

**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

**APPELLEE SUBMISSION
OF ANTIGUA AND BARBUDA**

1 February 2005

SERVICE LIST

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Table of Reports Cited in This Submission

SHORT TITLE	FULL TITLE
<i>Canada – Automotive Industry</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/ABR, WT/DS142/AB/R, adopted 31 May 2000
<i>Canada – Wheat</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 30 August 2004
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Hormones</i>	Appellate Body Report, <i>EC – Measures Concerning Meat and Meat Products</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, DSR 1998:I
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 315
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Mexico – Telecommunications</i>	Panel Report, <i>Mexico – Measures Affecting Telecommunications Services</i> , WT/DS204/R, adopted 1 June 2004.
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3

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I. INTRODUCTION

1. The United States of America (the “United States”) has appealed 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 This dispute was brought against the United States by Antigua and Barbuda (“Antigua”) under the *General Agreement on Trade in Services* (the “GATS”) of the World Trade Organisation (the “WTO”). The appeal of the United States² covers five broad areas:

- *First*, the United States alleges that the Panel erred in its conclusion that Antigua had made a *prima facie* case of the inconsistency with the GATS of certain United States federal and state laws, principally on the grounds that, according to the United States, Antigua had not sufficiently identified and discussed any of the applicable statutes during the course of the Panel proceedings. In this connection the United States also complains that the Panel improperly made Antigua’s case for it.
- *Second*, the United States alleges that the Panel erred in its conclusion that the United States undertook specific commitments on gambling and betting services in its Schedule of Specific Commitments under the GATS (the “US Schedule”). The primary argument of the United States on this issue is that, in its opinion, the “ordinary meaning” of the word “sporting” as used in the US Schedule includes gambling and betting services.

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

² Appellant Submission of the United States of America, WT/DS285, AB-2005-1 (14 January 2005) (the “US Appellant Submission”).

- *Third*, the United States alleges that the Panel erred in its interpretation of GATS Article XVI and its application to the United States statutes assessed by the Panel. The main argument of the United States in this respect is that for a trade-restrictive measure to violate either GATS Article XVI:2(a) or (c) it must actually be expressed as a numerical quota.
- *Fourth*, the United States alleges that the Panel erred in its interpretation of GATS Article XIV and its application to the United States statutes assessed by the Panel. The principal claim of the United States in this context is that the Panel improperly imposed a requirement that the United States engage in negotiations with Antigua to determine if there was a reasonably available, WTO consistent alternative to the prohibition of the services.
- *Fifth*, the United States challenges the finding by the Panel that “practice” may be an “autonomous measure that can be challenged in and of itself” for WTO dispute resolution purposes.³

2. Antigua will respond to each of these points in turn, with the key points of Antigua as follows:

- *First*, Antigua will demonstrate that, while it believes that the Panel should have considered this case on the basis of the “total prohibition,”⁴ Antigua—not the Panel—also established a *prima facie* case with respect to the federal and state statutes taken into consideration by the Panel.

³ Final Report, para. 6.197.

⁴ See Other Appellant Submission of Antigua and Barbuda, WT/DS285, AB-2005-1 (24 January 2005) (the “AB Other Appellant Submission”), paras. 8-51.

- *Second*, the United States’ position on the specific commitments on gambling and betting services in the US Schedule is not credible. The ordinary meaning of the word “sporting” does not include gambling and betting services, and all available evidence strongly supports the conclusion reached by the Panel that gambling and betting services are included in the US Schedule under “other recreational services.”
- *Third*, the United States interpretation of GATS Article XVI is wrong. It would be absurd to construe Article XVI:2 such that a complete prohibition that is not expressly worded as a numerical quota *would not* violate Article XVI while one which said “one supplier only” *would*. Further, the United States cannot have it both ways—if it insists on a strict construction of the wording of Article XVI:2, then the wording of Article XVI:1 should be strictly construed as well—and the United States’ prohibition be found to violate Article XVI:1 without reference to Article XVI:2.
- *Fourth*, the United States misread the Panel on GATS Article XIV. Instead of “imposing” a requirement to negotiate with other Members in order to show a measure “necessary” under Article XIV, the Panel actually determined that the United States had not proven the statutes in question were “necessary” under Article XIV. The fact the United States did not negotiate or consult with Antigua to find a WTO consistent alternative to prohibition was just indicative of the failure of the United States’ proof on the issue.
- *Fifth*, there is nothing in Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”), GATS Article

XXVIII or WTO jurisprudence to support the United States' insistence that "practice" cannot be an "autonomous measure that can be challenged in and of itself" for WTO dispute resolution purposes.

3. Antigua will address the five themes addressed in the United States' appellant submission in the same order they were raised by the United States, *first* the identification of the measures, *second* the interpretation of the US Schedule, *third* the interpretation of GATS Article XVI:2, *fourth* the Panel's interpretation and application of GATS Article XIV and *fifth*, and briefly, the issue of "practice" as a measure. However, before the sections addressing the US Schedule and GATS Article XVI, Antigua has inserted a section on treaty interpretation and the interpretative value of the scheduling guidelines circulated to WTO Members by the then-GATT Secretariat during the Uruguay Round negotiations (the "1993 Scheduling Guidelines")⁵ and the services sectoral classification list prepared by the GATT Secretariat in the same context ("W/120")⁶ as general issues relevant to both the discussion on the US Schedule and the discussion on Article XVI:2.

4. Overall, Antigua is troubled by the fact that in its appellant submission, the United States very often has referred to evidence or facts that simply do not exist in the record. In many cases, unsubstantiated assertions are cast as fact; and in others the United States refers to a footnote or reference for support and, upon delving deeper, the support simply is not there. The United States has made many unsubstantiated claims over the course of this proceeding as well as in its appellant submission, but careful examination will reveal that the evidence submitted by the United States in this case is slim indeed. In effect, the United States conveniently asserts that

⁵ *Scheduling of Initial Commitments in Trade in Services: Explanatory Note* (MTN.GNS/W/164) (3 September 1993).

⁶ MTN.GNS/W/120 (10 July 1991).

“remote” gambling poses “risks” and thus it may prohibit all cross-border supply, while at the same time it encourages a huge domestic industry teeming with well-documented “risks.”

International trade obligations cannot be set aside on the basis of “mere assertions.”

II. ARGUMENT

THE MEASURES

A. **The Panel correctly determined that Antigua had made a *prima facie* case of GATS inconsistency with respect to a number of United States federal and state laws.**

1. **Introduction.**

5. As Antigua noted in its other appellant submission, the United States has insisted that Antigua was not entitled to submit its case against the United States on the basis of the admitted “total prohibition” of cross-border gambling and betting services. In appealing the findings of the Panel in the Final Report with respect to the three federal and eight state statutes the Panel ultimately took into consideration (collectively, the “11 Laws”),⁷ the United States would deny Antigua the ability to establish its case, even under the theory demanded by the United States. What the United States asks the Appellate Body to do is render more than two years of work and thousands of pages of submissions and evidence pointless, all over an issue on which there is no disagreement—that the cross-border provision of gambling and betting services from Antigua to consumers in the United States is—in the view of the United States government—against the law.

6. To borrow the “forest and trees” analogy used by the United States in its appellant submission,⁸ the parties being in complete agreement as to the existence of the forest, the United States would demand Antigua nonetheless prove it so by counting each individual tree, cataloging

⁷ Final Report, para. 6.249.

⁸ US Appellant Submission, para. 7.

it, determining its genus and describing exactly how that tree contributes to the overall composition of the forest.

7. To properly discuss this alleged point of error by the United States, Antigua will *first* provide some important background and context by revisiting the issue of the total prohibition and *second* demonstrate that under the facts of this case, the Panel was more than justified in making the review and assessment of the 11 Laws that it ultimately performed in the Final Report.

2. The Approach of the Total Prohibition.

(i) The Development of the Case

8. Antigua, encouraged to no small degree by the United States itself,⁹ primarily presented its case on the basis that the United States maintained a total prohibition against the provision of gambling and betting services on a cross-border basis, and that this total prohibition was a “measure” sufficient for challenge under GATS Article XXVIII and DSU Article 6.2. In its other appellant submission, Antigua discussed the development of its case and the reasons why Antigua believes it was entitled to pursue the case on that basis.¹⁰ It is now appropriate to pick up that discussion where it ended and examine what occurred subsequent to the filing with the Panel by the United States of its Request for Preliminary Rulings (the “Request for Preliminary Rulings”).¹¹

(ii) The Request for Preliminary Rulings

9. In the Request for Preliminary Rulings, filed after the first written submission of Antigua to the Panel but prior to filing its own first written submission, the United States:

⁹ AB Other Appellant Submission, paras. 32-36.

¹⁰ *Id.*, paras. 32-38.

¹¹ Request for Preliminary Rulings by the United States of America, WT/DS285 (17 October 2003).

- Complained that the items in Section III of the Annex to Antigua’s panel request (the “Panel Request”)¹² were not “measures” within the meaning of DSU Article 6.2.
- Complained that the Panel Request improperly included certain measures that were not the subject of consultations under DSU Article 4.
- Asserted that Antigua had not, in the AB First Submission, established a *prima facie* case regarding any “specific” measure and asked the Panel to either require Antigua to make a further submission detailing its case on a “measure-by-measure” basis or dismiss Antigua’s case altogether.¹³

10. With the last point, the United States was in effect asking the Panel to rule that Antigua was not entitled to rely on the total prohibition as a “measure” in establishing its case.¹⁴ It is clear both from the Request for Preliminary Rulings and the comments of Antigua in response to it (the “AB Comments”)¹⁵ that the issue of the total prohibition was squarely before the Panel.¹⁶

11. In the AB Comments, although Antigua made its position on the total prohibition absolutely clear, it also invited the Panel to decide whether the United States’ position was correct:

“Antigua believes it is not necessary to submit a supplemental submission as suggested by the United States. Nevertheless, were the Panel to decide that it would like a further submission from Antigua on the issues raised by the United States (or on other issues),

¹² WT/DS285/2 (13 June 2003).

¹³ Request for Preliminary Rulings, paras. 1-2.

¹⁴ It is important to note that at no time did the United States object to the Panel Request on the basis that, with respect to the identification of the total prohibition, it was insufficient under DSU Article 6.2.

¹⁵ Comments on the United States’ Request for Preliminary Rulings by Antigua and Barbuda, WT/DS285 (22 October 2003).

¹⁶ Request for Preliminary Rulings, paras. 16-21; AB Comments, paras. 10-18.

Antigua respectfully requests that the Panel allow Antigua to submit this on a date to be determined by the Panel . . .”¹⁷

If there was a point in the proceeding at which the Panel should have presented its opinion on the identification of the total prohibition as a “measure” in the Panel Request and whether Antigua was entitled to rely on it as such, this was undoubtedly the best time and place to do so.

