Opening Statement
by
Sir Ronald Michael Sanders
Chief Foreign Affairs Representative of Antigua and Barbuda
on 26 January 2004
to the Second Meeting of the World Trade Organisation (WTO)
Panel in the Dispute:
United States — Measures Affecting the
Cross-Border Supply of Gambling and Betting Services
WT/DS285

I. INTRODUCTION

1. Mr Chairman and distinguished Panel members, it is our pleasure today to come before you again. I wish to thank you for the time and effort you have spent on this matter, and particularly your willingness to attend to this matter quickly. As I have noted previously, this is a very important matter for our country and the longer this dispute continues to linger, the greater the harm to our economy and our people.

2. Before I get to the heart of our presentation today, I would like to present some general thoughts about the status of this case. In our preparations for this meeting, we have reviewed the record in this proceeding as it has developed over the past months. In doing so, I was particularly struck that our first submission, filed with this Panel on 1 October 2003 continues to define this case. Although in our subsequent submissions and discussions the issues have been refined and considerably more evidence provided, all of the elements of our case were thoroughly presented in that first submission. Our case, as initially established in that submission, has gone effectively unrebutted by the United States.

3. That is the other point that struck me upon my review of the record. Despite the bold statements and claims of the United States in its various submissions and presentations, it *has* been singularly unsuccessful in substantively defending against our case. While the core of our case remains much as it was last October, so remain the strategies and arguments of the United States.

4. As I noted at our last meeting, a close examination of the United States' submissions reveals that they are replete with misstatements of Antigua's positions and evidence, overstatements of WTO law and unsupported evidentiary conclusions. This tactic of the United States is if anything, bold as throughout its materials the United States over and over again asks the Panel to suspend disbelief.

5. For example, let us look at the first three paragraphs of its second submission. In the first paragraph the United States says that Antigua wants the United States "to treat services and suppliers of other Members *more favourably* than its own domestic services and suppliers in respect of remote supply." We do not ask to be treated "more favourably." We simply want the right to compete, nothing more. And more importantly, while the United States may want to make this a case about what it has called "remote supply," what Antigua wants to compete in is the colossal United States domestic gambling market. And the only way we *can* compete is on a cross-border basis – something that the United States, in its GATS schedule of commitments, told us we could do.

6. In the second paragraph of its second submission, the United States argues that Antigua wishes this Panel to interpret the United States' GATS schedule "in ways that defy the customary rules of interpretation of public international law." But as has been clear from the beginning, and as the third parties have confirmed quite convincingly, what Antigua asks is that the United States GATS schedule *be* interpreted in accordance with customary rules of public international law. It is the United States in this case that would have the Panel discard the Vienna Convention, ignore the explanatory materials prepared by the United States federal agency that is lawfully delegated the responsibility of maintaining the United States schedule, and, instead, scour dictionaries for tangential uses of the word "sporting" that might support the United States' conclusion.

7. The third paragraph of the United States' submission, states that "Antigua has offered virtually nothing to support its assertion that all gambling services and suppliers are 'like,' against a mountain of contrary evidence." First of all, we have not only submitted substantial, third party evidence to demonstrate the "likeness" of gambling and betting services under the GATS, we have also extensively discussed "likeness" in a legal context under the WTO agreements as well. But where is "a mountain of contrary evidence?" In fact, the opposite is true. While Antigua has submitted vast amounts of evidence, the United States has submitted very little at all, instead relying on its own statements as if they are proof in and of themselves.

8. I could continue this analysis for just about every paragraph in the United States' second submission. But, I think enough has been said to make the point. Undoubtedly the Panel has already discerned for itself the differences between what the United States may *say* about something and what the record demonstrates to the contrary.

II. SUMMARY OF THE MAJOR ISSUES

9. At this stage, Antigua perceives the primary issues to be:

- The United States' insistence that the Panel read, comprehend, interpret and harmonise all United States domestic gambling and betting legislation in order to be in a position to conclude that the United States maintains one or more "measures" that might be contrary to its commitments under the GATS.

- The proper interpretation of the United States schedule of specific commitments under the GATS and whether it has made commitments in the area of cross-border supply of gambling and betting services.

- With respect to Article XVI of the GATS, whether Article XVI:1 is a "stand alone" provision and, if not, whether a total prohibition can be a "quota of zero" under Article XVI:2(a).

- With respect to Article XVII of the GATS, whether cross-border gambling and betting services from Antigua are "like" domestic gambling and betting services for purposes of Article XVII:l.

- Whether Article XIV of the GATS has any application to this case.

10. Two other issues overlay some of the other issues in this case, particularly those under Article XVII and Article XIV. These issues are:

- The attempt by the United States to divert the focus of this proceeding from the cross-border provision of gambling and betting services to something that the United States has labelled "remote" gambling and betting.

- Whether the United States has demonstrated that there are actual law enforcement and health concerns applicable to the cross-border gambling and betting services provided by Antigua sufficient not only to distinguish Antiguan services from United States domestic services for purposes of Article XVII of the GATS but also to justify a total ban on the provision of gambling and betting services from Antigua under Article XIV.

We will discuss the latter points primarily in the context of Article XVII.

III. THE MEASURES

11. In its second submission the United States continued to assert that Antigua has not met its "burden of proof' with respect to the existence of United States "measures." The United States' position appears to have three components. First, is the refusal to agree that its oft-repeated concession of the "total ban" is sufficient, in and of itself, to establish the existence of a "measure" for the Panel to consider in this proceeding. Second is the refusal to accept that Antigua has not only submitted substantial evidence of United States law but has also discussed in much detail the way United States law on gambling and betting works in practice. Third is the insistence that Antigua "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."[1]

12. We continue to believe that the most efficient way for the Panel to approach this dispute is on the basis of the unambiguous agreement of the parties that the cross-border provision of gambling and betting services from Antigua to consumers in the United States is always illegal under United States law. We have demonstrated the wide scope of what constitutes a "measure" under the GATS and other WTO agreements. We have also demonstrated that WTO jurisprudence supports our approach.

