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

WT/DS285

2 FEBRUARY 2004

RESPONSES OF ANTIGUA AND BARBUDA TO THE PANEL'S SECOND QUESTIONS TO THE PARTIES

QUESTION 32

In its first oral statement (para. 21), in arguing that a prohibition on the cross-border supply of gambling and betting services exists, Antigua points to three federal laws, namely the *Wire Act* (18 USC § 1084), the *Travel Act* (18 USC § 1952) and the *Illegal Gambling Business Act* (18 USC § 1955). In its first oral statement (para. 20), Antigua also refers, through Exhibit AB-84, to five state laws that prohibit Internet gambling. Could Antigua indicate whether or not these are the only *specific* laws it seeks to rely on in substantiating its allegation that a prohibition on the cross-border supply of gambling and betting services exists. If not, could Antigua identify and explain the other laws or measures upon which it seeks to rely in this regard.

All the specific laws contained in Antigua's Panel request form part of the total prohibition that effectively exists in the United States (and is recognized by the United States). Through paragraph 25 of our oral statement of 10 December 2003 and Exhibits AB-81 and –88, Antigua has provided further explanation of all these specific laws, the texts of which can be found in Exhibits AB-82, -89, -90, -91 and -99. In our view all this material concerning specific laws further substantiates the existence of a total prohibition. It is important to note, however, that Antigua has cited all these laws in its Panel request in order to be as comprehensive as possible, *not* because it believes that each law is an essential part of a "puzzle" without which there would be no total prohibition. As explained in paragraph 19 of Antigua's oral statement of 10 December 2003, most of the laws cited in the Panel request are prohibition laws that could be applied independently of each other to prohibit cross-border supply from Antigua.

Antigua submits its response to this question in advance of the deadline of 2 February because this question could also be interpreted as an invitation to submit more detailed explanation about the federal and state laws that were not discussed in paragraph 20-21 of the oral statement of 10 December and Exhibit AB-84. In Antigua's view this is probably not the purpose of question 32 because the documents submitted as Exhibits

AB-81 and -88 already contain an explanation of all the federal and state laws listed in the Panel request that is similar to the explanation given for the three federal laws in our oral statement of 10 December 2003 and for the laws of the five states summarized in Exhibit AB-84.

We are of course prepared to submit further explanation of the laws at issue if that is what the Panel is seeking, but we do not want to burden the Panel with further written material if that is not what the Panel is looking for. If we have understood question 32 wrongly, we respectfully request the Panel to clarify it so that we may respond in the most helpful manner before the deadline of 2 February.

QUESTION 33

Could Antigua provide a list of the gambling and betting services they seek to supply cross-border to the United States and that they claim are subject to a prohibition.

Antigua seeks to supply all types of services that involve the making of a bet or wager to consumers in the United States, subject to services that are prohibited by Antiguan law, such as those involving the use of pornographic, indecent or offensive material. It is difficult to cover every possible permutation in a list, but the product offerings encompassed by the gambling and betting services that Antigua seeks to offer include:

- Random selection games (in whatever form and including games that are traditionally described as "lotteries" or "casino-type games" in their probably endless permutatations).
- Event-based gambling.
- Card games and other games of skill involving monetary stakes.
- Person-to-person gambling (so-called "betting exchanges").

QUESTION 36 (FOR THE UNITED STATES)

With respect to the reference to the "very few exceptions limited to licensed sportsbook operations in Nevada" in the second paragraph of Exhibit AB-73, could the United States identify these exceptions, even on an illustrative basis?

Antigua would like to point out that the statement made on behalf of the United States in the letter attached as Exhibit AB 73 is not completely accurate when it says "[w]ith very few exceptions limited to licensed sportbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States (...)." Under the legislation known as the "PASPA,"[1] the United States federal government expressly exempted four states, Nevada, Oregon, Delaware and Montana, from its general prohibition on sports betting other than horse racing,

[1] 28 U.S.C. §§ 3701-3704.

greyhound racing and jai alai. Presently, only Nevada has full-scale sports betting, although Oregon has a number of sports betting opportunities through the state-owned lottery.[2] There is nothing in the PASPA or other federal laws restricting the ability of these states to engage in the full range of sports betting services on a commercial or state-owned basis.

Further, while the United States appears to distinguish in several ways between horse racing and other forms of sports betting, Antigua believes that there is really no logical basis for the distinction. Horse race betting *is* sports betting and is widely sanctioned throughout the United States, whether delivered "in person", over the telephone or via the Internet.

QUESTION 38 (FOR THE UNITED STATES)

What is the United States' reaction to Antigua's arguments in paragraph 31 of Antigua's second oral statement regarding the significance of the word "whether" in Article XVI:2(a)?