12. Instead, the Panel declined to make such a ruling and declined to request that Antigua make an additional submission framing its case in the way desired by the United States, even though in its decision the Panel demonstrated that it well understood the Antiguan position on the total prohibition.¹⁸

(iii) *The Panel’s Questions*

13. Following the Panel’s decision on the Request for Preliminary Rulings, Antigua had no reason to believe that its approach to the case on the basis of the total prohibition would ultimately be rejected by the Panel in the Final Report. Although the United States maintained its position throughout that Antigua could not rely on the total prohibition, the Panel certainly never indicated that it agreed with the United States until it issued the interim report in this matter.

14. Contrary to the assertion of the United States, Antigua was never “asked by the Panel to address specific measures.”¹⁹ Question 10 from the Panel reads as follows:

“Is Antigua and Barbuda challenging: (i) specific *legislative and regulatory provisions* that are claimed to amount to a prohibition on the cross-border supply of gambling and betting services *as such*; and/or (ii) the specific *application* of such provisions; and/or (iii) the US *practice vis-a-vis* the foreign cross-border supply of gambling and betting services? Please identify all relevant legislative and regulatory provisions.”²⁰ (emphasis in original)

¹⁷ AB Comments, para. 27.

¹⁸ Final Report, Annex B, para. 37.

¹⁹ US Appellant Submission, para. 21.

²⁰ Final Report, Annex C, Question 10, p. C-33.

Antigua took this question as a request by the Panel for Antigua to state on what basis it was advancing its case. Accordingly, Antigua reasserted its position in relation to the existence of a total prohibition, and, with respect to “identification,” noted that “[t]he statutory provisions that the United States appears to rely on most heavily in its law enforcement actions, or are most likely to form part of the total ban, were listed in the Annex to [the Panel Request] and also have been submitted to the Panel, together with summaries.”²¹

15. Following the second substantive meeting of the Panel with the parties, the Panel provided the parties with a second round of written questions. Question 32, directed to Antigua, reads as follows:

“In its first oral statement (para. 21), in arguing that a prohibition on the cross-border supply of gambling and betting services exists, Antigua point to three federal laws, namely the Wire Act . . . the Travel Act . . . and the Illegal Gambling Business Act In its first oral statement (para. 20), Antigua also refers, through Exhibit AB-84, to five state laws that prohibit Internet gambling. Could Antigua indicate whether or not these are the only specific laws it seeks to rely on in substantiating its allegation that a prohibition on the cross-border supply of gambling and betting services exists. If not, could Antigua identify and explain the other laws or measures upon which it seeks to rely in this regard?”²²

16. While Antigua had submitted considerable evidence of specific “laws and measures” and discussed them in a variety of ways and circumstances, Question 32 at least raised the possibility that the Panel considered itself in need of further information.

17. Seeking clarification from the Panel, prior to the date the responses to the Questions were due, Antigua submitted to the Panel a preliminary response to Question 32:

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

²¹ *Id.*, p. C-34.

²² *Id.*, Question 32, p. C-58. The “Wire Act” is codified at 18 U.S.C. §§ 1081, 1084, the “Travel Act” at 18 U.S.C. § 1052 and the “Illegal Gambling Business Act” at 18 U.S.C. § 1955.

not the purpose of question 32 because the documents submitted as Exhibits AB-81 and -88 already contain an explanation of all the federal and state laws listed in the Panel request that is similar to the explanation given for the three federal laws in our oral statement of 10 December 2003 and for the laws of the five states summarized in Exhibit AB-84. Antigua is of course prepared to submit further explanation of the laws at issue if that is what the Panel is seeking, but we do not want to burden the Panel with further written material if that is not what the Panel is looking for. *If we have understood question 32 wrongly, we respectfully request the Panel to clarify it so that we may respond in the most helpful manner before the deadline of 2 February.*²³ (emphasis added)

18. Antigua also noted the following in its preliminary response:

“All the specific laws contained in [the Panel Request] form part of the total prohibition that effectively exists in the United States (and is recognized by the United States). Through paragraph 25 of our oral statement of 10 December 2003 and Exhibits AB-81 and -88, Antigua has provided further explanation of all these specific laws, the texts of which can be found in Exhibits AB-82, -89, -91 and -99. All this material concerning specific laws further substantiates the existence of a total prohibition. It is important to note, however, that Antigua has cited all these laws in [the Panel Request] to be as comprehensive as possible, not because it believes that each law is an essential part of a ‘puzzle’ without which there would be no total prohibition. Most of the laws cited in [the Panel Request] are prohibition laws that could be applied independently of each other to prohibit cross-border supply from Antigua.”²⁴

19. The same day, the Panel responded by electronic mail as follows:

“Dear Party,

The Panel has nothing further to add to the question and asked me to thank you for your response.

Sincerely,

Mireille Cossy
Secretary to the Panel”

²³ Final Report, Annex C, Question 32, p. 58. This was not the first time that Antigua had expressly given the Panel the opportunity to clarify its concerns regarding the total prohibition or the measures. In its opening statement at the first substantive meeting of the Panel with the parties, Antigua, having simultaneously provided the Panel with the text and summaries of the laws contained in the Annex to the Panel Request, added “[f]urthermore, we would be pleased to address any further questions or concerns the Panel may have, or submit any further information the Panel would desire regarding the ‘measures’ issue.” First Panel Meeting, Opening Statement of Antigua and Barbuda, WT/DS285 (10 December 2003) (the “AB First Statement”), para. 25.

²⁴ *Id.*

As a result of this message from the Panel, Antigua did not provide any further answer to or submit any additional materials under Question 32.

(iv) *Summary*

20. Antigua’s “total prohibition” approach to this case did not arise in a vacuum. Antigua was encouraged to base its case on the total prohibition by a number of factors, including (i) the uncertainty of the *actual* reach of specific United States laws;²⁵ (ii) the unambiguous position taken by the United States in consultations and at two meetings of the WTO’s Dispute Settlement Body (the “DSB”) with respect to the total prohibition; (iii) the failure of the United States to object to the identification of the total prohibition under DSU Article 6.2; (iv) the failure of the Panel to rule early in the proceeding on the viability of the total prohibition under the DSU, even when squarely presented with the issue; (v) the ambiguity of the Panel’s two questions to Antigua with respect to “measures;” and (vi) the Panel’s response to Antigua’s express offer to submit more statutory discussion if the Panel so desired. As a result, Antigua did not take up the United States’ suggestion that Antigua undertake the “impossible task.”²⁶ But, as will be demonstrated below, that does not mean that Antigua failed to carry its burden of proof with respect to any measures at all, as claimed by the United States.

²⁵ While the United States makes light of this point in its appellant submission (*see* US Appellant Submission, para. 9, point 4), Antigua notes that the United States Congress has considered, yet failed to pass, legislation to expressly prohibit gambling on the Internet. It has been observed that this legislation was intended to “clarify” the status of Internet gambling under United States law. *See* Exhibit US-4 (referencing the Internet Gambling Prohibition Act); US-5 (referencing the Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act (referred to in Exhibit US-5); US-38 (copies of updated versions of the foregoing proposed legislation); *see also* First Written Submission of the United States, WT/DS285 (7 November 2003) (the “US First Submission”), para. 8 (“In addition to existing restrictions on gambling applicable to the Internet, Congress has considered, but not yet enacted, further legislation more narrowly aimed at the remote supply of gambling services over the Internet.”).

²⁶ *See* AB Other Appellant Submission, paras. 45 and 49.

2. Antigua Established a *Prima Facie* Case Regardless.

(i) Introduction

21. Although Antigua presented its case primarily on the basis of the total prohibition, it also submitted extensive evidence of United States federal and state laws, discussed them in a number of contexts and referred to specific laws as prohibiting the provision of the services that Antigua wants to be able to provide to consumers in the United States. The fact that Antigua believes this case most efficiently resolved on the basis of the total prohibition does not mean that Antigua considers no *single* United States law to have that effect as well. As Antigua stated in response to the Request for Preliminary Rulings:

“This lack of clarity of United States law confronted Antigua with a dilemma when it drafted [the Panel Request]. If it were to have listed the Wire Act only there is little doubt that, at the stage when the United States needed to implement any recommendations and rulings resulting from this dispute, the United States would have taken the position that it needed only to disapply or adapt the Wire Act and could continue to apply other laws because these would have been outside the terms of reference of the Panel.”²⁷

From that paragraph alone, it is obvious that Antigua recognised that there were extant laws that alone prohibited provision of the services.

22. It is clearly within the discretion of a Panel to decide for itself how much evidence is sufficient in order for it to reach a conclusion on a particular issue, as well as to consider all the evidence before it.²⁸ Further, there is nothing in WTO jurisprudence that would either exclude from consideration evidentiary material and relevant discussion contained in exhibits or suggest that discussion and evidence contained in exhibits is inferior to direct statements and discussion of the parties in submissions.

²⁷ AB Comments, para. 14.

²⁸ See, e.g., Appellate Body Report on *Korea – Dairy*, paras. 137-138.

(ii) *What Antigua Submitted*

23. The United States has asserted that Antigua provided “little discussion” concerning the eight of the 11 Laws that the Panel ultimately found were contrary to the United States’ obligations under the GATS,²⁹ and argues that the discussion in the record is insufficient for the Panel to have concluded that Antigua identified any specific “measure” for determination of GATS inconsistency in this case.³⁰ In furtherance of this assertion, the United States attached an annex to its appellant submission (the “US Annex”) entitled “Antigua’s minimal discussion of U.S. federal and state laws as to which the Panel made adverse findings.” The US Annex is misleading in two principal respects. *First*, it fails to include the AB Comments, in which, among other things, Antigua (i) makes six references to the Wire Act (including the one in paragraph 21 above); (ii) discusses the prosecution under the Wire Act of Jay Cohen for his operation of an Internet gambling company in Antigua; (iii) mentions both the Travel Act and the Illegal Gambling Business Act in the context of federal prosecutions; (iv) references the portions of the report of the United States General Accounting Office (the “GAO Report”)³¹ addressing federal and state legal issues related to Internet gambling; and (v) references a publication of the Nevada State Attorney General’s Office³² detailing federal and state legal issues related to Internet gambling.³³

²⁹ US Appellant Submission, para. 8.

³⁰ *Id.*, para. 7.

³¹ United States General Accounting Office, GAO - 03-89, *Internet Gambling: An Overview of the Issues* (December 2002) (Exhibit AB-17).

³² 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) (the “Rodefer Article”) (Exhibit AB-54).

³³ AB Comments, paras. 11, 14, fns. 15, 16 and 18.

24. *Second*, the US Annex fails to refer to the large number of exhibits that Antigua submitted to the Panel as part of its case. Antigua submitted more than 25 exhibits to the Panel expressly for the purpose of furnishing it with further discussion of and information on various federal and state laws, including the actual text and brief summaries of each of the 11 Laws.³⁴ Included with this submission as *Annex A* and incorporated herein is a chart summarising references to federal and state laws made by Antigua over the course of this proceeding, including direct references in submissions and other evidence submitted to the Panel as exhibits.