13. Yet, the United States essentially submits that the Panel can only assess Antigua's claim if we first provide a "precise statutory analysis"[2] of all federal and state laws and regulations applying to the cross-border supply of gambling and betting services from Antigua, and also, apparently, of all the laws and regulations authorising and regulating legal gambling in the United States. The United States also believes that it is incumbent upon the Panel to "examine the independent meaning of each specific measure (…)."[3] This concerns thousands of pages of legislative and regulatory provisions and (as the United States itself has noted) would make this case simply impossible. No matter how confidently the United States may so assert, there is no support for this kind of formalistic approach, either in the GATS, any of the other WTO Agreements or under WTO jurisprudence.

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1 Second Written Submission of the United States, WT/DS285 (the "US Second Submission"), para. 8.

2 US Second Submission, para. 21.

3 *Id*., para.8.

14. Such an approach will also make the resolution of many other trade disputes impossible, in particular claims brought by developing country Members against Members that maintain very complex domestic legislation with regard to a specific subject matter. Because of scarce resources, developing countries find it difficult to bring dispute settlement cases to the WTO even when the domestic legislation of the defendant is simple. An approach such as that insisted upon by the United States would serve only to deter developing Members from using the dispute settlement system, effectively limiting access to WTO dispute machinery to the richest Members. Furthermore there will likely be cases where the thousands of pages of domestic legislation are not available in English, French or Spanish. In such a situation a stringent requirement of "precise statutory analysis" of all these provisions would entail, to say the least, an insurmountable translation task. Finally, it would be totally impossible for panels to respect the nine months timeframe laid down in Article 20 of the DSU.

15. Of course, there may be circumstances in which a panel nevertheless has to undertake such a "precise statutory analysis," namely in situations where there is a genuine disagreement and a genuine lack of clarity about the effect of a Member's domestic law. But that is patently not the case here.

16. The United States, in its first submission, referring to the Appellate Body Report in *US - German Steel*, argued that Antigua had to submit evidence as to the scope and meaning of United States law. According to that Appellate Body report:

> "Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."

This is precisely what Antigua has done.[4]

17. Contrary to what the United States continues to maintain, Antigua has not "failed or refused" to submit evidence of the United States measures. In fact, the evidence that we have submitted on this point is more than sufficient to satisfy Antigua's burden of proof and to establish the existence of one or more United States measures – particularly because the United States has either expressly agreed or at least not sought to deny that:

- All cross-border supply of services from Antigua to the United States that involves placing a bet or wager is prohibited.
- It is impossible to obtain an authorisation to supply gambling and betting services on a cross-border basis to the United States.
- Its states maintain physical presence requirements.
- Its states maintain numerical limits on the number of service suppliers.

[4] *See*, Comments on the United States' request for preliminary rulings by Antigua and Barbuda, para. 11-13; AB First Submission, para. 134-138; AB Oral Statement of 10 December 2003, para. 19-22; AB Second Submission, para. 21-33; Exhibit AB 17 (p. 11-17); Exhibits AB 54-58, 73, 81-84, 86, 88, 89, 92, 94, 96-99, 116, 119,131-144.

- Its states have established monopolies and given exclusive rights to certain domestic operators.

18. The purpose of WTO dispute settlement is to stop the impairment of treaty benefits. It is not to undertake academic analyses of Member's domestic laws. It is also not to identify and remove specific "measures" of the defendant. If that were the case a defendant who loses a case could replace its "measures" with new and different "measures" that have the same effect. As we have demonstrated previously, under United States law, the federal government possesses the exclusive power to legislate in the area of international commerce. If the United States is concerned about how it might comply with an adverse ruling by the DSB against it in this proceeding, it need only look as far as what its Congress has done in countless other situations – impose one federal law governing the relationship between the United States and Antigua that is binding upon all of the states, automatically rendering all contrary state legislation moot.

IV. THE UNITED STATES' COMMITMENTS

19. The issue of the United States' commitments has been thoroughly and exhaustively addressed by both Antigua and the third parties. Despite its bold assertions to the contrary, the United States' position on this issue is simply not credible.

20. What the United States appears to have fallen back to at this stage are three, non-technical issues. First, the United States would like the Panel to read the general GATS scheduling methodology essentially in reverse – that is, unless a service subsector is expressly mentioned in a schedule, then it is *ipso facto* excluded. But that is not the case. The schedules of the Members are all organised around the concept of services sectors, with the understanding that once a particular service sector is listed in a schedule, then all its subsectors are also covered unless the Member clearly limits its commitment in relation to one or more of these subsectors. If a Member wanted to exclude an entire sector, it could either expressly say so or simply leave that sector off its schedule. However the schedules of the Members may differ in one way or another, all schedules are consistent with this approach. Therefore, either gambling and betting services are expressly (or at least clearly) excluded by the United States in its schedule or they are committed to. Together with the third parties, we have made a compelling case for the inclusion of gambling and betting services in subsector 10.D of the United States schedule.

21. The second defense asserted by the United States is that Antigua is trying to somehow "force" the CPC on the United States and its GATS schedule. We are not. But what we do think is appropriate is that the W/l 20 document and the CPC be used in the interpretation of the United States schedule under concepts of international law – and not the least because the United States International Trade Commission has expressly instructed us to do so in a public document.

22. The third defense of the United States – first raised in its second submission – seems to be the concept that, regardless of what its schedule might say (or might be interpreted to say) the United States simply would not have made a commitment in "the sensitive field of

gambling services."[5] At the outset, Antigua agrees with the United States when it said to the panel in *Mexico – Telecommunications* (emphasis added):[6]

> "To begin, the United States considers that whether or not Mexico was 'freezing' the level of market access prevailing at the time of the negotiations is irrelevant; the ordinary meaning of Mexico's Schedule speaks for itself and should control. *The extent of a Member's commitments cannot depend upon what it alleges to have intended at the time of the negotiations. The ordinary meaning of Mexico's Schedule instead dictates its commitments."*

23. WTO jurisprudence is also in agreement with the United States' position in its dispute with Mexico. Even if the United States made its commitment "unintentionally" this is not relevant for the interpretation of its Schedule. As the Appellate Body pointed out in *EC-LAN* in relation to a GATT schedule, schedules are an integral part of WTO law and need to be interpreted on the basis of Article 31 of the Vienna Convention – the purpose of which is to ascertain the *common* intentions of the parties. According to the Appellate Body "[t]hese *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty."[7]

24. We also cannot believe that the United States in particular would have made *any* commitment "unintentionally" and that, during the negotiations on its schedule, the United States did not realise that the only proper interpretation of the scope of its subsector 10.D is that it covers gambling and betting services. As both we and the EC have pointed out, quite a few countries, including many with considerably fewer available resources than the United States, were able to recognise where gambling and betting commitments might be made and to expressly exclude these services from their schedules.

