BEFORE THE APPELLATE BODY
OF THE
WORLD TRADE ORGANISATION

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

AB-2005-1

OTHER APPELLANT SUBMISSION OF ANTIGUA AND BARBUDA

24 January 2005

43701/MMEN/18797.01

SERVICE LIST

<u>OTHER APPELLEE</u>

H.E. Ms. Linnet F. Deily, Permanent Mission of the United States to the World Trade Organisation

<u>THIRD PARTIES</u>

H.E. Mr. Sergio Marchi, Permanent Mission of Canada
H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. Shotaro Oshima, Permanent Mission of Japan
H.E. Mr. Fernando de Mateo, Permanent Mission of Mexico
Mr. Ching-Chang Yen, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

Table of Reports Cited in This Submission

SHORT TITLE	FULL TITLE
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R , adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products,* WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 315
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179

SHORT TITLE	FULL TITLE
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion-Resistant Steel	Appellate Body Report, *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 29 November 2004
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, adopted 27 January 2000*, DSR 2000:II, 815
US – Section 337	Panel Report, *United States Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 5

POINTS RELATED TO THE MEASURES 5

A. The Panel erred in concluding that Antigua had not identified the "total prohibition" as a measure in the Panel Request and thus was not entitled to rely upon it as a measure in the dispute 5

1. Legal Requirements of a Panel Request 5

2. Application of the Law to Antigua's Panel Request 9

B. The Panel erred in concluding that, even had Antigua identified the "total prohibition" as a measure in the Panel Request, the "total prohibition" cannot constitute a measure that can be challenged in and of itself 11

1. Introduction 11

2. What the Panel Said 11

3. What is a Measure? 14

4. Development of Antigua's Case 16

5. Application of Law to the Facts 20

(i) The Proper Standard 20

(ii) The "Burden of Proof" and Can This Case be Resolved on the Basis of the Total Prohibition? 21

6. Completing the Analysis 26

POINTS RELATED TO GATS ARTICLE XVI 26

A. Conditional Appeal Regarding GATS Article XVI – In the event the Appellate Body were to find in favour of the United States and reverse the Panel's conclusion in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel's erroneous legal conclusion that the first paragraph of Article XVI is limited by its second paragraph 26

B. The Panel erred in its conclusion that measures that prohibit consumers from using the gambling services offered by Antiguan operators through cross border supply do not violate GATS Article XVI:2(a) and Article XVI:2(c) 28

POINTS RELATED TO GATS ARTICLE XIV 31

A. The Panel erred in its decision to consider the defence asserted by the United States under GATS Article XIV, which was only raised by the United States at the end of the second substantive meeting of the Panel with the parties. The Panel further erred by constructing and completing the Article XIV defence on behalf of the United States, thus relieving the United States of its burden of proof. Both of these errors are contrary to due process, the principle of equality of arms and the terms of DSU Articles 3.10 and 11 31

1. Article XIV is an Affirmative Defence 31

2. The Factual Background 31

(i) Time Line 32

(ii) The US Second Submission 33

(iii) The US Second Oral Statement . . . 35
(iv) The US Second Answers . . . 36
3. The Panel Should Not Have Considered the Defence . . . 37
4. The Panel Should Not Have Made the Defence for the United States . . . 39
(i) GATS Article XIV(a) . . . 40
(ii) GATS Article XIV(b) . . . 41
(iii) The Chapeau . . . 41
(iv) Conclusion . . . 42
B. The Panel erred in its application and assessment of GATS Article XIV(a), including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11 . . . 42
1. Introduction . . . 42
2. Failure to Consider the Text . . . 42
3. Assessment of GATS Article XIV(a) . . . 43
4. Evidentiary Matters . . . 49
(i) Introduction . . . 49
(ii) Designed to Protect Public Morals or Order . . . 50
(iii) Importance of Interests or Values Protected . . . 50
(iv) Contribution to the Ends Pursued . . . 52
(v) Trade Impact-The Five Concerns . . . 52
C. The Panel erred in concluding that the United States had sufficiently identified the RICO statute for consideration under GATS Article XIV(c) . . . 57
D. The Panel erred in its application and assessment of GATS Article XIV(c), including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11 . . . 58
1. Introduction . . . 58
2. The RICO Statute Relies on State Laws . . . 59
3. The End Pursued by the RICO statute is not at Issue . . . 60
4. Evidentiary Matters . . . 61
E. The Panel erred in its consideration, application and assessment of the chapeau to GATS Article XIV, including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11 . . . 62
1. Introduction . . . 62
2. The Panel Should Not Have Considered the Chapeau . . . 63
3. The Panel Should Not Have Segmented the Industry . . . 63
4. Failure to Objectively Assess the Matter . . . 64

III. CONCLUSIONS . . . 65

I. INTRODUCTION

1. Antigua and Barbuda ("Antigua") is pleased with the decision of the Panel in its final report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "Final Report").[1] Antigua attaches great significance to the fact that the Final Report vindicates Antigua's belief that a small country such as Antigua can confront the world's only remaining superpower on important trade issues in a fair and impartial international forum. Far from undermining the integrity of the World Trade Organisation (the "WTO") dispute resolution process, Antigua believes that the result obtained by the Final Report can do nothing other than significantly enhance the stature of the system throughout the WTO membership.

2. If the United States had not appealed certain aspects of the Final Report, clearly Antigua would have not lodged an appeal either. However, given the United States' appeal, Antigua decided it important to appeal certain decisions of the Panel contained in the Final Report. Some of the appeal points, such as those relating to the "measures" and issues of due process, Antigua considers important not just to this case, but also from a WTO systemic perspective. Other of the points, such as those relating to Article XVI of the *General Agreement on Trade in Services* (the "GATS") and GATS Article XIV, relate to issues under appeal by the United States that, absent an appeal by Antigua, may leave the Appellate Body without a comprehensive evaluation of the case and the applicable GATS provisions.

3. Antigua's appellate points fall into three broad categories which may be summarised as follows:

- *First,* with respect to the "measures," the Panel erred in its conclusion that Antigua had not identified what has come to be known as the "total prohibition" in

[1] WT/DS285/R, circulated 14 November 2004.

Antigua's request for the establishment of a panel (the "Panel Request"),[2] and further erred in its conclusion that even had Antigua identified the "total prohibition" in the Panel Request, the "total prohibition" could not be evaluated by the Panel as a "measure."

- *Second*, with respect to GATS Article XVI, the Panel erred in its conclusion that Article XVI:1 is limited by Article XVI:2[3] and in its conclusion that measures preventing consumers from using services offered from another WTO Member through cross-border supply do not violate Articles XVI:2(a) and (c).
- *Third*, with respect to GATS Article XIV, the Panel erred in its decision to consider the defence by the United States under Article XIV, which was asserted only on the last day of the second session of the Panel and only in response to a direct question from a Panelist. Consideration of Article XIV by the Panel under the circumstances deprived Antigua of the right to adequately respond to the defence and, in the event, resulted in the Panel improperly constructing the defence on behalf of the United States. Having made the defence for the United States, the Panel erred in its application and assessment of Articles XIV(a) and (c) to the defence in a number of material respects. Finally, the Panel also erred in its consideration of the "chapeau" under Article XIV, both in the decision to evaluate the case under the chapeau at all, and also in its application and evaluation of the chapeau.

4. Throughout the Final Report runs a consistent theme which, Antigua believes, significantly hampered the work of the Panel. And that theme is, broadly, "*litigation or dispute resolution*?" Both Antigua and the Panel struggled with repeated and relentless acts by the United States to side track the dispute, to overstate and exaggerate its case while at the same time

---

[2] WT/DS285/2, 13 June 2003.

[3] Antigua raises this point conditionally in the event the Appellate Body were to agree with the United States' argument that GATS Articles XVI:2(a) and (c) only apply to limitations that are in form specified exactly and expressly in terms of numerical quotas. *See* Appellant Submission of the United States of America, AB-2005-1 (14 January 2005) (the "US Appellant Submission"), paras. 97-134.

misrepresenting that of Antigua and, more problematically, to deny a full and fair hearing on all issues.

5. For example, despite having admitted a "total prohibition" on the provision of cross-border gambling services from Antigua, the United States insisted that it was Antigua's:

> "burden of detailing precisely how each individual measure at issue operates under US municipal law. Antigua then bears the further burden of detailing how, under US municipal law, these individual measures operate together to give rise to the cumulative effect that Antigua is alleging inconsistent with the GATS."[4]

In essence, despite full agreement by the parties on the *cause*–a total prohibition on the services sought to be offered by Antigua–and the *effect*–inability of Antigua to lawfully offer those services to consumers in the United States; which *then* can be tested for consistency with United States obligations under the GATS, the United States throughout the process insisted that Antigua never met its "burden of proof" because it had not engaged in some long, drawn-out parsing and examination of every possible American gambling-related statute. Never during the proceeding was there any real disagreement between the parties over the cause and effect. Never during the proceeding was there any doubt about the nature of the dispute between the parties, about what was at stake. Yet, absurdly, the United States maintained that the case could not go forward until Antigua could sufficiently explain to the United States exactly how its own "total prohibition" is constructed and justified under United States domestic law–in its own words, an "impossible task."[5] Antigua would ask what is the objective of WTO dispute resolution–to resolve disputes or to obfuscate, hinder and delay dispute resolution?

---

[4] Final Report, para. 3.87.

[5] Closing Statement of the United States at the First Substantive Meeting of the Panel, WT/DS285 (11 December 2003) (the "US First Closing Statement"), para. 4.

6. Another example is the defence ultimately asserted by the United States under GATS Article XIV. Despite the clarity of the WTO on the need for a party asserting a defence to raise it and prove it in a timely manner,[6] the United States did not even *mention* Article XIV in its first submission or its first oral statement to the Panel. It first addressed the issue in its second written submission, but even then, insisted that it was *not* raising the defence. Indeed, even following the final session with the Panel, whether or not the United States was actually asserting Article XIV as a defence remained ambiguous.[7] The prejudice to Antigua and the Panel of this failure of the United States to clearly and timely detail its defence is apparent. Antigua was arguably chided by the Panel for not advancing "much argumentation in response to the submissions made and evidence adduced by the United States in support of its defence under Article XIV."[8] The Panel, on the other hand, stretched barely three pages of United States discussion on Article XIV(a) in its second submission (the "US Second Submission") to more than 19 pages of densely packed discussion in the findings section of the Final Report. It is patently obvious from reading the Article XIV discussion in the Final Report that the Panel simply did not have adequate presentation of Article XIV before it to properly and clearly assess the issue.

7. Completely opposite from the position advanced by the United States in the US Appellant Submission that the Panel had, in effect, come to the wrong conclusion on initially proper findings,[9] Antigua believes that the Panel came to the correct conclusion through sometimes flawed analysis. It is this that Antigua hopes to remedy through this other appeal.

---

[6] *See* the discussion at paragraphs 61 through 77 below.

[7] *See* the discussion at paragraph 69 through 71 below.

[8] Final Report, para. 6.584.

[9] *See* US Appellant Submission, para. 2.

II. ARGUMENT

POINTS RELATED TO THE MEASURES

A. The Panel erred in concluding that Antigua had not identified the "total prohibition" as a measure in the Panel Request and thus was not entitled to rely upon it as a measure in the dispute.

1. Legal Requirements of a Panel Request.

8. Under GATS Article XXVIII(a), "measure" is defined broadly as:

> "[A]ny measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, *or any other form* . . .." (emphasis added)

While until this case GATS Article XXVIII(a) had not yet been the subject of a panel or Appellate Body report, WTO jurisprudence to date has been expansive in assessing what can constitute a "measure" for purposes of Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[10]

9. The requirements for a panel request are set out in DSU Article 6.2, which provides in part:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

10. The well accepted purpose of the requirement that the measures at issue are identified and the legal basis of the complaint is summarised is definitively set out by the Appellate Body in its Report on *EC – Bananas III*:

> "It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[11]

---

[10] *See* the discussion at paragraphs 27 through 31 below.

[11] Appellate Body Report on *EC – Bananas III*, para. 142.

In *EC – Bananas III*, the panel request of the complaining parties against the European Communities (the "EC") provided in part:

> "The European Communities maintains a *regime* for the importation, sale and distribution of bananas, established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime. The regime and related measures appear to be inconsistent with the obligations of the EC . . .."[12] (emphasis added)

11. The EC in *EC – Bananas III* had argued that the panel request of the complaining parties failed to comply with the requirements of DSU Article 6.2, noting that "the request refers specifically to only one EC regulation and describes that regulation and related, but unspecified, measures as a 'regime.'"[13] The panel, in a ruling expressly affirmed by the Appellate Body,[14] determined that the complaining parties' reference to a "regime" in their panel request was sufficient for purposes of DSU Article 6.2:

> "Article 6.2 of the DSU requires that the 'specific measures at issue' be 'identif[ied]' and that there be 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly'. The EC challenges the panel request on both grounds. As to the first requirement, the panel request does identify the basic EC regulation at issue by place and date of publication. In our view, this complies with the requirements of Article 6.2. While the request does not identify the subsequent EC legislation, regulations and administrative measures that further refine and implement the basic regulation, *we believe that the 'banana regime' that the Complainants are contesting is adequately identified*."[15] (emphasis added)

12. There have been a number of disputes under the DSU where the complaining party has asserted an overall effect or concept in its panel request, together with some accompanying

---

[12] Panel Report on *EC – Bananas III (US)*, para. 7.23.

[13] *Id*. at para. 7.24. *See also, id.*, para. II.8.