25. Antigua submits that it is not the number of times a matter is cited in a text that is relevant, rather, it is the nature of the discussion and whether it provides objectively relevant information to the Panel about a law and its scope. In its very first submission, while Antigua advanced the total prohibition argument it also submitted discussion regarding the GAO Report and its own analysis of how United States law regarding cross-border gambling and betting services functioned.³⁵ This discussion expressly mentioned the Wire Act, the Travel Act and the Illegal Gambling Business Act and the fact that each had been used to prosecute persons for offering gambling services on a cross-border basis. The GAO Report itself is a valuable resource, containing a discussion of federal and selected state laws relating to Internet gambling as is the Rodefer Article, which thoughtfully considers the scope of each of the federal laws at issue in this case.

26. In Antigua's comments to the Request for Preliminary Rulings, in addition to the paragraph quoted in paragraph 21 above, Antigua noted:

“The United States accepts that the total prohibition of cross-border gambling exists. In view of its explanation of *United States v. Cohen* applying [the Wire Act] in paragraph 20 and footnote 36 of its Request, it clearly also accepts that a least one specific law in the

³⁴ Exhibits AB-82 (text of federal laws); AB-81 (summaries of federal laws); AB-99 (text of state laws in electronic format); AB-88 (summary of state laws).

³⁵ AB First Submission, paras. 134-135, 137.

Annex to the [Panel Request] (*i.e.* the Wire Act) prohibits provision of cross-border gambling services. [The GAO Report] quoted in Antigua’s first submission confirms this for other specific United States laws mentioned in the Annex to [the Panel Request].”³⁶

This paragraph leaves little doubt that Antigua considered the Wire Act and the other laws mentioned in the GAO Report as prohibiting the provision of cross-border gambling services, and not simply in the context of the total prohibition.

27. The next opportunity Antigua had to present arguments to the Panel was the first substantive meeting with the Panel held on 10 December 2003. At that meeting, far from “failing or refusing” to discuss United States law, Antigua not only described its view on how United States laws pertaining to gambling operated in a general sense,³⁷ but also referenced the Wire Act, the Travel Act and the Illegal Gambling Business Act by name, concluding “[e]ach of these three laws separately prohibits the cross-border supply of gambling and betting services from Antigua.”³⁸ Of course, the United States has never denied that conclusion with respect to those laws, and has on a number of occasions affirmed it to be the case.³⁹

28. In its final written submission, Antigua further elaborated on its interpretation of United States law and how the federal and state statutes relate to each other.⁴⁰ This lengthy and comprehensive discussion was not without context, and obviously related to the federal and state laws included within the scope of the Panel Request. Not only are a number of statutes specifically referenced to illustrate the operation of United States law, but Antigua also referred

³⁶ AB Comments, para. 11.

³⁷ AB First Statement, paras. 19-25.

³⁸ *Id.*, para. 21.

³⁹ See the discussion at paragraph 39 below.

⁴⁰ Second Written Submission of Antigua and Barbuda, WT/DS285 (9 January 2004) (the “AB Second Submission”), paras. 19-34. This discussion was obviously in response to the claims of the United States that Antigua had not discussed or explained United States law sufficiently. *Id.*, paras. 16-17.

the Panel to secondary sources, including the GAO Report, in the context of its discussion of federal and state gambling laws.

(iii) *GATS Inconsistency*

29. The United States further argues in its appellant submission that Antigua failed to specifically allege that any of the 11 Laws were inconsistent with GATS Article XVI, and thus failed to establish yet another requirement of its *prima facie* case.⁴¹ Antigua’s position on this issue was clear however—any United States law, whether one, many, a combination of several or otherwise, which prohibits the provision of cross-border gambling and betting services from Antigua to consumers in the United States violates, *inter alia*, GATS Article XVI.⁴² Whether its arguments were presented in the context of a “total prohibition” or a “discrete prohibition law,” it was Antigua’s case against the United States that effectively prohibiting the cross-border supply of gambling and betting services was contrary to GATS Article XVI. This is certainly the way the Panel viewed the issue:

“Antigua argues that federal and state laws prohibit or prevent the cross-border supply of gambling and betting services by Antigua in violation of Articles XVI . . . of the GATS.”⁴³

30. In the portion of the Final Report in which the Panel assessed each of the 11 Laws for consistency with GATS Article XVI,⁴⁴ the Panel had no difficulty in determining whether or not the laws were inconsistent with GATS Article XVI based on the evidence and discussion

⁴¹ US Appellant Submission, para. 9.

⁴² *See, e.g.*, AB First Submission, paras. 180-185; AB First Statement, paras. 98-103; Responses of Antigua and Barbuda to the Panel’s First Questions to the Parties, WT/DS285 (9 January 2004), Answer to Question 16; AB Second Submission, paras. 22-24 (“*The individual legislative and regulatory provisions, applications thereof and related practices that make up the United States’ total prohibition are also caught by both Article XVI:2(a) and XVI:2(c) as separate ‘measures.’*”) (emphasis added).

⁴³ Final Report, para. 6.210.

⁴⁴ *Id.*, paras. 6.357-6.421.

available to it. While the Panel did not follow the approach suggested by Antigua and instead adopted its own, there is nothing in WTO jurisprudence to prevent a Panel from arriving at a legal conclusion based upon its own reasoning.

(iv) *The Panel Did Not Make the Case for Antigua*

31. Antigua agrees with the United States that a Panel should not create a case for a party that it has not in fact made itself.⁴⁵ But the differences between what the Panel did for the United States in the Final Report with respect to GATS Article XIV and what the United States alleges with respect to Antigua's *prima facie* case in the US Appellant Submission could not be more pronounced.

32. Antigua was surprised by the view expressed by the Panel that Antigua had in effect left the Panel to sort through Antigua's evidence to determine which of the discrete measures established by Antigua could impose a prohibition on the cross-border supply of gambling and betting services.⁴⁶ As discussed previously, not only had Antigua expressly asked the Panel if it wanted further information regarding the "measures" on at least three separate occasions, but when presented squarely with an opportunity to rule on the total prohibition approach early in the proceedings, the Panel declined to.⁴⁷ Not surprisingly, Antigua proceeded to cast its case primarily in terms of the total prohibition.

33. Nonetheless, Antigua provided the Panel with extensive resources that enabled the Panel to assess the dispute on the basis that the Panel, itself, finally adopted. Antigua went to the extraordinary effort of sorting through the laws of the 50 states and of the federal government, identifying which statutes it believed prohibited the services offered by Antigua; it provided the

⁴⁵ See AB Other Appellant Submission, paras. 78-87.

⁴⁶ Final Report, paras. 6.204-6.207.

⁴⁷ See the discussion at paragraphs 9 through 20 above.

Panel with the definitive text of each statute, it summarised each statute; it provided commentary on how United States authorities viewed the law as working to prohibit gambling; it provided significant discussion of its own on how the federal and state laws operated and it discussed a number of the statutes directly in its submissions over the course of the proceeding.⁴⁸

34. Further, Antigua presented a thorough discussion regarding GATS Article XVI and how a prohibition of cross-border supply of gambling and betting services violates Article XVI in the context of this dispute.⁴⁹ Although the Panel may have chosen a slightly different approach to the analysis than Antigua did, it certainly had the evidence and the argumentation before it to do so.

(iv) Prejudice to the United States

35. In support of its claim that the Panel erred in its determination that Antigua had presented a *prima facie* case with respect to eight of the 11 Laws, the United States asserts that it was “denied a fair opportunity to defend these laws.”⁵⁰ It is difficult under the circumstances of this case to understand how the United States could suffer prejudice from the Panel’s assessment of the laws and evidence before it. Although the United States consistently denied that the total prohibition could be a measure in and of itself, it is beyond dispute that the United States agrees that Antigua is prohibited from providing gambling and betting services to United States consumers. In its submissions in this case alone the United States has on more than a dozen different occasions admitted, in one form or another, that the services are prohibited.⁵¹ Even with

⁴⁸ See the discussion at paragraphs 23 through 28 above.

⁴⁹ See the discussion at paragraphs 29 through 30 above.

⁵⁰ US Appellant Submission, para. 6.

⁵¹ Not counting the statements made by the United States to Antigua in consultations and before the DSB. See US First Submission, paras. 8 (“In the 20th century, the United States expanded the regulatory regime for remote supply of gambling so that it now addresses modern threats, including organized crime, and modern communications technologies, including the Internet.”); and 26 (“Gambling in the United States is permitted only within particular locations and facilities designated by law, and only in forms that the United States believes can be effectively regulated.

express reference to discrete federal statutes, the United States has agreed that the services are prohibited.⁵² Other than its disingenuous claim with respect to “certain” gambling and betting “services” that were not illegal under United States law,⁵³ the United States *never* denied that its laws prohibit the provision of gambling and betting services from Antigua. So the question becomes—what would the United States be defending?

36. Even if the United States’ contention about the need to identify, discuss, explain and establish the effect of every particular law at issue were correct,⁵⁴ Antigua manifestly met this

Where it exists, it operates under the most rigorous regulatory constraints.”) and Exhibit U.S.-5 (Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, 108th Congress 10 (2003) (statement of John G. Malcolm that Internet gambling violates federal law); United States’ Responses to the Panel’s Questions in Connection with the First Substantive Meeting (9 January 2004), para. 21 (“At the June 24, 2003, DSB meeting, the United States stated that it had ‘made it clear that cross-border gambling and betting services are prohibited under U.S. law’ and that such services ‘are prohibited from domestic and foreign service suppliers alike.’ The United States stands by these statements.”); United States’ Response to Question 9 from the Panel (“We have very forthrightly told both the DSB and this Panel that the United States does not permit certain services, such as Internet betting, either domestically or on a cross-border basis.”); and United States’ Responses to Question 35 from the Panel (“Could the United States identify the “certain services” for which supply is prohibited both domestically and on a cross-border basis? Yes. The United States is referring principally to services involving the transmission of a bet or wager by a wire communication facility across state or U.S. borders, such as Internet and telephone betting.”).

⁵² US Second Submission, paras. 95-96 (“Congress designed §§ 1084, 1952, and 1955 in large part to serve as law enforcement tools to secure compliance with other WTO-consistent U.S. laws. Most obviously, these statutes ‘secure compliance’ with state laws restricting gambling and other like offenses by enhancing the enforcement of such measures. Sections 1084, 1952, and 1955 make an essential contribution to the enforcement of state law. Before these federal laws existed, violators of state gambling laws often avoided prosecution by supplying their services remotely, from locations out of reach of state and local law enforcement authorities. Sections 1084 and 1952 address that problem by enabling federal law enforcement authorities to pursue remote suppliers of illegal gambling who violate state law, even if those violators are beyond the reach of state or local authorities. Section 1955 similarly furthers enforcement of state laws by enabling federal authorities to pursue large gambling businesses that violate state law, especially in cases where state authorities are unable or unwilling to address the problem.”).

