Work Programme on Electronic Commerce: Note by the Secretariat, 16 November 1998, S/C/W/68, para. 26. While not legally binding, this observation by the Secretariat further confirms the association between restrictions on gambling and the protection of public morals and maintenance of public order.

[139] *See* discussion supra at paras. 46-51.

[140] *See supra,* para. 82 (quoting Statement of Findings accompanying the Organized Crime Control Act of 1970).

> *this uncertainty could pose a risk to national security from terror and/or criminal organizations.*[141]

Antigua's own evidence thus confirms that the United States is not alone in viewing remote supply of gambling as a potential vehicle for organized crime and other forms of lawlessness that threaten public order and public morals.

114. 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.[142] By thus expanding gambling from controlled settings into uncontrolled settings, remote supply expands the audience of potential gamblers – most notably by making it easy for children to gamble. While adults can be expected to exercise their own moral judgment, society recognizes that children have a less well-developed sense of right and wrong. Thus the availability of gambling in uncontrolled settings naturally provokes concerns about public morals that are present to a far lesser degree when gambling is conducted away from homes and schools and subject to verifiable age controls.[143]

115. The United States has already shown that §§ 1084, 1952, and 1955 are indispensable tools in the fight against organized crime and other forms of criminality.[144] At the same time, these statutes serve to suppress betting by remote supply, and are in that respect necessary to prevent the intrusion of gambling into uncontrolled settings.

116. 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.

3. The measures meet the requirements of the Article XIV chapeau.

117. 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

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[141] Bear Stearns Report, p. 1 (emphasis added), Exhibit AB-36. *See also id.*, p. 40, (discussing Antigua and five other jurisdictions, and concluding that "although these major markets provide for some of the most lucrative and popular gaming sites on the Internet, they also provide for the least amount of public information. . . . In our view, this lack of access to information increases the risk profile of the region tremendously. As we stated earlier in this report, we believe that the Carribean market, in which we believe a large number of operators are domiciled, could present a threat to national security given the lack of available information.")

[142] *See* NGISC Report at p. 5-1, Exhibit AB-10 ("[O]n-line wagering promises to revolutionize the way Americans gamble because it opens up the possibility of immediate, individual, 24-hour access to the full range of gambling in every home."). *See also* First Submission of the United States, para. 18 (discussing classification of gambling as vice activity and concerns about its spread into homes, schools, etc.).

[143] *See* discussion supra at paras. 54-55; First Submission of the United States, para. 18.

[144] *See* discussion supra at paras.74-85.

a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services." The purpose of the chapeau of Article XIV is to avoid abuse or misuse of the particular exceptions set forth in Article XIV(a) through (e).[145]

118. 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. On the contrary, as the United States has repeatedly observed, they apply equally regardless of national origin. Therefore the only question with respect to the chapeau is whether these laws constitute "a disguised restriction on trade in services."

119. Antigua has asserted that the real purpose of U.S. restrictions on remote supply of gambling is "simply protectionism, nothing more, nothing less."[146] As the foregoing discussion of the legislative history of §§ 1084, 1952, and 1955 amply illustrates, Antigua is mistaken. 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." On the contrary, their application is a legitimate and non-discriminatory response to the continuing threats posed by remote supply of gambling – including those newer threats posed by Internet gambling.

4. The United States cannot be required or reasonably expected to negotiate standards for cross-border supply of gambling.

120. Antigua's comments in its oral statement suggest a belief on its part that the United States should be required to address its concerns about remote supply of gambling by negotiating international regulatory standards.[147] This suggestion suffers from at least two basic flaws. First, as a legal matter, nothing in the text of the GATS requires such action. Second, as a factual matter, the absence of any U.S. domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to seek negotiations to permit such a regime for its cross-border suppliers.

121. The United States recognizes that certain other countries – including, most obviously, Antigua itself – have determined that they can regulate the remote supply of gambling services in a manner that those countries consider to be sufficient. Indeed, each Member has the right to determine for itself the level of law enforcement to provide through its domestic laws and regulations.[148]

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[145] *See U.S. – Gasoline,* Appellate Body Report, pp. 22 and 25.

[146] *See* Oral Statement of Antigua & Barbuda, para. 111.

[147] *See* Oral Statement of Antigua & Barbuda, para. 4; First Submission of Antigua & Barbuda, para.

[148] *See Korea–Beef,* Appellate Body Report, para. 176 ("It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations.").

122. The Panel has before it extensive evidence of the study and debate that has taken place in the United States concerning the possible regulation of remotely supplied gambling services. In spite of all of this study and debate, the United States has not found it possible to develop regulations for the remote supply of gambling on a domestic basis that would provide sufficient levels of law enforcement to satisfy the priorities of U.S. regulators.[149] Given this context, it is unreasonable to expect the United States to negotiate an "agreed regulatory context" for cross-border supply of such services.

5. An examination of Article XIV is not necessary to the resolution of this dispute

123. In closing, the United States wishes simply to reiterate that there is no need for the panel to reach Article XIV issues in order to resolve this dispute. While the maintenance and enforcement of U.S. restrictions on gambling clearly serves the interests identified by the GATS negotiators in Article XIV as being of overriding importance, it does so in a non-discriminatory manner that is in all respects fully consistent with the GATS.

V. CONCLUSION

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

[149] As the United States has pointed out, among the issues that have prevented the U.S. regulators from authorizing remote supply of gambling are the significantly greater regulatory concerns associated with remote supply of gambling, *see* discussion supra at paras. 46-56, including the law enforcement and other concerns described above that led to the enactment of, and require the enforcement of, §§ 1084, 1952, and 1955. Internet gambling poses such severe regulatory difficulties that the U.S. National Association of Attorneys General ("NAAG"), representing state law enforcement officials, has taken the unusual step of asking the federal government to enact new legislation to make U.S. restrictions on Internet gambling more explicit. *See* NGISC Report at 5-9, Exhibit AB-10. As the NGISC observed, "NAAG's position on Internet gambling is a rare stance by the association in support of increased federal law enforcement and regulation and is a clear indication of the regulatory difficulties posed by Internet gambling." *Id.*