Antigua would like to emphasise that the word "whether" must have *some* meaning. If Article XVI:2(a) were to be interpreted as the United States desires—an express recital of the only "forms" that denial of market access can take in order to result in a violation of Article XVI—the word "whether" is meaningless. If "whether" is taken out of the text, then the text reads as the United States summarised in paragraph 20 of its second written submission. Yet, the United States would have the *actual* text of Article XVI:2(a) read exactly the same way, despite the inclusion of the word "whether." In this respect the Panel should note that in *EC – Hormones*, the Appellate Body stated that:

> "The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination (...)."[3]

The United States' argument that the broad purposes expressed in Article XVI:1 are then negated by a formalistic reading of Article XVI:2 is patently illogical and violates the basic rule of treaty interpretation described by the first paragraph of Article 31 of the Vienna Convention, *i.e.* that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." According to its preamble the object and purpose of GATS is the "progressive liberalization" of trade in services "as a means of promoting the economic growth of all trading partners and the development of developing countries." Market access commitments are obviously one of the main mechanisms through which this "progressive liberalisation" is put into effect. To allow a country to evade full commitments to market access expressed in its schedule simply by adopting a barrier in the "form" of a total, outright prohibition would render those

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2 *See* www.oregonlottery.com.

3 Appellate Body Report on *European Communities – Measures Concerning Meat and Meat Products,* WT/DS26/AB/R; WT/DS48/AB/R , para. 181.

commitments ineffective. This clearly cannot have been the intention of the drafters of the GATS.

QUESTION 40

Does Antigua have any market-based/economic evidence to support its assertion in paragraph 36 of its second oral statement that "Internet-based" and "land-based" gambling and betting services compete and that consumers switch from one to the other?

In 2001, a survey was undertaken by some industry participants in order to determine the "consumer market" among gamblers world-wide. A summary of the report on their findings[4] contains some interesting material regarding the demographics of gamblers.[5] The River City Study found considerable overlap in the use of gambling services by regular gamblers. In particular, it found that "[l]and-based and pay-online players, those who gamble for real money both online and offline, are the market's true gambling enthusiasts. (...). [T]hey are the greatest gambling spenders in the market."[6] The study also found that gamblers who only play for real money on-line but do not gamble at land-based facilities "are a unique sliver of the total e-gaming consumer market."[7]

A number of academic studies in the United States and the United Kingdom have found a high degree of substitutability between different forms of gambling. To Antigua's knowledge there are no such studies that specifically investigate substitutability of "Internet-based" gambling vis-à-vis "land-based gambling." However, Antigua has asked the opinion with respect to substitutability in the gambling markets of two leading economists in this field (Professor Donald Siegel of the Rensselaer Polytechnic Institute of Troy, New York and Professor Leighton Vaughan Williams from Nottingham Trent University). Both conclude that "Internet based" gambling is a strong substitute for "land-based" gambling.[8]

With its first submission, Antigua also provided the Panel with anecdotal evidence of competition between Internet-based and domestic gambling services in the

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4 "The River City Gambler Monitor," The River City Group, Reymer & Associates (2001).

5 "Internet Gambling Report, Sixth Edition," River City Group, LLC (2003) (the "River City Study"). Chapter 5 of the River City Study is included as Exhibit AB 209.

6 *Id.*, p. 57.

7 *Id.*

8 *See*, the statement by Professor Donald Siegel and Professor Leighton Vaughan Williams submitted as Exhibit AB 210 and the additional statement by Professor Leighton Vaughan Williams submitted as Exhibit AB 211. Some of the literature to which the first opinion refers is also submitted as evidence: D. Siegel and G. Anders, "The Impact of Indian Casinos on State Lotteries: A Case Study of Arizona," *Public Finance Review*, Vol. 29, No. 2, March 2001, pp. 139-147; D.S. Elliott and J.C. Navin, "Has Riverboat Gambling Reduced State Lottery Revenue?" *Public Finance Review*, Vol. 30, No. 3, May 2002, pp. 235-247. Copies of these articles are included as Exhibits AB 212 and AB 213, respectively.

United States.[9] There is considerable further anecdotal evidence of competition between Internet and other gambling.[10]

With regard to the general proposition that "Internet-based" commerce competes with "land-based" commerce Antigua refers to the initiative of the United States' Federal Trade Commission ("the FTC") to promote competition over the Internet.[11] The FTC has found, however, "that many state regulations favor local suppliers over out-of-state competitors and that others ban online competition for particular goods and services altogether." In relation to an investigation of Internet wine sales the FTC found that: "E-commerce can offer consumers lower prices, greater choices, and increased convenience. In wine and other markets, however, anticompetitive barriers to e-commerce are depriving consumers of those benefits." The FTC further found that: "State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." In relation to the states' concern of underage drinking the FTC concluded that "states can limit sales to minors through less-restrictive means than an outright ban."

