

ANNEX A

**Working Procedures for the Panel  
in *United States – Measures Affecting the Cross-Border Supply  
of Gambling and Betting Services***

1. The Panel will provide the parties with a timetable for panel proceedings and will work according to the normal working procedures as set out in the DSU and its Appendix 3 plus certain additional procedures, as follows:
2. The Panel shall meet in closed session. The parties to the dispute, and the third parties, shall be present at the meetings only when invited by the Panel to appear before it.
3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. As provided in Article 18.2 of the DSU, where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
4. Before the first substantive meeting of the Panel with the parties, the parties to the dispute shall transmit to the Panel written submissions in which they present the facts of the case and their arguments.
5. At its first substantive meeting with the parties, the Panel shall ask the party which has brought the complaint to present its case. Subsequently, at the same meeting, the party against which the complaint has been brought shall be asked to present its points of view.
6. The third parties shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. The third parties may be present during the entirety of this session.
7. Formal rebuttals shall be made at a second substantive meeting of the Panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the Panel.
8. The Panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing. Written replies to questions shall be submitted at a date to be decided by the Panel in consultation with the parties.
9. The parties to the dispute and any third party invited to present its views shall make available to the Panel and the other party a written version of their oral statements.
10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, comments on the descriptive part of the report, and comments on the interim report, shall be made available to the other party.
11. Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a party's first written submission. If the complaining party requests any such ruling, the respondent shall submit its response to such a request in its first written submission. If the respondent requests any such ruling, the complaining party shall submit its

response to such a request prior to the first substantive meeting of the Panel. The complaining party shall submit this response at a time to be determined by the Panel after receipt and in light of the respondent's request. Exceptions to this procedure will be granted upon a showing of good cause.

12. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

13. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the stages of the dispute.

14. The parties and third parties shall provide the Panel with an executive summary of the facts and arguments as presented to the Panel in their written submissions and oral presentations within one week following the delivery to the Panel of the written version of the relevant submission. The executive summaries of the written submissions to be provided by each party should not exceed 10 pages in length and the executive summaries of the oral presentations should not exceed 5 pages in length each. The summary to be provided by each third party shall summarize their written submission and oral presentation, and should not exceed 5 pages in length. The executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. However, the Panel may reproduce the executive summaries provided by the parties and third parties in the arguments section of its report, subject to any modifications deemed appropriate by the Panel. The parties' and third parties' replies to questions, and the parties' comments on each other's replies to questions will be attached to the Panel report as annexes.

15. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. In this regard, it is noted that the complainant has undertaken to ensure as far as possible that a government official be present at all meetings with the Panel. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. In particular, private lawyers acting on behalf of the complainant are bound by the same obligations and responsibilities as WTO Members. Parties shall provide a list of the participants of their delegation before or at the beginning of the meeting with the Panel.

16. Following issuance of the interim report, the parties shall have no less than 10 days to submit written requests to review precise aspects of the interim report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at the time the written request for review is submitted. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within a time-period to be specified by the Panel to submit written comments on the other parties' written requests for review. Such comments shall be strictly limited to commenting the other parties' written requests for review.

17. The following procedures regarding service of documents apply:

(a) Each party and third party shall serve its submissions directly on all other parties, including where appropriate the third parties, and confirm that it has done so at the time it provides its submission to the Panel.

(b) The parties and the third parties should provide their written submissions and written answers to questions by 5:30 p.m. on the deadlines established by the Panel,

unless a different time is set by the Panel. In this regard, the parties have agreed that they will exchange written submissions and written answers to questions, including all exhibits, electronically, in word processing format (Word or WordPerfect). Where necessary (for example, due to the nature and/or size of the document in question), exhibits may be submitted in .pdf format or by fax. In cases where the size of the exhibits is so large as to render it impracticable to send the documents in .pdf format or by fax by the stipulated deadlines, hard copies shall be sent by courier for receipt the day after the due date. Hard copies of all submissions and answers will be sent by courier within 24 hours of the deadlines. These procedures apply to the submission of documents to the Panel, to the other party and to third parties.

(c) Parties and third parties shall provide the Secretariat with copies of their oral submissions by noon of the first working day following the last day of the substantive meetings.

(d) The parties and third parties shall provide the Panel with 9 copies of all their submissions, including the written versions of oral statements and answers to questions. All these copies shall be filed with the Dispute Settlement Registrar, Mr. Ferdinand Ferranco (office number 3154).

(e) At the time they provide a hard copy of their submissions, the parties and third parties shall also provide the Panel with an electronic copy of all their submissions on a diskette or as an e-mail attachment in a format compatible with the Secretariat's software. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with a copy to Ms Mireille Cossy (e-mail: mireille.cossy@wto.org).

(f) Each party shall serve executive summaries mentioned in paragraph 14 directly on the other party and confirm that it has done so at the time it provides its submission to the Panel. Each third party shall serve executive summaries mentioned in paragraph 14 directly on the parties and confirm that it has done so at the time it provides its submission to the Panel. Subparagraphs (d) and (e) above shall be applied to the service of executive summaries.

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## ANNEX B

### REQUEST FOR PRELIMINARY RULINGS

#### A. DECISION OF THE PANEL \*

1. This communication from the Panel is in response to the United States request for preliminary rulings in respect of Antigua and Barbuda's request for establishment of a panel<sup>1</sup> and issues relevant to that request in Antigua and Barbuda's first written submission.<sup>2</sup> The request was received on Friday night, 17 October 2003.

2. On 20 October 2003, the Panel invited Antigua and Barbuda and the third parties to comment on the US request. Antigua and Barbuda submitted its response on 23 October 2003, the European Communities and Japan on 24 October 2003. Chinese Taipei, Mexico and Canada informed the Panel that they would not submit any comments to the US request for preliminary rulings.

#### 1. Procedural background

3. On 13 March 2003, Antigua and Barbuda requested consultations with the United States regarding measures applied by central, regional and local authorities in the United States that (allegedly) affect the cross-border supply of gambling and betting services. In an Annex to its original request for consultations<sup>3</sup>, Antigua and Barbuda identified a number of documents as "measures", indicating that "these measures and their application may constitute an infringement of the obligations of the United States under GATS".

4. Sections I and II of the Annex to the request for consultations contain a list of federal and state statutory measures. Section III lists other documents, categorised by Antigua and Barbuda in its Annex as "Other United States and State actions or measures." These documents include case law, Attorney Generals' opinions, press releases and pages from Internet websites.

5. With respect to the items identified in the Annex, Antigua and Barbuda claimed in its request for consultations that:

"It is my Government's understanding that the cumulative impact of the Federal and State measures of the type listed in the Annex to this request is that the supply of gambling and betting services from another WTO Member (such as Antigua and Barbuda) to the United States on a cross-border basis is considered unlawful under United States law."<sup>4</sup>

6. On 10 April 2003, Antigua and Barbuda notified an addendum to its request for consultations.<sup>5</sup> That addendum purported to "clarify some of the references to US legislation in the original Annex".<sup>6</sup> Attached to the addendum was a new version of the Annex that had been attached to the original request for consultations. The addendum also reiterated Antigua and Barbuda's claim that a prohibition on the cross-border supply of gambling and betting services results from the

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\* Sent to the parties on 29 October 2003. The arguments by the parties and third parties are found, respectively, in sections B and C of this Annex.

<sup>1</sup> WT/DS285/2, 13 June 2003.

<sup>2</sup> 1 October 2003.

<sup>3</sup> WT/DS285/1, 27 March 2003.

<sup>4</sup> WT/DS285/1, para. 2.

<sup>5</sup> WT/DS285/1/Add.1, 10 April 2003.

<sup>6</sup> WT/DS285/1/Add.1, para.1.

cumulative application of the measures listed in the Annex. In particular, the addendum provided that:

"As explained in our request for consultations of 13 March 2003 it is our understanding that the prohibition on the cross-border supply of gambling and betting services in the United States arises from the cumulative impact of measures of the type listed in the Annex. The corrected Annex clarifies some of the references to United States legislation and replaces references to a few measures which are no longer in force with references to current measures."<sup>7</sup>

7. On 13 June 2003, Antigua and Barbuda submitted to the DSB its request for establishment of a panel (hereinafter referred to as the "Panel request").<sup>8</sup> As in the case of the request for consultations, the Panel request contained an Annex, the contents and structure of which is virtually identical to the Annex attached to the revised request for consultations.

8. The Panel request reiterates the claim made in Antigua and Barbuda's request for consultations that the laws referred to in Sections I and II of the Annex have the effect of prohibiting all supply of gambling and betting services from outside the United States to consumers in the United States. However, with respect to the items contained in Section III of the Annex, the Panel request states that:

"Section III of the Annex lists examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling and betting services."<sup>9</sup>

9. Finally, the Panel request also states that:

"The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."<sup>10</sup>

10. At the first and second meetings of the DSB at which Antigua and Barbuda's Panel request was considered, the United States alleged a number of inadequacies associated with Antigua and Barbuda's Panel request.<sup>11</sup> In particular, the United States stated that a number of items contained in the Annex to the Panel request were not "measures" that could be properly included within the scope of a panel request; that the Annex included several measures which appeared not to have been included in the revised request for consultations; and that not all of the measures cited in the Annex were related to the supply of cross-border gambling and betting services.<sup>12</sup> The United States raised the issue of these alleged inadequacies again at the Panel's organizational meeting held on 3 September 2003.

11. On 1 October 2003, as provided in the Panel's Working Procedures and timetable, Antigua and Barbuda made its first written submission to the Panel in which it addressed some of the concerns that had previously been raised by the United States regarding its Panel request.

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<sup>7</sup> WT/DS285/1/Add.1, para. 2.

<sup>8</sup> WT/DS285/2.

<sup>9</sup> WT/DS285/2, para.2.

<sup>10</sup> WT/DS285/2, para.2.

<sup>11</sup> First meeting held on 24 June 2003: WT/DSB/M/151; Second meeting held on 21 and 23 July 2003: WT/DSB/M/153.

<sup>12</sup> WT/DSB/M/151, p.11, para.9; WT/DSB/M/153, para. 47

12. According to the Panel's timetable for these proceedings, the United States was due to make its first written submission on 29 October 2003. However, as noted above, on 17 October 2003, the United States requested the Panel to make a number of preliminary rulings, which are the subject-matter of this communication.

## **2. The US request for preliminary rulings**

13. We have been requested by the United States to issue preliminary rulings pursuant to paragraph 11 of the Panel's Working Procedures. Paragraph 11 of our Working Procedures reads as follows:

"Any request for a preliminary ruling (including rulings on jurisdictional issues) to be made by the Panel shall be submitted no later than in a party's first written submission. If the complaining party requests any such ruling, the respondent shall submit its response to such a request in its first written submission. If the respondent requests any such ruling, the complaining party shall submit its response to such a request prior to the first substantive meeting of the Panel. The complaining party shall submit this response at a time to be determined by the Panel after receipt and in light of the respondent's request. Exceptions to this procedure will be granted upon a showing of good cause."

14. The Panel understands the United States to seek preliminary rulings on four issues. According to the United States:

- (a) Some of the measures listed in the Annex to the Panel request were not included in the request for consultations. Therefore, such measures were not consulted on and should not be considered by the Panel.
- (b) Some of the items listed in the Annex to the Panel request are not "measures" within the meaning of Article 6.2 of the DSU and, therefore, are not within the Panel's terms of reference.
- (c) Some of the measures listed in the Panel request are unrelated to cross border supply of gambling services.<sup>13</sup>
- (d) Antigua and Barbuda has not made a *prima facie* case of violation and, therefore, its complaint should be rejected.

15. We deal with each of these issue in turn below.

## **3. The Panel's assessment of the US request for preliminary rulings**

### **(a) General Considerations**

16. We note as a starting-point that the jurisprudence confirms that, according to Article 6.2 of the DSU, a request for establishment of a panel must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief

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<sup>13</sup> We note that in para. 14 of the US request for preliminary rulings, the United States raised this argument as part of its claim that Antigua's request for establishment of a panel improperly included certain measures that were not the subject of consultations. However, the Panel has decided to treat this argument as a separate issue.

summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>14</sup> In *EC – Bananas III*, the Appellate Body made clear that:

"It is important that a Panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the Panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."<sup>15</sup>

17. In assessing the United States' request for preliminary rulings, the Panel considers that it is important to bear in mind what Antigua and Barbuda considers to be the measure(s) that it is challenging and in respect of which it requested consultations. In this regard, we note that in its Panel request, in its first written submission, and in its comments on the US request for preliminary rulings, Antigua and Barbuda emphasised that it is effectively challenging the overall and cumulative effect of various federal and state laws which, together with various policy statements and other governmental actions, constitute a complete prohibition of the cross-border supply of gambling and betting services.

18. In this regard, we recall the Appellate Body's guidance in *Korea – Dairy*<sup>16</sup> and in *US – Carbon Steel* as to how a panel should approach challenges to the sufficiency of Panel requests under Article 6.2 of the DSU:

"As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a Panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the Panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the Panel request as a whole, and in the light of attendant circumstances."<sup>17</sup>

19. It is also important to bear in mind that the measures(s) that have been challenged in a Panel request must be capable of enforcement under Article 19.1 of the DSU, which provides that:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned<sup>18</sup> bring the measure into conformity with that agreement."

20. Finally, with regard to the timing of preliminary ruling requests, we recall the Appellate Body statement in *US – FSC*:

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in

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<sup>14</sup> Appellate Body Report on *Korea – Dairy*, para. 120.

<sup>15</sup> Appellate Body Report on *EC – Bananas III*, para. 142.

<sup>16</sup> Appellate Body Report on *Korea – Dairy*, paras. 120-128.

<sup>17</sup> Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>18</sup> The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.



other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." (emphasis added)<sup>19</sup>

(b) Assessment of the US request

(i) *Some of the measures listed in the Annex to the Panel request were not included in the request for consultations and should not be considered by the Panel*

21. As indicated above, the issue here is whether the Panel is entitled to consider provisions of legislation referred to in the Panel request in cases where the request for consultations referred to the same legislation but contained references to different provisions of that legislation.

22. The concerned measures indicated by the United States in this regard are the state laws for Colorado, New York and Rhode Island. In particular:

(1) With respect to Colorado, the revised request for consultations referred to "COLO. REV. STAT. §§ 18-10-101 to 18-10-~~08~~ (1999)" whereas the Panel request referred to "COLO. REV. STAT. §§ 18-10-101 to 18-10-~~08~~ (1999)".

(2) In relation to New York, the revised request for consultations refers to "N.Y. CONST. art. ~~II~~, §9" whereas the Panel request refers to "N.Y. CONST. art. ~~I~~, §9".

(3) With respect to Rhode Island, the revised request for consultations refers to "R.I. CONST. art. ~~I~~, § 22" whereas the Panel request refers to "R.I. CONST. art. ~~VI~~, § 22".

23. The Panel notes that, pursuant to Article 6.2 of the DSU, it is incumbent upon complaining parties to, *inter alia*, indicate in their request for establishment of a panel whether consultations were held on the matter in dispute. This requirement seeks to ensure that parties have had an adequate opportunity to discuss the matter in dispute before a panel is established to adjudicate that dispute. Indeed, jurisprudence exists to indicate that a Member will be prevented "from requesting the establishment of a panel with regard to a dispute on which no consultations were requested".<sup>20</sup>

24. Given the discrepancies between the Panel request and the request for consultations, the United States argues that consultations were not conducted in relation to the measures for which references were amended in the Panel request. In deciding the significance and consequences associated with these discrepancies, we note that the Appellate Body stated in *Brazil – Aircraft* that:

"We do not believe ... that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."<sup>21</sup>

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<sup>19</sup> Appellate Body Report on *US – FSC*, para.166.

<sup>20</sup> Panel Report on *Canada – Aircraft*, para. 9.12.

<sup>21</sup> Appellate Body Report on *Brazil – Aircraft*, para. 132.

25. We take this to mean that there may be differences between the measures listed in the request for consultations and those listed in the request for establishment of a panel. Indeed, we consider that such differences may well be justified given that facts may emerge during the course of consultations so as to "shape the substance and the scope of the subsequent panel proceedings".<sup>22</sup> However, we do recognize that a balance is needed between, on the one hand, the right of the complainant to alter the request for establishment of a panel in light of information that may become available during consultations and, on the other hand, the need to ensure that a Member does not request the establishment of a panel with regard to a dispute on which no consultations were requested.

26. As to whether or not, in this case, the differences between the Panel request and the revised request for consultations referred to above are such that the Panel is still entitled to consider the measures implicated by the US argument, we note that both the revised request for consultations and the Panel request contain references to the same *legislation* for each of the relevant states. However, the discrepancies that exist as between the two sets of requests relate to the *provisions* referred to. On the face of it, the discrepancies appear typographical in nature. Given that the jurisprudence anticipates alteration of Panel requests in certain circumstances referred to above, it would seem that alterations to Panel requests in cases of typographical errors should be accepted given their apparently less egregious nature.

27. However, we are unable at this stage to make a definitive assessment of whether the differences are purely typographical in nature given that Antigua and Barbuda has not yet completed establishing its *prima facie* case<sup>23</sup> and the legislation in question has not yet been adduced as evidence. In addition, the Panel considers that it will be better placed to make this assessment once it has heard the parties' substantive arguments. Therefore, for the time being, the Panel declines to rule on this aspect of the US request.

(ii) *Some of the items listed in the Annex to the Panel request are not "measures" within the meaning of Article 6.2 of the DSU and, therefore, are not within the Panel's terms of reference*

28. In its response to the United States' request for a preliminary ruling on this issue, we note that Antigua and Barbuda emphasised that the Panel need not determine whether the items contained in Section III of the Annex to the Panel request constitute separate and individual measures. Indeed, Antigua and Barbuda has stated that the items contained in Section III are based on the legislative provisions listed in Sections I and II.

29. As to the legal status that should be attributed to the items contained in Section III of the Annex to the Panel request, we recall the Appellate Body statement in *US – Carbon Steel*:

"The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."<sup>24</sup>

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<sup>22</sup> Appellate Body Report on *India – Patents US*, para. 94.

<sup>23</sup> In this regard, see the Panel's conclusions in paras. 38 to 40 below regarding the US claim that Antigua and Barbuda has failed to make a *prima facie* case.

<sup>24</sup> Appellate Body Report on *US – Carbon Steel*, para. 157.

30. Therefore, in light of the foregoing, a complaining Member is entitled to use various types of evidence to display how a measure violates a WTO provision.<sup>25</sup> Whilst the items listed by Antigua and Barbuda in Section III of the Annex to its Panel request may not (all) be measures<sup>26</sup>, these items may, nevertheless, be relevant for Antigua's demonstration that the legislative measures referred to in Sections I and II of the Annex to its Panel request result in a complete prohibition on the cross-border supply of gambling and betting services.

31. Given that Antigua and Barbuda has indicated that it does not intend to treat the items listed in Section III as distinct and autonomous "measures" but, essentially, will seek to rely upon them as evidence to illustrate the existence of a general prohibition against cross-border supply of gambling and betting services in the United States, we decline to rule out the relevance of such items. However, as suggested by Antigua and Barbuda, during our substantive consideration of this dispute, we will not consider and examine them as separate, autonomous measures.

(iii) *Some of the measures are unrelated to cross border supply of gambling services*

32. In paragraph 14 of its request for preliminary rulings, the United States has identified some legislative provisions which it argues are "unrelated to cross-border gambling" and that, therefore, they should not be considered by the Panel in this dispute.<sup>27</sup>

33. Article 6.2 of the DSU provides that the request for the establishment of a panel "shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

34. We agree with the argument made by the European Communities that, since Article 6.2 of the DSU is a general provision regulating the content of requests for panel establishments, it must be read together with relevant provisions contained in the WTO agreements. In this regard, relevant provisions in the GATS include Article XXIII of the GATS Agreement, which effectively provides that the DSU governs disputes arising under the GATS. We note, in addition, that Articles I:3 and XXVIII(a) and (c) together broadly define the measures to which the provisions of the GATS apply.<sup>28</sup> To the extent that the GATS definition of a "measure" is broader than that contained in Article 6 of

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<sup>25</sup> Appellate Body Report on *US – Carbon Steel*, paras. 156-157.

<sup>26</sup> We agree with Japan that the issue of what constitute a "measure" under WTO law is a sensitive matter that was recently debated before the panel on *US – Corrosion-Resistant Steel Sunset Review*.

<sup>27</sup> See Georgia Code § 16-12-37; Iowa Code § 725.11; Arkansas Statutes § 5-66-115; California Penal Code §§ 337b through 337e; Georgia Code §§ 16-12-33 and 16-12-34; Massachusetts General Laws, Chapter 271, §§ 39 and 39A; California Penal Code §§ 337u through 337z; Delaware Code §§ 1470 and 1471; Maryland Code, Criminal Law, § 12-109; Massachusetts General Laws, Chapter 271, §§ 12 and 32; Ohio Revised Code § 2915.05; Oregon Revised Statutes § 167.167; Virginia Code § 18.2-327; Washington Revised Code §§ 9.46.196 through 9.46.1962; California Penal Code §§ 337f through 337h; Vermont Statutes title 13, § 2153. Massachusetts General Laws, Chapter 271, § 46.

<sup>28</sup> Article I:3 of the GATS reads as follows: (a) "measures by Members" means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory. Article XXVIII(a) provides that "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. In addition, Article XXVIII(c) provides that "measures by Members affecting trade in services" include measures in respect of (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

the DSU, it would supplement the meaning of "measures" in Article 6.2 of the DSU,<sup>29</sup> as interpreted by the jurisprudence.

35. Recent jurisprudence has established that before the provisions of the GATS can be applied in determining whether or not a GATS inconsistency exists, a panel must in the normal course of its analysis determine whether the measure in question "affects trade in services".<sup>30</sup> The Appellate Body has emphasized further that "the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS".<sup>31</sup>

36. It seems to us that the majority of the laws challenged by the United States as being unrelated to the cross-border supply of services are concerned primarily with prohibiting bribery, cheating, etc. rather than regulating the supply of gambling services *per se*. Although it may be difficult at this stage to understand why Antigua and Barbuda is challenging such penal laws and how they violate the GATS, it is conceptually possible that these measures are measures affecting cross-border trade in gambling and betting services within the meaning of the GATS. In any event, the Panel notes that Antigua and Barbuda stated in its Panel request that "the measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."<sup>32</sup> As to whether these measures do, in fact, affect cross-border trade in gambling and betting services, this is to be answered during the Panel's proceedings and cannot, in our opinion, be the subject of a preliminary ruling at this early stage.

37. Moreover, since Antigua and Barbuda appears to be arguing that all laws listed in the Annex to the Panel request are to be read together in demonstrating that the United States generally prohibits the cross-border supply of gambling and betting services, the Panel is of the view that it would be more appropriate to abstain from reaching any definitive conclusion as to whether any of the listed laws, whether read in isolation or in conjunction with others, are "unrelated to cross border supply of gambling services" at this stage of the proceedings.

(iv) *Antigua and Barbuda has not made a prima facie case of violation with the GATS and, therefore, its complaint should be rejected*

38. We note that Appellate Body jurisprudence has established that a complainant has two sets of written submissions and two panel hearings within which to convince the Panel that it has established its *prima facie* case that the measure(s) at issue do(es) violate one or more WTO provisions.<sup>33</sup>

39. In addition, we recall the panel's conclusion in *Thailand – H-Beams*, which stressed the importance of the distinction between, on the one hand, the sufficiency of the Panel request and, on

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<sup>29</sup> The Appellate Body has already determined (in *Guatemala – Cement I*, para. 75) that in a dispute under the Anti-dumping Agreement, the requirements of both the Anti-dumping Agreement and the DSU must be respected in determining what the "matter" referred to the DSB is: "The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the Anti-Dumping Agreement. In our view, there is no inconsistency between Article 17.5 of the Anti-Dumping Agreement and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A Panel request made concerning a dispute brought under the Anti-Dumping Agreement must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a "matter" is referred to the DSB by a complaining party under Article 17.4 of the Anti-Dumping Agreement, the Panel request must meet the requirements of Articles 17.4 and 17.5 of the Anti-Dumping Agreement as well as Article 6.2 of the DSU". (emphasis added)

<sup>30</sup> Appellate Body Report on *Canada – Autos*, paras. 150-155.

<sup>31</sup> Appellate Body Report on *EC – Bananas III*, para. 220

<sup>32</sup> WT/DS285/2, para. 2.

<sup>33</sup> Appellate Body Report on *EC – Bananas III*, paras. 145-147.

the other hand, the issue of whether or not the complaining party has established a *prima facie* case of violation:

"Thailand argues that 'a panel may only accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings.' According to Thailand, "this would be the case only where (1) a panel found that the complainant had failed to present a *prima facie* case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request." We are concerned here that Thailand is blurring the distinction between, on the one hand, the sufficiency of the Panel request and, on the other, the issue of whether or not the complaining party establishes a *prima facie* case of violation of an obligation imposed by the covered agreements. We recall that "there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."<sup>34</sup> Article 6.2 DSU does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of the claims set out in the Panel request. Nor does it determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings. To the extent that the requests by Thailand under Article 6.2 DSU relates to whether or not Poland established a *prima facie* case of violation of the relevant provisions, we examine this below."<sup>35</sup> (emphasis added)

40. In accordance with this jurisprudence, the question of whether or not Antigua and Barbuda has established its *prima facie* case is independent of, and must be considered separately from, the question of whether the Panel request meets the requirements of Article 6.2 of the DSU. Given that Antigua and Barbuda has two sets of written submissions and two panel hearings to convince the Panel that it has established a *prima facie* case, we cannot accept the United States' request that we conclude at this early stage of the Panel's proceedings that Antigua and Barbuda has failed to make its *prima facie* demonstration that the measures listed in the Annex to its Panel request are inconsistent with the United States' obligations under the GATS Agreement.

41. The above rulings are without prejudice to the Panel's right to further elaborate and develop its findings on these issues having heard all parties and third parties on the substantive aspects of Antigua and Barbuda's claims.

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<sup>34</sup> Appellate Body Report on *EC – Bananas III*, para. 141.

<sup>35</sup> Panel Report on *Thailand – H-Beams*, para. 7.43.

#### 4. Adjustment of Panel's Timetable

42. In light of the above, we request that the United States file its first written submission by Friday, 7 November 2003 and its executive summary by Friday, 14 November 2003. Third parties' submissions will be due on Friday, 14 November 2003 with executive summaries of these submissions due on 21 November. As a consequence of the changes to the timetable that result from the US request for preliminary rulings, it is necessary to postpone the first substantive meeting with the parties. Due to the panelists' commitments, the first panel meeting with the parties will take place on 10, 11 and 12 December 2003. The rebuttals of the parties will be due on Friday, 9 January 2004 and the second panel meeting will take place on 26 and 27 January 2004. A revised calendar was attached.

[signed: B.K. Zutshi, Chairman of the Panel]

#### B. ARGUMENTS OF THE PARTIES

##### 1. Arguments of the United States

43. Having reviewed the first submission of Antigua, the **United States** requests the Panel to make preliminary rulings on the following issues, pursuant to paragraph 11 of the Panel's working procedures: (i) the items cited as "measures" in Section III of the Annex to the panel request<sup>36</sup> are not in fact "measures" within the meaning of Article 6.2 of the DSU, and are therefore not within the terms of reference of the Panel; and (ii) Antigua's request for establishment of the Panel improperly included certain measures that were not the subject of consultations. In addition to these requests, the United States wishes to bring to the Panel's attention the fact that Antigua's first submission fails to establish a *prima facie* case of WTO inconsistency with respect to any specific US measure. Instead, Antigua bases its claim on a proposition about the effect of one or more unspecified measure(s) from among the hundreds of items listed in the Annex to its panel request. For the reasons explained below, this approach cannot form the basis for a *prima facie* case.

44. Concerning the first issue raised in paragraph 43, the United States argues that, among the numerous items challenged by Antigua are several items in Section III of the Annex to its panel request, labelled "other ... actions or measures," that do not constitute "measures." Consequently, the United States requests that the Panel find that these particular items are beyond its terms of reference. A "matter" referred to the DSB consists of one or more "specific" measure(s), together with one or more legal claims relating to such measures.<sup>37</sup> A panel with standard terms of reference may only examine this matter, i.e., claims relating to a "measure" in the panel request. For something to be a measure for purposes of WTO dispute settlement, it must "constitute an instrument with a functional life of its own" under municipal law – i.e., it must "*do* something concrete, independently of any other instruments."<sup>38</sup> For example, a Panel recently found that a US government "policy bulletin" did not constitute a measure that could be challenged in WTO dispute settlement proceedings because, in and of itself, it was not a legal instrument that operates on its own.<sup>39</sup>

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<sup>36</sup> WT/DS285/2.

<sup>37</sup> DSU Article 6.2. See also Appellate Body Report on *Guatemala – Cement I*, para. 72.

<sup>38</sup> Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.119, citing *US – Export Restraints*, para. 8.85 ("In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations." (original emphasis)); *US – Steel Plate*, para. 7.23 (finding that a challenged practice "lacks independent operational status"; Panel Report on *US – Section 129(c)(1) URAA*, note 89 (discussing *US – Export Restraints*).

<sup>39</sup> Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, para. 7.125. See also Panel Report on *US – Section 301 Trade Act*, para. 7.133 (finding that the US Statement of Administrative Action

45. The United States notes that Antigua's panel request cites several press releases as measures.<sup>40</sup> These press releases are self-evidently informational in character and are merely designed to inform and educate the public about actions taken by officials. They do not in themselves have any force under US law,<sup>41</sup> and therefore do not constitute "measures" under the DSU. The same is true of a Michigan Gaming Control Board web page cited by Antigua.<sup>42</sup> This web page (consisting of a "Frequently Asked Question" section) conveys information to the public, but does not have any independent legal status under US law. The site provides an answer to a question designed to inform the public about laws relating to Internet gambling. The answer lacks any independent operational status under municipal law. On the contrary, it merely describes how state and/or federal law would operate. As such, this website does not constitute a measure under the DSU. The United States submits that Antigua's panel request also cites an opinion of the Kansas Attorney General<sup>43</sup> as a measure. This opinion is an interpretation of the law applicable to Internet gambling provided by the Attorney General and Deputy Attorney General in 1996 at the request of a State Senator. In Kansas, as in other states, Attorney General opinions are not legally binding.<sup>44</sup> The opinion states on its face that it is merely "our opinion" and does not presume to have any independent legal status under US municipal law. Therefore it does not constitute a measure under the DSU. The same reasoning applies with even greater force to the two web pages of Attorney Generals' offices in Kansas and Minnesota cited as measures by Antigua in its panel request.<sup>45</sup> The two documents are similar. Each one "sets forth the enforcement position" of the Attorney General. An "enforcement position" is at best a non-binding guide to the public about the attitude that state officials are likely to take in future prosecutions. The two statements are comparable in this respect to the "policy bulletin" that the panel in *US – Corrosion-Resistant Steel Sunset Review* found was not a "legal instrument" that could "operate independently from other legal instruments," and therefore could not be challenged in WTO dispute settlement proceedings.<sup>46</sup> As mere policy statements or position papers, these documents lack independent legal status beyond the laws upon which they rely, and therefore cannot be measures under the DSU.

46. The United States further notes that Antigua's panel request cites two judicial opinions as measures.<sup>47</sup> The operational status of a judicial opinion under US municipal law flows from the

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accompanying the Uruguay Round Agreements Act "could be considered not as an autonomous measure of the Administration determining its policy of implementing Section 304, but as an important interpretative element in the construction of the statutory language of Section 304 itself."

<sup>40</sup> Florida Attorney General, *Press Release: Western Union Cuts Off Sports Betting Accounts* (December 23, 1997); New York Attorney General, *Press Release: Ten Banks End Online Gambling With Credit Cards-Spitzer Hails Establishment of New Banking Industry Standard* (February 11, 2003); New York Attorney General, *Press Release: Agreement Reached with Paypal to Bar New Yorkers from Online Gambling-Campaign Against Illegal Gambling Web Site in New York Continues* (August 21, 2002); New York Attorney General, *Press Release: Financial Giant Joins Fight Against Online Gambling- Leading Credit Card Issuer Agrees to Block Key Internet Transactions*, June 14, 2002.

<sup>41</sup> See Appellate Body Report on *US – Certain EC Products*, para.73 (finding that statements by US officials in a press release did not "in and of themselves" allow the Appellate Body to determine the legal relationship between two measures).

<sup>42</sup> Michigan Gaming Control Board, *Frequently Asked Questions: Is it Legal to Gamble Over the Internet in Michigan?* The site states that "all forms of gaming are illegal in Michigan except those specifically permitted under Michigan law" and directs the public to "[c]ontact the Michigan Attorney General's Criminal Division (517/334-6010) for more information."

<sup>43</sup> Kansas Op. Att'y Gen. No. 96-31 (25 March 1996).

<sup>44</sup> See *Kansas Ass'n of Public Employees v. Public Employee Rel. Bd.*, 13 Kan. App. 2d 657, 660; 778 P.2d 377, 379 (Court of Appeals of Kansas 1989) ("Attorney general opinions, of course, are not binding on the courts.").

<sup>45</sup> Kansas Attorney General, *Internet Gambling Warning*; Minnesota Attorney General, *Statement of Minnesota Attorney General on Internet Jurisdiction*.

<sup>46</sup> Panel Report on *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.125 and 7.126.

<sup>47</sup> *United States v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001); *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2D 844, 854 (N.Y. Sup. Ct. 1999).

measure interpreted and applied, and from the scope of the court's authority. The opinions of a US court of competent jurisdiction are binding as to the parties to the dispute only. They may also have value as precedent in future decisions – but opinions of courts inferior to the US Supreme Court have such value only with respect to the same court and lower courts within the scope of the originating court's authority.<sup>48</sup> The United States submits that, while the Panel may consider the two opinions cited by Antigua in order to help determine the meaning of the US laws they interpret (to the extent that those laws are within the scope of this dispute), these opinions are not "measures" under the DSU for purposes of this dispute. In conclusion, the United States requests that the Panel make preliminary rulings finding that the items discussed above are not "measures" within the meaning of Article 6.2 of the DSU, and that therefore these items are not within the Panel's terms of reference.

47. With respect to the second issue raised in paragraph 43, the United States argues that Antigua requested establishment of a panel for three measures that were not the subject of consultations: Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. These provisions were not cited in Antigua's consultations request,<sup>49</sup> were not discussed during the consultations, and are unrelated to any of the measures and purported measures cited in the consultations request. A Member may not request the establishment of a panel with regard to just *any* measure; rather, it may only file a panel request with respect to a measure that was consulted upon.<sup>50</sup> Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request "including identification of *the measures at issue* and an indication of the legal basis for the complaint" (emphasis added). In this case, there is no dispute that Antigua failed to include the cited provisions in its request for consultations. Antigua did include different citations to the New York Constitution, the Rhode Island Constitution, and the Colorado Revised Statutes in its request for consultations, but those citations were, by Antigua's own admission, wholly irrelevant and/or nonsensical.

48. The United States notes that Antigua attempts to characterize the different citations in its request for consultations as "nothing but typographical errors" and argues that, based on the context and the subject matter of the erroneously cited provisions (voting rights and the right to bear arms), "it should have been clear" to the United States what the correct citations were. Contrary to Antigua's implication, many of the items listed in the Annex to Antigua's consultations request are unrelated to cross-border gambling, and have not been "corrected" in Antigua's panel request. They include, among others, laws against dogfighting<sup>51</sup> and bullfighting;<sup>52</sup> laws against bribery,<sup>53</sup> cheating,<sup>54</sup> and

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<sup>48</sup> The United States notes that the *U.S. v. Cohen* case cited by Antigua was decided by the United States Court of Appeals for the Second Circuit. The Second Judicial Circuit, of which the United States Court of Appeals for the Second Circuit is the highest court, consists of only the federal courts within the states of New York, Connecticut and Vermont, including the federal district and bankruptcy courts for the Southern, Northern, Eastern and Western Districts of New York, the District of Connecticut and the District of Vermont. The *Vacco v. World Interactive Gaming* case cited by Antigua was decided by the Supreme Court of New York, New York County. Under New York's judicial system, the Supreme Courts are courts of original instance, not courts of appeal. Their opinions thus have very limited precedential value.

<sup>49</sup> WT/DS285/1/Add.1.

<sup>50</sup> See Appellate Body Report on *US – Certain EC Products*, para. 70 (finding that an action "not formally the subject of the consultations" was, for that reason, not a measure at issue in the dispute and not within the Panel's terms of reference (original emphasis)).

<sup>51</sup> See Georgia Code § 16-12-37.

<sup>52</sup> See Iowa Code § 725.11.

<sup>53</sup> See, e.g., Arkansas Statutes § 566-115 (prohibiting bribery of participants in sporting events); California Penal Code §§ 337b through 337e (same); Georgia Code §§ 16-12-33 and 16-12-34 (same); Massachusetts General Laws, Chapter 271, §§ 39 and 39A (same).

<sup>54</sup> See, e.g., California Penal Code §§ 337u through 337z; Delaware Code §§ 1470 and 1471; Maryland Code, Criminal Law, § 12-109; Massachusetts General Laws, Chapter 271, §§ 12 and 32; Ohio Revised Code § 2915.05; Oregon Revised Statutes § 167.167; Virginia Code § 18.2-327; Washington Revised Code §§ 9.46.196 through 9.46.1962.



drugging of racing animals;<sup>55</sup> and a state statute making it illegal to dispose of a refrigerator without first removing the door.<sup>56</sup> In any event, the ability of a party to predict changes in the measures cited in the request for consultations is irrelevant. The request for consultations is not a guessing game. Antigua indisputably failed to request consultations on Article I, Section 9 of the New York Constitution; Article VI, Section 22 of the Rhode Island Constitution; and Sections 18-10-101 to 18-10-108 of the Colorado Revised Statutes. Therefore, the United States requests that the Panel find that the measures cited for the first time in Antigua's panel request are outside the Panel's terms of reference.

49. Finally, the United States argues that Antigua failed to offer a *prima facie* case regarding specific US measures. After listing hundreds of statutory provisions, and other items, as possibly being among the challenged measures in its panel request, Antigua states that, in its view, "[t]he subject of this dispute is the *total prohibition on the cross-border supply of gambling and betting services*." While appearing to accept that this "total prohibition" is comprised of particular "laws or regulations," Antigua has neither quoted, attached, nor argued the meaning of any such law or regulation. Instead, Antigua asserts that "there is no need to conduct a debate on the precise scope of specific United States laws and regulations." It further states that "[t]he precise way in which this import ban is constructed under United States law" – allegedly through one or more of the measures and purported measures listed in its panel request – "should not affect the outcome of this proceeding." So long as Antigua refuses to identify specific measures as the subject of its *prima facie* case, the United States submits that Antigua has established no *prima facie* case with respect to any measure. As explained above, it is well established that a "matter" referred to the DSB consists of one or more "specific" measure(s), together with one or more legal claims relating to such measures.<sup>57</sup> A panel with standard terms of reference may only examine this matter, i.e., claims relating to the "specific" measures included in a panel request.

50. The United States argues that Antigua, as the complaining party, bears the burden of identifying the specific measures as to which it asserts violations of WTO provisions. Even under the minimal requirements applicable to a panel request, a panel has recently found that "[d]ue process requires that the complaining party fully assume the burden of identifying the specific measures under challenge" so that the opposing party does not bear the burden of determining what measures are or are not at issue.<sup>58</sup> If this much is required of the panel request, due process clearly requires no less specificity with respect to identification of specific measures that are the subject of the complaining party's *prima facie* case.<sup>59</sup> The complaining party bears this burden, and cannot shift it to the responding party – as Antigua is explicitly seeking to do here.<sup>60</sup> Antigua must make it clear what specific measures are at issue in this dispute.

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<sup>55</sup> See, e.g., California Penal Code §§ 337f through 337h; Vermont Statutes title 13, § 2153.

<sup>56</sup> Massachusetts General Laws, Chapter 271, § 46 (imposing a fine for failure to remove doors from discarded refrigerators).

<sup>57</sup> DSU Article 6.2. See also Appellate Body Report on *Guatemala – Cement I*, para. 72.

<sup>58</sup> Panel Report on *Canada – Wheat Exports and Grain Imports*, para. 24.

<sup>59</sup> The United States notes that the Appellate Body clarified in *India – Patents (US)* that parties may not be deliberately vague regarding their claims and factual allegations, including what specific measures are at issue. ("All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims." Para. 94).

<sup>60</sup> The United States recalls that Antigua and Barbuda states that the United States is "better positioned than Antigua to coherently construe its own laws". The United States notes that, if necessary, it will address the burden of proof issue further in its first submission. For the moment, the United States simply notes that the Appellate Body has previously clarified that a party making a claim of WTO inconsistency regarding another party's municipal law "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion." Appellate Body Report on *US – Carbon Steel*, para. 157.