[14] Appellate Body Report on *EC – Bananas III*, para. 140: "We agree with the Panel that the request in this case . . . contains sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU."

[15] Panel Report on *EC – Bananas III (US)*, para. 7.27.

references to statutory, regulatory, administrative or other material, and the panel request was deemed sufficient. For example, in *US – Carbon Steel* the EC's panel request complained that:

> "[T]he US decision of 2 August 2000 not to revoke the countervailing duties imposed on imports of corrosion resistant steel (Issue No. 65 FR 47407), as well as certain aspects of the sunset review procedure which led to it (regulated by Section 751c) of the Tariff Act of 1930 and the implementing regulations and interim final rules issued by the DOC –see footnote 2) are inconsistent with the obligations of the United States under the SCM Agreement . . .."[16] (emphasis in original)

13. In *US – FSC* the "measure at issue in this dispute is the *FSC scheme* . . ."[17] which was identified by the EC in its panel request as such, together with references to certain United States laws. The panel determined the panel request sufficient, in a conclusion that does not appear to have been before the Appellate Body.[18] Similarly, the panel in *Argentina – Footwear (EC)* found the panel request of the EC sufficient for resolution of the dispute, despite non-inclusion of certain Argentine laws in the request, concluding that "it is the provisional and definitive measures *in their substance* rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference."[19]

14. In *EC – Computer Equipment*, the panel request of the United States was said by the EC to be insufficient for failure to identify a number of measures that the EC argued were required to resolve the dispute.[20] The panel request had complained of "applying tariffs" and "customs authorities' actions" but identified only one specific measure.[21] Ruling nonetheless for the United States, the Appellate Body stated:

---

[16] Appellate Body Report on *US – Carbon Steel*, para. 128.

[17] Panel Report on *US – FSC*, para. 7.24 (emphasis added).

[18] *Id.*, paras. 7.29-7.34.

[19] Panel Report on *Argentina – Footwear (EC)*, para. 8.40.

[20] Appellate Body Report on *EC – Computer Equipment*, para. 62.

[21] *Id.*, paras. 64, 63.

> "We consider that 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. Since the request for the establishment of a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU."[22] (footnotes omitted)

15. In the recent case of *US – Oil Country Tubular Goods Sunset Reviews*, Argentina in its panel request had alleged, among other things, that a sunset review by the United States violated certain WTO agreement provisions:

> "[B]ecause it was based on a virtually irrefutable presumption under US law as such that termination of the anti-dumping duty measure would be likely to lead to continuation or recurrence of dumping. This unlawful presumption is evidenced by the consistent practice of the [USDOC] in sunset reviews (which practice is based on US law and the [USDOC's] Sunset Policy Bulletin)."[23]

The United States complained about the sufficiency of the panel request for a number of reasons, including on the basis that "nowhere in the panel request does Argentina identify which legal measure or provision–United States statute, the SAA, or the SPB–embodies this 'irrefutable presumption.'"[24] Although later in its panel request Argentina had listed certain United States statutes, regulations and policies, these were not directly tied in the panel request to the "irrefutable presumption" claim of Argentina. Nonetheless, the Appellate Body concluded that the panel request with respect to the alleged "irrefutable presumption" was sufficient.[25]

---

[22] *Id*., para. 65.

[23] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 158.

[24] *Id*., para. 159.

[25] *Id*., para. 171.

16. The Appellate Body has also recognised that under certain circumstances, the sufficiency of a panel request may be evaluated in light of the course of the subsequent proceedings, in particular the contents of a complainant's first written submission.[26]

2. Application of the Law to Antigua's Panel Request.

17. The Panel Request provides in pertinent part:

> "The Government of Antigua and Barbuda considers that certain measures of central, regional or local governments and authorities of the United States are inconsistent with the United States' commitments and obligations under the General Agreement on Trade in Services (GATS) with respect to the cross-border supply of gambling and betting services.
>
> The rules applying to the cross-border supply of gambling and betting services in the United States are complex and comprise a mixture of state and federal law. The relevant laws are listed in Sections I and II of the Annex attached to this request. Although this is not always clear on the face of the text of these laws, relevant United States authorities take the view that these laws (separately or in combination) have the effect of *prohibiting all supply of gambling and betting services* from outside the United States to consumers in the United States. Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services. The measures listed in the annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations.
>
> *The total prohibition of gambling and betting services* offered from outside the United States appears to conflict with the United States' obligations under GATS and its Schedule of Specific Commitments annexed to the GATS (and in particular Sector 10.D thereof) . . . ."[27] (emphasis added)

18. In paragraph 6.171 of the Final Report, the Panel concluded that "[s]ince [Antigua] did not identify the "total prohibition" as a measure in and of itself, it is not entitled to rely upon it as a 'measure' in this dispute." This finding of the Panel is in error.

19. Although Antigua did not expressly state in the Panel Request that "the 'total prohibition' is a measure in and of itself" or use similar words, the substance of the Panel Request is clear and

---

[26] *See, e.g.*, Appellate Body Report on *US – Carbon Steel*, para. 127.

[27] Final Report, para. 6.153.

unambiguous. The words "total prohibition" and "prohibiting all" *are* expressly used in the Panel Request. The wording of the Panel Request cannot be distinguished substantively from the panel requests before the panels and the Appellate Body in, for example *EC – Bananas III* ("regime for the importation, sale and distribution of bananas"),[28] *US – Carbon Steel* ("US decisions . . . certain aspects of the sunset review procedure"),[29] *US – FSC* ("the FSC scheme"),[30] *EC – Computer Equipment* ("applying tariffs . . . authorities' actions")[31] and *US – Oil Country Tubular Goods Sunset Reviews* ("a virtually irrefutable presumption").[32] And, as was the case in each of these other proceedings, in the Panel Request Antigua identified a number of statutes, rules, actions and other measures which it asserted contributed to the total prohibition.

20. While Antigua believes that the total prohibition was clearly identified in the Panel Request, any ambiguity was certainly resolved in Antigua's First Submission to the Panel,[33] if not earlier.[34]

---

[28] *See* paragraph 10, footnote 12 above.

[29] *See* paragraph 12, footnote 16 above.

[30] *See* paragraph 13, footnote 17 above.

[31] *See* paragraph 14, footnote 21 above.

[32] *See* paragraph 15, footnote 23 above.

[33] Final Report, para. 6.154.

[34] *See* the discussion at paragraphs 32 through 38 below.

B. The Panel erred in concluding that, even had Antigua identified the "total prohibition" as a measure in the Panel Request, the "total prohibition" cannot constitute a measure that can be challenged in and of itself.

1. Introduction.

21. The issue of whether the "total prohibition" could be considered by the Panel as a separate measure is closely related to and in some ways hard to differentiate from the issue of whether Antigua had adequately identified the total prohibition in the Panel Request. It is obvious from the Panel Report itself that the Panel had a difficult time separating the two, and the discussion of these issues by the Panel is frequently confusing.[35] Whether the total prohibition was adequately identified should be, under the principles and precedents described above, a relatively simple determination. Equally, whether the total prohibition should have been found to be a measure for purposes of this dispute and tested for GATS consistency by the Panel, although a more complex proposition, is just as clear.

22. To aid in the logical presentation of the discussion on this issue, Antigua will (i) *first* examine the Panel's approach to the matter in the Final Report; (ii) *second* provide a brief review of WTO jurisprudence on the issue; (iii) *third* explain how the "total prohibition" concept evolved over the course of the dispute; (iv) *fourth* apply WTO law to the facts of this case; and (v) *fifth* request the Appellate Body to complete the analysis of Antigua's case with respect to Article XVI on the basis of the total prohibition.

2. What the Panel Said.

23. Throughout the course of the proceeding, the United States over and over repeated its theme with respect to the "burden of proof" upon Antigua and its need to prove its "*prima facie*

---

[35] *See* Final Report, paras. 6.154-6.185.

case" with respect to each specific law cited in the Panel Request.[36] The United States continually referred to the "refusal" and the "failure" of Antigua to "introduce evidence," "link its evidence and argumentation," "say what provisions it views as relevant," "examine" and otherwise develop its "*prima facie* case."[37] In doing so, the United States itself refused to acknowledge Antigua's clear, unambiguous argument that it was contesting a total prohibition that was based on a vast, uncertain body of American laws, practices and customs. This in turn was a by-product of the insistence of the United States that something such as a "total prohibition" could never be a measure under WTO law:

> "Antigua's proposition regarding a 'total prohibition' is not itself a measure. As explained above, the term 'measure' refers to something that has a 'functional life of its own' under

---

[36] *See, e.g.*, Request for Preliminary Rulings by the United States of America, WT/DS285 (17 October 2003), paras. 18 ("Antigua, as the complaining party, bears the burden of identifying the specific measures as to which it asserts violations of WTO provisions.") and 19 ("due process clearly requires no less specificity with respect to identification of specific measures that are the subject of the complaining party's prima facie case. The complaining party bears this burden... "); First Written Submission of the United States, WT/DS285 (7 November 2003) (the "US First Submission"), para. 44 ("Antigua bears the burden of establishing a prima facie case demonstrating that the United States has adopted specific measure(s) and that the measure(s) are inconsistent with obligations that the United States has assumed as a Member of the WTO . . .").

[37] *See, e.g.*, US First Submission, paras. 3 ("Antigua bears the burden of proving . . . the scope and meaning of specific U.S. measures. By flatly refusing to sustain that burden. . ."), 42 ("Antigua has refused to provide the Panel with the text of actual laws or regulations . . .") and 47 ("Ignoring the most basic burden of proof requirements, Antigua goes so far as to insist that it is under no obligation to adduce evidence as to specific U.S. laws or regulations."); US Second Submission, para. 5 ("Antigua's failure to make a *prima facie* case as to the existence and meaning of the measure(s) that it means to challenge"); Executive Summary of the Second Written Submission of the United States, WT/DS285 (16 January 2004), para. 2 ("Antigua continues to ignore its fundamental obligations of making a *prima facie* case regarding specific measures and their interaction."); Opening Statement of the United States at the Second Substantive Meeting of the Panel, WT/DS285 (26 January 2004) (the "US Second Oral Statement"), paras. 1-3 ("In the view of the United States, this dispute still begins and ends with two threshold issues. The first is Antigua's failure to make its *prima facie* case as to the existence and meaning of measures that are the subject of its claims...Antigua then states that it has submitted statutory provisions that 'are most likely to form part of the total ban.' This response confirms Antigua's failure to make its *prima facie* case.").

> municipal law. Under U.S. municipal law, Antigua's 'total prohibition' has no functional life."[38] (footnotes omitted)

24. The United States' relentless repetition of its point appears to have ultimately carried the day with the Panel, at least with respect to Antigua's claim.[39] The Panel determined that the "total prohibition" could not be a measure for three reasons. First, in paragraph 6.176 of the Final Report the Panel seems to have concluded that under an interpretation of *US – Corrosion Resistant Steel* advanced by the United States, a measure must be an "instrument," and as the total prohibition "is a description of an effect rather than an instrument containing rules or norms," then the total prohibition could not be a measure.[40]

25. Second, the Panel decided that the total prohibition could not be a measure because Antigua had not "specifically" identified it in the Panel Request.[41] Third, the Panel appears to have decided that the total prohibition could not be a measure because the Panel perceived possible difficulties in bringing United States law into conformity with the GATS pursuant to DSU Article 19.1 if the total prohibition were to itself be a measure.[42]

26. The Panel erred in the development of this test and in its application to the facts in this case.

---

[38] Request for Preliminary Rulings by the United States of America, WT/DS285 (17 October 2003), para. 20.

[39] Final Report, paras. 6.171, 6.175.

[40] *Id.*, para. 6.176.

[41] *Id.*, para. 6.177.

[42] *Id.*, paras. 6.181-6.183. Paragraph 6.184 of the Final Report starts with the word "finally," implying a fourth prong to its test. However, paragraph 6.184 seems to be a general statement about the burden of proof.

3. What is a Measure?

27. As noted in paragraph 8 above, GATS Article XXVIII(a) broadly defines the term "measure." As the Panel observed in paragraph 6.150 of the Final Report, to the extent that the GATS definition of "measure" expands upon the definition of the term in the DSU, then the broader definition should be considered supplementary to the DSU Article 6.2 definition. However, even "measure" within the meaning of DSU Article 6.2 has been given a broad meaning by WTO panels and the Appellate Body.[43]

28. Ironically, the Appellate Body case that the Panel misinterpreted to impose an "instrument" requirement upon a measure, *US – Corrosion Resistant Steel*, contains perhaps the most expansive description of what a "measure" can be for purposes of WTO dispute resolution. Stating that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings,"[44] the Appellate Body, construing language in Article 17.3 of the *Anti-Dumping Agreement*–language substantially similar to GATS Article XXIII–went on to note that:

> "This language underlines that a measure attributable to a Member may be submitted to dispute settlement provided only that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it under the *Anti-Dumping Agreement*. There is no threshold requirement, in Article 17.3, that the measure in question be of a certain type."[45]

29. Getting to the heart of the matter, in paragraph 89 of its decision in *US – Corrosion Resistant Steel*, the Appellate Body made (if obliquely) a critical point–that what is most important is whether a "measure" can be tested for WTO consistency:

> "[A]llowing measures to be the subject of dispute settlement proceedings, whether or not

---

[43] *See* the discussion at paragraphs 8 through 16 above.

[44] Appellate Body Report on *US – Corrosion Resistant Steel*, para. 81.

[45] *Id.*, para. 86.