25. We can speculate about why the United States may have made full commitments in this area, although we also understand that the reason, if any, is legally irrelevant. But the most plausible reason is that the United States, as the main advocate of the GATS and in an attempt to convince developing countries to open their services markets, made commitments in all sectors where it did not perceive an immediate competitive threat.

26. Before I leave the subject of the United States commitments, I would like to briefly touch on the United States' dictionary-based arguments. These simply do not hold up. The *New Shorter Oxford* dictionary provides differences for the use of "sporting" as a verbal noun and "sporting" as an adjective:

- As a verbal noun it means "the action of sport" and "participation in sport; amusement, recreation." According to the dictionary it is used in combinations with other words in the sense of "concerned with." This is of course precisely the type of usage one can expect in a classification such as W/l 20 or the United States schedule referring to "sporting services." Indeed, this is how the word "sporting" is used in the United States' own NAICS.[8]

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5 US Second Submission, para. 1.

6 Second Written Submission of the Unites States of America, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204 (5 February 2003), para. 20.

7 Appellate Body Report on *EC-LAN*, para. 84 (original emphasis).

8 Exhibit AB 208.

- As an adjective it means "sportive; playful," "engaged in sport or play," "interested in or concerned in sport" or, in more colloquial and ironic language "designating an inferior sportsman or a person interested in sport from purely mercenary motives. Now *esp. pertaining to be interested in betting or gambling. Chiefly in* sporting man." It is clear on the face of these definitions that "sporting" is not normally used as an adjective in relation to a word such as "services."

27. The Panel should also note that according to the United States, the term "sporting" does not only refer to gambling but, as stated in its response to the Panel's question 8 to the parties the term "sporting" also covers "other (non-gambling) forms of sporting." Thus rather than arguing that "sporting" should be given its ordinary meaning, the United States submits that "sporting" should be given *all* the meanings that can be found in a dictionary. In this case this would include:[9]

- Services concerned with sport.
- Prostitution.
- Services related to the spontaneous producing by a plant of an abnormal form or variety.
- Services related to gambling.
- Services relating to the taking of risks.

28. Even if it is true that dictionaries mention all these divergent meanings, the term "sporting" cannot simultaneously have all of these different meanings in a document if it is used just once.

V. ARTICLE XVI

29. As is the case with other issues in this proceeding, we believe that the arguments on Article XVI have been well developed in previous submissions. The late effort of the United States to avoid the scope of Article XVI by stating that it indeed allowed certain cross-border "gambling and betting" services is baseless. That brings us to a couple of its remaining legal points on this issue.

30. In its second submission the United States put forward an interpretation of Article XVI:2 that is disingenuous on two accounts. First, the United States interprets Article XVI:2 in a literal, exclusively text-based way. However, it does not do the same with Article XVI:1. The text of the latter unambiguously imposes a legal obligation on a Member to accord services of other Members treatment no less favourable that that provided for in its Schedule. In its first submission the United States argued that the Panel should set aside this clear text on the basis of a phrase from the *2001 Scheduling Guidelines*.[10] Antigua believes it appropriate that if Article XVI:2 is to be interpreted in a purely text-based way, that should also be the case for the Article XVI:1.

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9 *See* Exhibit US 37.

10 *See*, US First Submission, paras. 80-81, and footnote 110.

31. Second, the United States' textual analysis of Article XVI:2(a) is disingenuous because it is not based on the actual text of Article XVI but on a table summarizing the text. The actual text of Article XVI:2(a) mentions:

> "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." (emphasis added)

The United States has removed the word "whether" and reads Article XVI:2 as if its says "limitations on the number of service suppliers in the form of numerical quotas, monopolies, exclusive service suppliers (...)". However, the fact that the actual text contains the word "whether" indicates that the enumeration following it is not meant to limit the application of Article XVI:2(a) but rather to make it clear that the four forms of limitations on the number of service suppliers explicitly mentioned are in any event caught by Article XVI:2(a).

32. As discussed in our response to question 9 from the Panel, our interpretation is confirmed by the *1993* and the *2001 Scheduling Guidelines* which state unequivocally that a nationality requirement for service suppliers would be caught by Article XVI:2(a) as *equivalent* to a zero quota despite the fact that it does not have the *form* of a numerical quota. In fact, the United States' interpretation would for example allow a law that explicitly provides that "all foreign services are prohibited" to escape the application of Article XVI, because it is not expressed in numerical terms. This clearly cannot be the case.

VI. ARTICLE XVII AND "LIKENESS" ISSUES

33. The United States uses much of its Article XVII discussion not only to develop its "remote" gambling theory but also to lay out its claims concerning "law enforcement and health considerations." The United States uses both of these concepts to allege that Antiguan gambling and betting services and service suppliers are not "like" gambling and betting services and service suppliers domiciled in the United States.

34. We want to make it absolutely clear that Antigua does not believe there is any meaningful category of "remote" gambling for the purposes of this dispute. Antiguan services are necessarily "remote" because they are furnished cross-border, but this does not change their character as fundamentally gambling and betting services.

35. As a further point the United States complains that Antigua wishes to reverse the "burden of proof" on the issue of likeness; this is yet another misstatement. Our point here is that Antigua *has* demonstrated with considerable evidence and legal discussion that its gambling and betting services are "like" those in the United States for purposes of Article XVII – and that the United States has failed utterly to establish the contrary.