51. United States submits that Antigua's proposition regarding a "total prohibition" is not itself a measure.<sup>61</sup> As explained above, the term "measure" refers to something that has a "functional life of its own" under municipal law.<sup>62</sup> Under US municipal law, Antigua's "total prohibition" assertion has no functional life. For example, US authorities could not prosecute a service provider by alleging a violation of the "total prohibition." Prosecutors must rely on some specific law, such as the federal statute relied upon in the *U.S. v. Cohen* case cited in Antigua's panel request.<sup>63</sup>

52. United States submits that it raised this concern many times with Antigua, including during consultations and at the DSB meetings at which Antigua requested establishment of a panel. The United States, and indeed the third parties, would suffer prejudice if Antigua were allowed to substitute a general proposition for specific measures in this dispute. Because Antigua has not identified the specific measures that are the subject of its *prima facie* case, the United States has not been able to prepare its defense; it simply does not know which specific US measures of the hundreds listed by Antigua are being challenged. Moreover, without knowing the specific measures at issue and how such measures are allegedly violating WTO rules, the third parties will confront the same difficulties as the United States in presenting their views to the Panel. Finally, Antigua must not be permitted to hide behind the excuse that US law is supposedly too complex and opaque; Antigua and its two outside law firms are certainly capable of identifying and attempting to establish a *prima facie* case as to specific measures if they choose to do so.<sup>64</sup>

53. In the interest of providing for a constructive first panel meeting and ensuring a full opportunity to respond to any claims that Antigua may wish to make regarding specific measures, the United States requests that the Panel invite Antigua to make a further submission, identifying the specific measures at issue from the Annex to its panel request and presenting arguments with respect to these measures, before 29 October 2003, the date the US first written submission is currently due. If the Panel agrees and if Antigua accepts this invitation, the United States requests that the Panel adjust its timetable so that the US first submission would be due four weeks after receipt of Antigua's supplemental submission (duplicating the time initially provided between Antigua's first written submission and that of the United States). This is because ample time will be required for the United States to respond to any arguments Antigua may wish to advance regarding specific measures in a supplemental submission. Moreover, there is potentially a large number of measures at issue, including sub-federal measures; as the United States noted during the Panel organizational meeting, consultations with sub-federal entities are required by US law in preparing the defence of specific sub-federal measures. Since Antigua has done nothing thus far to shed light on the specific measures that are the subject of its *prima facie* case, the United States will require sufficient time to prepare its submission, pursuant to Article 12.4 of the DSU.

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<sup>61</sup> The United States notes that Antigua makes much of the supposed agreement between the parties about the existence of a "total prohibition." It relies in this regard on the United States' statement at the 24 June DSB meeting, where the United States stated that it had "made it clear that cross-border gambling and betting services are prohibited under US law" and that such services "are prohibited from domestic and foreign service suppliers alike" (WT/DSB/M/151). The United States submits that this statement does not relieve Antigua of its responsibility, as the complaining party, to state which specific measures are at issue and to make a *prima facie* case of a WTO violation as to each measure identified.

<sup>62</sup> See above footnote 38.

<sup>63</sup> See *United States v. Cohen*, 260 F.3d 68, 71 (2nd Cir. 2001) ("Cohen was arrested in March 1998 under an eight-count indictment charging him with conspiracy and substantive offences in violation of 18 U.S.C. § 1084.").

<sup>64</sup> The United States recalls that an official of the US Department of Justice was flown in for consultations with Antigua in Geneva on 30 April 2003, for the purpose of explaining to Antigua and its outside counsel in some detail various US laws relating to gambling. In addition to this explanation, the United States notes that Antigua appears to have no shortage of other expertise on US gambling law, since it was able to devote more than 18 pages of its first written submission to explaining the various forms of gambling it alleges to be authorized under US law. The United States therefore finds it curious that Antigua should profess itself unable to cope with the supposed "complexity and opacity" of US laws restricting gambling.

54. The United States proposes that, should Antigua state that it does not intend to make any arguments with respect to any specific measures, there would be no need for the Panel to adjust the timetable to provide for a supplemental submission. In this regard, the United States further requests that Antigua be invited to state, no later than 24 October 2003, whether it will make a supplemental submission, so that the United States can know in advance if its first written submission will still be due on 29 October. In the event Antigua confirms that it will not file this further submission, the United States would request that the Panel make a preliminary ruling to find that all the measures and purported measures listed in the Annex to Antigua's panel request are no longer at issue in this dispute. This ruling would ensure that the United States is not prejudiced and deprived of due process by having the WTO-consistency of specific measures raised at some later stage of the proceedings, when the US and third parties will not have a full opportunity to respond to Antigua's claims with respect to these specific measures.<sup>65</sup>

55. In conclusion, the United States requests that the Panel make preliminary rulings finding that: (i) the items discussed above are not "measures" within the meaning of Article 6.2 of the DSU; and (ii) the measures cited for the first time in Antigua's panel request are outside the Panel's terms of reference. The United States also requests that the Panel invite Antigua to make a further submission presenting any arguments it wishes to advance with respect to specific measures listed in the Annex to its panel request; and that the Panel make a preliminary ruling – if Antigua chooses not to make this further submission – that all the items listed in the Annex are no longer at issue in this dispute.

## 2. Arguments of Antigua

56. Antigua argues that, overall the approach of the United States represents the starkest possible of contrasts to the principles of WTO dispute settlement as stated by the Appellate Body.<sup>66</sup> The points raised at this stage by the United States are unfair, they are far from prompt and will, if accepted, lead to the most ineffective means of resolving this trade dispute. The US argument that it cannot prepare its defence is a transparent attempt to delay this proceeding and extend the timetable, while at the same time, it should be noted, the United States is aggressively attempting to destroy the Antiguan gambling and betting industry through a number of law enforcement and other actions.<sup>67</sup>

57. On 30 April 2003 the United States and Antigua held consultations in Geneva. The only explanation regarding US gambling law given by the United States on that occasion was that, whilst a number of the laws listed in the request for consultations did not relate to the cross-border supply of gambling, such cross-border supply was in any event unambiguously prohibited by United States law. On 8 May 2003, Antigua sent a letter to the United States offering to enter into further consultations. Importantly, in the 8 May communication, Antigua stated, among other things:

"In any event, the debate about the specific scope and nature of the individual measures has become much simpler, if not moot, because the US team explained that the provision of cross-border gambling and betting services is always unlawful in the entire US in whatever form. Thus we think it is no longer relevant to continue the debate about the impact or the applicability of specific measures. What matters in

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<sup>65</sup> Panel Report on *US – Steel Plate*, para. 7.28 (finding that allowing a party to resurrect a claim after stating that it would not pursue the claim would "deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim").

<sup>66</sup> "[The] procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." Appellate Body Report on *US – FSC*, para. 166; and Appellate Report on *Thailand – H-Beams*, para. 97.

<sup>67</sup> Antigua notes that, at the end of September 2003, the United States subpoenaed so-called "internet portal sites" and other media companies because they carried advertisements for cross-border gambling services. Prior to doing so the United States Department of Justice had sent letters to media companies warning them not to cooperate with "offshore" gaming operators. (US Department of Justice, Letter to the National Association of Broadcasters, dated 11 June 2003).

terms of WTO law is the effect of one or more measures and, in that regard, you have unambiguously told us that the provision of these types of services from Antigua and Barbuda to persons in the US is unlawful in the US."

58. Antigua notes that, in May 2003 the United States apparently did not consider this point worthy of further discussion.<sup>68</sup> Since then Antigua has unambiguously repeated this approach to the United States' general prohibition.<sup>69</sup> During this same period the United States has unambiguously repeated that it prohibits all cross-border gambling.<sup>70</sup> Furthermore the United States has prosecuted and incarcerated an individual for operating a licensed Antiguan gambling and betting company<sup>71</sup> and has taken a number of steps to prevent the use of credit cards and other financial instruments and transactions in connection with access by United States consumers to gambling and betting services located in other countries such as Antigua.<sup>72</sup> Clearly, the United States considers such services illegal and has made public statements and taken actions consistent with that. In that context, for the United States now to claim inability to respond to the arguments of Antigua based upon ignorance of its own measures is simply not credible.<sup>73</sup>

59. Antigua notes that the United States argues, with regard to the "specific measures" issue, that it "has raised this concern many times with Antigua, including during consultations and at the DSB meetings at which Antigua requested establishment of a panel." This is incorrect. The United States

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<sup>68</sup> On 28 May the United States (only on being asked by Antigua) confirmed that it was "in the process of drafting a response". On 5 June Antigua received the following two paragraph response from the United States:

Thank you for your letter of May 8, 2003, suggesting a continuation of consultations in the matter of [US – Gambling].

The United States appreciates the written explanation of your views on the issues referred to in your letter and the further explanation of your views on the interpretation of the United States services schedule. We recall that the United States provided its views on these issues during the consultations held with your delegation in Geneva on April 30, 2003. While the United States would be willing to meet again in Geneva with the representatives of your government, we believe that we have already presented our position on the points raised in your letter of May 8, 2003. We note that it is the consistent view of the US Justice Department that internet gambling is prohibited under US law.

<sup>69</sup> In Antigua's panel request of 12 June 2003, at the DSB meeting of 24 June 2003 (WT/DSB/M/151, para. 44), at the DSB meeting of 21 July 2003 (WT/DSB/M/153, para. 46), during the organisational meeting with the panel on 3 September 2003 and in Antigua's first submission of 1 October 2003. At the DSB meeting of 21 July 2003 Antigua also stated its willingness to "try to answer any specific questions that the United States might have, just as it would welcome a US detailed and written explanation of what it did not understand about its panel request." (WT/DSB/M/153, para. 46)

<sup>70</sup> At the DSB meeting of 24 June 2003 the United States' representative stated that "[j]ust as importantly, the United States had made it clear that cross-border gambling and betting services were prohibited under US law" (WT/DSB/M/151, paragraph 47); at the DSB meeting of 21 July 2003 the United States' representative stated that: "it was also clear that these services were prohibited under US law" (WT/DSB/M/153, para. 47). See also the letter dated 11 June sent by the US Department of Justice to the National Association of Broadcasters, dated 11 June 2003, referred to in footnote 67.

<sup>71</sup> See *United States v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001).

<sup>72</sup> See the discussion in para. 3.80 of this Report and Press Release by the New York Attorney General (dated 21 August 2002), at <http://www.oag.state.ny.us/press/2002/aug/aug21a-02.html>, visited on 23 September 2003 and the *Assurance of Discontinuance* signed between the New York Attorney General and Paypal Inc. dated 16 August 2002.

<sup>73</sup> Antigua notes that it is noticeable that, while the United States complains about the fact that some of the (deliberately misinterpreted – see para. II.B.2.65 below) references in the Annex to the panel request also regulate other matters than cross-border gambling services (such as refrigerator disposal), it makes no attempt to explain why exactly it is that the numerous references to laws that do clearly prohibit the provision of cross-border gambling and betting services, combined with the text of the panel request, Antigua's first submission and other communications by Antigua, do not allow it to prepare its defence. The only legal defence that the United States has raised with Antigua until now is that its GATS Schedule does not cover gambling and betting services. Antigua does not see how the issues raised in the Request could have an impact on the development of that argument.

has raised other procedural issues regarding the "measures" (see below paragraphs 3.78 to 3.80). Until submitting its request for preliminary rulings, the United States has at no point stated that it cannot understand Antigua's claim in the absence of further explanation of that claim as it relates to each individual law. If the United States had done so, Antigua would have addressed this issue in its first submission. With respect to the US assertion that Antigua has not submitted sufficient "proof" to establish a *prima facie* case that each individual law listed in the Annex to its panel request effectively prohibits the provision of cross-border gambling services, Antigua submits that 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,<sup>74</sup> the United States clearly also accepts that at least one specific law in the Annex to Antigua's panel request (i.e. the Wire Act) prohibits provision of cross-border gambling services. A report from the GAO confirms this for other specific United States laws mentioned in the Annex to the panel request.<sup>75</sup> Furthermore the United States has yet to dispute that most of the laws cited in the Annex to the panel request do in fact relate to the prohibition of cross-border gambling and betting services (it only claims that some do not, and only on the basis of a deliberate misreading of the references to these laws).<sup>76</sup> In this respect Antigua submits that to the extent that "proof" is an issue here, Antigua has in any event established a *prima facie* case with regard to the measures listed in its panel request that come within the scope of this dispute (i.e. those that do relate to the cross-border supply of gambling and betting services).<sup>77</sup>

60. Antigua submits that it is doubtful that anyone could compose a definitive list of all United States laws and regulations that could be applied against cross-border gambling. The reason for this is that United States law with regard to this issue is itself unclear and Antigua is certainly not the only party with some difficulty in understanding the US legal system as it relates to the provision of cross-border gambling and betting services. As the United States' own General Accounting Office has stated:

"Internet gambling is an essentially borderless activity that poses regulatory and enforcement challenges. The legal framework for regulating it in the United States and overseas is complex. US law as it applies to Internet gambling involves both state and federal statutes."<sup>78</sup>

61. There is also significant debate within the United States legal community as to the exact nature of the United States' prohibition on the supply of cross-border gambling and betting services.<sup>79</sup> Further, there is even disagreement among courts in the United States on the precise interpretation of

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<sup>74</sup> See above para. II.B.1.51 and footnote 63.

<sup>75</sup> United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89), December 2002, page 11. See also the letter from the Department of Justice of 11 June 2003 to the National Association of Broadcasters, referred to in footnote 67.

<sup>76</sup> Antigua notes in this regard that the seemingly irrelevant statutes delineated in para. II.B.1.48 above are, in point of fact, included within a "range" of statutes that otherwise relate to gambling and betting activity. It is an accepted method of citation in United States law to include a "range" of related statutes even if the range includes repealed or irrelevant statutes as well.

<sup>77</sup> Antigua's panel request explicitly states that: "The measures listed in the Annex only come within the scope of this dispute to the extent that these measures prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States under conditions of competition compatible with the United States' obligations."

<sup>78</sup> United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89), (December 2002), p. 3.

<sup>79</sup> See Jeffrey R. Rodefer, *Internet Gambling in Nevada. Overview of Federal Law Affecting Assembly Bill 466* published on 18 March 2003 on the website of the Department of Justice of Nevada ([www.ag.state.nv.us](http://www.ag.state.nv.us)), pp. 8-13 in the context of the Wire Act. In the article the author notes "(...) there is a secondary debate ongoing about whether the definition of 'wire communication facility' is limited to telephone companies." *Ibid.*, p. 13.

United States laws on this issue.<sup>80</sup> This lack of clarity of US law confronted Antigua with a dilemma when it drafted its 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. This concern has been vindicated by the fact that the United States now adopts a very similar formalistic and obstructive approach in the request for preliminary rulings. It was for these reasons – as well as the oft-repeated statements by the United States that it prohibits all cross-border gambling and betting services – that Antigua determined to challenge the general prohibition of cross-border gambling and betting services that effectively exists in the United States whilst at the same time making a serious and good faith effort to identify specific measures after conducting a detailed investigation of an arcane area of United States law. In doing so Antigua has already done more than can reasonably be expected of a complainant in WTO dispute settlement proceedings.<sup>81</sup>

62. Antigua also rejects the US argument that, pursuant to its terms of reference, the Panel would be obliged to investigate separately the impact of each specific law listed in the Annex to Antigua's panel request.<sup>82</sup> Antigua finds it difficult to see how – much less why – the Panel would go about assessing "separately" the specific impact of each of the 93 legislative prohibition measures listed in the Annex to Antigua's panel request. Such an approach would be unnecessary, cumbersome, repetitive, time consuming and would not serve to enhance the legitimate rights of the defence (other than by simply frustrating the effectiveness of WTO dispute settlement). To require Antigua and the Panel to spend time and effort in analysing exactly how the US measures operate and interact in practice given the unambiguous legal position of the United States regarding the services at issue, would be patently absurd. In any event, the terms of reference for the Panel are determined by Antigua's panel request and Antigua is not aware of any provision or doctrine of WTO law that would prevent the Panel from investigating in aggregate the impact of a series of specific measures that all have the same effect, i.e. prohibition. The Panel should note that, in relation to this argument the United States incorrectly states that: "Antigua refuses to identify specific measures as the subject of its *prima facie* case." As stated in paragraph 61 above, notwithstanding the difficult nature of doing so, Antigua has made a serious and good faith effort to identify specific measures in the Annex to its panel request.<sup>83</sup>

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<sup>80</sup> See with regard to the Wire Act, the discussion in United States General Accounting Office, *Internet Gambling: An Overview of the Issues* (GAO-03-89) (December 2002), p. 13.

<sup>81</sup> Antigua is of the view that, putting the threshold even higher will make WTO dispute settlement virtually unmanageable for all but the largest WTO Members – for instance in cases involving a complex domestic legal background against a WTO Member the laws of which are not generally available in English (or another language that is widely understood across the world). In such a situation an obligation to first conduct a detailed investigation of all these laws, even when the WTO Member at issue does not deny the alleged impact of its legislation, could take years and would serve no purpose.

<sup>82</sup> See para. 49 above.

<sup>83</sup> For instance, Antigua's panel request identifies 18 U.S.C. §§ 1081, 1084. As the United States points out itself in footnote 63 above this statute was used to convict Mr Jay Cohen in the *United States v. Cohen* case also cited in the panel request. Mr Cohen was convicted because he worked for an Antiguan supplier of gambling and betting services. The panel request also mentions 18 U.S.C. § 1952 (the "Travel Act") and 18 U.S.C. § 1955 (the "Illegal Gambling Business Act") which according to the United States General Accounting Office "have been used to prosecute gambling entities that take interstate or international bets over the telephone and would likely be applicable to Internet gambling activity". With regard to these three laws, see also the letter of 11 June 2003 from the United States Department of Justice to the National Association of Broadcasters mentioning "Sections 1084, 1952 and 1955 of Title 18 of the United States Code". Antigua has further listed the specific measures of individual states that are described as follows by the GAO: "Some states have taken specific legislative actions to address Internet gambling, in some cases criminalizing it and in others relying on existing gambling laws to bring actions against entities engaging in or facilitating Internet gambling" GAO, *Internet Gambling*, op. cit., page 11.

63. With respect to the US argument that certain "items" listed in Section III of the Annex to Antigua's panel request are not "measures" that can be investigated under the DSU, Antigua maintains that, since the measures listed in Section III of the Annex are based on the legislative provisions listed in Sections I and II of the Annex,<sup>84</sup> they are in any event covered in that capacity. In Antigua's view it does not really matter whether the measures listed in Section III "do something concrete, independently of any other instruments" or whether these are taken into account by the Panel "to help determine the meaning of US laws." In fact, actions by criminal enforcement authorities (such as the ones listed in Section III of the Annex) could very well be classified under both categories. What matters is that the United States maintains and enforces a total prohibition on cross-border gambling (and this is clearly the case). In this respect Antigua suggests that the Panel utilise its discretion to exercise judicial economy and to decide this case without ruling whether measures such as the ones listed in Section III of the Annex are "measures" that can be the subject of WTO dispute settlement.

64. In case the Panel nevertheless wants to address this issue, Antigua refers back to the discussion in paragraph 3.77 of this report. Antigua would add only that the four press releases and related documents from Attorneys General are obviously not included in the panel request as press releases but because they describe the measures, i.e. the prosecution actions (on which little or no other official information is publicly available).

65. Antigua rejects the US argument that Antigua's panel request improperly includes measures that were not the subject of consultations and notes it has already responded to this argument in paragraph 3.78 of this report. The United States simply ignores these arguments and the Appellate Body ruling in *Brazil – Aircraft*<sup>85</sup> referred to by Antigua in its first submission. Antigua notes the United States' reference to the Appellate Body Report in *US – Certain EC Products*.<sup>86</sup> Antigua submits, however, that whether or not a measure that was not formally part of consultations can be included in a panel request depends on the specific circumstances of each case. In this instance Antigua believes this to be possible (as did the Appellate Body in the circumstances at issue in *Brazil – Aircraft*). As in *Brazil – Aircraft*, the parties in this instance have in fact consulted on the gambling prohibition in the New York Constitution, the Rhode Island Constitution and the Colorado Revised Statutes (because the parties consulted on the total prohibition of the provision of cross-border gambling and betting services of which these measures form a part). Antigua further submits that the typing errors that were corrected for the New York Constitution, the Rhode Island Constitution and the Colorado Revised Statutes are different from the allegedly incorrect references to laws against dog fighting and other irrelevant laws which the United States mentions in paragraph 14 of the Request. The latter are instances where these non-gambling related provisions are included within a "range" of statutes that otherwise relate to gambling and betting activity. It is an accepted method of citation in United States legal writing to include a "range" of related statutes even if the range includes repealed or irrelevant statutes. When the United States suggests that the references to these "range" statutes complicate its understanding of Antigua's claim it is merely being disingenuous.

66. In conclusion, 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), Antigua requests that the Panel allow Antigua to submit this on a date to be determined by the Panel, but not to delay the 29 October 2003 due date for the United States' first submission.<sup>87</sup> Antigua further requests that the Panel dismiss the request for preliminary rulings on the three issues raised by the United States in the Request.

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<sup>84</sup> Antigua submits that this is explicitly confirmed by the United States in para. II.B.1.52.

<sup>85</sup> Appellate Body Report on *Brazil – Aircraft*.

<sup>86</sup> Appellate Body Report on *US – Certain EC Products*.

<sup>87</sup> Antigua notes that the United States cites as a justification for delay its need to hold "consultations with sub-federal entities (...) required by US law (...)." However, under the applicable federal statute, these state-federal consultations were to have been initiated no later than seven days, and to have been actually held within 30 days, after the request for consultations from Antigua was received. See 19 U.S.C. §3512(b)(1)(C).

C. ARGUMENTS OF THE THIRD PARTIES<sup>88</sup>

1. Arguments of the European Communities

67. The European Communities notes that the United States first challenges the qualification as "measures", within the meaning of Article 6.2 of the DSU, of certain documents referred to in Section III of Antigua and Barbuda's panel request. These are: press releases; the replies of a gaming control board of a State of the United States to "Frequently Asked Questions"; opinions and statements of Attorneys General of States part of the United States; and judicial decisions of US Courts. The European Communities recalls that in its request for panel establishment, Antigua and Barbuda distinguishes between, on the one hand, Section I and II of the Annex, and, on the other hand, Section III thereof. In respect of Section I and II, Antigua claims that "these laws (separately or in combination) have the effect of prohibiting all supply of gambling and betting services from outside the United States". By contrast, it qualifies the documents listed in Section III as "examples of measures by non-legislative authorities of the United States applying these laws to the cross-border supply of gambling". There is therefore some ambiguity as to whether the purpose of these references is more an exemplifying and clarifactory one than a list of further measures in their own right. Also, the issue raised by the United States is strictly connected with the substance of the case, which is legally and factually rather complex. As such, it is not suited for adjudication through a summary preliminary ruling proceeding brought under Article 6.2 of the DSU.

68. For the case the Panel considers that the US claim needs to be addressed at this stage, the European Communities would offer the following considerations. Article 6.2 of the DSU is a general provision regulating the content of requests for panel establishments for virtually the entirety of the WTO provisions.<sup>89</sup> As such, it must be able to be read in such a way that it does not restrict the content of any of the provisions in the covered agreements. The term "measure" in Article 6.2 cannot be read any narrower than covering any action that can amount to a violation of a WTO provision. Article 6.2 is meant to apply to the whole of the *WTO Agreement*. Otherwise, it would risk unduly reduce the scope of obligations in other provisions of the covered agreements. Thus, for example, several WTO provisions use the term "measure" or "requirement" and have been interpreted in previous reports. All those generally suggest a broad reading of the term "measure", in particular as to the form that measures can take. In particular, since there is a specific definition to measures for GATS purposes in Article XXVIII of the GATS any interpretation of the term "measure" that is narrower than the definition laid down therein would amount to restricting the scope of Article XXVIII, and of the entire GATS with it.<sup>90</sup> This would amount to diminishing the rights and obligations of the Members under the *WTO Agreement*, contrary to Article 3.2 of the DSU.

69. Moreover, the range of WTO Members' action that can come within the purview of dispute settlement review is even broader than that resulting from Article XXVIII of the GATS. For example, violations can result not only from a particular "instrument", but also from an omission (e.g. the failure to publish trade-related legislation, regulations, judicial decisions and administrative rulings of general application, contrary to Article X:1 of the GATT 1994). Also, Article XXIII:1(c) of the GATT 1994 allows complaints to be brought based on the existence of "any other situation" (that is, other than (a) the failure to comply with a WTO obligation and (b) nullification or impairment resulting from a measure whether or not in violation of the GATT). Such complaints are still possible and generally governed by the DSU, including Article 6.2, pursuant to Article 26.2 thereof. Therefore, any interpretation of the term "measure" in Article 6.2 would be overly restrictive if it would risk preventing examination of such type of complaints on grounds that it is not allowed by Article 6.2.

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<sup>88</sup> Canada, Mexico and Chinese Taipei informed that Panel that they would not submit their views on US request for preliminary rulings.

<sup>89</sup> According to the European Communities, a notable exception is Article 17.4 of the *Anti-Dumping Agreement* (see Appellate Body Report in *Guatemala – Cement I*, para. 14).

<sup>90</sup> Pursuant to its Article I:1, the GATS "applies to measures by Members affecting trade in services".



70. The European Communities argues that, in many of these cases, the standard the US proposes (i.e. that a measure within the meaning of Article 6.2 must "constitute an instrument with a functional life of its own" under municipal law – i.e., it must "*do* something concrete, independently of any other instruments."<sup>91</sup>) would not allow a panel to review the violation of these provisions. The US references to WTO "jurisprudence" under the *Anti-Dumping Agreement*<sup>92</sup> are in any way of no relevance, as they relate to a special and additional rule to the DSU (Article 17.4 of the *Anti-Dumping Agreement*) and not the general standard set out in Article 6.2.

71. The European Communities emphasizes that it is not arguing that the term "measure" in Article 6.2 is devoid of any autonomous meaning compared to, for example, the provisions of the covered agreements.<sup>93</sup> For one thing, Article 6.2 could be relied upon by a panel to decline full examination of a dispute in some manifest cases: where, for example, the alleged measure referred to in a panel request was not even attributable to a body of a WTO Member (e.g., a policy statement of a non-governmental organization). Furthermore, it is clear from Article 6.2 that it is necessary to identify a specific measure. Finally, should the Panel decide to review the documents that the US challenges under this claim and should it further conclude that some of them do not constitute "measures" within the meaning of Article 6.2 of the DSU, its conclusion should not have any bearing on the evidentiary relevance that they may have to review whether Antigua and Barbuda's claim is overall well founded. Indeed this activity pertains to the Panel's review of the substance of the case.

72. Turning to the US second claim that certain provisions of three US measures (New York Constitution; Rhode Island Constitution; Colorado Revised Statutes) are outside the Panel's terms of reference because they do not appear in Antigua and Barbuda's request for consultations under Article 4 of the DSU,<sup>94</sup> the European Communities understands that these measures and the specific provisions thereof referred to by the United States are properly referenced in Antigua and Barbuda's request for panel establishment, and that the references to those specific provisions in the request for panel establishment replaced references to other provisions of the same measures contained in the request for consultations. The issue raised by the United States must be appreciated in the light of the purpose of consultations and the request therefor, the purpose of Article 6.2 of the DSU, and more generally the nature and function of dispute settlement procedures.

73. The European Communities submits that, in connection with the first aspect, a very clear indication has been provided by the Appellate Body in *Brazil – Aircraft*.<sup>95</sup>

"[W]e do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, '[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.'"

74. The European Communities fully agrees with the approach and the conclusions of the Appellate Body and would add that they apply *a fortiori* in a case, like the present one, where the measures are the same in both the request for consultations and in the request for panel establishment. It appears to the European Communities that the only provisions of, e.g., the New York Constitution that could have been the subject of consultations are those relating to restrictions on betting and gambling. It would thus be absurd if, while Antigua and Barbuda continues to rely on the same

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<sup>91</sup> See above para. II.B.1.44.

<sup>92</sup> See above footnote 38.

<sup>93</sup> Appellate Body Report on *US – Gasoline*, p. 23.

<sup>94</sup> See above para. II.B.1.47.

<sup>95</sup> Appellate Body Report on *Brazil – Aircraft*, para. 132 (footnotes omitted).

measure as it indicated in its request for consultations, the Panel would be barred by Article 6.2 from reviewing the consistency of that measure with the WTO provisions relied upon by the claimant. Furthermore, the purpose of consultations has to be contrasted with that of the panel request, which is to define the scope of the Panel's terms of reference, and to notify the responding party and third parties of the complainant's case.<sup>96</sup> It is in view of that different function that "[d]efects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings".<sup>97</sup> But, again, Antigua and Barbuda's request for panel establishment does include not only the relevant specific measures, but also the specific provisions thereof referred to by the United States.

75. The European Communities also wishes to recall how the role of the parties in dispute settlement procedures was very effectively characterized by the Appellate Body in *US – FSC*:<sup>98</sup>

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."

76. The European Communities notes in this connection that, whereas it must be acknowledged that the United States raised this issue before the DSB, it should be equally acknowledged that Antigua and Barbuda promptly offered to enter into further clarifactory contacts.<sup>99</sup> There is therefore no question that the United States was fully enabled to effectively defend itself.

77. With respect to the US assertion that Antigua did not make a prima facie case because "Antigua has neither quoted, attached, nor argued the meaning of any such law or regulation", the European Communities considers that this issue is concerned with the substance of the dispute and indeed the very core of dispute settlement proceedings. As such, it is not suitable for a preliminary ruling issued on a summary proceeding basis such as the present one, relying on Article 6.2 of the DSU, but needs to be addressed by the Panel throughout the (full) proceeding.<sup>100</sup> Otherwise, parties would be denied the benefit of full panel review of complex legal and factual matters such as the ones at issue in this dispute, with clear due process implications. A panel has a duty to make an objective assessment of the facts. That assumes a fully informed assessment. Accordingly, the European Communities reserves the right to further comment on this substantive aspect of the dispute in its third party submission and at the third party session of the Panel's first substantive meeting.

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<sup>96</sup> In this sense, Appellate Body Report on *Brazil – Desiccated Coconut*, page 22; Appellate Body Report on *US – Carbon Steel*, paras. 125-126.

<sup>97</sup> Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>98</sup> Appellate Body Report on *US – FSC*, para. 166.

<sup>99</sup> WT/DSB/M/153, paras. 43 and 46.

<sup>100</sup> The European Communities is of the view that the United States confuses the jurisdictional aspect, regulated by Article 6.2 of the DSU, with the substantive aspect for example in footnote 61 above. The European Communities agrees with the United States that Antigua and Barbuda is not relieved from its burden of making its *prima facie* case; but this is, precisely, the core substantive issue.

78. The European Communities submits that the US claim that Antigua and Barbuda has not made a *prima facie* case also seems to assume that a claimant is precluded from doing so beyond a particular point in time (presumably the filing of its first written submission, as in the present case). Such assumption would be clearly incorrect.<sup>101</sup> What is more, inasmuch as the United States relates its claim that Antigua and Barbuda has not made a *prima facie* case to the obligation to identify specific measures set out in Article 6.2 of the DSU, its argument is also incorrect and should be rejected. First of all, Antigua and Barbuda has claimed that there is a prohibition of all supply of gambling and betting services from outside the United States to consumers in the United States.<sup>102</sup> Second, in the Annex to its request for panel establishment it has identified a number of specific measures. There is therefore a possibility for the other parties to understand the substance and basis of the complaint, and for the responding party specifically to rebut the legal qualification of these measures made by Antigua and Barbuda.

79. The European Communities considers that the very fact that the United States is able to discuss the nature of the documents cited to in the Annex to Antigua and Barbuda's request for panel establishment shows that it is perfectly able to identify them. There is therefore no prejudice to the parties concerned, which is a factor that needs to be considered in appreciating whether a violation of Article 6.2 has been committed.<sup>103</sup> The fact that a violation of WTO provisions may result from multiple measures of a WTO Member – for example, a bundle of trade defence measures – may render litigation more complex, but is not a reason for a panel to decline jurisdiction under Article 6.2 of the DSU.

## 2. Arguments of Japan

80. Concerning the US claim that several items cited in the request for the establishment of a panel by Antigua and Barbuda do not constitute "measures" provided for in Article 6.2 of the DSU, and thus are beyond the Panel's terms of reference, Japan does not wish to prejudice the Panel's decision on the specific items in question, nor is in a position to comment on the factual aspects of the current proceeding. Nevertheless, Japan cannot agree with the argument presented by the United States that relies on the Panel's finding in *US – Corrosion-Resistant Steel Sunset Review*. Although the Panel in *US – Corrosion-Resistant Steel Sunset Review* found that the "Sunset Policy Bulletin" was not a measure that in and of itself gave rise to a WTO violation, this finding is now under review by the Appellate Body. Japan, as specified in its notice of appeal<sup>104</sup>, is requesting the Appellate Body to reverse this finding of the Panel. Therefore, Japan reiterates its disagreement with the finding of the Panel in *US – Corrosion-Resistant Steel Sunset Review* on this issue, and submits that the Panel on *US – Gambling* should disregard this erroneous finding.

81. With respect to the US claim that Antigua and Barbuda's first submission states that the subject of the current proceeding is the total prohibition on the cross-border supply of gambling and betting services without specifying laws and regulations comprising such total prohibition, and that, because Antigua and Barbuda "refused" to identify specific measures as the subject of its *prima facie* case, it failed to establish a *prima facie* case with respect to any measure, Japan submits that the United States appears to be confusing two totally separate matters. Japan believes that the question of whether Antigua and Barbuda has successfully established a *prima facie* case is a substantive one, and thus, should not be subject to preliminary rulings of the Panel.

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<sup>101</sup> See e.g. Appellate Body Report on *Korea – Dairy*, para. 145, and the reference therein to Appellate Body Report on *India – Quantitative Restrictions*, para. 143.

<sup>102</sup> WT/DS285/2, para. 2.

<sup>103</sup> Appellate Body Report on *Korea – Dairy*, paras. 126-127 (referring to Appellate Body Report on *EC – Computer Equipment*, para. 70).

<sup>104</sup> "The Panel erred in its legal conclusions in paras. 7.145, 7.195, and 7.246 of the Panel Report, and the reasoning leading thereto, that the Sunset Policy Bulletin, ... cannot, by itself, give rise to a WTO violation, and is therefore not a measure challengeable under the WTO Agreement as such." WT/DS/244/7, sub-para. 4.

82. Japan notes that, as the United States itself admits, a panel's preliminary rulings on the specificity of measures relate to due process rights of defence. In contrast, as the Appellate Body found in *US – Wool Shirts and Blouses*, the party asserting the affirmative of a particular claim or defence establishes a *prima facie* case by adducing evidence sufficient to raise a presumption that what is claimed is true, and "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."<sup>105</sup> Panel's deliberations on this matter are of important substantive nature and form the basis of its findings of consistency/inconsistency of the measures in question with the WTO Agreement. Consequently, the question of whether or not Antigua and Barbuda has established a *prima facie* case is independent of, and must be separated from, the question of whether or not the United States' due process rights are affected by the alleged lack of specificity. Even if the Panel were to find that the identification of the measures by Antigua and Barbuda is not sufficiently specific, it would only be a finding of a violation of Article 6.2 of the DSU, and would not have any other legal effect.

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<sup>105</sup> Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

## ANNEX C

### PANEL'S QUESTIONS TO THE PARTIES

#### Note

This Annex contains the questions posed by the Panel and written answers provided by the Parties during the first (Section I) and second (Section II) substantive meetings, as well as the questions posed to the Third Parties during the first substantive meeting and their answers (Section IV).

The Panel expressly invited each Party to reply to questions posed to the other Party, if it so wished, as well as to questions posed to the Third Parties. At the first meeting, Third Parties were also invited to reply to questions posed to the Parties (Section I).

Moreover, with respect to the questions posed at second substantive meeting, each Party was invited to comment on the responses provided by the other Party. These comments are reproduced in Section III of this Annex.

#### **I. PANEL'S QUESTIONS TO THE PARTIES AT THE FIRST SUBSTANTIVE MEETING**

##### **A. US SCHEDULE**

#### **For both parties:**

- 1. What is the legal status and value of the 1993 Scheduling Guidelines and W/120 in WTO dispute settlement proceedings and to what extent are they relevant for the interpretation of GATS Schedules where no explicit reference to the CPC is contained in those Schedules?**

#### **Antigua**

Pursuant to Article 31 of the Vienna Convention, the 1993 Scheduling Guidelines circulated by the Secretariat during the Uruguay Round negotiations<sup>106</sup> and the W/120 represent important tools to the interpretation of Members' schedules under the GATS. Whether or not a GATS schedule contains explicit references to the CPC has no impact on the interpretative value of the 1993 Scheduling Guidelines and W/120 as determined pursuant to Article 31 of the Vienna Convention.

The 1993 Scheduling Guidelines are part of the *context* of the GATS and GATS schedules because they are an "instrument" made in connection with the conclusion of the treaty as per Article 31(2) of the Vienna Convention. Admittedly the 1993 Scheduling Guidelines were technically not "made" by "one or more parties" but by the then GATT Secretariat. However, the 1993 Scheduling Guidelines explicitly mention that they were "circulated by the Secretariat in response to requests by participants." At the time of the Uruguay Round negotiations they were also accepted by all parties as a basis for the drafting of services schedules. This was explicitly confirmed when the Council for Trade in Services unanimously adopted new scheduling guidelines in 2001 (the "2001 Scheduling Guidelines"<sup>107</sup>), footnote 1 of which states that: "[I]t should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and

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<sup>106</sup> MTN.GNS/W/164 (3 September 1993).

<sup>107</sup> S/L/92 (28 March 2001).

MTN.GNS/W/164/Add.1). Against this background Antigua submits that the 1993 Scheduling Guidelines cannot be disqualified as "context" simply because their formal author is the GATT Secretariat and not a Member of the World Trade Organisation (the "WTO").<sup>108</sup> The purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to identify the common intention of the parties.<sup>109</sup> Articles 31 and 32 of the Vienna Convention should be applied with that objective in mind and not literally.<sup>110</sup> What is important in determining whether an instrument, such as the 1993 Scheduling Guidelines, expresses the *common* intention of the parties is whether it is accepted by *all* the parties, not whether its formal author is *one* of the parties. Antigua further submits that the 2001 Scheduling Guidelines comprise a *subsequent agreement* between the parties (as per Article 31(3) of the Vienna Convention) regarding the interpretation of existing schedules in the light of the 1993 Scheduling Guidelines. As mentioned above, footnote 1 of the 2001 Scheduling Guidelines (unanimously approved by the Council for Trade in Services) provides that: "It should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and MTN.GNS/W/164/Add.1."

Antigua believes that W/120 qualifies as part of the context of the GATS and GATS schedules for two primary reasons: (i) W/120 is incorporated by reference in the Dispute Settlement Understanding ("the DSU") of the WTO (Article 31(2) of the Vienna Convention); and (ii) W/120 is an instrument made in connection with the conclusion of the treaty and accepted by all parties (Article 31(2)(b) of the Vienna Convention). Furthermore there exists a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention and subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention confirming the interpretative value of W/120.

According to Article II:2 of the Marrakech Agreement Establishing the World Trade Organization (the "WTO Agreement"), the GATS, the DSU and the other multilateral and plurilateral agreements are integral parts of the WTO Agreement. Article 31(2) of the Vienna Convention defines context as (amongst others) the text of the treaty, including its preambles and annexes. Thus the DSU qualifies as context for the interpretation of the GATS (and vice-versa) because they are both part of the same treaty—the WTO Agreement. Article 22(3)(f)(ii) of the DSU explicitly refers to W/120 to define "sector" of trade for purposes of suspension of concessions. In doing so it incorporates W/120 by reference in the DSU. As a part of the DSU, W/120 is context of the GATS and the US Schedule, which itself is an integral part of the GATS under Article XX:3 of the GATS.

W/120 further qualifies as "context" because, like the 1993 Scheduling Guidelines, it is an instrument made in connection with the conclusion of the GATS under Article 31(2)(b) of the Vienna Convention. The Montreal Ministerial of December 1988 explicitly requested the GATT Secretariat to compile a "reference list of sectors."<sup>111</sup> W/120 was the result of this exercise and it follows from the 1993 Scheduling Guidelines and the reference to W/120 in the DSU that all Members accepted W/120 as a starting point, a "reference list" for the drafting of their GATS schedules.<sup>112</sup> The common intention of the parties (expressed in the 1993 Scheduling Guidelines) allowed a party to depart from

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<sup>108</sup> Antigua is of the view that neither can the 1993 Scheduling Guidelines be disqualified because they state that they "should not be considered as an authoritative legal interpretation of the GATS" (See I. Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press, 1984), pp. 129-130.

<sup>109</sup> Appellate Body Report on *EC – Computer Equipment*, para. 84.

<sup>110</sup> See, e.g., I. Sinclair, *Vienna Convention*, at pp. 117-118: "In their commentary the Commission refer to the rich variety of principles and maxims of interpretation applied by international tribunals. They point out that these are, for the most part, principles of logic and good sense which are valuable only as guides to assist in appreciating the meaning which parties may have intended to attach to the expressions employed in a document; and that recourse to many of these principles is discretionary rather than obligatory, interpretation being to some extent an art rather than an exact science."

<sup>111</sup> MTN.TNC/7(MIN), Part II.