> they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations . . .under the covered agreements, and to clarify the existing provisions of those agreements.' As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgment as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, *only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations*."[46]

30. The Appellate Body recently confirmed its expansive view of the term "measure" in *US – Oil Country Tubular Goods Sunset Reviews*. In that case, the United States argued that its "sunset policy bulletin" could not be a measure for dispute resolution purposes because it was "not a legal instrument under United States law," it did not "set forth rules or norms that are intended to have general and prospective application" and did not "bind the USDOC."[47]

31. The Appellate Body rejected the United States position, concluding:

> "The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC is 'entirely free to depart from [the] SPB at any time'. However, it is not for us to opine on matters of United States law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in US – Corrosion-Resistant Steel Sunset Review, the Appellate Body indicated that 'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement. (. . .) In our view, the SPB has normative value, as *it provides administrative guidance and creates expectations among the public and among private actors*."[48] (emphasis added)

---

[46] *Id.*, para. 89, *quoting* DSU Article 3.2.

[47] Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 184.

[48] *Id.*, para. 187.

4. Development of Antigua's Case.

32. From the outset of its case, Antigua faced conceptual difficulties in how to frame its complaint. Even prior to the consultations meeting with the United States, it was clear to Antigua that the United States approached cross-border provision of gambling and betting services on the basis that they were completely–*totally*–prohibited.[49] However, it was just as obvious to Antigua that the United States Department of Justice (the "DOJ") did not have a clear and convincing legal basis on which to support this assertion.[50] Understanding that it was the position of the DOJ that the provision of cross-border gambling and betting services was prohibited pursuant to a number of laws, and understanding further the weaknesses in this assertion, in framing its request for consultations[51] (the "Consultations Request") Antigua searched for language sufficient to cover how the United States itself interprets its laws, while at the same time giving examples of some of the laws that Antigua believed contributed to this interpretation:

---

[49] *See, e.g.*, Letter from John G. Malcolm, Deputy Assistant Attorney General, United States Department of Justice, to National Association of Broadcasters (11 June 2003) (Exhibit AB-73):

> "With very few exceptions limited to licensed sportsbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore."

See also Statement of John G. Malcolm, Deputy Assistant Attorney General, United States Department of Justice Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary, United States House of Representatives (29 April 2003), pp. 2-3 (Exhibit AB-85):

> "Internet Gambling Violates Federal Law. Most of these gambling businesses operate offshore in foreign jurisdictions. If they are accepting bets or wages from customers located in the United States, then these businesses are violating federal laws . . ."

[50] *See, e.g.*, Jeffrey Rodefer, "Internet Gambling in Nevada: Overview of the Federal Law Affecting Assembly Bill 466," published on the website of the Department of Justice of Nevada (18 March 2003) (Exhibit AB-54). In this article, Mr. Rodefer of the Nevada Attorney General's office concludes:

> "Therefore, what conclusions, if any, can be reached regarding future federal action? (...) Is interactive gaming or on-line gambling legal under current federal law? Absent Congressional guidance, these questions will remain unanswered and subject to the ongoing debate about the interpretation and application of the federal laws that have been enumerated herein." *Id.*, p. 37.

[51] Request for Consultations by Antigua and Barbuda, WT/DS285/1/S/L/110 (13 March 2003).

"It is my Government's understanding that the cumulative impact of the Federal and State measures of the type listed in the Annex to this request is that the supply of gambling and betting services from another WTO Member (such as Antigua and Barbuda) to the United States on a cross-border basis is considered unlawful under United States law.

> These measures and their application may, therefore, constitute an infringement of the obligations of the United States of America under the GATS and the Schedule of Specific Commitments by the United States of America annexed to the GATS. In particular these measures and their application appear to contravene, among other provisions, Articles II, VI, VIII, XI, XVI and XVII of the GATS."

33. During the consultations meeting held by the parties under DSU Article 4.3, while the United States represented itself as confused by the inclusion of a number of the laws and other items described in the annex attached to the Consultations Request,[52] on one point the United States expressed no confusion whatsoever–that the provision of cross-border gambling and betting services via the Internet to consumers in the United States is prohibited.[53]

34. In a letter to the United States provided by Antigua on 8 May 2003, subsequent to the consultations meeting but prior to the Panel Request, Antigua noted:

> "In any event, the debate about the specific scope and nature of the individual measures has become much simpler, if not moot, because the U.S. team explained that the provision of cross-border gambling and betting services is always unlawful in the entire U.S. in whatever form. Thus we think it is no longer relevant to continue the debate about the impact or the applicability of specific measures. What matters in terms of WTO law is the effect of one or more measures and, in that regard, you have unambiguously told us that the provision of these types of services from Antigua and Barbuda to persons in the U.S. is unlawful in the U.S."[54]

35. In response to this letter, the obvious purpose of which was to offer further consultations, the United States responded:

---

[52] *See* First Written Submission of Antigua and Barbuda, WT/DS285 (1 October 2003) (the "AB First Submission"), paras. 132-133.

[53] *See* Comments on the United States' Request for Preliminary Rulings by Antigua and Barbuda, WT/DS285 (22 October 2003) (the "AB Comments"), paras. 7-9.

[54] AB Comments, para. 7.

> "Thank you for your letter of May 8, 2003, suggesting a continuation of consultations in the matter of [US – Gambling].
>
> The United States appreciates the written explanation of your views on the issues referred to in your letter and the further explanation of your interpretation of the US services schedule. We recall that the United States provided its views on these issues during the consultations held with your delegation in Geneva on April 30, 2003. While the United States would be willing to meet again in Geneva with the representatives of your government, we believe that we have already presented our position on the points raised in your letter of May 8, 2003. We note that *it is the consistent view of the U.S. Justice Department that internet gambling is prohibited under U.S. law*."[55] (emphasis added)

36. As a result of Antigua's initial analysis of United States laws and the position of the DOJ regarding gambling, reinforced by the statements made by the United States during the course of the consultations, Antigua determined to frame the Panel Request on the basis of the total prohibition.

37. As noted by the Panel in paragraph 6.154 of the Final Report, in its first submission to the Panel (the "AB First Submission"), Antigua "framed its argumentation on the basis of what it considered to be an admission by the United States that there is a 'total prohibition' on the cross-border supply of gambling and betting services in the United States." This is indeed what Antigua did, clearly and unambiguously, in the AB First Submission,[56] and for good reason. At the meeting of the WTO Dispute Settlement Body (the "DSB") held on 24 June 2003 the United States Ambassador to the WTO was present and stated to the DSB in direct reference to the Panel Request that "[j]ust as importantly, the United States had made it clear that cross-border gambling and betting services were prohibited under US law."[57] At a subsequent meeting of the DSB held

---

[55] *Id.*, para. 8, fn. 4.

[56] AB First Submission, paras. 132-143.

[57] WT/DSB/M/151, para. 47.

on 21 July 2003, the United States representative said, again in reference to the Panel Request, "it was also clear that these services were prohibited under US law."[58]

38. Subsequent to the filing of the AB First Submission, the United States filed with the Panel a Request for Preliminary Rulings (the "US Request for Rulings").[59] In the US Request for Rulings the United States in essence dismissed Antigua's right to proceed on the basis of the "total prohibition" and began its frequently repeated litany that a "total prohibition" cannot be a measure. In the AB Comments, and continuing throughout the dispute, Antigua consistently maintained that it was entitled to present its case based upon the total prohibition[60] while the United States consistently maintained that it was not.[61]

---

[58] WT/DSB/M/153, para. 47.

[59] Request for Preliminary Rulings by the United States of America, WT/DS285 (17 October 2003).

[60] *See, e.g.*, AB First Submission, para. 136 ("The subject of this dispute is the total prohibition on the cross-border supply of gambling and betting services—and the parties are in agreement as to the existence of that total prohibition. The precise way in which this import ban is constructed under United States law should not affect the outcome of this proceeding."); First Panel Meeting, Opening Statement of Antigua and Barbuda, WT/DS285 (10 December 2003) (the "AB First Oral Statement"), para. 23 ("Antigua and Barbuda submits that it is not only legally possible but also logical for it to challenge the United States' total prohibition on the cross-border supply of gambling. Under domestic United States law this total prohibition is composed of many different prohibition laws which all have a similar effect but which may have a different or slightly different territorial or substantive scope."); AB Second Submission, para. 5 ("The United States repeatedly and consistently confirmed that it prohibits the provision of all cross-border gambling. This 'total prohibition' can, in itself, be challenged as a "measure" in WTO dispute settlement.").

[61] *See, e.g.*, US First Submission, paras. 2 ("Antigua insists on targeting all its claims in this dispute exclusively against the notion of a 'total prohibition' on cross-border supply of gambling. That notion has no legal status under U.S. law.") and 40 ("Rather than providing an analysis of specific U.S. laws as they relate to gambling, Antigua is asking this Panel to accept a mere assertion as to the effect of such laws – that they represent a 'total prohibition' on cross-border gambling – as proof that the United States is in violation of its WTO obligations."); Oral Statement of the United States, WT/DS285 (10 December 2003) (the "US First Oral Statement") , para. 14 ("Up to now, Antigua is apparently still asserting a proposition about the collective effect of U.S. domestic laws relating to the remote supply of gambling, without regard to individual measures and how they work. Antigua, without any basis, labels this effect a "total prohibition on the cross-border supply of gambling and betting services."); US Second Oral Statement, para. 18 ("The 'total prohibition' is simply a baseless label created by Antigua. It does not embody, or even accurately describe, the

5. Application of the Law to the Facts.

39. Based upon the discussion above, it is clear not only that Antigua identified the total prohibition in the Panel Request, but that something such as the total prohibition is capable of constituting a measure for purposes of WTO dispute resolution. The question remaining to be resolved is whether under the application of the law to the facts of this case, Antigua was entitled to rely on, and the Panel assess, the total prohibition as a measure.

40. In its assessment of this issue in the Final Report, rather than relying on the threshold test established by the Appellate Body in *EC – Bananas III*[62] and followed many times thereafter, the Panel proceeded to apply its "three-part test" without recourse to the *EC – Bananas III* test at all.

(i) The Proper Standard

41. Although the test in *EC – Bananas III* relates expressly to identification of a measure in a Panel Request under DSU Article 6.2, in practice in cases where the Appellate Body has determined that a panel request sufficiently identified the measures at issue, whether the identified measure can qualify for dispute resolution under the DSU generally follows as a matter of course.

42. The Appellate Body in *EC – Bananas III* said it was important for a panel request to be precise for two reasons, "first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[63] There can be no doubt that the Panel's terms of reference in

---

actual provisions of U.S. law, and it is nothing more than another attempt by Antigua to avoid its burden of establishing its prima facie case regarding the actual text and meaning of U.S. law."); Closing Statement of the United States at the Second Substantive Meeting of the Panel, WT/DS285 (27 January 2004) (the "US Second Closing Statement"), para. 2 ("The United States neither concedes nor agrees with any of Antigua's propositions about the alleged 'total prohibition.' That label neither embodies nor accurately describes U.S. law.").

[62] *See* the discussion at paragraphs 10 through 11 above.

[63] Appellate Body Report on *EC – Bananas III*, para. 142.

this dispute were neither unclear nor exceeded, and neither the Panel nor the United States has so alleged. With respect to the second reason, this has been consistently interpreted as ensuring that the ability of the defending party to defend its case is not prejudiced by lack of clarity or certainty in the panel request.[64] The United States has not alleged that it was prejudiced by the Panel Request; undoubtedly however because the Panel refused to consider the total prohibition as a measure, as well as because the United States itself refused to consider or address the total prohibition as a measure. According to the Appellate Body's decision in *Korea – Dairy*, failure of the defending party to raise and demonstrate prejudice should be dispositive of the issue.[65]

(ii) The "Burden of Proof" and Can This Case be Resolved on the Basis of the Total Prohibition?

43. Having identified the total prohibition as a measure in the Panel Request, at this point Antigua's burden of proof became clear. *First*, establish a *prima facie* case that the total prohibition exists; *second* establish a *prima facie* case that the total prohibition has the claimed effect, that is, prohibiting the cross-border supply of gambling services from Antigua to consumers in the United States; and *third*, establish a *prima facie* case that this effect is counter to a United States obligation under the GATS.

44. It was at this juncture that the Panel's reasoning, at the insistence of the United States, went off in the wrong direction. As noted earlier, the United States made much of the "failure" and "refusal" of Antigua to introduce evidence of the "measures," to "identify," "examine" and

---

[64] *See, e.g.*, Appellate Body Report on *EC – Computer Equipment*, para. 70; Appellate Body Report on *Korea – Dairy*, para. 130-131; Panel Report on *US – FSC*, paras. 7.27-7.30.

[65] Appellate Body Report on *Korea – Dairy*, para. 131.

"explain" how the various laws cited by Antigua in the Panel Request "work together."[66] The United States' position is succinctly summarised in paragraph 3.88 of the Final Report:

> "Antigua's staunch refusal in this dispute to provide evidence and argumentation relating to each relevant individual measure, as well as to the interaction between the measures under municipal law that supposedly results in Antigua's claimed collective effect, makes it impossible for Antigua to credibly assert that it has sustained its burden of proof in this dispute."

45. What Antigua *did* "fail and refuse to do" at this point in the case was to fall into the trap suggested by the United States and attempt the "impossible task" of "assembling the puzzle"[67] for purposes of establishing the total prohibition. Because indeed, the only relevance of the "impossible task" was to establish that the total prohibition exists. However, the United States had already admitted this fact. Not only did the United States admit that the total prohibition exists, but it also admitted its effect–prohibiting the provision of cross-border gambling and betting services from Antigua to consumers in the United States.[68]

46. While the Panel admitted that the United States had done so,[69] it failed to attach any significance to this whatsoever. And in doing so, it failed to objectively assess the facts before it

[66] These statements are, even in the context of the laws described in the Panel Request, misleading at best and fundamentally incorrect.