36. Moving on, and for convenience broadly following the topics as discussed in the United States' second submission, the United States first argues that Antiguan so-called "remote" gambling services do not compete with the gambling services offered domestically by United States operators because "remote gambling has different consumers." This is based on a statement in the Bear Stearns' report that "Internet gamers are generally not the same customer as land-based gamers."[11] But this obviously does not mean that "Internet based" and "land-based" gambling and betting services do not compete. It simply means

[11] US Second Submission, para. 34.

that, in Bear Stearn's view, gamblers choose their preferred distribution channel. For example, most consumers who buy music over the Internet will normally reduce or stop their visits to "brick and mortar" music shops. But, of course, there *is* competition between the two distribution channels because consumers switch from one to the other – just like a gambler can switch from one land based casino to another.

37. The United States also refers to the statements in the expert report of Professor Griffiths and Dr Wood that Internet gambling could involve a smaller risk of excessive gambling or "gambling addiction" than the more traditional forms of gambling available in the United States.[12] To the extent that regulatory concerns can play a role in the context of Article XVII at all (which we and the EC both discount), Antigua repeats that not every difference in public interest concerns raised by domestic and foreign services is capable of justifying radically different treatment. Certainly the prohibition of a *less harmful* foreign service cannot be justified by the argument that it is not "like" a *more harmful* domestic service that is allowed.

38. With regard to the claim that cross-border gambling offers a "mere imitation" of a casino, we make the following points. First, casino "imitations" form only part of the Antiguan product offerings. Second and more importantly, we strongly disagree that various product offerings can be meaningfully distinguished on what are really superficial comparisons between how they look, how they sound or whether their components clink about mechanically or connect electronically. The mistake the United States makes in trying to compare cross-border gambling and domestic gambling with physical activities such as "virtual reality" horse riding and actual horse riding is this – it is the *recreational activity of gambling – the experience of winning or losing* – that is fundamentally being engaged in, not the flipping of cards or the watching of a screen. The flipping of cards and the watching of a screen are merely the methods through which the same recreational experience is delivered. This is precisely why the United States' prohibition focuses on the wagering of money. US Exhibit 34 provides examples of statutory provisions articulating state gambling policies. The statute cited for Louisiana says:

> "Gambling has long been recognized as a crime in the state of Louisiana and despite the enactment of many legalized gaming activities remains a crime. Gambling which occurs via the Internet embodies the very activity that the legislature seeks to prevent."

39. In this connection, it is important to keep in mind that, as Dr. Howard J. Shaffer of Harvard University has stated in his expert's report that we are submitting to you today as Exhibit AB 185, in essence, *all gambling is experienced "locally" by the individual gambler himself*,[13] irrespective of whether the source of the gambling is a slot machine in a casino, a scratch ticket that the gambler scratches at home or an Antiguan operator who communicates via the Internet.

40. Of course, if one wants to engage in the dubious activity of comparing gambling offerings, we can do so. I refer the Panel to Exhibit AB 4, which are examples of scratch cards with a casino theme marketed by United States lotteries. These are also "mere imitations" of a casino and cannot be distinguished on that basis from Antiguan services.

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12 US Second Submission, paras. 34 and 41.

13 Exhibit AB 185, p. 8.

Casino games and their "imitators" all operate on the basis of the same simple premise – random selection.

41. The fact that random selection is performed by a software algorithm does not make a random selection game "unlike" a random selection game using another selection method. Furthermore random selection by software algorithms is used on a grand scale in state-sanctioned gambling in the United States and consequently cannot be the basis of a distinction between random selection games of Antiguan and United States origin.[14]

42. Alleged "operating differences" are in any event irrelevant for the betting on sports and other future events and for card games where players play against each other via Internet connections rather than whilst all sitting together in the same room (both major components of the Antiguan gambling industry). Further, these alleged differences cannot distinguish Antiguan cross-border gambling services from non-casino gambling that is legally and prolifically offered in the United States such as lotteries, the electronic gambling devices (or "EGDs") that are available in thousands of American pubs, bars, truck stops and convenience stores, or the "remote access" gambling that is offered by United States operators.[15]

43. On the issue of regulatory characteristics – first we again note that regulatory issues are not relevant for the assessment of likeness under Article XVII. Further, the United States is being disingenuous when it claims to "regulate" so-called "remote" gambling differently than "other gambling services." What the United States in fact does is *prohibit* cross-border gambling from other WTO Members, *tolerate* extensive domestic inter-state gambling and *regulate* at state level the rest of the massive domestic gambling market (whether "remote" or "non-remote").

44. The United States continues to make its vague and unsubstantiated allegations that "remote gambling" poses a greater organised crime threat. The United States says in its second submission that "Antigua is apparently choosing simply to disbelieve the official statements of U.S. and Canadian authorities on this issue (...)." That is absolutely correct, at least in so far as such statements are intended to apply to the cross-border gambling industry in Antigua.

45. Further, the United States does not explain exactly what constitutes "organised crime" but in most of the materials submitted by the United States, the crime at issue appears to be the gambling itself – and, of course, this makes the United States' argument circular: the gambling is organised crime because the United States declares it illegal.

46. The United States submits that it is more difficult for it to police an activity that is partially taking place abroad. This is no doubt correct. However, this applies to all cross-border economic activity and trade. Furthermore organised crime syndicates can and do abuse many areas of international trade to further their criminal objectives.[16] The answer to this threat is not a blanket prohibition of international trade but international cooperation.

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[14] *See* articles describing the use of computerized drawings and games by United States lotteries in Exhibits AB 179, 180 and 189. *See also* Matt Connor, "Game Trends", *International Gaming & Wagering Business* (January 2004), p. 28: "With a majority of the slots currently in use in U.S. casinos being the video variety (…)" (Exhibit AB 176).

[15] AB First Submission para. 80.

[16] *See* the report referred to by the United States in footnote 58 of its Second Submission. The report describes how "international trade", as such, is abused for criminal purposes (U.S. State Department,

47. Despite the cynical statement that "internet gambling in Antigua and Barbuda is sometimes used for money laundering,"[17] the United States does not cite even one specific example of money laundering via Antiguan gambling operators. Further, as of this day, I can confirm that the Antiguan authorities have received *no* communication whatsoever from the United States – much less any requests for judicial cooperation – concerning money laundering via Antigua' s gambling industry. Yet, we have received numerous other requests or enquiries from the United States about other instances of financial crime under the Mutual Legal Assistance Treaty which exists between Antigua and the United States and which the United States acknowledges operates successfully.