<sup>112</sup> With regard to the issue that W/120 was "made" by the GATT Secretariat and not by a party, Antigua submits that the argumentation developed on this issue with regard to the 1993 Scheduling Guidelines equally applies to W/120.

that "reference list," provided it did so explicitly. Paragraph 5 of the US Draft Final Schedule confirms that the United States explicitly subscribed to this "common intention."

The 2001 Scheduling Guidelines comprise a subsequent agreement confirming the interpretative value of the 1993 Scheduling Guidelines. The 1993 Scheduling Guidelines explicitly establish W/120 as the "default" reference list for Uruguay Round Schedules. Thus, by confirming the interpretative value of the 1993 Scheduling Guidelines the 2001 Scheduling Guidelines have also confirmed the interpretative value of W/120.

A "subsequent practice," within the meaning of Article 31(3)(b) of the Vienna Convention, exists establishing the agreement of the WTO Members regarding the interpretative value of W/120. Since the entry into force of the GATS, Members have consistently referred to W/120 as the classification used for GATS purposes and as the main point of reference for any discussion on the classification of services. This includes the United States' own communication to the WTO on Classification of Energy Services<sup>113</sup> and the USITC Document.

As explained above, the reasons why the 1993 Scheduling Guidelines and W/120 qualify as important interpretative factors within the meaning of Article 31 of the Vienna Convention for *all* GATS schedules, are not related to references to the CPC. Thus the absence or presence of explicit references to the CPC in a specific schedule can have no impact on the legal status and interpretative value of the 1993 Scheduling Guidelines or W/120.

#### United States

These negotiating history documents are "preparatory work" within the meaning of Article 32 of the Vienna Convention.<sup>114</sup> Insofar as these documents mention the CPC, the CPC is only relevant to the interpretation of a particular commitment if a Member included an explicit reference to the CPC in that commitment. This is confirmed by: (i) the text of the US Schedule (which does not include CPC references); (ii) the context of the US Schedule (which shows that other schedules did include CPC references for some or all commitments, thus confirming that they were optional); (iii) other negotiating history of the GATS (which confirms that the parties to the GATS negotiations did not intend to be bound by any specific nomenclature); and (iv) the subsequent statements of Members reflected in discussions in the Committee on Specific Commitments (which confirm that a Member scheduling GATS commitments during the Uruguay Round was free to choose to refer or not refer to the CPC; and that the result of doing so is that CPC definitions do not control the interpretation of that Member's commitment(s)).<sup>115</sup>

#### Canada

Canada recalls the arguments made in its Third Party written submission to the Panel.<sup>116</sup>

At the outset, Canada submits that the issue before the Panel is to determine, in accordance with the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention, the common intention of the Members with respect to the specific commitments undertaken by the United States and inscribed in the latter's Schedule. That common intention must be ascertained by interpreting the US Schedule in good faith, in accordance with the ordinary meaning to be given to the terms of the Schedule in their context and in the light of the object and purpose of the GATS and the WTO

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<sup>113</sup> Communication from the United States: Classification of Energy Services. S/CSC/W/27. 18 May 2000.

<sup>114</sup> The 1993 Scheduling Guidelines expressly state that they "should not be considered as an authoritative legal interpretation of the GATS."

<sup>115</sup> See Section III.B.2 of this Report.

<sup>116</sup> See Section IV.A. of this Report.

Agreement more generally. To the extent appropriate, recourse may also be had to supplementary means of interpretation.

The United States clearly used and followed the structure of the W/120 to schedule its specific commitments. However, its Schedule does not include explicit references to the CPC numbers that, in the W/120, are associated with a particular services sector or sub-sector. This does not mean, as the United States suggests, that the CPC numbers associated with a particular services sector or sub-sector in the W/120 are irrelevant, inapplicable or to be ignored when interpreting the United States' specific commitments. Rather, they form part of the *context*, or, alternatively, constitute a *supplementary means of interpretation*, which, in accordance with Articles 31 and 32 of the Vienna Convention, is relevant to interpreting and ascertaining the meaning of the specific commitments of the United States.

When the US Schedule is interpreted in accordance with Articles 31 and 32 of the Vienna Convention, and all the elements that are relevant to ascertaining the common intention of the Members with respect to the United States' specific commitments are taken into consideration, there is only one reasonable conclusion: where the US Schedule mirrors the W/120, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments were meant and are to be interpreted in the light of the W/120 and the CPC numbers associated with it.

When the United States scheduled its specific commitments, it was free to clearly reject the W/120 and the corresponding CPC numbers. It did not. On the contrary, it expressly indicated to its trade partners that except where specifically noted in its Schedule, the scope of the United States' specific commitments corresponds to the sectoral coverage in the W/120.<sup>117</sup> Since the W/120 defines sectoral coverage by referring to relevant CPC numbers, this means that, except where specifically noted in the US Schedule, the scope of the United States' specific commitments corresponds to the scope of relevant CPC numbers (setting out the scope of particular services sectors or sub-sectors) referred to in the W/120. This was and is the common understanding of the Members with respect to the specific commitments undertaken by the United States under the GATS, and it must be respected.

As regards more specifically the W/120, Canada recalls its conclusion that the W/120 and the corresponding CPC numbers form part of the *context* that, pursuant to Article 31 of the Vienna Convention, must be taken into account by the Panel when interpreting the specific commitments of the United States under the GATS. In Canada's view, the W/120 (and by implication the CPC numbers referred to in it) at least qualifies as an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" under Article 31(2) of the Vienna Convention.<sup>118</sup> Indeed: (i) the W/120 is an instrument; (ii) the W/120 was prepared by the GATT Secretariat at the request and for the benefit of Uruguay Round participants. It was reviewed and commented upon by these countries.<sup>119</sup> Uruguay Round participants used the W/120 as the general benchmark for the scheduling of specific commitments, thereby incorporating into their Schedules the W/120's nomenclature, except where specifically noted. These same countries also agreed to the use of the W/120 in the DSU.<sup>120</sup> The W/120 was in effect made by Uruguay Round participants acting through the then GATT Secretariat – quite possibly the only practical and effective way to work in a concerted manner on such a complex matter. In these circumstances, the W/120 can be considered to have been "made by the parties"

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<sup>117</sup> Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.3, 7 December 1993, para. 5.

<sup>118</sup> See Section IV.A of this Report.

<sup>119</sup> *Ibid.*

<sup>120</sup> DSU, Article 22(3)(f)(ii).



within the meaning of Article 31(2)(b) of the Vienna Convention<sup>121</sup>; (iii) the W/120 was finalized in July 1991 and used by Uruguay Round participants until the end of the market access negotiations. It was also specifically referred to in the DSU. It was thus made in connection with the conclusion of the GATS; and (iv) the notable fact that the W/120 is specifically referred to in the DSU,<sup>122</sup> which is one of the Multilateral Trade Agreements binding on all Members,<sup>123</sup> necessarily establishes that it was accepted by all Uruguay Round participants as an instrument related to the GATS and the WTO Agreement. This, in itself, invalidates the United States' assertion that the W/120 is only part of the negotiating history of the GATS and therefore cannot constitute anything more than a supplementary means of interpretation under Article 32 of the Vienna Convention.<sup>124</sup>

In the event that the W/120 and the corresponding CPC numbers are found not to qualify as "context" within the meaning of Article 31(2) of the Vienna Convention, Canada submits, alternatively, that they do qualify, and should be referred to by the Panel, as *supplementary means of interpretation* of the US Schedule under Article 32 of the Vienna Convention.<sup>125</sup>

In the end, what is certain is that the W/120 and the corresponding CPC numbers are relevant and ought to be considered by the Panel when interpreting the specific commitments in the US Schedule in accordance with the applicable rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. When the US Schedule is interpreted in accordance with these rules of interpretation, and all the elements that are relevant to ascertaining the meaning of the United States' specific commitments are taken into consideration, the only reasonable conclusion is that where the US Schedule mirrors the W/120, without clearly and explicitly departing from it and the corresponding CPC numbers, it must be inferred that the United States' specific commitments are to be interpreted consistently with the W/120 and the CPC numbers associated with it.<sup>126</sup>

As regards the 1993 Scheduling Guidelines *per se*, they constitute a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. Canada recalls that it does not challenge the fact that these Guidelines do not constitute an authoritative legal interpretation of the GATS.<sup>127</sup> Indeed, they specifically state that they are not such an authoritative legal interpretation of the GATS. In any case, the authority to adopt interpretations of the WTO agreements, including the GATS, is reserved exclusively to the Ministerial Conference and the General Council.<sup>128</sup> This is beside the point, however. The fact that the 1993 Scheduling Guidelines do not consist of formal legal interpretations of the GATS does not mean that they cannot be used to shed light on the general understanding of the Uruguay Round participants as regards the scheduling of specific commitments. While there is no question that the 1993 Scheduling Guidelines are not an authoritative legal interpretation of the GATS, there is also no question that, in accordance with their stated purpose, they assisted all Members in the preparation of their Schedules and the listing of their specific

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<sup>121</sup> Canada in no way suggests that any document from, or involving the participation of, the Secretariat may qualify as an "instrument" or "agreement" under Article 31(2) of the Vienna Convention. Canada argues that the W/120 qualifies as relevant "context" for the interpretation of the US Schedule based on the specific and unique characteristics and circumstances pertaining to that document.

<sup>122</sup> DSU, Article 22(3)(f)(ii).

<sup>123</sup> WTO Agreement, Article II:2.

<sup>124</sup> See Section III.B.2. of this Report. This may also support the argument that the W/120 qualifies as an "agreement" within the meaning of Article 31(2)(a) of the Vienna Convention.

<sup>125</sup> Canada wrote that the United States does not contest that the W/120 may qualify as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention (see United States' first written submission, para. 63). In its argumentation, however, the United States simply ignores the relevance and application of the W/120 as such a supplementary means of interpretation of its Schedule, and does not address its effect on the interpretation of its specific commitments in the present case.

<sup>126</sup> See Section IV.A of this Report.

<sup>127</sup> *Ibid.*

<sup>128</sup> WTO Agreement, Article IX:2.

commitments. As such, they may be used as an element that confirms other evidence of what the United States has done in its Schedule.

In the present case, the 1993 Scheduling Guidelines constitute one element among others that refutes, rather than supports, the United States' argument that the W/120 and the corresponding CPC numbers are irrelevant and should be ignored. They are concordant with other factors demonstrating that, in its Schedule, the United States espoused the W/120, and by implication the corresponding CPC numbers, except where specifically noted. These factors are: (i) the US Schedule generally mirrors the W/120; (ii) in a number of instances, the United States did depart from the W/120 and the corresponding CPC numbers in a clear and unambiguous manner, that is, in the manner suggested in the 1993 Scheduling Guidelines (and the revised 2001 Scheduling Guidelines); (iii) in elaborating upon how Members may suspend concessions with respect to services sectors, Article 22 of the DSU relies on the W/120 to define these sectors; (iv) the cover note in draft schedules circulated by the United States indicating that specific commitments are scheduled in accordance with the W/120's nomenclature; and (v) the USITC concordance. Notwithstanding how much the United States wishes that it be otherwise, all these factors point to the conclusion that the US Schedule follows the W/120 and the corresponding CPC numbers except where it explicitly diverges from them.

### European Communities

As already pointed out by the European Communities in its third party submission and oral statement, both the 1993 Scheduling Guidelines (W/164) and the 1991 Sectoral classification (W/120) are documents relevant to the interpretation of the US Schedule of specific commitments. Specifically, in the EC view they constitute supplementary means of interpretations under Article 32 of the Vienna Convention.<sup>129</sup>

It is not necessary, for a document to be relevant to treaty interpretation, that it be specifically mentioned, referred to or reprinted in the text of the treaty to be interpreted. The Vienna Convention (Article 32) gives specific relevance to other documents too. The United States contends that since there is no express reference to the CPC codes in its Schedule, these are essentially irrelevant to the interpretation of its specific commitments. However, if only documents expressly referred to were relevant in interpreting a treaty provision, the very category of "preparatory works" and "circumstances of conclusion" would virtually disappear. This would mean rendering certain customary rules of treaty interpretation redundant. Although neither the 1991 Sectoral classification nor the 1993 Scheduling Guidelines are meant to be a legally binding agreement or an authoritative interpretation, they provide important guidance on how the WTO Members understood the commitments that they were negotiating. Both documents were referred to or used extensively by negotiators. The United States admits as much in its draft Schedules it tabled until the final phase of the Uruguay Round.<sup>130</sup>

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<sup>129</sup> See Section IV.B of this Report. The European Communities notes that reference has been made in this dispute to the Panel Report on *US – Section 110(5) Copyright Act* WT/DS160/R, adopted 27 July 2000 to support the proposition that the 1991 Sectoral classification constitutes "context" within the meaning of Article 31(2) of the Vienna Convention. In that report (footnote 55) the panel refers to explanatory reports drawn up in parallel to conventions within the framework of the Council of Europe. Unlike such explanatory reports, which are adopted by representatives of the Council of Europe Members, the 1993 Scheduling Guidelines did not form the subject of adoption by the contracting parties to the GATT.

<sup>130</sup> *Communication from the United States of America, Draft Final Schedule of the United States of America to the members of the Group of Negotiations on Services*, MTN.GNS/W/112/Rev.3, 7 December 1993; *Communication from the United States of America, Revised Conditional Offer of the United States of America concerning initial commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993; *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993; See also Section IV.B of this Report.

### Mexico

The 1993 Scheduling Guidelines and the W/120 constitute part of the preparatory work of the GATS and the WTO Agreement. At the very least, both thus qualify as "supplementary means of interpretation" pursuant to Article 32 of the Vienna Convention. As such, both documents can always be used to confirm the meaning of the United States' specific commitments resulting from the application of the general rule of interpretation in Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves that meaning ambiguous or obscure. Accordingly, both documents are highly relevant to the interpretation of the GATS Schedule of Specific Commitments of the United States on the basis of the Vienna Convention in this dispute. The fact that no explicit reference to the CPC is contained in the US Schedule has no bearing on this issue. The relevant question is rather whether the 1993 Scheduling Guidelines and document W/120 support the conclusion that sub-sector 10.D of the US Schedule includes a commitment on gambling and betting services.

### Chinese Taipei

The 1993 Scheduling Guidelines and the W/120 do not have independent legal status within the WTO in the sense that they do not have any formal binding legal authority on Members. In fact, the introduction to the Guidelines clearly states that the explanatory answers contained in it "should not be considered as an authoritative legal interpretation of the GATS."<sup>131</sup> Nevertheless, the documents do constitute part of the tools for the interpretation of Members' GATS Schedules, even where no explicit reference to the CPC is contained in the Schedules. To the extent that Members, in general, have relied on the Guidelines and the W/120 to shape their own GATS Schedules and to understand other Members' Schedules, they are relevant in WTO dispute settlement proceedings. With regard to how the Panel should use the 1993 Scheduling Guidelines and the W/120 as interpretative tools, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with the third party written submission and the oral statement made by Canada. The Appellate Body reasoning in *EC – Computer Equipment*<sup>132</sup> that a GATT schedule is an integral part of the GATT 1994 and is thus subject to the rules of treaty interpretation set out in the Vienna Convention is equally applicable in the GATS context. The 1993 Scheduling Guidelines and the W/120, among other documents, therefore form part of the context pursuant to Article 31 of the Vienna Convention, to be considered when interpreting Members' GATS Schedules, and in this case, the specific GATS commitments of the United States.

## **2. With respect to the USITC Document contained in Exhibit AB-65<sup>133</sup>:**

- (a) What is the legal status and value of this document in WTO dispute settlement proceedings?**
- (b) How does this document compare with the US Statement of Administrative Action?**
- (c) Can a statement by the USITC be attributed to, and bind, the United States?**
- (d) With reference to the previous question, please comment on whether Article 4 of the International Law Commission (ILC) Draft Articles on the Responsibility for States of Internationally Wrongful Acts annexed to the UN General Assembly Resolution of 12 December 2001 (A/RES/56/83), is of any relevance. Article 4 provides as follows:**

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<sup>131</sup> 1993 Scheduling Guidelines, para. 1.

<sup>132</sup> Appellate Body Report on *EC – Computer Equipment*, para. 84.

<sup>133</sup> Exhibit AB-65 is the USITC Document submitted by Antigua, see Section III.B.2. of this Report.

**"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.**

**2. An organ includes any person or entity which has the status in accordance with the internal law of the State."**

Antigua

[a]& [c]: The USITC is an agency of the United States federal government, created by Act of Congress<sup>134</sup> and given a number of powers and responsibilities under a number of federal statutes,<sup>135</sup> including the power to make rules and regulations.<sup>136</sup> The USITC Document consists of "explanatory materials" produced by the USITC in connection with the US Schedule. The USTR is also an agency of the United States federal government, created by Act of Congress<sup>137</sup> and given a variety of powers and responsibilities under a number of federal statutes,<sup>138</sup> including the power to make rules and regulations,<sup>139</sup> the power to "utilize, with their consent, the services, personnel, and facilities of other Federal agencies,"<sup>140</sup> the power and responsibility for the conduct of all international trade negotiations, including "any matter considered under the auspices of the World Trade Organization"<sup>141</sup> and, in particular, to "develop (and coordinate the implementation of) United States policies concerning trade in services."<sup>142</sup> By letter dated April 18, 1994, the USTR requested that the USITC take responsibility for compiling and maintaining the US Schedule, and it has done so since then to the present.<sup>143</sup>

As agencies of the United States government with specific responsibilities and powers, actions taken pursuant to those responsibilities and powers *are* acts of the United States. While the USITC Document is an "explanation" and not specifically rulemaking or regulations, nonetheless under United States law it is binding on the government unless contrary to "governing statutes and regulations of the highest or higher dignity (...)." <sup>144</sup> In the case of *Fiorentino v. United States* the United States Court of Claims was confronted with the issue of an internal agency policy manual that contained terms contrary to federal law. In that case, the court noted that the United States "government is not bound by pronouncements purportedly made in its behalf by persons not having actual authority,"<sup>145</sup> but in the case of "informal" publications it is necessary to examine the publication to "see if it was really written to fasten legal consequences on the government."<sup>146</sup> Under this standard, the plain language of the USITC Document demonstrates that it was intended to "facilitate comparison of the US Schedule with foreign schedules (...)" as well as to "[demonstrate] the relationships between sectors found in the US Schedule, sectors identified in the GATT Secretariat's Services Sectoral Classification List, and sectors defined and numbered in the United Nations' Provisional Central Product Classification (CPC) System." As such, it cannot be

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<sup>134</sup> 19 U.S.C. §1330.

<sup>135</sup> See, e.g., 19 U.S.C. §§1331-1339; 19 U.S.C. §2151.

<sup>136</sup> 19 U.S.C. §1335.

<sup>137</sup> 19 U.S.C. §2171(a).

<sup>138</sup> See, e.g., 19 U.S.C. §§ 2171(c)-(f).

<sup>139</sup> 19 U.S.C. §2171(e)(3).

<sup>140</sup> 19 U.S.C. §2171(e)(4).

<sup>141</sup> 19 U.S.C. §2171(c)(1)(C).

<sup>142</sup> 19 U.S.C. §2114c(1)(A).

<sup>143</sup> In the period from 1994 to December 2003, the USITC has maintained, revised, amended or supplemented the US Schedule on at least three occasions.

<sup>144</sup> *Fiorentino v. United States*, 607 F.2d 963, 968 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980).

<sup>145</sup> *Ibid.*, at 967.

<sup>146</sup> *Ibid.*, at 968.

contested that the USITC Document serves as an interpretative aid to the US Schedule and, as an official pronouncement of an agency of the United States government with the power to exercise authority in connection with the United States' relationships with the WTO, the statement has significant value in this proceeding.<sup>147</sup>

Under general principles of international law the USITC Document, made on behalf of the United States by an organ of government expressly delegated powers to act in the area, is binding upon the United States. The USITC has, at the request of the USTR, assumed responsibility for "maintaining" the US Schedule.<sup>148</sup> In the USITC Document, a public document clearly intended to explain the US Schedule to the world at large, the USITC has indicated that sub-sector 10.D of the US Schedule corresponds to CPC category 964. The United States has not disputed the USITC's interpretation until the emergence of this dispute. It is a fundamental rule of international law that a state party to a treaty has a right to designate the organ or organs of its government that are responsible for the carrying out of its responsibilities under that treaty.<sup>149</sup> Some treaties provide for this expressly.<sup>150</sup> Other treaties rely implicitly on this rule.<sup>151</sup> The USTR designated the USITC to (emphasis added): "[I]nitiate an ongoing program to compile and maintain the *official* US Schedule of Services Commitments."<sup>152</sup> This entails: "[T]he compilation of an initial US Schedule reflecting the final services commitments in the Uruguay Round."<sup>153</sup>

In "maintaining," "compiling" and "explaining" the US Schedule, the USITC was acting on behalf of the United States and engaging its responsibility under international law. Therefore, in interpreting the US Schedule in accordance with applicable international law rules, the statements of the USITC as to the meaning of its provisions are of fundamental importance. In addition to the jurisprudence under WTO law,<sup>154</sup> other rules of international law also support this conclusion, particularly: (i) the interpretation of treaties in the light of subsequent practice in the application of the treaty; (ii) the international law principle of estoppel; and (iii) the international law concept of the binding unilateral declaration.

The USITC Document is highly relevant subsequent practice. It is a fundamental rule of international law that, whenever there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties in the application of the treaty has a "high probative value" as to the intention of the parties at the time of its conclusion.<sup>155</sup> The

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<sup>147</sup> See, e.g., Panel Report on *US – Section 301 Trade Act*, para. 7.112, where the panel stated with respect to the United States Statement of Administrative Action "[t]his official statement in the SAA (...) is a major element in our conclusion (...)."

<sup>148</sup> USITC Document, p. vii and footnote 6 and Letter from USTR to USITC (18 April 1994).

<sup>149</sup> McNair, *The Law of Treaties* (Clarendon Press, 1961), at p. 345.

<sup>150</sup> See e.g., Article 25(1) of the 1965 Convention on the Settlement of Investment Dispute between Contracting States and Nationals of Other Contracting States.

<sup>151</sup> Bilateral investment treaties, for example, provide for standards of treatment that will apply to investments embodied, *inter alia*, in "concession contracts" or "investment agreements." Once such contracts or agreements are concluded at any level of government, the state party will be bound to observe the treaty standards as regards the investments embodied in those contracts or agreements (see e.g. *Azurix Corp. v Argentine Republic* (ICSID Case No ARB/01/12); and *Lanco International Inc. v. Argentine Republic* (ICSID Case No ARB/97/6)).

<sup>152</sup> Letter from USTR to USITC (18 April 1994).

<sup>153</sup> *Ibid.*

<sup>154</sup> See the discussion at footnote 147 above.

<sup>155</sup> McNair, *The Law of Treaties* at p. 424. Similarly, Rousseau has commented that:

"Il arrive assez fréquemment que la jurisprudence internationale procède à l'interprétation d'un traité d'après l'application qui en a été faite par les Parties contractantes, cette attitude relevant l'interprétation qui en fait a été effectivement suivie par les auteurs du traité". (*Principes Généraux du Droit International Public* (1944), pp. 704-707.)

Permanent Court of International Justice has applied this rule widely.<sup>156</sup> This rule has also been applied by the International Court of Justice, even prior to the Vienna Convention, in its Advisory Opinion on the *International Status of South-West Africa*,<sup>157</sup> where the Court stated that "[I]nterpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." This conclusion is consistent with Article 31.3(b) of the Vienna Convention which provides that, in interpreting a treaty, account shall be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

This approach should be particularly relevant to the interpretation of a text, such as the schedules established under the GATS, that originates from only one of the contracting parties.<sup>158</sup> Furthermore, special credence should be given to subsequent practice of state organs that, like the USITC in this instance, have been given a specific role in relation to the treaty obligation at issue.<sup>159</sup> In the USITC Document the USITC explained how the US Schedule corresponds to the CPC. No other agency, organ or official of the United States has taken a different view prior to the advent of this proceeding and no WTO Member has objected to the USITC interpretation. This absence of protest indicates that the WTO Members, and Antigua in particular, have acquiesced in the USITC's interpretation.<sup>160</sup>

Further support for the binding character of the USITC interpretation of the US Schedule can be found in the international law principle of estoppel. The doctrine of estoppel has been recognized and applied in many contexts by international courts and tribunals.<sup>161</sup> The United States, acting through the USITC, has consistently stated that sub-sector 10.D of the US Schedule corresponds to CPC category 964. It has done so by means of a public document intended to clarify the United States' obligations under the GATS. The USITC's central role in the compilation and maintenance of

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<sup>156</sup> See, e.g., Advisory Opinion on the *Competence of the International Labour Organization with respect to Agricultural Labour* (1922), Series B, Nos. 2 and 3, pp. 40, 41; Advisory Opinion on the *Interpretation of Article 3(2) of the Treaty of Lausanne* (1925), Series B, No. 12 at p.24; and Advisory Opinion on the *Jurisdiction of the Courts of Danzig* (1928), Series B, No. 15 at p. 18.

<sup>157</sup> I.C.J. Reports, 1950, at pp. 128, 135.

<sup>158</sup> See Appellate Body Report on *EC – Computer Equipment*, para. 93: "In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance."

<sup>159</sup> This approach has been endorsed by the United States Supreme Court, which has stated that: "... the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight" *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-5 (1982), 101 ILR 570, at 576-7, citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), 32 ILR 203, at 207).

<sup>160</sup> See the *Case Concerning the Territorial Dispute (Libya/Chad)*, I.C.J. Reports 1994, Judgment of 13 February 1994, separate opinion of Judge Ajibola, para. 96. McNair has stated that "when one party in some public document ... adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal" (*The Law of Treaties*, at p. 427).

<sup>161</sup> See, e.g., the *Eastern Greenland* case, P.C.I.J. (1933), Series A/B, No. 53 at pp. 22 and 68, where the Permanent Court of International Justice held that Norway could not object to the Danish claim to sovereignty over Greenland because the Norwegian Minister of Foreign Affairs had previously made a statement consistent with the Danish claim. See also the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Reports 1962 at p. 6; *El Salvador-Honduras Land, Island and Maritime Frontier*, I.C.J. Reports 1990 at pp. 92, 118; the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* I.C.J. Reports 1997 at p. 7 (separate opinion of Judge Weeramantry at pp. 88, 115-6); the *Cameroon v. Nigeria (Preliminary Objections)* case, I.C.J. Reports 1998 at pp. 275, 303; *Amco Asia Corporation and Others v. The Republic of Indonesia (Rectification)*, ICSID Case No ARB/81/1 (resubmitted case), 89 ILR 366 at pp. 400-401, where the concept was described as being based on the fundamental requirement of good faith; and general discussion of the doctrine of estoppel at international law by Judge Ajibola in the *Case Concerning the Territorial Dispute (Libya/Chad)*, I.C.J. Reports 1994, Judgment of 13 February 1994, at pp. 77-83.

the "official" US Schedule indicates the intention of the United States that it should be bound by the USITC's statement. Trade in gambling and betting services has in fact taken place from Antigua to the United States consistent with the USITC interpretation. A binding estoppel has therefore arisen under international law to prevent the United States from unilaterally abandoning the public interpretation made by the USITC to the detriment of other WTO Members that may have relied on the interpretation.

It is further submitted that the USITC Document constitutes a unilateral declaration by the United States to the effect that sub-sector 10.D of the US Schedule corresponds to CPC category 964 that is binding on, and engages the responsibility of, the United States. As such, it creates enforceable rights for other WTO Members. In the *Nuclear Tests* cases,<sup>162</sup> the International Court of Justice concluded that statements made by the French government, intended to be relied upon by other states as an expression of future French conduct, constituted an undertaking possessing legal effect. As such, they were binding on, and engaged the responsibility of, France.<sup>163</sup> Similarly, in the present case, the statement of the USITC constitutes a binding unilateral declaration in which other WTO Members are entitled to place confidence.

Antigua concludes that, considering the role of the USITC as the agency of the United States government given the responsibility for the compilation and maintenance of the US Schedule, the consistency of its interpretation,<sup>164</sup> the lack of any inconsistent interpretations or statements from any other agency of the United States government and the absence of any protest from other WTO Members, the USITC Document represents an authoritative interpretation by the United States of the US Schedule in accordance with applicable rules of customary international law and Article 31 of the Vienna Convention. That interpretation is binding on, and engages the responsibility of, the United States. The USITC Document also comprises a binding unilateral declaration upon which other WTO Members are entitled to rely. The United States is estopped, in its relations with WTO Members, from now adopting an interpretation of the US Schedule inconsistent with that of the USITC.

[b]: Antigua assumes the Panel's question refers to the SAA accompanying the Uruguay Round Agreements Act ("URAA").<sup>165</sup> According to the URAA, the SAA constitutes "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application."<sup>166</sup> According to the SAA itself:

... this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements,

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<sup>162</sup> I.C.J. Reports 1974 at pp. 253, 267; paras. 43 and 46 (*Australia v. France*) and pp. 457, 472-473; paras. 46 and 49 (*New Zealand v. France*).

<sup>163</sup> On the subject of binding unilateral declarations at international law, see further: *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* I.C.J. Reports 1986 at pp. 554, 573-4; and *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, I.C.J. Reports 1984, at pp. 392, 418.

<sup>164</sup> The USITC repeated its interpretation in August 1998 when it published a second edition of the USITC Document.

<sup>165</sup> H.R. 5110, H.R. Doc 316, Vol 1, 103d Congress, 2<sup>nd</sup> Session, 656 (1994).

<sup>166</sup> 19 U.S.C. § 3512(d).

the interpretations of those agreements included in this Statement carry particular authority.<sup>167</sup>

Thus the SAA qualifies as binding under international law because it explicitly states it is "an authoritative expression" of the United States' views "for purposes of US international obligations." Such an explicit statement, however, is not a requirement for an interpretation to become binding on a country under international law.<sup>168</sup> In fact, countries will rarely make such explicit statements and even the SAA was primarily produced as a guide to the interpretation of domestic legislation<sup>169</sup> and has mainly, if not exclusively, been used for that purpose by the Appellate Body and various WTO panels.<sup>170</sup> The SAA explicitly states that it was "designed to describe *changes* in US laws and regulations proposed to implement the Uruguay Round agreements." (original emphasis).<sup>171</sup> Before doing that it "briefly summarizes the most important provisions of the [WTO Agreements]."<sup>172</sup>

The concordance of industry classifications contained in the USITC Document, however, is exclusively concerned with the explanation and clarification of the international obligations assumed by the United States in the US Schedule:

To facilitate comparison of the US Schedule with foreign schedules, the USITC has developed a concordance that demonstrates the relationships between sectors found in the US Schedule, sectors identified in [W/120] and sectors defined and numbered in the [CPC].

The concordance developed by the USITC clarifies how the service sectors referenced in [W/120], the CPC system, and the US Schedule correspond.<sup>173</sup>

In this respect Antigua submits that the USITC Document has even higher interpretative value than the SAA.

[d]: The ILC Draft Articles are relevant to the question of whether or not a statement by the USITC can be attributed to, and bind, the United States.<sup>174</sup> They confirm with clarity, in relation to a specific context, the conclusions reached above in relation to questions 2(a) and 2(c). The ILC Draft Articles concern the premises for establishing the responsibility of states for their internationally wrongful acts. They do not concern responsibility for conduct that does not constitute an international wrong. However, although they represent an attempt to codify one branch of the law of state responsibility, many of the principles referred to are of broader application. Chapter II of Part One of the ILC Draft Articles, entitled "Attribution of conduct to a State," which includes Article 4, reflects general principles of international law capable of transposition and application to the present context. Article 4 of the ILC Articles concerns the attributability of the conduct of state organs. It reflects a

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<sup>167</sup> SAA, p. 656.

<sup>168</sup> See, e.g., Advisory Opinion on the International Status of South-West Africa (I.C.J. Reports, 1950, at pp. 128, 135), cited above; and the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Reports 1962 at p. 6.

<sup>169</sup> See also the Panel Report on *US – Section 301 Trade Act*, para. 7.114.

<sup>170</sup> See, e.g., the Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*, the Panel Report on *US – Export Restraints*, and the Panel Report on *US – Section 301 Trade Act*.

<sup>171</sup> SAA, p. 657.

<sup>172</sup> *Ibid.*, p. 656.

<sup>173</sup> USITC Document, p. viii.

<sup>174</sup> The International Law Commission is a subsidiary organ of the United Nations General Assembly. Although the ILC Draft Articles have no binding force *per se* at international law, they do reflect agreement reached by leading publicists from a variety of political and regional backgrounds. Given the ILC's mandate to codify international law, the ILC Draft Articles thus constitute weighty evidence of customary international law.



rule of customary international law<sup>175</sup> that a sovereign state is responsible for the conduct of all of its organs, acting in that capacity, as part of the principle of the unity of the state at international law. The reference to a state organ in Article 4 is extremely wide, extending beyond organs of central government to all kinds of state organ, whatever its functions, position or character and whatever its level in the state hierarchy. The conduct of any state organ is therefore capable of giving rise to state responsibility and to this extent can bind the state to the consequences flowing therefrom. Applying these general statements about the rules of state responsibility and attribution to the present case, the USITC is an organ of the United States tasked with, *inter alia*, the compilation and maintenance of the US Schedule. Its statements of interpretation of the US Schedule therefore represent acts carried out in its capacity as an organ of the United States and in relation to which the United States can be held responsible at international law.<sup>176</sup>

### United States

The document in question is merely an "explanatory" text prepared by an independent agency with no authority to negotiate or interpret agreements on behalf of the United States.<sup>177</sup> The document states that "[t]o facilitate comparison of the US Schedule with foreign schedules, the USITC has developed a concordance...." This does not indicate that USITC was purporting to issue an interpretation.

[a]: Antigua appears to assert that the USITC Document represents "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention.<sup>178</sup> Antigua is mistaken. The Appellate Body has referred to such "subsequent practice" as a "discernible pattern of acts or pronouncements implying an agreement among WTO Members."<sup>179</sup> Clearly explanatory materials prepared unilaterally by only one independent organ of one of the Members do not constitute such a pattern, and therefore have no particular status under the customary international rules of treaty interpretation as reflected in the Vienna Convention.

[b]: The SAA of the URAA was prepared and submitted with the URAA. The function of this SAA is set forth in its preamble, as follows:

This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and

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<sup>175</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 121 ILR 405, at p.432, para. 62, referring to Article 6 of the previous version ILC Draft Articles, now Article 4.

<sup>176</sup> Antigua states that for the purposes of the ILC Draft Articles, even if the USITC were not an organ of the United States, its statements of interpretation of the US Schedule would still be attributable to the United States by virtue of Article 5 of the ILC Draft Articles. Article 5 deals with the conduct of bodies that are not state organs so as to be covered by Article 4, but that are nonetheless authorised to exercise elements of governmental authority. The USITC has been explicitly authorised by the United States federal government to compile and maintain the US Schedule. That role clearly involves the exercise of an element of governmental authority in relation to the United States' WTO obligations. The USITC's statements about the interpretation to be given to the US Schedule were made in that capacity and would thus be attributable to, and bind, the United States by virtue of Article 5 even if the USITC were not an organ of the United States.

<sup>177</sup> The USITC is an independent, quasi-judicial federal agency that administers U.S. trade remedy laws within its mandate and also provides non-binding, independent information and advice to the President and Congress on tariff and trade matters.

<sup>178</sup> The United States infers this from Antigua's reference to the document under the heading of "practice in the application of the treaty." See Section III.B.2 of this Report.

<sup>179</sup> See Appellate Body Report on *Chile – Price Band System*, para. 214.

proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

The SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute. The status granted to the SAA under the US system, however, is only in respect to its interpretive authority *vis-à-vis* the statute.

By contrast, the USITC "explanatory" document prefatory to the copy of the US Schedule of Specific Commitments maintained by the USITC were prepared only "to facilitate comparison" for the reader. It is not, and does not purport to be, in any way binding or authoritative as a matter of US law. Nor has it been approved by Congress. Moreover, the United States notes that facilitating "comparison" with other documents in no way implies identity of meaning between the US schedule and such other documents.

[c]: Statements of the USITC cannot bind the United States with regard to the interpretation of a multilateral treaty. It is important to note that the issue here relates to the interpretation of a term of an annex to the GATS, not the meaning of US law or the legal status of the USITC. Neither the United States (through the USITC or otherwise) nor any other Member may unilaterally adopt multilaterally binding interpretations of a term of the GATS, or any other WTO agreement.

[d]: The United States does not consider that Article 4 of the Draft Articles on the Responsibility for States of Internationally Wrongful Acts has any relevance to the interpretation of the US Schedule, the issue in this dispute. First, the United States notes that it is not a "customary rule of interpretation of international law" within the meaning of Article 3.2 of the DSU. Second, it is inapplicable in any event because USITC is not purporting to interpret the US schedule.

### Canada

[a]: The United States says that the USITC Document has no legal significance since the explicit purpose of the concordance in the document is only to "facilitate comparison of the US Schedule with foreign schedules."<sup>180</sup> This statement is factually incomplete and legally incorrect. The relevant part of the USITC Document reads:

To facilitate comparison of the US Schedule with foreign schedules, the USITC has developed a concordance that demonstrates the relationships between sectors found in the US Schedule, sectors identified in the GATT Secretariat's Services Sectoral Classification List, and sectors defined and numbered in the United Nations' Provisional Central Product Classification (CPC) System. In preparing national schedules, countries were requested to identify and define sectors and sub-sectors in

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<sup>180</sup> See Section III.B.2. of this Report.

accordance with the GATT Secretariat's list [the W/120], which lists sectors and their respective CPC numbers. Accordingly, foreign schedules frequently make explicit references to the CPC numbers. The US Schedule makes no explicit references to CPC numbers, but it corresponds closely with the GATT Secretariat's list.

The concordance developed by the USITC clarifies how the service sectors referenced in the GATT Secretariat's list, the CPC system, and the US Schedule correspond. [...] <sup>181</sup>

Such a statement by the United States federal agency that, "[a]t the request of the Office of the United States Trade Representative[,] [...] assumed responsibility for maintaining and updating, as necessary, the [US Schedule]" <sup>182</sup> has probative value and is a factor confirming other evidence that there is a close correspondence between the United States' specific commitments, the W/120 and the CPC numbers referred to in it.

In *Chile – Taxes on Alcoholic Beverages*, the Panel found that statements by a government against WTO interests are most probative. <sup>183</sup> The USITC Document is such a statement to the extent that, in this dispute, the United States is taking the position that there is no close correspondence between the United States' specific commitments, the W/120 and the CPC numbers referred to in it.

[b]: The conclusion in [a] above is not affected by the fact that, unlike the United States' Statement of Administrative Action, the USITC Document does not specifically state that it represents an "authoritative" expression by the United States government concerning its views regarding the interpretation and application of the Uruguay Round agreements. <sup>184</sup> The probative value of a statement made by an organ of a State (Member) needs to be assessed on a case-by-case basis. This may depend, for instance, on the identity of the organ making the statement, and the nature and circumstances of that statement.

In the present case, the organ of the United States that made pronouncements concerning the structure and content of the US Schedule is not just any agency. It is the United States federal agency that, at the request of the Office of the USTR assumed responsibility for maintaining and updating, as necessary, the US Schedule. <sup>185</sup> The nature of the pronouncements, and the circumstances of their making, are also formal, explicit and unequivocal. In the circumstances of this case, Canada is of the view that the USITC Document can legitimately be considered to be probative of the United States' interpretation of its own Schedule under the GATS. That document (concordance) undermines any argument by the United States that its Schedule has no relation whatsoever with the W/120 and the corresponding CPC numbers, and thus that the latter should be ignored or considered irrelevant when ascertaining the meaning of the specific commitments undertaken by the United States. Rather than supporting the United States' position, the USITC Document confirms other evidence that there is a

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<sup>181</sup> USITC Document, p. viii.

<sup>182</sup> Ibid., p. vii.

<sup>183</sup> Panel Report on *Chile – Alcoholic Beverages*, para. 7.119.

<sup>184</sup> The United States' Statement of Administrative Action states: As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority. Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Volume 1, 103d Congress, 2nd Session, 1994, p. 656. See Panel Report on *US - Exports Restraints*, paras. 8.93-8.100, where interpretive value was given to the United States' Statement of Administrative Action.

<sup>185</sup> USITC Document, p. vii.

close correspondence between the United States' specific commitments, the W/120 and the CPC numbers referred to in it.

[c]: As indicated above, in the circumstances of this case, the pronouncements of the USITC can legitimately be attributed to the United States, and thus be considered to be evidence of the United States' interpretation of its own Schedule under the GATS. It has probative value in that it is a statement of the United States that is contrary to the position taken by the United States in the present case. It is one credible element among others that undermines, and refutes, the position advocated by the United States in this case. It is a unilateral statement of the United States made spontaneously, and it can be used for the "purpose of throwing light on a disputed question of fact," namely, the intention of the United States to adopt and maintain a Schedule that corresponds closely with the W/120 and the corresponding CPC numbers.<sup>186</sup>

[d]: Canada notes that the attribution, in this case, of the USITC Document to the United States is in line with Article 4 of the International Law Commission's Articles on State Responsibility,<sup>187</sup> which expresses the well-known and general international law principle of the unity of the State at international law.<sup>188</sup> Another expression of that principle of the unity of the State at international law can be found in Article 27 of the Vienna Convention. That principle also finds its expression in the GATS itself, in that the measures of a Member that are subject to the GATS are those taken by central, regional or local governments and authorities, as well as those taken by non-governmental bodies in the exercise of powers delegated by such governments or authorities.<sup>189</sup> Any measure taken by such governments or authorities, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, is covered.<sup>190</sup> Just as a measure of the USITC can be a measure for which the United States is responsible under the GATS, a pronouncement by the USITC, such as in the document containing the concordance, may be attributed to the United States when considering the obligations of the United States under the GATS.