[67] US First Closing Statement, para. 4.

[68] *See* the discussion at paragraphs 32 through 38 above.

[69] Final Report, paras. 6.161, 6.162, 6.164.

as required by DSU Article 11. After discussing the United States admission,[70] the Panel continued its focus on the approach advocated by the United States:

> "[W]hat remains unclear is: what are the specific provisions of those laws that prohibit the remote supply of gambling and betting services in the United States and with which specific provisions . . ..."[71]
>
> "[T]he details of how [the total prohibition] is constituted are far from clear."[72]
>
> "[O]ur role here is to identify which measures are inconsistent with the GATS."[73]
>
> "The fact that the United States has admitted a total or partial prohibition on the remote supply of certain gambling and betting services under US law does not relieve Antigua of its obligation to specifically identify . . . such a prohibition."[74]

47. However, what *was* clear at this point was that the United States itself had said in no uncertain terms that it prohibited the provision of cross-border gambling and betting services from Antigua to consumers in the United States and further that the provision of such services was illegal under United States law. Going back to Antigua's burden of proof in this case as outlined in paragraph 43 above, at this stage in the proceeding there can be no doubt that Antigua *had* demonstrated its *prima facie* case on points one and two–the *existence* of the prohibition and the

---

[70] The discussion of the Panel in paragraphs 6.160 and 6.162 of the Final Report relates to the United States' dubious attempt to back off from its earlier repeated and unambiguous concessions of the total prohibition, which occurred at the [first meeting] of the parties with the Panel, at which the United States disingenuously stated that it did not in fact maintain a "total prohibition" because it allowed certain "gambling and betting" services, such as those described by the Panel in paragraph 6.162 of the Final Report. However, it has always been clear that the subject of this dispute is *not* about the "gambling and betting" services described in paragraph 6.162 that may be permitted, but rather the provision of the gambling and betting services offered by Antigua to United States consumers and comprehensively described in the AB First Submission.

[71] Final Report, para. 6.165.

[72] *Id.*, para. 6.177.

[73] *Id.*, para. 6.183.

[74] *Id.,* para. 6.184.

effect. Under WTO jurisprudence, it was incumbent upon the United States to then rebut the presumption established by the *prima facie* case:

> "If [a] party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[75]

48. The United States did not adduce evidence to rebut the *prima facie* case of Antigua. It never contested or denied that the provision of the services in question was prohibited under United States law.[76] Far from being a "mere assertion" or a "simple allegation,"[77] the "total prohibition"–a "measure" under GATS Article XVIII(a) and DSU Article 6.2 that "creates expectations among the public and among private actors"[78]–was *alleged* and *proven* by Antigua in its *prima facie* case–in large part by the concessions of the United States itself.

---

[75] Appellate Body Report on *US – Wool Shirts and Blouses,* p. 14.

[76] *See* Final Report, paras. 3.114, 3.116.

[77] *Id.*, paras. 3.97, 6.176, 6.184.

[78] *Id.*, para. 187. There is no doubt that the United States' assertion has created expectations among the public and private actors. *See, e.g.*, United States Government Accounting Office, GAO - 03-89, Internet Gambling: An Overview of the Issues (December 2002) (Exhibit AB-17), pp. 24-25:

> "Officials from the eight large U.S.- based issuing member banks . . . which represent more than 80 percent of the purchase volume of cards issued by VISA and MasterCard in the United States, all indicated that they had implemented policies to deny payment authorization for Internet gambling transactions coming through their automated systems."
>
> "Most of the issuing banks explained that they blocked Internet gambling transactions primarily because of on-line gambling's unclear legal status, which they believed could cause them to unknowingly facilitate illegal Internet gambling . . ."
>
> "Since the legality of Internet gambling is questionable . . . some bettors have refused to pay their gambling debts, claiming that the issuing banks facilitated the illegal activities."

See also Exhibits AB-55, 56, 57 and 58 (describing actions taken by private banking companies to cease involvement in Internet gambling transactions due to actions by authorities of the State of New York, relying on state and federal law) and Exhibit AB-92 (describing action by authorities in the State of Florida advising advertisers they were unlawfully promoting illegal gambling under Florida law by promoting offshore gambling enterprises).

49. The United States relies on the fact that Antigua failed to perform the "impossible task" to conclude that the *prima facie* case had not been made. But the burden of proof on Antigua in this respect was *not* to engage in a parsing and examination of United States domestic law in order to explain and verify the legal underpinnings of the total prohibition.[79]

50. As Antigua observed at the second session of the Panel,[80] there may well be circumstances under which a panel would need to make a precise statutory analysis of a defending party's laws, namely when there is genuine disagreement over the effect of the applicable laws. In the WTO cases that the United States relied upon to support its argument that the "impossible task" must be performed, this was indeed the case.[81] In each of those cases, there was genuine disagreement between the parties either as to the interpretation of the applicable measures themselves or as to the effects of those measures that required examination and resolution by the Panel.[82] None of those cases was like this one, where the parties are in agreement on the existence and the effect of the prohibition.

---

[79] *See* Appellate Body report on *US – Oil Country Tubular Goods Sunset Reviews,* para. 184 *See also Panel Report on US – Section 301 Trade Act*, para. 7.18:

> "Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India – Patents (US)*[634], interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations."

[80] Opening Statement of Antigua and Barbuda at the Second Panel Meeting, WT/DS285 (26 January 2004), para. 15.

[81] *See* US First Submission, paras. 48-54.

[82] *Japan – Film* is a good example of this. In that case, the United States argued that a wide number of Japanese laws and practices had the effect of inhibiting fair competition in the sale of film products in Japan. Unlike *this* case however, Japan denied both that the measures did so and that there was unfair competition. Panel Report on *Japan – Film*, para. 6.22.

6. Completing the Analysis.

51. Antigua identified and established the effect of the total prohibition. The Panel erred under DSU Articles 6.2 and 11 and GATS Article XXVIII(a) by failing to assess Antigua's claims of GATS violations on the basis of the total prohibition. Accordingly, Antigua requests the Appellate Body to complete the analysis and assess the total prohibition for consistency with GATS Article XVI.

POINTS RELATED TO GATS ARTICLE XVI

A. Conditional Appeal Regarding GATS Article XVI – In the event the Appellate Body were to find in favour of the United States and reverse the Panel's conclusion in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel's erroneous legal conclusion that the first paragraph of Article XVI is limited by its second paragraph.

52. The United States has appealed the Panel's legal interpretation of GATS Article XVI:2(a) and Article XVI:2(c). In essence the United States argues that the Panel should have adopted a narrow and strictly text based interpretation and concluded that (i) Article XVI:2(a) only catches measures explicitly expressed in the form of "numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test" and that (ii) Article XVI:2(c) only catches limitations "expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test."

53. In the event the Appellate Body were to find in favour of the United States on this matter and reverse the Panel's conclusion in paragraph 7.2(b) of the Final Report, Antigua seeks review of the Panel's legal conclusion that the first paragraph of Article XVI is limited by its second paragraph. The Panel concluded that Article XVI only catches the type of measures listed in its second paragraph and therefore that the second paragraph of Article XVI limits the first.[83] That

[83] *See* Final Report, paras. 6.298, 6.299 and 6.318.

interpretation cannot be sustained if Article XVI is to be interpreted purely on the basis of its text, as argued by the United States in its appeal concerning Article XVI:2.

54. GATS Article XVI:1 provides as follows:

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

On its face this provision obliges a WTO Member to allow "market access . . . no less favourable" than provided for in its Schedule of Specific Commitments under the GATS (each a "Schedule"). Via its Schedule the United States agreed that it would maintain no ("*none*") limitations on market access and, as the Panel pointed out in paragraph 6.275 of the Final Report, this implies that the United States should not maintain or introduce "provisions or conditions limiting the ability of services and service suppliers to gain access to the market." Obviously, the measures at issue in this dispute *do* limit the ability of Antiguan services and service suppliers to gain access to the market and therefore violate Article XVI:1 when interpreted purely on the basis of its text.[84]

55. There is nothing in the text of Article XVI that suggests that paragraph 1 is merely an introductory clause without any legal effect or significance of its own. In fact, such an interpretation would reduce paragraph 1 to redundancy and therefore cannot be correct. If it becomes necessary for the Appellate Body to rule on this aspect of Antigua's appeal, Antigua requests the Appellate Body to reverse the Panel's legal findings on Article XVI:1 and complete the analysis by finding that the United States measures violate Article XVI:1.

---

[84] *See also* Third Party Submission of the European Communities to the Panel, WT/DS285, paras. 81-83.

B. The Panel erred in its conclusion that measures that prohibit consumers from using the gambling services offered by Antiguan operators through cross-border supply do not violate GATS Article XVI:2(a) and Article XVI:2(c).

56. The Panel found that measures that prohibit consumers from purchasing services supplied on a cross-border basis to consumers in the United States from Antigua are not caught by subparagraphs 2(a) and 2(c) of GATS Article XVI because they are not directed at "service suppliers" for the purposes of subparagraph 2(a) nor to "service operations" and "service output" for the purposes of subparagraph 2(c).[85] Antigua submits that these conclusions by the Panel are legally wrong.

57. The Panel correctly concluded that the United States cannot maintain measures that, by *prohibiting* the supply of a service by remote means, in fact impose a zero quota on service suppliers, service operations and service output caught by subparagraphs 2(a) and 2(c) of GATS Article XVI. Any other conclusion would produce absurd results and would be contrary to the object and purpose of Article XVI and the intention of the contracting parties as expressed in the 1993 Scheduling Guidelines which give the following example of a limitation under subparagraph 2(a): "nationality requirements for suppliers of services (equivalent to zero quota)."[86] On that same basis the Panel should have decided that, in a context such as the one at issue in this dispute, a measure that prohibits consumers from buying services and even imposes criminal sanctions on consumers for buying such services is also equivalent to a zero quota on "service suppliers," "service operations" and "service output," caught by subparagraphs 2(a) and 2(c) of Article XVI.

---

[85] *See* Final Report, paras. 6.382-6.383, 6.397-6.398, 6.401-6.402 and 6.405-6.406.

[86] MTN.GNS/W/164, "Scheduling of Initial Commitments in Trade in Services – Explanatory Note", para. 6. The same example is given in para. 12 of the 2001 Scheduling Guidelines (S/L/92, "Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)."

58. More specifically the Panel erred in placing too much emphasis on the text of subparagraphs 2(a) and 2(c) of GATS Article XVI by making a distinction between prohibitions directed at consumers and prohibitions directed at suppliers. In the words of the Panel in *US – Section 301 Trade Act* the elements referred to in Article 31 of the Vienna Convention, *i.e.*, text, context, object-and-purpose and good faith: "are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order."[87] The Panel's interpretation would allow a Member that has made a full commitment on cross-border supply of a particular service to prohibit its citizens and companies from purchasing from anyone who seeks to supply via remote communication. In doing so that Member would in fact eliminate the possibility of cross-border supply, even without any express restrictions on the service supplier, but it would not be violating its obligations under Article XVI.

59. Antigua believes the better rule to be that any Member that would want to maintain such a prohibition should either make that clear in its Schedule or undertake no commitments in the sector concerned. An interpretation that would allow a Member to maintain such a prohibition

---

[87] *See* Panel Report on *US – Section 301 Trade Act*, para. 7.22. The panel referred to the International Law Commission and Sinclair's commentary on the Vienna Convention: "As noted by the International Law Commission (ILC) – the original drafter of Article 31 of the Vienna Convention – in its commentary to that provision:

> "The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus [Article 31] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule" (Yearbook of the ILC, 1966, Vol. II, pp. 219-220).

See also Sinclair, I., *The Vienna Convention on the Law of Treaties*, 2nd Edition, Manchester University Press, 1984, p. 116:

> "Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve. The conclusion which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation".

even if it has a full commitment on cross-border supply does not properly take into account context, object-and-purpose and good faith. It does not properly take into account context because the 1993 Scheduling Guidelines explicitly provide the example of a non-numerical restriction that is "equivalent to zero quota." The 1993 Scheduling Guidelines do not distinguish between, on the one hand, nationality requirements enforced via criminal sanctions imposed on service suppliers and, on the other hand, nationality requirements enforced via criminal sanctions imposed on consumers. In fact, it would be absurd to do so because both are obviously "equivalent to zero quota."

60. Furthermore Antigua submits that a good faith interpretation of GATS Article XVI, in the light of the object-and-purpose of the GATS cannot allow the distinction made by the Panel. The main object-and-purpose of the GATS is:

> "to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries."[88]

If, in that context, Members make a full commitment on market access they should not be allowed to circumvent that commitment via a simple legal trick, *i.e.* to enforce the import ban via the service consumers rather than via the service suppliers. For instance, the Panel's interpretation would allow a developed WTO Member with a full market access commitment on the cross-border supply of computer services to prohibit its companies from outsourcing computer services to other countries. Under the Panel's reasoning this would not violate Article XVI because the prohibition is formally imposed on the buyer of the service rather than the supplier. On any

---

[88] Second paragraph of the preamble to the GATS.

reasonable analysis that would be a contrived interpretation that would violate the legitimate expectations of other WTO Members.