⁵³ See AB Other Appellant Submission, para.46, fn. 70.

⁵⁴ US Appellant Submission, para. 11.

burden with respect to the eight laws found by the Panel to be sufficiently proven. Furthermore, there is no evidence in the record of the United States arguing that any of these statutes does not in fact prohibit the provision of gambling and betting services from Antigua to consumers in the United States. As noted above, in fact the contrary is true.⁵⁵

37. The United States argues in its appellant submission that if it had but known that the Panel was going to examine certain laws individually, then it could have defended those laws.⁵⁶ What the United States does not say is what prevented it from doing so. The statutory references were in its possession at least since the date of the Panel Request. It also had the full text of all of the laws and summaries available to it no later than 10 December 2003, when Antigua provided them to the Panel and the United States. The fact that the United States asserted the same federal and state laws in its Article XIV defence further undermines any claim that the United States was prejudiced in this respect.⁵⁷

38. On the actual issues disputed by the parties in this case—whether the United States had made a commitment with respect to gambling and betting services in the US Schedule and whether prohibiting the provision of gambling and betting services results in a breach of GATS Article XVI—the discussion was clear and robust. There is no indication in the Final Report or the record in this proceeding that the Panel’s determination that certain United States laws prohibit the provision of gambling and betting services prejudiced the United States in its ability to defend or articulate its position on these key issues.

⁵⁵ See the discussion at paragraph 35 above.

⁵⁶ See US Appellant Submission, paras. 37-38.

⁵⁷ See Final Report, paras. 6.544, 6.547. See also *id.*, para. 6.453: “[T]hroughout the present proceedings the United States has argued that the prohibition in the United States against the remote supply of gambling and betting services, regardless of whether enforced through state or federal laws, is based on the same policy concerns . . .”

(v) *Did the Panel Fail to Make an Objective Assessment?*

39. The United States argues that the determination of the Panel with respect to its assessment of the 11 Laws violated the Panel's duty under DSU Article 11.⁵⁸ Antigua considers this issue to be inseparable from the overall issue of whether the Panel committed error in deciding that eight of the 11 Laws violated GATS Article XVI.

40. While Antigua would agree that the Panel took its own approach to the resolution of the case, Antigua would strongly disagree that in doing so it exceeded the discretion and authority available to it. The WTO cases cited by the United States in its submission to support its case are readily distinguishable from this one. In *EC – Hormones*, the Appellate Body found that the panel had fundamentally reversed the burden of proof and placed it upon the responding party by an incorrect reading of the WTO's *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement").⁵⁹ The Appellate Body in *EC – Hormones* was not assessing whether the complaining party had of itself proven its case, at least in the portion of the decision referred to by the United States.⁶⁰

41. In *Canada – Wheat*, the United States complained that the panel had not made certain factual findings with respect to the lack of independence of the board of directors of the Canadian Wheat Board (the "CWB").⁶¹ However, the United States had not made the factual arguments to the panel at all, but simply submitted the entirety of the Canadian Wheat Board Act (the "CWBA") to the panel without any mention of the purpose for why it did so. Nor did it mention or bring to the attention of the panel which provisions contained within the CWBA that it, on

⁵⁸ US Appellant Submission, paras. 39-44.

⁵⁹ Appellate Body Report on *EC – Hormones*, paras. 99-109.

⁶⁰ US Appellant Submission, para. 7, fn. 7.

⁶¹ Appellate Body Report on *Canada – Wheat*, para. 185.

appeal, said the panel should have reviewed and construed as factual evidence of the lack of independence of the CWB.⁶²

42. In *Japan – Agricultural Products II*, the Appellate Body determined that the panel had exceeded its authority in making a case on behalf of the United States with respect to the availability of alternative measures under Article 5.6 of the SPS Agreement by suggesting a specific alternative testing method.⁶³ However, in that case the United States had not even argued (or, apparently, and contrary to the assertion of the United States in paragraph 13 of the US Appellant Submission, even *mentioned*) that the particular method was available. Rather, it was something that the panel had determined for itself based upon information it received from consultants during the course of the proceeding.⁶⁴

43. Antigua remains convinced that the Panel should have assessed this case on the basis of the total prohibition. However, it had more than sufficient evidence and argumentation before it to reach the issue and come to its conclusions in the manner in which it did.

TREATY INTERPRETATION PURSUANT TO THE VIENNA CONVENTION AND THE SIGNIFICANCE OF THE 1993 SCHEDULING GUIDELINES AND W/120

A. General.

44. It is well established that the duty of a treaty interpreter is to examine the words of the treaty to determine the common intention of the parties.⁶⁵ This must be done pursuant to Article 31 of the *Vienna Convention on the Law of Treaties* (the “Vienna Convention”), *i.e.* a treaty must be interpreted in good faith, on the basis of its text, context and object-and-purpose. As discussed in paragraph 58 of Antigua’s other appellant submission, and as indicated by the heading of

⁶² *Id.*, paras. 185-187.

⁶³ Appellate Body Report on *Japan – Agricultural Products II*, para. 126.

⁶⁴ *Id.*, para. 125.

⁶⁵ Appellate Body Report on *EC – Computer Equipment*, para. 84.

Article 31 of the Vienna Convention, it is *one* “general rule of interpretation,” not a hierarchical sequence of tests. The United States appears to argue that Article 31 *does* impose a hierarchical sequence of tests, which starts with the text.⁶⁶ In the United States’ view the other elements of Article 31 (good faith, context and object-and-purpose) only come into play when a provision cannot be interpreted on the basis of its text alone. That is not correct and on that basis alone the United States appeal on the Panel’s interpretation of the US Schedule and GATS Article XVI:2 should fail.

45. Furthermore the United States pursues its exclusively text-based, hyper-legalistic interpretation of the US Schedule and Article XVI:2 up to a point where it no longer qualifies as a good faith interpretation, nor a proper reflection of the common intention of the negotiating parties. The GATS negotiations were a successful attempt to add a whole new dimension to the system of world trade rules, *i.e.*, the introduction of rules on trade in services. This was a complex and novel enterprise that required the introduction of entirely new legal concepts, such as those of GATS Article XVI, and a method to schedule commitments on trade in services. During the negotiations the 1993 Scheduling Guidelines were produced in order to explain to the negotiating parties how the GATS would work and what commitments would mean in practice. It is important to note that for most WTO Members, English is not a native language and that most WTO Members’ legal resources are infinitely smaller than those of the United States and other major WTO Members.

46. In light of that background it would be contrary to good faith to set aside the explanation that WTO Members were given in the Scheduling Guidelines, and by the United States itself in

⁶⁶ US Appellant Submission, paras. 47-48, 106.

the draft schedule it used during the negotiations,⁶⁷ on the basis of strained and arcane dictionary definitions of the word “sporting” or the presence or absence of a comma in the text of Article XVI:2(c).

B. The interpretive value of the 1993 Scheduling Guidelines and W/120.

47. In light of their specific objective to explain what GATS schedules and certain GATS provisions would mean in practice, the 1993 Scheduling Guidelines and W/120 are “context” of the highest possible relevance and of the greatest importance for a “good faith” interpretation of the US Schedule and GATS Article XVI. The Panel correctly pointed out that GATS schedules can simply not be understood without reference to the 1993 Scheduling Guidelines.⁶⁸

48. Antigua agrees with the Panel’s findings and thorough analysis regarding this matter⁶⁹ and sees no need to reargue this point. For further reference, however, Antigua would refer the Appellate Body to Antigua’s answer to the Panel’s first question, which explains Antigua’s position on this issue.⁷⁰ The response contains some elements that were not carried over into the Panel’s reasoning and may therefore be of interest to the Appellate Body. For instance, it should be noted that the revised scheduling guidelines circulated by the Secretariat in 2001 (the “2001

⁶⁷ The draft schedule that the United States used to negotiate its commitments during the Uruguay Round had a cover note which explicitly stated that “*except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in [W/120].*” (emphasis added) See the discussion in paras. 6.115-6.121 of the Final Report and document MTN.GNS/W/112/Rev.3, para. 5 (Exhibit AB-74).

⁶⁸ Final Report, para. 6.78. In footnote 131 of its appellant submission the United States erroneously suggests that qualifying the 1993 Scheduling Guidelines and W/120 as “context” implies that all documents created by the WTO Secretariat could be treated as agreements by all Members for purposes of dispute settlement. Whether or not a document prepared by the Secretariat qualifies as “context” will differ from case to case and most Secretariat documents will probably not qualify as context. In light of their specific objective and role during the Uruguay Round negotiations, however, the 1993 Scheduling Guidelines and W/120 do qualify as context.

⁶⁹ Final Report, paras. 6.77-6.82.

⁷⁰ Final Report, Annex C, Question 1, p. C-1.

Scheduling Guidelines”)⁷¹ confirm that pre-existing GATS schedules “have been drafted according to [the 1993 Scheduling Guidelines].”⁷² The 2001 Scheduling Guidelines were unanimously approved by the WTO Council for Trade in Services and, in Antigua’s view, constitute a subsequent agreement and/or subsequent practice regarding the interpretation of GATS schedules, pursuant to subparagraphs 3(a) and 3(b) of Article 31 of the Vienna Convention.

THE COMMITMENTS

A. Introduction.

49. Antigua agrees with the Panel’s findings and thorough analysis regarding the US Schedule⁷³ and will not reargue this point in full. Antigua has already made comments on the general interpretative approach of the United States and on the interpretative value of the 1993 Scheduling Guidelines and W/120 in the preceding discussion. In this portion of its discussion Antigua will respond to a number of specific arguments put forward in the United States’ appellant submission.

B. The ordinary meaning of “sporting.”

50. Irrespective of the number of dictionary definitions that the United States can find,⁷⁴ it is in fact obvious that, in a document such as the United States GATS Schedule, the ordinary meaning of the word “sporting” does not include gambling. This is because the United States’ schedule is a *classification* of services categories. The objective of any such classification is to clearly

⁷¹ *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, S/L/92 (28 March 2001).

⁷² *Id.*, para. 28.

⁷³ Final Report, paras. 6.83-6.134.

⁷⁴ Antigua notes that the various dictionary references cited by the United States in paragraph 53 of its appellant submission are misleading in their presentation (although the United States does in each instance use the words “in part”). In none of the referenced dictionaries is the usage quoted by the United States the primary definition. Indeed, in each, the first presented definitions are uniformly describing what is ordinarily meant by “sporting,” *i.e.*, relating to sport.

identify, on a mutually exclusive basis, categories of services.⁷⁵ By definition therefore, an entry in such a classification can only have *one* meaning. That meaning can be general, for instance, “recreational services” for a category encompassing a broad range of services that have one or more important features in common. That meaning can also be more specific, for instance in the case of “gambling and betting services.” However, it is impossible for *one* entry in a classification list to have *different* meanings. For that reason it is simply not appropriate to interpret an entry in the US Schedule on the basis of its *different* dictionary definitions. The United States appeal arguments seem to prove that point because the United States in essence argues that its entry “sporting” captures services as different as services relating to sports, gambling services of all types (sports and non-sports related) and prostitution.⁷⁶ In the context of a classification this is simply absurd.