### European Communities

[a]: The document of the USITC contained in Exhibit AB-65 is a document from a WTO Member – the United States – providing indications as to the content of its Schedules of specific commitments, compared to the W/120 and the CPC. The attributability of this document to the United States as a WTO Member is beyond doubt as discussed below, in the reply to question 2(c). The USITC Document contained has to be seen together with other documents issued by different US authorities during and after the conclusion of the Uruguay Round and addressing the issue of GATS Schedules. These documents include, in the first place, the various versions of the US Schedule tabled by the United States in the final phase of the Uruguay Round, referred to above in the reply to question 1. They further include other documents referred to by the European Communities at the Third Party session of the Panel's first substantive meeting with the parties. These are the 1998 version of the

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<sup>186</sup> See *Anglo-Iranian Oil Co. Case*, 1952 ICJ 93, at p. 107.

<sup>187</sup> The Draft Articles on Responsibility of States for Internationally Wrongful Acts were adopted by the International Law Commission on 9 August 2001. The General Assembly of the United Nations has taken note of the Draft Articles adopted by the International Law Commission: Resolution of the General Assembly of the UN, A/RES/56/83, Responsibility of States for internationally wrongful acts, adopted on 12 December 2001.

<sup>188</sup> For instances where the Articles on State Responsibility have been referred to for additional interpretive guidance, see: Appellate Body Report on *US – Line Pipe*, paras. 259-262; Appellate Body Report on *US – Cotton Yarn*, para. 120; *US – FSC (Article 22.6 – US)*, paras. 5.58-5.60; *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44. See also In the Matter of an Arbitration under Chapter Eleven of the North American Free Trade Agreement Between ADF Group Inc. and United States of America, ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003, Judge Florentino P. Feliciano (President), para. 166, where it was determined that Article 4 of the Articles on State Responsibility reflects an established rule of customary international law.

<sup>189</sup> GATS Article I:3(a).

<sup>190</sup> GATS Article XXVIII(a).

document contained in Exhibit AB-65 and two annual USITC reports on trends in US service trade for 1996 and 2003.<sup>191</sup>

The 1998 version of the USITC Document reproduces the table of concordance already contained in such exhibit.<sup>192</sup> The 2003 Annual Report, when mentioning the classification issues arising in the area of utility services, considers that<sup>193</sup>

[i]ndustry classification issues present a central challenge to negotiations on utility services, principally because utilities are poorly defined in the classification system used by WTO members in negotiating commitments under the Uruguay Round. This classification system is based on the UN Provisional Central Product Classification (Provisional CPC), a product and service classification intended to provide a general framework for international comparison of data. Because the Provisional CPC was developed during the 1980s and published in 1991, it does not reflect the major changes in the structure of the utility industries brought about by the privatization and regulatory reform programs that proliferated during the 1990s. As a result, the CPC does not contain categories that adequately describe markets where production, transmission, distribution, and commercialization activities have been unbundled into discrete functions that are open to private participation and, to some degree, competition.<sup>38</sup>

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<sup>38</sup> The Provisional CPC was updated in 1998 with the publication of CPC Version 1, which does reflect some of the industry changes more accurately. However, because GATS commitments are based upon the Provisional CPC, shifting to Version 1 could alter the legal standing of existing commitments.

For its part, the 1996 Annual Report refers to W/120 "[f]or a complete list of service industries addressed during the Uruguay Round."<sup>194</sup>

It is noteworthy that these statements are absolutely unqualified and do not distinguish either between the United States and other Members, or between WTO Members that included express references to the CPC in their Schedules and those that did not. In other words, the United States itself does not seem to see a fundamental difference between Members' Schedules that include express references to the CPC and those not including such references. Taken together, these documents show a consistent position, on the part of the United States, that GATS specific commitments, including its own commitments for recreational services, follow the CPC categories but for express departures.

As to the legal status of the USITC Document contained in Exhibit AB-65, in the EC view it constitutes practice of the United States in the application of the *WTO Agreement* subsequent to its conclusion. As such, it is a relevant instrument of interpretation of the US WTO obligations, within the meaning of Article 31.3(b) of the Vienna Convention. As noted in the EC Third party submission

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<sup>191</sup> USITC, *U.S. Trade Shifts in Selected Industries: Services*, Investigation No. 332-345, June 1996, Publication No. 2969 (available at the Internet address: <http://www.usitc.gov/wais/reports/arc/w2969.htm>); USITC, *Recent Trends in U.S. Services Trade*, 2003 Annual Report, Investigation No. 332-345, May 2003, Publication No. 3599 (available at the Internet address: <ftp://ftp.usitc.gov/pub/reports/studies/PUB3599.PDF>).

<sup>192</sup> Compare p. xxv of Exhibit AB-65 and p. xxiv of the 1998 version.

<sup>193</sup> USITC, *Recent Trends in U.S. Services Trade*, 2003 Annual Report, Investigation No. 332-345, May 2003, Publication No. 3599, p. 12-9 (emphasis added).

<sup>194</sup> USITC, *U.S. Trade Shifts in Selected Industries: Services*, Investigation No. 332-345, June 1996, Publication No. 2969, p. 4-4, footnote 14.

and Oral statement, this document merely confirms what already results from the 1993 Scheduling Guidelines and the W/120, as well as from the cover note to the US draft final schedule.

The European Communities is aware of the objection raised by the United States as to the value of "unilateral practice" of one party to a treaty.<sup>195</sup> The relevance of unilateral practice has to be evaluated in the light of the obligation to be implemented. In particular, implementation of a Schedule of specific commitments is incumbent upon the WTO Member concerned. Therefore, the practice of that Member is particularly relevant to interpret that part of the WTO Agreement. The "implementing practice" of other Members in respect of such Schedule appears to be limited to either acceptance of or objections to the way in which the Member concerned applies its Schedule. To the best of the EC knowledge no WTO Member has objected to the concordance provided by the USITC in its document. Also, in its Report in *EC – Computer Equipment* the Appellate Body referred to practice of one Member, the European Communities, in order to review the EC Schedule.<sup>196</sup> The documents issued by US authorities after the Uruguay Round, and the lack of objections, by other WTO Members, to the position that GATS commitments, and specifically US commitments for sub-sector 10.D, are based on the CPC but for express departures, constitute a "discernible pattern" of a concordant sequence of acts implying an agreement of the various WTO Members on this interpretative issue.<sup>197</sup>

[b]: The relevance for interpretation of treaty obligations in accordance with the Vienna Convention of each instrument must be evaluated on its own merits, irrespective of the status and value of other possible documents and instruments.

The SAA is one document in which the United States indicated what it believes to be the interpretation of the Uruguay Round texts and the obligations of the United States. As noted by the Panel in *US – Section 301 Trade Act*, the SAA provides, in its own terms,<sup>198</sup> "[...] this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law." Based on this, in the words of the Panel, "[T]he SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely."<sup>199</sup> Of course, the fact that the SAA is a document in which the US Administration position was set out does not exclude that other documents also express positions attributable to the United States. The US authorities are subject to the international customary rules on attributability of acts to a State just as authorities of all other Members are.

The European Communities also notes that the SAA contains no general interpretation of the US Specific commitments. Nor was the US obliged to do so, since paragraph 16 of the 1993 Scheduling Guidelines clarifies that in the absence of express departures, reference should be made to the CPC codes. Instead, the SAA refers to a specific instance in which the United States decided to depart from the CPC system:

[s]ome commitments made in the financial services sector, including those made by the United States, have been scheduled according to the Understanding on Commitments in Financial Services, which formed part of the Uruguay Round

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<sup>195</sup> See Section III.B.2. of this Report.

<sup>196</sup> Appellate Body Report on *EC – Computer Equipment*, para. 93.

<sup>197</sup> Appellate Body Report on *Chile – Price Band System*, paras. 213-214, quoting Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 11.

<sup>198</sup> Panel Report on *US – Section 301 Trade Act*, para. 7.110; see also Panel Report on *US – Export Restraints*, para. 2.4 and Panel Report on *US – Section 129(c)(1) URAA*, para. 6.36.

<sup>199</sup> Panel Report on *US – Section 301 Trade Act*, para. 7.111.

package. The Understanding describes certain commitments that differ from, and in some cases are more detailed than, those found in the GATS.<sup>200</sup>

This specific indication in the SAA confirms that when so needed, the United States was able to indicate a departure from the general CPC system. No other such departure is indicated in the Statement of Administrative Action. Given that the SAA contains no general explanation of the scope of the US Schedules, the US authorities must presumably have considered it useful to provide such explanation elsewhere, also for the benefit of business operators. This was done, *inter alia*, in the USITC Document. Providing such clarifications is indeed one of the missions of the USITC<sup>201</sup> and the information contained in the USITC Document is presumably correct – witness the fact that the same concordance table was reproduced in the 1998 version of Exhibit AB-65. Otherwise, one might infer that the USITC has not fulfilled the task it was entrusted with by the USTR (see reply to question 2(d) below). Of course, the USITC Document itself does not "create" or "determine" the scope of the US obligations under the US Schedule (nor does, for that matter, the SAA). A WTO Member does not have a right to determine unilaterally and subsequently the content of its international obligations. Rather, the USITC Document confirms what can already be gleaned from the 1993 Scheduling Guidelines and what was stated by the United States when it submitted its Draft Final Schedule, also containing an offer for sub-sector 10.D.

[c]: Yes. It should be noted that the "statement" to which the Panel presumably refers – that is, the concordance between the US Schedule, the W/120 and the CPC is not a incidental or spontaneous one. It is one rendered by the USITC at the request of the USTR, in turn acting under legal authority delegated to it by the US President under Section 332 of the Tariff Act of 1930.<sup>202</sup> The position expressed by the USITC in Exhibit AB-65 is also not an isolated one. As already noted above in reply to question 2(a), the USITC has, for several purposes, taken the general position that GATS commitments were negotiated on the basis of the CPC. As to the legal value of the USITC Document, such document confirms the position consistently taken by the United States as to the way in which its Schedule is structured and the scope of the US specific commitments. It does not create a legal obligation to interpret the US Schedule consistently with the 1993 Scheduling Guidelines and the W/120 (and thus the CPC). That obligation already flows from the value of the 1993 Scheduling Guidelines and W/120 as interpretative tools within the meaning of the Vienna Convention. It also results from the express indication, in the explanatory note to the drafts and final version of the US Schedule, that "Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)."<sup>203</sup> This matter is further addressed below in reply to question 2(d).

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<sup>200</sup> Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Congress, 2nd Session, p. 976 (1994).

<sup>201</sup> See, e.g., the USITC strategic plan (available at the Internet address: <http://www.usitc.gov/webabout.htm>), p. 21, whereby it is stated:

Stable mission. The Commission maintains an extensive repository of trade data and trade-related expertise and provides information services relating to U.S. international trade and competitiveness.

<sup>202</sup> 19 U.S.C. 1332(g) (the provisions governing the organization and functioning of the USITC are available at the Internet address: <http://www4.law.cornell.edu/uscode/19/ch4stIIpII.html>).

<sup>203</sup> *Communication from the United States of America, Draft Final Schedule of the United States of America to the members of the Group of Negotiations on Services*, MTN.GNS/W/112/Rev.3, 7 December 1993; *Communication from the United States of America, Revised Conditional Offer of the United States of America concerning initial commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993; *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993.

[d]: State responsibility is not the only context in which the issue of attributability of an act to a State (or other subject of public international law) arises. For example, the same issue arises – as an implied threshold question – in treaty-making. Thus, it is submitted that Article 4 of the *Draft Articles on the Responsibility for States of Internationally Wrongful Acts*<sup>204</sup> is relevant in that it codifies the customary law principle of attribution, concerning attributability of actions to a State generally – not just with a view to establishing international responsibility. In fact, the act of the USITC is not a wrongful act. Chapter II of Part I of the International Law Commission Articles on the Responsibility of States defines the circumstances in which a certain conduct is attributable to the State, the latter being an essential requirement for the establishment of international responsibility of a State. In particular Article 4, on the basis of the principle of the unity of the State, lays down the rule that the conduct of an organ of a State is attributable to that State. As the International Law Commission points out in its commentary on the Articles on State Responsibility the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognised in international judicial decisions."<sup>205</sup> Furthermore, the International Court of Justice has recently confirmed the above rule as well as its customary character. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* the Court held that "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility ...".<sup>206</sup>

As the International Law Commission explains, the term "state organ" is to be understood in the most general sense.<sup>207</sup> It extends to organs from any branch of the State, exercising legislative, executive, judicial *or any other functions*. It should be noted that it has been held that these functions might involve the giving of administrative guidance to the private sector.<sup>208</sup> Article 5 of the International Law Commission Articles on the Responsibility of States goes further to attribute to the State the conduct of a person or entity which is not a State organ in the sense of Article 4, but which is nevertheless authorised by the law of that State to exercise governmental authority. As the ILC explains in its commentary to Article 5, the generic term 'entity' covers a wide variety of bodies which may include public corporations, semi-public entities, *public agencies* of various kinds, "provided that the entity in question is empowered by the law of the State to exercise functions of a public character normally exercised by State organs".<sup>209</sup>

The members of the USITC are appointed by the President, with the consent of the Senate.<sup>210</sup> Furthermore, the Commission acts at the request of the USTR, being obliged to carry out investigations and reports as requested by the President or the Congress.<sup>211</sup> The USITC is clearly entrusted with special powers, which are normally exercised by State organs. For example, it is empowered to "prosecute any inquiry necessary to its duties in any part of the United States or in any foreign country".<sup>212</sup> Equally, the USITC has the authority to obtain information by, among others,

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<sup>204</sup> The text of the Draft Articles is reflected in a resolution adopted on 12 December 2001 by the UN General Assembly (A/RES/56/83).

<sup>205</sup> *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2; J. Crawford, *The International Law Commission's Articles on State Responsibility- Introduction, Text and Commentaries*, Cambridge, Cambridge University Press, 2002, commentary to Article 4 at p. 94, para. 3 and footnote 108.

<sup>206</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at p. 87, para. 62, referring to then Draft Article 6, now embodied in Article 4.

<sup>207</sup> *The International Law Commission's Articles on State Responsibility*, p. 85, para. 6.

<sup>208</sup> Panel Report on *Japan – Semi-conductors*, BISD 35S/116; Panel Report in *Japan – Film*.

<sup>209</sup> *The International Law Commission's Articles on State Responsibility*, p. 100, para. 2.

<sup>210</sup> 19 U.S.C. 1330 (a).

<sup>211</sup> 19 U.S.C. 1332 (g).

<sup>212</sup> 19 U.S.C. 1331 (d).



having access to any documents pertaining in its investigations, summoning witnesses, and requesting any person to provide it with the required information.<sup>213</sup> The letter by which the USTR requested the USITC to undertake responsibility for maintaining the US Schedule of specific commitments<sup>214</sup> is absolutely clear in this respect:

[u]nder the GATS, the US Government is obligated to develop and maintain a US Schedule of Services Commitments. I believe that the maintenance of the US Schedule and list is a task that is most appropriately performed by the US International Trade Commission. The Commission has significant experience in maintaining our GATT Schedule XX, reflecting US tariff concessions in the goods area. I therefore request, pursuant to authority delegated by the President under Section 332 of the Tariff Act of 1930, that the Commission initiate an ongoing program to compile and maintain the official US Schedule of Services Commitments.

Furthermore, domestic law, though relevant, is however not decisive in determining what constitutes a State organ. Otherwise, a State would be in a position to escape responsibility for the conduct of its own organs, acting in that capacity, simply by denying them that status under its own law. Therefore, as the International Law Commission points out, certain institutions performing public functions and exercising public powers (e.g. the police) are to be considered State organs even if they are regarded in internal law as autonomous and independent of the executive government.<sup>215</sup> Specifically, the fact that the USITC is termed as an "independent agency" has no impact on the attributability of its actions to the United States. What is relevant is of course not the formal qualification of the body concerned, but the activity at issue in a particular case. Indeed, several actions of the USITC have been reviewed by panels and the Appellate Body in the past – for example, safeguard investigations and injury investigations in anti-dumping proceedings.<sup>216</sup>

### Mexico

[a]: At the very least, that document constitutes relevant evidence on the USITC's position and practice with respect to the definition and scope of the United States' GATS commitments. Such evidence must be assessed by the Panel when applying Articles 31 and 32 of the Vienna Convention as part of its analysis of Antigua and Barbuda's claims.

[b]: Mexico notes that Exhibit AB-65 and the SAA do not appear to have been published for the same purposes. While the purpose of Exhibit AB-65 appears to be to provide a comprehensive explanation of the US Schedule of Specific Commitments, the SAA constitutes an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the *Uruguay Round Agreements Act*] in any judicial proceeding in which a question arises concerning such interpretation or application."<sup>217</sup>

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<sup>213</sup> 19 U.S.C. 1333.

<sup>214</sup> Letter from M. Kantor, United States Trade Representative, to D. E. Newquist, Chairman of the U.S. International Trade Commission, 18 April 1994 (emphasis added).

<sup>215</sup> *The International Law Commission's Articles on State Responsibility*, p. 92, para. 6 and p. 98, para. 11.

<sup>216</sup> See, e.g., for safeguards, Appellate Body Report on *US – Steel Safeguards*; for anti-dumping, e.g. Appellate Body Report on *US – Hot-Rolled Steel*. The acts of other independent agencies of the United States have also been reviewed by international jurisdictions: for example, actions of the Environmental Protection Agency (EPA) (e.g. Appellate Body Report, *US – Gasoline*, or of the Central Intelligence Agency (CIA) *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14). Both entities share with the USITC the qualification of "independent agencies" (see Official US Executive Branch Web Sites, with Internet address <http://lcweb.loc.gov/global/executive/fed.html>, visited on 17 December 2003).

<sup>217</sup> Panel Report on *US – Export Restraints*, para. 2.3.

[c]: In the context of this dispute, the issue is whether the statement by the USITC can be used to interpret the US Schedule of Specific Commitments within the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention. See Mexico's response to question 2(a) above.

[d]: See the response to the previous question.

**3. Antigua and Barbuda as well as the European Communities (Exhibit AB-74 and paragraph 15 of the European Communities' oral statement to the first meeting of the Panel with the parties) have referred to the cover note of the Draft Final Schedule of the United States of America concerning Initial Commitments, dated 7 December 1993, which contains a paragraph that reads as follows:**

**"Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)."**

- (a) In which revision of the Uruguay Round Draft (Final) Schedule of the United States was that cover note omitted?
- (b) What is the legal status and value of that cover note for the interpretation of the US GATS Schedule?

Antigua

[a]: To Antigua's knowledge document MTN.GNS/W/112/Rev.3 is the final schedule submitted by the United States and the sentence from the cover note was never omitted. During the first substantive meeting with the Panel the United States pointed out that this cover note was not part of the actual schedule as annexed to the GATS. This is not because it was omitted or withdrawn by the United States but simply because such a cover note is not formally part of a GATS schedule as it is attached to the GATS by Article XX:3.

[b]: The cover note is part of the preparatory work of the US Schedule. Article 32 of the Vienna Convention provides that such a document may be used as a supplementary means of interpretation to confirm the meaning resulting from the application of Article 31 of the Vienna Convention. As mentioned above the cover note also confirms the acceptance by the United States of the scheduling method set out in the 1993 Scheduling Guidelines and W/120, thus confirming the status of these two documents as instruments accepted by all parties (per Article 31(2)(b) of the Vienna Convention).

United States

[a]: A note substantially similar to the quoted text appeared in documents MTN.GNS/W/112/Rev.2 and MTN.GNS/W/112/Rev.3.<sup>218</sup> It does not appear in the final document.

[b]: These negotiating history documents are "preparatory work" within the meaning of Article 32 of the Vienna Convention. The value of these notes is minimal, since at most they only confirm what the United States has already stated – that it generally followed the W/120 structure in its schedule of specific commitments. The Panel should distinguish, however, between a Member's use of W/120 as a basis for scheduling, and the inscription of references to the CPC to further describe its

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<sup>218</sup> See Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, 7 December 1993, MTN.GNS/W/112/Rev.3, para. 5; Communication from the United States of America, *Revised Conditional Offer of the United States of America Concerning Initial Commitments*, 7 December 1993, MTN.GNS/W/112/Rev.2, p. 1. The word "revised" in the text quoted by the Panel does not appear in the cited materials.

commitments. Like other Members, the United States was free to choose to inscribe or not inscribe CPC references to further describe its commitments. The United States chose not to do so.

Canada

[a]: The *Draft Final Schedule of the United States of America Concerning Initial Commitments* ("Draft Final Schedule"), dated 7 December 1993, contains the following cover note:

Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991) [the W/120].<sup>219</sup>

The Draft Final Schedule is the fourth and, as its name indicates, final, draft schedule circulated by the United States in the context of the market access negotiations under the GATS. The third draft schedule circulated by the United States contains a cover note identical to the cover note in the Draft Final Schedule.<sup>220</sup> Such a cover note does not appear in the first and second draft schedules circulated by the United States.<sup>221</sup>

[b]: The cover note contained in the last two draft schedules circulated by the United States forms part of the circumstances of the conclusion of the market access negotiations under the GATS. As such, it qualifies as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention. Pursuant to that provision, the Panel may have recourse to such a supplementary means of interpretation in order, *e.g.*, to confirm the meaning of the United States' specific commitments resulting from the application of the general rule of interpretation set out in Article 31 of the Vienna Convention, or to determine that meaning when the interpretation according to Article 31 leaves it ambiguous or obscure. Canada has already demonstrated in its submission that the only reasonable conclusion, when ascertaining the common intention of the Members with respect to the United States' specific commitments, is that where the US Schedule mirrors the W/120, without any clear and explicit departure from it and the corresponding CPC numbers, the specific commitments at issue are to be interpreted in the light of the W/120 and the CPC numbers associated with it. The cover note contained in the last two draft schedules of the United States is yet another factor confirming, or clarifying, that this is the correct meaning to be given to the specific commitments of the United States. The Panel is justified in having recourse to that additional element under Article 32 of the Vienna Convention.

While the cover note does not appear in all four draft schedules circulated by the United States, the fact that it is contained in the last two is significant and gives it particular probative value. It clearly indicates that as the negotiations progressed and were finalized, the understanding of the Members with respect to the United States' specific commitments was, as Canada has already argued, that the United States followed the W/120 (and by implication the corresponding CPC numbers), except where specifically noted.<sup>222</sup>

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<sup>219</sup> Communication from the United States of America, *Draft Final Schedule of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.3, 7 December 1993, para. 5.

<sup>220</sup> Communication from the United States of America, *Revised Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.2, 1 October 1993, para. 4.

<sup>221</sup> Communication from the United States of America, *Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112, 13 November 1990. Communication from the United States of America, *Revised Conditional Offer of the United States of America Concerning Initial Commitments*, MTN.GNS/W/112/Rev.1, 21 January 1992.

<sup>222</sup> *Ibid.* Canada notes that the mere fact that the first two draft schedules do not specify explicitly that they are based on the W/120 does not necessarily mean that that was not the case. The specification, or clarification, included in the last two draft schedules tends to show otherwise.

Canada recalls that in *EC – Computer Equipment*, the Panel, when interpreting the European Communities' Schedule under the GATT, did not consider the *Harmonized System* and its *Explanatory Notes*. The Appellate Body reacted as follows:

We are puzzled by the fact that the Panel, in its effort to interpret the terms of [the] Schedule [...], did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the Harmonized System's nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. [...] We believe [...] that a proper interpretation of [the] Schedule [...] should have included an examination of the *Harmonized System* and its *Explanatory Notes*.<sup>223</sup>

The inclusion of the cover note in the last two draft schedules circulated by the United States constitutes evidence that through to the end of the market access negotiations between the United States and other Uruguay Round participants, these negotiations were held on the basis of the W/120's nomenclature. In other words, it constitutes evidence of what the common intention of the Uruguay Round participants was (and still is) with respect to the United States' specific commitments.<sup>224</sup> That common intention must now be respected. It cannot be changed *a posteriori*, as suggested by the United States, by relying almost exclusively on definitions of dictionaries that result in reading the United States' specific commitments out of their context and without regard to the object and purpose of the GATS and the *WTO Agreement*.<sup>225</sup>

#### European Communities

[a]: In addition to the documents referred to by the EC in its oral statement, there was another revised final schedule of commitments of the United States, circulated as MTN.GNS/W/112/Rev.4 on 15 December 1993.<sup>226</sup> This was only distributed in paper format in the very last weeks of the negotiations, when the United States decided to withdraw some of its proposed commitments (e.g. in the maritime transport sector). Such document only includes a few amendments related to some entries in the US Schedule, but does not modify the cover note to the previous final draft (MTN.GNS/W/112/Rev3). On the contrary, it contains the very same statement as quoted by the Panel from the previous revision. It thus does not change in any way the conclusion on the issue at stake. The only further activity was a process of "technical verification of schedules", which did not modify at all the scope of the results of negotiations.<sup>227</sup> Thus, never before the end of the negotiations

<sup>223</sup> Appellate Body Report on *EC – Computer Equipment*, para. 89.

<sup>224</sup> Appellate Body Report on *EC – Computer Equipment*, paras. 84 and 109.

<sup>225</sup> In any case, Canada agrees with the European Communities that the definitions of dictionaries referred to by the United States do not support the conclusion that the specific commitments taken by the United States under sub-sector 10.D – Other Recreational Services (except sporting) exclude as such gambling and betting services. One may refer to the Preamble of the GATS for guidance on the object and purpose of that treaty. The Preamble of the GATS emphasizes, e.g., the wish of the Members to "establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade *under conditions of transparency* [...]" [emphasis added] The United States' approach to the interpretation of its Schedule, which leaves its specific commitments ambiguous and unclear, is the antithesis of this objective expressed by the Members in the Preamble of the GATS.

<sup>226</sup> *Communication from the United States, Schedule of the United States Concerning Initial Commitments on Trade in Services*, MTN.GNS/W/112/Rev.4, 15 December 1993.

<sup>227</sup> See GATT/AIR/3544, 15 January 1994, para. 1:

[i]l est signalé que, les négociations sur les services étant terminées, l'objet de ce processus est de confirmer l'exactitude des listes sur le plan technique et non d'en modifier la teneur.

did the United States contradict its position that the scope of its commitments is based on the 1991 Sectoral Classification W/120 and the CPC.<sup>228</sup>

[b]: The legal status and value of the cover note is the same as that of its attachment. It is a preparatory document where the United States explained the scope of its final offer and thus of the obligations it was offering to undertake. As such, it is part of the supplementary means of interpretation of the US Schedules of specific commitments. It is the document which the other [then] GATT contracting parties had available in order to evaluate the US services final offer. If the United States had meant, after the issuance of documents. MTN.GNS/W/112/Rev.3 and MTN.GNS/W/112/Rev.4, to depart from the 1991 Sectoral Classification and thus from the corresponding CPC categories, good faith in the conduct of international negotiations would have required it to warn the other contracting parties of its changed position before the end of the negotiations. Since the United States failed to do so, its Schedules, as finally adopted, are to be read in the light of W/120 and the corresponding CPC numbers since their entry into force.

#### Mexico

[a]: To Mexico's knowledge, the cover note appears in the Final Draft of the US Schedule of Specific Commitments (Communication from the United States of America, *Draft Final Schedule of the United States of America to the Members of the Group on Negotiations on Services*, MTN.GNS/W/112/Rev.3, December 1993) and in the introduction to the US Revised Conditional Offer tabled during the Uruguay Round negotiations (Communication from the United States of America, Revised Conditional Offer of the United States of America Concerning Initial Commitments, MTN.GNS/W/112/Rev.2, 1 October 1993).

[b]: The United States Draft Final Schedule, which contains the cover note, constitutes a part of the preparatory work of the GATS and the WTO Agreement. At the very least, these documents thus qualify as "supplementary means of interpretation" pursuant to Article 32 of the Vienna Convention.

#### For Antigua and Barbuda:

#### **4. What is the legal status and value of the other Members' Schedules in interpreting the US GATS Schedule?**

##### Antigua

Article XX:3 of the GATS provides that schedules form an integral part of the Agreement. Consequently, the other Members' GATS schedules provide "context" for the interpretation of the US Schedule as per Article 31(2)(a) of the Vienna Convention. In paragraphs 41-60 of its Third Party Submission the European Communities has shown that an interpretation of the US Schedule in the context of other Member's schedules confirms the conclusion that the United States has made full modes 1 and 2 market access and national treatment commitments with regard to gambling and betting services.

##### Canada

It is striking that when addressing the context of the specific commitments at issue in this case, the United States, instead of referring to its own Schedule, e.g. its structure and the fact that it generally mirrors the W/120, seeks to rely on a few entries in a very limited and selective number of

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<sup>228</sup> As it was clear to all (future) WTO Members that the United States had, until the finalization of its Schedule, followed the 1993 Scheduling Guidelines and the 1991 Sectoral classification and CPC codes but for express departures, there was no need to repeat in doc. GATS/SC/90 what already flows, for all Members, from para. 16 of the 1993 Scheduling Guidelines.

other Members' Schedules in order to interpret its own Schedule. As the European Communities has shown, these entries referred to by the United States do not clearly support the United States' position. In any case, what a very few Members out of a hundred and forty-six<sup>229</sup> may have done in their Schedules with respect to specific services is not relevant for purposes of determining what the United States has done in its own Schedule. Canada has made clear that a Member may, in certain cases, have departed from the W/120 and the corresponding CPC numbers associated with it. No Member was obliged to schedule specific commitments in accordance with the W/120 and the corresponding CPC numbers. The fact that a few Members may have scheduled specific commitments on gambling and betting services differently than the United States simply reflects that fact. The task of a panel is to look at what the United States has done in its Schedule, not at what a few other Members may have done.

**For the United States:**

- 5. Which classification system, if any, did the United States follow in establishing its GATS schedule of specific commitments? If the United States has followed a specific classification system, could the United States provide the Panel with a table of concordance between that system and W/120 for the entire schedule? In the absence of an explicit reference to the CPC in the US Schedule, what is the definitional framework within which the US commitment in the first column of its Schedule should be interpreted?**

**United States**

Subject to some changes (e.g., "except sporting"), the United States generally followed the W/120 *structure* in its schedule of specific commitments. However, the United States did not refer to the CPC or any other particular nomenclature to describe the terms of the US Schedule, preferring instead that those terms be interpreted according to their ordinary meaning, in their context and in light of the object and purpose of the GATS. Those rules, reflected in Articles 31 and 32 of the Vienna Convention, provide the definitional framework within which the description of the US commitment in the first column of its Schedule should be interpreted. Because the United States did not agree to any special meanings for the terms in its schedule, such as by agreeing to any particular nomenclature, there is no additional document that could be used as the basis for a concordance.

- 6. What is the relevance of the US industry classification system for interpreting the US GATS schedule? How are gambling and betting services classified in that system?**

**United States**

The North American Industry Classification System (NAICS 2002) is intended for classifying types of establishments for statistical purposes. It is the result of trilateral negotiations among three WTO Members (Canada, Mexico, and the United States). Accordingly it is not negotiating history for the US GATS Schedule, but does provide evidence that there are internationally accepted, alternative ways to classify services other than the CPC. The NAICS supports the US view that gambling is not part of "other recreational services (except sporting)." NAICS 2002 includes the two-digit heading 71, "Arts, Entertainment, and Recreation." Within that heading, three-digit heading 713, "Amusement, Gambling, and Recreation Industries," includes four-digit heading 7132 "Gambling Industries." Significantly, "Gambling Industries" is a stand-alone heading, and is not part of the separate four-digit heading 7139, covering "Other Amusement and Recreation Industries" (7139). "Internet game sites" falls under separate NAICS 2002 heading 516110, "Internet Publishing and

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<sup>229</sup> As of 4 April 2003.

Broadcasting." Definitions of these categories may be found on the US Census Bureau website "2002 NAICS Codes and Titles" by clicking on the hyperlinks for individual codes.<sup>230</sup>

### Antigua

At the time of the Uruguay Round negotiations the United States used the Standard Industrial Classification system (the "SIC"), introduced in 1987. Although this classification has since been reorganised (in 1997), to the current North American Industry Classification System (the "NAICS"), only the SIC system could possibly be relevant for any examination of United States commitments agreed in the Uruguay Round as the NAICS postdates the Uruguay Round Agreements. The SIC contained a broad category, "79 – Amusement and Recreation Services."<sup>231</sup> This in turn contained a subcategory "7999 - Amusement and Recreation Services [not elsewhere classified]." This last subcategory included "casinos" and "lottery, bingo, bookie and other gaming operations." Thus, under the SIC gambling and betting services were classified in *precisely the same way* as they are under the CPC and W/120 in a "residual" subcategory of a general category for recreational services.

#### **7. Could the United States provide a breakdown of the services sub-sectors that are covered under:**

- (a) Sub-sector 10.D of the US Schedule, entitled *Other recreational services (except sporting)?*
- (b) Sub-sector 10.A of the US Schedule, entitled *Entertainment services?*

### United States

No such breakdown was provided by the GATS negotiators in regard to the US Schedule, therefore it is not possible to provide an *a priori* list of the contents of 10.A and 10.D based on the text of the GATS and its annexes. The meaning of each of these sub-sectors must be discerned in the same manner as that of any other term of a treaty – through application of the customary rules of treaty interpretation. Even a Member that referred to the CPC in its schedule would be unable to provide a complete breakdown of 10.A and 10.D, inasmuch as the CPC categories are no less subject to interpretation than the W/120 headings. (Indeed, this observation is implicit in the Panel's question regarding the meaning of "gambling and betting services" (question 13)).

Subject to the foregoing observations, the United States believes that an interpreter could find, consistent with customary rules of treaty interpretation, that: (i) "Other recreational services (except sporting)" (10.D) includes services that fall squarely within the plain meaning of "recreation" and are distinguishable from either "sporting" or "entertainment." Such activities could include, *inter alia*, the operation of such recreational facilities as marinas, beaches, and parks, as well as the organization and/or facilitation of non-sporting recreational activities; and (ii) "Entertainment services" (10.A) includes services that fall squarely within the plain meaning of "entertainment" and are distinguishable from either "sporting" or "recreation." Such activities could include, *inter alia*, services consisting of the operation of entertainment facilities, such as theaters, dance halls, music halls, and other performing arts venues; and the organization and/or facilitation of such entertainment activities.

To the extent that other services fall within sector 10 but do not fall within sub-sectors 10.A through 10.D, those services reside by default in sector 10.E, "other."

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<sup>230</sup> See <http://www.census.gov/epcd/naics02/naicod02.htm>.

<sup>231</sup> See 1987 Standard Industry Classification ("SIC") system matched to 1997 North American Industry Classification System.

8. **The United States argues, *inter alia*, that (i) "except sporting" is meant to exclude gambling and betting from its commitment under 10.D and, (ii) had the US undertaken a commitment on gambling and betting, it would have done it under 10.E (*Other*). Why would the United States feel the need to exclude "sporting" (including, in its view, gambling and betting) from sub-sector 10.D if it considered that gambling and betting are included under 10.E? How can this be reconciled with the principle that entries in a classification system are mutually exclusive?**

United States

The two assertions to which the Panel refers respond to two alternative arguments advanced by Antigua (which bears the burden of proving the existence of a US commitment). In response to Antigua's assertion that sub-sector 10.D of the US Schedule is defined by the CPC and includes gambling services, the United States has pointed out that (1) the US Schedule is not and cannot be defined by the CPC; and (2) even if 10.D did include gambling services (*quod non*), the words "except sporting" exclude gambling, which is within the ordinary meaning of "sporting."<sup>232</sup> In response to Antigua's assertion that gambling is within the ordinary meaning of "entertainment" and also within the ordinary meaning of "recreational," the United States has pointed out that (1) Antigua fails to prove this; and (2) even if it were true (*quod non*), the logical consequence would be that gambling really fits neither of these categories, and thus belongs in "10.E Other." The latter point is even more persuasive if the Panel finds that W/120 entries for "entertainment" and "other recreational services" are mutually exclusive.

Regarding why the United States would find it useful to exclude "sporting" (including gambling) if it belongs in 10.E in any event, the United States considers that the exclusion provides an added assurance against misinterpretation of the US commitments, while at the same time clarifying the status of other (non-gambling) forms of sporting.

B. THE MEASURE(S) AT ISSUE

**For both parties:**

9. **What is the legal status and value of comments made by the US representative at meetings of the DSB<sup>233</sup> to the effect that the supply of cross-border gambling and betting services is prohibited under US law?**

Antigua

In the context of this dispute the United States has twice before the DSB unequivocally stated that "cross-border gambling and betting services are prohibited under US law,"<sup>234</sup> confirming earlier statements made to Antigua during consultations. It has also made the same statement on a number of

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<sup>232</sup> With respect to the meaning of "sporting," the United States attaches for the Panel's examination copies of the following definitions: *New Shorter Oxford English Dictionary*, p. 3000 (1993) ("Now *esp[ecially]* pertaining to or interested in betting or gambling"); *Merriam-Webster's Collegiate Dictionary*, p. 1134 (10th ed. 2001) ("of or relating to dissipation and *esp[ecially]* gambling"); *Webster's Third New International Dictionary*, p. 2206 (1986) ("of, relating to, or preoccupied with dissipation and *esp[ecially]* gambling"); *The American Heritage Dictionary*, p.1681 (4th ed., 2000) ("Of or associated with gambling."); *The Random House Dictionary of the English Language*, p. 1844 (2d ed. 1987) ("interested in or connected with sports or pursuits involving betting or gambling: *the sporting life of Las Vegas.*"); *Webster's II New Riverside University Dictionary*, p. 1124 (1988) ("Of or having to do with gambling."); *Encarta World English Dictionary*, available at [http://encarta.msn.com/dictionary\\_/sporting.html](http://encarta.msn.com/dictionary_/sporting.html) (2004) ("of gambling: relating to gambling, or taking an interest in gambling").

<sup>233</sup> WT/DSB/M/151, para. 47 and WT/DSB/M/153, para 47.

<sup>234</sup> WT/DSB/M/151, para. 47; WT/DSB/M/153, para. 47.



other occasions not directly related to this proceeding.<sup>235</sup> Although at the first Panel session in this matter the United States appeared initially to have withdrawn that statement, during the final Panel meeting of the session the United States once more made clear its position that the cross-border provision of gambling and betting services from Antigua to the United States was illegal under United States law.<sup>236</sup>

The discussion contained in *US – Section 301 Trade Act* is very helpful in assessing the effect of the United States statements before the DSB as well as before the Panel in this proceeding. In *US – Section 301 Trade Act* the United States had "explicitly, officially, repeatedly and unconditionally confirmed [a United States] commitment (...)"<sup>237</sup> both at a meeting of the panel and in response to questions from the panel. While observing that "[a]ttributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions,"<sup>238</sup> the panel found that the statements made before it "were a reflection of official US policy (...)" and

"were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel's second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect."<sup>239</sup>

The panel concluded that:

"We are satisfied that the representatives of the US appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. (...) It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSB, the legal position of a Member as regards its domestic law read in the light of its WTO obligations. The panel system would not function if such a power could not be presumed."<sup>240</sup>

Turning to the facts in this proceeding, the first statement of the United States to the DSB regarding the "total prohibition" was made by the United States Ambassador to the WTO, Mrs. Linnet F. Deily at the 24 June 2003 meeting of the DSB. It was read aloud to the DSB membership at that meeting and was unequivocal. The same statement was repeated virtually verbatim by the United States representative at the DSB meeting of 23 July 2003. And at the Panel meeting of

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<sup>235</sup> See, e.g., Letter from the United States Department of Justice to the National Association of Broadcasters entitled "Advertising for Internet Gambling and Offshore Sportsbooks Operations"; Statement of John G. Malcolm before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives (29 April 2003); Statement of John G. Malcolm at the Special Briefing: Money Laundering and Payment Systems in Online Gambling Sponsored by World Online Gambling Law Report (20 November 2002).

<sup>236</sup> In the final Panel meeting of the session, the United States explained its apparent reversal of position by claiming that not *all* gambling and betting services were prohibited, going on to reference odds-making services and other activities only tangentially related to gambling and betting as permissible, but reaffirming that all cross-border wagering—placing and taking of bets—was illegal under United States law. While it is unclear why the United States at this late juncture chose to modify its original statements regarding the "total prohibition" of cross-border gambling and betting services, it is Antigua's belief that this change in tactics is an attempt by the United States to avoid the snare of GATS Article XVI. See Second Submission of Antigua and Barbuda, WT/DS285, para. 38.

<sup>237</sup> Panel Report on *US – Section 301 Trade Act*, para. 7.115.