POINTS RELATED TO GATS ARTICLE XIV

A. The Panel erred in its decision to consider the defence asserted by the United States under GATS Article XIV, which was only raised by the United States at the end of the second substantive meeting of the Panel with the parties. The Panel further erred by constructing and completing the Article XIV defence on behalf of the United States, thus relieving the United States of its burden of proof. Both of these errors are contrary to due process, the principle of equality of arms and the terms of DSU Articles 3.10 and 11.

1. Article XIV is an Affirmative Defence.

61. GATS Article XIV is an affirmative defence, and as such the United States bears the burden of proving it.[89] There is no difference between the assertion of a case-in-chief and the assertion of an affirmative defence in that the demands of due process require:

> "[a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely."[90]

2. The Factual Background.

62. Both because Antigua anticipated that the United States might assert some defence under GATS Article XIV and because Article XIV had yet to be the subject of a panel or Appellate Body report, Antigua believed it important to provide the Panel with a frame of reference for the proper interpretation and application of Article XIV. Accordingly, in Antigua's first submission in this proceeding, it outlined the framework of an Article XIV analysis, further noting "[o]f course, Antigua will only be able to respond in full to a possible Article XIV defence when (and if) the United States presents one."[91]

---

[89] Final Report, paras. 6.13, 6.450.

[90] Appellate Body Report on *India – Patents*, para. 94.

[91] AB First Submission, para. 203.

(i) Time Line

63. Following the AB First Submission on 1 October 2003, the United States on:

- **17 October 2003** filed the US Request for Rulings with the Panel, which made *no reference* to GATS Article XIV;
- **7 November 2003** filed the US First Submission with the Panel, which made *no reference* to Article XIV;
- **10 December 2003** made the US First Oral Statement to the Panel, which made *no reference* to Article XIV;
- **11 December 2003** made the US First Closing Statement to the Panel, which made *no reference* to Article XIV;
- **9 January 2004** filed the Second US Submission with the Panel, which was the first time that it referenced Article XIV in the dispute, albeit with the caveat that "[i]t is . . . unnecessary for the Panel to examine Antigua's claims in light of Article XIV of the GATS;"[92]
- **26 January 2004** made the US Second Oral Statement to the Panel, in which it mentioned Article XIV two times, once to say "we maintain our view that the Panel not reach the issue;"[93]
- **27 January 2004** made the US Second Closing Statement to the Panel, which made *no reference* to Article XIV;
- **2 February 2004** filed its Second Answers to Questions of the Panel, in which it responded to two direct questions from the Panel regarding Article XIV; and

---

[92] US Second Submission, para. 72.

[93] US Second Oral Statement, para. 73. *See* the discussion at paragraph 60 below.

- **11 February 2004** filed its Comments on Antigua's Question Responses with the Panel, in which it made *no reference* to Article XIV.

As observed by the Panel, only in response to a direct question from a member of the Panel at the end of the second substantive meeting of the Panel did the United States say that it was actually invoking GATS Article XIV as a defence in the case, and even then, not until the question had been repeated by the Panelist following an ambiguous first answer.[94]

(ii) The US Second Submission

64. The United States' discussion of Article XIV in the US Second Submission was brief, covering 53 separately numbered paragraphs over barely 15 pages. Of these paragraphs and pages:

- 12 paragraphs over approximately four and a half pages discuss the historical foundation and development of certain United States federal laws without any reference to this dispute at all;[95]
- Ten paragraphs over approximately three pages address GATS Article XIV(a) with but two references to this dispute;[96]
- 20 paragraphs over approximately six pages address GATS Article XIV(c) in general, without any substantive reference to this dispute at all;[97]

---

[94] Final Report, para. 6.584. Antigua notes that this observation was not made until the discussion regarding the chapeau of GATS Article XIV, 140 paragraphs into the Panel's Article XIV discussion.

[95] US Second Submission, paras. 74-86.

[96] *Id.*, paras. 107-116. *See* the discussion in paragraphs 81 through 84 below relating to the two instances in which the Article XIV(a) discussion references this dispute.

[97] *Id.*, paras. 87-106. In para. 94, the United States made the reference ". . . highly risky service (in this case, gambling by remote supply) . . ." and in para. 99, the United States made the reference ". . . other concerns associated with gambling and more fully described elsewhere in this submission" referencing discussion on GATS Article XVII.

- Six paragraphs over approximately one and a half pages address the "chapeau" of GATS Article XIV, with three or four instances that might be considered referencing this dispute;[98] and
- Five paragraphs contain general statements regarding GATS Article XIV.[99]

65. In the short discussion in the US Second Submission regarding GATS Article XIV(a), the United States mentioned *only* two specific concerns associated with the "remote supply" of gambling and betting services–organised crime and underage gambling, expressly eliminating any "concerns" regarding adults by saying "[w]hile adults can be expected to exercise their own moral judgment, society recognizes that children have a less well-developed sense of right and wrong."[100]

66. With respect to GATS Article XIV(c), paragraph 94 of the US Second Submission cites no support for nor elaborates on its "highly risky service" statement, while in paragraph 99, the United States said simply in the course of a general discussion about what state gambling laws are designed to protect "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," followed by a reference to paragraphs 46-56 of the US Second Submission. Paragraphs 46 through 56 of the US Second Submission contain allegations of the United States with respect to "greater threats" posed by "remote gambling" in the areas of (i) organised crime; (ii) money laundering; (iii) fraud and consumer crimes; and (iv) human health.[101]

---

[98] *Id.*, paras. 117-122. *See* the discussion in paragraph 86 below relating to the instances in which the chapeau discussion references this dispute.

[99] *Id.*, paras. 72-73, 87-88, 123.

[100] *Id.*, para. 114.

[101] The quality and relevance of the discussion in the referenced paragraphs is discussed in paragraphs 113 through 120 below.

67. Paragraphs 117 through 122 of the US Second Submission purport to address the chapeau of GATS Article XIV. The first two paragraphs are used to explain the United States' interpretation of the chapeau generally. In the third paragraph the United States denied its "restrictions on remote supply of gambling" are protectionist measures and asserted that the application of its laws "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."[102]

68. The remaining three paragraphs of the chapeau discussion are remarkable in that the United States offered the theory that because the United States has no domestic regulatory scheme for what it calls "remote" gambling, it is "unreasonable for Antigua to expect the United States to seek negotiations to permit such a regime for its cross-border suppliers."[103]

(iii) The US Second Oral Statement

69. In its Second Oral Statement, the United States made two references to GATS Article XIV, once to say simply that "the United States does not intend to recapitulate the Article XIV concerns discussed in its second submission. We will be happy to address questions on that subject, but we maintain our view that the Panel need not reach the issue."[104] In its only other reference, the United States "invite[d] the Panel to reflect on the Article XIV implications of some of our earlier discussion . . .."[105]

---

[102] US Second Submission, para. 119. The paragraph does not expand any further on what "those newer threats" might be.

[103] *Id.*, para. 120. In paragraph 121, the United States reiterated its "unreasonable to expect the United States to negotiate" argument following a completely unsupported reference to "extensive evidence of the study and debate that has taken place in the United States concerning the possible regulation of remotely supplied gambling services."

[104] US Second Oral Statement, para. 73.

[105] *Id.*, paras. 74-75. The United States followed this with reference to a number of unsupported or irrelevant conclusions regarding the alleged ills of "remote" gambling in the context

(iv) The US Second Answers

70. In its second set of questions to the parties, given subsequent to the second substantive meeting, the Panel felt it necessary to ask the United States directly:

> "Is the United States formally invoking Article XIV and expecting a determination on the same, if necessary?"[106]

Even at that stage, the United States did not clearly state whether it was invoking GATS Article XIV as a defence:

> "The United States maintains its strongly-held view that *it is not necessary to reach the issue*. There is no requirement that a measure be inconsistent with the GATS in order for Article XIV to apply (although the US would recognize that a panel would normally not want to reach Article XIV unless it had found an inconsistency). Article XIV thus applies in this dispute with or without a finding of an inconsistency with the GATS. Because the measures discussed in the US second submission serve important policy objectives that fall within Article XIV, the United States invokes Article XIV in this dispute and would expect a determination on the same, if necessary. However, in view of the express language of Article XIV . . . *the United States views the primary role of Article XIV in this dispute as further confirming the absence of any inconsistency*."[107] (emphasis added)

71. Panel question 45 asked the United States to "clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)?" In its response, the United States referred to one federal criminal statute (the "RICO statute"),[108] what it called "findings" of the Organized Crime Control Act of 1970 and Attorney General Order 1386-89. The United States also made a generalised reference to state laws allegedly designed to prevent crime, listing the statutory citations of approximately ten of them.

---

of GATS Article XVII. *Id.*, paras. 45-67.

[106] Final Report, Annex C, Question 44.

[107] *Id.*

[108] 18 U.S.C. §§ 1961-1968.

3. The Panel Should Not Have Considered the Defence.

72. Taking into consideration the facts outlined above, Antigua submits that the Panel erred in its decision to consider the United States' defence in this proceeding at all. It is obvious that the extraordinary delay of the United States in affirmatively invoking the defence was a simple litigation tactic–clearly contrary to DSU Article 3.10–and it is equally obvious that Antigua was greatly prejudiced thereby. Due process mandates that a party be given fair opportunity to respond to the claims made and evidence submitted by the other party in a WTO dispute.[109]

73. Although Antigua had attempted to anticipate a defence by the United States under Article XIV, it of course could not adequately counter such a defence until such time as the defence was raised, discussed and argued by the United States. Because the United States did not even raise the issue until its second written submission–filed with the Panel on the same day that Antigua's second (and final) written submission was due–Antigua was deprived of a full and fair opportunity to respond to the defence.

74. Antigua's ability to respond to any GATS Article XIV defence was also prejudiced by the United States' repeated obfuscation of whether it was advancing a defence at all. In its overall cursory treatment of Article XIV in the proceeding, at least four times the United States nonetheless conveyed to the Panel and Antigua that perhaps it was not really raising the issue as a

[109] *See, e.g.*, Appellate Body Report on *Australia – Salmon*, paras. 272, 278; Appellate Body Report on *India – Patents*, para. 94.

defence at all.[110] Antigua's exasperation with the dissembling of the United States was expressed in its comment to the United States' answer to the Panel's question 44:

> "The United States position on this issue remains unclear. Its statements contained in paragraphs 31 and 32 of its response to this question can be construed to mean that the United States does not invoke Article XIV as a defence, but simply as a method of 'further confirming the absence of any inconsistency' of its laws with the GATS, apparently."[111]

75. The Panel confirmed the prejudice to Antigua in paragraph 6.584 of the Final Report:

> "Antigua did not advance much argumentation in response to the submissions made and evidence adduced by the United States in support of its defence under Article XIV. However, we consider that a number of the factual arguments made by Antigua in the context of Article XVII are relevant in deciding whether or not the measures in question are applied in a manner that constitutes 'arbitrary and unjustifiable discrimination between countries where like conditions prevail' and/or a 'disguised restriction on trade'."

76. Paragraph 6.584 evidences prejudice in at least three ways. First, the initial sentence could be viewed as critical of Antigua for not supplying more argument in response to United States "evidence"[112]–a criticism that would be unusual under the circumstances. Second, the Panel admitted that it had taken evidence submitted by Antigua for another purpose and applied the evidence to an Article XIV discussion, a different GATS provision altogether with completely different issues and context. Antigua's evidence and argumentation under GATS Article XVII was submitted for purposes of demonstrating that the gambling services offered from Antigua were "like" gambling services offered to American consumers domestically. Third, it infers that

---

[110] US Second Submission, paras. 72-73 (In these introductory paragraphs to the United States' discussion of GATS Article XIV the United States inferred that the purpose of the discussion was to demonstrate that it "would have been incomprehensible for the United States to make [gambling services] the subject of a specific commitment."); *id.*, para. 123 ("no need for the panel to reach Article XIV"); US Second Oral Statement, para. 73 ("we maintain our view that the Panel need not reach the issue."); US Second Answers, paras. 31-32 ("United States maintains its strongly-held view that it is not necessary to reach the issue").

[111] Final Report, Annex C, p. C-72.

[112] *See* the discussion at paragraphs 106 through 120 below. In the event, the United States submitted no substantive evidence in support of its GATS Article XIV defence.

this “imported” argumentation was only to be used by the Panel in assessing the GATS Article XIV chapeau.

77. The Panel should have refused consideration of the GATS Article XIV claim raised by the United States so late, so ambiguously and so sketchily.

4. The Panel Should Not Have Made the Defence for the United States.

78. With the United States having raised its GATS Article XIV defence late in the proceedings, the Panel–with but cursory discussion of the issue from the United States and limited input from Antigua as well–having determined to consider the defence, had little to go on. What it did then was to construct the defence for the United States on its own initiative and effort. By constructing the defence for the United States, the Panel denied Antigua the ability to respond to the defence in violation of due process and the principle of equality of arms. Further, in manufacturing the defence, the Panel failed to make an objective assessment of the matter before it, contrary to DSU Article 11.

79. As, ironically, the United States has asserted in the US Appellant Submission in another context,[113] while the Appellate Body has given panels some latitude in their ability to sort through the facts, evidence and legal arguments of the parties, panels are not entitled to make the case for a complaining party.[114]

80. An examination of the Final Report and the submissions by the parties yields considerable evidence that the Panel constructed the GATS Article XIV defence on behalf of the United States.

---

[113] US Appellant Submission, paras. 17-35. Antigua will respond to the United States claim in its Appellee’s Submission.