48. If the United States has *any* information about infiltration of organised crime syndicates in the Antiguan gaming industry or the use of our industry for money laundering purposes, we feel certain that the United States would have communicated this information to us to ensure appropriate action by both our authorities and theirs. As we explained in our first submission, Antigua has since 1999 handled more than 30 formal requests for information from the United States under a Mutual Legal Assistance Treaty yet not one of these requests involved criminal conduct related to Antigua's gaming industry.[18]

49. Antigua is and has always been willing to cooperate with the United States to combat crime. For instance, our Office of National Drug and Money Laundering Control Policy (the "ONDCP") routinely cooperates with the United States Drug Enforcement Administration or ("DEA") and the Federal Bureau of Investigation ("FBI"). In fact, DEA and FBI agents often operate in unison with our ONDCP agents.

50. The United States tries to substantiate its allegation concerning organised crime by referring to a statement from the investment bank Bear Stearns,[19] which bases its view on the fact that little public information is available about Antiguan operators. However, if Antiguan operators were able to operate lawfully and if they were confident that the information would not be used by the United States to prejudice their position, more information would be made publicly available to the Americans. I should point out that it was not so long ago that our Directorate of Offshore Gaming would routinely contact the United States government for background information on American citizens applying for gaming licenses in Antigua. Also, in 1997 our then-director of Offshore Gaming travelled to the United States expressly to meet with United States officials to discuss the Antiguan gambling and betting industry and any concerns that the United States might have with respect to the industry. A copy of her report to the Prime Minister on these meetings is submitted to you today as Exhibit AB 192.

51. On the topic of consumer fraud, the United States has not provided *even one* example involving Antigua but only makes general statements about Internet gambling, irrespective of source. The United States asserts the compelling need for regulation and appears to suggest that other countries, and in particular countries such as Antigua, can never be capable of

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International Narcotics control Strategy Report: Money Laundering and Financial Crimes (March 2003) p. XII-27) (Exhibit AB 177). *See also* United States Drug Enforcement Agency, Department of Justice, *Drug Intelligence Brief: Money Laundering in Canada* (August 2003), p. 6 (www.usdoj.gov/deal/pubs/intel/03034/03034.pdf) (concluding that as of August 2003 organized crime syndicates in the United States and Canada uses Canadian jewelry stores, travel agencies, video rental stores, courier services, land-based casinos and international computer networks to launder illicitly obtained proceeds).

17 US Second Submission, para. 50.

18 AB First Submission para. 74.

19 US Second Submission, para. 113

regulating a service as well as a developed economy like the United States. Of course, it can never be sufficient for a WTO Member to make such a general, unsubstantiated statement – in its own terms a "mere assertion"—to escape its obligations under the GATS. Any other position would turn the GATS into an agreement that only works in one way: export from developed countries to developing countries.

52. Of course, the real answer to any actual concerns the United States may have regarding the abuse of cross-border trade for money laundering, consumer deception, fraud or other criminal activities is international cooperation.[20] The Panel should also note that there *is* clear evidence of involvement of organised crime, money laundering and consumer fraud in the United States' own gambling industry.[21] Yet the United States does not prohibit this domestic gambling.

53. Much effort has been expended by the United States to convince the Panel that cross-border gambling and betting presents unique health risks to American citizens, although the United States appears to come around to the point of view that "the precise mechanics of gambling addiction is a novel issue on which not all authorities agree."[22] We say in response that a "novel issue on which not all authorities agree" *per se* is an insufficient basis on which to distinguish between services under the GATS.

54. On the substance of the United States claim, the very short opinion from the American Psychiatric Association[23] cited by the United States is based on studies prepared by Professor Griffiths and Dr. Wood and by Dr. Shaffer – each of whom serves as an expert to Antigua in this proceeding. The opinion in fact says very little about risks specifically related to Internet gambling:

- It mentions that Internet gambling is often unregulated. Internet gambling in Antigua is regulated. As stated many times previously, we are prepared to amend our regulatory scheme if the United States were to have any specific concerns or suggestions.

- It mentions that Internet gambling is a solitary activity but that is also the case for most gambling in the United States.

- It mentions that people who gamble on the Internet can gamble uninterrupted and undetected for unlimited periods of time. However, United States operators lawfully use numerous techniques to ensure that gamblers do just that in order to maximise the gambler's losses (and the operator's gains).[24]

The remainder of the document from the American Psychiatric Association simply discusses the risks of gambling in general.

55. In his article prepared for this proceeding, Dr. Shaffer, Director of the Harvard Medical School Division of Addictions and one of the leading experts in the field, concludes that to the extent there is a demonstrable difference at all in the health risks associated with

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20 A view shared by the United States' Federal Trade Commission, *see* Exhibit AB 193.
21 *See*, Exhibits AB 145, 148 and 156.
22 US Second Submission, para. 52.
23 Exhibit US 10.
24 AB First Submission para. 90-91.

gambling, the primary distinction is not between Internet gambling and other forms of gambling, but between "rapid-cycle" games and other kinds of gambling that involve either more deliberation or participation by other persons. A thorough reading of Dr. Shaffer's paper reveals that only sports gambling and multi-player table games appear to clearly evade the "rapid-cycle" effect or the single player environment that may exacerbate health concerns. But it is clear from Dr. Shaffer that, as acknowledged by the United States in the quote above, this is not a field in which there is any scientific certainty.

56. The United States pleads that allowing the use of the Internet or the telephone to offer gambling and betting services from Antigua would "open the floodgates" and would add to the "population of potential victims." This smacks of the unscientific hysteria that Dr. Shaffer and his colleagues warned against in their joint editorial in the *Journal of Gambling Studies* and that he references in his paper submitted to you today.[25] Such bare hyperbole simply cannot form a basis for distinguishing between services for purposes of the GATS.