<sup>238</sup> *Ibid.*, at para. 7.118.

<sup>239</sup> *Ibid.*, at para. 7.122.

<sup>240</sup> *Ibid.*, at para. 7.123.

11 December 2003, the United States head of delegation, while ostensibly narrowing the scope of earlier United States declarations on the subject, still clearly stated that the placing and taking of bets—"gambling and betting"—on a cross-border basis was illegal under United States law. Under the reasoning adopted by the panel in *US – Section 301 Trade Act*, the Panel is entitled to rely on these statements by the United States.<sup>241</sup> Given these clear declarations by the United States of "its legal position (...) as regards its domestic law"<sup>242</sup> at the heart of this dispute, it is untenable for the United States to assert that Antigua has argued the "total prohibition" based upon a "mere assertion" or that, indeed, Antigua has not made its *prima facie* case regarding the measures of the United States at issue in this proceeding.

The panel in *US – Section 301 Trade Act* referred to the judgment of the ICJ in the *Nuclear Test* case (Australia v. France).<sup>243</sup> In that case the ICJ found that France had imposed on itself an obligation of international law by making repeated public statements that it would cease the conduct of atmospheric nuclear tests. The panel in *US – Section 301 Trade Act* pointed out that the legal effect of the United States statement at issue in *US – Section 301 Trade Act* did not go as far as creating a new legal obligation but it nonetheless applied the same and perhaps even more stringent conditions than the ones unused by the ICJ in the *Nuclear Test* case.<sup>244</sup> In the *Nuclear Test* case the ICJ based its finding primarily on statements by the French President and the French Defence Minister at two press conferences.<sup>245</sup> The statements by the United States at issue in this case were not made at press conferences but, as in *US – Section 301 Trade Act*, were made in the context of a specific dispute settlement procedure. Furthermore the statements at issue in this case do not create a new legal obligation for the United States but only describe the effect of extant United States' domestic legislation. This results in a statement of fact upon which not only the Panel, but also Antigua and the third parties, are entitled to rely. With reference to the panel report in *US – Section 301 Trade Act*, Antigua submits that the dispute settlement system would not function if a complainant could not rely on such statement when bringing and formulating its case under the WTO dispute settlement procedures. At the very least a defendant should only be allowed to "withdraw" such a statement if it submits compelling evidence that its earlier statement about the effects of its domestic laws is incorrect—which the United States has not attempted to do. Otherwise a defendant would be encouraged to make incorrect statements about its own domestic laws simply to complicate the complainant's case and the panel's work.

Although this dispute settlement procedure is not governed by United States law, Antigua believes that United States law on the effect of statements such as those made by the United States regarding the total prohibition is helpful in assessing, to the extent relevant, the intention or *mens* of the United States in making its statements before the DSB and the Panel. If this matter were pending in a United States court, the United States representatives' statements would, standing alone, be sufficient evidence upon which a court could make a final determination on the issue of whether Antiguan operators face a total prohibition against providing cross-border gambling and betting services. In other words, the United States' own words before the DSB and the Panel would be sufficient, without the offer of any other evidence whatsoever, for a United States court to conclude that Antigua had carried the burden to prove the existence of a measure which interferes with the provision of betting and gambling services in contravention of the GATS.

Under United States law, the United States statements would be considered a stipulation as to the existence of a total prohibition of remote cross-border gambling services. A "stipulation" in a United States legal proceeding is defined as:

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<sup>241</sup> Ibid., at paras. 7.123 and 7.124.

<sup>242</sup> Ibid., at para. 7.123.

<sup>243</sup> I.C.J. Reports 1974 at p. 253.

<sup>244</sup> Panel Report on *US – Section 301 Trade Act* at footnote 692.

<sup>245</sup> See para. 40 of the judgment reported at I.C.J. Reports 1974 at p. 253.

"[A]n agreement, admission, or *other concession* made in a judicial proceeding by the parties or their attorneys. The essence of a stipulation is an agreement between the parties or between counsel with respect to business before a court (...). A stipulation is a time-saving device used to admit necessary, but foundational or peripheral evidence which both parties to the litigation concede the truth of and which is not a point of contention between the parties. A stipulation is a confessional pleading negating the need to offer evidence to prove the fact, and the party is not permitted to later attempt to disprove the fact."<sup>246</sup>

The circumstances surrounding the United States' statement strongly suggests that it would be considered a stipulation under United States law. During consultations, Antigua proposed its position that the lengthy measures cited in its Annex, either singularly or in combination, were best described as a total prohibition of remote cross-border betting and gambling services by the United States. Antigua's proposal reflected its belief that the "total prohibition" concept was not in dispute and, further, would serve to expedite the review of this matter by allowing the Panel and parties to avoid expending the time and resources necessary to describe and define the numerous federal and state laws which constitute the total prohibition. In response to a letter from Antigua<sup>247</sup> raising the merits of proceeding under this theory, the United States responded in writing by confirming its position that the cross-border gambling services offered by Antiguan operators were prohibited by United States law.<sup>248</sup> The United States then proceeded to repeat the "total prohibition" concept in statements to the DSB and to the Panel. Under circumstances in which the United States knowingly and willingly propounded its position that there is a total prohibition after the concept was raised by Antigua as an efficiency measure, and then when the United States repeated and clarified the total prohibition concept before the DSB and this Panel, it is clear and unambiguous that the United States concedes that one or more its measures serve to prohibit remote betting and gambling services offered by Antiguan operators.<sup>249</sup> This concession qualifies as a stipulation under United States law.<sup>250</sup> The effect of this stipulation would be to put an end to the United States' contention that Antigua has failed to meet its burden with regard to explaining or describing the complained of measures. As a general rule under United States law, stipulations are conclusive as to all matters properly contained, and necessarily included within them, and to all matters which are an essential part of the stipulation.<sup>251</sup> Ordinarily a party will not be permitted to contradict a stipulation,<sup>252</sup> even though it is contrary to fact, and even though the stipulation affects the statutory and constitutional rights of the parties thereto.<sup>253</sup>

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<sup>246</sup> 83 Corpus Juris Secundum ("C.J.S.") Stipulations §2 (emphasis supplied) (internal citations omitted).

<sup>247</sup> Letter from Antigua and Barbuda to United States (8 May 2003). See Antigua's comments on the United States' request for preliminary rulings, para. 7.

<sup>248</sup> Letter from United States to Antigua and Barbuda (5 June 2003). See Antigua's comments on the United States' request for preliminary rulings, footnote 4.

<sup>249</sup> Under United States law, a stipulation need not follow any particular form other than having terms which are definite and certain, with it being essential that the stipulation be assented to by the parties or their representatives. C.J.S. Stipulations., §13 (internal citations omitted).

<sup>250</sup> Under United States law, the issue of whether the statement constitutes a stipulation would be a matter for a court to decide. In doing so, the court would give the stipulation a liberal construction, or one which will render it reasonable and just to both parties. C.J.S. Stipulations, § 47. A stipulation admitting, or agreeing on the existence of, designated facts for the purpose of trial is to be fairly and reasonably construed as a whole in order to effectuate the parties' intention, and in the light of the whole record and the surrounding circumstances. *Ibid.*, § 84. A primary rule of construction is to ascertain and give effect to the intention of the parties. *Ibid.* § 46 (internal citations omitted).

<sup>251</sup> *Ibid.*, § 6 (internal citations omitted).

<sup>252</sup> A stipulation cannot be disregarded or set aside at will, however, a stipulation can be set aside by a court. The question whether a stipulation shall be set aside rests in the discretion of the court, and requires an extraordinary exercise of its powers, which can be allowable and proper only when it is made clear that it is necessary to prevent injustice. This discretion generally will not be exercised to set aside a stipulation unless good cause be shown for doing so, and unless such action may be taken without prejudice to either party.

<sup>253</sup> C.J.S. Stipulations, § 6 (internal citations omitted).

Under United States law, the United States' statements to the DSB that United States law prohibits the services in question would represent compelling evidence of the existence of matter asserted — that United States law prohibits Antiguan operators from providing remote cross-border betting and gambling services to consumers in the United States. This significant piece of evidence by itself would be sufficient to support a finding in a United States court that the United States totally prohibits cross-border gambling and betting services. Although Antigua does not believe the United States denies the existence of its total prohibition, if the United States sought to do so a United States court would consider the formal statements of the United States before the DSB an "admission by a party opponent." Relevant admissions of a party, whether consisting of oral or written assertions or nonverbal conduct,<sup>254</sup> are admissible in evidence in United States courts when offered by an opponent.<sup>255</sup> Admissions in the form of an opinion are competent evidence, even if the opinion is a conclusion of law.<sup>256</sup> As such, the statements made by the United States before the DSB would be allowed into evidence by a United States court as an admission by the United States.

It is a general principle under United States law that a party who has knowingly and deliberately assumed a particular position in a proceeding is generally not allowed to assume a position inconsistent therewith to the prejudice of the adverse party. As a simple illustration, a party who breaches a contract for reasons specified at the time will not be permitted afterwards, when sued for damages, to offer other and different reasons for breaching the contract.<sup>257</sup> In United States legal parlance, the breaching party in this example would be "estopped" from changing its position.<sup>258</sup>

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<sup>254</sup> Wright and Miller, 30B Federal Practice and Procedure §7015, Exhibit AB-109, *citing United States v. Nakaladski*, 481 F.2d 289 (5th Cir.1973), *cert. denied*, 414 U.S. 1064 (1973) (a smile found to constitute an admission) and 4 Weinstein's Evidence ¶ 801(d)(2)(A)[01] at 801-239 (1990) (Rule 801(d)(2) "makes no attempt to categorize the myriad ways in which a party \* \* \* may make an admission. Admissions can be made expressly or may be inferred from conduct.").

<sup>255</sup> This doctrine is based upon Federal Rule of Civil Procedure 801(d)(2), which states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if [...]

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

<sup>256</sup> Wright and Miller, 30B Federal Practice and Procedure § 7015, *citing Owens v. Atchison, Topeka & Santa Fe Ry. Co.*, 393 F.2d 77, 79 (5th Cir.1968), *cert. denied* 393 U.S. 855, 89 S.Ct. 129, 21 L.Ed.2d 124 (1968) ("It is well settled that the opinion rule does not apply to party's admissions."); see also McCormick, Evidence § 256 at 141-42 (5th ed. 1999).

<sup>257</sup> *David J. Joseph Co. v. United States*, 82 F.Supp. 345 (Ct.Cl. 1949), (holding that where the United States cancelled a contract to receive scrap iron from a company for a single stated reason, it was barred by estoppel from claiming as a defence to breach of contract at trial that it cancelled the contract for another reason).

<sup>258</sup> See, e.g., *United States v. Smith*, 781 F.2d 184 (10<sup>th</sup> Cir. 1986). ("[N]otwithstanding the position previously taken by the United States Attorney, the government now seeks to contend that it is immaterial whether [a government official complied with certain procedures]. It is this belated and dramatic shift of position we decline to permit."). *Ibid.*, at 185.

Because the United States made the statements regarding the total prohibition in the course of this proceeding, were this matter pending in a United States court, the United States would be "judicially estopped" from contending now that there is no total prohibition. The doctrine of "judicial estoppel" arises under United States jurisprudence when a party attempts to assert, in a judicial or quasi-judicial proceeding, a position contrary to a position taken by that party in a prior judicial or quasi-judicial proceeding.<sup>259</sup> United States courts have recognized that it is wrong to allow a person to abuse the judicial process by advocating one position, then later advocating a different position at a time when the changed position becomes beneficial.<sup>260</sup> If the doctrine is applied, the court in the subsequent proceeding will "estop," or prevent, the party from asserting a factual or legal position contrary to that asserted in the earlier action.<sup>261</sup> The United States government is, like any other litigant, subject to judicial estoppel whenever that doctrine is properly invoked.<sup>262</sup>

### United States

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 US law" and that such services "are prohibited from domestic and foreign service suppliers alike." The United States stands by these statements. Two clarifications may be helpful. First, the United States did not say at the time that this prohibition was "total," and has repeatedly clarified that it is not. At the time of the DSB meeting, such a clarification was unnecessary because we were speaking in the context of claims that we then understood to relate to transmission of bets by Internet or telephone from Antigua suppliers – actions which are indeed prohibited under US law. Second, our remark about the applicability of this prohibition to domestic service suppliers should have made it clear that the prohibition we were referring to was not a restriction on cross-border supply *per se*; rather, we were referring to laws of general application that apply equally to cross-border supply and supply of the like services (i.e., remote supply) within the United States.

Both of these points were implicit in our remarks at the DSB meeting. Antigua is incorrect to read these remarks as a "concession" of, or even as support for, the existence of its alleged "total prohibition" on cross border supply of all gambling services. As we have repeatedly stated, there is no such "total prohibition" in US domestic law. More importantly, since the concept of a "total prohibition" is devoid of any legal meaning or consequences under either US law or the GATS, Antigua's assertions about it contribute nothing to its *prima facie* case.

### For Antigua and Barbuda:

10. **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.**

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<sup>259</sup> T. Scott Belden, "Judicial Estoppel in Civil Action Arising from Representation or Conduct in Prior Administrative Proceeding," 99 American Law Reports 5<sup>th</sup> 65 (2002). See also 31 C.J.S. Estoppel and Waiver, §140 (stating that "[g]enerally, a party is estopped to assume inconsistent positions in the course of the same judicial proceeding.").

<sup>260</sup> 99 A.L.R. 5<sup>th</sup>, 65, § 2.

<sup>261</sup> *Ibid.*

<sup>262</sup> *United States v Levasseur*, 699 F Supp 965 (D. Mass, 1988). (stating "[a]t its essence, this doctrine forbids a party from asserting inconsistent positions in judicial proceedings. The doctrine is borne of 'a universal judicial reluctance to permit litigants to 'play fast and loose' with courts of justice according to the vicissitudes of self-interest" as well as a desire "to protect ... the judicial process from abuse." 1B J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 0.405[8] (2d ed. 1984) (*citing Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 [3d Cir.1953] [Hastie, J.]").

Antigua

Antigua is challenging all three aspects which are intrinsically linked and are all elements of the total ban that Antigua seeks to challenge in this case. *Legislative and regulatory provisions* are given a practical effect by their *application* to specific cases. If, for example, the United States maintained its prohibition but did not enforce it, then the impairment of Antigua's GATS benefits would be much less substantial and Antigua would probably not have started this proceeding. The United States *practice* vis-à-vis the foreign cross-border supply of gambling and betting services is also based on or at least purported to be based on legislative and regulatory provisions.<sup>263</sup> In Antigua's view it would not be logical or effective to challenge some of these elements and not others.

In Antigua's Panel request, it is said that: "[T]he total prohibition of gambling and betting services offered from outside the United States appears to conflict with the United States' obligations under GATS and its Schedule of Specific Commitments annexed to the GATS (and in particular Sector 10.D thereof) (...)." The objective of this statement was to bring the "total prohibition" itself before the Panel. While not denying the total prohibition, the United States insists that Antigua must explain to the United States and the Panel exactly how the total prohibition is constructed under United States law. Antigua has consistently taken the position that to force it to do so – in the words of the United States "an impossible task in our view"<sup>264</sup> – is wasteful and would deflect the efforts of the Panel to an exercise in understanding the minute details of the American legal system when such details should not affect the outcome of this proceeding.

Antigua believes that it is logical and efficient to challenge the United States' total prohibition, as a measure in and of itself, composed of specific legislative and regulatory provisions, applications and practices that both separately and jointly impair Antigua's GATS benefits. The Appellate Body's recent report in *US – Corrosion-Resistant Steel Sunset Review*<sup>265</sup> confirms that is legally possible to challenge such a total ban, and that while the Panel must, as a matter of substance, establish the impairment of Antigua's GATS benefits by the total ban it is not obliged, as a preliminary jurisdictional matter, to examine all domestic laws, regulations, applications and practices that may contribute to the impairment of those benefits.

The purpose of this dispute settlement proceeding is to address the impairment of Antigua's GATS benefits. In this respect Antigua is in essence challenging every legislative provision that could be construed to form a piece of the United States' total prohibition on the cross-border supply of gambling and betting services. The 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 Antigua's Panel request and also have been submitted to the Panel, together with summaries. The fact that the total prohibition is comprised of a large number of different statutory provisions does not mean that the United States would have to abolish or amend all of these individual legislative provisions in order to bring its laws in conformity with its obligations under the GATS. As noted in Antigua's opening statement at the first Panel meeting, the United States federal government possesses the power to legislate in the area of international commerce in a manner that would preempt all contradictory state laws and regulations.<sup>266</sup> Furthermore a considerable number of the laws that can currently be applied against Antiguan gambling and betting services because these services are currently considered "illegal" would no longer be applicable because, once "authorized," the Antiguan services would be "legal." In any event, what matters to Antigua, and what matters for WTO dispute settlement, is that the United States ceases the impairment of its treaty obligations by

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<sup>263</sup> See, e.g., the "Assurance of Discontinuance" entered into in August 2002 between the Attorney General of the State of New York and Paypal, Inc. and the discussion of that document in Antigua's response to Panel's question 29.

<sup>264</sup> See Section III.B.3 of this Report.

<sup>265</sup> See Appellate Body Report on *US – Corrosion-Resistant Steel Sunset Review*.

<sup>266</sup> See Section III.B.3 of this Report.

providing market access for cross-border gambling and betting services from Antigua in accordance with its GATS obligations. How this is formally structured under United States law does not matter.

### United States

Setting aside issues concerning Antigua's failure to make a *prima facie* case, as to which the United States has already commented, the Panel's question points to a distinct issue concerning the scope of Antigua's Panel request. The United States considers that the only claims within the scope of Antigua's Panel request (and, therefore, the Panel's terms of reference) would be "as such" claims against specific legislative and regulatory provisions and/or the collective effect of two or more such provisions. The Panel request does not articulate any claim against particular applications of these measures, and Antigua's clarification, as accepted by the Panel, would appear to confirm that no such claim is within the scope of the Panel request.<sup>267</sup> To the extent that Antigua raised the application of laws or regulations in its Panel request, it pointed to instances of such application only in an attempt to illustrate the existence of a "general prohibition against cross-border supply of gambling and betting services in the United States" as such.<sup>268</sup>

- 11. What "authorisation to supply" is Antigua and Barbuda referring to in paragraph 88 of its first oral statement? Please identify and provide details of instances when "authorisation to supply" in the United States was refused.**

### Antigua

In its opening statement to the Panel at the first substantive meeting of the parties, Antigua stated that "it is not possible for Antiguan suppliers to obtain an authorization to supply gambling services on a cross-border basis." What was meant here was not that Antiguan operators had applied to supply gambling and betting services into the United States and were refused — the point was that under United States law, it is impossible for Antiguan suppliers to meet any authorisation criteria. There are two reasons for this. First is the obvious, that the United States government considers the provision of cross-border gambling and betting services illegal, and thus it would be illegal under United States law as it currently exists for Antiguan suppliers to gain authorisation. At the first Panel meeting Antigua asked the United States to explain how Antiguan service providers could lawfully provide gambling and betting services into the United States. In response, the United States confirmed that this was not possible.

Second, under the laws or practice of every state that provides for state-sanctioned gambling in one form or another, the conditions attached to obtaining the right to supply gambling services in the state by definition preclude Antiguan operators from qualifying on a cross-border basis. Thus, even if the United States did not maintain its total prohibition, Antiguan operators could still not lawfully offer their services under the authorization schemes of the various states.<sup>269</sup>

- 12. In paragraph 3 of its first oral statement, Antigua and Barbuda illustrates its allegation that it is illegal for Antigua and Barbuda operators to provide gambling and betting services in the United States by noting that the United States has imprisoned the operator of an Antiguan company. Could Antigua and Barbuda provide more details with respect to its example. Are there other instances that illustrate Antigua and Barbuda's point? If so, please provide details?**

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<sup>267</sup> See Communication from the Panel, 29 October 2003, para. 31, reproduced in Annex B of this Report.

<sup>268</sup> Ibid.

<sup>269</sup> See examples of state authorization schemes contained in the Second Submission of Antigua and Barbuda, WT/DS285, paras. 26 - 29.

Antigua

The case referred to is the *United States v. Jay Cohen* case.<sup>270</sup> The *Cohen* case involves the prosecution under the Wire Act<sup>271</sup> of an American citizen who had moved to and established a company in Antigua to offer gambling and betting services into, among other places, the United States on a cross-border basis. In 1996, Mr. Cohen, then a 29 year old options trader on the Pacific Stock Exchange with a degree in nuclear engineering from the University of California at Berkeley, moved to Antigua with a number of colleagues and formed an Antiguan company, World Sports Exchange Limited ("WSE"), to operate an Internet sports book. WSE was initially licensed by the government of Antigua to provide those services in 1996 and has been licensed and operating continuously since then. In 1998 Mr. Cohen was among approximately 20 operators of Antiguan and other foreign companies engaged in the cross-border supply of gambling and betting services charged by the United States government for violating the Wire Act simply by providing these services to consumers in the State of New York.

Although most of the individuals charged either entered into some kind of plea arrangements with the United States or have simply remained outside of the United States and beyond prosecution, Mr. Cohen returned to the United States from Antigua solely for purposes of contesting the charges against him. Mr. Cohen was convinced that he could not be found guilty of violating the Wire Act because he had expressly modelled WSE's business on that of Capital OTB, a United States domestic company that has been offering interstate betting by telephone for more than 20 years—as well as more recently by the Internet—without prosecution under the Wire Act.<sup>272</sup> When Mr. Cohen attempted to assert in his defence his belief in the legality of WSE's business under United States law and his efforts to comply with United States law in the organisation and operation of WSE, the presiding judge deemed those beliefs and efforts irrelevant. In this respect it is, to say the least, remarkable that during Mr. Cohen's trial the United States Department of Justice represented to the trial court that the comparison with Capital OTB was irrelevant because Capital OTB's interstate operations were not prohibited by the Wire Act, whereas the operations of WSE were.<sup>273</sup> This representation to the court in the *Cohen* case about the legality of Capital OTB's activities is expressly contrary to what the United States has told the Panel in this case.<sup>274</sup> Mr. Cohen was ultimately convicted and his sentence upheld by the United States Court of Appeals for the Second Circuit. The presiding judge sentenced Mr. Cohen to 21 months in federal prison and two additional years of supervised probation. As of the date of these responses, Mr. Cohen is incarcerated in a federal prison facility located, with not an insignificant amount of irony, in Las Vegas, Nevada.

The United States also undertakes law enforcement action against financial intermediaries and media companies carrying advertising for foreign gambling and betting services. Such action is considered a more effective impediment for foreign cross-border gambling than the prosecution of individuals that are not physically present in the United States.<sup>275</sup> Examples of these kinds of actions can be found in various exhibits submitted by Antigua. Other examples of actions taken by United States federal and state authorities to prevent the provision of cross-border gambling and betting

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<sup>270</sup> *United States v. Jay Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001), *cert. denied* 122 S.Ct. 2587 (2002).

<sup>271</sup> 18 U.S.C. §1084.

<sup>272</sup> One of Mr. Cohen's statements in his defence was that he had modelled the business of WSE on the Capital OTB model described in the first submission of Antigua. See *Cohen Trial Transcript*, pp. 838, 859 – 869 (testimony of Mr. Cohen dated 22 February 2000 at his trial in New York).

<sup>273</sup> *Cohen Trial Transcript*, at p. 857 (statement by Ms. Pesce representing the United States Department of Justice).

<sup>274</sup> At the meeting of the Panel and the parties of 10 December 2003, the United States representative stated that the operations of companies such as Capital OTB were contrary to federal law.

<sup>275</sup> See 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, 108<sup>th</sup> Congress 10 (2003), p. 70.



services include the proceeding brought by the New York Attorney General under state criminal statutes, the Wire Act and the Travel Act in the *World Interactive Gaming Corp.* case<sup>276</sup> and the unsuccessful prosecution in the case of *United States v. Truesdale*<sup>277</sup> of an Internet gambling service provider based in the Dominican Republic under the "Illegal Gambling Business Act."<sup>278</sup> In addition, state authorities continue to take action to prohibit or impede the offering of cross-border betting and gambling services. Like the United States' recent letter advising national advertisers not to allow advertising for offshore Internet gambling services,<sup>279</sup> states have followed suit and taken similar action. An example of such state action was recently reported in Alabama.<sup>280</sup>

In Alabama, state law provides that a person commits the state crime of "promoting gambling" if he knowingly advances or profits from unlawful gambling activity otherwise than as a player.<sup>281</sup> In November 2003, the Alabama state attorney general's office instructed WJOX-AM in Birmingham, Alabama, a sports-talk radio station, to cease broadcasting commercials for Internet gambling operations or risk criminal prosecution. The warning was issued in a letter by Richard Allen, chief deputy to Alabama Attorney General Bill Pryor. In the letter, Allen informed the radio station that the Alabama Attorney General's office had reviewed advertisements broadcast by the radio station for Internet and telephone gambling operations. "If the ads are discontinued immediately, this office contemplates no further action. This is, however, the second time we have communicated with you about these kinds of activities," Allen wrote. Promoting gambling is a misdemeanour that carries a maximum penalty of a year in jail and a fine of \$2,000. Allen warned that each airing of a commercial would be considered a separate crime. As a result of the Attorney General's letter, radio hosts on WJOX-AM have informed listeners they can no longer call in and discuss gambling or betting lines - a frequent topic during college football season.<sup>282</sup>

### United States

Antigua appears to be referring to the case of Jay Cohen, a US citizen who ran an Internet gambling operation from Antigua. Cohen was arrested in March 1998 and convicted after a ten-day trial in February 2000. The facts of the case are described on appeal in *United States v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001) (affirming Cohen's conviction).<sup>283</sup>

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<sup>276</sup> *Vacco ex rel. People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 854 (N.Y. Sup. Ct. 1999). While the *Vacco* case involved elements not present in the *Cohen* case, such as allegations of fraud against investors, the New York Attorney General in the *Vacco* case did assert the Wire Act as prohibiting the cross-border provision of gambling and betting services from Antigua into the United States

<sup>277</sup> 152 F.2d 443 (5<sup>th</sup> Cir. 1998). Contrary to the determination of the court in the *Cohen* case, the *Truesdale* court held that the gambling and betting services were provided from and occurred outside of the United States and thus were not illegal under United States law.

<sup>278</sup> 18 U.S.C. §1955.

<sup>279</sup> Letter from the United States Department of Justice to the National Association of Broadcasters entitled "advertising for Internet Gambling and Offshore Sportsbooks Operations" (11 June 2003)

<sup>280</sup> Several states in addition to Alabama have warned advertisers not to accept business from foreign-based gambling operators. In 1997, the Florida Attorney General advised advertisers that they were unlawfully promoting illegal gambling under Florida law by promoting offshore gambling enterprises. Florida Attorney General, Press Release: Western Union Cuts off Sports Betting Accounts (23 December 1997). See also statement of John Malcolm (20 November 2002). (Noting that, in 2001, the Colorado Attorney General warned advertisers not to advertise for foreign Internet gambling operators and, in 2000, the California Horse Racing Board sent notices to all California radio stations to stop running advertisements for foreign gambling operators.)

<sup>281</sup> Ala. Code §13A-12-22.

<sup>282</sup> "State Warns All Sports Station About Gambling Ads," *Gadsden Times* (Alabama) (8 Nov. 2003), (<http://www.gadsdentimes.com/apps/pbcs.dll/article?AID=/20031107/APN/311071052&cachetime=5>).

<sup>283</sup> *United States v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001), *cert denied*, 122 S. Ct. 2587.

**For the United States:**

13. **How does the United States reconcile its statement in paragraph 46 of its first oral statement that "there is no across-the-board prohibition on cross-border supply of gambling services in US law" with its statements in paragraphs 47 of WT/DSB/M/151 and WT/DSB/M/153 respectively that the supply of cross-border gambling and betting services is prohibited under US law? Please provide a list of the transactions that would be included in "gambling and betting services"?**

United States

The United States has addressed the first part of the Panel's question in its response to question 9 above. As to a list of the transactions that would be included in "gambling and betting services," as the United States has previously noted, "gambling and betting services" appears neither in the US Schedule nor in W/120. And the provisional CPC (the only document that refers to this term) does not include such a list. The United States can conceive of no basis, however, on which Antigua could possibly assert that "gambling and betting services" excludes services that involve the organization and/or facilitation of gambling, but do not involve the actual transmission of bets or wagers.<sup>284</sup>

14. **What is the legal status of the Internet Gambling Prohibition Act (referred to in Exhibit US-4), the Unlawful Internet Gambling Funding Prohibition Act (referred to in Exhibit US-5) and the Internet Gambling Licensing and Regulation Commission Act (referred to in Exhibit US-5)? Please provide copies of these documents.**

United States

These are bills (i.e., proposed measures) that were debated in Congress. None of them have been enacted.<sup>285</sup> The United States has provided the Panel with key elements of the testimony presented to Congress during its consideration of these bills as evidence of various contemporary issues and concerns surrounding Internet gambling. Copies of the unadopted bills are attached.

C. ARTICLE XVI

**For the United States:**

15. **Where a Member has made full market access commitments on the cross border supply of gambling and betting services, could a prohibition on the remote supply of gambling and betting services within that Member allow the same Member to contend that there is no violation of Article XVI of the GATS? Please comment.**

United States

Yes. As discussed in the US second submission, a "prohibition" is not *ipso facto* inconsistent with Article XVI of the GATS. A panel must examine whether the alleged prohibition constitutes a limitation that matches the precise criteria in Article XVI:2. Those criteria relate both to the subject matter of the limitation and its precise form and/or manner of expression. Any limitation that does not correspond to these criteria does not violate Article XVI:2.

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<sup>284</sup> Examples of such services are listed in Section III.B.3.

<sup>285</sup> The use of the word "Act" in the titles of the proposals reflects a U.S. legislative convention for naming proposed bills; it does not signify enactment.

### Antigua

Article XVI is not a non-discrimination or national treatment clause. Whether or not a measure that violates Article XVI (in this case a prohibition on cross-border supply) also applies within a Member has no relevance for the application of Article XVI Paragraph 6 of the 1993 Scheduling Guidelines lists four examples of limitations on market access caught by Article XVI:2(a): (i) license for a new restaurant based on an economic needs test; (ii) annually established quotas for foreign medical practitioners; Government or privately owned monopoly for labour exchange; and nationality requirements for suppliers of services (equivalent to zero quota). These clearly include examples of measures applying to foreign and domestic services and services suppliers alike. These measures are nevertheless caught by Article XVI:2(a). The last example, the nationality requirement, further confirms that, contrary to what is argued by the United States, a total ban that is not expressed in numerical terms is caught by Article XVI:2(a) as being equivalent to a zero quota (despite the fact that, nominally, a nationality requirement also applies to service suppliers of the Member concerned). Likewise, a total prohibition on remote supply results in a total denial — equivalent to a zero quota — of market access in cross-border mode, as cross-border supply is not possible if remote supply is unlawful.

In the response to question 1 above Antigua explained that the 1993 Scheduling Guidelines are highly relevant for the interpretation of the US Schedule because the 1993 Scheduling Guidelines are part of the context of all GATS schedules. The 1993 Scheduling Guidelines are also highly relevant for the interpretation of the GATS itself and Article XVI in particular.

Article XVI can only be applied through specific commitments in schedules. Consequently the approach taken by the Members when drafting Article XVI commitments in their Uruguay Round schedules is a good indicator of the common intention of the parties regarding the meaning of Article XVI. That common intention is described in the 1993 Scheduling Guidelines (as was unanimously and explicitly confirmed by all Members in the 2001 Scheduling Guidelines). The 2001 Scheduling Guidelines contain precisely the same examples as the 1993 Scheduling Guidelines.<sup>286</sup> With regard to the specific point that a non-numerical total ban is caught by Article XVI:2(a) as equivalent to a zero quota, the 2001 Scheduling Guidelines therefore qualify as a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the Vienna Convention. As mentioned in the response to question 1, the 2001 Scheduling Guidelines were unanimously approved by the Members. The Panel should further note that the United States has itself recognised the value of the 2001 Scheduling Guidelines for the interpretation of Article XVI.<sup>287</sup>

### European Communities

No. The European Communities understands the Panel's hypothetical to assume that, besides "a prohibition on the remote supply of gambling and betting services within [the] Member" that has committed market access, the Member in question also maintains a measure falling within one of the items of Article XVI:2 of the GATS (such as, in the EC view, a prohibition on cross-border supply of gambling services). Once it is concluded that a measure (such as a prohibition on cross-border supply of gambling services) falls within one of the items of Article XVI:2, the fact that the same Member simultaneously maintains a prohibition on remote supply domestically is irrelevant and does neither eliminate nor *ipso facto* justify a violation of Article XVI.

### Mexico

To the extent and assuming that the term "remote supply" means the cross-border supply of gambling and betting services, it appears that under the scenario described in the question, suppliers

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<sup>286</sup> 2001 Scheduling Guidelines, para. 12.

<sup>287</sup> See Section III.B.2. of this Report.

of other WTO Members would, in fact, be denied any market access under mode 1 (cross-border). Thus, service suppliers of other WTO Members could accord treatment less favourable than that provided for under the terms, limitations and conditions agreed and specified in the Schedule of a Member that has made "full market access commitments".

D. ARTICLE XVII

**For both parties:**

**16. If there is "total prohibition" in the United States on the cross-border supply of gambling and betting services, as claimed by Antigua and Barbuda, can there be a violation of Article XVII at all?**

Antigua

In Antigua's view the most appropriate interpretation of the relationship between Articles XVI and XVII is that a determination that a total prohibition on cross-border supply violates Article XVI obviates the need to assess whether the prohibition also violates Article XVII. Antigua acknowledges, however, that the text of Articles XVI, XVII and XX:2 of the GATS also allows the conclusion that Articles XVI and XVII can apply simultaneously to a total prohibition on cross-border supply. In this respect Antigua submits that the resolution of the debate on the precise relationship between Articles XVI and XVII has no practical significance for the outcome of this case. To Antigua it does not really matter whether the United States' total prohibition violates Article XVI without reaching Article XVII or whether it violates both Articles.

The question of the overlap between Articles XVI and XVII appears to be one of the most controversial legal questions surrounding the application of the GATS. However, the overlap question only creates a practical problem if a Member has made different commitments for market access and national treatment with regard to the same sector.<sup>288</sup> That is not the case for the sub-sectors of the US Schedule at issue or possibly at issue in this case: sub-sector 10.D and sub-sector 10.A. Consequently, in the specific context of this dispute, the question of overlap is merely a technical one – irrespective of whether the United States' total prohibition violates Article XVI only or both Articles XVI and XVII, the United States is under an obligation to remedy the breach of its GATS obligations by the total ban. This is not an instance in which different aspects of the United States measures are caught by Article XVI or XVII respectively. It is simply a matter of "double usage" of Article XVI and XVII. There are undoubtedly circumstances where Article XVI may apply to a situation and Article XVII not, and vice versa. The fact that in this dispute the United States measures violate both provisions does not undermine the usefulness of either provision. Antigua believes, however, that when looked at in isolation, the wording of Article XVII is sufficiently broad to capture almost all market access restrictions caught by Article XVI, in particular because it covers *de facto* as well as *de jure* discrimination.<sup>289</sup>

The broader problem of the overlap between Article XVI and XVII has been described as one of "Text versus Context."<sup>290</sup> The text of Article XVII allows for it to be applied to almost all market

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<sup>288</sup> See Informal Note by the Secretariat, "Technical Review of GATS Provisions," JOB(01)/17, dated 16 February 2001; see also Informal Note by the Secretariat, "Proposals for a Technical Review of GATS Provisions – Article XX:2", JOB(02)/153, dated 24 October 2002.

<sup>289</sup> A Member may, for instance, maintain a quantitative limitation of five suppliers in a certain sub-sector that is equally applicable to foreign and domestic suppliers. In many circumstances this will result in a *de facto* discrimination in favour of the, for instance, three suppliers already operating in that market.

<sup>290</sup> A. Mattoo, "National Treatment in the GATS," 31 *Journal of World Trade* 1997, 107-135, at p. 113. Mr. Mattoo is one of the most distinguished commentators on the GATS and worked in the Trade in Services Division of the WTO Secretariat at the time he wrote the article.

access restrictions covered by Article XVI. On the other hand the structure of the GATS (*i.e.* the fact that Article XVI exists and is given an equally prominent place as Article XVII in the GATS and in GATS schedules) indicates that there must be meaningful distinction between the two. Although Antigua has not been able to review the negotiating history of these provisions, Antigua has come across what appears to be contradictory commentary on the negotiating history. Some suggest that negotiators worked on the basis of a dividing line between Article XVI and XVII;<sup>291</sup> others suggest that negotiators were well aware of the overlap.<sup>292</sup> In Antigua's view the most appropriate interpretation of the relationship between Articles XVI and XVII is one of "practical hierarchy" in which: (i) Article XVI concerns "the key to the door," *i.e.* regulation that affects an operator's ability to access a market; and Article XVII concerns regulation that distorts competition in favour of domestic suppliers once an operator has gone "through the door" and is operating on the market.

Under that approach the scope of Article XVII is negatively defined by the scope of Article XVI—if a measure is covered by Article XVI it is not covered by Article XVII. This interpretation does not lead to an unacceptable result in a situation involving a Member that has no commitments in the market access column and a full commitment in the national treatment column, a situation which is perceived to be the most important practical problem posed by the overlap of Articles XVI and XVII.<sup>293</sup> In such a situation, Antigua's proposed interpretation would imply that to the extent that a Member does not maintain measures contrary to Article XVI (meaning that it allows market access even though it goes beyond the commitments in its schedule), it must grant national treatment. Of course, the value of that national treatment commitment will be limited because traders will know that WTO law allows the Member to restrict market access and ban them from the market. However, as long as they are allowed access to the market, they would have to be given national treatment.

Antigua submits that this "practical hierarchy" interpretation is supported by: (i) the structure of the GATS; (ii) the equally prominent place that Article XVI and XVII have in GATS schedules; (iii) the rule that an interpretation must give meaning and effect to all terms of a treaty; and the parallelism between GATT and GATS which was one of the working premises of the negotiators. The situation is complicated, however, by Article XX:2 of the GATS. This appears to confirm that measures can be caught both by Articles XVI and XVII. Simultaneously, however, it excludes the possibility that Article XVII can be used to undermine the effectiveness of restrictions on the application of Article XVI (as in the example described above of the Member that made no commitments for market access and a full commitment for national treatment).<sup>294</sup> In Antigua's view this confirms that, even if the text of Articles XVI and XVII allows overlapping application or "double usage," it was the common intention of the parties that this would not be the case and that the provisions would be applied separately. On the other hand Article XX:2 could be interpreted as supporting the text-based interpretation that Articles XVI and XVII can be applied to the same measure. In Antigua's view this is not the most appropriate interpretation but it is not an inappropriate

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<sup>291</sup> *Ibid.*, at pp. 115-116.

<sup>292</sup> Informal Note by the Secretariat, "Proposals for a technical review of GATS provisions – Article XX:2," JOB(02)/89, dated 16 July 2002.

<sup>293</sup> An expansive, strictly text-based interpretation of Article XVII would be problematic in the situation of the example (no commitment to market access and a full commitment to national treatment): if Article XVII would also cover measures caught by Article XVI, the restriction on market access in the schedule would be without effect because the measure would violate Article XVII and could not be maintained. It cannot have been the common intention of the parties to nullify limitations on market access specifically made by Members in their schedules.

<sup>294</sup> Article XX:2 does not deal with the situation where a Member makes a full commitment under Article XVI and no commitment under Article XVII. In Antigua's view this situation is not problematic. It simply means that a Member cannot maintain measures caught by Article XVI but it can still maintain measures which are beyond the scope of Article XVI and that would be prohibited by Article XVII had the Member made a commitment under that Article.

interpretation and the Panel may adopt it. Whatever the Panel decides, Antigua holds the strong view that the decision on this issue will have no material effect on the practical outcome of this dispute.

### United States

In this dispute, where the restrictions at issue apply to both cross-border suppliers and domestic suppliers of the "like" service, the United States does not see how there could be a violation of Article XVII. That said, the United States notes that the analysis of an alleged "prohibition" under Article XVI would appear to be important to answering the Panel's question. Article XVI (in contrast to Article XI of the GATT) does not automatically bar any "prohibition." The Panel should therefore examine whether the alleged prohibition meets the precise criteria articulated in Article XVI:2.