[114] Appellate Body Report on *Japan – Agricultural Products II*, para. 129.

(i) GATS Article XIV(a)

81. As Antigua has already established,[115] in all of its discussion regarding GATS Article XIV(a) the United States only raised *two* "public morals or public order" concerns–organised crime and under-age gambling. The Panel, however, applied Article XIV(a) in relation to *five* "risks" or "concerns" alleged to be "associated" with Internet gambling–these five included the two actually raised by the United States, but also three others–money laundering, fraud and risks to (adult) health.[116] These three additional concerns were apparently culled by the Panel from United States Congressional reports submitted by the United States in this dispute for another purpose.[117] By adopting this approach the Panel has effectively added defences that the United States never made itself.

82. Furthermore, the Panel's discussion and analysis of GATS Article XIV(a) runs through almost 20 densely packed pages and 100 paragraphs of the Final Report.[118] This is, on any analysis, remarkable in view of the scant effort by the United States to develop and substantiate its Article XIV(a) defence,[119] and can only be viewed as the Panel making the case on behalf of the United States.

83. For instance, while the first sentence of paragraph 6.479 of the Final Report is verbatim from paragraph 111 of the US Second Submission, the second sentence does not appear in any United States discussion on GATS Article XIV. Where the second sentence *does* come from is paragraph 10 of the US First Oral Statement, in the context of a broad refutation of Antigua's

---

[115] *See* the discussion at paragraph 56 above.

[116] Final Report, para. 6.489.

[117] *Id.*, paras. 6.484, 6.489.

[118] *Id.*, paras. 6.456-6.535.

[119] *See* the discussion at paragraphs 54 through 62 above.

description of the vast extent of legal gambling in the United States and prior to the United States mentioning, much less invoking, Article XIV.

84. The Panel then stretched its discussion of the "concerns" it identified (collectively, the "Five Concerns") into a 22 paragraph discussion, selecting paragraphs from various of the parties' submissions given in a variety of contexts to create one relatively coherent argument in support of the United States' GATS Article XIV(a) defence.

(ii) GATS Article XIV(b)

85. Although neither the United States nor the Panel anywhere mentioned GATS Article XIV(b), the Panel considered an Article XIV(b) issue in its Article XIV(a) discussion.[120] One of the Five Concerns, "risks to health," does not plainly come within the scope of GATS Article XIV(a)–but it does *expressly* come under the scope of Article XIV(b). Of course, the United States did not raise "risks to health" in its discussion on GATS Article XIV(a), but as it did not argue GATS Article XIV(b) at all, consideration of this issue by the Panel was clearly error under any standard.

(iii) The Chapeau

86. Antigua believes that even were the Panel correct in deciding to consider the United States's defence, it should not have addressed the chapeau at all.[121] The United States dedicated a total of one and a half pages in six paragraphs to its discussion of the chapeau.[122] None of the inscrutable discussion on the application of the chapeau by the Panel contained in paragraphs 6.585 through 6.606 of the Final Report was contained in the United States discussion on the

---

[120] Final Report, paras. 6.510-6.514.

[121] *See* the discussion at paragraphs 137 through 141 below.

[122] *See* the discussion at paragraphs 58 through 59 above.

chapeau or, indeed, submitted by the United States in the GATS Article XIV context at all. Nor, for that matter, was it submitted by Antigua.[123]

(iv) Conclusion

87. The Panel created for the United States that which it entirely failed to do itself–a defence under GATS Article XIV. The Panel erred in doing so.

B. The Panel erred in its application and assessment of GATS Article XIV(a), including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

1. Introduction.

88. No doubt in large part due to the haphazard way in which the United States presented its "case" under GATS Article XIV–and Article XIV(a) in particular–the discussion of the Panel in the Final Report on Article XIV(a) is among its most obscure portions. The errors made by the Panel in its Article XIV(a) assessment fall into (and are discussed below under) three broad categories–*first* the failure of the Panel to consider the complete text of Article XIV(a), *second*, an improper analysis and assessment of Article XIV(a), including under the standards adopted by the Appellate Body in *Korea – Various Measures on Beef*, and *third* the failure of the Panel to objectively assess the evidence before it.

2. Failure to Consider the Text.

89. In paragraphs 6.457 through 6.470 of the Final Report, the Panel struggled with the meaning of "public morals" and "public order," ultimately deciding in paragraph 6.469 that for purposes of its GATS Article XIV(a) analysis in this case it did not matter which category the "concerns" regarding gambling raised by the United States came under. During the course of its

[123] The Panel admitted as much in paragraph 6.584 of the Final Report.

discussion,[124] the Panel made reference to footnote 5 to GATS Article XIV(a) ("footnote 5"), which says:

> "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."

It is clear from paragraph 6.468 of the Final Report that the Panel's resort to footnote 5 was solely to aid it in its attempt to distinguish between public "morals" and "order."

90. After paragraph 6.468 of the Final Report, there is *no further mention* in the Final Report of either footnote 5 or its text. In failing to assess whether the interests the United States purported to protect in its GATS Article XIV(a) defence rose to a level to withstand scrutiny under footnote 5, the Panel failed to take into consideration the complete text of GATS Article XIV(a) and, accordingly, its analysis is incomplete and cannot stand.

3. Assessment of GATS Article XIV(a).

91. In order to establish a *prima facie* case under GATS Article XIV(a), a complaining party must establish that the measures in question (i) be *designed* to "protect public morals" or to "maintain the public order," and (ii) are also *necessary* to "protect public morals" or to "maintain the public order."

92. As noted by the Panel, GATS Article XIV had not been invoked in WTO dispute resolution before this case. The Panel further observed that the Appellate Body in *EC – Bananas III* determined that WTO jurisprudence under Article XX of the *General Agreement on Tariffs and Trade 1994* (the "GATT") could be relevant for the interpretation of GATS Article XIV.[125] Given that GATT Article XX and GATS Article XIV are largely identical, it is appropriate to consider GATT Article XX cases in the interpretation and application of GATS Article XIV.

---

[124] Final Report, paras. 6.467-6.468.

[125] Final Report, paras. 6.447-6.448.

93. The seminal GATT Article XX case is *Korea – Various Measures on Beef* in which, as the Panel correctly observed,[126] the Appellate Body set out a "weighing and balancing" test with three particular components to assess whether a measure is "necessary" to, in the context of this case, protect public morals or maintain the public order.[127] The three components to be "weighed and balanced" are:

- The relative importance of the common interests or values that the measure to be enforced is intended to protect; the more important the interests or values are, the easier it would be to accept the contested measure as "necessary;"
- The extent to which the measure contributes to the realisation of the end pursued; the greater the contribution the easier it would be to accept the contested measure as "necessary;" and
- The extent to which the measure produces restrictive effects on international commerce; the lower the adverse impact on international trade the easier it would be to accept the contested measure as "necessary."[128]

94. As a threshold matter, it is unclear from the Appellate Body decision in *Korea – Various Measures on Beef* precisely at what stage a *factual* analysis is appropriate.[129] Clearly, an analysis in the abstract would be of little value in assessing a particular case and there must at some point be an inquiry into whether public morals or public order issues are *actually present* in a dispute. In other words, it is one thing to *allege* that a service or a product has an adverse impact on public

[126] *Id.*, para. 6.477.

[127] The word "necessary" precedes "to protect public morals or to maintain public order" in GATS Article XIV(a), just as it precedes "to secure compliance" in GATT Article XX.

[128] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 162-163.

[129] Arguably, the factual determination in that case was made *prior* to the application of the three-part "necessary" test in the context of whether the measure was designed to "secure compliance with" other, GATT consistent laws. *Id.*, paras. 157-158.

morals or public order, but it is something else to *establish* that such an impact exists. In the context of this dispute for example, it might be said that the United States has *concerns* about the impact of cross-border gambling and betting services. That is something entirely different, however, from assessing the actual *risk* posed by such cross-border gambling and whether, in the context of the United States' contemporary tolerant attitude towards domestic gambling, this risk can be qualified as posing a "genuine and sufficiently serious threat . . . to one of the fundamental interests of society"–as required by footnote 5.

95. Subsequent to *Korea – Various Measures on Beef* the Appellate Body considered the issue again in *EC – Asbestos*. While it was clear that the panel in *EC – Asbestos* had made a factual determination concerning the product at issue after direct consultations with experts,[130] it is not particularly obvious from the panel report or the Appellate Body report in what context the finding was made although, as in *Korea – Various Measures on Beef*, it appears more likely that the factual determination was made prior to the application of the "necessity" test in the context of whether the measure was designed to "protect human . . . life or health."[131]

96. Regardless, in this case the Panel never performed that analysis at all. While it suggested that it might do so, it in fact never did.[132] Without a factual finding that the United States concerns with respect to "remote" gambling relate to *actually existing risks*, the three United States laws under consideration as measures in the Panel's GATS Article XIV(a) discussion cannot be justified under Article XIV(a).

97. In its consideration of the second part of the *Korea – Various Measures on Beef* test–the extent to which the measures contribute to the realisation of the end pursued–the Panel in a one-

---

[130] *Id.*, para. 157; Panel Report on *EC – Asbestos*, Section V.

[131] Appellate Body Report on *EC – Asbestos*, para. 124.

[132] *See, e.g.,* Final Report, paras. 6.493, 6.520.

paragraph analysis concluded that because the United States measures prohibit the "remote" supply of gambling and betting services, then they "must contribute, at least to some extent, to addressing these concerns."[133] This reasoning is faulty in two respects. First, there is no established nexus between *prohibiting gambling* on the one hand and *addressing the Five Concerns* on the other. Second, the Panel failed to make any assessment whatsoever of "the extent" to which the measures contribute to the realisation of the end pursued. Clearly, a more rigourous examination is needed in order to objectively assess this aspect of the "necessary" test.

98. Turning to the third part of the *Korea – Various Measures on Beef* test, Antigua submitted that the United States' approach to cross-border gambling and betting services–prohibition–was the most restrictive possible. The Panel agreed that the United States laws had a "significant restrictive impact."[134] The Panel decided, however, that prior to completing its "necessary" analysis it should examine whether the United States had exhausted all WTO compatible alternatives prior to resorting to its WTO-inconsistent alternative–prohibition.[135]

99. In its pursuit of the "compatible alternatives" analysis, the Panel erred in several respects. First, misreading the Appellate Body in *Korea – Various Measures on Beef*, the Panel concluded that it "need[ed] to consider whether the United States *has*, in other contexts, used measures other than a prohibition to address similar concerns to those that are alleged to be the basis for its justification in this case for the prohibition on the remote supply of gambling and betting

---

[133] Final Report, para. 6.494.

[134] *Id.*, para. 6.495.

[135] *Id.*, para. 6.496. The logical basis for making this analytical "detour" at this stage in the evaluation remains a little unclear. However, the approach is consistent with that taken by the Appellate Body in *Korea – Various Measures on Beef* and other cases.

services."[136] In *Korea – Various Measures on Beef*, rather than establishing it as a test the Appellate Body simply condoned the approach taken by the Panel to examine:

> "a range of possible alternative measures, by examining measures taken by Korea with respect to situations involving, or which could involve, deceptive practices similar to those which in 1989-1990 had affected the retail sale of foreign beef."[137]

The Appellate Body examined the approach followed by the panel and determined that under the facts of the case and the approach adopted by the panel, Korea had not demonstrated that alternative measures consistent with the WTO Agreement were not reasonably available to it.[138]

100. The Appellate Body did not say anything in *Korea – Various Measures on Beef* that justified the Panel's restriction in its "compatible alternatives" inquiry to situations where the United States *has* used less restrictive measures[139] Further, the Appellate Body did not say anything in *Korea – Various Measures on Beef* that justifies limiting the inquiry into whether another WTO-consistent alternative might be reasonably available to any particular type of situation *at all*. When the Appellate Body revisited the *Korea – Various Measures on Beef* test in *EC – Asbestos* it did not approach the "compatible alternatives" inquiry in anywhere near as narrow a manner as the Panel did in this dispute.[140]

101. In *EC – Asbestos*, Canada had suggested that France could use the product in another fashion that might arguably abate the health risks that the panel determined were applicable to asbestos. The panel had found that the efficacy of the alternative method was uncertain for a

---

[136] Final Report, para. 6.497 (emphasis added).

[137] Appellate Body Report on *Korea – Various Measures on Beef*, para. 168.

[138] *Id.*, paras. 179-180.

[139] *Id.*, para. 168.

[140] Particularly in a case such as this, where the GATS Article XIV defence was so poorly and haphazardly presented, adopting such a restrictive view on what reasonably available compatible alternatives could be considered could have the effect of shifting the burden of proof from the party claiming the defence to the other party. There is no justification for doing so.

number of reasons. Under those circumstances, where the alternative method would involve a continuation of the very risk that France sought to prevent, that alternative was thus not a reasonable alternative to France.[141]

102. When considering alternatives, the key concept seems to have originated in *US – Section 337*:

> "A contracting party cannot justify a measure inconsistent with another GATT provisions as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[142]

103. In light of the foregoing discussion, it is clear that the Panel erred in limiting its "compatible alternatives" inquiry to situations in which the United States "has, in other contexts, used measures other than a prohibition to address similar concerns."[143] There are any number of potential "compatible alternatives" worth analysis, not the least of which is the regulatory scheme adopted by Antigua and the methods whereby certain other countries, such as the United Kingdom, have determined they can address any "risks" that might arise in the context of Internet gambling.[144]

104. The Panel also made an incorrect statement in paragraph 6.497 of the Final Report when it said "the only relevant context to which reference has been made in this dispute is gambling and betting services supplied by non-remote means." Reference was made in the dispute to, *inter alia*,

---

[141] Appellate Body Report on *EC – Asbestos*, paras. 173-174.