57. The reality is that numerous legal gambling opportunities are available in the United States to people who want to gamble, with or without Internet gambling. Certainly the expansion of gambling opportunities has not been a concern to the United States in the past. In 1999 the United States' National Gambling Impact Study Commission called for a pause in the expansion of gambling opportunities.[26] Since then, however, gambling opportunities have expanded considerably in the United States[27] and total gross gaming revenue increased almost 25 percent from already very high levels.[28] Furthermore lotteries promoted by American authorities themselves, and not by private companies, use aggressive and sophisticated marketing techniques to sell as many lottery products as possible.[29] One of their most widespread selling techniques is to market scratch cards as impulse purchase products on the counters of thousands of shops throughout the country.[30] In this respect it is worth referring back to the quote from the *Champion v. Ames* decision of the United States Supreme Court in the United States first submission referring to the "widespread pestilence of lotteries" which "infests the whole community; it enters every dwelling; it reaches every class."[31] Furthermore the Panel should note that the United States federal government has even *subsidised* Native American tribes to develop gambling enterprises.[32] Against this background the United States cannot credibly contend that it seeks to limit gambling opportunities. What they describe as the "population of potential victims" already comprises the entire United States population. Allowing cross-border gambling simply provides another gambling option to choose from.

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25 *See also* Antigua's Oral Statement of 10 December 2003, para. 76.

26 *See* Exhibit AB 10, p.1-7.

27 *See* Exhibit AB 173.

28 1998 figures compared to 2002 figures.

29 *See* AB First Submission, para. 113 and the referenced materials. *See also* the results of a marketing survey in *Public Gaming International* (August 2003) (Exhibit AB 191); and Rick Green, "States Manipulate Lottery Dreamers: Scratch-Off Tickets Aimed at Vulnerable Targets," *The Hartford Courant*, (6 October 2002) (Exhibit AB 206).

30 *See* the Report concerning the Wisconsin Lottery in Exhibit AB 188 and the statement of the Ohio lottery reported in *Public Gaming International* (September 2002), p. 20 (Exhibit AB 190). *See also* the pictures in Exhibit AB 186.

31 US First Submission, footnote 8.

32 *See* the U.S. Supreme Court's Decision in *Cabazon*, Exhibit AB 195, p.11.

58. In this respect the Panel may be interested in the 1999 decision of the United States Supreme Court in the *Greater New Orleans* case.[33] The Supreme Court found that federal rules that prohibited the broadcasting of advertisements for private casinos whilst allowing it for Native American casinos was unconstitutional. In that case the United States argued that the prohibition was necessary to protect the American public from gambling opportunities. However, the Supreme Court found that, whatever the character of the broadcasting ban was in 1934 when it was adopted, "the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal." The Supreme Court also rejected the federal government's argument that Native American casinos were a lesser threat because they operated in isolated locations and found that: *"If distance were determinative, Las Vegas might have remained a relatively small community or simply disappeared like a desert mirage*."[34] This is an authoritative statement that is highly relevant for the current dispute. As a result of the *Greater New Orleans* ruling, United States gambling operators can now advertise in all states.

59. The United States has also made nothing but "mere assertions" regarding the supposed increased risk to children posed by Internet gambling. We have shown not only that our regulatory scheme and the nature of the business in general works against the participation of children in cross-border gambling but that there are other ways to avoid child gambling as well. While in its second submission the United States quotes a credit card official to the effect that credit cards are available to children, this does not change the fact that the United States Congress has seen fit to legislate the use of credit cards as an effective way to keep children from engaging in potentially harmful behaviours on the Internet. We have presented additional factual evidence regarding child gambling in the United States.[35] This material also shows that United States government-run lotteries actively target the youth market, and even the underage market.[36] Suffice it to say that American children have many opportunities to gamble (for instance on scratch cards with "cartoon-like design and childish iconography"[37]) and we believe that Internet gambling is among the very least accessible ways for them to do so. The United States has presented no evidence to the contrary.

60. The last "likeness" point raised by the United States in its second submission is international classification in the most recent version of the CPC. But the most recent version of the CPC does *not* provide a different subclass for Internet gambling. Rather it explicitly includes "on-line gambling" in the same category as other "gambling and betting services" – thus supporting Antigua's position.

VII. ARTICLE XVII AND LESS FAVOURABLE TREATMENT

61. A few points on less favourable treatment under the GATS. The United States says that it does not discriminate with respect to gambling and betting services on the basis of national origin. However, the United States clearly has and enforces laws that specifically outlaw gambling services that cross international borders.[38] This is *de jure* discrimination in

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33 Greater New Orleans Broadcasting Assoc., Inc. v. United States, 527 U.S. 173 (1999) (Exhibit AB 196) (a summary can be found at Exhibit AB 194, p. 2.).

34 Exhibit AB 196, p. 10.

35 Exhibit AB 158, p. 4.

36 Exhibit AB 158, p. 2 (with regard to the underage market, note the statement from the Washington D.C. Lottery concerning "Generation X, Generation Y and Generation Z." *See also* Exhibit AB 178, a "Winner claim form" of the Iowa lottery that allows minors to claim their winnings by post.

37 *See* US Second Submission, para. 54 and Exhibit AB 174.

38 *See* US Second Submission, para. 78 and following.

the context of a national treatment commitment for cross-border supply, irrespective of whether these laws also prohibit inter-state gambling. To the extent that these laws would indeed prohibit inter-state gambling, we have shown that they are not enforced against domestic operators which also constitutes a discrimination.

62. The United States' argument on less favourable treatment is entirely based on the notion of "remote supply," an unspecified distribution method which is allegedly not used by United States gambling operators. The United States argues, for instance, that lottery gambling is not "remote" because lotteries use computers and vending machines that are placed in the 180,000 "authorized lottery distribution locations" in the United States. But this obviously is "remote" gambling because the gambler does not need to physically go to the lottery to play. Rather, he can play in the local grocer, pharmacy, petrol station or other location where he must go to buy other products in any event.