- 17. In determining whether services are "like" is it relevant to have regard to differences in regulation between the place from which the service is supplied and the place into which it is supplied? To what extent, if at all, is Antigua and Barbuda's regulatory regime for the supply of Internet gambling and betting services relevant in determining "likeness" with the supply of those services in the United States?**

### Antigua

Article XVII of the GATS concerns likeness of services, not of "services regulation." Thus differences in regulation cannot, as such, play a role in determining likeness for the purposes of Article XVII. In particular, regulation in the importing Member cannot normally play a role in determining "likeness" because this regulation is entirely within the control of that importing Member which could manipulate it in such a way that foreign services are regulated differently, or not at all, which would then make them unlike. In *EC – Bananas* the Appellate Body explicitly ruled on this point when rejecting an argument by the European Communities that it did not discriminate in favour of bananas originating from the group of African, Caribbean and Pacific region countries known as "ACP" because it maintained two separate regulatory regimes for the importation of bananas: one for ACP bananas and one for bananas originating in other Members, which allegedly removed the possibility of discrimination. The Appellate Body found that:

The issue here is not whether the European Communities is correct in stating that two separate import regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member.<sup>295</sup>

Regulation in the exporting Member may play an indirect role because it can determine one or more specific characteristics of the service, which may be important to determine likeness of the service itself. This could be relevant in a dispute where an importing Member claims the imported

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<sup>295</sup> Appellate Body Report on *EC – Bananas III*, para. 190.

service is "unlike" because of one or more specific features determined by the regulation of the exporting Member. In the current instance, however, this is not the case because the United States' prohibition does not relate to specific characteristics of Antiguan services determined by Antiguan regulation. Furthermore Antigua has pointed out on a number of occasions that it is willing to change its regulatory regime in order to address any specific concerns the United States might have. Thus, in the circumstances of this case, the regulatory regimes of the importing and the exporting Member play no role, not even an indirect one, in the determination of likeness of the services.

As set out in Antigua's opening statement at the first Panel meeting, Antigua's view that regulation is not relevant for the determination of likeness is confirmed by the view taken by the Appellate Body in *EC - Asbestos* with regard to Article III:4 of GATT 1994.<sup>296</sup> In *EC - Bananas III (US)*, the panel interpreted Article II of the GATS (an MFN provision) in the light of Article XVII of the GATS and Article III of the GATT (both national treatment provisions). The Appellate Body criticised this approach, pointing out that the appropriate comparison was between Article II of the GATS and MFN-type obligations in the GATT 1994.<sup>297</sup> Thus the panel was criticised for not interpreting a provision of the GATS in the light of a corresponding provision in the GATT 1994. Neither the United States nor any of the Third Parties have convincingly explained why this Panel should adopt a different approach to the one set out by the Appellate Body in *EC - Bananas III*, and not draw an analogy between the national treatment provisions of the GATT and the GATS. In the absence of such an explanation the Panel should, *mutatis mutandis*, adopt the approach of the Appellate Body in *EC - Asbestos* when applying Article XVII. It follows from *EC - Asbestos* that Antigua's regulatory regime for the supply of gambling and betting services *could* be relevant for this dispute in the context of an Article XIV defence raised by the United States—for instance, to determine whether a total ban on cross-border, remote-access gaming is necessary to protect the sort of public interest concerns outlined by the United States in its first submission.

Contrary to the Appellate Body's approach in *EC - Asbestos*, the United States and Japan appear to suggest that such a public interest debate should also take place in the context of Article XVII. Under that approach a service could be declared "unlike" because it raises different public interest concerns, justifying different regulation. In this respect Antigua submits, *arguendo*, that if public interest concerns could play a role in the likeness debate, other elements of the Article XIV debate, such as the necessity test, should also be taken into account. Not every difference in public interest concerns raised by domestic and foreign services is capable of justifying radically different treatment. That is not the case under Article XIV and it should not be the case under Article XVII – difference in treatment is only justified to the extent that it is necessary to address different risks. However, transplanting the conditions for the application of Article XIV to the context of Article XVII inevitably results in a situation in which an identical test is applied in two different contexts, once in the context of the debate on like services and once in the context of Article XIV. In Antigua's view this will only lead to confusion and Antigua therefore questions the need or even usefulness for the GATS legal system of replicating the regulatory debate of Article XIV in the context of Article XVII. In *EC - Asbestos* the Appellate Body clearly did not see the wisdom of such an approach either.

### United States

In certain circumstances it may be important to have regard to differences in regulation between the place from which the service is supplied, and the place into which it is supplied. For

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<sup>296</sup> That is that the determination of "likeness" is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products" (Appellate Body Report in *EC - Asbestos*, para. 99), and that regulatory concerns of the authorities of a Member (as opposed to concerns of a consumer) have to be dealt with in the context of Article XX of the GATT 1994, not in the context of the likeness assessment.

<sup>297</sup> Appellate Body Report on *EC - Bananas III*, para. 231.

example, theoretically, if the United States permitted domestic gambling by remote supply subject to particular regulatory requirements, there might be "like services and service suppliers" issues regarding the extent to which services supplied from Antigua meet the same requirements. However, that is not the case. The more relevant likeness factor in this dispute is therefore not differences in regulation *per se*, but differences in the characteristics of services and suppliers that influence the manner in which they are regulated. Specifically, the greater susceptibility of gambling by remote supply to various threats (organized crime, money laundering, health risks, child and youth gambling, etc.) makes it unlike other, non-remote forms of gambling.

**18. With respect to paragraph 63 of Antigua and Barbuda's first oral statement, which states in relevant part that the "likeness of service providers has little functional relevance in this case":**

- (a) **Is there always a need to assess likeness for both "services" and "service suppliers" under Article XVII of the GATS?**
- (b) **Is there a difference in the relevance of the "likeness" of service suppliers for modes 1 and 2 as compared to for modes 3 and 4? In other words, should the likeness of *service suppliers* as well as the likeness of *services* be considered in the case of modes 1 and 2?**

#### Antigua

[a]: In Antigua's view this is not the case. In paragraph 95 of its first submission the United States suggests that Article XVII can only apply if like services are supplied by like service suppliers. Thus the reference to "service suppliers" in Article XVII:1 would function as a limitation on the scope of Article XVII:1: less favourable treatment of like services would only be caught by Article XVII to the extent that the services are supplied by like service suppliers. However, the text of Article XVII:1 does not support that conclusion at all. The text of Article XVII provides that:

each Member shall accord to services and service suppliers of any other Member, (...), treatment no less favourable than that it accords to its own like services and service suppliers.

Thus Article XVII mandates treatment "no less favourable" for "like services" *and* "like service suppliers," without limiting that obligation to situations in which both the services and the services suppliers are "like." The text does *not* refer to "like services supplied by like service suppliers." Indeed, it would be difficult to see why the drafters of the GATS would have wanted to limit the scope of Article XVII in such a way. Presumably, in adding the "like service supplier" concept the drafters wanted to extend rather than limit the scope of Article XVII. This is because, in the area of trade in services, much more than in the area of trade in goods, the conditions of competition in the market place can be affected by measures applicable to the service suppliers rather than to the services themselves. This is particularly the case when services are supplied in mode 3 or 4. For instance a Member could impose discriminatory taxes on a foreign service supplier "commercially present" on its territory. In Antigua's view the purpose of the extension of the national treatment obligation to service suppliers in Article XVII is to capture such measures. It is not intended to somehow limit the scope of Article XVII.

[b]: In modes 3 and 4, arguably the *identity* of the service supplier might be more relevant, given that both modes involve the actual, physical presence of businesses or natural persons located in the territory of the Member. In such circumstances it is perhaps more likely that denial of national treatment may occur on the basis of the identity of the service supplier without regard to the actual services being provided. Further, the actual presence of businesses or natural persons may invoke the many concerns that may arise in that context, such as immigration, use of public resources and



services and a host of other issues raised by actual physical presence. But whether or not identity can or should be synonymous with "likeness" is questionable.

United States

[a]: Yes. Article XVII requires likeness of both services and service suppliers. As the panel in *Canada – Autos* observed, "in the absence of 'like' domestic service suppliers, a measure by a Member cannot be found to be inconsistent with the national treatment obligation in Article XVII of the GATS."<sup>298</sup> The same panel also emphasized that the burden of proving this element rested on the complaining party.<sup>299</sup>

[b]: Antigua bears the burden of proving likeness of service suppliers regardless of the mode of supply concerned. The United States is unable to find any basis in Article XVII or elsewhere in the GATS for disregarding likeness in particular modes of supply.

European Communities

[a]: No, because it is e.g. sufficient, for a violation of Article XVII to occur, that discrimination is made between foreign and domestic services. Article XVII:1 requires Members to grant national treatment to both foreign services and foreign service providers.

[b]: Given the answer to question (a) above, this question becomes moot. This being said, there is nothing in the text of the Agreement that would suggest that a difference between modes should be made.

Mexico

[a]: The extent of the assessment required will depend on the specific claims of violation in any given dispute and the facts and circumstances of each case.

[b]: See Mexico's response to question (a) above.

**19. Is Internet/remote gambling and betting authorized between states within the United States?**

Antigua

Antigua has not been able, for the purposes of this question, to conduct an exhaustive review of all the circumstances in which interstate gambling and betting is authorised within the United States. The examples which follow provide, however, the clearest possible indication that there is remote, state-sanctioned interstate gambling and betting within the United States: this, in turn, shows that the United States' statement that such activities are illegal is contradicted by the practice. Because the Panel's question specifically refers to betting services between states, Antigua does not include in this answer information about Internet/remote gambling authorized *within* a state in the United States.<sup>300</sup>

The United States has a longstanding policy of permitting interstate telephone account wagering on horse races which is authorized by state and local laws. In 1973, the State of New York

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<sup>298</sup> Panel Report in *Canada – Autos*, para. 10.289.

<sup>299</sup> *Ibid.*

<sup>300</sup> For example, Nevada has created a special exemption under its state laws for intrastate account wagering on sporting events such as horse races and professional and amateur contests. Nevada Revised Statutes §465.094.

legalised and began to operate its own pari-mutuel account wagering system, New York Capital OTB.<sup>301</sup> Over the next 15 years, three other states sanctioned account wagering on horse races: Connecticut in 1976, Maryland in 1984 and Pennsylvania in 1987.<sup>302</sup> By the 1990s, sanctioned operators were offering remote account wagering from the 12 states<sup>303</sup> that enacted licensing schemes for such wagering. The operators in the 12 states that permit remote wagering, in turn, accept cross-border wagers by means of electronic communications from residents of 37 other states.<sup>304</sup> The proliferation of betting from anywhere resulted in an increase in total wagers in the pari-mutuel industry, despite a modest decline in racetrack attendance and the number of races run during the same period. By 1999, almost one-half of all wagers placed on horse races in the United States are by off-track or telephone wagers<sup>305</sup> and, as of 2003, 85 per cent of the US\$15 billion in annual wagers on horse races in the United States is generated away from the track where the race is actually being run by means of remote gambling.<sup>306</sup>

United States operators which offer cross-border account wagering do so under United States legal precedents which hold that states retain the discretion to determine the legal effect of in-coming communications into the state.<sup>307</sup> These court opinions found gambling takes place at the location where the money changes hands, not necessarily where the person placing the bet is located.<sup>308</sup> This concept is codified in Oregon's remote gambling regulation, which states that "any wager that is made from an account maintained by an Oregon operator in Oregon is considered to have been made in the State of Oregon" is legally valid.<sup>309</sup> While there is debate about the exact status of cross-border gambling in the United States,<sup>310</sup> it is undisputed that state sanctioned remote gambling services like

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<sup>301</sup> 2003 *North American Gaming Almanac*, p. 558.

<sup>302</sup> *Ibid.*

<sup>303</sup> Antigua referenced eight states which permit operators to accept remote wagers from within the state or from outside the state. Upon further review, there are at least 12 states which offer account wagering on horse racing, with additional states to come. A leading Nevada gaming law firm, Lionel Sawyer & Co., reports that, as of 2002, 12 states - Connecticut, Ohio, Kentucky, Maryland, New York, Oregon, California, Louisiana, Massachusetts, New Hampshire, North Dakota and Pennsylvania - have adopted state legislation authorizing the acceptance of account wagering in interstate off-track pari-mutuel racing. See Nevada Pari-Mutuel Association, Las Vegas Dissemination Co. and Lionel Sawyer & Collins, *An Overview of Off-Track Wagering* (25 July 2002), p. 27 (presented to the Nevada Gaming Commission and State Gaming Control Board). Bear Stearns & Co. reports that, as of 2003, 14 states permit gambling operators to accept remote wagers on horse races. 2003 *North American Gaming Almanac*, p. 558.

<sup>304</sup> See, e.g., [www.Youbet.com](http://www.Youbet.com) and [www.CapitalOTB.com](http://www.CapitalOTB.com)

<sup>305</sup> 2003 *North American Gaming Almanac*, p. 560, (chart entitled "Exhibit 3: The Numbers Don't Lie," indicating that 46.3 percent of all pari-mutuel wagers – the largest component of the pari-mutuel handle – was placed by using an off-track or telephone account).

<sup>306</sup> See also the chart "US Horseracing Statistics".

<sup>307</sup> Antonia Z. Cowan, *The Global Gambling Village: Interstate and Transnational Gambling*, 7 *Gambling Law Review* 251 (August 2003), pp. 259 – 260, citing *Lescallet v. Commonwealth*, 89 Va. 878, 17 S.E. 546, 547-48 (Va. 1893) and *United States v. Truesdale*, 152 F. 3d 443 (5th Cir. 1998).

<sup>308</sup> Cowan, *The Global Gambling Village*, p. 260, citing Jeffrey A. Modisett, *A Brief Look at The Past, Present and Future through The Eyes of A Former Attorney General*, 6 *Gaming Law Review* 198 (2002), p. 203 and Memorandum from Gregory C. Avioli, National Thoroughbred Horseracing Association (on the issue: "Whether Account Wagering may be lawfully conducted by a state-licensed pari-mutuel facility with account holders located in a state other than the state where the account is located") (August 3, 1999), pp. 2-8.

<sup>309</sup> See Oregon Administrative Rule 462-220-0060.

<sup>310</sup> As an illustration of this extreme uncertainty, during February 2000, the United States Department of Justice itself made contradictory statements as to whether cross-border pari-mutuel wagering services such as Capital OTB were regulated by the Wire Act. At Jay Cohen's trial, on 22 February 2000, the Department of Justice attorneys convinced the trial judge that Capital OTB was not regulated by the Wire Act. Cohen Trial Transcript, p. 839 – 859. Three weeks earlier, however, a Department of Justice representative instructed the New York State Racing and Wagering Board that wagering services such as Capital OTB were probably regulated by the Wire Act and, therefore, unlawful under United States law. Letter of Kevin DiGregory, Assistant Attorney General, United States Department of Justice to Nicole Thuillez of the New York State

Youbet.com and Capital OTB have been accepted for over 30 years in the United States without any known federal prosecution of major service providers. The United States National Thoroughbred Racing Association has been reported as stating that state-licensed and regulated entities in over 30 states have been conducting interstate pari-mutuel wagering for more than 20 years with the full knowledge of the United States Department of Justice.<sup>311</sup>

While some of the state-sanctioned pari-mutuel wagering services, such as Youbet.com and Capital OTB currently accept both Internet and telephone wagers, there are other state-sanctioned services which accept only telephone wagers. Autotote Enterprises, Inc., for instance, is a licensed pari-mutuel operator in Connecticut which provides 12 off-track venues for patrons to watch and bet on horse racing.<sup>312</sup> The company maintains a telephone account wagering system called "On the Wire," which is accessible to residents of 27 states.<sup>313</sup> The longstanding and uninterrupted policy of acceptance by the United States of remote wagering by off-track and telephone accounts was codified into law in December 2000, when the United States Congress amended the Interstate Horseracing Act (the "IHA")<sup>314</sup> and specifically expanded the definition of "interstate off-track wager" to include pari-mutuel wagers transmitted between states by way of telephone or other electronic media. The added statutory language reads as follows:

[T]he term . . . 'interstate off-track wager' means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools;<sup>315</sup>

The plain language of the revised statute clearly appears on its face to permit interstate pari-mutuel wagering over the telephone or other modes of electronic communication, including the Internet, so long as such wagering is legal in both states. The legislative history of the amendment supports this conclusion. As part of the underlying legislative debate surrounding the passage of the amendment, Representative Frank R. Wolf of the State of Virginia expressed his understanding of the effect of this new language:

I want Members of this body to be aware that section 629 ... would legalize interstate pari-mutuel gambling over the Internet. Under the current interpretation of the Interstate Horse Racing Act in 1978, this type of gambling is illegal, although the Justice Department has not taken steps to enforce it. This provision would codify legality of placing wagers over the telephone or other electronic media like the Internet.<sup>316</sup>

As a result of this legislative amendment to the IHA, account wagering has begun to spread into additional states. In 2003, Nevada approved account wagering on horse racing but the account wagering system has not commenced operations until its regulation system is being finalized.<sup>317</sup> In

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Racing and Wagering Board (1 February 2000). The states which have reviewed this issue have reached contradictory conclusions as well.

<sup>311</sup> Letter by Greg Avioli, counsel for the National Thoroughbred Racing Association to Congressman W.J. Tauzin.

<sup>312</sup> See <http://www.autobet.com/>.

<sup>313</sup> See [www.ctotb.com/wire.asp](http://www.ctotb.com/wire.asp) and [www.ctotb.com/open.asp](http://www.ctotb.com/open.asp). Autotote Enterprises is a subsidiary of Scientific Games Corporation, a United States-based publicly traded company which is a global technology leader in the pari-mutuel and lottery industries. See [www.scigames.com/sgcorp/index.asp](http://www.scigames.com/sgcorp/index.asp).

<sup>314</sup> See DC Appropriations, Pub. L. No. 106-553, § 629, 114 Stat. 2762A-108 (2000).

<sup>315</sup> 15 U.S.C. § 3002(3).

<sup>316</sup> 146 Cong. Rec. H 11230, 11232, 106th Cong. 2nd Sess. (2000).

<sup>317</sup> Cowan, *The Global Gambling Village*, p. 259, footnote 61.

addition, during 2003 Virginia amended its pari-mutuel wagering laws to grant the Virginia Racing Commission the authority to regulate account wagering, by "which an individual may establish an account with an entity, approved by the Commission, to place pari-mutuel wagers in person or electronically."<sup>318</sup>

Under the Indian Gaming Regulatory Act (the "IGRA"), gamblers at Native American gaming establishments are permitted to gamble against each other by using remote electronic player stations.<sup>319</sup> In two separate rulings issued in 2000, *United States v. 162 MegaMania Gambling Devices*<sup>320</sup> and *United States v. 103 Electronic Gambling Devices*,<sup>321</sup> federal appellate courts affirmed the sanctioned use of electronic player stations that allowed players at various Indian locations to play bingo-type gambling games against each other. Both of these cases involved the legality of a bingo-style gambling game called MegaMania, which is played on a machine called an "electronic player station."<sup>322</sup> These player stations are located on Native American lands in Oklahoma, California and elsewhere.<sup>323</sup> A person playing MegaMania begins the game by electronically selecting up to four cards with randomly generated numbers. The player must pay US\$0.25 per card to begin the game. A game will commence once at least 12 players nationwide purchase at least 48 cards. A random selection machine located on Native American land in Oklahoma selects three numbered balls, and a human operator transmits the numbers on the balls by computer to Multimedia's headquarters, where they are sent through a computer network to each player station. The player then touches the corresponding space or spaces on the player's card appearing on the MegaMania station screen. To continue playing the game, a player must pay an additional US\$0.25 per card in exchange for the numbers on the next three balls. These numbers are transmitted in roughly ten second intervals. Consequently, the player must continue to pay US\$0.25 to US\$1.00 every ten seconds to stay in the game. A player wins by being the first player among all those who are playing throughout the country to obtain a set of numbers which match a certain arrangement on his electronic card. On average, Multimedia and the participating Native American tribes retain 15 percent of the amount taken in by the machines and the winning players receive 85 per cent.<sup>324</sup>

In both the *162MegaMania Gambling Devices* and *103 Electronic Gambling Devices* cases, the federal courts held that the cross border electronic MegaMania gambling game was lawful under the IGRA. The analysis applied in these cases suggests that IGRA allows the use of technology, including the Internet, to expand player participation in a common game if the game and all the players are participating from terminals located on Native American land.<sup>325</sup>

United States lotteries are played across state lines in the cases of the Powerball and Mega Millions lottery games. Powerball is a multi-state, mega-jackpot lotto game that is played in 24 states, the District of Columbia and the United States Virgin Islands. The game is administered by the Multi-State Lottery Association (the "MUSL"), a multi government-benefit association owned and operated by its member lotteries.<sup>326</sup> For each drawing, five white balls are picked out of a drum containing 53 balls and one red ball out of another drum containing 42 red balls.<sup>327</sup> Mega Millions is a multi-state lottery game played in 11 states, including Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas, Virginia and Washington.<sup>328</sup> Mega Millions drawings are held

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<sup>318</sup> James R. Kibler, Jr., "Annual Survey of Virginia Law: Administrative Law, 38 University of Richmond Law Review 39 (2003), p. 44-45, *citing* Va. Code Ann. § 59.1-369(5) (Cum. Supp. 2003).

<sup>319</sup> Cowan, *The Global Gambling Village*, p. 258 (internal citations omitted).

<sup>320</sup> 231 F.3d 713 (10<sup>th</sup> Cir. 2000).

<sup>321</sup> 223 F.3d 1091 (9<sup>th</sup> Cir. 2000).

<sup>322</sup> *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d at 716 – 717.

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*

<sup>325</sup> Cowan, *The Global Gambling Village*, p. 258 (internal citations omitted).

<sup>326</sup> See [www.powerball.com/pb\\_about.asp](http://www.powerball.com/pb_about.asp).

<sup>327</sup> See [www.nmlottery.com/PowerBall/AboutPowerball.htm](http://www.nmlottery.com/PowerBall/AboutPowerball.htm)

<sup>328</sup> See [www.megamillions.com/aboutus/lottery\\_faq.asp](http://www.megamillions.com/aboutus/lottery_faq.asp).

Tuesday and Friday nights. The drawings are conducted by the Georgia Lottery in Atlanta, Georgia.<sup>329</sup> In both of these multi-state gambling games, players in participating states purchase lottery tickets from retail terminals which are linked to the Powerball or Mega Millions multi-state computer network.

### United States

The gambling services described in paragraph 20 of the United States' second written submission may be transmitted between US states or on a cross-border basis. Other forms of Internet/remote gambling services are not authorized between US states or on a cross-border basis.

### For Antigua and Barbuda:

20. **Could Antigua and Barbuda please elaborate on its comment in paragraph 43 of its first oral statement that "We agree that in *certain specific circumstances* a service could be considered unlike only because it is supplied on a cross-border basis"? (emphasis added)**

### Antigua

The debate in this proceeding may have suffered from a possibly confusing use of the terms "cross-border" and "remote supply." Antigua has used these terms as follows: (i) *cross-border* is defined by Article I(2)(a) of the GATS: "from the territory of one Member into the territory of any other Member." This implies that "the service supplier is not present within the territory of the Member where the service is delivered," and includes "the supply of the service through telecommunications or mail"<sup>330</sup> (but only when service supplier and consumer are physically located on the territory of different Members); and (ii) *remote supply* includes the supply of services through telecommunications or mail or any other means when service supplier and consumer are not physically together irrespective of whether they are located within the same or within different countries.

Thus cross-border supply is necessarily remote supply but remote supply is only cross-border supply when service supplier and consumer are physically located in different Members. In its statement Antigua compared foreign services supplied on a cross-border basis (*i.e.* remote), with domestic services supplied via physical presence (*i.e.* non-remote)<sup>331</sup>. Antigua was not comparing cross-border remote supply with domestic remote supply. A more accurate wording is the following:

Antigua and Barbuda submits therefore that, in the context of a commitment by a Member to national treatment of cross-border supply, there must at least be a presumption that the fact that the services are provided remotely cannot, standing alone, make a service "unlike" a service provided via physical presence. We agree that in certain specific circumstances a service *could* be considered "unlike" only because it is supplied remotely. However, in line with our reasoning discussed above, and the position expressed by Japan in its third party submission, Antigua and Barbuda believes that it is for the United States to rebut what should be an assumption of *prima facie* "likeness" of services supplied remotely.

### United States

The United States wishes to clarify that it is not alleging that services supplied from Antigua are unlike because they are supplied on a cross-border basis. In principle, remote supply can occur

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<sup>329</sup> See [www.megamillions.com/aboutus/lottery\\_faqs.asp](http://www.megamillions.com/aboutus/lottery_faqs.asp).

<sup>330</sup> 1993 Scheduling Guidelines, para. 19.

<sup>331</sup> See Section III.B.5 of this Report.

either on a cross-border basis or on a purely domestic basis. US restrictions on remote supply apply equally regardless of national origin.

**For the United States:**

21. **Exhibit AB-42<sup>332</sup> indicates that Youbet.com provides its subscribers the ability to wager "in most states" on horse races. US legal residents above 21 years old can become a member and place bets online or on the telephone once they have opened an account. Youbet.com states that it "is in full compliance with all applicable state and federal laws". Could the United States comment on this case, especially in view of its statement (in paragraph 33 of its first written submission) that the *Interstate Horseracing Act* "does not provide legal authority for any form of Internet gambling"?**

**United States**

While Youbet.com states that they are in "full compliance with all applicable state and federal law," the US Department of Justice (the nation's chief law enforcement agency) does not agree with this statement. The Interstate Horseracing Act of 1978 is a civil statute in which the federal government has no enforcement role. In December 2000, the definition of the term "interstate off-track wager" in the IHA was amended. Congress, however, did not amend preexisting criminal statutes. When President William J. Clinton signed the bill containing the amendment to the IHA after the bill was passed by Congress, the Presidential Statement on Signing stated as follows:

Finally, section 629 of the Act amends the Interstate Horseracing Act of 1978 to include within the definition of the term "interstate off-track wager," pari-mutuel wagers on horse races that are placed or transmitted from individuals in one State via the telephone or other electronic media and accepted by an off-track betting system in the same or another State. The Department of Justice, however, does not view this provision as codifying the legality of common pool wagering and interstate account wagering even where such wagering is legal in the various States involved for horseracing, nor does the Department view the provision as repealing or amending existing criminal statutes that may be applicable to such activity, in particular sections 1084, 1952, and 1955, of Title 18, United States Code.<sup>333</sup>

After hearings on Internet gambling in 2003, the Department of Justice reiterated its view that current federal law prohibits all types of Internet gambling, including gambling on horse races, dog racing, or lotteries. The Department of Justice maintains this view because the 2000 amendment to the IHA did not repeal the preexisting federal laws making such activity illegal. Under the principles of statutory interpretation applicable in United States courts, "[i]t is a cardinal principle of construction that repeals by implication are not favoured ... . The intention of the legislature to repeal must be clear and manifest."<sup>334</sup>

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<sup>332</sup> Extract from the website of Youbet.com, at [www.youbet.com/faq/](http://www.youbet.com/faq/), submitted by Antigua as exhibit.

<sup>333</sup> Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, 2001, 36 Weekly Comp. Pres. Doc. 3153,3155-3156 (25 December 2000).

<sup>334</sup> *United States v. Borden Co.*, 308 U.S. 188, 188 (1939).

- 22. How does the United States treat Internet services provided by Youbet.com, TVG, Capital OTB and Xpressbet.com, referred to by Antigua and Barbuda in paragraph 118 of its first written submission?**

United States

Antigua discussed account wagering on horse races via the Internet and telephone.<sup>335</sup> The United States does not agree that the 2000 amendment to the IHA permits the interstate transmission of bets or wagers on horse races because pre-existing criminal statutes prohibit such activity.<sup>336</sup> It should be noted, however, that these Internet services provide additional services beyond just accepting wagers on horse races. They provide access to information about the horses, the odds on the horse races, simulcasting of horse races, etc. While US law does not permit interstate transmission by a wire communication facility of bets or wagers on horse races, the interstate transmission by a wire communication facility of information assisting in the placing of bets or wagers on horse races would not be prohibited, pursuant to 18 U.S.C. §1084(b), as long as the information is being transmitted from a place where betting on that event is legal to a place where betting on the same event is legal.

- 23. Could the United States comment on a statement made in the Gaming Industry Report by Bear Stearns (Exhibit AB-36<sup>337</sup>) that a number of operators in Nevada have established Internet gambling websites?**

United States

The Bear Stearns report discussed proposals for Internet gambling in the State of Nevada. The report indicated that Nevada's plans for Internet gambling are on hold, and that Nevada has been informed by the Department of Justice that US federal law does not permit Internet transmission of a bet or wager. Nevada officials have assured federal officials that no operation licensed in Nevada has been approved or authorized to use any wagering system that operates over the Internet. In the discussion on Internet gambling businesses located in Alderney and the Isle of Man, the report stated on page 18 that Venetian Casino Resort Athens LLC, a subsidiary of Las Vegas Sands, Inc., had applied for an e-gaming license from Alderney. On page 19, the report stated that MGM Mirage had been awarded a license from the Isle of Man. The United States understands that MGM Mirage formerly operated an Internet gambling website from the Isle of Man, but has ceased operation. Further, when this website was operating, our information indicated it did not accept wagers from individuals located in the United States. The United States does not have specific information on whether or when the Venetian Casino Resort began operating its Internet gambling website. While the United States is not in a position to provide an analysis of the operation of any specific website from the Isle of Man or Alderney, we can categorically state that as long as such websites do not accept bets or wagers from individuals located in the United States and do not provide information assisting in the placing of bets or wagers to individuals located in the United States where such wagering is illegal, then the operation of such websites from Alderney or the Isle of Man by "operators from Nevada" does not violate US federal gambling laws.

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<sup>335</sup> The United States submits that Antigua incorrectly states that "[i]n order to accommodate this new form of account wagering, in 2000, the United States expanded the IHA [Interstate Horseracing Act of 1978] to permit betting on horse races over the Internet. Today, United States residents can lawfully gamble on horse races by telephone or online with several United States-based companies." See Section III.B.5. of this Report.

<sup>336</sup> See US response to Panel's question 21.

<sup>337</sup> Michael Tew and Jason Ader, Bear Stearns & Co. Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders*, submitted by Antigua as exhibit.

24. **What is the status of the New Jersey bill referred to in the Gaming Industry Report by Bear Stearns (Exhibit AB-36) that would allow existing land-based casino facilities in New Jersey to operate Internet gaming sites from their own casino floors?**

United States

On page 35 of Exhibit AB-36, a bill introduced in 2001 in the State of New Jersey legislature is discussed. That bill was not passed by the State of New Jersey legislature. Another bill, AB 568, is discussed on page 36. That bill was introduced in the 2002-2003 session but it was not passed during that session. We have no information on whether that bill or any similar legislation has been or will be reintroduced in the New Jersey legislature.

25. **With respect to Exhibit AB-18<sup>338</sup>, could the United States indicate how it treats the services provided by Alliance Gaming Corp?**

United States

Exhibit AB-18 is an article from the *Las Vegas Review-Journal* about a progressive slot system in casinos in Moscow that is monitored by operators in a control room in Las Vegas. This article appears to concern a progressive slot machine system that involves physical slot machines located in casinos, and does not concern on-line slot machines. The article does not contain sufficient factual allegations on the operation of this system to allow the United States to draw any conclusions about the legality of this system. Generally, progressive slot machines are slot machines that are linked together in the same or multiple casinos in order to increase the jackpot. The United States understands that the player must travel to a participating casino where the progressive slot machine is located, physically deposit the wager in the slot machine, and play the slot machine inside the participating casino. Under this scenario, the bet is placed in the casino where the player is located. Thus, the wager is not placed remotely.

26. **Could the United States comment on the following excerpt from WT/GC/16 (referred to in paragraph 42 of Antigua and Barbuda's first oral statement) and the relevance, if any, of the comments contained therein to the present dispute:**

**"there should be no question that where a 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".**

United States

The United States concurs with the view that electronic delivery, in and of itself, does not cause a service to be excluded from a Member's commitments. The United States is not arguing for such an exclusion in this dispute. The quoted statement does not say, and should not be taken to mean, that delivery of a service by electronic means, or other means of remote supply, for that matter, automatically makes that service "like" any domestic service that is subject to the same commitment for purposes of the Article XVII likeness analysis. Remote supply does not mean that the service thus supplied (or its supplier) gets a "free pass" on likeness. As the United States points out in its second written submission, Antigua has failed to prove that its remotely supplied gambling services are like non-remote US gambling services.

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<sup>338</sup> Rod Smith, "Casino Industry Technology: Open Wide, New Progressive slot System Lets Las Vegas Company Serve Russian Gamblers," *Las Vegas Review Journal* (2 September 2003), submitted by Antigua as exhibits.



E. ARTICLE VI

**For Antigua and Barbuda:**

- 27. Could Antigua and Barbuda specify what "authorization procedures" it is referring to in its claim of violation of Articles VI:1 and VI:3 of the GATS Agreement?**

Antigua

The answer to this question is the same as question 11. It is not possible for Antiguan service suppliers to obtain authorisation to provide gambling and betting services into the United States. This violates Article VI:1 of the GATS because the "authorisation procedures" by their very terms exclude Antiguan suppliers and thus cannot be considered "administered in a reasonable, objective and impartial manner." This violates Article VI:3 because the inability to apply for authorisation makes it impossible for the United States to comply with the requirements of Article VI:3.

- 28. In respect of its claim of violation of Article VI:1, could Antigua and Barbuda indicate what "measures of general application" are not being "administered in a reasonable, objective and impartial manner" and why?**

Antigua

The general approach to gambling law in the United States is that all gambling and betting is prohibited unless a specific authorisation has been given. Thus, the United States first maintains its "measures of general application"—the state and federal measures that act to prohibit the provision of gambling and betting services in the United States. Overlaying the general prohibitions are the state and federal measures that authorise certain persons to provide certain gambling and betting services under a wide and disparate variety of situations.<sup>339</sup> By not providing a method by which Antiguan suppliers can obtain authorisation to offer their services into the United States, the United States is in violation of Article VI:1.

F. ARTICLE XI

**For Antigua and Barbuda:**

- 29. In paragraph 108 of its first oral statement, Antigua and Barbuda refers to "legal provisions" that formed the basis of the New York Attorney General's action against Paypal.**

- (a) Which legal provisions is Antigua and Barbuda referring to?
- (b) Is Antigua and Barbuda challenging these legal provisions and/or the application of these provisions?

Antigua

[a]: Paragraphs 14-18 of the "Assurance of Discontinuance" entered into in August 2002 between the Attorney General of the State of New York and PayPal, Inc,<sup>340</sup> refer to the two legal provisions and two cases (each of which was included in the Annex to Antigua's Panel request). In his discussion

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<sup>339</sup> See Section III.B.7. of this Report.

<sup>340</sup> Attorney General of the State of New York, Internet Bureau, *In the Matter of Paypal, Inc.*, Assurance of Discontinuance (16 August 2002).

of the two cases the New York Attorney General further refers to two other legal provisions that are also included in the Annex to the Panel request. Antigua refers to all these legal provisions. The provisions and cases at issue are:

- **N.Y. General Obligation Law §§ 5-401 and 5-411 (McKinney 2001).** Section 5-401, makes all wagers on races and games of chance unlawful. Section 5-411 renders void all contracts based on wagers or bets.
- **N.Y. Const. art. I, §9.** Article I, section 9 of the New York Constitution states, in its pertinent part:

"except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offences against any of the provisions of this section."
- ***U.S. v. Cohen*, 260 F.3d 68 (2<sup>nd</sup> Cir. 2001), cert. denied, 536 U.S. 922 (2002).** This case involves the United States' prosecution of Jay Cohen discussed in Antigua's answer to question 12. The New York Attorney General cited Mr. Cohen's case as evidence that federal law – the Wire Act<sup>341</sup> – prohibits "offshore sports betting operations used by persons located in New York State."<sup>342</sup>
- ***The People of the State of New York v. World Interactive Gaming Corp.*, 185 Misc. 2d 852 (Sup. Ctr. N.Y. Co. 1999).**<sup>343</sup> The New York Attorney General cited this case for the proposition that New York's criminal laws regarding unlawful gambling<sup>344</sup> allow the State of New York to enjoin a licensed Antiguan gaming enterprise from providing gambling services to Internet users in New York.

[b]: As was the case in Antigua's answer to question 10, Antigua is challenging the statutes (*and* their application as demonstrated by the cited cases) to the extent they are used by the United States to prevent Antiguan service suppliers from providing gambling and betting services to consumers in the United States.

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<sup>341</sup> 18 U.S.C. §1084.

<sup>342</sup> "Assurance of discontinuance" signed between the New York Attorney General and Paypal Inc., dated 16 August 2002, para. 16.

<sup>343</sup> Antigua cites to this same case in Section III of the Annex to its Panel request. Antigua's citation, although to the same case, is to a different reporting service.

<sup>344</sup> N.Y. Penal Law §225 (general gambling prohibition laws, included in the Annex to Antigua's Panel request).

## II. PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

### B. US SCHEDULE

#### For the United States:

30. In its reply to Panel question No. 3 to third parties, the European Communities refers to the last revision of the Revised Final Schedule of the United States Concerning Initial Commitments, circulated as MTN.GNS/W/112/Rev4 on 15 December 1993. The European Communities notes that this revision contained a cover-note that read as follows:

Except where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991).

The European Communities notes that the only further activity to be undertaken following circulation of this document by the United States was a process of "'technical verification of schedules' which did not modify at all the scope of the results of negotiations" (as provided for in GATT/AIR/3544, which, in turn, refers to a decision of the GNS dated 11 December 1993 providing the same).

- (a) Could the United States comment on the European Communities' reply?
- (b) How does the United States define the term "scope" in this cover-note?

#### United States

[a]: The document MTN.GNS/W/112/Rev.4 cited by the European Communities includes a sentence, substantially identical to that which appeared in MTN.GNS/W/112/Rev.3, stating that "[e]xcept where specifically noted, the scope of the sectoral commitments of the United States corresponds to the sectoral coverage in the Secretariat's revised Services Sectoral Classification List (MTN.GNS/W/120, dated 10 July 1991)." The EC has incorrectly described the cover note to draft versions of the US Schedule as indicating a US position "that the scope of [US] commitments is based on the 1991 Sectoral Classification (W/120) and the CPC."<sup>345</sup> The addition of the words "and the CPC" at the end of that sentence misrepresents the content of the cover note. The United States did not refer to the CPC in that note. Also, the United States has previously explained that the ordering of a schedule according to W/120 and the use of the CPC were distinct issues. Using W/120 did not bind a Member to the CPC, and this is confirmed by the fact that Members wishing to refer to the CPC inscribed CPC numbers in their schedules.

Regarding the discussions taking place in late 1993 and early 1994, those discussions provided ample opportunity for other participants in the GATS negotiations to request that the United States place CPC references in its schedule. A statement by the chairman of the Group of Negotiations on Services at an informal meeting on October 29, 1993 confirms this. The Chairman stated that:

I also intend to organise consultations, possibly on a fairly large scale and probably on 16 November, on drafting of schedules of commitments. I should stress that it would not be the purpose of this exercise to consider the economic content or value of offers, but rather, in the interest of all participants, to identify possible improvements

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<sup>345</sup> European Communities' reply to Panel question No. 3.

in the presentation of offers, based on actual examples. The organisation of this discussion would be greatly assisted if participants informed the secretariat in advance of any common errors in scheduling which in their view affect the clarity or the legal security of commitments. This would enable the secretariat to prepare a working document for the discussion.<sup>346</sup>

The Chairman's instructions strongly imply that any participant that desired the insertion of CPC references in the US schedule was free to raise the issue at that time.

The GATT Secretariat subsequently asked that parties to the GATS negotiations submit their questions on others' schedules of commitments and MFN exemptions by 27 January 1994. Meetings were scheduled in early February 1994 at which interested parties were invited to discuss the draft schedules of individual participants as part of a "rectification" process, with final schedules requested by early March, 1994. While this period was mainly intended to address technical matters, a number of substantive issues remained outstanding as well.<sup>347</sup> Thus the United States would not agree with the assertion that the "scope of the results of the negotiations" was fully settled by December 1993.

[b]: The note relates the "scope" of US commitments to the "sectoral coverage" in W/120, from which one may infer that "scope of commitments" and "sectoral coverage" were being used as roughly synonymous terms. Contrary to the EC's assertions, participants in the negotiations could not reasonably have read this note as an endorsement of the CPC classification. The United States was already on record as not wishing to be bound by any particular nomenclature. Moreover, as the United States noted in response to part (a) of this question, W/120 and the CPC were recognized to be distinct issues. While many favoured the CPC, others did not wish to refer to it. The texts of the schedules reflect that Members wishing to refer to the CPC so indicated by the inscription of numerical CPC references.

**31. In the European Communities' reply to Panel question No. 2 to the parties, the European Communities stated that "the relevance of unilateral practice has to be evaluated in the light of the obligation to be implemented." Could the United States comment on the European Communities' view of the relevance of unilateral practice of a Member in interpreting that Member's GATS Schedule.**

#### United States

This statement was made in the context of the USITC Document. In view of the limitations of that document already described at length by the United States,<sup>348</sup> the United States fails to see how it could constitute a "practice" in the application of GATS – even a unilateral one.

The United States disagrees with the argument advanced by the EC that unilateral practice is relevant to the interpretation of the US schedule in this dispute. The EC cites no customary rule of interpretation of public international law that gives weight to unilateral practice. The EC refers to *EC - Computer Equipment*, but ignores key aspects of that report that demonstrate that it supports the US view, including the following: (i) The Appellate Body in that dispute criticized the panel for looking at the classification practice of one Member while failing to look at that of another.<sup>349</sup> (ii) The

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<sup>346</sup> Informal GNS Meeting – 29 October 1993: Chairman's Statement, MTN.GNS/48 (29 October 1993).