[142] Panel Report on *US – Section 337*, para. 5.26. *Quoted* in Appellate Body Report on *Korea – Various Measures on Beef*, para. 165; Appellate Body Report on *EC – Asbestos*, para. 171.

[143] Final Report, para. 6.497.

[144] *See* AB First Oral Statement, para. 4; AB First Submission, paras. 25-74.

the United States' Child On-Line Protection Act[145] in which the United States Congress addressed means of restricting the access of minors to offensive material on the Internet, as well as the views expressed by the United States Federal Trade Commission on how to prevent minors from purchasing wine over the Internet.[146] Furthermore, it was in any event improper for the Panel to restrict contexts in relations to which it performed a "compatible alternative" analysis to those explicitly raised by Antigua when Antigua was never given the opportunity to properly rebut the Article XIV defence.

105. As a final matter with respect to GATS Article XIV(a), the Panel erred in its analysis and determination that United States regulation of its domestic gambling market should not be considered in evaluating "compatible alternatives."[147] Not only is the bulk of the discussion which follows[148] lifted completely out of context for this purpose,[149] but it fails any reasonably objective evidentiary assessment.[150]

4. Evidentiary Matters.

(i) Introduction

106. There are a number of occasions in the Panel's discussion of GATS Article XIV(a) where the Panel failed to make an objective of assessment of the facts and evidentiary matters before it. Antigua realises that contests by parties of panels' findings under DSU Article 11 are not taken lightly.[151] The language of DSU Article 11 is straightforward, and although a panel has discretion in how it assesses factual and evidentiary matters before it, an "objective assessment" should at

---

145 47 U.S.C. § 231. *See* AB First Oral Statement, para. 74.

146 Final Report, Annex C, Question 40. *See also*, Exhibit AB-216.

147 Final Report, para. 6.498.

148 *Id.*, paras. 6.498-6.521.

149 *See* the discussion at paragraph 76 above.

150 *See* the discussion at paragraphs 106 through 120 below.

151 Appellate Body Report on *EC – Poultry*, para. 133.

least involve an examination of all relevant facts before it.[152] In any event, total deference to the statements and findings of a Member's authorities cannot constitute an objective assessment.[153]

(ii) Designed to Protect Public Morals or Order

107. In the discussion regarding whether the "challenged measures" are designed to "protect public morals" or "maintain public order,"[154] with one exception[155] the Panel took into consideration only statements made by the United States in its submissions or evidence in the form of statements made by government persons during the course of Congressional hearings. No third party evidence is cited or discussed. The only other evidence referenced is a United States government report regarding the lack of negative effects of United States government-sponsored gambling on military bases in foreign countries.[156] However, other than being placed in the midst of the rest of the Panel's discussion, the Antiguan evidence is neither discussed nor taken into consideration. The conclusions reached by the Panel in this portion of the Final Report cannot reasonably be supported by the evidentiary information accompanying the discussion.

(iii) Importance of the Interests or Values Protected

108. In the discussion regarding the "importance of the interests or values protected" under the *Korea – Various Measures on Beef* "necessary" test,[157] the Panel concluded, *solely* on the basis of two extracts from Congressional hearings, that the interests protected by the federal laws in

---

[152] Panel Report on *US – Underwear*, para. 7.13.

[153] *Id.*, para. 7.10.

[154] *Id.*, paras. 6.479-6.486.

[155] *Id.*, para. 6.480.

[156] *Id.*, para. 6.480.

[157] *Id.*, paras. 6.489-6.493.

question "serve very important societal interests that can be characterized as 'vital and important in the highest degree' . . .."[158]

109. Furthermore, the Congressional hearings on statutes referenced by the Panel were held in 1961. Mindful of the Panel's insight that the interpretation of the terms "public morals" and "public order" can "vary in time and space, depending upon a range of factors, including *prevailing* social, cultural, ethical and religious values,"[159] the Panel's conclusion in paragraph 6.492 of the Final Report cannot be supported by political statements made more than 40 years ago, well prior to the boom in the domestic gambling industry in the United States described in the AB First Submission.[160]

110. Most significantly in this respect, the Panel ignored a contemporary assessment by the United States Supreme Court of the *prevailing* attitude in the United States towards gambling in a case submitted to the Panel by Antigua:

> ". . . in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits. Despite its awareness of the potential social costs, Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities. That Congress has generally exempted state-run lotteries and casinos from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States. Indeed, in *Edge* we identified the federal interest furthered by § 1304's partial broadcast ban as the 'congressional policy of balancing the interest of lottery and nonlottery States.' . . . Whatever its character in 1934 when § 1304 was adopted, *the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal*."[161] (citations omitted, emphasis added)

---

[158] *Id.*, para. 6.492. The second extract appears not to relate to any of the measures which the United States sought to justify under GATS Article XIV(a) at all, but rather to the RICO statute.

[159] *Id.*, para. 6.461 (emphasis added).

[160] *See* AB First Submission, paras. 75-131.

[161] *Greater New Orleans Broadcasting Association, Inc., v. United States,* 527 U.S. 173, 186-187 (1987) (Exhibit AB-196).

In light of this clear and unambiguous finding by the Supreme Court, the Panel could not objectively or reasonably conclude that the interests protected by the federal laws at issue were "vital and important to the highest degree" on the basis of what was said in Congressional hearings in 1961.

(iv) Contribution to the Ends Pursued

111. In the discussion regarding the "contribution to the ends pursued" under the *Korea – Various Measures on Beef* "necessary" test,[162] the Panel apparently relied on no evidence at all. The conclusions reached by the Panel in this portion of the Final Report cannot reasonably be supported on the basis of no evidence.

(v) Trade Impact–The Five Concerns

112. In the discussion regarding the "trade impact" under the *Korea – Various Measures on Beef* "necessary" test, the Panel chose to make its most extensive review of ostensibly factual material.[163] Antigua has two primary objections to the use and assessment of this evidence. The first objection is that none of the evidence relates to factual matters involving the cross-border gambling and betting services provided by Antigua. The entire discussion is a consideration of the Five Concerns in the abstract with no actual assessment of factual evidence regarding the Antiguan gambling and betting services at issue. Antigua notes that nowhere in the Final Report did the Panel conclude that the United States had established the actual existence of any of the Five Concerns in the context of Antigua gambling services, but rather it simply concluded that the United States has a number of "concerns," some of which the Panel believes are specific only to the "remote" supply of gambling and betting services.[164]

---

[162] Final Report, para. 6.494.

[163] *Id.*, paras. 6.499-6.520.

[164] *See, e.g.*, para. 6.498.

113. Antigua's second objection to the evidence regarding the Five Concerns is that substantially all of it is unsupported, unsubstantiated statements of United States government employees or elected public officials (collectively, "US Persons") evaluated by the Panel either without consideration of Antiguan evidence at all or with an unobjective assessment of Antiguan evidence. The discussion below summarises the failures of the evidence relied upon the Panel in reaching its conclusions in its discussion on the Five Concerns. Included with this submission as ***Annex A*** and incorporated herein is a chart detailing the evidence relied upon by the Panel in each applicable paragraph with Antigua's responses in each case.

114. With respect to the Panel's discussion on money laundering:

- The statements in paragraph 6.499 of the Final Report are all unsubstantiated statements made by the United States in its submissions with no reference. None of the statements refers to Antigua. None of the evidence contrary to these statements is referenced. For example, Antigua's regulated industry does not permit cash deposits by customers; Antiguan operators are required to establish the identity of their customers; Antiguan operators take deposits through credit cards and traceable financial instruments; the Antiguan government has not encountered any material or organised money laundering in connection with its industry; and the United States has never contacted Antigua under the United States-Antigua mutual legal assistance treaty in connection with any money laundering in relation to the Antiguan gaming industry.[165]

[165] AB First Submission, paras. 55, 71-74.

- The statements in paragraph 6.500 of the Final Report are all unsubstantiated statements made by US Persons. All are repetitive of the statements in paragraph 6.499 and none of the contrary Antiguan evidence is considered.
- The statements in paragraph 6.502 of the Final Report are all unsubstantiated statements made by US Persons. All are repetitive of the statements in paragraph 6.499 and none of the contrary Antiguan evidence is considered.
- The statements in paragraphs 6.501 and 6.503 of the Final Report have no apparent connection to Antigua. None of the Antiguan evidence about its industry is considered, and it is difficult to understand how the Panel could reach the conclusion in paragraph 6.504 on the basis of two examples in an FATF report.
- In paragraph 6.505 of the Final Report, the Panel ignored the Antiguan evidence regarding its own industry. The Panel also repeated the unsubstantiated American claims about "volume, speed, international reach and virtual anonymity" all of which Antigua disputed with evidence of its own industry.
- In none of the discussion on money laundering did the Panel take into account Antigua's rebuttal evidence of the United States' unsubstantiated claims.[166]

115. With respect to the Panel's discussion on fraud:

- The statement in paragraph 6.506 of the Final Report is an unsubstantiated statement made by the United States in a submission, for which the United States provided no actual evidence.

[166] *See, e.g.*, AB First Oral Statement, paras. 72-84.

- The statements in paragraphs 6.507 and 6.508 of the Final Report are unsubstantiated statements made by US Persons, for which the United States provided no actual evidence.
- The statement of the Panel in paragraph 6.509 of the Final Report is an example of the Panel ignoring or discounting the value of independent evidence submitted by Antigua and coming to a conclusion based solely on statements of US Persons.[167]

116. With respect to the Panel's discussion on health concerns:

- The statement of the Panel in paragraph 6.510 of the Final Report has no support in the record at all.
- The conclusion of the Panel in paragraph 6.511 of the Final Report appears to be based solely on the unsubstantiated statements of US Persons referenced in paragraphs 6.511 and 6.512 of the Final Report, for which the United States provided no actual evidence.
- The statement made by the Panel in paragraph 6.513 of the Final Report is a clearly misleading representation of the expert report in question which actually concluded that "there is no overall evidence that Internet gambling is any more addictive than other types of gambling."[168]
- In paragraph 6.514 of the Final Report, the Panel first discounted Antigua's evidence regarding gambling pathologies, and in particular the expert report of Dr. Shaffer. The Panel concluded that the United States "argues" that "remote" gambling presents "special health risks" and thus, in essence, Antigua's contrary evidence is rendered meaningless. There is in fact no evidence of any "special

[167] *Id.*, paras. 85-87.

[168] Exhibit AB-80, p. 11.

health risks" associated with "remote" gambling in the record or any other pathologies, for that matter, other than addictive gambling.

117. With respect to the Panel's discussion on underage gambling:

- The statement in paragraph 6.515 of the Final Report is an unsubstantiated statement made by the United States in a submission, for which the United States provided no actual evidence.
- The statement in paragraph 6.516 of the Final Report is an unsubstantiated statement made by a US Person, for which the United States provided no actual evidence.[169]
- The references in paragraph 6.517 of the Final Report are all to unsubstantiated statements made by US Persons, for which the United States provided no actual evidence.
- The Panel's conclusions in paragraph 6.518 of the Final Report are fundamentally flawed as in this case the Panel accepted the testimony of a credit card official before Congress as evidence sufficient to overcome an act of Congress that expressly provides that credit cards are an effective method of screening on-line consumers for age.
- The Panel either failed to take into account Antigua's evidence with respect to underage gambling or expressly chose to discount it.[170]

118. With respect to the Panel's discussion on organised crime:

---

[169] The footnote to this paragraph refers to certain exhibits, one of which is another unsubstantiated statement of a US Person. The others do not appear to be directly relevant.

[170] *See* AB First Submission, paras. 45-46; AB First Oral Statement, paras. 70-74.

- The statements in paragraph 6.519 of the Final Report are all unsubstantiated statements made by US Persons, for which the United States provided no actual evidence.

119. Paragraph 6.520 of the Final Report is interesting because the Panel concluded that the United States has not met its evidentiary burden of proof with respect to its organised crime "concerns." However, the United States' claims in the dispute regarding organised crime are not much different in character and substance than most of its claims on the other Five Concerns. In the attendant commentary, the Panel appeared to be requiring the provision of evidence of *actual* organised crime participation in "remote" gambling and betting–which is the standard that Antigua believes should have been applied to the entire analysis of the Five Concerns.

120. In conclusion, Antigua believes that the factual analysis conducted by the Panel with respect to matters under GATS Article XIV(a) did not rise to the standards required by DSU Article 11 and the related findings should be reversed accordingly.

C. The Panel erred in concluding that the United States had sufficiently identified the RICO statute for consideration under GATS Article XIV(c).

121. Having determined that Antigua was not entitled to rely on the total prohibition in this dispute, the Panel developed its own methodology (the "Measures Test") for determining whether specific United States laws listed in the Panel Request had been sufficiently identified and discussed by Antigua throughout the course of the proceeding for purposes of determining the GATS consistency of those laws.[171] It is Antigua's position that the Panel's methodology was not necessary in this dispute because Antigua was entitled to proceed on the basis of the total prohibition.[172] In the event the Appellate Body retains the Panel's reasoning with respect to the

---

[171] Final Report, paras. 6.215-6.249.

[172] *See* the discussion at paragraphs 8 through 51 above.

Measures Test intact, Antigua submits that the Panel erred in assessing the RICO statute under GATS Article XIV(c), as the United States failed to sufficiently identify the RICO statute under the standards of the Measures Test.