51. Antigua submits that the more appropriate point of comparison to determine the “ordinary meaning” of “sporting” in the US Schedule is other classifications. These include W/120, the CPC and other WTO Member’s GATS schedules. The Panel has analysed these and correctly found that they do not support the conclusion that “sporting” includes gambling. Other classifications that have been referred to in the context of this dispute are the 1987 Standard Industry Classification (the “SIC”) and the 2002 North American Industry Classification System (the “NAICS”), used by the United States.⁷⁷ Rather than describing gambling as “sporting,” the SIC classifies gambling in precisely the same way as the CPC and W/120 do, *i.e.* in a residual subcategory for “Amusement and Recreation Services [not elsewhere classified].” The NAICS

⁷⁵ See, in this respect, Final Report, para. 6.63.

⁷⁶ US Appellate Submission, paras. 59-61 and footnote 117.

⁷⁷ See the response by the United States and Antigua to Panel Question 6 (Final Report, Annex C, Question 6, p. C-26, and Exhibits AB-107 and AB-108.

uses the word “gambling” to identify the gambling industry and “sporting” to identify sports-related services and goods.⁷⁸ The United States has been unable to point to *any* classification that uses the word “sporting” to refer to gambling or prostitution or any other *non-sports* related service or product.

C. It is impossible to separate the structure of W/120 from its content.

52. In paragraph 75 of its appellant submission, the United States tries to distinguish the structure of W/120 from the meaning of its categories. However, that is simply not possible. It is the very essence of a classification such as W/120 that it gives meaning to the listed categories. If one uses the structure of W/120, one therefore inevitably uses the content of its categories. That would only be different if a Member were to indicate that it is explicitly diverting from that content in relation to a specific sector or subsector—which the United States did in relation to a number of sectors, but not in relation to either “sporting” or “other recreational” services.⁷⁹

D. The Panel’s interpretation does not lead to an absurd and unreasonable result and there is no need to demonstrate that Antigua pursued negotiations with the United States on gambling during the Uruguay Round.

53. The United States submits that the Panel’s interpretation of the US Schedule “does not accurately reflect” the expectations of the United States nor pays “due respect to national policy objectives” of the United States.⁸⁰ These considerations are obviously not legally relevant but there is also no evidence on the record that these considerations are correct.

54. Why would the Panel’s interpretation not “accurately reflect” the expectations of the United States? Antigua finds it difficult to believe that, of all WTO Members, the United States would have made its commitment on gambling and betting services unintentionally. After all, it is

⁷⁸ See Exhibit AB-208.

⁷⁹ See Final Report, para. 6.104

⁸⁰ US Appellant Submission, para. 87.

relatively simple to identify gambling and betting services as part of “other recreational services” in sector 10.D of W/120 and in the schedules of WTO Members. Furthermore, the only evidence on the record that would be relevant for the determination of the United States’ expectations is the USITC document. That document, however, fully supports the interpretation of the Panel, Antigua and the Third Parties that the United States has made commitments for gambling and betting services.⁸¹

55. With regard to the issue “due respect to national policy objectives,” it should be noted that the United States has a tolerant attitude towards gambling.⁸² If that were not the case, the United States would probably have been able to successfully invoke GATS Article XIV (and likely would have made a more substantial attempt to do so before the Panel). The United States makes much of the “strong historical evidence that it maintained strict regulation of gambling, including gambling by remote supply, for a very long time prior to the Uruguay Round.”⁸³ That situation, however, is indeed “historical,” because it has changed dramatically over the last 25 years. Antigua presented extensive factual evidence on the size of the United States’ domestic gambling industry to the Panel. In paragraph 110 of Antigua’s other appellant submission it referred to the views of the United States Supreme Court on the evolution of attitudes about gambling in the

⁸¹ In footnote 142 of its appellant submission the United States tries to devalue the USITC document by saying that it is “merely an ‘explanatory’ text prepared by an independent agency with no authority to negotiate or interpret agreements on behalf of the United States.” In reality, the USITC is an agency of the United States government, officially appointed to “compile and maintain the official U.S. Schedule of Service commitments” (see paragraph 1 of Antigua’s response to Question 2 from the Panel and Exhibit AB-103; see also, paras. 6.126-6.130 of the Final Report).

⁸² It is very possible as well that at the time of the preparation of the US Schedule, the United States government’s position with respect to Internet gambling services offered by Antigua may have been decidedly equivocal. See Government of Antigua and Barbuda, *Report to Prime Minister Lester Bird on Meeting with Mr. Scott Charney and Mr. Jonathan Winer, 21st and 22nd in Washington, D.C. (30 September 1997)* (Exhibit AB-192).

⁸³ US Appellant Submission, para. 95.

country. In addition, Antigua notes the following findings of the “National Gambling Impact Study Commission,” a 1999 United States federal commission that conducted a lengthy and detailed investigation on the evolution of gambling in the United States over a period of approximately 25 years:

“Commercial gambling has become an immense industry. Governments are now heavily involved and increasingly active in pursuit of gambling revenues, either directly through state-owned lotteries and Native American tribal gambling or through the regulation and taxation of commercial operators.”⁸⁴

“There was no single, overarching national decision to turn the United States into a world leader in gambling. Rather, games of chance spread across the map as a result of a series of limited, incremental decisions made by individuals, communities, states and businesses.”⁸⁵

“In the next 25 years, gambling could, at its present rate of growth, become more and more like other common and legal, but somewhat restricted, business activities, such as the sale of alcohol or cigarettes. Of course, over time, the basic rules of our economic system would be expected to play a greater role in shaping the pattern of gambling, as the quasi-monopolistic circumstances of the present are replaced by more routine competition.”⁸⁶

Since then the United States gambling industry has expanded further at a higher growth rate than ever before.⁸⁷

56. The United States further argues that the Panel’s interpretation leads to an “absurd and unreasonable result” because there is no evidence of a negotiation on gambling services with the United States by Antigua or any other party and no attempts were made to “clarify any perceived ambiguity in the U.S. Schedule.”⁸⁸ It is not clear, however, what “perceived ambiguity” the United States is referring to. The US Schedule is not ambiguous as far as its coverage of

⁸⁴ *National Gambling Impact Study Commission Final Report* (18 June 1999), Executive Summary, p. 1 (Exhibit AB-11).

⁸⁵ *Id.*, p. 1.

⁸⁶ *Id.*, pp.1-2.

⁸⁷ *See* AB First Submission, para. 78, and Exhibit AB-173

⁸⁸ US Appellant Submission, paras. 91, 95.

gambling and betting services is concerned and there was therefore no reason for any of the other negotiating parties to attempt to clarify its meaning with the United States. In fact, this argument is merely a variation on the United States' argument about its expectations and it is equally legally irrelevant. Surprisingly, the United States submits that the Appellate Body's decision in *EC - Computer Equipment* somehow supports its case for an interpretation of the US Schedule in light of the United States' subjective views. In *EC - Computer Equipment* the Appellate Body said precisely the opposite and found that a GATT Schedule could *not* be interpreted on the basis of the subjective views of one Member alone and should be interpreted on the basis of the *common* intentions of the parties, to be established pursuant to Article 31 of the Vienna Convention.⁸⁹

57. On the basis of the United States' "expectations" and "historical negotiations" argument, one would also have to exclude all electronic commerce from the scope of GATS commitments made during the Uruguay Round. Such electronic commerce, and the bulk of cross-border trade in services that is taking place today, has only become possible through advances in technology that occurred after the Uruguay Round. It was therefore beyond the expectations of the negotiators. There is, however, no legal basis for such an exclusion and the Panel correctly points out that there is no support for such an approach among WTO Members.⁹⁰ In fact, the United States itself has forcefully stated that "there should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality."⁹¹

58. During the Uruguay Round, it was certainly not the intention of the European Communities to make GATS commitments that would cover the activities of banana importing

⁸⁹ Appellate Body Report on *EC - Computer Equipment*, paras. 82-84.

⁹⁰ Final Report, para. 6.286.

⁹¹ WT/GC/16, p. 3.

companies. In *EC - Bananas III*, however, the Appellate Body nevertheless decided that the EC had made such commitments.⁹² In *Mexico – Telecommunications* Mexico argued that it had not intended to make “reference paper” commitments on interconnection in relation to cross-border supply. The Panel, however, found that it had, without respect to its intentions.⁹³ In fact, under the analysis suggested by the United States, in every WTO dispute the defending Member could argue that it was not its intention to accept the obligation that the complaining Member is seeking to enforce. There will be very few cases, however, if any at all, in which there exists “historical evidence” specifically confirming that the defending Member did accept that obligation. Not only does such an approach have no support under WTO law, but it is an entirely impractical basis on which to assess the commitments of 148 different Members under the GATS.

GATS ARTICLE XVI

A. The United States’ argument that a measure “equivalent to zero quota” is not caught by subparagraphs 2(a) or 2(c) of Article XVI.

1. Introduction.

59. The United States’ primary contention regarding GATS Article XVI is the purely textual argument that the Panel disregarded the “ordinary meaning” of the terms of Articles XVI:2(a) and 2(c) in finding that these can capture a measure that is equivalent to a zero quota. In response Antigua submits that the United States’ reading of Article XVI:2 is erroneous, even if its provisions are interpreted exclusively on the basis of the text. This is further confirmed if Article XVI:2 is properly interpreted pursuant to Article 31 of the Vienna Convention, *i.e.*, in good faith and on the basis of its text, context and object-and-purpose.

⁹² Appellate Body Report on *EC – Bananas III*, paras. 225-227.

⁹³ Panel Report on *Mexico – Telecommunications*, paras. 4.93-4.102, 7.138-7.144.

2. Textual Analysis of Article XVI:2(a).

60. GATS Article XVI:2(a) provides as follows:

“2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test”

61. According to the United States the ordinary meaning of the terms of the second part of Article XVI:2(a) should be interpreted as restricting the limitations caught by the provision to specifically defined “forms” of limitation. Antigua submits that this is not the case. The wording in the second part of Article XVI:2(a) is intended to provide a broad description of the types of measures caught by Article XVI:2(a) rather than to limit its scope to strictly defined categories. There are three reasons for this. *First*, the structure of Article XVI:2(a) (and all other subparagraphs of Article XVI:2 for that matter) suggests that the emphasis is put on the first part of the subparagraph, *i.e.* “limitations on the number of service suppliers.” *Second*, because of the use of the word “whether,” the ordinary meaning of which suggests illustrations that are not set out in full or are not fully prescribed. *Third*, because the GATS does not provide a definition of any of the terms “numerical quotas,” “monopolies,” “exclusive service suppliers” or “economic needs test.” In the absence of a such a definition it is difficult to see how these relatively vague terms could be used to restrict the scope of Article XVI:2(a) to precisely defined “forms.” For instance, when does a measure have the “form” of a monopoly or an exclusive right? These are in fact matters of “effect” much more than form. Antigua appreciates that Article XVI:2(a) uses the word “form” and not “effect” but submits that the use of the word “form” in the sentence at issue does not necessarily imply a rigid legal test.