<sup>347</sup> For example, participants continued to debate the scope of the GATS and the need to schedule certain types of measures. Participants were also given until June 1994 to complete the scheduling of certain sub-central measures. See Statement by the Chairman: Scheduling of Subsidies and Taxes at the Sub-Central Level, MTN.GNS/50 (13 December 1993).

<sup>348</sup> See Section III.B.2. of this Report; response to Panel question No. 2.

<sup>349</sup> Appellate Body Report on *EC – Computer Equipment*, para. 93

Appellate body in *EC - Computer Equipment* found that "classification practice" was only a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention, not context within the meaning of Article 31.3(b).<sup>350</sup> In that respect, *EC - Computer Equipment* once again directly contradicts the arguments of the EC and Antigua. (iii) *EC - Computer Equipment* dealt exclusively with "classification practice" – i.e., the practical application of customs classifications to goods.<sup>351</sup> The USITC Document, by contrast, does not represent the practical application of classifications under the GATS; its purpose is only to "facilitate comparison." It therefore does not reflect substantive implementation of US GATS commitments in the way that classification practice reflects implementation of goods commitments.

The United States further notes that, notwithstanding the fact that the USITC Document does not represent the implementation, interpretation, or application of any US commitment, the EC's comments on "unilateral practice" contain a number of surprising, and ultimately untenable, propositions.

First, the EC appears to suggest that implementation of a commitment is "particularly relevant" to the interpretation of a commitment. This is somewhat startling. In the first place, the EC cites no basis for this proposition in the customary rules of treaty interpretation. Indeed, it is hard to reconcile that position with the basic principle codified in Article 31(1) of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Furthermore, the EC appears to ignore completely the fact that many specific commitments were the subject of request-offer or other bi- or plurilateral negotiations. The EC's approach would no doubt surprise many Members who thought that other Members' GATS schedules record the results of their negotiations, and not just a set of words that the scheduling Member can "implement" and thereby interpret.

Second, the EC appears to suggest that the absence of an objection by other Members to the way one Member applies a specific commitment can be determinative of the meaning of that commitment. It is not entirely clear what the consequences of the EC's approach would be, whether for the schedule of the United States or that of any other Member. (The suggestion that the GATS had led to that sort of outcome would no doubt also startle many Members who participated in the negotiations but lack the resources to monitor implementation of other Members' every commitment.) In any case, the EC's position fundamentally rests on a principle that was rejected under the GATT 1947. As a GATT 1947 panel rejecting a similar argument by the European Communities made clear, "... it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties."<sup>352</sup>

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<sup>350</sup> Ibid., para. 92.

<sup>351</sup> Ibid., paras. 92-93.

<sup>352</sup> Panel Report on *EEC – Import Restrictions*, para. 28. Another panel pointed out that "[t]he decision of a contracting party not to invoke a right vis-à-vis another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement." Panel Report on *EEC (Member States) – Bananas I*, para. 3.62.

C. THE MEASURE(S) AT ISSUE

**For Antigua and Barbuda:**

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

Antigua

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

Antigua submits its response to this question in advance of the deadline of 2 February because this question could also be interpreted as an invitation to submit more detailed explanation about the federal and state laws that were not discussed in paragraph 20-21 of the oral statement of 10 December and Exhibit AB-84. In Antigua's view this is probably not the purpose of question 32 because the documents submitted as Exhibits AB-81 and -88 already contain an explanation of all the federal and state laws listed in the Panel request that is similar to the explanation given for the three federal laws in our oral statement of 10 December 2003 and for the laws of the five states summarized in Exhibit AB-84. 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.

United States

The United States wishes to reserve its right to respond to any new arguments and/or evidence put forward by Antigua in response to the Panel's additional questions. Consistent with the views expressed in the US request for preliminary rulings, the United States would request that the Panel permit the United States a minimum of four weeks to respond to any new arguments or comment on any new evidence advanced by Antigua concerning measures that it has not addressed in its previous submissions and statements.

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

Antigua

Antigua seeks to supply all types of services that involve the making of a bet or wager to consumers in the United States, subject to services that are prohibited by Antiguan law, such as those involving the use of pornographic, indecent or offensive material. It is difficult to cover every possible permutation in a list, but the product offerings encompassed by the gambling and betting services that Antigua seeks to offer include: (i) Random selection games (in whatever form and including games that are traditionally described as "lotteries" or "casino-type games" in their probably endless permutations). (ii) Event-based gambling. (iii) Card games and other games of skill involving monetary stakes. (iv) Person-to-person gambling (so-called "betting exchanges").

**For the United States:**

**34. How is paragraph 20 of the United States' second written submission relevant to Panel question No. 19? Is Internet/remote gambling and betting authorized between US states?**

United States

In response to Panel question 19, the United States stated that gambling services described in paragraph 20 of the US second written submission could be transmitted between US states or on a cross-border basis, but other forms of Internet/remote gambling services were not authorized between US states or on a cross-border basis. The reference to "paragraph 20" in that response was erroneous; the United States intended to refer to paragraph 26 of the US second written submission, in which the United States stated that US restrictions do not preclude cross-border supply of all gambling services, and listed several examples. The Internet/remote gambling services described in paragraph 26 are permitted between US states and on a cross-border basis, but other forms of Internet/remote gambling service (i.e., those involving transmission a bet or wager using a wire communications facility) are not. The United States thanks the Panel for bringing this error to its attention.

The United States wishes to note that paragraph 20 of the US second written submission does, however, bear a relationship to question 19. The table provided in paragraph 20 clarifies that in order to violate Article XVI:2(a), on which Antigua now bases its Article XVI:2 arguments, a limitation must restrict the "number of service suppliers," and must be "in the form of numerical quotas," etc. Under US law, whether a service is permissible between states and cross-border depends on the character of the activity involved. This type of restriction does not limit the number of suppliers (indeed, there can be an indefinite number of suppliers of permissible cross-border gambling services), and it does not take the "form" of "numerical quotas."

**35. In paragraph 17 of its second oral statement, the United States submits that "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." Could the United States identify the "certain services" for which supply is prohibited both domestically and on a cross-border basis?**

United States

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 US borders, such as Internet and telephone betting. Other gambling services that are similarly restricted both domestically and cross-border

include the mailing of lottery tickets between states, the interstate transportation of wagering paraphernalia, and wagering on sporting events.

**36. With respect to the reference to the "very few exceptions limited to licensed sports book operations in Nevada" in the second paragraph of Exhibit AB-73<sup>353</sup>, could the United States identify these exceptions, even on an illustrative basis?**

United States

Exhibit AB-73 is a letter from Deputy Assistant Attorney General John Malcolm to the National Association of Broadcasters. The sentence in that letter referred to by the Panel states that "[w]ith very few exceptions limited to licensed sports book operation in Nevada, state and federal laws prohibit the operation of sports books and Internet gambling within the United States, whether or not such operations are based offshore." Nevada is the only state where sports book services are legal in the United States. This exception results from the historical fact that Nevada had already authorized such services at the time when the US federal government decided to prohibit the further authorization of sports gambling by US states.<sup>354</sup> Sports book services are limited to Nevada, and sports books in Nevada cannot accept wagers from individuals located in other states.

Antigua

Antigua would like to point out that the statement made on behalf of the United States in the letter attached as Exhibit AB 73 is not completely accurate when it says "[w]ith very few exceptions limited to licensed sport book operations in Nevada, state and federal laws prohibit the operation of sports books and Internet gambling within the United States (...)." Under the legislation known as the "PASPA,"<sup>355</sup> the United States federal government expressly exempted four states, Nevada, Oregon, Delaware and Montana, from its general prohibition on sports betting other than horse racing, greyhound racing and jai alai. Presently, only Nevada has full-scale sports betting, although Oregon has a number of sports betting opportunities through the state-owned lottery.<sup>356</sup> There is nothing in the PASPA or other federal laws restricting the ability of these states to engage in the full range of sports betting services on a commercial or state-owned basis. Further, while the United States appears to distinguish in several ways between horse racing and other forms of sports betting, Antigua believes that there is really no logical basis for the distinction. Horse race betting *is* sports betting and is widely sanctioned throughout the United States, whether delivered "in person", over the telephone or via the Internet.

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<sup>353</sup> Letter from the United States Department of Justice to the National Association of Broadcasters entitled "Advertising for Internet Gambling and Offshore Sportsbooks Operations," (11 June 2003), Submitted by Antigua as exhibit.

<sup>354</sup> 28 U.S.C. §§ 3701-3704. This law was enacted in 1991 to "stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248, reprinted in 1992 U.S.C.C.A.N. 3553, 3555. Congress believed that "[s]ports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports." Ibid. Nevada was the only state that had authorized sports books at the time of the enactment of this federal statute (or within a year thereafter), thus under the terms of the statute it became the only state permitted to continue doing so.

<sup>355</sup> 28 U.S.C. §§ 3701-3704.

<sup>356</sup> [www.oregonlottery.com](http://www.oregonlottery.com)



D. ARTICLE XVI

**For the United States:**

- 37. Assuming, arguendo, that the United States has made a commitment in its GATS Schedule in relation to gambling and betting services, what is the purpose of evaluating consistency with paragraph 2 of Article XVI in addition to making that evaluation with respect to paragraph 1 given that the United States has inscribed a "none" in its Schedule in relation to market access commitments?**

United States

The word "none" appears under the heading of "limitations on market access." In order to determine whether a Member has violated the commitment reflected by inscription of the word "none," one must therefore determine what it means to have a "limitation on market access." Article XVI:2 provides the closed list of carefully-described quantitative restrictions and other limitations that are considered "limitations on market access" under the GATS. Thus one is logically bound to look to Article XVI:2 to determine whether a Member has maintained or adopted a measure inconsistent with Article XVI.

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

United States

Antigua relies on the word "whether" to assert that Article XVI:2(a) is, internally speaking, an open list rather than a closed one. The word "whether" does not automatically imply an open list. In fact, the WTO agreements are replete with contrary examples where the drafters understood this, and therefore added some catch-all term such as "any other form." The particular example using that phrase is Article XXVIII(a) of the GATS, which states that "'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form" (emphasis added). Another example more functionally analogous to Article XVI of the GATS is Article XI of the GATT, which describes an open list by reference to "prohibitions or restriction ... whether made effective through quotas, import or export licenses or other measures". Indeed, that example further confirms the previous US arguments on the important differences between Article XI of the GATT and Article XVI of the GATS.

There is another example in the GATS Annex on Financial Services, which uses the phrase "whether on an exchange, in an over-the-counter market or otherwise". Indeed, the WTO Agreements contain a number of other examples. Together they confirm that since Article XVI:2(a) includes no catch-all phrase, it is properly read as a closed list.

Antigua

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

that: "[T]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination (...)." <sup>357</sup>

The United States' argument that the broad purposes expressed in Article XVI:1 are then negated by a formalistic reading of Article XVI:2 is patently illogical and violates the basic rule of treaty interpretation described by the first paragraph of Article 31 of the Vienna Convention, i.e. that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." According to its preamble the object and purpose of GATS is the "progressive liberalization" of trade in services "as a means of promoting the economic growth of all trading partners and the development of developing countries." Market access commitments are obviously one of the main mechanisms through which this "progressive liberalisation" is put into effect. To allow a country to evade full commitments to market access expressed in its schedule simply by adopting a barrier in the "form" of a total, outright prohibition would render those commitments ineffective. This clearly cannot have been the intention of the drafters of the GATS.

**39. Could the United States comment on Antigua's arguments in paragraph 32 of Antigua's second oral statement regarding the significance of the 1993 and 2001 Scheduling Guidelines insofar as they state that a nationality requirement for service suppliers would be caught by Article XVI:2(a) of the GATS? Could the 2001 Scheduling Guidelines constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention or "subsequent practice" under Article 31(3)(b) of the Vienna Convention?**

United States

In paragraph 32 of its second oral statement, Antigua asserts that the 1993 and 2001 scheduling guidelines "state unequivocally that a nationality requirement for service suppliers would be caught by Article XVI:2(a) as equivalent to a zero quota despite the fact that it does not have the form of a numerical quota." Antigua bases this assertion on a list of examples of limitations on market access provided in the scheduling guidelines. That list includes, under "[l]imitations on the number of service suppliers," the entry "[n]ationality requirements for suppliers of services (equivalent to zero quota)."

The United States disagrees with Antigua's broad assertions based on this line in the scheduling guidelines for the following reasons: (i) nothing in the text of Article XVI supports the theory of an implied "zero quota." The text of Article XVI:2(a) relied upon by Antigua refers in relevant part to "limitations on the number of service suppliers ... in the form of numerical quotas." Under the ordinary meaning of this text, the "form" of the limitation is the legally relevant fact, not its alleged implication or effect. The quoted language requires that this form be "numerical" (which means "of, pertaining to, or characteristic of a number or numbers") and a "quota" (which means a "quantity ... which under official regulations must be ... imported"). <sup>358</sup> US restrictions on remote supply of gambling do not take the form of numerical quotas on service suppliers; (ii) the scheduling guidelines themselves state elsewhere that "[n]umerical ceilings should be expressed in defined quantities in either absolute numbers or percentages." <sup>359</sup> This statement is more consistent with the text of Article XVI; (iii) the scheduling guidelines state on their face that they "should not be considered as an authoritative legal interpretation of the GATS" <sup>360</sup>; (iv) the example of a nationality requirement is inapposite because such a requirement theoretically precludes all cross-border supply, whereas – as the United States has repeatedly stressed – US restrictions on remote supply of gambling

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<sup>357</sup> Appellate Body Report on *EC – Hormones*, para. 181.

<sup>358</sup> *The New Shorter Oxford English Dictionary*, pp. 1955, 2454 (4<sup>th</sup> ed. 1993).

<sup>359</sup> Addendum to 1993 Scheduling Guidelines; response to question 3; 2001 Scheduling Guidelines, para. 9.

<sup>360</sup> 1993 Scheduling Guidelines, para. 1; 2001 Scheduling Guidelines, para. 1.

do not prohibit all cross-border supply of gambling services, and they apply regardless of nationality; (v) unlike nationality requirements, US restrictions on remote supply of gambling are restrictions on the attributes of a service, not limitations on market access. In a 1997 paper discussing (among other things) the "zero quota" line in the Scheduling Guidelines, the WTO Secretariat observed that although a nationality requirement might be considered a zero quota (*quod non*), "[a] restriction on the composition of management of a commercial presence cannot be construed as a direct restriction on market access for a foreign services supplier."<sup>361</sup> The Secretariat thus distinguished between restrictions on the "attributes" of a service, which belonged in the national treatment column, and restrictions on "natural persons actually supplying the service," which belonged in the market access column.<sup>362</sup> Consistent with this analysis, US restrictions on the attributes of a service are not limitations on market access.

The Panel asks whether the 2001 Scheduling Guidelines constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention. They do not. The United States has already pointed out that the text of the document states that it should not be considered as a legal interpretation of the GATS. It would therefore be inconsistent with the terms of the document itself to construe it as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Also, the General Council and the Ministerial Conference have the "exclusive authority" to adopt legal interpretations of the WTO agreements.<sup>363</sup> Finally, the 2001 Scheduling Guidelines do not relate to the "interpretation" or "application" of the GATS; rather, they represent preparatory work for the negotiation of new commitments. For all of these reasons, the 2001 Scheduling Guidelines do not constitute a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention.

The Panel asks whether the 2001 Scheduling Guidelines constitute "subsequent practice" under Article 31(3)(b) of the Vienna Convention. They do not. Article 31(3)(b) of the Vienna Convention refers to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." The 2001 Scheduling Guidelines constitute non-binding guidance for the negotiation of treaty provisions, and as such represent preparatory work for future commitments, not practice "in the application of the treaty." Moreover, the 2001 Scheduling Guidelines do not "establish[] the agreement of the parties regarding" the interpretation of the GATS. On the contrary, these "guidelines" expressly state that they are not an interpretation, and were drafted with great care to suggest or recommend, rather than require, particular approaches, nomenclatures, or interpretations. Therefore one cannot conclude that the 2001 Guidelines represent a practice of Members reflecting a common understanding by Members on the interpretation of any provisions of the GATS.

The positions expressed in the two preceding paragraphs are further confirmed by the text of the Decision by which the Council for Trade in Services adopted the 2001 scheduling guidelines. The Council decided:

1. To adopt the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services contained in document S/CSC/W/30 *as a non-binding set of guidelines*.
2. Members are invited to follow these guidelines *on a voluntary basis* in the future scheduling of their specific commitments, in order to promote their precision and clarity.

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<sup>361</sup> Revision of Scheduling Guidelines – Note by the Secretariat, S/CSC/W/19, para. 20 (5 March 1999).

<sup>362</sup> *Ibid.*

<sup>363</sup> Article IX:1 of the Marrakesh Agreement Establishing the World Trade Organization.

3. These guidelines *shall not modify any rights or obligations* of the Members under the GATS.<sup>364</sup>

The italicized language demonstrates that the 2001 Scheduling Guidelines were intended neither to bind Members nor to alter the extent of any right or obligation under the GATS (including the extent of commitments). Moreover, it was understood that the revised guidelines did not constitute an authoritative interpretation of GATS provisions, since such an interpretation would have to be based on Article IX of the WTO Agreement. Rather, they constituted preparatory work for "future scheduling" of specific commitments.

E. ARTICLE XVII

**For Antigua and Barbuda:**

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

Antigua

In 2001, a survey was undertaken by some industry participants in order to determine the "consumer market" among gamblers world-wide. A summary of the report on their findings<sup>365</sup> contains some interesting material regarding the demographics of gamblers.<sup>366</sup> The River City Study found considerable overlap in the use of gambling services by regular gamblers. In particular, it found that "[l]and-based and pay-online players, those who gamble for real money both online and offline, are the market's true gambling enthusiasts. (...). [T]hey are the greatest gambling spenders in the market."<sup>367</sup> The study also found that gamblers who only play for real money on-line but do not gamble at land-based facilities "are a unique sliver of the total e-gaming consumer market."<sup>368</sup>

A number of academic studies in the United States and the United Kingdom have found a high degree of substitutability between different forms of gambling. To Antigua's knowledge there are no such studies that specifically investigate substitutability of "Internet-based" gambling vis-à-vis "land-based gambling." However, Antigua has asked the opinion with respect to substitutability in the gambling markets of two leading economists in this field (Professor Donald Siegel of the Rensselaer Polytechnic Institute of Troy, New York and Professor Leighton Vaughan Williams from Nottingham Trent University). Both conclude that "Internet based" gambling is a strong substitute for "land-based" gambling.<sup>369</sup>

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<sup>364</sup> Decision on the Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS) – Adopted by the Council for Trade in Services on 23 March 2001, S/L/91 (29 March 2001) (emphasis added).

<sup>365</sup> "The River City Gambler Monitor," The River City Group, Reymer & Associates (2001).

<sup>366</sup> "Internet Gambling Report, Sixth Edition," River City Group, LLC (2003) (the "River City Study").

<sup>367</sup> Ibid., p. 57.

<sup>368</sup> Ibid.

<sup>369</sup> The statement by Professor Donald Siegel and Professor Leighton Vaughan Williams and the additional statement by Professor Leighton Vaughan Williams submitted by Antigua as exhibits. Some of the literature to which the first opinion refers is also submitted as evidence: D. Siegel and G. Anders, "The Impact of Indian Casinos on State Lotteries: A Case Study of Arizona," *Public Finance Review*, Vol. 29, No. 2, March 2001, pp. 139-147; D.S. Elliott and J.C. Navin, "Has Riverboat Gambling Reduced State Lottery Revenue?" *Public Finance Review*, Vol. 30, No. 3, May 2002, pp. 235-247.

With its first submission, Antigua also provided the Panel with anecdotal evidence of competition between Internet-based and domestic gambling services in the United States.<sup>370</sup> There is considerable further anecdotal evidence of competition between Internet and other gambling.<sup>371</sup>

With regard to the general proposition that "Internet-based" commerce competes with "land-based" commerce Antigua refers to the initiative of the United States' Federal Trade Commission ("the FTC") to promote competition over the Internet.<sup>372</sup> The FTC has found, however, "that many state regulations favor local suppliers over out-of-state competitors and that others ban online competition for particular goods and services altogether." In relation to an investigation of Internet wine sales the FTC found that: "E-commerce can offer consumers lower prices, greater choices, and increased convenience. In wine and other markets, however, anticompetitive barriers to e-commerce are depriving consumers of those benefits." The FTC further found that: "State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." In relation to the states' concern of underage drinking the FTC concluded that "states can limit sales to minors through less-restrictive means than an outright ban."

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

Antigua

From the beginning of this dispute, Antigua has maintained that all gambling and betting services involving the placing of a wager are "like" for purposes of Article VXII of the GATS. Due to the lack of WTO jurisprudence on "likeness" under the GATS, as was discussed at some length in Antigua's oral statement of 10 December, Antigua believes that an appropriate context for assessing "likeness" is found in the leading GATT 1994 case on the topic, that of *EC – Asbestos*.<sup>373</sup>

In *EC – Asbestos*, the Appellate Body found that the two most important criteria for the determination of "likeness" were: (i) the extent to which the products are capable of serving the same or similar end-uses; and (ii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand. In this respect Antigua submitted in paragraph 38 of its opening statement of 26 January 2004 that the experience of winning or losing money is the *sine quo non* of gambling and betting services which could equally well be delivered locally or "remotely." This is not the case with a comparison the

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<sup>370</sup> This evidence can be found in "The Handle: Thursday Roundup," *The Spokesman Review* (Spokane Washington) (2 February 2001); David Bennett, "Lottery's pot for schools ends up short," *Crain's Cleveland Business* (23 July 2001); Jim Saunders, "Video-gambling debate spins in soft economy," *The Florida Times-Union* (29 December 2002); and Michael Kaplan, "Gambling in America: A Special Report," *Cigar Aficionado*, (October 2002).

<sup>371</sup> See, e.g., Rod Smith, "Online Betting Growth Called Threat to Nevada," *Las Vegas Review-Journal* (24 January 2003), D1 ([http://www.reviewjournal.com/lvrj\\_home/2004/Jan-24-Sat-2004/business/23006933.html](http://www.reviewjournal.com/lvrj_home/2004/Jan-24-Sat-2004/business/23006933.html)) (Nevada gambling industry experts view on-line betting growth as a threat to the Nevada gambling industry's standing as the centre of the world gaming industry) Ed DeRosa, "NYRA, Magna Withhold Simulcast Signal From Attheraces," *Thoroughbred Times.com*, 13 January 2004 (<http://www.thoroughbredtimes.com/todaysnews/newsview.asp?recno=41340&subsec=>) (Internet betting sites adversely impacting horse race betting). In its 2002 Equity Research paper on the Gaming Industry, "E-Gaming: a giant beyond our borders," (September 2002) the investment banking firm of Bear Stearns & Co., Inc. cites a number of competitive concerns of the United States domestic gaming industry over Internet-based gambling. See Michael Tew and Jason Ader, Bear Stearns & Co, Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders*, pp. 32-39.

<sup>372</sup> FTC, "E-commerce lowers prices, increases choices in wine market".

<sup>373</sup> Appellate Body Report on *EC – Asbestos*.

United States tries to make in paragraph 39 of its second written submission in which it seeks to draw an analogy with the difference between participation in actual horseback riding compared to participation in "virtual reality" horseback riding—a situation in which the main feature of the two activities is clearly different (physical as opposed to non-physical activity).

In view of the criteria put forward by the Appellate Body in *EC – Asbestos*, Antigua believes that the most important criterion for the determination of "likeness" in WTO law is product (or service) substitutability. There are, of course, various levels of substitutability. For instance, economic evidence existing in the United States shows that, at one level, gambling activities serve as a broad substitute for other "entertainment and recreation services."<sup>374</sup> Antigua does not suggest, however, that any level of substitutability necessarily makes two services "like." On the other hand the level of substitutability required for two services to be viewed as "like" should not be set at a level which is unduly high and should be considered in the context of the other "competition component" of Article XVII: the requirement of "conditions of competition" that are not less favourable. In other words, services with a low substitutability will bear a considerable level of different treatment without effect on the "conditions of competition" and without violation of Article XVII. In the case of two services with a high substitutability, a low level of different treatment will modify conditions of competition and, consequently, violate Article XVII.<sup>375</sup> The available economic evidence suggests that there is a high or relatively high degree of substitutability between the various traditional forms of gambling services as well as substitutability between the various methods of distribution of gambling services.<sup>376</sup> In this respect Antigua submits that a radically different treatment of one form of gambling, or one distribution method, compared to another necessarily violates Article XVII.

#### **For the United States:**

- 42. In its submissions, the United States has introduced a distinction between, on the one hand, remote supply of gambling and betting services and, on the other, the non-remote supply of such services. Could the United States clarify how it defines "remote" and "non-remote" supply of such services, making reference to the specific application of this distinction in the United States. For instance, if a lottery ticket for a New York State lottery is purchased through a licensed vendor in Florida, does this amount to remote supply, given the definition of this term referred to by the United States in paragraph 7 of its first written submission?**

#### **United States**

By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. Non-remote supply means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc. The United States wishes to add

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<sup>374</sup> D. Siegel and G. Anders, op. cit., pp. 140.

<sup>375</sup> See also, A. Mattoo, "MFN and the GATS," in T. Cottier and Petros C. Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, (The University Of Michigan Press, 2000), 51-99, at p.73-75.

<sup>376</sup> Statement by Professor Donald Siegel and Professor Leighton Vaughan Williams in response to the question: "does Antigua have any market-based/economic evidence to support its assertion that "Internet-based" and "land-based" gambling and betting services compete and the consumers switch from one to the other?" submitted to the Panel by Antigua; D. Siegel and G. Anders, "The Impact of Indian Casinos on State Lotteries: A Case Study of Arizona," *Public Finance Review*, Vol. 29, No. 2 (March 2001); D.S. Elliott and J.C. Navin, "Has Riverboat Gambling Reduced State Lottery Revenue?" *Public Finance Review*, Vol. 30, No. 3 (May 2001).

a brief comment on the New York/Florida example. In practice, that example would not occur because the state lotteries operate on an exclusive territorial basis.<sup>377</sup> Setting that aside for the sake of discussion, the United States considers that if the consumer must go to a local vendor point of presence to purchase the gambling service, it is non-remote. In the Panel's example, the New York supplier needs to contract with a vendor in Florida, rather than supplying the service directly by means of distance communication.

- 43. What is the United States' reaction to statements made by the representative of Antigua during the Panel's second substantive meeting that there has been no communication between Antiguan and US authorities regarding the concerns that the United States has pointed to as justifying the drawing of a regulatory distinction between remote gambling and non-remote gambling?**

United States

The United States fails to see how Antigua's assertions bear on a likeness analysis under Article XVII. Nothing in Article XVII indicates that likeness depends on the degree of communication between Members' authorities concerning differences between services. The United States has already observed that it has had significant interactions with Antigua and Barbuda on law enforcement issues. To the extent that the Panel's question refers to Antigua's assertions concerning requests for law enforcement assistance, the United States refers the Panel to paragraphs 7 through 10 of the US second closing statement. Regarding other forms of regulatory cooperation, the United States welcomes inquiries and fact-finding missions from governments wishing to learn about US regulation of gambling services. The United States is not aware of any effort by the government of Antigua to pursue such cooperation. As explained in the US second submission and second opening statement, the absence of any US domestic regulatory regime that permits the remote supply of gambling services makes it unreasonable for Antigua to expect the United States to engage in international negotiations toward the establishment of such a regime for its cross-border suppliers. Moreover, Antigua's positions in this dispute make it clear that Antigua is unwilling to recognize the existence of specific US regulatory concerns surrounding remote supply of gambling.

F. ARTICLE XIV

**For the United States:**

- 44. Is the United States formally invoking Article XIV and expecting a determination on the same, if necessary?**

United States

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

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<sup>377</sup> U.S. states could in theory permit businesses to procure for a person in one state a ticket, chance, share or interest in a lottery conducted by another state (without actually transmitting the ticket out of the state where it was purchased) pursuant to an agreement between the two states authorizing such activity. But the United States is not aware of any states that have entered into the agreements that would be necessary to permit such activity. Even if states did enter into such agreements, local presence in the consumer's state would be required, as the tickets could not be mailed between states.

view of the express language of Article XIV ("nothing in the agreement shall prevent..."), the United States views the primary role of Article XIV in this dispute as further confirming the absence of any inconsistency.

**45. In the case of an affirmative answer to the previous question, could the United States clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)?**

United States

The United States would like to first note that a Member's laws and regulations are presumed to be consistent with WTO rules unless proven to be otherwise. A defending party's burden of proof regarding measures enforced under Article XIV(c) therefore differs from the burden imposed on a party seeking to prove that laws or regulations are inconsistent with the GATS. The defending party under Article XIV(c) need only show that such laws exist and have not been found inconsistent with the GATS. Such laws do exist in this case, and although Antigua challenges some of these laws (alleged state restrictions on gambling), Antigua has not shown that any (much less all) are inconsistent with the GATS.

Sections 1084, 1952, and 1955 secure compliance with state laws restricting gambling and like offences. State laws restricting gambling include the laws by which a number of states prohibit some or all gambling.<sup>378</sup> With respect to this issue, Antigua stated in paragraph 30 of its second submission that "[t]he existence of federal legislation facilitates the prosecution of suppliers of 'unauthorized' gambling" under state law." Thus Antigua itself recognizes that US federal gambling laws serve as enforcement measures for state laws.

The United States argued in paragraphs 100-101 of its second submission that §§ 1084, 1952, and 1955 are measures against organized crime, and that inherent in the concept of "organized crime" are certain types of criminal activity in which organized crime groups typically engage. Thus, the United States submits that as measures against organized crime, §§ 1084, 1952, and 1955 secure compliance with the US laws and regulations that define and/or prohibit organized crime, as well as laws and regulations that prohibit the criminal activity that, when committed in certain ways, constitutes organized crime. These laws and regulations include the following:

- (i) Racketeer Influenced and Corrupt Organizations statute: Organized crime is a subset of the broader category of "racketeering." The predominant US law defining and prohibiting racketeering is the Racketeer Influenced and Corrupt Organizations statute, or, more commonly, the "RICO" statute,<sup>379</sup>
- (ii) Organized Crime Control Act of 1970 findings: While the term "organized crime" has no legal definition as such under US law, the statutory findings of Congress in the Organized Crime Control Act of 1970 refer to "a highly sophisticated, diversified, and widespread activity" involving "unlawful conduct and the illegal use of force, fraud, and corruption" and which "derives a major portion of its power through money obtained from such illegal endeavours as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation";<sup>380</sup>
- (iii) Attorney General Order 1386-89: "Organized crime" is defined for operational purposes at the US federal level in the Appendix to Attorney General Order 1386-89. That document

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<sup>378</sup> See, e.g., Utah Code Ann. § 76-10-1102; Hawaii Rev. Statutes §§ 712-1221 through 712-1223.

<sup>379</sup> RICO Statute, 18 U.S.C. §§ 1961-1968.

<sup>380</sup> See Section III.B.5. of this Report.



states that: "[T]he definition of "organized crime" ... refers to those self-perpetuating, structured and disciplined associations of individuals or groups, combined together for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while protecting their activities through a pattern of graft and corruption." According to this definition, organized crime groups possess certain characteristics which include but are not limited to the following: (i) Their illegal activities are conspiratorial; (ii) In at least part of their activities, they commit or threaten to commit acts of violence or other acts which are likely to intimidate; (iii) They conduct their activities in a methodical, systematic, or highly disciplined and secret fashion; (iv) They insulate their leadership from direct involvement in illegal activities by their intricate organizational structure; (v) They attempt to gain influence in government, politics, and commerce through corruption, graft, and legitimate means; (vi) They have economic gain as their primary goal, not only from patently illegal enterprises such as drugs, gambling and loan sharking, but also from such activities as laundering illegal money through and investment in legitimate business;<sup>381</sup>

- (iv) Underlying criminal activities: As the above descriptions make clear, organized crime ultimately consists of the commission in a given manner of a combination of underlying crimes. A measure against organized crime is therefore also a measure against the commission of such underlying crimes. Key examples of underlying crimes that are often committed as organized crime include the following: (i) violent crimes. US state laws forbid the illegal use of force. For example, all of the states prohibit murder and assault.<sup>382</sup> Federal laws also apply to such acts when they occur within federal jurisdiction.<sup>383</sup> State and federal laws also prohibit acts involving the threat of force, such as extortion;<sup>384</sup> (ii) property crimes: US state laws also forbid acts of larceny and fraud,<sup>385</sup> and other property crimes. Federal laws also apply to such acts when they occur under certain circumstances, such as fraud schemes using the US mails or interstate wire transmissions, or where stolen property is taken across state lines<sup>386</sup>; (iii) corruption and conspiracy crimes: US state and federal laws prohibit various forms of corruption and conspiracy.<sup>387</sup> One such law, the federal RICO statute, is mentioned above. Another is the federal conspiracy statute;<sup>388</sup> (iv) money laundering. US federal and state law also prohibits money laundering.<sup>389</sup>

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<sup>381</sup> Order Directing Realignment of Organized Crime Program Resources, Attorney General Order 1386-89, appendix (26 December 1989).

<sup>382</sup> Examples of such laws from two of the larger U.S. states are Cal. Penal Code §§ 187-89 (murder) and §§ 240-41 (assault); N.Y. Penal Code §§ 120.00-.15 (assault).

<sup>383</sup> See, e.g., 18 U.S.C. § 1111 (federal crime of murder).

<sup>384</sup> An example of such laws at the federal level is 18 U.S.C. § 875. Examples from two of the larger U.S. states are Cal. Penal Code §§ 518-527 (extortion) and N.Y. Penal Law § 155.05(2)(e) (larceny by extortion).

<sup>385</sup> Examples from two of the larger U.S. states are Cal. Penal Code § 484 (theft) and N.Y. Penal Law § 190.40-.83 (criminal usury, scheme to defraud, criminal use of an access device, identity theft, and unlawful possession of personal identification information).

<sup>386</sup> 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 2314 (interstate transportation of stolen property).

<sup>387</sup> See, e.g., N.Y. Penal Law Arts. 180, 200 (bribery and bribery of public servants).

<sup>388</sup> 18 U.S.C. § 371.

<sup>389</sup> 18 U.S.C. §§ 1956-1957; N.Y. Penal Law Art. 470.

### III. COMMENTS BY THE PARTIES ON THE RESPONSES PROVIDED IN SECTION II

#### A. COMMENTS BY ANTIGUA AND BARBUDA ON THE UNITED STATES' RESPONSES TO PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

##### *Question 36 (for the United States)*

**With respect to the reference to the "very few exceptions limited to licensed sportsbook operations in Nevada" in the second paragraph of Exhibit AB-73<sup>390</sup>, could the United States identify these exceptions, even on an illustrative basis?**

In its response to this question, the United States answered that Nevada was the only state in which "sports book" services are legal in the United States. This is not accurate. As Antigua has pointed out previously, there are four states in the United States that are exempt from the application of the 1992 federal legislation that restricted certain forms of sports-related betting in the United States.<sup>391</sup> Although effected somewhat cryptically, the exemptions are found in Section 3704 of the statute.<sup>392</sup> Oregon maintains state-sponsored betting on certain sporting events on the basis of this exemption and Delaware has considered adopting extensive sports betting.

A proper analysis of the market for sports betting in the United States should take into account the non-sanctioned, or "illegal," sports betting industry, which comprises a huge segment of the United States gambling market and is, despite protests of the United States to the contrary, as stated by the United States NGISC, "*not likely to be prosecuted.*"<sup>393</sup>

##### *Question 42 (for the United States)*

**In its submissions, the United States has introduced a distinction between, on the one hand, remote supply of gambling and betting services and, on the other, the non-remote supply of such services. Could the United States clarify how it defines "remote" and "non-remote" supply of such services, making reference to the specific application of this distinction in the United States. For instance, if a lottery ticket for a New York State lottery is purchased through a licensed vendor in Florida, does this amount to remote supply, given the definition of this term referred to by the United States in paragraph 7 of its first written submission?**

In its response to this question, the United States for the first time presents a clear, concise definition of what it has called "remote supply" — what it considers to be the "unlike" gambling and betting service that it may prohibit from being supplied on a cross-border basis without being in violation of its commitments under the GATS.<sup>394</sup> The response deserves to be set out in its entirety (emphasis added):

By remote supply, the United States means situations in which the gambling service supplier (whether foreign or domestic) and the service consumer are not physically together. In other words, the consumer of a remotely supplied service does not have to go to any type of outlet, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier has no point of presence but offers the service directly to the consumer through some means of distance communication. *Non-remote supply*

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<sup>390</sup> See above footnote 353.

<sup>391</sup> 28 U.S.C. §§ 3701-3704.

<sup>392</sup> Anthony N. Cabot and Robert D. Faiss, "Sports Gambling in the Cyberspace Era," 5 *Chapman Law Review* 1, Spring 2002, p.7, footnote 31.

<sup>393</sup> NGISC Final Report, pp. 2-4. See generally the discussion and sources in Section III.B.2. of this Report.

<sup>394</sup> And which, apparently, it also believes is subject to exclusion under Article XIV of the GATS.

*means that the consumer presents himself or herself at a supplier's point of presence, thus facilitating identification of the individual, age verification, etc.*

This statement is important in a number of respects. First, it unambiguously establishes the United States' position that the only actual difference between "remote" and "non-remote" gambling and betting services is the ability of the consumer to make an actual physical appearance before (or in proximity to) another person or a vending machine. It also implicitly clarifies that the only arguable societal concern that might be better addressed by the "non-remote" gambling and betting service is under age gambling.<sup>395</sup> Antigua is aware of no form of gambling in the United States that requires verification of identity to simply place a wager, whether at a casino, at a vending machine, at a retail outlet or otherwise. Further, there is nothing inherent in a personal appearance before a gambling service provider or vendor that precludes organised crime participation or money laundering—at least nothing that the United States has produced in this proceeding. Indeed, rather than unsubstantiated allegations, the United States has produced nothing in this proceeding to either (i) challenge the efficacy of the Antiguan regulatory scheme with respect to organised crime or money laundering or (ii) demonstrate that organised crime or money laundering exists at all in the Antiguan gambling and betting industry, much less at levels in excess of those pervading the gambling industry in the United States.

If under age gambling is then the primary concern of the United States, again the United States has produced nothing in this proceeding: (i) demonstrating that under age gambling has ever occurred in connection with the Antiguan gambling and betting industry, much less at levels in excess of those pervading the gambling industry in the United States; (ii) demonstrating the insufficiency of the Antiguan regulatory schemes to prevent under age gambling; (iii) to explain why the United States Congress considers use of credit cards sufficient to prevent under age access to the clear dangers of pornography and paedophilia on the Internet but not sufficient to prevent under age access to gambling and betting services on the Internet; or (iv) countering the assertions of Antigua that enhanced inter-governmental cooperation or use of other means of age verification could further reduce the risk of under age gambling.

With respect to the statements made in the United States' response to this question, Antigua would refer the Panel to Antigua's answer to question 19 of the Panel, in which it was pointed out that there are multi-state lotteries currently operating in the United States.<sup>396</sup> The largest of these, the "Powerball" lottery, is played in 24 states.

*Question 43 (for the United States)*

**What is the United States' reaction to statements made by the representative of Antigua during the Panel's second substantive meeting that there has been no communication between Antiguan and US authorities regarding the concerns that the United States has pointed to as justifying the drawing of a regulatory distinction between remote gambling and non-remote gambling?**

In its response to this question, the United States says that it "fails to see how Antigua's assertions bear on a likeness analysis under Article XVII." The United States misunderstands the point of Antigua's statement. Antigua has made clear its belief that regulatory schemes cannot be relevant for purposes of assessing "likeness" under Article XVII. Rather the purpose of the statement was to indicate that although the United States would have this Panel believe that money laundering is

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<sup>395</sup> The United States has already conceded that "adults can be expected to exercise their own moral judgment (...)." Further, the United States has adduced no evidence to establish that what it calls "remote" gambling provides greater "health" risks than "non-remote" gambling, while Antigua has produced reports of three noted experts to the contrary.

<sup>396</sup> Antigua's reply to Panel question No. 1.

endemic in the Antiguan gambling and betting industry, the United States has *not even once* contacted the Antiguan government in this regard. Antigua was therefore simply refuting the baseless allegations made by the United States.

Two additional points made by the United States in its response to this question bear further comment. The United States says (emphasis added):

[T]he absence of any US domestic regulatory regime that permits the remote supply of gambling services *makes it unreasonable for Antigua to expect the United States to engage in international negotiations* toward the establishment of such a regime for its cross-border suppliers. Moreover, Antigua's positions in this dispute make it clear that Antigua is unwilling to recognize the existence of specific US regulatory concerns surrounding remote supply of gambling.

Antigua considers the first point made astonishing for a number of reasons, but particularly in the context of the requirements of the "chapeau" of Article XIV. With respect to the second point made in the paragraph, it is patently untrue. Antigua recognizes the regulatory concerns associated with gambling and betting services – that is why Antigua has its own, thorough set of regulations. More to the point, however, Antigua believes that any remaining regulatory concerns that the United States may have can and should be the subject of discussion and negotiations between the parties. As was pointed out by Antigua, there may well be existing technologies and methods of cooperation that could obviate any concerns that the United States may have in respect of the provision of cross-border gambling and betting services. Antigua has offered to consult with the United States in this respect on numerous occasions, but the United States has refused to do so – as it makes clear in its answer to this question.