122. Applied to the burden of proof on the United States to establish its affirmative defence under Article XIV(c), the Measures Test would require the United States to (i) identify the RICO statute; (ii) discuss it in sufficient detail to understand how it generally functions; and (iii) apply and discuss it in the context of Article XIV(c).

123. Although the United States submitted the text of the RICO statute as an exhibit,[173] throughout the course of the dispute it referenced the RICO statute but twice, once in a brief paragraph in the US Second Submission[174] and once more in its answer to Panel question 45. Under no analysis could these cursory references–less than five lines of text in the first and barely three lines of text in the second–be considered as discussion of the RICO statute in the abstract, much less how it applies in the context of the GATS Article XIV(c) defence of the United States.

124. Accordingly, the Panel failed to objectively assess the RICO statute in the context of Article XIV(c) on the basis of the information submitted to it by the United States in this dispute.

D. The Panel erred in its application and assessment of GATS Article XIV(c), including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

1. Introduction.

125. The Panel's assessment of the United States' defence under GATS Article XIV(c) suffered from the same flaws that afflict the discussion under Article XIV(a)–lack of thorough discussion, organisation and proper analysis of the facts and matters before the Panel. The Panel made three fundamental errors in its consideration of Article XIV(c). *First* the Panel should not have

---

[173] Exhibit US-35.

[174] US Second Submission, para. 104.

considered the RICO statute under Article XIV(c) because the Panel had already determined that the state statutes on which the RICO statute relies were not properly before the Panel, *second* the discussion is without application because the Panel had already determined that the United States had been unable to demonstrate that the only one of the Five Concerns that the RICO statute addresses-organised crime-is a specific "concern" related to "remote" gambling, and *third* making findings in its Article XIV(c) analysis, the Panel failed to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

2. The RICO Statute Relies on State Laws.

126. In its GATS Article XIV(c) defence, the United States argued that certain of its federal laws were necessary to secure compliance with state laws on gambling and certain other federal laws pertaining to organised crime.[175] In the Final Report, the Panel determined that no state laws were properly before the Panel[176] and that only one federal law–the RICO statute–had been sufficiently identified and discussed by the United States to qualify for consideration.[177]

127. Like many American federal criminal statutes, the RICO statute is dependent upon an actor's breach of one or more *other statutes*–federal or state. Although the RICO statute does create other classes of criminal conduct, it is wholly dependent upon some other legal violation.

128. Section 1961(1) of the RICO statute defines "racketeering activity" to include, among other things, an act involving gambling "which is chargeable under any State law" or under a number of enumerated federal laws. Section 1961(6) of the RICO statute defines an "unlawful debt" to include a debt contracted in gambling activity in violation of a state or federal law.

---

[175] US Second Submission, paras. 95-106.

[176] Final Report, paras. 6.547, 6.551. Ironically, the United States was in essence slain by its own sword, falling victim to its "identify and discuss" doctrine it so vigourously imposed upon Antigua.

[177] *Id.*, paras. 6.548-6.551.

Section 1962 of the RICO statute (which is the part of the statute enumerating what are "prohibited activities") criminalises certain activities involving "racketeering activity" or collection of an "unlawful debt."

129. The Panel noted that no state laws were properly before it for consideration under GATS Article XIV(c), either failing the Measures Test or having been found by the Panel as GATS inconsistent. Further, the only federal statutes before the Panel were the very (otherwise GATS inconsistent) measures being tested for compliance and the RICO statute itself.[178]

130. The RICO statute cannot be examined in a vacuum. It has no force on its own. As the laws upon which a RICO statute violation must of necessity rest were not themselves properly before the Panel, the RICO statute should not have been considered by the Panel.

3. The End Pursued by the RICO Statute is not at Issue.

131. The RICO statute was submitted by the United States and considered by the Panel as a measure for the enforcement of the criminal laws violated by organised crime[179] and for no other purpose or in any other context. Yet in its discussion of the Five Concerns in the portion of the Final Report dealing with them, the Panel found that the United States had failed to demonstrate a meaningful distinction between organised crime in the context of "remote" supply versus "non-remote" supply.[180] Assuming that finding is correct, then the only reason for which the RICO statute is being considered under the Article XIV(c) analysis–organised crime–has not been determined to be any different in the context of the provision of cross-border gambling and betting services.

---

[178] *Id.*, para. 6.551.

[179] *Id.*, para. 6.548; US Second Submission, para. 100.

[180] Final Report, para. 6.520.

132. Accordingly, the Panel should not have considered the RICO statute in its Article XIV review, as a determination in favour of the United States would in essence allow the United States to prohibit the provision of cross-border gambling and betting services under three otherwise GATS inconsistent statutes solely for a purpose that the Panel had found was not demonstrated to be any different than in the context of the domestic supply of those services.[181]

4. Evidentiary Matters.

133. The discussion of factual matters in the context of GATS Article XIV(c) suffers materially from the late introduction of the issue and the lack of thorough and robust consideration of the provision. As noted previously, the Panel "constructed" a comprehensive discussion of Article XIV(a) in large part on the basis of evidence and discussion submitted under GATS Article XVII.[182] There was no other context for even a tangentially relevant discussion of factual issues relating to Article XIV(c), so the entire factual underpinnings on which the Panel's Article XIV(c) discussion rests are unsubstantiated statements, either of the United States in its submissions or of US Persons without any actual evidence.

134. The statements in paragraph 6.552 of the Final Report are conclusory statements directly from various of the United States submissions, certain of which make reference to secondary materials, all of which are unsubstantiated statements of US Persons.

135. The conclusions of the Panel in paragraphs 6.554 through 6.556 of the Final Report appear to be supported by no evidence whatsoever.

136. The conclusions of the Panel in paragraphs 6.558 through 6.560 of the Final Report are based solely upon conclusory statements directly from various of the United States submissions,

---

[181] Possibly this was the issue the Panel had in mind in its cryptic discussion in paragraph 6.560 of the Final Report. However, this interpretation clearly cannot be correct for the reason stated in the text.

[182] *See* the discussion at paragraphs 76, 78 and 81 through 84 above.

certain of which make reference to secondary materials, all of which are unsubstantiated statements of US Persons without any actual evidence.

E. The Panel erred in its consideration, application and assessment of the chapeau to GATS Article XIV, including a failure to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

1. Introduction.

137. The "chapeau" of GATS Article XIV is the introductory language to the provision that constitutes a second part of an Article XIV analysis. A measure that could otherwise qualify under an Article XIV exception must still be assessed under the chapeau before a complete Article XIV defence is considered made. The chapeau of Article XIV is identical to the chapeau applicable to GATT Article XX and thus GATT interpretations in dispute settlement are relevant to its analysis.[183]

138. In *US – Gasoline*, the Appellate Body comprehensively addressed the nature of the chapeau and its application, establishing the two-tiered analysis of an Article XIV (in that particular case, GATT Article XX) defence: "first, provisional justification by reason of characterization of the measure under [Article XIV]; second, further appraisal of the same measure under the [chapeau]."[184] The Appellate Body was careful to point out that the chapeau is not to be assessed by the same standards used in provisional justification of the measure. To do so "would be both to empty the chapeau of its contents and to deprive the [lettered] exceptions [in the chapeau] of meaning."[185]

---

[183] *See* the discussion at paragraph 92 above.

[184] *US – Gasoline*, p. 22.

[185] *Id.*, p. 23.

139. In this context, the Appellate Body stated:

> "The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of [Article XIV] does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a *heavier task* than that involved in showing that an [Article XIV] exception . . . encompasses the measure at issue."[186] (emphasis added)

140. The Panel erred in its consideration, application and assessment of the chapeau in three material respects. *First* in assessing the chapeau at all in the absence of a "preliminary justification" under either GATS Article XIV(a) or (c), *second* in its decision to focus on only certain narrow segments of the gambling industry in its assessment of the chapeau, and *third* by failing to make an objective assessment of the matters before it, including the facts, contrary to DSU Article 11.

2. The Panel Should Not Have Considered the Chapeau.

141. The Panel found that the United States had not preliminarily justified any of the federal laws in question under GATS Article XIV.[187] Accordingly, as the Appellate Body noted in *Korea – Various Measures on Beef,* the Panel should not have considered the chapeau at all.[188] Antigua submits it was even less appropriate for the Panel to have considered an exercise in *obiter dicta* in light of the circumstances under which Article XIV arose in this dispute.[189]

3. The Panel Should Not Have Segmented the Industry.

142. In its discussion in the Final Report of the application of the chapeau to the circumstances of this dispute, the Panel, without any explanation, segmented the gambling industry such that it effectively excluded a substantial portion of gambling and betting services from any

---

[186] *Id.*, pp. 22-23.

[187] Final Report, para. 6.566.

[188] Appellate Body Report on *Korea – Various Measures on Beef*, para. 156.

[189] *See* the discussion at paragraphs 61 through 87 above.

analysis at all.[190] This arbitrary segmentation of the industry and limitation of the discussion only to narrow segments of the gambling and betting services industry is without any justification.[191]

4. Failure to Objectively Assess the Matter.

143. In paragraphs 6.590 through 6.593 of the Final Report, the Panel apparently came to the conclusion that identity and age verification occurs when lottery tickets are purchased through lottery terminals. However, there is *no* evidence in the record to support this conclusion, other than a completely unsubstantiated assertion of the United States in a submission to the Panel.[192] On the other hand, although the Panel concluded that "Antigua has not effectively refuted the United States' submission that identification and age verification do not occur when lottery tickets are purchased through lottery terminals,"[193] the Panel completely ignored independent evidence submitted by Antigua that suggests either lottery terminals are frequently not "manned" or there is a significant lack of age-identification in connection with them.[194]

144. Under WTO law, it is clear that a party making an assertion has the burden to prove it.[195] In paragraph 6.593, the Panel not only selected the "mere assertion" of the United States with respect to video lottery terminals over actual third-party evidence submitted by Antigua, but also

---

[190] Final Report, paras. 6.585-6.606.

[191] It is possible the Panel in its segmentation was trying to examine the issue in the context of "discrimination between countries where like conditions prevail," although this is by no means clear. If indeed that was the case, however, assuming *arguendo* that it was appropriate to segment the industry for *that* purpose, there is no basis to segment it in the context of "disguised restriction on trade in services," which Antigua would submit is on the mark in this dispute.

[192] US Second Submission, para. 65 (cited in the Final Report, para. 56.590, fn. 1053).

[193] Final Report, para. 6.593.

[194] *See, e.g.*, Exhibit AB-158, pp. 4-5. In footnote 1055 of the Final Report, the Panel further assigned the burden of proof to Antigua. It also referred to two of Antigua's exhibits, but neither of those exhibits supports the claim for which they are cited. It is possible the Panel misconstrued a picture in Exhibit AB-190, which shows a person behind a shop counter next to a lottery display.

[195] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

thereby improperly shifted the burden of proof to Antigua.

145. In the Panel's discussion under the heading "Nevada" it again reversed the burden of proof, accepting statements made by the United States in its submissions to the Panel as evidence and rejecting actual third-party evidence submitted by Antigua.[196]

146. Antigua understands neither the context of nor the basis for the findings of the Panel in paragraphs 6.604 through 6.606 of the Final Report, particularly why the Panel chose to consider the letters under a separate heading of their own.

147. Given the lack of evidence to support the Panel's findings in paragraphs 6.594, 6.603 and 6.606 of the Final Report and mindful of the Appellate Body's opinion as expressed in *US – Gasoline*,[197] there is a complete failure of proof with respect to the conclusions in those paragraphs.

III. CONCLUSIONS

148. For all of the reasons discussed above, Antigua respectfully requests that the Appellate Body find that the findings and conclusions of the Panel listed in the Notice of Other Appeal of Antigua and further discussed herein are in error and accordingly that, without limitation:

149. <u>With respect to points related to the measures</u>:

- The Appellate Body reverse the findings of the Panel in paragraph 6.171 of the Final Report; and
- The Appellate Body complete the analysis of Antigua's claims under GATS Article XVI on the basis of the total prohibition.

---

[196] Final Report, paras. 6.601-6.602.

[197] *See* the discussion at paragraphs 135 through 137 above.

150. With respect to points related to GATS Article XVI:

- In the event the Appellate Body were to find in favour of the United States and reverse the Panel's conclusion in paragraph 7.2(b) of the Final Report *then* the Appellate Body reverse the finding of the Panel in paragraph 6.318 of the Final Report; and
- The Appellate Body reverse the findings of the Panel in paragraphs 6.383, 6.398, 6.402 and 6.406 of the Final Report;

151. With respect to points related to GATS Article XIV:

- The Appellate Body find that the Panel should not have considered the defence of the United States under GATS Article XIV;
- The Appellate Body reverse the findings of the Panel in paragraphs 6.481, 6.486, 6.487, 6.492, 6.494, 6.497,6.498, 6.501, 6.504, 6.505, 6.507, 6.509, 6.510, 6.511, 6.513, 6.514, 6.516, 6.518, 6.521 and 6.533 (with respect to all but the final finding in the third sentence), of the Final Report;
- The Appellate Body reverse the findings of the Panel in paragraphs 6.550 (with respect to the identification of the RICO statute), 6.551 (with respect to the final sentence), 6.554, 6.555, 6.556, 6.558, 6.559, 6.560 and 6.564 (with respect to the first sentence) of the Final Report;
- The Appellate Body find that the Panel should not have considered the chapeau of Article XIV; and
- The Appellate Body reverse the findings of the Panel in paragraphs 6.593, 6.594, 6.602, 6.603, 6.605 and 6.606 of the Final Report.