63. Furthermore lotteries *do* allow players to play at home. United States lotteries allow players to purchase tickets to participate in numerous drawings spread out over several months or even a year.[39] Players can verify winning numbers on the television or the Internet. Many United States lotteries allow players to purchase lottery tickets by post, pay by cheque or even credit card, and then claim any winnings by post - all without ever leaving the home.[40] Several United States lotteries also have games that allow players to participate from home in a televised lottery game.[41] Some United States lotteries can even be played from home by minors under the age of 18, as illustrated by the form used by the Iowa lottery which allows underage gamblers to claim their winnings by post.[42] Sports betting operators in Las Vegas also allow punters to place bets on events occurring in the near- or the far-distant future, return to their homes and claim their winnings by post days, weeks or months later.[43]

64. However, given the absence of a clear definition of the term "remote"[44] a discussion concentrating on whether or not something is "remote" is unlikely to be fruitful. Rather the discussion should be conducted on the basis of the terms of Article XVII which requires "conditions of competition" that are "not less favourable" for "like services." In paragraph 68 of its second written submission the United States stated that 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." This begs the question whether it would be legal for Antiguan operators to place computers in bars, shops or other outlets through which consumers could then gamble with Antiguan operators (similar to, for instance, the New York state lottery).[45] Such an operation would violate state law because it

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39 AB Exhibit 204.

40 *See, e.g.*, the Virginia Lottery (which offers "subscriptions for season tickets" that can be ordered from home by regular post [www.valottery.com/megamillions/subscription.asp, a sample order form is provided as Exhibit AB 202] and allows winnings to be collected by sending a signed lottery ticket, regular post, with a return address on it www.valottery.com/faq/kb_detail.asp?id=7]). The Illinois lottery's Internet web site offers players a downloadable form to purchase up to a year's worth of lottery tickets by mail, with payment to be made by credit card. Exhibit AB 199 (www.illinoislottery.com/subsections/Subscrip.htm). *See also* Exhibit AB 203 regarding "Lotto from Home" in New York.

41 *See, for instance*, the material on the Ohio lottery's "The Cash Explosion – Play-At-Home Bonus Box", Exhibit AB 200.

42 Exhibit AB 178 (the claim form specifies how minors under the age of 18 can claim their winnings [www.ialottery.com/LegalRequirements/claimform.pdf]).

43 *See* Exhibit AB 208.

44 In its answer to question 20 to the parties Antigua has explained how it intended to use the term "remote gambling." The United States obviously uses this term in a different way.

45 *See* Exhibit AB 205.

is not specifically authorised and it would of course also violate the Wire Act and the other federal anti-gambling laws because the gambling service crosses an international border.

65. This gives rise to two further issues in the debate about the application of Article XVII to the inability of Antiguan services suppliers to use specific distribution methods.

66. The first issue is "less favourable treatment within specific distribution methods." The United States allows its gambling operators to use distribution methods (whether intra-state or inter-state) that could be used by Antiguan operators to supply gambling and betting services on a cross-border basis: the Internet, telephone, post, television, vending machines, electronic links with computers and the like. The United States prohibits, however, the use of these distribution methods for Antiguan services. This inevitably results in a finding of "less favourable treatment."

67. The second issue is "less favourable treatment across specific distribution methods." In Antigua's view, the United States also violates Article XVII by allowing domestic suppliers to use distribution methods that require physical commercial presence (such as brick and mortar casinos) whilst prohibiting the use of a distribution method that can be used for cross-border supply (such as the Internet). Because of its commitment to national treatment of cross-border supply, the United States must allow Antiguan operators to compete with United States' brick and mortar casinos under equal conditions of competition. This does not mean that they should receive formally identical treatment (which is indeed unlikely in view of the different distribution method). It does, however, mean that the United States must allow fair competition.

VIII. ARTICLE XIV OF THE GATS

68. As the Panel is aware, after having never mentioned Article XIV of the GATS in any of its submissions or oral statements, in the submission filed by it on 9 January 2003 the United States for the first time raised the issue of GATS Article XIV. Even so, it is not entirely clear that the United States is actually asserting Article XIV as a defence. In paragraph 72 of its second submission, the United States says it is "*unnecessary* for the Panel to examine Antigua's claims in the light of Article XIV" but that its measures "*would* easily meet the requirements of Article XIV." Article XIV provides an affirmative defence and if the United States does not invoke it, then the Panel should not address it. Antigua does certainly *not* request the Panel to apply Article XIV and, refers the language quoted above and that contained in paragraph 123 of the second submission of the United States - " 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."

69. To the extent that the United States seeks to somehow raise an "informal" Article XIV type defence, it does so only with regard to three federal statutes and not with regard to other federal or state statutes.[46] The three federal statutes at issue are the Wire Act,[47] the Travel Act[48] and the Illegal Gambling Business Act.[49] With regard to these three federal statutes the United States essentially raises three Article XIV type defences.

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46 US Second Submission, para. 74.
47 18 U.S.C. § 1084.
48 18 U.S.C. § 1952.
49 18 U.S.C. § 1955.

70. First, the United States submits that the three statutes are "necessary" "for the enforcement of state laws on gambling" and are therefore covered by Article XIV(c). Article XIV(c) exempts measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." The United States says that its state laws are consistent with the GATS and that therefore the federal laws enhancing those laws are exempted under Article XIV(c). This reasoning is obviously circular and merits only a brief response. An Article XIV issue can only arise when a WTO Member violates its GATS obligations. Antigua challenges the lack of market access and the absence of equal conditions of competition. To the extent that United States laws contribute to this violation they cannot be invoked as a justification for this infringement under Article XIV(c).

71. The second Article XIV type defence seems to be that these statutes are "necessary" for the enforcement of the criminal laws violated by organised crime and are therefore covered by Article XIV(c). The crimes mentioned by the United States include loan sharking, prostitution, sale and distribution of drugs, distribution of stolen property, murder, kidnapping, arson and robbery. Apparently the United States believes that the prohibition of all cross-border gambling and betting services from Antigua is "necessary" to enable the United States to combat organised crime and prevent the commission of these crimes – a baffling proposition which lacks all credibility. In any event, in evaluating the United States' claim, the Panel must take into account, on the one hand, the extent to which the prohibition contributes to that end and, on the other, the extent to which the prohibition produces restrictive effects on international commerce.[50]

72. This evaluation is very simple in our case:

- The United States has submitted no evidence of organised crime involvement in Antigua's gambling industry nor has it submitted any evidence that Antigua would not cooperate with criminal investigations and prosecutions by the United States.

