United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (AB-2005-1)

EXECUTIVE SUMMARY OF THE APPELLEE SUBMISSION OF ANTIGUA AND BARBUDA

1 February 2005

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"). 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").

2. In its Appellee Submission, Antigua addresses 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. In addition, 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") and the services sectoral classification list prepared by the GATT Secretariat in 1991 ("W/120") as general issues relevant to both the discussion on the US Schedule and the discussion on Article XVI:2.

A. THE MEASURES

3. The United States' first appellate contention is 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.

4. In its Appellee Submission, Antigua demonstrates that, while the Panel should have considered this case on the basis of the "total prohibition," Antigua–not the Panel–also established its *prima facie* case with respect to the federal and state statutes taken into consideration by the Panel. Antigua submitted a large amount of evidence and discussion regarding discrete federal and state legislation in this case. Antigua discussed this legislation 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. On a number of occasions throughout the Panel proceedings Antigua explicitly stated that it was also challenging individual United States laws, and not only the "total prohibition".

5. 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 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.

6. 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.

7. Accordingly, Antigua established a *prima facie* case with regard to the federal and state laws taken into account by the Panel.

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

8. 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. 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. This is a "general rule of interpretation," not a hierarchical sequence of tests.

9. The United States appears to argue that Article 31 *does* impose a hierarchical sequence of tests, which starts with the text. 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.

10. 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.

11. Antigua agrees with the Panel's findings and thorough analysis regarding this matter and sees no need to reargue this point. Antigua notes in its Appellee Submission that the revised scheduling guidelines circulated by the Secretariat in 2001 (the "2001 Scheduling Guidelines") confirm that pre-existing GATS schedules "have been drafted according to [the 1993 Scheduling Guidelines]." 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.

C. THE COMMITMENTS

12. The United States second appellate contention is 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.

13. In its Appellee Submission, Antigua establishes that 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."

14. Irrespective of the number of dictionary definitions that the United States can find, 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.

15. The more appropriate point of comparison to determine the "ordinary meaning" of "sporting" in the United States 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.

16. Other classifications that have been referred to in the context of this dispute are the 1987 Standard Industry Classification ("SIC") and the 2002 North American Industry Classification System ("NAICS"), used by the United States. Rather than describing gambling as "sporting," the 1987 NIC classifies gambling in precisely the same way as the CPC (and W/120), *i.e.* in a residual subcategory for "Amusement and Recreation Services [not elsewhere classified.]" The 2002 NAICS uses the word "gambling" to identify the gambling industry and "sporting" to identify sports-related services and goods.

17. Accordingly, Antigua agrees with the Panel's findings and thorough analysis regarding the United States' Schedule.

D. GATS ARTICLE XVI

18. The United States third appellate contention is 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.

19. In its Appellee Submission, Antigua demonstrates that 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* do so.

20. Antigua's interpretation of Article XVI is further confirmed by the context provided by the WTO Members' GATS Schedules. Almost all WTO 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 put forward by the United States. If the United States' interpretation of Article XVI were to be correct, the Members would not have listed these measures as limitations on market access because they would not be inconsistent with Article XVI.

E. GATS ARTICLE XIV

21. The United States fourth appellate contention is that the Panel erred in its interpretation of GATS Article XIV and its application to the United States statutes assessed by the Panel, with the principal claim of the United States under this issue being 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.

22. In its appellee submission, Antigua demonstrates how the United States misread the Panel's findings on GATS Article XIV. The Panel did not impose a requirement to negotiate with other Members in order to demonstrate that a measure is "necessary" under Article XIV. What the Panel in fact determined was that the United States had failed to prove the necessity of the three measures, and that the lack of consultation with Antigua was in effect simply evidence of that failure. Antigua further demonstrates that the Panel did not violate Article 11 of the DSU in finding that the evidence concerning *(i)* the legality of inter-state remote access gambling in light of the "Interstate Horse Racing Act", and *(ii)* the enforcement of laws against major

domestic suppliers of Internet gambling services did not allow the United States to meet its burden of proof.

F. THE ISSUE OF PRACTICE AS A MEASURE

23. 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 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.

24. The discussion of the Panel on this point is without context, and certainly *obiter dicta* in this case. That being said, given the expansive scope of what constitutes a "measure" for purposes of GATS Article XXVIII and DSU Article 6.2 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.

G. CONCLUSIONS

25. For the reasons explained in its Appellee Submission, as well as in its Other Appellant Submission, 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.