*Question 44 (for the United States)*

**Is the United States formally invoking Article XIV and expecting a determination on the same, if necessary?**

The United States position on this issue remains unclear. Its statements contained in its response to this question can be construed to mean that the United States does not invoke Article XIV as a defence, but simply as a method of "further confirming the absence of any inconsistency" of its laws with the GATS, apparently. Antigua disagrees with the United States position that Article XIV can apply in the absence of a determination of inconsistency of other domestic measures with the GATS. It is clear under WTO jurisprudence that defences such as those contained in Article XIV are "exceptions to substantive obligations" of the parties.<sup>397</sup> In the absence of a "substantive obligation," the "exceptions" of Article XIV have no application.

*Question 45 (for the United States)*

**In the case of an affirmative answer to the previous question, could the United States clearly and specifically identify the provisions of laws and regulations with which it says the challenged measures secure compliance under Article XIV(c)?**

The part of Article XIV(c) on which the United States relies in its response to question 45 refers to measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)."

The Panel asked the United States to (emphasis added) "*clearly and specifically* identify the provisions of laws and regulations with which it says the challenged measures secure compliance

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<sup>397</sup> Appellate Body Report on *US – Shrimp*, para. 121.

under Article XIV(c)." In its response the United States recognizes that it is the task of a defending party that seeks to invoke Article XIV(c) to "show that such laws exist." The United States then discusses two categories of laws: "state gambling laws and regulations" and "organized crime laws and regulations."

With regard to the category of "State gambling laws and regulations," the United States submits the following:

State laws restricting gambling include the laws by which a number of states prohibit some or all gambling.<sup>20</sup>

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<sup>20</sup> See, e.g., Utah Code Ann. § 76-10-1102; Hawaii Rev. Statutes §§ 712-1221 through 712-1223.

In doing so the United States clearly confirms that the states' gambling prohibition laws apply to gambling and betting services supplied on a cross-border basis from Antigua — if the state laws would not apply to such supply the United States could not argue that the three federal prohibition laws<sup>398</sup> are necessary to secure compliance with these state laws. The Panel should note that the two specific state laws cited in the United States' footnote 378 are listed in Antigua's Panel request. Thus, the United States' response to question 45 confirms that the state prohibition laws identified by Antigua are part of and contribute to the United States total prohibition. Consequently they are themselves GATS-inconsistent and cannot form the basis of an Article XIV(c) defence.

With regard to the actual argument that the United States seeks to run on the basis of the state gambling prohibitions, Antigua has the following observations. The United States' argument apparently rests on a hypothetical situation in which the Panel were to find that three federal laws violate the GATS but that the state laws do not, presumably on the basis of the formalistic view that Antigua has submitted sufficient "provision specific" information with regard to these three federal laws but not with regard to the state laws. In Antigua's view, this is in any event not the case, if only because the level of "provision specific" information that Antigua has submitted for these three federal laws is the same as it has submitted regarding other state and federal laws — the actual texts of the statutes, summaries of each and discussion regarding how they operate.

In any event, if the Panel were nevertheless to adopt such a position, the United States defence would fail regardless because, on any analysis, it suffers from a lack of "provision specific" information. In Antigua's view the level of "measure identification" a defending party that invokes the affirmative defence of Article XIV(c) must meet is at the very least similar to that of a complaining party who seeks to challenge a measure in WTO dispute settlement: both have to establish that "measures" with the alleged effect exist. With regard to the category of "state gambling laws and regulations," the only "provision specific" information that the United States submitted in response to the request of the Panel is one sentence, accompanied by one footnote that merely cites, and only by way of example, statutory provisions of two states, i.e. Utah and Hawaii.

Antigua's Panel request alone already contains more information than the United States attempt to invoke Article XIV(c) because it lists the main gambling prohibition laws of *all* states and territories and not just two. And of course, Antigua has done more than merely cite references, amongst others in response to question 10 from the Panel to Antigua which was coined in similar terms as question 45 to the United States: "please identify all relevant legislative and regulatory provisions."

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<sup>398</sup> 18 U.S.C. § 1084, 18 U.S.C. §§ 1952, 1955

Antigua also disagrees with the United States' argument that a defending party who seeks to invoke Article XIV(c) must not establish a *prima facie* case that the law for whose compliance the inconsistency with GATS is necessary, is itself consistent with GATS (particularly so if that law essentially has the same effect as the law that has already been found to be GATS-inconsistent). Article XIV is an affirmative defence and it is therefore up to the United States to make a *prima facie* case that the conditions of Article XIV(c) are fulfilled, including the presence of laws that are "not inconsistent" with GATS.

With respect to organized crime laws and regulations, the United States does not meet the high "measure identification" standard that it says exists in WTO dispute settlement. It cites a number of specific laws by way of example<sup>399</sup> but does not even try to give a comprehensive overview of the main state and federal laws at issue. To the extent that it explains these laws, it does so in a summary way that is less extensive than the explanation Antigua has given for all major gambling prohibition laws at both the federal and state level. Furthermore the United States includes in its brief recital of "laws and regulations" an "Attorney General Order" and "statutory findings of Congress" which, in its own view, cannot be classified as "laws and regulations."<sup>400</sup>

That being said, Antigua does not suggest that the United States' level of "measure identification" of the "organized crime laws and regulations" is necessarily insufficient for the purposes of Article XIV(c) or WTO dispute settlement in general. Antigua only submits that, if the standard of "measure identification" is as high as the United States has argued that it is throughout this dispute, the United States' Article XIV(c) defence concerning organized crime laws and regulations does not meet that standard.

As a final point Antigua submits that nothing in the United States' response to this question of the Panel or in the materials submitted with that response establishes that the total prohibition of cross-border supply of gambling services from Antigua is "necessary" to secure compliance with the GATS-consistent aspects of its laws against organised crime. In fact, there is no evidence at all of any involvement of organised crime in Antiguan suppliers of gambling and betting services, nor is there evidence of any of the other criminal activities mentioned in the United States' response to Question 45 in the Antiguan gambling and betting industry.

B. COMMENTS BY THE UNITED STATES ON ANTIGUA AND BARBUDA'S RESPONSES TO PANEL'S QUESTIONS AT THE SECOND SUBSTANTIVE MEETING

*Question 40 (for Antigua)*

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

Antigua asserted that "there is competition between" Internet-based and land-based gambling services "because consumers switch from one to the other – just like a gambler can switch from one land based casino to another." The Panel asked for market-based/economic "evidence" to support this

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<sup>399</sup> See, e.g., the Racketeer Influenced and Corrupt Organizations Statute ("RICO"), Cal. Penal Code §§ 187-189 and §§ 240-241, NY Penal Code §§ 120.00-.15, 18 U.S.C. § 1111, 18 U.S.C. § 875, Cal. Penal Code §§ 518-527 and NY Penal law § 155.05 (2) (e)

<sup>400</sup> The Attorney General Order 1386-89 is used by the United States to illustrate its definition of "organized crime." Similarly the Organized Crime Control Act 1970 findings are also used to explain what is meant by "organized crime" as this phrase "has no legal definition as such under U.S. law." Of course, the United States has argued a number of times that a "measure" must be in essence be a discrete law in and of itself. See, e.g., Request for Preliminary Rulings by the United States of America, WT/DS285 (17 October 2003), paras. 3-10.

assertion. Antigua's response provides none. Instead, Antigua offers a series of baseless assertions that assume, rather than prove, such competition.

In the first paragraph of its response to question 40, Antigua asserts that there is "considerable overlap in the use of gambling services by regular gamblers." In fact, Antigua has not provided any evidence approaching "considerable overlap" between the users of Internet-based remote gambling services and users of non-remote gambling services.

Antigua cites a summary of a River City Group "study," but fails to provide the study itself.<sup>401</sup> Moreover, the summary cited by Antigua actually contradicts Antigua's "overlap" argument. Specifically, it states that only 28 per cent of all gamblers gamble online for real money. Another source, the Online Gambling Market Research Handbook, indicates that the overlap in customers is much smaller – possibly less than 5 per cent.<sup>402</sup>

In the second paragraph of its response to question 40, Antigua asserts that "academic studies in the United States and the United Kingdom have found a high degree of substitutability between different forms of gambling." Based on such literature, Antigua and its economic consultants assert the existence of substitution between Internet gambling and land based gambling. This reasoning is seriously flawed.

First of all, Antigua overstates the limited conclusions of its own consultants regarding substitutability of Internet and land-based gambling. Antigua states that its consultants "conclude that 'Internet based' gambling is a strong substitute for 'land-based' gambling." By contrast, the consultants themselves actually concluded that "there is strong substitutability *among gaming choices*" – a generalization that does not specifically compare Internet and land-based gambling. When trying to compare Internet and land-based gambling specifically, however, Antigua's consultants could only draw the weaker conclusion that there was "substantial evidence to support the assertion that 'land-based' gambling and betting services compete and that consumers switch from one to the other."<sup>403</sup> Yet upon examination, the alleged "substantial evidence" for this "assertion" appears to consist only of literature related to non-remote gambling.<sup>404</sup>

Antigua and its consultants are making an unsupported leap of logic. They cite no empirical studies actually addressing the relationship between Internet gambling and land-based gambling. Instead, they merely allege, without foundation, that literature finding that the revenue of established

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<sup>401</sup> The summary cited by Antigua (and authored by the chairman of the Interactive Gaming Council, a group dedicated to promoting Internet gambling) provides neither a full data set nor an explanation of its methodology, so its validity, if any, is impossible to discern.

<sup>402</sup> Online Gambling Market Research Handbook, p. 8 (2003) ("Many industry analysts estimate less than [sic] 5% of the players on the Internet are 'real gamblers.' This is attributed to the following reasons:

- Online generation is younger
- Different experience
- From areas where land-based gaming is not legal
- Consist of non-core gamblers, but who like a little flutter."

<sup>403</sup> Statement by Professor Donald Siegel and Professor Leighton Vaughan Williams submitted by Antigua to the Panel.

<sup>404</sup> Ibid. The United States has examined as many of these sources as could be located in the time available and found no empirical evidence comparing Internet and land-based gambling.

In addition, the separate statement by Professor Williams reaches an even weaker conclusion. Professor Williams relies on studies "looking at other sectors of the gambling industry" and "gambling products which in some respects mimic the Internet gambling experience," not Internet gambling itself, to support "a conclusion that Internet gambling is likely to substitute *in some degree* for land-based gambling" (emphasis added). One need hardly point out that Professor Williams is making an unsupported leap of logic from other sectors and products to Internet gambling, and that "some degree" is a carefully-chosen term that does not exclude a slight or minuscule degree.

land-based gambling options changed with the introduction of other new land-based gambling options somehow demonstrates that substitutability exists between Internet and land-based gambling.<sup>405</sup>

Furthermore, the argument put forward by Antigua and its consultants rests on the implicit assumption that individuals budget a specific amount of money for gambling that must be redistributed with the introduction of a new gambling option. Based on results discussed in the submitted studies, however, this does not appear to be the case.<sup>406</sup> The relatively rapid growth of the gambling industry is more consistent with the hypothesis that increasing the available forms of gambling increases total expenditures on gambling, rather than merely shifting expenditures among gambling options.

In short, Antigua and its consultants have not explained why they think Internet gambling would be highly substitutable with land based gambling. Nor have they accounted for unique variables that would be likely to impact substitutability in the case of Internet gambling, such as availability of Internet access<sup>407</sup> and the different nature of the Internet gambling environment.<sup>408</sup>

Tellingly, Antigua provides no direct economic data on cross-price elasticities of demand between Internet and land-based gambling, in spite of the fact that one of Antigua's consultants acknowledges that it is "common practice to assess substitution through studies that estimate 'cross-price elasticities of demand.'"<sup>409</sup> Past panel reports reviewing an economic substitution argument have relied on high-quality statistical evidence of the existence of cross-price elasticities of demand (in this case, it would be between Internet and land-based gambling or remote and non-

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<sup>405</sup> Not surprisingly, Antigua ignores aspects of this literature that appear to contradict its own conclusions. For example, Paton, Siegel and Williams (2003a), cited by Antigua, found "no evidence of substitution from machines or casino gambling to betting," which would seem to disprove the hypothesis that all forms of gambling inherently display a high degree of substitutability. Also, the studies show contradictory results for "substitution" between lotteries and Native American casinos. Antigua's consultants rely heavily on the results from Siegel and Anders, who found that increased numbers of slots at Native American casinos in Arizona reduced state lottery revenues. But they ignore the results of Elliott and Navin, who failed to find any impacts for Native American reservations in a much broader sample than the Siegel and Anders study. Nor do they attempt to explain the apparent contradiction between Elliot and Navin's findings for riverboat casinos and their findings for Native American casinos.

<sup>406</sup> Elliot and Navin reported that Gulley and Scott (1989) found that "[e]ach additional dollar bet on the state lottery is estimated to lead to a decline of three cents in thoroughbred racing handle." David O. Gulley and Frank A. Scott Jr, "Lottery Effects On Pari-Mutuel Tax Revenues", *National Tax Journal*, vol. 42, 1989, 89-93 as cited in Elliott and Navin.. Even Elliott and Navin's results on the impact of riverboats found that for each \$5 in additional gross outlays at the boats, state lottery revenues fell by only \$1.38. Thus, it appears that the greater impact of the addition of gambling options was to increase overall expenditures on gambling.

A study by Kearney (2003) similarly indicates that increasing gambling options results in increased gambling expenditures. Kearney found that in the United States, total household expenditures on gambling increased after the introduction of a state lottery. See Melissa Schettini Kearney, "State Lotteries and Consumer Behaviour" draft Sept. 2003, p. 30, available at <http://www.wellesley.edu/Economics/kearney/mskearney-lotteries-9-03.pdf> ("Data from micro-level surveys of gambling behaviour corroborate the claim that household lottery gambling is financed by a reduction in non-gambling expenditures, not by substitution away from alternative forms of gambling.").

<sup>407</sup> Internet gambling requires access to a computer and the Internet, whereas the land-based forms of gambling analyzed in the literature cited by Antigua did not require the participant to own any special equipment. As some studies have indicated, many lottery players tend to be from lower income households and may be less likely to own a computer.

<sup>408</sup> Other forms of gambling require much more active engagement on the part of the participant to reach, with specific intent to gamble, the point of sale. On the Internet, however, pop-up ads and other inducements may cause the potential gambler to reach the gambling opportunity without any specific intent to gamble, and then encourage gambling in an environment of unmatched ease and privacy. This very different environment for gambling on the Internet is likely to result in individuals gambling through Internet use who would not otherwise be involved in gambling activity.

<sup>409</sup> Additional Statement by Professor Leighton Vaughan Williams submitted by Antigua to the Panel.



remote gambling), not the unsupported speculation and "stylized facts" offered by Antigua and its consultants.<sup>410</sup>

Moreover, evidence from the United Kingdom, relied upon heavily by Antigua and its consultants, has little weight in an assessment of consumer behaviour in the United States.<sup>411</sup> Nonetheless, it is noteworthy that Antigua's own consultant stated in that context that Internet betting exchanges were complementary to, rather than substitutes for, existing betting on bookmakers.<sup>412</sup> Together with the foregoing analysis, this statement further confirms that Antigua's assertions of substitutability between Internet and land-based gambling rest on questionable and unsupported assumptions, rather than on facts.

In the third paragraph of its response to Question 40, Antigua asserts that there is "considerable further anecdotal evidence of competition between Internet and other gambling," but the sources it cites provide no support for this view.<sup>413</sup> Indeed, in some cases the sources contradict

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<sup>410</sup> Panel Report on *Japan – Alcoholic Beverages II*, para. 6.31 (noting that elasticity of substitution is measured through "[f]ormal statistical methods" and "based on actual observations," and criticizing a party's failure to examine particular variables). See also Panel Report on *Chile – Alcoholic Beverages*, paras. 7.63-64 (treating studies regarding cross-price elasticity of demand with caution because they lacked supply side data and used small statistical samples, and stating that "a high estimated coefficient of elasticity would be important evidence to demonstrate that products are directly competitive or substitutable *proved that the quality of the statistical analysis is high.*" (emphasis added)). In this dispute, Antigua has provided no statistical analysis whatsoever comparing Internet and land-based gambling.

<sup>411</sup> Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 20 (quoting the observation in the Report of the Working Party on *Border Tax Adjustments* that "consumers' tastes and habits ... change from country to country"). See also Minutes of Evidence Taken before Joint Committee on the Draft Gambling Bill, Thursday, 8 January 2004, Q250, available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-iii/uc13902.htm> (response of Dr. Mark Griffiths, Antigua's consultant in the present dispute, testifying that "[E]very country has a different culture of gambling. ... Every country I have looked at that has de-regulated in a big way has seen an increase in problem gambling, and I do not see why that should not occur here, but there will be a different culture in terms of what people will enjoy gambling on."); David Paton, Donald S. Siegel, and Leighton Vaughan Williams, "A Policy Response to the ECommerce Revolution: The Case of Betting Taxation in the U.K.," *Economic Journal*, Vol. 111, Issue 480, F296-F314 (2002) ("It is clear, then, that there are major differences in the nature of gambling activity and how it is perceived and regulated in UK and the USA.").

<sup>412</sup> Minutes of Evidence Taken before Joint Committee on the Draft Gambling Bill, Tuesday, 13 January 2004, Q324, available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtgamb/uc139-iv/uc13902.htm> (response of Professor Williams, stating that "the turnover that is going through betting exchanges is complementary not substitute for existing betting on bookmakers"). A gambling industry representative testifying before the same committee alongside Professor Williams stated that "we are in the business of providing destination leisure opportunities through which gaming is delivered. That is a very, very different market from somebody betting at a betting exchange or on Internet gaming." See *Ibid.*, Q326 (response of Mr. John Kelly, Cross-Industry Group on Gaming Deregulation).

In the same hearing, Professor Williams also qualified his own conclusions regarding substitutability of gambling generally by stating that "I have found only weak evidence, however, of substitution between casino and gaming spend and betting and only weak evidence to date of a substitution effect between gaming activity and bingo activity." *Ibid.* at Q315 (response of Professor Williams). This statement confirms that any belief that substitutability may exist between land-based forms of gambling is by no means universal, and therefore substitutability cannot simply be assumed to exist between Internet and land-based gambling.

<sup>413</sup> The Article "Online Betting growth called threat to Nevada" cited in above footnote 371 of Antigua's response to question 40 reports on assertions that Nevada and Nevada-based casinos are losing moneymaking opportunities because U.S. law prevents them from taking their "fair share" of Internet gambling revenues. Nowhere does this article state or imply that Internet gambling is competing for revenues with non-remote forms of gambling. It merely confirms the U.S. position that Internet gambling is illegal for domestic operators as well as cross-border operators. Similarly, the article "NYRA, Magna Withhold Simulcast Signal From Attheraces" cited in footnote 371 of Antigua's response explains that the concern in that case was not

this view by suggesting that Internet gambling is a complement to, rather than a substitute for, land-based gambling.<sup>414</sup>

Much stronger "anecdotal" evidence comes from industry leaders from both the Internet and land-based gambling industries who contradict Antigua's assertions that these two different services are in competition with one another. For example, American Gaming Association President Frank Fahrenkopf has testified before the US Congress that Internet gambling is not a competitive threat to US commercial casinos.<sup>415</sup>

Prominent companies in the Internet gambling industry appear to share this view. For example, Boss Media, one of a handful of major suppliers of Internet gambling technology, states on its website that "Boss Media considers that Internet casinos do not compete with land-based casinos."<sup>416</sup> Similarly, a 2002 industry report funded by Microgaming, another major supplier of Internet gambling technology, concluded that Internet gambling and land-based gambling are actually complementary products, rather than competitors.<sup>417</sup>

In its response to question 40, Antigua refers to "the general proposition that 'Internet-based' commerce competes with 'land-based' commerce" and cites a press release concerning a United States Federal Trade Commission staff report on sales of wine over the Internet. The United States fails to see how this discussion of an unrelated industry is relevant in any way to Antigua's specific burden of proof regarding gambling services. As the United States pointed out, the issue in this dispute is not whether remotely supplied services are *always* like non-remote services. Likeness is a case-by-case

Internet competition; it was the failure by certain providers to direct betting data into the common pool used in all pari-mutuel wagering.

<sup>414</sup> For example, in footnote 371 of its response to question 40, Antigua cites the Bear Stearns report. Once again, an examination of that report shows that it supports the U.S. position. The cited pages of the report provide no evidence of direct competition between Internet and land-based gambling. On the contrary, the Bear Stearns analysts theorize that Internet gambling is a complement to land-based gambling in that it allows land-based operators to "cross-market to a different customer base." Michael Tew and Jason Ader, Bear Stearns & Co, Inc., Equity Research, *Gaming Industry: E-Gaming: A Giant Beyond Our Borders*, p. 33. This is consistent with the same report's conclusion that "Internet gamers are generally not the same customer as land-based gamers." See *ibid.*, p. 55.

<sup>415</sup> Mr. Fahrenkopf stated that:

There is simply no comparison between the social, group-oriented entertainment experience of visiting a casino resort and the solitary experience of placing a bet or wager using a personal computer. Visiting a casino today is about much more than legal wagering opportunities. Whether measured by how people spend their time or how they spend their dollars, guests of U.S. commercial casinos are increasingly attracted as much or more by restaurants, shows, retail, recreation, and other non-gaming amenities.

The view that Internet gambling is not a competitive threat to U.S. commercial casinos is shared by financial analysts at major Wall Street firms, whose job it is to analyze the competitive impact of market developments on the industries and firms they cover, including the major publicly traded gaming companies the AGA represents.

Testimony of Frank J. Fahrenkopf, Jr., President and CEO, American Gaming Association, Before the Senate Banking Committee, March 18, 2003, *available at* [http://www.senate.gov/~banking/\\_files/fahrenkopf.pdf](http://www.senate.gov/~banking/_files/fahrenkopf.pdf). See also Net Gambling Bills Protect Established Gambling Interests, Tech Law Journal *available at* <http://www.techlawjournal.com/Internet/19991025b.htm> (October 25, 1999) (quoting Mr. Fahrenkopf as stating that "We are not concerned about losing business to Internet gambling. There is simply no comparison between playing at home on a computer and the broad entertainment experience our destination resorts offer. Wall Street analysts confirm that view.")

<sup>416</sup> [http://www.bossmedia.se/about/risk\\_analysis.asp](http://www.bossmedia.se/about/risk_analysis.asp), Exhibit US-45.

<sup>417</sup> Internet Gaming: An Industry Survey, Internet Gaming & Wagering Business, p. 7, *available at* <http://www.microgaming.com/themes/microgaming/brochure/survey.pdf> (August 2002) ("[C]ontrary to earlier fears from within the terrestrial gaming industry, online gambling is not expected to detract from the total amount wagered offline. In fact, pundits now believe that online gambling will help develop the land-based casino market by educating future gamblers virtually.")

analysis. In the case of gambling, Antigua has failed to support its assertions of likeness with economic evidence or with any other credible evidence.

*Question 33 (For Antigua)*

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

The United States is surprised by the list of services in Antigua's response to question 33. This new taxonomy of services is difficult to reconcile with Antigua's previous statement identifying Internet "virtual casinos" and Internet and telephone sports betting ("sports book") operators as the types of services and suppliers it licenses. If the items in Antigua's response to question 33 are now to be considered as the services sought to be provided by Antigua, then the United States submits that in addition to its many other failures to make a *prima facie* case, Antigua has failed to relate its argumentation and evidence to this particular list of services, or show how any specific US measure(s) affect the supply of the newly listed services.

The United States also finds it ironic that after consistently seeking to diminish or dismiss the serious regulatory concerns reflected in US law, Antigua now asserts its own right to prohibit services that it considers "offensive." Antigua asserts such a right while at the same time attempting to deny the United States the authority to restrict services that the United States views (on firm evidence) as posing serious law enforcement, consumer protection, and health risks – not to mention threats to public order and morals.

*Question 36 (For the United States)*

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

Antigua's comments on question 36 incorrectly describe the Professional and Amateur Sports Protection Act, codified at 28 USC. §§ 3701-3704. Antigua's comment on question 36 states that:

Under the legislation known as the "PASPA," the United States federal government expressly exempted four states, Nevada, Oregon, Delaware, and Montana, from its general prohibition on sports betting other than horse racing, greyhound racing and jai alai. ... *There is nothing in the PASPA or other federal laws restricting the ability of these states to engage in the full range of sports betting services on a commercial or state-owned basis.* (emphasis added)

Both of the quoted sentences are incorrect.

The purposes of the Professional and Amateur Sports Protection Act (PASPA) were described in the US response to question 36. Essentially, the PASPA halted all sub-federal authorization of sports-related gambling in the United States.

The PASPA permitted the continuation of certain previously authorized sports betting activity in some states (although, contrary to Antigua's description, such states are not "expressly" mentioned in the legislation). However, the statute did not provide that those states had unlimited ability to add new forms of sports wagering.

As it happens, Nevada, Oregon, Delaware and Montana<sup>418</sup> had authorized particular forms of sports-related gambling during the time periods specified in the legislation, and these particular forms of gambling were therefore permitted to be authorized in the future under the terms of the statute. Of these states, only Nevada allowed sports book services. The others allowed sports-related lottery games.<sup>419</sup>

The PASPA does not permit the future authorization of sports betting in these states in any form beyond that which existed at the time of the enactment of PASPA. Thus, Oregon, Delaware and Montana may not now enact legislation authorizing sports book services, and Nevada may not now enact legislation authorizing sports-related lottery games.<sup>420</sup> As a result, Nevada is the only place in the United States where sports book services may be authorized.

In the context of the present dispute, it is also important to note that nothing in the PASPA creates an exception for any domestic or foreign operator from the application of 18 U.S.C. § 1084. Thus the PASPA does not permit the authorization in any state of Internet sports gambling in violation of 18 U.S.C. § 1084, or of any other interstate or cross-border transmission of a bet or wager using a wire communications facility. Moreover, Antigua has advanced no theory on which the PASPA could be found to violate any provision of the GATS.

On the issue of pari-mutuel betting on horse races, Antigua's comment on question 36 that "[f]urther, while the United States appears to distinguish in several ways between horse racing and other forms of sports betting, Antigua believes that there is really no logical basis for the distinction" is baseless. Indeed, while Antigua has made a number of assertions concerning pari-mutuel betting on horse races, the fact remains that Antigua has offered no specific evidence demonstrating that any Antiguan gambling services and suppliers are "like" US pari-mutuel horse race betting services and their suppliers.

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<sup>418</sup> During the Congressional debate on the PASPA, "calcutta" wagering in Wyoming and pari-mutuel bicycle wagering in New Mexico were also mentioned at one point as previously authorized forms of gambling.

<sup>419</sup> No state enacted new legislation allowing covered sports betting before expiration of the time periods specified in the legislation, thus the scope of permissible activity remains as it was as of the enactment of the legislation.

<sup>420</sup> A Senate Committee report discussed how the PASPA would apply to those states that had authorized some form of sports wagering. This report stated that:

Under paragraph (1) of subsection (a), Oregon and Delaware may conduct sports lotteries on any sport, because sports lotteries were conducted by those States prior to August 31, 1990. Paragraph (1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting. ...

Under paragraph (2), casino gambling on sports events may continue in Nevada, to the extent authorized by State law, because sports gambling actually was conducted in Nevada between September 1, 1989, and August 31, 1990, pursuant to State law. Paragraph (2) is not intended to prevent Nevada from expanding its sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act. Furthermore, sports gambling covered by paragraph (2) can be conducted in any part of the State in any facility in that State, whether such facility currently is in existence. At the same time, paragraph (2) does not allow a State sports lottery to be established in any State in which such a lottery was not in operation prior to August 31, 1990.

The narrowness of subsection (a) reflects the committee's policy judgment that sports gambling should be strictly contained.

Senate Report No. 102-248 (1992), reprinted in 1992 U.S.C.C.A.N. 3553,3561. Thus, Nevada, Oregon, Delaware, and Montana do not possess unlimited ability to add new forms of sports wagering.

*Question 41 (For Antigua)*

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

Antigua states that "the experience of winning or losing money is the *sine quo non* of gambling and betting services which could equally well be delivered locally or 'remotely.'"

Further to the arguments that the United States has already made rebutting this argument, we note the recent testimony of Professor Griffiths, Antigua's consultant in this dispute, who stated before a Joint Committee of the British Parliament that:

My guess is that for 99 per cent of the people who go to a destination to gamble, like myself when I go to Las Vegas or wherever, it is because I think I am going to have a fun time. I do not go there to win money. If I win, that is a bonus. When I go to my local casino in Nottingham, I go there to have a meal, be with friends, have a talk or whatever and the gambling is incidental. My guess is that for most people who go to destination resorts that would be their aim, just to have a fun time out. Yes, they may win some, they may lose some, but the point is that this is not being done in isolation.<sup>421</sup>

**IV. PANEL'S QUESTIONS FOR THE THIRD PARTIES ONLY**

**For all Third Parties:**

**B. ARTICLE XVI**

- 1. Do the third parties agree with the EC's submission in paragraph 84 of its written submission that a blanket prohibition on the provision of cross-border gambling and betting services amounts to a quantitative restriction within the meaning of Article XVI:2(a)?**

**European Communities**

The European Communities confirms its position. It would like to add that the position expressed does not exclude such a blanket prohibition, if existing, may also be relevant under different items of Article XVI:2 of the GATS. For example, depending on the way in which the prohibition is drafted, it might also be relevant under items (b) or (c). Also, a blanket prohibition that only applied, *de jure* or *de facto*, to services supplied cross-border could be relevant under Article XVII.

**Japan**

Japan shares the point that a complete prohibition on the provision in a service sector where specific commitments are undertaken amounts to a quantitative restriction within the meaning of Article XVI:2(a), when that complete prohibition is provided in express terms by one or combination of domestic laws and regulations. It reserves its views on such cases where supplying services in a specific sector is not prohibited in express terms by one or combination of domestic laws and regulations, but is made in effect extremely difficult by one or combination of domestic laws and

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<sup>421</sup> Minutes of Evidence, Thursday, 8 January 2004, *supra* footnote 11, Q257 (response of Dr. Mark Griffiths).

regulations which respectively do not constitute measures covered by Article XVI:2(a) to (f) and therefore are not reserved in a Members' schedule. It considers that the consistency of such situation with Article XVI needs to be addressed on a case-by-case basis, while the situation could simultaneously might as well raise a question of Article VI:5 consistency.

### Mexico

Mexico's view is that where there is a blanket prohibition on the provision of a service through mode 1 (cross-border supply), the number of service suppliers that can supply a service through that mode is zero. Thus, a blanket prohibition on the provision of a service through mode 1 amounts to a quantitative restriction within the meaning of Article XVI:2(a).

## C. ARTICLE XVII

### **2. To what extent is the competitive relationship between, on the one hand, services and service suppliers in the territory from which the service is being supplied and, on the other hand, services and service suppliers in the territory into which the service is being supplied relevant in assessing "likeness"?**

### European Communities

At the outset, the European Communities wishes to point out that to establish a violation of Article XVII of the GATS there is no need to consider the relationship between both services and service suppliers (see reply to question 9 below). As clarified by the Appellate Body in *Korea – Alcoholic Beverages*,<sup>422</sup> "like" products are always a subset of "directly competitive" products. Therefore, to some extent the competitive relationship (actual or potential) will always be relevant in a "likeness" analysis. The extent will depend on the particular case. In that context, the European Communities also notes that if the competitive relationship is distorted (or absent) owing to a measure applied in the territory into which the service is being supplied, the relevant benchmark is the *potential* competitive relationship that would exist if the services supplied were not subject to that measure. The European Communities would also refer the Panel to its Third party submission and Oral statement where this matter is further addressed.

### Mexico

In Mexico's view, it is the nature and characteristics of the services at issue that are directly relevant to the question of whether those services are "like". With respect to service suppliers, where the services supplied are "like", the suppliers of those services are also "like".<sup>423</sup> Mexico further notes that paragraph 3 of Article XVII provides that formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member (i.e., of the Member implementing the measure at issue) as compared to like services or service suppliers of any other Member. Thus, the competitive relationship between services in the territory from which the service is being supplied and services in the territory into which the service is being supplied is highly relevant to the question of whether services and service suppliers of another Member are treated in a manner "no less favourable" than services and service suppliers of the WTO Member implementing the contested measure.

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<sup>422</sup> Appellate Body Report on *Korea – Alcoholic Beverages*, para. 118.

<sup>423</sup> Panel Report on *EC – Bananas III (US)*, para. 7.322.

3. **Do the third parties consider that regulatory circumstances in the territory where the service is being supplied and/or in the territory from which the service is being supplied should be taken into consideration under Article XVII in the "likeness" analysis and/or the "less favourable treatment" analysis? If so, what are the parameters within which the regulatory circumstances should be considered?**

European Communities

The European Communities provides its answer based on two different assumptions as to the meaning of the term "regulatory circumstances". If the Panel, by referring to "regulatory circumstances", means to refer to the applicable regime, as explained in its Third party submission and its Oral statement, the European Communities takes the view that regulatory circumstances as such are not relevant in determining whether two services are "like". Specifically, the mere fact that different regulations apply to services provided from within and from outside the territory of a Member or even the particular enforcement problems that the latter may create, cannot make foreign and domestic service "unlike". It is the very objective of Article XVII to protect *inter alia*, services provided from outside the territory of a Member against regulations that are less favourable than those applicable to services provided from within that territory. The place, if any, to address special regulatory circumstances of foreign services in Article XVII is the notion of "less favourable treatment", discussed below.

Alternatively, the Panel, by referring to "regulatory circumstances", may mean to refer to the factual circumstances that are the subject of regulation. The European Communities would also note that the "territory where the service is being supplied" will in principle differ from the "territory from which the service is being supplied" only in case of supply through mode 1. If differences in the factual circumstances had an impact e.g. on the characteristics of the services themselves, as they are provided in the territory of the WTO Member whose measure is at issue, they could have an impact on the "likeness" of the domestic and foreign service. The "less favourable treatment" standard has been the subject of numerous GATT and WTO panel and Appellate Body reports, particularly in connection with Article III of the GATT. Longstanding GATT practice has clarified that "treatment no less favourable" requires effective equality of competitive opportunities for foreign and domestic goods.<sup>424</sup> This approach, developed for the goods sector, is now codified in Article XVII:2-3 of the GATS.

While the underlying objective of the "no less favourable treatment" standard is to guarantee equality of treatment, there may be cases in which application of formally identical treatment would in practice result in according less favourable treatment to foreign goods or services. This may be the case where the differences in regulatory circumstances in the territory from which the service is being supplied and the territory in which it is being supplied have an impact on the provision of the service in the Member whose measure is under dispute. Applying Article XVII of the GATS entails a comparison between two "treatments" granted by the same WTO Member in the territory of which the service is supplied – the treatment of domestic and the treatment of foreign services. Attainment of the objective of the "no less favourable treatment" standard might thus require a WTO Member to apply a different regime to foreign goods or services so as to ensure that the treatment accorded is in fact no less favourable. It may also allow formally different treatment where identical treatment would result in more favourable treatment of the foreign service, provided that the treatment of foreign services remains "no less favourable". Of course, this would not allow an outright prohibition on foreign services where domestic services are allowed. Last, formally different treatment based on different circumstances in the Member from which the service is provided, inasmuch as those circumstances had an impact on the market of the Member whose measure is at issue, might also be relevant under Article XIV of the GATS.

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<sup>424</sup> Panel Report on *US – Section 337*, BISD 36S/345.

Mexico

At the very least, the regulatory circumstances would be relevant to the "less favourable treatment" analysis. See Mexico's response to question 6 above.

- 4. With respect to paragraph 9 of Japan's written submission, does the mere fact that services are supplied through different modes of supply (as defined in the GATS Agreement) mean that the regulatory circumstances are different and that, therefore, different treatment as between those modes of supply is justified? Do the third parties agree with Japan's appraisal in paragraph 11 of its written submission of the possible consequences for coverage under the GATS Agreement if "likeness" across modes is permitted under Article XVII?**

European Communities

The European Communities does not share the view, expressed in paragraph 9 of Japan's Third party submission, that differences in regulatory circumstances may affect *per se* the "likeness" of a domestic and a foreign service. Inasmuch as "differences in regulatory circumstances" means "differences in applicable regimes", this point is already addressed in paragraph 96 of the EC Third party submission. Inasmuch as it means "differences in factual circumstances which may be the subject of legal regulation", such differences might affect likeness only in case they made the characteristics of the two services different, as explained above in reply to question 3. The European Communities also considers that the issue raised in paragraph 11 of Japan's written submission does not need to be addressed in order to solve the present dispute, which is only concerned with Article XVII of the GATS.<sup>425</sup>

Japan<sup>426</sup>

What Japan meant in this paragraph is that there should be some room for arguing for denying likeness of services, when the necessity of differentiated treatment in light of regulatory requirements, the difference in regulatory circumstances, etc. are sufficiently proven on a particular case by a defending Member. In some cases, the difference in regulatory circumstances are effectively represented in the difference of modes, but as is clear in its submission, Japan does not make a categorical statements that difference in modes always makes services unlike. On the contrary, when it is found on specific cases that difference in regulatory circumstances does not suffice to establish the un-likeness of services in certain service sectors, or when that argument is not sufficiently substantiated by a Party concerned, difference in supplying mode itself would not decline the likeness of services.

Paragraph 11 of Japan's written submission is not in fact Japan's appraisal. It is meant to be a factual description of discussion in the Council for Trade in Services, which in Japan's view might have some relevance to the interpretation of likeness of services. Therefore Japan introduced this discussion for a deliberation by this panel if appropriate.

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<sup>425</sup> Appellate Body Report on *EC – Bananas III*, para. 231, where the Appellate Body considered that provisions relating to national treatment are not necessarily relevant to the interpretation of the GATS most-favoured-nation clause.

<sup>426</sup> The Panel notes that, when commenting on the descriptive part of the Report, Japan requested the deletion of various elements contained in the initial response.



### Mexico

With respect to the first issue, pursuant to paragraph 3 of Article XVII, formally different treatment between modes of supply is possible under the GATS. Such a difference in treatment will only violate Article XVII to the extent that it modifies the conditions of competition in favour of services or service suppliers of the Member (i.e. of the Member implementing the measure at issue) as compared to like services or service suppliers of any other Member. With respect to the second issue, see Mexico's response to question 3 above.

### Antigua

*Do the third parties agree with Japan's appraisal in paragraph 11 of its written submission of the possible consequences for coverage under the GATS Agreement if "likeness" across modes is permitted under Article XVII?*

In paragraph 11 of its written submission Japan submits that, if likeness across modes is permitted, limitation on national treatment for a particular mode of supply will be rendered meaningless through the effect of Article II of the GATS. In essence, this theory would oblige the Panel to choose between: (i) making national treatment commitments on cross-border supply meaningless (because cross-border supply would by definition be "unlike"); or (ii) making limitations on cross-border supply meaningless (because the "likeness" provision of Article II of the GATS would undermine the effectiveness of such a limitation in case a Member has made national treatment commitments for other modes of supply). This, in itself, shows that this theory cannot be a correct interpretation of Articles II and XVII of the GATS because, whichever of the two options is chosen, an important part of a Member's schedules of commitments is made redundant.

Furthermore the theory put forward by Japan presupposes that "likeness" and "less favourable treatment" in Article II and Article XVII must always be interpreted in precisely the same way. In *EC – Bananas III*, however, the Appellate Body has already stated that there is no such analogy between Articles II and XVII and that Article II of the GATS should be interpreted in the light of the MFN provisions of the GATT 1994, and not in the light of Article XVII of the GATS.<sup>427</sup> In view of the above Antigua and Barbuda submits that, in the situation described by Japan in paragraph 11 of its third party submission, Member A would not be obliged to extend "treatment b" to cross-border services of Member C. If Member A were obliged to do that, it would be obliged to give the services of Member C better treatment than the services of Member B and the purpose of Article II is precisely to prohibit this, not to require it. The Article XVII context is obviously completely different when a Member has made a specific commitment to give treatment "no less favourable" to services supplied on a cross-border basis.

### For Japan:

- 5. In paragraph 9 of its written submission, Japan has stated that in *some* service sectors and for *certain* services, it could be argued that regulatory circumstances should be taken into account in assessing "likeness" of services. Could Japan indicate what criteria should apply in determining for which sectors/ for which services regulatory circumstances should be taken into account?**

### Japan

Japan as a third party is in no position to categorically identify specific service sectors requiring consideration of regulatory circumstances at this juncture, where there is a view widely shared among Members that likeness of goods and services needs to be identified on a case-by-case

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<sup>427</sup> Appellate Body Report on *EC – Bananas III*, para. 231.

basis. It is not in a position to state either that the service sector central to this particular case categorically requires consideration of regulatory circumstances. It is of the view that differences in regulatory circumstances should not be categorically excluded as a factor to be taken into consideration in identifying likeness of services, but it is at the liberty of a Party to this and future panel to argue on that aspect, as necessitated.

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