- The effect of the United States' measures is the most restrictive possible: total prohibition.

Consequently this aspect of the defence fails.

73. In this respect the Panel may be interested in a 1989 decision of the United States Supreme Court.[51] In that case the Supreme Court had to balance the desire of the State of California to prohibit certain forms of gambling on Native American reservations against the Native American and federal interest of promoting tribal economic development. As the United States does here, in that case California submitted that its gambling restrictions were necessary to prevent the infiltration of Native American tribes by organised crime. The Supreme Court rejected this argument because the fears expressed by California were, as is true here, but a vague allegation.

74. The United States' third Article XIV defence is that the three federal statutes are "necessary to protect public morals or to maintain public order" as provided in Article

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50 *See*, Appellate Body Report on *Korea – Beef*, para. 162-164.

51 *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (Exhibit AB 195). Exhibit AB 194 contains a summary of the *Cabazon* case.

XIV(a). The footnote to Article XIV(a) clarifies that this exception needs to be interpreted narrowly:

> "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."

75. In *Korea – Beef* the Appellate body also found that when evaluating whether a measure is "necessary":

> "a treaty interpreter (...) may (...) take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument."[52]

76. The United States wisely does not argue that gambling and betting is, as such, contrary to public morals and public order. In view of the wide availability of gambling in the United States and the active involvement in the promotion of gambling of both the state and the federal governments, such a claim would have no credibility at all. The United States does, however, argue that public order and public morals are endangered because of the alleged organised crime threat (which we have already dealt with) and because:

> "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."[53]

However, this would only be problematic for children because the United States concedes that "adults can be expected to exercise their own moral judgment."[54]

77. We have already explained that age verification and other technologies exist (and many are being used) to reduce the chances of minors gambling on the Internet with Antiguan operators. While the United States has made plenty of "mere assertions," it has not provided any evidence to the contrary with respect to our industry.

78. Even if the United States could establish that current age verification systems are not effective, other methods of preventing underage gambling are conceivable that would be less restrictive on international trade than a total prohibition. For instance, the United States could cooperate with Antiguan operators in verification of social security numbers or other government means of identification. Or, gambling and betting accounts with Antiguan operators could be opened in person at news agents or other specifically designated shops. In such circumstances the age verification system would be exactly the same as that used by lotteries in the United States. Consequently, the United States' total ban on cross-border supply from Antigua cannot possibly be said to be "necessary" because its "remote" character would not allow age verification.

79. We have shown that the United States tolerates a substantial amount of underage gambling. We have also demonstrated that state lotteries aggressively target the youth market. We must therefore conclude that youth gambling and the strict enforcement of its laws on underage gambling is of only limited importance to the United States.

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52 Appellate Body on *Korea – Beef*, para. 162.
53 US Second Submission, para. 114.
54 US Second Submission, para. 114.

80. Even were the United States to make out a provisional defence under Article XIV, it is required to demonstrate that the three federal statutes in question meet the additional requirements of the "chapeau" of Article XIV.[55] This is clearly not the case. For the sake of argument we nevertheless have a few observations on this point. First, the United States discriminates against Antiguan services because they cannot be supplied through distribution methods that are available for the distribution of domestic services. This is an obvious "unjustifiable discrimination."

81. Second, even when comparing the treatment of purely Internet and telephone based Antiguan services with that of services that the United States describes as "non-remote," the United States' total prohibition does not meet the requirements of the chapeau. As effected by the three federal statutes explored in the United States' submission, the total prohibition is a "rigid and unbending"[56] measure. While the United States refuses to consider cooperation with Antigua regarding its alleged objectives of age verification and fighting organised crime, such international cooperation would not only be a less "rigid and unbending" and trade restrictive policy, but it would also be a much more effective tool for the United States to achieve its stated objectives.

82. The United States dismisses, out of hand, the suggestion of cooperation with Antigua, despite the fact that it follows from the Appellate Body report in *US – Shrimp* that under the chapeau, a total prohibition cannot be justified by a Member that refuses to pursue international cooperation. In this context, I refer to our Exhibit 197, an interview with the president of the International Association of Gaming Attorneys.[57] In the interview, he explains how the expansion of United States gaming companies into the United Kingdom benefits from cooperation between the regulators of the two countries. Thus, international regulatory cooperation in the gaming sector is possible and is already taking place – albeit to the exclusive advantage of companies from the United States.

83. As a final point on the chapeau, I refer to Exhibit 201, which consists of two letters of the president of an association of the state lotteries in the United States (the "NASPL"), one of which specifically concerns this dispute. In both letters it is repeated *verbatim* that the NASPL "does not take a position on Internet gambling, per se" but that it is the position of the NASPL "that each individual state should be permitted to legislate and regulate the forms of gaming conducted within its borders, as well as the methods by which gaming is offered to the citizens of the state." As demonstrated in our second submission, what this means in practice is that state governments determine "the various industries' potential profits and losses" and *in* that process "rivalry and competition for investment and revenues" is the main motivation.[58] The two letters from the NASPL clearly indicate what the states' *real* concern is with Internet gambling – *not* that it is inherently more dangerous than other forms of gambling but simply that it will undermine the states' ability to determine the conditions of competition in the gambling sector in view of the economic benefits accruing to the state and its local operators. Thus, this is further evidence that the United States' total ban on Internet gambling services from Antigua *is* "a disguised restriction on trade in services."

IX. CONCLUSION

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55 AB First Submission, para. 206.

56 Appellate Body Report in *US – Shrimp*, para. 177.

57 *International Gaming & Wagering Business* (January 2004), p. 10.

58 AB Second Submission, para. 23.

84. Mr. Chairman and distinguished gentlemen of the Panel, I thank you for your patience and kind attention. Should you have any questions of me or our delegation, we would be pleased to address them.