3. Textual Analysis of Article XVI:2(c).

62. Like the Panel, Antigua takes the view that the difference in text between subparagraphs (a) and (c) of GATS Article XVI:2 does not allow one to draw a substantially different conclusion from that stated above.⁹⁴ The United States makes much of the absence of the comma in the English text that does appear in the French and Spanish versions. Antigua understands the United States' argument to be that "expressed in terms of designated numerical units in the form of quotas" should be read as one "form" caught by Article XVI:2(c) rather than two "forms" (*i.e.* "expressed in terms of numerical units" and "in the form of quotas").⁹⁵ However, that cannot be correct because the phrase "expressed in terms of designated numerical units in the form of quotas" makes no sense. It might be possible to speak of "quotas expressed in terms of designated numerical units" but not the other way around. In Antigua's view this missing comma is simply a typographical error in the English version of Article XVI:2(c).

4. Interpretation in Good Faith Taking into Account Text, Context and Object-and-Purpose in Order to Determine the Common Intentions of the Parties.

63. As set out above, Antigua agrees with the Panel that the 1993 Scheduling Guidelines are context for the interpretation of GATS Article XVI:2 and, as the Panel correctly points out, the 1993 Scheduling Guidelines specifically mention that measures "equivalent to zero quota" are caught by Article XVI:2(a).⁹⁶ Furthermore there exists considerable other "context" that confirms the Panel's view that the categories of restrictions described in the subparagraphs of XVI:2 should not be interpreted as narrowly as the United States suggests. This context can be found in the Schedules of the United States and other WTO Members. These schedules form an integral part

⁹⁴ Final Report, para. 6.346.

⁹⁵ US Appellant Submission, paras. 114-120.

⁹⁶ 1993 Scheduling Guidelines, para. 6; Final Report, para. 6.332.

of the GATS and are therefore clearly part of the context of Article XVI. When making “commitments with limitations” with regard to Article XVI, Members identified these limitations in the “limitations on market access column” of their schedules.⁹⁷ The 1993 Scheduling Guidelines provided the following in that respect:

“(…) the Member must describe in the appropriate column the measures maintained which are inconsistent with Articles XVI or XVII. The entry should describe each measure concisely, *indicating the elements which make it inconsistent with Articles XVI or XVII.*”⁹⁸ (emphasis added)

64. The GATS schedules of most Members that have made “commitments with limitations” regarding Article XVI, including the United States, list measures that would not be caught by the very narrow interpretation of Article XVI proposed by the United States.⁹⁹ For instance, the US Schedule from the Uruguay Round¹⁰⁰ provides, *inter alia*, the following limitations on market access for certain legal services supplied through commercial presence:¹⁰¹ “Services must be supplied by a natural person;” “Partnership in law firms is limited to persons licensed as lawyers;” and “US citizenship is required to practice before the US Patent and Trademark Office.” In

⁹⁷ The 1993 Scheduling Guidelines explain that Members have four options to describe the level of commitment they want to make in a sector appearing in their schedule: (a) “full commitment”, in which case the word “NONE” (for “no limitations”) appears in the appropriate column; (b) “commitments with limitations”, in which case the Member describes the limitation in the appropriate column; (c) “no commitment”, in which case the word “UNBOUND” appears; and (d) “No commitment technically feasible” in which case a the word “UNBOUND” appears in combination with a footnote. (1993 Scheduling Guidelines, para. 24-28).

⁹⁸ 1993 Scheduling Guidelines, para. 25.

⁹⁹ Antigua reviewed a sample of 21 GATS schedules, all of which listed measures [as limitations on market access] that would not be caught by the United States’ interpretation of Article XVI. The results of Antigua’s review are summarised in *Annex B* to this appellee submission.

¹⁰⁰ GATS/SC/90.

¹⁰¹ Sector 1.A(a)(1).

relation to the cross-border supply of “Reinsurance & Retrocession” services¹⁰² the United States listed the following limitation:

“Insurance companies incorporated in Nevada may purchase reinsurance only from an insurer admitted to Nevada.”

In relation to “Trading of Securities and Derivative Products”¹⁰³ the United States listed the following limitation on modes 1, 2 and 3:

“Federal law prohibits the offer or sale of futures contracts on onions, options contracts on onions, and options on futures contracts on onions in the United States, and services related thereto.”

65. Obviously, if the interpretation of GATS Article XVI that the United States now puts forward were correct, the United States would not have listed these measures as limitations on market access because they would not be inconsistent with Article XVI. There are numerous other examples of measures listed as limitations on market access in the GATS schedules of the United States and other WTO Members. This clearly demonstrates that the United States interpretation does not represent the common intention of the parties. It also demonstrates that the Panel correctly concluded that, if the United States intended to maintain measures that make it impossible to supply gambling services on a cross-border basis, it should have scheduled a limitation on market access.¹⁰⁴

66. As a corollary, these entries in Members’ GATS schedules also demonstrate that violations of Article XVI will often be relatively obvious and that “indicating the elements which

¹⁰² Sector 7.A5(c).

¹⁰³ Sector 7.B.

¹⁰⁴ Final Report, para. 6.329. *See also* AB Other Appellant Submission, para. 60. The fact that WTO Members also schedule restrictions imposed on consumers as violations of Article XVI further confirms Antigua’s claim raised in its other appeal that the Panel erred in finding that restrictions imposed on consumers do not violate GATS Article XVI:2. *See* AB Other Appellate Submission, paras. 56-60.

make [a measure] inconsistent with Article XVI”¹⁰⁵ does not necessarily require a lengthy legal analysis—contrary to what the United States seems to suggest when it complains that Antigua did not set out its Article XVI claim with sufficient detail with respect to each individual measure.

67. Finally, Antigua agrees with the Panel’s view that the United States’ very restrictive interpretation of Article GATS XVI:2 leads to absurd results because it makes it extremely easy for Members to circumvent it.¹⁰⁶ The Appellate Body has previously found that provisions that do not explicitly prohibit *de facto* violations should nevertheless be interpreted as capturing such violations to avoid easy circumvention.¹⁰⁷ A similar approach should be followed with regard to Article XVI:2.

5. GATS Articles XVI:1 and XVI:2 Should be Interpreted Consistently.

68. In the Final Report, the Panel determined that GATS Article XVI:1 is limited by the terms of Article XVI:2.¹⁰⁸ However, a strictly text-based analysis of Article XVI:1 does not lead to that conclusion at all. If Article XVI:2 is, as the United States would argue, to be assessed solely on the basis of its text, then Article XVI:1 should be also—in which event a measure can violate Article XVI:1 without any further analysis under Article XVI:2.

¹⁰⁵ See 1993 Scheduling Guidelines, para. 25, as quoted in paragraph 63 above.

¹⁰⁶ Final Report, para. 6.332.

¹⁰⁷ Appellate Body Report on *EC - Bananas III*, para. 233: “Moreover, if Article II was not applicable to *de facto* discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article.” Appellate Body Report on *Canada - Automotive Industry*, para. 142: “Finally, we believe that a finding that Article 3.1(b) extends only to contingency ‘in law’ upon the use of domestic over imported goods would be contrary to the object and purpose of the *SCM Agreement* because it would make circumvention of obligations by Members too easy.”

¹⁰⁸ Final Report, para. 6.318.

B. The Panel’s interpretation of Article XVI:2 does not limit the right of Members to regulate the supply of services and does not lead to absurd results.

69. In paragraphs 126 through 134 of its appellant submission the United States develops a number of scenarios that it believes should convince the Appellate Body of the dramatic impact that the Panel’s interpretation of Article XVI:2 will have on a WTO Member’s capacity to regulate services. The United States submits that a ban on unsolicited advertising by facsimile or electronic mail or a prohibition on highway-side outdoor advertising signs would be caught by Article XVI:2. Furthermore it would “potentially call into question every domestic regulation that has the effect of prohibiting any fraction of a sector or mode of supply where a Member inscribes a market access commitment.”¹⁰⁹ This is obviously not correct.

70. Whether or not a measure can be qualified as equivalent to a zero quota (or to any of the other forms described in the subparagraphs of Article XVI:2) is a matter of case by case analysis. In the circumstances of this case the United States recognises that its measures make cross-border supply for “services involving the transmission of a bet or wager” legally impossible.¹¹⁰ The only “gambling and betting services” that according to the United States can be supplied on a cross-border basis are those not involving the transmission of a bet or wager such as “odds making” or the transmission of pictures of horse races¹¹¹—which, in Antigua’s view, do not even qualify as “gambling and betting services,” at least not those at issue in this proceeding. By consequence, the United States’ measures outlaw cross-border supply for a whole sector, or at least a very large part of a sector. As the United States has made a commitment to allow cross-border supply in that sector, this is equivalent to a zero quota. This situation is substantially different from the

¹⁰⁹ US Appellant Submission, para. 130.

¹¹⁰ See the United States’ responses to Questions 9 and 35 from the Panel.

¹¹¹ See Final Report, para. 6.26.

unsolicited advertising or highway advertising scenarios put forward by the United States. In both these scenarios the foreign service supplier has access to the market via all channels, other than unsolicited facsimile or electronic mail correspondence or highway-side advertising signs. In Antigua's view, therefore, these would not qualify as measures equivalent to a zero quota.

71. Finally, it should of course be noted that any objectively justified regulatory measure that is applied on a truly non-discriminatory basis can be exempted on the basis of GATS Article XIV.

GATS ARTICLE XIV

A. The Panel correctly determined that the United States had not established that the federal laws in question were “necessary” for purposes of GATS Articles XIV(a) and (c).

1. Introduction.

72. The United States' primary point of contention with respect to the Panel's reasoning on GATS Article XIV is that, in the view of the United States, the Panel:

“impos[ed] a procedural requirement on the United States to consult or negotiate with Antigua before the United States may take measures to protect public morals, protect public order, or enforce GATS-consistent laws in reliance on Article XIV.”¹¹²

73. However, the United States misses the point. What the Panel determined was that the United States had not met its burden of proof that the laws at issue were “necessary” within the meaning of GATS Article XIV.¹¹³ In its discussion of the issue, the United States further misinterprets the Appellate Body decisions in *Korea – Various Measures on Beef* and *EC – Asbestos* to in essence shift the burden of proof from the party invoking the defence to the party defending against it. In the view of the United States, apparently once the party invoking Article XIV makes a “mere assertion” that the measures are necessary, the burden then shifts to the

¹¹² US Appellant Submission, para. 139.