QUESTION 41

With respect to Antigua's arguments in paragraph 38 of its second oral statement, is Antigua now arguing that all gambling and betting activities that involve the experience of winning and losing money are necessarily "like" and that this would constitute the main criterion in deciding "likeness" under Article XVII?

From the beginning of this dispute, Antigua has maintained that all gambling and betting services involving the placing of a wager are "like" for purposes of Article VXII of the GATS.[12] Due to the lack of WTO jurisprudence on "likeness" under the GATS, as was discussed at some length in Antigua's oral statement of 10 December,[13] Antigua

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9 *See* First Submission of Antigua and Barbuda, WT/DS285 (1 October 2003) (the "AB First Submission"), fn. 317. This evidence can be found in Exhibits AB 66, 67, 68 and 34.

10 *See, e.g.* Rod Smith, "Online Betting Growth Called Threat to Nevada," *Las Vegas Review-Journal* (24 January 2003), D1 (http://www.reviewjournal.com/lvrj_home/2004/Jan-24-Sat-2004/business/23006933.html) (Nevada gambling industry experts view on-line betting growth as a threat to the Nevada gambling industry's standing as the centre of the world gaming industry) (Exhibit AB 214); Ed DeRosa, "NYRA, Magna Withhold Simulcast Signal From Attheraces," *Thoroughbred Times.com,* 13 January 2004 (http://www.thoroughbredtimes.com/todaysnews/newsview.asp?recno=41340&subsec=) (Internet betting sites adversely impacting horse race betting) (Exhibit 215). In its 2002 Equity Research paper on the Gaming Industry, "E-Gaming: a giant beyond our borders," (September 2002) the investment banking firm of Bear Stearns & Co., Inc. cites a number of competitive concerns of the United States domestic gaming industry over Internet-based gambling. *See* Exhibit AB 36, pp. 32-39.

11 *See* FTC, "E-commerce lowers prices, increases choices in wine market," attached as Exhibit AB 216.

12 *See* AB First Submission, paras. 188, 194.

13 First Panel Meeting, Opening Statement of Antigua and Barbuda, WT/DS285 (10 December 2003) (the "AB First Opening Statement"), paras. 38-60.

believes that an appropriate context for assessing "likeness" is found in the leading GATT 1994 case on the topic, that of *EC – Asbestos*.[14]

In *EC-Asbestos* the Appellate Body found that the two most important criteria for the determination of "likeness" were:

- The extent to which the products are capable of serving the same or similar end-uses; and
- The extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand.

In this respect Antigua submitted in paragraph 38 of its opening statement of 26 January 2004 that the experience of winning or losing money is the *sine quo non* of gambling and betting services which could equally well be delivered locally or "remotely." This is not the case with a comparison the United States tries to make in paragraph 39 of its second written submission in which it seeks to draw an analogy with the difference between participation in actual horseback riding compared to participation in "virtual reality" horseback riding—a situation in which the main feature of the two activities is clearly different (physical as opposed to non-physical activity).

In view of the criteria put forward by the Appellate Body in *EC – Asbestos*, Antigua believes that the most important criterion for the determination of "likeness" in WTO law is product (or service) substitutability. There are, of course, various levels of substitutability. For instance, economic evidence existing in the United States shows that, at one level, gambling activities serve as a broad substitute for other "entertainment and recreation services."[15] Antigua does not suggest, however, that *any* level of substitutability necessarily makes two services "like." On the other hand the level of substitutability required for two services to be viewed as "like" should not be set at a level which is unduly high and should be considered in the context of the other "competition component" of Article XVII: the requirement of "conditions of competition" that are not less favourable. In other words, services with a low substitutability will bear a considerable level of different treatment without effect on the "conditions of competition" and without violation of Article XVII. In the case of two services with a high substitutability, a low level of different treatment will modify conditions of competition and, consequently, violate Article XVII.[16] The available economic evidence suggests that there is a high or relatively high degree of substitutability between the various traditional *forms* of gambling services as well as substitutability between the various *methods of distribution* of gambling services.[17] In

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[14] Appellate Body Report on *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R ("*EC – Asbestos*").

[15] D. Siegel and G. Anders, *op. cit.*, p. 140 (Exhibit AB 212).

[16] *See also*, A. Mattoo, "MFN and the GATS," in T. Cottier and Petros C. Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, (The University Of Michigan Press, 2000), 51-99, at p.73-75.

[17] Exhibits AB 210, 211, 212 and 213.

this respect Antigua submits that a radically different treatment of one form of gambling, or one distribution method, compared to another necessarily violates Article XVII.