¹¹³ Final Report, paras. 6.535, 5.26.

defending party to prove that a WTO consistent alternative was reasonably available to the party invoking the defence.¹¹⁴

74. In the discussion that follows, Antigua will *first* illustrate how the United States misread the conclusion of the Panel under its discussion of the “necessary” component of an Article XIV defence, *second* outline the burden of proof under Article XIV and demonstrate how the United States would improperly shift the burden of proof from the complaining to the responding party, and *third* discuss the lack of evidence before the Panel.

2. The United States Misread the Panel’s Conclusion.

75. The United States argued in its appellant submission that the Panel’s *sole* legal basis for rejecting the Article XIV defence of the United States was that the United States did not negotiate or consult with Antigua in order to determine if a less trade restrictive alternative to outright prohibition was available. However, the United States misread the Panel’s conclusion.

76. Rather than imposing a consultations requirement on the United States and thus finding that the United States had not proven that three federal laws were necessary *solely on that basis*, what the Panel in fact determined was that the United States had failed to prove the necessity of the three federal laws, *period*, and that the lack of consultation with Antigua was in effect simply evidence of that failure.

77. This is most clearly illustrated by paragraph 5.26 of the Interim Section of the Final Report:

“It is well established under WTO law that it is for the Member invoking the application of a justification provision (such as Article XIV of the GATS) to demonstrate that it has complied with the requirements of such a provision. It was, therefore, for the United States to demonstrate that the measures at issue were ‘necessary’ to ‘protect public morals’ or to ‘maintain public order’. The Panel reached the conclusion that the measures at issue

¹¹⁴ US Appellant Submission, paras. 152-155.

were indeed designed so as to protect public morals or to maintain public order; but the United States had failed to demonstrate that they were ‘necessary’ since it had not shown that there was no WTO-consistent alternative measure reasonably available that would provide the United States with the same level of protection against the risks it had identified. *It was in this context that we considered it relevant* that the United States had not accepted Antigua's invitation to discuss and consider WTO-consistent alternatives that might or could address the United States' concerns.” (emphasis added)

78. As the Panel correctly pointed out, the burden was on the United States to prove the measures necessary. It could have accomplished this if it had proven “that there was no WTO-consistent alternative measure reasonably available that would provide the United States with the same level of protection against the risks it had identified,”¹¹⁵ but it failed to do so. And *it was in this context* that the Panel considered it *relevant* that the United States had not consulted with Antigua. It did not, contrary to the United States’ assertions, impose a procedural requirement to negotiate.

3. The Burden of Proof.

79. The burden of proof on a party asserting a GATS Article XIV defence is three-fold. The party must:

- *First*, prove that the applicable measure is designed to protect morals or to maintain public order, to protect human, animal or plant life or health or to secure compliance with certain laws or regulations which are not inconsistent with the GATS;¹¹⁶
- *Second*, prove that the applicable measure is necessary to accomplish the applicable end; and

¹¹⁵ Final Report, para. 5.26.

¹¹⁶ GATS Article XIV. A fourth requirement is imposed in cases where an assertion of maintaining public order is made, that the invoking party establish “a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” *Id.*, fn. 5.

- *Third*, prove that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade.¹¹⁷

80. In this case, the United States arguably invoked defences under Articles XIV(a) and (c), alleging that three federal laws, the Wire Act, the Travel Act and the Illegal Gambling Business Act (collectively, the “three federal laws”) were “designed” to protect morals or to maintain public order and to secure compliance with other GATS consistent measures.

81. Obviously, with its enormous domestic gambling industry the United States could not credibly argue that gambling and betting *per se* is contrary to “morals” in the United States or, with respect to public order, poses a “genuine and sufficiently serious threat to one of the fundamental interests of society.” Ultimately, in respect of Article XIV(a) the United States alleged two specific threats to “morals and public order” that the three federal laws were “designed” to protect,¹¹⁸ organised crime and under-age gambling. Accordingly, it was incumbent upon the United States to prove that the three federal laws were “necessary” to protect its citizens from organised crime and under-age gambling—but not just organised crime and under-age gambling in the abstract, but in the context of the services from Antigua at issue in this case.¹¹⁹

82. With respect to GATS Article XIV(c), the Panel found that the only otherwise GATS consistent law at issue was the “RICO statute.”¹²⁰ Thus, the United States had to prove that the

¹¹⁷ GATS Article XIV; Appellate Body Report on *Korea – Various Measures on Beef*, paras. 156-157; Appellate Body Report on *US – Gasoline*, pp. 22-23. This third requirement, the “chapeau” of Article XIV, will be discussed under a separate heading.

¹¹⁸ See US Second Submission, paras. 111-115; see also AB Other Appellant Submission, para. 81.

¹¹⁹ This determination should be even more problematic, given the fact that the three federal laws date from the early 1960’s, well in advance of the Internet.

¹²⁰ Final Report, para. 6.551. The RICO statute is codified at 18 U.S.C. §§ 1961-1968.

three federal laws were “necessary” to secure compliance with the RICO statute, again, not in the abstract but in the context of the services at issue.

83. As the United States observed in its submission,¹²¹ the Appellate Body has said that “necessary” should not be “limited to that which is ‘indispensable’ or ‘of absolute necessity’ or ‘inevitable’.”¹²² And as the United States also pointed out, “necessary” could be seen as falling somewhere on a “continuum,” at one end of which lies “indispensable” and the other “making a contribution to.”¹²³ What the United States failed to note, however, is that the Appellate Body in *Korea – Various Measures on Beef* did not end there:

“We consider that a ‘necessary’ measure is, in this continuum, located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.”¹²⁴ (footnote omitted)

84. What evidence did the United States adduce to meet its burden of proof that the three federal laws were *necessary* to protect American citizens against organised crime and under-age gambling in the context of gambling and betting services from Antigua?¹²⁵

85. In its brief discussion on Article XIV(a), it is arguable that the United States submitted no evidence at all, although the United States did say that the three federal laws “*serve to* suppress betting by remote supply, and are in that respect necessary to prevent the intrusion of gambling and betting into uncontrolled settings.”¹²⁶ Antigua submits that “*serve to*” is considerably closer

¹²¹ US Appellant Submission, paras. 140-141.

¹²² Appellate Body Report on *Korea – Various Measures on Beef*, para. 161.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Antigua has argued that there is a complete failure of proof that there are any actual risks related to organised crime and under-age gambling related to the services offered from Antigua, much less any risks that are in any demonstrable way greater than risks associated with the United States domestic industry. See AB Other Appellant Submission, paras. 94-96, 112-120.

¹²⁶ US Second Submission, para. 115 (emphasis added).

to the “making a contribution” pole of the *Korea – Various Measures on Beef* continuum than it is to the “indispensable” pole.

86. What evidence did the United States adduce to meet its burden of proof that the three federal laws were *necessary* to secure compliance with the RICO statute in order to protect American citizens against organised crime in the context of gambling and betting services from Antigua?¹²⁷

87. In its discussion on GATS Article XIV(c) the United States again submitted no evidence at all, saying only that “[a]s measures *against* organized crime [the three federal laws] are necessary to secure compliance with all the various WTO-consistent U.S. criminal laws violated by organized crime activities.”¹²⁸

88. In the Final Report, the Panel found:

“that a key element of the application of the ‘necessity’ test of Article XIV in this dispute is whether the United States has explored and exhausted reasonably available WTO-consistent alternatives to the US prohibition on the remote supply of gambling and betting services that would ensure the same level of protection.”¹²⁹

89. In its objection to this finding of the Panel, the United States argues that it was either the burden of Antigua or the Panel to establish that one or more reasonably available WTO-consistent alternatives to prohibition existed. For example:

“[T]he mere possibility of finding a theoretical alternative through consultations does not render a responding party’s Article XIV measure objectively unnecessary.”

“The Panel noted that Antigua had ‘asserted that I has in place a regulatory regime that is sufficient to address the specific concerns identified by the United States,’ but did not find

¹²⁷ As in the case of Article XIV(a), Antigua submits that the record contains no evidence at all of any organised crime risk associated with the gambling and betting services offered by Antigua, much less any risks that are in any demonstrable way greater than risks associated with the United States domestic industry. *See* AB Other Appellant Submission, paras. 133-136.

¹²⁸ US Second Submission, para. 100.

¹²⁹ Final Report, para. 6.528.

that Antigua’s assertion was true or represented an alternative that would meet the desired level of protection in the United States.”

“The Panel, in a footnote, alluded to the fact that ‘suggestions have been made in US literature as to how the concerns that have been raised in the United States regarding the remote supply of gambling and betting services may be addressed.’ On the contrary, by stating that these possible alternatives ‘may’ address U.S. concerns, it implicitly recognized that they may not address U.S. concerns.” (citation omitted)

“In the absence of any finding by the Panel in this dispute that an alternative measure was reasonably available, the Panel had no legal basis under the alternative measure analysis used in some past disputes under individual exceptions of Article XX of the GATT 1994 to find that the relevant United States measures were not ‘necessary.’”¹³⁰

90. There is no justification for this reversal of the burden of proof. Arguably, if a party invoking Article XIV had in fact met its burden and established a *prima facie* case of “necessity” the burden might then shift to the other party to rebut the *prima facie* case. However, the United States never made a *prima facie* case.

4. The Evidence Before the Panel.

91. Irrespective of the issue of the burden of proof, on the basis of the evidence before it and the very limited efforts of the United States to substantiate its GATS Article XIV defence, the Panel could not possibly have decided in favour of the United States.

92. Although it is by no means certain from the United States argumentation, it is possible that it is contending that its “mere assertions” that it “extensively considered whether and to what extent it should legalize Internet gambling” and was “[i]n spite of these efforts . . . unable to discover an alternative that would permit remote supply of gambling, either on a domestic basis or a cross-border basis, without reducing the levels of protection that the United States has chosen”¹³¹ amount to proof that prohibition is “necessary.”

¹³⁰ US Appellant Submission, paras. 152, 153, fn. 227 and para. 157.

¹³¹ *Id.*, para. 157, fn. 238.

93. Contrary to what it asserted in its appellant submission,¹³² the United States in fact submitted no evidence of any efforts to consider legalisation or regulation of Internet gambling, much less of why any such “efforts” were unsuccessful. In this context, it would be particularly relevant if the United States had submitted evidence as to why regulation or some other alternative were found to be inadequate to address the concerns ostensibly raised by the United States under GATS Article XIV. There was no evidence of this nature at all in this case.

94. Antigua had submitted to the Panel that it maintained a robust regulatory scheme for its cross-border gambling and betting industry, and argued that this regulatory scheme was sufficient to address the specific concerns raised by the United States with respect to the remote supply of gambling and betting services.¹³³ The United States never even attempted to rebut Antigua’s assertions in this respect.

95. The burden was on the United States to prove its measures “necessary,” not for the Panel or Antigua to prove they were not. The Panel was correct to conclude that the United States had failed to meet this burden.

B. The United States did not negotiate with Antigua on the cross-border supply of gambling services.

96. In its second written submission to the Panel, the United States concluded that “it is unreasonable to expect the United States to negotiate an ‘agreed regulatory context’ for cross-border supply of [gambling and betting] services.”¹³⁴ The United States has further stated that in

¹³² US Appellant Submission, para. 156.

¹³³ Final Report, para. 6.522. Antigua’s evidence in this respect was by no means a “mere assertion,” covering more than 15 single-spaced pages in the AB First Submission, and a number of related exhibits. *See* AB First Submission, paras. 28-74. Antigua also submitted evidence of other countries that have chosen to permit Internet gambling, including the United Kingdom. *See* Final Report, fn. 987. The United States did not rebut this evidence either.

¹³⁴ *Id.*, para. 122.

any event, negotiations with Antigua would be “fruitless.”¹³⁵ These assertions during the Panel proceedings apparently were in response to the belief of Antigua that, based upon its success with its own regulatory efforts, “any resolution of this dispute between Antigua and Barbuda and the United States should take place in an agreed regulatory context.”¹³⁶ The United States argued that the suggestion of Antigua for negotiation:

“suffers from at least two basic flaws. First, as a legal matter, nothing in the text of the GATS requires such action. Second, as a factual matter, the absence of any U.S. domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to seek negotiations to permit such a regime for its cross-border suppliers.”¹³⁷

97. This statement of the United States suffers from two flaws itself. First, the United States has substantial domestic industry that is “remote” by the standard identified by the Panel,¹³⁸ including unsupervised video lottery and poker terminals, intra-state Internet and telephone gambling in Nevada and expressly-sanctioned Internet and telephone betting on horseracing.¹³⁹

¹³⁵ US Second Submission, paras. 118, 122. *See* Closing Statement of the United States at the Second Substantive Meeting of the Panel, WT/DS285 (27 January 2004), para. 9. The statement was made by the United States to show that discussions with Antigua would not be productive because Antigua took a contrary position to the United States with respect to Jay Cohen. That is a circular argument, because Jay Cohen was charged by the United States with violating the Wire Act for providing the very services Antigua argues it is entitled to provide in this case.

¹³⁶ AB First Statement, para. 4; US Second Submission, para. 120.

¹³⁷ *Id.*

¹³⁸ Final Report, para. 6.591.

¹³⁹ *See* Exhibits AB-37 (discussion and references to availability of video lottery terminals in the United States from La Fleur's 2001 World Lottery Almanac, pp. 6-7, 14, and 21); AB-190, -191, -190 and -191 (discussions of or references to the wide use of instant lottery ticket vending machines); AB-178 (Iowa lottery form to claim winnings by mail, even for youths under the age of 18); AB-199 (Illinois lottery Internet sales form); AB-202 (Virginia lottery Internet sales form); and AB-203 (New York lottery Internet ticket sales form); AB-47 (Station Casinos Internet sports wagering service); AB-42 (www.Youbet.com); AB-43 (TVG Network); and AB-44 (www.CapitalOTB.com).

98. Second, if the United States is inferring that its own lack of desire or resolve to cooperate with Antigua to develop an agreed regulatory structure is of any consideration in assessing its obligations under the GATS, it is clearly mistaken.¹⁴⁰

99. Surprisingly, despite its statements to the Panel, the United States has informed the Appellate Body that it *did* engage in consultations with Antigua—meaning the consultations under DSU Article 4 initiated by Antigua as a result of the United States prohibition of cross-border gambling and betting services.¹⁴¹

100. Certainly, the consultations meeting required by the DSU in advance of filing a panel request under DSU Article 6 is *not* what the Panel had in mind when it suggested that the United States should have consulted with Antigua “before and while imposing its prohibition on the cross-border supply of gambling and betting services . . .”¹⁴² in order to determine whether WTO consistent alternatives might be available.¹⁴³

C. Regarding the chapeau of GATS Article XIV.

1. Introduction.

101. Antigua has argued that the Panel was wrong to discuss the chapeau of GATS Article XIV and that the discussion, such that it was, was flawed in many respects.¹⁴⁴ Given the discussion of

¹⁴⁰ This is apparently what the United States suggested in paragraph 122 of the US Second Submission where it states, without any substantiation whatsoever that “the United States has not found it possible to develop regulations for the remote supply of gambling on a domestic basis that would provide sufficient levels of law enforcement to satisfy the priorities of U.S. regulators.”

¹⁴¹ US Appellant Submission, para. 173.

¹⁴² Final Report, para. 6.531.

¹⁴³ Antigua notes that despite the statements in paragraphs 173 and 175, as well as footnotes 260 and 263 of the US Appellant Submission, the only evidence before the Panel regarding the nature of the consultations between the parties subsequent to Antigua’s request for consultations to the United States is summarised in paragraph 6.523 of the Final Report.

¹⁴⁴ AB Other Appellant Submission, paras. 141-147.

the issue by the United States in its submission, however, Antigua will make a few brief points.

2. The Burden of Proof is on the United States.

102. It is the burden of the party invoking GATS Article XIV as a defence to prove all elements of the defence, including the chapeau, a burden which the Appellate Body has said is a “heavier task” than provisionally justifying a measure under Article XIV.¹⁴⁵

103. According to the United States, it “rested” its *prima facie* case under the chapeau by its assertion in the US Second Submission that:¹⁴⁶

“The restrictions in [the three federal laws] meet the requirements of the chapeau. None of these measures introduces any discrimination on the basis of nationality. On the contrary, as the United States has repeatedly observed, they apply equally regardless of national origin.”¹⁴⁷

Although the United States argues that “[t]hese observations were backed by extensive evidence and argumentation,” the quoted paragraph from the US Second Submission does not cite any evidence or information at all. In its submission to the Appellate Body, the United States concludes that its assertion that the restrictions “meet the requirements of the chapeau” is “backed” by the “evidence and argumentation” that the United States had submitted to the Panel *in connection with the assessment of GATS Article XVII*.¹⁴⁸

104. Ironically, the United States proceeds in paragraphs 188 and 198 of its appellant submission to argue that the Panel improperly made Antigua’s *rebuttal* of the United States chapeau “case” “by recycling evidence and argumentation that Antigua had used to allege a national treatment violation under Article XVII as if those arguments had been made in the

¹⁴⁵ Appellate Body Report on *US – Gasoline*, pp. 22-23. See AB Other Appellant Submission, paras. 137-138.

¹⁴⁶ US Appellant Submission, para. 187.

¹⁴⁷ US Second Submission, para. 118.

¹⁴⁸ US Appellant Submission, para. 187.

context of the Article XIV chapeau.”¹⁴⁹ It continues on somewhat absurdly to assert that Antigua’s “recycled” Article XVII evidence is of no value to an assessment under the chapeau because it was not advanced in the context of Article XIV—however, the United States decides that the same does not hold true for its own arguments and evidence.¹⁵⁰

105. Not only did Antigua not get a chance to “rebut” the United States case under the chapeau, but it is clear that the United States never came close to meeting its heavier task of proving that its measures complied with the chapeau.¹⁵¹

3. Factual Issues.

106. The United States raises a number of additional points with respect to the chapeau in its submission to the Appellate Body. One of these points appears to be that the Panel violated DSU Article 11 in finding that the United States had failed to meet its burden of proof under the chapeau with respect to a particular federal statute, the “Interstate Horseracing Act,” or “IHA.”¹⁵² The IHA, on its face, allows interstate betting on horse races over the telephone and other modes of electronic communication, such as the Internet. The United States has argued, in essence, that this law has no legal effect, a statement which on any analysis is not credible. In its discussion of this issue in its appellant submission, the United States further refers to a large number of unspecified prosecutions on federal laws. Presumably these relate to the wide-spread “underground” illegal domestic gambling discussed in Antigua’s first submission to the Panel.¹⁵³ The United States submitted no evidence at all, however, of any efforts undertaken against large

¹⁴⁹ *Id.*, para. 188.

¹⁵⁰ *Id.*, para. 189.

¹⁵¹ *See* AB Other Appellant Submission, paras. 72-77, 86, 141-147.

¹⁵² US Appellant Submission, paras. 190-200; Final Report, paras. 6.595-6.600.

¹⁵³ AB First Submission, paras. 125-128.

and well-know Internet gambling companies that *openly* conduct business in the United States, including one owned by the State of New York. This in itself indicates that the lack of effect of the IHA under United States law is not as clear-cut as the United States suggests it is. With respect to this issue, the Panel found the “evidence” before it regarding the IHA “inconclusive.”¹⁵⁴ Based upon the evidence before it, it is very difficult to see how the Panel could have found in favour of the United States.

107. Antigua has argued that there was no basis for the Panel to have segmented the gambling and betting industry in the manner the United States desired for purposes of assessing the chapeau of GATS Article XIV.¹⁵⁵ Because Antiguan operators can only provide gambling and betting services “remotely,” by employing this definition the United States is able to completely exclude Antiguan suppliers while its domestic industry flourishes. No credible evidence has been submitted to justify a distinction between United States domestic service providers and Antiguan providers that allows the United States to avoid its commitments under the GATS. Allowing the massive domestic gambling industry described in Antigua’s first submission to the Panel¹⁵⁶ while at the same time denying competition from Antigua on an arbitrary and at best untested basis is not only to maintain an “arbitrary or unjustifiable discrimination between countries where like conditions prevail” but obviously a “disguised restriction on trade in services.”

THE ISSUE OF PRACTICE AS A MEASURE

108. In paragraph 6.197 of the Final Report, the Panel concluded that “‘practice’ can be considered as an autonomous measure that can be challenged in and of itself or it can be used to

¹⁵⁴ *Id.*, para. 6.600.

¹⁵⁵ AB Other Appellant Submission, para. 142.

¹⁵⁶ AB First Submission, paras. 75-131.

support an interpretation of a specific law that is challenged ‘as such’.” The United States alleges in its submission that this conclusion was in error.¹⁵⁷

109. The discussion of the Panel on this point is without context, and certainly *obiter dicta* in this case and, Antigua suspects, will be of limited assistance in any future case. That being said, given the expansive scope of what constitutes a “measure” for purposes of GATS Article XXVIII and DSU Article 6.2¹⁵⁸ Antigua believes that there may well be circumstances under which the “practice” of a WTO Member should be considered a “measure” for purposes of dispute resolution.¹⁵⁹

III. CONCLUSIONS

110. For the reasons explained above, Antigua respectfully requests the Appellate Body to reject all of the arguments and the claims contained in the appellant submission of the United States of 14 January 2005.

¹⁵⁷ US Appellant Submission, paras. 205-212.

¹⁵⁸ See AB Other Appellant Submission, paras. 8, 27-31.

¹⁵⁹ It is interesting given the finding by the Panel that it did not give consideration to the total prohibition as “practice.” The repetition by the United States of the total prohibition concept in its communications with Antigua, the DSB and others could reasonably be construed to constitute “practice” as the Panel defined it in paragraph 6.196 of the Final Report. See AB Other Appellant Submission, paras. 32-36, 48.